U.S. Customs and Border Protection

Slip Op. 12–32

UNITED STATES, Plaintiff, v. COUNTRY FLAVOR CORP., Defendant.

Court No. 11–00138

[Denying Motion for Entry of Default Judgment, without prejudice]

Dated: March 15, 2012

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff. With him on the brief were *Tony West*, Assistant Attorney General, Civil Division; and *Jeanne Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch.

OPINION

RIDGWAY, Judge:

The Government commenced this action against Country Flavor Corporation and its surety, International Fidelity Insurance Company, seeking unpaid antidumping duties pursuant to 19 U.S.C. § 1505 (2006),[1] and unpaid antidumping duties and penalties pursuant to 19 U.S.C. § 1592, related to 13 entries of frozen fish fillets that Country Flavor imported from Vietnam in 2006.

According to the Government, the fish fillets at issue were a species known as *pangasius*, and thus were subject to the 2003 antidumping duty order covering certain frozen fish fillets from Vietnam. *See generally* Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 47,909 (Aug. 12, 2003) ("Antidumping Duty Order"); *see also* Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission, 73 Fed. Reg. 15,479 (March 24, 2008) ("Final Results of Administrative Review") (final results of administrative review for review period August 1, 2005 through July 31, 2006). However, the Customs Form 7501 entry summaries filed by Country Flavor identified the merchandise as "broadhead," a species of fish not subject to the antidump-

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

ing duty order. The Government contends that the asserted misstatements in the entry summaries are attributable to negligence on Country Flavor's part.

After Country Flavor failed to enter an appearance by counsel and failed to plead or otherwise defend itself within 21 days of being served with the summons and complaint, the Clerk of the Court entered Country Flavor's default. *See* Entry of Default (July 1, 2011); USCIT R. 12(a)(1)(B)(i). Thereafter, the Government settled with Country Flavor's surety, and the surety was dismissed with prejudice from this action. *See* Order (Sept. 16, 2011).

Now pending before the Court is the Government's Motion for Entry of Default Judgment. *See* Plaintiff's Motion for Entry of Default Judgment ("Motion for Default Judgment"). The Government requests a default judgment against Country Flavor in the sum of $617,562.00 as a civil penalty for negligence, pursuant to 19 U.S.C. § 1592(a) and (c), as well as $34,363.45 (together with prejudgment interest) for lost revenue pursuant to 19 U.S.C. § 1592(d). *See id*. at 6, 7.[2]

Jurisdiction lies under 28 U.S.C. § 1582. For the reasons set forth below, the Motion for Entry of Default Judgment must be denied. However, the Government may seek to cure the defects in its case and then renew its request for relief.

I. *Background*

In May and June 2006, Country Flavor imported 13 entries of frozen fish fillets from Vietnam, which were identified on the Customs Form 7501 entry summaries that Country Flavor filed as "broadhead," a species of fish not subject to any antidumping duties. *See* Complaint ¶¶ 9, 10; Motion for Default Judgment at 2, 5; Declaration ¶¶ 2, 3.[3] After testing samples from each of the 13 entries, however, the Bureau of Customs and Border Protection[4] determined that the merchandise at issue was actually a different species, known as *pangasius*. *See* Complaint ¶¶ 11, 12; Motion for Default Judgment

[2] Although the complaint includes claims against Country Flavor under both 19 U.S.C. §§ 1505 and 1592, the Government's Motion for Default Judgment is addressed solely to the claims under 19 U.S.C. § 1592.

[3] Appended to the Government's motion is a declaration executed by the Fines, Penalties, and Forfeitures Officer for the Bureau of Customs and Border Protection in Los Angeles, California.

[4] The Bureau of Customs and Border Protection – part of the U.S. Department of Homeland Security – is commonly known as U.S. Customs and Border Protection and is referred to as "Customs" herein.

at 2; Declaration ¶¶ 4, 5.[5] As such, the 13 entries were covered by the 2003 antidumping duty order on certain frozen fish fillets from Vietnam, and were subject to antidumping duties at the Vietnam-wide rate of 63.88%. *See* Complaint ¶¶ 8, 12; Motion for Default Judgment at 1–2; Declaration ¶ 5; Antidumping Duty Order, 68 Fed. Reg. 47,909; Final Results of Administrative Review, 73 Fed. Reg. 15,479.

In early July 2006, Customs sent Country Flavor a Notice of Action with respect to 11 of the 13 entries at issue, stating Customs' intent to assess antidumping duties and demanding that Country Flavor pay antidumping duty cash deposits on the 11 entries at the 63.88% Vietnam-wide rate. *See* Complaint ¶¶ 13, 14; Motion for Default Judgment at 2; Declaration ¶ 8. Customs liquidated the 11 entries in June 2008, assessing duties at the rate of 63.88%. *See* Complaint ¶ 15; Motion for Default Judgment at 2. The other two of the 13 entries had been liquidated earlier, without regard to antidumping duties, in March and April 2007. *See* Complaint ¶ 16; Motion for Default Judgment at 2; Declaration ¶ 8.

In late January 2011, Customs issued a pre-penalty notice to Country Flavor in the amount of $617,562.00, based on Country Flavor's alleged negligence in declaring the fish as "broadhead" (rather than *pangasius*) in the entry summaries filed with Customs. *See* Declaration ¶ 9; Complaint ¶ 17; Motion for Default Judgment at 3. According to the complaint, the $617,562.00 figure represents "two times the amount of lost revenue." *See* Complaint ¶ 27; *see also* Motion for Default Judgment at 6; Declaration ¶ 9. Elsewhere, the complaint states that the unpaid antidumping duties on the 13 entries at issue totaled $305,445.95. *See* Complaint ¶ 29; *but see* Motion for Default Judgment at 3 (indicating that the unpaid antidumping duties totaled $308,781.23); Declaration ¶ 10 (same).

In early February 2011, Customs issued a notice of penalty and demand for payment to County Flavor. *See* Motion for Default Judgment at 3; Complaint ¶ 17; Declaration ¶ 11. Country Flavor failed to respond to the pre-penalty notice, the penalty notice, and the demand for payment, and has paid none of the antidumping duties and civil penalties owed on the 13 entries. *See* Complaint ¶ 18; Motion for Default Judgment at 3; Declaration ¶¶ 12, 14.

International Fidelity Insurance Company served as Country Flavor's surety for the entries in question. Specifically, International Fidelity had issued a continuous entry bond to Country Flavor, promising to pay all duties, taxes, and fees owed during the period at issue

[5] Apparently *pangasius* is more commonly known as "basa," "tra," "sutchi," "swai," and "Vietnamese catfish." *See* Motion for Default Judgment at 1; Declaration ¶ 5; Antidumping Duty Order, 68 Fed. Reg. at 47,909.

in this action, up to a maximum of $100,000.00. *See* Complaint ¶ 6; Declaration ¶ 13. Of that sum, the surety paid $6,582.22 for "antidumping duties and mandatory interest upon one of the 13 subject entries" before this action was commenced. *See* Complaint ¶ 19; *see also id*. ¶ 6. In addition, the surety had issued eight single transaction bonds for entries of merchandise subject to this action, promising to pay all duties, taxes, and fees owed on the specified entries, up to varying amounts. *See* Complaint ¶ 7; Declaration ¶ 13. According to the complaint, none of the single transaction bonds had been exhausted at the time this action was commenced; and the remaining single transaction bond coverage then totaled $174,908.67. *See* Complaint ¶ 7.

International Fidelity paid $274,417.78 in duties to settle the Government's claims against it, in early August 2011; and the surety was subsequently dismissed with prejudice from this action. *See* Motion for Default Judgment at 3; Order (Sept. 16, 2011); Declaration ¶ 13. In the meantime, the Clerk of the Court entered Country Flavor's default. *See* Entry of Default (July 1, 2011).

II. *Analysis*

When a defendant has been found to be in default, all well-pled facts in the complaint are taken as true, for purposes of establishing the defendant's liability. *See* 10 J. Moore *et al.*, Moore's Federal Practice § 55.32[1][a], p. 55–43 (3d ed. 2011) ("Moore's Federal Practice"). An entry of default alone, however, does not suffice to entitle a plaintiff to the relief that it seeks. Even after an entry of default, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." *See* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2688, p. 63 (3d ed. 1998) ("Wright & Miller"); *see also* 10 Moore's Federal Practice § 55.32[1][b], p. 55–44. Accordingly, in the case at bar, the threshold issue presented is whether the well-pled facts set forth in the Government's complaint establish Country Flavor's liability under 19 U.S.C. § 1592 for a civil penalty for negligent misrepresentation, as well as its liability for unpaid antidumping duties, as the Government contends.

Under 19 U.S.C. § 1592(a), it is unlawful for any person – by negligence, gross negligence, or fraud – to "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States" by means of any material and false document, data, information, statement, or act, or any material omission. *See* 19 U.S.C. § 1592(a)(1)(A); *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1342 n.4 (Fed. Cir. 2009). Where, as here, a party's actions are alleged

to be the result of negligence and to have affected the assessment of duties, a violation of 19 U.S.C. § 1592(a) "is punishable by a civil penalty in an amount not to exceed . . . the lesser of . . . (i) the domestic value of the merchandise, or (ii) two times the lawful duties, taxes, and fees of which the United States [was] deprived." *See* 19 U.S.C. § 1592(c)(3)(A)(i)-(ii). In the case at bar, the Government asks that the requested default judgment against Country Flavor include a civil penalty in the amount of $617,562.00, which the Government asserts is "the statutory two times lost revenue maximum amount for negligence." *See* Motion for Default Judgment at 6, 7; *see also id*. at 3.[6]

In an action to recover a civil penalty under 19 U.S.C. § 1592 where the violation is alleged to be the result of negligence, the statute provides that "the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." *See* 19 U.S.C. § 1592(e)(4); *see generally United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006). All issues are decided by the court *de novo*, including the amount of any civil penalty. *See* 19 U.S.C. § 1592(e)(1); *see also United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1370 (Fed. Cir. 2008) (explaining that "the amount [of a civil penalty] is decided *de novo* by the Court of International Trade").

In addition to a civil penalty for Country Flavor's alleged negligent misrepresentations, the Government's motion further requests that the default judgment include unpaid antidumping duties. *See* Motion for Default Judgment at 6, 7. Where the United States has been deprived of duties "as a result of a violation of [19 U.S.C. § 1592(a)]," 19 U.S.C. § 1592(d) provides that "the Customs Service shall require that such lawful duties, taxes, and fees be restored, *whether or not a monetary penalty is assessed*." *See* 19 U.S.C. § 1592(d) (emphasis added). The recovery of such unpaid duties does not constitute a penalty. *See United States v. Inn Foods*, 560 F.3d at 1348.

Here, the Government invokes 19 U.S.C. § 1592(d) and requests a default judgment against Country Flavor for unpaid duties in amount of $34,363.45, which is said to be the balance of the antidumping duties on the 13 entries that remains "after subtracting the amount obtained through settlement with International Fidelity." *See* Motion for Default Judgment at 6, 7. The Government also seeks an award of

[6] Prejudgment interest is not awarded on civil penalties imposed pursuant to 19 U.S.C. § 1592(a). *See United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1369–71 (Fed. Cir. 2008).

prejudgment interest on that sum. *See id*. at 6, 7 (*citing United States v. Matthews*, 31 CIT 2075, 2084 n.10, 533 F. Supp. 2d 1307, 1315 n.10 (2007) (relying on 19 U.S.C. § 1677g and assessing prejudgment interest on unpaid antidumping duties), *aff'd*, 329 Fed. Appx. 282 (Fed. Cir. 2009)).

As explained above, because Country Flavor has defaulted, all well-pled facts in the complaint are accepted as true for purposes of establishing Country Flavor's liability. *See* 10A Wright & Miller § 2688, pp. 58–61; *Finkel v. Romanowicz*, 577 F.3d 79, 83–84 & n.6 (2d Cir. 2009) (*citing*, *inter alia*, *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)). Thus, if the well-pled facts in the Government's complaint establish Country Flavor's liability for negligent misrepresentation and unpaid antidumping duties, all that remains is for the Court to determine, *de novo*, the amount of the civil penalty to be imposed and the amount of unpaid antidumping duties. *See* 19 U.S.C. § 1592(e)(1). In doing so, the Court may look beyond the complaint, if necessary, to investigate any matter or to determine appropriate relief. *See* USCIT R. 55(b).

A. *Country Flavor's Liability*

The well-pled facts in the complaint establish that Country Flavor was the importer of record for the specified 13 entries of fish fillets from Vietnam. *See* Complaint ¶¶ 3, 9; *see also* Motion for Default Judgment at 2. Similarly, the well-pled facts in the complaint establish that – although the Customs Form 7501 entry summaries submitted by Country Flavor identified the frozen fish fillets at issue as "broadhead" (a species of fish not subject to any antidumping duties) – the imported merchandise actually was *pangasius*, and thus was subject to antidumping duties under the 2003 antidumping duty order, at the rate of 63.88%. *See* Complaint ¶¶ 8, 10, 12; *see also* Motion for Default Judgment at 1–2; Antidumping Duty Order, 68 Fed. Reg. 47,909; Final Results of Administrative Review, 73 Fed. Reg. 15,479.

Country Flavor's incorrect identification of the merchandise as "broadhead," rather than *pangasius*, on the relevant entry summaries constituted – for purposes of 19 U.S.C. § 1592(a)(1)(A) – false statements that were used to enter the merchandise into the commerce of the United States. Moreover, those false statements were "material" within the meaning of 19 U.S.C. § 1592(a)(1)(A), in light of their potential "'to influence Customs' decision in assessing duties.'" *See United States v. Matthews*, 31 CIT at 2080, 533 F. Supp. 2d at 1312 (*quoting United States v. Thorson Chemical Corp.*, 16 CIT 441,

448, 795 F. Supp. 1190, 1196 (1992)); *see also* 19 C.F.R. Part 171, App. B § (B) (definition of "material" in Customs' "Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592").

Finally, the well-pled facts set forth in the complaint establish that Country Flavor has failed to pay the civil penalty that Customs assessed. *See* Complaint ¶ 18; *see also* Motion for Default Judgment at 3. Nor has Country Flavor paid any of the applicable antidumping duties. *See* Complaint ¶ 18; *see also* Motion for Default Judgment at 3.

As outlined above, the well-pled facts set forth in the complaint – which are admitted by virtue of Country Flavor's default – establish the "act or omission constituting the violation" of 19 U.S.C. § 1592(a)(1)(A) alleged by the Government. *See* 19 U.S.C. § 1592(e)(4). Country Flavor therefore bears "the burden of proof that the act or omission did not occur as a result of negligence." *See id*. But Country Flavor has defaulted. Country Flavor thus has made no attempt to demonstrate that it acted with reasonable care.

In sum, the Government has established Country Flavor's liability, demonstrating that the importer negligently violated 19 U.S.C. § 1592(a) and failed to pay applicable antidumping duties. As discussed below, however, the Government has failed to offer the proof required to establish either the amount of the civil penalty to be imposed or the amount of antidumping duties that remain unpaid for which Country Flavor is liable.[7]

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[7] As explained in *United States v. Jean Roberts*, "[b]efore seeking to recover a penalty in the Court of International Trade, Customs must perfect its penalty claim in the administrative process required by [19 U.S.C. § 1592]." *See generally United States v. Jean Roberts of California, Inc.*, 30 CIT 2027, 2030–35 (2006) (analyzing the effect on litigation seeking to recover civil penalty of "various errors made by Customs in conducting the [underlying] administrative proceeding under Section [1592]"); *see also* 19 U.S.C. § 1592(b) (setting forth required administrative procedures, including issuance of pre-penalty notice and notice of penalty). The Government here has never filed with the Court the underlying administrative record, including copies of the "prepenalty notice, demands for duties, and . . . penalty notice" cited in the complaint. *See* Complaint ¶ 17.

If the Government elects to renew its Motion for Default Judgment, copies of all supporting documentation should be submitted, including, *inter alia*, all documents cited in the complaint and all relevant documentation from the administrative penalty proceedings, as well as all evidence that may bear on aggravating or mitigating circumstances (as discussed in note 8, below). *See United States v. Scotia Pharmaceuticals Ltd.*, 33 CIT ____, ____, 2009 WL 1410437 * 1 (2009) (criticizing Government's initial failure to "submit, in support of its application for judgment by default, a complete record of the administrative penalty proceedings that were conducted before [Customs]"); *see also*, *e.g.*, *United States v. Inner Beauty Int'l (USA) Ltd.*, 35 CIT ____, ____, 2011 WL 6009239 * 2 (2011) (citing country of origin declarations attached to entry summaries for the eight entries at issue, designated "Pl's Mot. exhibits A-H"); *United States v. Jean Roberts*, 30 CIT at 2028–29 (analyzing text of, *inter alia*, "Pre-Penalty Notice" and "Notice of Penalty," filed in response to court's request).

B. *The Relief Requested By the Government*

While the effect of a default is to admit all well-pled facts in the complaint for purposes of establishing liability, "a default does not concede the amount demanded." *See* 10A Wright & Miller § 2688, p. 67; *see also* 10 Moore's Federal Practice § 55.32[1][c], p. 55–44 to 55–45 (stating that defaulting party "does not admit the allegations in the claim as to the amount of damages"). Instead, the plaintiff bears the burden of proving the extent of the relief to which it is entitled. *See* 10 Moore's Federal Practice § 55.32[1][d], p. 55–45. The court is obligated to ensure that there is an adequate evidentiary basis for any relief awarded. *See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997) (*quoting Fustok v. ContiCommodity Servs., Inc.*, 873 F.2d 38, 40 (2d Cir. 1989)) (explaining that court must ensure that there is basis for relief awarded).

Thus, even when liability is established by default, the court must undertake further inquiry to ascertain the appropriate relief, except in those relatively rare cases where the claim is "for a sum certain or for a sum that can be made certain by computation." *See* 10 Moore's Federal Practice § 55.32[2][c], p. 55–48; *id*., § 55.32[2][a], p. 55–47 (noting that "[m]ost often . . . , claims are not sufficiently certain"); USCIT R. 55(b).[8] However, an evidentiary hearing is not necessarily

[8] The Government contends that the relief it seeks in this case is "a sum certain or . . . a sum that can be made certain by computation" within the meaning of Rule 55(b). *See* Motion for Default Judgment at 5, 6; USCIT R. 55(b). To the contrary, the Government's claims for relief here are uncertain due both to "the nature of the claims" and to "errors and discrepancies in the pleadings and affidavits." *See* 10 Moore's Federal Practice § 55.32[2][a], p. 55–47.

Because 19 U.S.C. § 1592(e)(1) requires a court to make a *de novo* determination as to the amount of any civil penalty, the amount of the penalty cannot be considered "a sum certain or . . . a sum that can be made certain by computation." *See United States v. Inner Beauty Int'l*, 35 CIT at ____, 2011 WL 6009239 * 4–5; *see also United States v. Nat'l Semiconductor Corp.*, 547 F.3d at 1369–70 (rejecting Government's argument that prejudgment interest should be awarded on civil penalties, reasoning that the amount of a penalty is "uncertain" – and therefore an inappropriate basis for calculating interest – prior to a final decision by Court of International Trade; and observing that "[n]ot only do past cases state that nothing requires the court to grant Customs' request for the maximum penalty, they also explain that the court should not presume that the maximum is warranted").

As the Court of Appeals has observed, "Congress has delegated to the judiciary *discretion* to determine the amount of civil penalties under [19 U.S.C. § 1592]." *See United States v. Ford Motor Co.*, 463 F.3d 1286, 1290 (Fed. Cir. 2006) (emphasis added); *see also United States v. Nat'l Semiconductor Corp.*, 547 F.3d at 1370 (emphasizing that, in determining appropriate amount of a civil penalty, the court enjoys "the broad discretion allowed by the statute and the *Complex Machine Works* analysis"); *United States v. Ford Motor Co.*, 463 F.3d at 1285 (noting that "[a] trial court has considerable discretion to award civil penalties within the statutory range"). The fact that the penalties set forth in 19 U.S.C. § 1592(c) are

required. It may be possible to determine the appropriate relief based on affidavits and other materials. *See* 10 Moore's Federal Practice § 55.32[2][c], p. 55–48.

As detailed below, the existing record in this matter provides no basis for determining either the appropriate amount of the civil penalty to be imposed on Country Flavor or the amount of the antidumping duties that remains unpaid. The Government's Motion for Default Judgment therefore must be denied.

1. *The Amount of the Civil Penalty*

In its Motion for Entry of Default Judgment, the Government correctly observes that "[a] negligent violation of section 1592(a) is punishable by a civil penalty not to exceed the lesser of the domestic value of the merchandise or two times the lawful duties, taxes, and fees of which the United States has been deprived." *See* Motion for Default Judgment at 3–4 (*citing* 19 U.S.C. § 1592(c)(3)). Elsewhere in the motion, the Government argues that it is entitled to a default judgment against Country Flavor for a civil penalty based on negligence, in the sum of $617,562.00, which the Government asserts is "the statutory two times lost revenue maximum amount for negli-

captioned "[m]aximum penalties" further underscores the discretion of the court to impose a penaltyin an amount that is less than the maximum that the Government seeks here. *See* 19 U.S.C. § 1592(c) (captioned "Maximum penalties").

The case law similarly reflects the role of judicial discretion in determining the appropriate amount of a civil penalty. *See, e.g., United States v. Complex Machine Works Co.*, 23 CIT 942, 947–50, 83 F. Supp. 2d 1307, 1313–15 (1999) (identifying factors relevant to determining appropriate amount of civil penalty) (*discussed in United States v. Inn Foods*, 560 F.3d at 1349–50, *aff'g*, 31 CIT 1474, 1488–89, 515 F. Supp. 2d 1347, 1361–62 (2007); *United States v. Nat'l Semiconductor Corp.*, 547 F.3d at 1367–70; *United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1354, 1356–59, 1361–62 (Fed. Cir. 2007); *United States v. Ford Motor Co.*, 463 F.3d at 1285; *United States v. Matthews*, 31 CIT at 2085–86 & n.15, 533 F. Supp. 2d at 1316–17 & n.15; *United States v. Jean Roberts*, 30 CIT at 2039–40; *United States v. New-Form Mfg. Co.*, 27 CIT 905, 919–24, 277 F. Supp. 2d 1313, 1327–32 (2003)); *see also* 19 C.F.R. Part 171, App. B §§ (G)-(H) (non-exclusive list of mitigating factors and aggravating factors, in Customs' "Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592") (*discussed in*, *inter alia*, *United States v. Inner Beauty Int'l*, 35 CIT at ____, 2011 WL 6009239 * 5–6; *United States v. Jean Roberts*, 30 CIT at 2039–40).

The Government's claim for unpaid duties similarly cannot fairly be characterized as "a sum certain or . . . a sum that can be made certain by computation." *See* USCIT R. 55(b). As discussed in section II.B.2 below, there are inconsistencies in the documentation submitted by the Government in an effort to support its claim for unpaid antidumping duties. Under these circumstances, the Government's claim for unpaid duties cannot be considered a claim for "a sum certain." *See, e.g., KPS & Assocs. v. Designs by FMC, Inc.*, 318 F.3d 1, 17–21 (1st Cir. 2003) (discussing distinction between claims for "a sum certain" and other claims, and holding that claim there at issue was not for "a sum certain" where there were patent discrepancies between damages claimed in body of complaint and damages requested in *ad damnum* clause, as well as significant arithmetical errors in affidavit filed with complaint).

gence." *See* Motion for Default Judgment at 6, 7. Similarly, the declaration appended to the motion attests that a civil penalty in the amount of $617,562.00 "represents two times the loss of revenue," and that "[a] penalty of $617,562.00 . . . remains outstanding." *See* Declaration ¶¶ 9, 15. However, nowhere does the motion or the attached declaration state that a civil penalty in the amount of "two times the lawful duties, taxes, and fees of which the United States [was] deprived" would be less than a penalty in the amount of "the domestic value of the merchandise," which is what the statute requires in a case such as this. *See* 19 U.S.C. § 1592(c)(3)(A).

Moreover, although the *complaint* makes the representation that "a civil penalty in the amount of $617,562.00 . . . is less than the dutiable value of the subject merchandise," the complaint does not specify "the dutiable value of the subject merchandise" (or, more importantly, in the words of the statute, "the domestic value of the merchandise," to the extent that is different). *See* Complaint ¶ 27; 19 U.S.C. § 1592(c)(3)(A).[9] Nor has the Government proffered evidence to

[9] The statement in the complaint that "a civil penalty in the amount of $617,562.00 . . . is less than *the dutiable value of the subject merchandise*" raises at least two issues, in addition to the Government's substitution of "the dutiable value" for "the domestic value," which is the terminology that Congress employed in the statute. *Compare* Complaint ¶ 27 (emphasis added) *with* 19 U.S.C. § 1592(c)(3)(A)(i).

The first issue concerns the application of *Iqbal* and *Twombly* in civil penalty cases like this one. *See generally Ashcroft v. Iqbal*, 556 U.S. 662, ____, 129 S. Ct. 1937, 1949–50 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–63 (2007). In particular, there is some authority for the proposition that the domestic value of the merchandise at issue is "a fact essential to the court's *de novo* determination of the amount of any penalty" in a civil penalty case, and that the Government's complaint therefore "must allege the domestic value of the merchandise as a well-pled fact in order to obtain a default judgment." *See United States v. Callanish Ltd.*, 34 CIT ____, ____, 2010 WL 4340463 * 3–4 (2010).

In *United States v. Callanish*, a civil penalty action involving an alleged fraudulent scheme to import "evening primrose oil" into the United States in violation of 19 U.S.C. § 1592, the court denied the Government's motion for default judgment. The court there reasoned:

> The amended complaint seeks a penalty of $17,734,926, which [the Government] alleges to be the domestic value of the fifty-two consumption entries of [evening primrose oil] that it alleges to have been fraudulently imported in violation of the statute. *The complaint lacks any well-pled fact concerning the domestic value of the merchandise or how that value was determined.* [The Government] provides only the conclusory statement of the domestic value of the imported [evening primrose oil]. The mere allegation of an amount offered as the "domestic value," absent anything more, does not constitute a well-pled fact.

United States v. Callanish, 34 CIT at ____, 2010 WL 4340463 * 4 (emphasis added; citations and footnote omitted) (relying on, *inter alia*, *Twombly*, 550 U.S. at 555–56).

The complaint in the case at bar does not even include a statement that "a civil penalty in the amount of $617,562.00 . . . is less than *the domestic value of the merchandise*," much less a statement specifying *the dollar amount* of that domestic value (which was, in any event, found to be insufficient in *United States v. Callanish*). Certainly the complaint here does not include as a well-pled fact "how [the domestic value of the 13 entries] was

determined," which is what *United States v. Callanish* seems to require. *See United States v. Callanish*, 34 CIT at ____, 2010 WL 4340463 * 4; *see generally United States v. Callanish Ltd.*, 36 CIT ____, ____, 2012 WL 286857 (2012).

On the other hand, *Iqbal*, *Twombly*, and their progeny concern the interpretation and application of Federal Rule of Civil Procedure 8(a)(2). *See, e.g., Iqbal*, 556 U.S. at ____, 129 S. Ct. at 1949 (quoting Fed. R. Civ. P. 8). Federal Rule of Civil Procedure 8 provides:

> Rule 8. General Rules of Pleading
>
> (a) *Claim for Relief*. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction . . . ;
>
> (2) *a short and plain statement of the claim showing that the pleader is entitled to relief*; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a) (emphasis added) (paralleling USCIT R. 8(a)). In other words, the holdings of *Iqbal* and *Twombly* arguably are limited to a complaint's allegations concerning *liability*, and thus do not extend to the *relief sought* (which is addressed in Rule 8(a)(3)). Such a reading is supported by *Iqbal* 's summary of *Twombly* :

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . .
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they *plausibly* give rise to an *entitlement to relief*.

Iqbal, 556 U.S. at ____, 129 S. Ct. at 1949–50 (emphases added).

"[L]egal conclusions" are not a concern here; the question is the sufficiency of the complaint's "well-pleaded factual allegations" and "whether they plausibly give rise to an entitlement to relief." It can be argued that whether or not a complaint in a civil penalty case specifies the amount of the domestic value of the merchandise and how that value was determined will shed no light on the *plausibility* of the Government's *entitlement* to relief; rather, such information goes instead to the *amount* of relief that may be awarded. Under this theory, *Iqbal* and *Twombly* arguably would not require that the complaint in a civil penalty case include "well-pled facts" concerning the domestic value of the merchandise and how that value was determined.

This important and timely issue merits much greater attention than the preliminary discussion outlined above. If the Government renews its Motion for Default Judgment, the motion should analyze this question carefully and in detail (specifically addressing, *inter alia*, whether the complaint in this matter must be amended to include "well-pled fact[s] concerning the domestic value of the merchandise [and] how that value was determined"). *See United States v. Callanish*, 34 CIT at ____, 2010 WL 4340463 * 4.

The second issue concerns the means of establishing "the domestic value of the merchandise," without regard to whether (and, if so, how) the domestic value and the means of determining that value must be pled in the complaint. As with the issue of *Iqbal* and *Twombly* above, the Court has not undertaken to independently research this matter. However, there is ample authority for the proposition that "the dutiable value of the merchandise" (the terminology used in the complaint here) is not the same as "the domestic value of the merchandise." *See*, *e.g.*, *United States v. Pan Pacific Textile Group, Inc.*, 30 CIT 138, 139–40 & n.2 (2006) (stating that "[d]utiable value and domestic value are not equivalent measures of entered merchandise," and defining "domestic value"). Indeed, the civil penalty statute itself distinguishes between the "domestic value" and the "dutiable

establish "the domestic value of the merchandise." *See* 19 U.S.C. § 1592(c)(3)(A)(i). In the absence of such evidence, it is not possible to make the determination that the statute requires — that is, to determine whether the civil penalty in this action is capped by "the domestic value of the merchandise" or by "two times the lawful duties . . . of which the United States [was] deprived" (as the Government contends). *See* 19 U.S.C. § 1592(c)(3)(A)(i)-(ii).

Further, even if the Government had established "the domestic value of the merchandise" (which it has not), it nevertheless would not be possible to determine the statutory cap on the civil penalty to be imposed in this case, because that determination requires a comparison of "the domestic value of the merchandise" to the figure that reflects "two times the lawful duties . . . of which the United States [was] deprived." *See* 19 U.S.C. § 1592(c)(3)(A)(i)-(ii). And, as discussed immediately below, the Government here has failed to establish the amount of unpaid antidumping duties – that is, the amount of "the lawful duties . . . of which the United States [was] deprived." *See* section II.B.2, *infra*.

Finally, even if one were to accept as true the complaint's representation that "two times the amount of lost revenue" is, in fact, less than "the domestic value of the merchandise," a default judgment for a civil penalty for negligence still could not enter because, as discussed in section II.B.2 below, the Government has not established the amount of unpaid antidumping duties, *i.e.*, the amount of the "lost revenue" or "the lawful duties . . . of which the United States [was] deprived" – which is the basis for calculating the civil penalty that the Government seeks. *See* section II.B.2, *infra* ; 19 U.S.C. § 1592(c)(3)(A).

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value" of merchandise. *Compare* 19 U.S.C. § 1592(c)(3)(A)(i) (referring to "the domestic value of the merchandise") *with* 19 U.S.C. § 1592(c)(3)(B) (referring to "the dutiable value of the merchandise"); *see also* S. Rep. No. 95–778, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2231–32 (explaining that "[*d*]*omestic value* is generally equivalent to retail value while *dutiable value* is generally equivalent to wholesale value").

Moreover, several recent decisions of this court have focused on the proper means of establishing "the domestic value of . . . merchandise" for purposes of a civil penalty action. *See, e.g., United States v. Callanish*, 34 CIT at ____ n.3, 2010 WL 4340463 * 4 n.3 (criticizing Government's failure to explain how Customs determined domestic value of merchandise at issue in civil penalty action, emphasizing that, "[f]rom exhibits to plaintiff's application for judgment by default, it appears that the amount of the 'domestic value' was derived by doubling the amounts for entered value as set forth on entry summaries for the [relevant] importations"); *see also United States v. Callanish*, 36 CIT at ____, 2012 WL 286857 * 2 (discussing same); *id*., 36 CIT at ____, 2012 WL 286857 * 4–5 (inferring from the Government's representations that "Customs construes 19 C.F.R. § 162.43 [governing appraisal of property that has been seized] to apply to an appraisal to determine domestic value for purposes of penalty assessment under 19 U.S.C. § 1592(c)(1)").

If the Government renews its Motion for Default Judgment, these issues also must be analyzed carefully and in detail.

In short, in light of the Government's failure to establish either "the domestic value of the merchandise" at issue or the amount of "the lawful duties . . . of which the United States [was] deprived," the requested default judgment against Country Flavor for a civil penalty cannot enter. *See* 19 U.S.C. § 1592(c)(3)(A)(i)-(ii).

2. *The Amount of Unpaid Antidumping Duties*

The Government's case on the amount of unpaid antidumping duties is no stronger than its case on the amount of the civil penalty (discussed above). In its Motion for Entry of Default Judgment, the Government implicitly asserts that, at the time this action was commenced, the unpaid duties on the 13 entries at issue totaled $308,781.23. The declaration appended to the motion explicitly so states. *See* Declaration ¶ 10 (attesting that Country Flavor "deprived the United States of lawful anti-dumping duties in the amount of $308,781.23"). And the motion itself seeks entry of a default judgment against Country Flavor for $34,363.45 in unpaid duties — a figure which, when added to the $274,417.78 paid by the surety to secure its dismissal from this action, totals $308,781.23. *See* Motion for Default Judgment at 3 (noting surety's payment of $274,417.78); *id*. at 6, 7 (seeking entry of default judgment against Country Flavor for unpaid duties in the amount of $34,363.45). However, the Government's current claims that the unpaid antidumping duties at issue in this action totaled $308,781.23 cannot be reconciled with the averments in the Government's complaint.

Specifically, the Government stated in its complaint that the unpaid antidumping duties totaled $305,445.95 — *not* $308,781.23. *See* Complaint ¶ 29 (stating that "Country Flavor is liable pursuant to 19 U.S.C. § 1592(d) for . . . unpaid duties in the amount of $305,445.95"). The Government's demand for relief in the complaint is to the same effect, seeking "lost duties in the amount of $305,445.95" — again, *not* $308,781.23. *See id*. at ¶ 4 of demand for relief. The Government's motion fails even to acknowledge, much less explain, this critical discrepancy.[10]

[10] As discussed above, the complaint itself specifies that the unpaid antidumping duties at issue totaled $305,445.95. *See* Complaint ¶ 29; *id*., at ¶ 4 of demand for relief. However, the "Section 1592 Penalty Calculation Worksheet" which is attached to the complaint lists "Total ADs" (presumably "Total Antidumping Duties") as "$308,781.23." *See id*., Att. A, at 2 (Section 1592 Penalty Calculation Worksheet). Thus, not only is there a significant discrepancy between the Government's complaint and its Motion for Default Judgment, but, in addition, there is an internal inconsistency between the complaint itself and the documentation attached to the complaint.

In addition, it is worth noting that the $305,445.95 figure set forth in the complaint appears nowhere in the documentation attached to the complaint. *Compare* Complaint ¶ 29;

In light of the inconsistencies between the complaint and the Government's pending motion concerning the amount of unpaid antidumping duties at issue in this action, default judgment against Country Flavor for unpaid duties cannot enter. *See generally* 10 Moore's Federal Practice § 55.32[2][a], p. 55–47 (explaining that "errors and discrepancies in the pleadings and affidavits" may necessitate court inquiry and thus preclude entry of default judgment); *see*,

id., at ¶ 4 of demand for relief *with* Complaint, Att. A (Section 1505 Lost Revenue Calculation Worksheet and Section 1592 Penalty Calculation Worksheet).

Frankly, the complaint and the attached documentation (the "Section 1505 Lost Revenue Calculation Worksheet" and the "Section 1592 Penalty Calculation Worksheet") raise more questions than they answer – and reviewing those documents against the Government's Motion for Default Judgment compounds the confusion exponentially. For example, although the complaint and the motion state that antidumping duties were assessed at liquidation on 11 of the 13 entries, the Section 1505 Lost Revenue Calculation Worksheet attached to the complaint lists only 10 entries. *Compare* Complaint ¶ 15; Motion at 2 *with* Complaint, Att. A, at 1 (Section 1505 Lost Revenue Calculation Worksheet). No explanation is offered for this seeming discrepancy. Similarly, although – given the paucity of information provided to the Court – it is difficult to make heads or tails out of most of the figures on the two "Worksheets" attached to the complaint, it seems obvious that at least some of the figures are incorrect. Thus, for example, the figure listed on the Section 1505 Lost Revenue Calculation Worksheet as the "Correct Duty" for "Entry # 99116876" – *i.e.*, "$32,803.63" – appears to be clearly erroneous. For each of the other nine entries listed on the Worksheet, the figure in the "Correct Duty" column is the sum of the figure listed in the "Duty/Fees" column and the figure in the "Add'l AD" (presumably "Additional Antidumping Duties") column. This suggests that the figure listed in the "Correct Duty" column for "Entry # 99116876" actually should be $6,617.44 – and definitely not "$32,803.63," as the Government's Worksheet indicates.

In any event, if the Government renews its motion, it is obviously the Government's responsibility to adduce all documentation and other evidence necessary to make its case (whether or not the Court has expressly requested it), to thoroughly research and clearly present the applicable law on all relevant issues, and to ensure the accuracy of the entirety of its submission, both as to all facts and all law. If the Government fails to do so, its motion will once again be denied; and it would be a grave mistake indeed for the Government to assume that it will be accorded multiple bites at the apple.

If the Government renews its motion, the Government must clearly and thoroughly explain – and provide complete documentation to support – each and every figure in its motion, as well as each and every figure in its complaint and Attachment A thereto. Any inconsistencies, discrepancies, errors, and omissions must be clearly identified, explained, and remedied, and copies of all documentation necessary to support the clarifications and corrections must be supplied as well.

Among other issues (including, but not limited to, the numerous matters specifically identified herein), the Government must address Customs' allocation to specific, individual entries of all payments made by International Fidelity (and the basis for each of those allocations), including the $6,582.22 paid for "antidumping duties and mandatory interest upon one of the 13 subject entries" before this action was commenced, and the $274,417.78 paid to settle the Government's claims against the surety. *See* Complaint ¶ 19; *see also id*. ¶ 6; Motion for Default Judgment at 3; Order (Sept. 16, 2011); Declaration ¶ 13. In addition, the Government should determine and address – as a legal matter, and as practical matter – the present status of Country Flavor, particularly in light of the fact that, according to the complaint, "Country Flavor is currently dissolved." *See* Complaint ¶ 3.

e.g., *KPS & Assocs. v. Designs by FMC, Inc.*, 318 F.3d 1, 18–19 (1st Cir. 2003) (holding that district court erred in basing damages decision on complaint and affidavit where there were obvious discrepancies between damages claimed in body of complaint and damages requested in *ad damnum* clause, as well as serious arithmetical errors in affidavit filed with complaint).[11]

III. *Conclusion*

For the reasons set forth above, the Government's Motion for Entry of Default Judgment must be denied, without prejudice.

A separate order will enter accordingly.

Dated: March 15, 2012
New York, New York

Delissa A. Ridgway Judge
DELISSA A. RIDGWAY
JUDGE

[11] Rule 54(c) expressly provides that the relief granted by a default judgment cannot "differ in kind from, or exceed in amount, what is demanded in the pleadings." *See* USCIT R. 54(c). Thus, as a practical matter, "Rule 54(c) establishes a ceiling on the amount that may be awarded" in a default judgment. *See* 10 Moore's Federal Practice § 55.34[1], p. 55–62. "A default judgment in violation of Rule 54(c) is void, must be reversed on appeal, and is subject to collateral attack." *See* 10 Moore's Federal Practice § 55.34[1], p. 55–63.

In the case at bar, one conceivably could argue that Rule 54(c) limits the Government's total award for unpaid antidumping duties here to a maximum of $305,445.95 (the figure specified in the complaint), which – in light of the surety's payment of $274,417.78 in duties – would appear to cap Country Flavor's liability for unpaid duties at $31,028.17 (rather than the $34,363.45 that the Government claims in its Motion for Default Judgment). *See* USCIT R. 54(c); Complaint ¶ 29; *id*., at ¶ 4 of demand for relief; Motion for Default Judgment at 3, 6–7 (stating amount of surety's payment and amount of Government's asserted claim against Country Flavor for unpaid duties).

However, a strict application of Rule 54(c) is not warranted in light of the specific circumstances of this case. The underlying purpose of Rule 54(c) is "to ensure that a party, before deciding not to defend the action, has notice as to the potential extent of the judgment." *See* 10 Moore's Federal Practice § 55.34[1], p. 55–62 to 55–63. Here, although the complaint itself states that the total unpaid antidumping duties amounted to $305,445.95, the "Section 1592 Penalty Calculation Worksheet" which is attached to the complaint reflects the higher ($308,781.23) figure. *Compare* Complaint ¶ 29; *id*., at ¶ 4 of demand for relief *with id*., Att. A, at 2 (Section 1592 Penalty Calculation Worksheet). Moreover, in alleging Country Flavor's liability for a civil penalty, the complaint specifies the amount of that penalty as "$617,562.00," which the complaint asserts is "equal to two times the amount of lost revenue" – in other words, two times $308,781.00. *See* Complaint ¶ 27. Further, the complaint identifies the 13 entries at issue as those imported by Country Flavor between May 10, 2006 and June 8, 2006, and specifies the antidumping duty rate applicable to those entries. *See* Complaint ¶¶ 8, 9. On these facts, Country Flavor could not credibly claim that it lacked notice that the unpaid antidumping duties at issue in this action could range as high as $308,781.23.

Slip Op. 12–33

PT PINDO DELI PULP and PAPER MILLS, PLAINTIFF, v. UNITED STATES, Defendant, and APPLETON COATED LLC, NEWPAGE CORPORATION, S.D. WARREN COMPANY d/b/a SAPPI FINE PAPER NORTH AMERICA, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL CIO-CLC, Intervenor Defendants.

Before: Jane A. Restani, Judge
Court No. 10–00369

[Plaintiff-Respondent PT Pindo Deli Pulp and Paper Mills' motion for judgment on the agency record in antidumping duty order scope matter denied.]

Dated: March 16, 2012

Daniel L. Porter and *James P. Durling*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for plaintiff. With them on the brief were *Matthew P. McCullough* and *Ross E. Bidlingmaier*.

Alexander V. Sverdlov, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David Richardson*, International Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

William A. Fennell, Stewart and Stewart, of Washington, DC, and *Gilbert B. Kaplan*, King & Spalding, LLP, of Washington DC, argued for intervenor defendants. With them on the brief were *Jeffrey M. Telep*, *Eric P. Salonen*, and *Terence P. Stewart*, Stewart and Stewart, of Washington, DC, and *Brian E. McGill*, *Christopher T. Cloutier*, and *Daniel L. Schneiderman*, King & Spalding, LLP, of Washington, DC.

OPINION

Restani, Judge:

This matter is before the court pursuant to Plaintiff-Respondent PT Pindo Deli Pulp and Paper Mills' ("Pindo Deli" or "Plaintiff") 56.2 motion for judgment on the agency record. Plaintiff challenges the final antidumping duty determination[1] of the Department of Commerce, International Trade Administration ("Commerce" or "ITA") in *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 59,223 (Dep't Commerce Sept. 27, 2010).[2] Pindo Deli argues Commerce improperly expanded the scope

[1] For a summary description of the antidumping duty determination process *see Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, No. 11–1040, 2012 U.S. App. LEXIS 2399, at *4–9 (Fed. Cir. Feb. 7, 2012).

[2] In a separate case, Court No. 10–00370, Plaintiff Pindo Deli brought a 56.2 motion challenging the scope of the countervailing duty investigation for certain coated paper from

of the investigation to include multi-ply paperboard for packaging applications. Resp't Pl.'s Mem. of Points and Authorities in Support of its Mot. for J. on the Agency R. 1 ("Pl.'s Br."). Pindo Deli argues that even if Commerce did not improperly expand the scope, Commerce's final determination is contrary to law because it rests on inadequate industry support. *Id.* at 2. Ultimately, the court rejects both of Pindo Deli's arguments.

BACKGROUND

Because Commerce's reasoning is found in several documents, the administrative proceedings are described in detail. In September 2009, NewPage Corp., Appleton Coated LLC, S.D. Warren Company d/b/a Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") (collectively "Petitioners") submitted a petition to Commerce requesting antidumping and countervailing duties be imposed on imports of "certain coated paper suitable for high quality print graphics using sheet-fed presses" ("CCP") from Indonesia and the People's Republic of China. Petitions for the Imposition of Countervailing and Antidumping Duties on Imports of Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China ("Petition") Pl.'s Confidential App. Tab 4, at 7.[3]

Indonesia in *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 59,209 (Dep't Commerce Sept. 27, 2010). Because the agency record, final orders, and briefing addresses the same scope, the court addresses Plaintiff's arguments relating to the countervailing duty and antidumping duty investigations in a single opinion.

[3] The Petition contained the following proposed scope:

> The merchandise covered by each of these investigations includes Certain Coated Paper and paperboard suitable for high quality print graphics using sheet-fed presses, whether in finished sheet form or in semi-finished roll form; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher; weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions ("Certain Coated Paper").
>
> Certain Coated Paper includes coated paper in sheets or in rolls intended to be converted into sheets prior to final printing that meets this scope definition. Certain Coated Paper includes (a) coated free sheet paper that meets this scope definition; (b) coated groundwood paper produced from bleached chemi-thermo-mechanical pulp ("BCTMP") that meets this scope definition; and (c) any other coated paper that meets this scope definition.
>
> Certain Coated Paper is typically (but not exclusively) used for printing multicolored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.
>
> Specifically excluded from the scope are imports of paper or paperboard printed with final content printed text or graphics.
>
> As of 2009, imports of the subject merchandise are provided for under the following statistical categories of the HTSUS: 4810.13.1100, 4810.13.1900, 4810.13.2010,

The Petition stated that the like domestic product was CCP but that "all or virtually all" CCP produced in the United States was coated free-sheet paper ("CFS").[4] *Id.* at 8. Petitioners were unaware of any reasonably available public source that reported U.S. production of CCP or CFS paper and therefore, submitted data on U.S. shipments of CFS paper as a proxy for U.S. production of CCP. *Id.* at 3. The only known U.S. producers of CCP were the Petitioners, Mohawk Fine Papers, and SMART Papers LLC. *Id.* at 1. SMART Papers LLC submitted a letter in support of the Petition. Petition, Def.'s Confidential App. Tab 1, at Ex. I–2. Petitioners used the industry data to estimate the share of CFS shipments among the known domestic producers and Petition supporters and concluded Petitioners and supporters constituted more than 50% percent of total U.S. production of CCP in sheets. *Id.* at Ex. I–4.

Commerce initiated an antidumping duty investigation of CCP from China and Indonesia. *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations*, 74 Fed. Reg. 53,710 (Dep't Commerce Oct. 20, 2009) ("*Initiation Notice*").[5] Commerce concluded Petitioners had the required industry support and adopted the scope definition proposed by the Petition with two modifications. Commerce added a footnote defining paperboard[6] and excluded CCP in "semi-finished rolls" from the scope of the investigation. *See Initiation Notice*, 74 Fed. Reg. at 53,711, 53,715, at App. I.

In November 2009, Pindo Deli submitted comments on the proper scope of the investigation and requested Commerce to confirm that

4810.13.2090, 4810.13.5000, 4810.13.6000, 4810.13.7000, 4810.14.1100, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.7000, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.5000, 4810.22.6000, 4810.22.7000, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.7000.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Petition at 7–8 (footnote describing the GE brightness scale deleted).

[4] CFS is coated paper with no more than 10% mechanical pulp. *See* Petition at 6 n.5; *see also* Pl.'s Br. at 5.

[5] Commerce also initiated a countervailing duty investigation of CCP from Indonesia. *Certain Coated Paper from Indonesia: Initiation of Countervailing Duty Investigation*, 74 Fed. Reg. 53,707 (Dep't Commerce Oct. 20, 2009). As indicated, the scope of the countervailing and antidumping duty investigations were the same. *See id.* at 53,710 (defining the scope as CCP paper). Thus, the court's reference to the *Initiation Notice* refers to the initiation of both investigations.

[6] The added footnote stated: "'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.'" *Initiation Notice*, 74 Fed. Reg. at 53,715 n.4.

"*multi-ply coated paperboard*" was not within the scope of the investigations. Pindo Deli Scope Cmts. of Nov. 6, 2009 ("Pl.'s Scope Cmts.") Pl.'s Confidential App. Tab 6, at 2. Pindo Deli argued multi-ply coated paperboard is "not suitable for high quality print graphics using sheet-fed presses," because it is "used primarily for industrial packaging" and has different physical characteristics, manufacturing processes, and end-uses than singly-ply paperboard. *Id.* at 2–3. Pindo Deli also argued that the inclusion of multi-ply paper would call into question Petitioner's standing because major producers of multi-ply paper for packaging applications were not included in the Petition. *Id.* at 10–12.

Petitioners responded that any coated paper or paperboard that meets the product description should be included in the scope and submitted advertising materials from Pindo Deli that described Pindo Deli's multi-ply paper as suitable for "[h]igh quality cover applications, annual reports, catalog covers, trading cards, advertising brochures, and folders." Pet'rs' Rebuttal Scope Cmts. of Nov. 16, 2009 ("Pet'rs' Scope Cmts.") Def.'s Confidential App. Tab 5, at 2, 5.

In December 2009, Pindo Deli requested that Commerce reexamine the determination of industry support made at the time of initiation. Request to Re-examine the Dep't's Industry Support Calculation, Pl.'s Confidential App. Tab 7. Pindo Deli argued that because the scope had been expanded to include multi-ply paperboard for packaging applications, Commerce must recalculate industry support. *Id.* at 7. In support of its argument, Pindo Deli included information from U.S. producers not included in the Petition that advertised coated paper meeting the weight and brightness levels indicated in the scope. *Id.* at Attachs. Petitioners responded that it had never changed the scope definition or misled Commerce, the scope had never been conditioned on the number of plies, and if Pindo Deli wanted a determination on whether a particular product was within the scope, Pindo Deli should use a scope inquiry and not frame the argument as a standing issue. Pet'rs' Resp. to Chinese and Indonesian Resp'ts Req. to Re-examine Dep't's Industry Support Calculation, Def.'s Confidential App. Tab 7, at 8–10.

In February 2010, during meetings with the parties regarding scope issues, Commerce expressed concern over the administrability of the phrase "suitable for high quality print graphics" and requested comments on whether the suitability phrase could be deleted from the scope definition. *Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 75 Fed. Reg. 10,761, 10,763 (Dep't Commerce

Mar. 9, 2010) ("*CVD Preliminary Determination*").[7] Pindo Deli argued the suitability phrase could not be deleted without improperly expanding the scope to include products not originally covered by the Petition, such as multi-ply paperboard for packaging applications. Pl.'s Additional Scope Cmts. of March 29, 2010 ("Pl.'s Add. Scope Cmts.") Pl.'s Confidential App. Tab 9, at 2.

In May 2010, Petitioners responded to a Commerce questionnaire on scope issues and explained that the Petition did not include the U.S. producers identified by Pindo Deli because Petitioners were not experts in the packaging industry and were not aware that the U.S. packaging industry also produced CCP paper. Pet'rs' Resp. to Supplemental Questionnaire ("Pet'rs' Questionnaire Resp.") Def.'s Confidential App. Tab 9, at 7. Petitioners argued their omission was irrelevant because the U.S. producers identified by Plaintiff have workers represented by USW, one of the Petitioners, and therefore, supported the Petition. *Id.* at 7–8.

In August 2010, Commerce issued an internal memorandum addressing the scope comments. Antidumping and Countervailing Duty Investigations: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China, Scope ("Scope Memo"), Def.'s Confidential App. Tab 17. The Scope Memo concluded that multi-ply products were within the scope of the investigation and rejected Plaintiff's argument that the physical characteristics of multi-ply paperboard made it unsuitable for high quality print graphics because Plaintiff's own sales publications demonstrated that some multi-ply products were suitable for high quality printing. *Id.* at 3–6. The Scope Memo noted that Commerce was prohibited from reconsidering industry support after initiation but added that the inclusion of multi-ply products did not expand the scope. *Id.* at 7.[8]

The Scope Memo concluded that the phrase "suitable for high quality print graphics" could not be deleted from the scope definition because deleting the phrase would improperly expand the scope of the

[7] In May 2010, Commerce published its preliminary determination in the antidumping duty determination. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 Fed. Reg. 24,885 (Dep't Commerce May 6, 2010) ("*ADD Preliminary Determination*"). The *ADD Preliminary Determination* repeated Commerce's conclusion contained in the *CVD Preliminary Determination* that the number of plies was not a relevant physical characteristic. *Id.* at 24,887.

[8] The Scope Memo also granted Petitioners' request to include the Harmonized Tariff System of the United States ("HTSUS") classifications not originally included in the Petition but which may be applicable to some multi-ply subject merchandise. Scope Memo at 11–12.

investigation to include products that met the physical description of the scope but were not subject merchandise because they were not suitable for high quality print graphics. *Id.* at 10–11 ("[T]he possibility that we would be bringing into the scope merchandise that is not 'suitable for high quality print graphics' especially in the packaging applications leads us to recommend that the phrase not be deleted."). Commerce also noted the lack of objective physical criteria defining the phrase and stated that given the late stage of the investigation, the Department likely could not adequately determine whether specific products were in or out of the scope, but could do so in the context of a scope inquiry after the issuance of final orders. *Id.* at 11. Pindo Deli submitted a brief challenging Commerce's determination of the scope and Petitioners responded with a rebuttal brief. Pl.'s Case Br. Concerning Scope Issues of APP-China and APP-Indonesia, Pl.'s Confidential App. Tab 11; Resp.'s Case Br. Concerning Scope Issues of APP-China and APP-Indonesia, Def.'s Confidential App. Tab 19.

In September 2010, Commerce published its final antidumping and countervailing determinations. *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 59,223 (Dep't Commerce Sept. 27, 2010) ("*ADD Final Determination*"); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 59,209 (Dep't Commerce Sept. 27, 2010) ("*CVD Final Determination*"). The final determinations adopted the same scope language as the *Initiation Notice*. *ADD Final Determination*, 75 Fed. Reg. at 59,224; *CVD Final Determination*, 75 Fed. Reg. at 59,210. The final determinations concluded: (1) multi-ply coated paper and paperboard are not excluded from the scope of the investigations; (2) the phrase "suitable for high-quality print graphics" should be maintained; and (3) the three HTSUS classifications not mentioned in the Petition that may include multi-ply paperboard should be added to the scope as a reference. *ADD Final Determination*, 75 Fed. Reg. at 59,225; *CVD Final Determination*, 75 Fed. Reg. at 59,210. Although there were multiple Issues and Decision Memoranda relating to the investigations, all scope issues for all investigations were addressed in Issues and Decision Mem. for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China, C-570–959, POR 1/1/2008–12/31/2008 (Sept. 20, 2010) ("*Issue and*

Decision Memorandum"), *available at* http://ia.ita.doc.gov/frn/summary/prc/2010–24184–1.pdf (last visited Mar. 16, 2012).[9]

The *Issue and Decision Memorandum* noted that Pindo Deli had not addressed the evidence on the record showing that certain Pindo Deli paper met the physical description of the scope and was advertised as suitable for high quality printing. *Id.* at 50. Commerce noted that the Scope Memo concluded that the parties had not provided an objective definition of the phrase "suitable for high quality print graphics" but that this did not mean Commerce did not know what the phrase meant.[10] *Id.* Commerce noted that the Scope Memo had concluded that the phrase limited the scope of the investigation beyond the physical characteristics included in the scope definition and therefore, had meaning. *Id.* Commerce also noted that the use of a scope inquiry to determine whether a product is within the scope of an order is a normal and anticipated procedure specified in the regulations. *Id.* at 50–51. The *Issue and Decision Memorandum* found that the Petition intended to include multi-ply paperboard, the physical characteristics and end-use applications of multi-ply paperboard do not distinguish it from subject merchandise, and the suitability phrase should be maintained. *Id.* at 51–58. Commerce also found there was insufficient evidence to find that Petitioners had made an intentional or material omission of domestic producers and concluded that because the scope had not been expanded, there was no reason to reevaluate standing. *Id.* at 59.

Commerce published an antidumping duty order and countervailing duty order in November 2010. *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Antidumping Duty Order*, 75 Fed. Reg. 70,205 (Dep't Commerce Nov. 17, 2010); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet Fed-Presses from Indonesia: Countervailing Duty Order*, 75 Fed. Reg. 70,206 (Dep't Commerce Nov. 17, 2010).

[9] "The briefs pertaining to scope issues were submitted on the records of all four concurrent antidumping and countervailing duty investigations of certain coated paper from Indonesia and the People's Republic of China, and are addressed in the 'Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China,' dated concurrently with this memorandum." Issues and Decision Memorandum for Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination, at 3, C-560824, Investigation (Sept. 20, 2010), *available at* http://ia.ita.doc.gov/frn/summary/indonesia/2010–24182–1.pdf (last visited Mar. 16, 2012).

[10] Among other things, objective criteria make it easier for Customs to process entries.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold a final antidumping duty or countervailing duty determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Scope of the Investigations

"Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992), *aff'd* 984 F.2d 1178 (Fed. Cir. 1993). Commerce must exercise its discretion "reasonably and any consequent determination must be supported by substantial evidence in the administrative record." 782 F. Supp. at 120 (citations omitted).

Here, Pindo Deli argues that Commerce erred in interpreting the intent of the Petition in two ways. First, Commerce's conclusion that the Petition intended to cover all paper and paperboard, regardless of the number of plies, is not supported by substantial evidence. Pl.'s Br. at 15. Second, Commerce's conclusion that some multi-ply paperboard products are "suitable for high quality print graphics" is not supported by substantial evidence.[11] *Id.* at 23–27. The court addresses each argument in turn.

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[11] Pindo Deli occasionally frames its argument differently and argues Commerce erred by (1) including multi-ply products *for packaging applications* within the scope and, (2) concluding multi-ply products *for packaging applications* are suitable for high quality graphics. *See* Pl.'s Br. at i. The record does not show that Commerce ever concluded that all multi-ply products for packaging applications were properly within the scope of the investigation. Instead, Commerce concluded that multi-ply products should not be excluded from the scope because *some* multi-ply products meet the scope definition and are suitable for high quality graphics. Commerce stated: "While we are not excluding multi-ply, we do not rule out the possibility that certain merchandise (and, in particular, certain paper for packaging applications) that meets the physical characteristics described in the scope, may nonetheless be non-subject merchandise because it is not suitable for high-quality print graphics." *Issue and Decision Memorandum* at 51. Thus, Commerce recognized that not all multi-ply paperboard would be included within the scope of subsequent orders. Commerce could not, however, draw a clear dividing line between subject multi-ply paperboard and non-subject multi-ply paperboard because the parties had not presented sufficient evidence on the differences in physical characteristics between the products. *See id.* Commerce stated the parties would have the opportunity to develop the record in any subsequent scope inquiries should the issue arise. *Id.*

A. Exclusion of Multi-Ply Products

In making its determination, Commerce first looked to the intent of the Petition and the Petitioner's proposed scope. *See CVD Preliminary Determination*, 75 Fed. Reg. at 10,762–63. The scope definition, as contained in the Petition and adopted in the *Initiation Notice*, does not refer to the number of plies. *See Initiation Notice*, 74 Fed. Reg. at 53,715. Instead, the *Initiation Notice* described the scope as including: "(a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp ("BCTMP") that meets this scope definition; and (c) any other coated paper that meets this scope definition." *Id.* The applicable definition is that the product is: (1) paper or paperboard; (2) in sheets; (3) suitable for high quality print graphics using sheet-fed presses; (3) coated; (4) with a GE brightness of 80 or higher, and; (5) weighing not more than 340 grams per square meter. Petition at 7. Thus, the Petition did not distinguish based on the number of plies or make the number of plies a relevant characteristic in defining the scope. Commerce's interpretation of the Petition to include *any* coated paper that otherwise meets the scope's definition (weight, brightness, etc.) and is suitable for high quality print graphics is therefore, a reasonable interpretation of the Petition's proposed scope.

Pindo Deli argues Commerce improperly ignored evidence showing that the Petitioners never intended to include multi-ply paperboard within the scope of the investigation. Pl.'s Br. at 19. Specifically, Pindo Deli argues Commerce ignored: (1) the significance of the word "certain" in the scope's title; (2) the Petition's failure to include significant foreign producers of multi-ply coated paperboard for packaging applications; (3) the Petition's limitation of the domestic industry to producers of CFS paper and the exclusion of production data for domestic producers of paperboard for packaging applications, and; (4) that Petitioners admitted mechanical coated paper is not suitable for high quality print graphics by stating the lower amount of mechanical fiber in CFS helps the paper avoid discoloring with age. Pl.'s Br. at 15–19. Pindo Deli agrees that Commerce addressed its fifth argument, that the HTSUS classification applicable to multi-ply paper was not included in the Petition, but argues Commerce improperly interpreted the HTSUS rules.[12] Pl.'s Br. at 20–23.

[12] The HTSUS items included in a petition are for reference only and are not dispositive of scope. *See Wirth Ltd. v. United States*, 22 CIT 285, 295–96, 5 F. Supp. 2d 968, 977–78 (1998), *aff'd* 185 F.3d 882 (Fed. Cir. 1999) ("The inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise determined to be within the scope of the antidumping or countervailing duty orders but classified under an HTSUS

Contrary to Plaintiff's assertion, Commerce discussed each of Plaintiff's arguments. *Issue and Decision Memorandum* at 51–55; *see also* Scope Memo at 8 & n.30 (addressing the same five arguments in deciding whether to delete the phrase "suitable for high quality print graphics"). The court finds that none of Pindo Deli's arguments distract significantly from the substantial evidence on the record showing that the Petition intended to include multi-ply products that otherwise meet the scope definition. First, there is no evidence that the word "certain" in the title is meant to exclude multi-ply products. Second, Petitioners used U.S. shipments of CFS paper as a proxy for domestic CCP production because Petitioners believed all or virtually all U.S. production of CCP consisted of CFS paper. Although the record now shows that Petitioners may have been wrong that all or virtually all U.S. production is CFS paper,[13] there is no evidence to suggest Petitioners did not hold their initial understanding sincerely, as Commerce found. Instead, Petitioners explain that they are not experts in the packaging industry and were not aware that some packaging companies also made CCP paper or that there were other foreign producers of CCP. Pet'rs' Questionnaire Resp. at 5. Petitioners' omission of U.S. producers, of which they were not aware, does not evidence an intent to exclude these products from the investigation. Similarly, the failure to name foreign producers, of which Petitioners was not aware, does not demonstrate an intent to exclude those producers from the investigation. Third, the record reflects that Petitioners excluded shipments of coated mechanical paper from their calculation of industry support because the industry data showed that U.S. production of mechanical paper is in rolls (not sheets) and therefore, is not included within the scope of the Petition. *See* Petition, Todasco Ex. A, at 14 (industry data showing between 0 and 0.1% of U.S. shipments of coated mechanical paper are in sheets). Finally, although less mechanical pulp helps paper avoid discoloring with age, and multi-ply products generally contain more mechanical

heading not listed in the petition."). Thus, whatever HTSUS classification may have been excluded from the Petition cannot trump the plain language of the scope definition, which did not distinguish based on the number of plies.

[13] Petitioners concede that Pindo Deli has provided evidence showing certain U.S. companies produce paper that meets the scope definition. *See* Pet'rs' Questionnaire Resp. at 4, 8–9. Such evidence does not demonstrate what portion of the total revenue can be attributed to CCP paper, and thus, the evidence does not show significant production of CCP was excluded from the Petition. *See* infra, § II. Moreover, Plaintiff has not demonstrated that production levels for these U.S. producers were readily available to Petitioners, and therefore, should have been included in the Petition. *See* 19 U.S.C. § 1673a(c)(1)(A)(i) (Commerce must determine whether the petition "contains information reasonably available to the petitioner supporting the allegations").

pulp than single-ply products, it does not follow that all multi-ply products are therefore categorically incapable of high quality print graphics. *See, e.g.*, Pet'rs' Scope Cmts. at 4–5 & Attachs. (noting Plaintiff's own materials advertise its multi-ply products as suitable for "[h]igh quality cover applications, annual reports, catalog covers, trading cards, advertising brochures, and folders"). Thus, Plaintiff's evidence does not contradict Commerce's conclusion that the Petition intended to include multi-ply paper that otherwise meets the scope definition.

B. Suitable for High Quality Print Graphics

Pindo Deli argues the physical characteristics and typical end-uses of multi-ply paperboard[14] make it unsuitable for high quality printing and that Commerce failed to define the term "suitable for high quality print graphics." Pl.'s Br. at 23–29.

Pindo Deli argues multi-ply paperboard has a higher amount of mechanical pulp than single-ply paper, making it difficult to control the accuracy of the printing and resulting in reduced clarity and print quality.[15] *Id.* at 25. The assumption inherent in this argument, unsupported by the record, is that at some point, the amount of mechanical pulp will render a multi-ply product unsuitable for high quality print graphics. It would be unreasonable to conclude from this argument that any product that includes mechanical pulp is unsuitable for high quality print graphics. Plaintiff's arguments only echo Commerce's conclusion that although some multi-ply products are subject merchandise and some likely are not, the record does not currently reflect an appropriate dividing line among all such products.

Pindo Deli also argues that multi-ply paper requires recycled waste paper pulp, as opposed to the virgin pulp principally used in singly-ply paper, and thus, multi-ply paperboard is incapable of high quality print graphics. Pl.'s Br. at 26. Again, Pindo Deli's argument points only to some undefined proportion of recycled waste paper pulp versus virgin pulp that reduces a product's whiteness and suitability for high quality print graphics. Plaintiff's evidence does not demonstrate

[14] Pindo Deli uses "multi-ply paperboard" and "multi-ply paperboard for packaging applications" interchangeably. The record shows that at least some multi-ply products are suitable for high quality graphics and thus, not all "multi-ply paperboard" is "multi-ply paperboard for packaging applications." *See* Pet'rs' Scope Cmts. at 4–5 (citing to Pindo Deli sales materials that advertise Plaintiff's multi-ply paperboard as suitable for high quality printing).

[15] Pindo Deli argues Commerce ignored this evidence altogether. Pl.'s Br. at 10. As Commerce addressed Plaintiff's arguments in the *Issue and Decision Memorandum* and in the Scope Memo, this argument lacks merit. *See Issue and Decision Memorandum* at 51–59; Scope Memo at 8 n.30.

that all multi-ply products by definition include the proportion of recycled waste paper necessary to render a product unsuitable for high quality print graphics. Similarly, Pindo Deli's argument that multi-ply paperboard is generally used for packaging applications and is intended to be folded does not demonstrate that all multi-ply paper or paperboard capable of being folded or used for packaging applications is incapable of high quality print graphics.

The record evidence relied on by Commerce demonstrates that the number of plies alone does not render a product unsuitable for high quality print graphics. For instance, Plaintiff's own sales merchandise advertises multi-ply coated paper and paperboard with the necessary GE brightness and weight as suitable for high quality printing. *See* Pet'rs' Scope Cmts. at 4–5 & Attachs.[16] These sales materials show that two Pindo Deli brands of paper, Golden Coin and Sinar-Royal, are coated paper that meet the requirements for weight and brightness and are advertised as appropriate for, respectively, "white & color printing and writing paper" and "[h]igh quality cover applications, annual reports, catalog covers, trading cards, advertising brochures, and folders." *Id.* Thus, Pindo Deli's own sales merchandise supports Commerce's conclusion that some multi-ply products are suitable for high quality print graphics. Commerce also relied on print tests contained in a verification report in which investigators concluded that Plaintiff's multi-ply mechanical paper from Indonesia was virtually indistinguishable from comparable single-ply paper manufactured by Petitioners. *Issue and Decision Memorandum* at 52, 55. Pindo Deli has not addressed or disputed the verification report. Thus, the record shows that at least some multi-ply paper is suitable for high quality print graphics, including paper produced by Pindo Deli, and Commerce's decision not to exclude all multi-ply products is supported by substantial evidence.

Pindo Deli argues that Commerce's conclusion must be in error because Commerce never defined the term "suitable for high quality print graphics" and thus, could not determine whether multi-ply products meet this definition. Pl.'s Br. at 23. In evaluating whether the suitability phrase could be deleted from the scope definition, Commerce noted that the parties had not provided an objective definition of the phrase. Scope Memo at 4. Commerce ultimately con-

[16] Pindo Deli argues the fact that its sales materials advertise a product as capable of high quality printing does not mean the product can actually be used for that purpose because sales materials merely reflect the manufacturer's aspiration for the product and do not provide a complete description of the product or its uses. Pl.'s Br. at 29. This argument does not appear to have been made before the agency and thus does not distract from the adequacy of the agency's conclusion. *See Issue and Decision Memorandum* at 50. Also, equity would not permit the court to rely on the falsity of a plaintiff's advertising to its benefit.

cluded however, that the suitability phrase could not be deleted from the scope definition because it provided a limitation on the scope beyond the physical description. Scope Memo at 8–11; *Issue and Decision Memorandum* at 50. In the Scope Memo, Commerce stated that it was unable to determine whether particular products were subject merchandise because the record lacked information relating to the specific physical characteristics that can distinguish subject multi-ply merchandise from non-subject multi-ply merchandise.[17] Scope Memo at 9–10. Commerce, therefore, did not state that the phrase had no meaning, only that it could not, based on the record currently before it, make product specific determinations in a vacuum and proposed that specific determinations be made through scope inquiries should the issue arise. *Issue and Decision Memorandum* at 50. Specifically, Commerce stated it intended to rely on the scope procedures described in 19 C.F.R. § 351.225 to evaluate products on a case-by-case basis. *Id.* at 51.

The regulation referenced by Commerce provides a detailed procedure for determining whether a particular product falls within the scope of an antidumping or countervailing duty order. *See* 19 C.F.R. § 351.225(k). These regulations are in place because "the descriptions of subject merchandise contained in the Department's determinations must be written in general terms." *Id.* § 351.225(a).[18] Here, Commerce noted Plaintiff's arguments relating to the differences in thickness, stiffness, and reading/recognition between multi-ply and single-

[17] This raises the question of whether Commerce created a scope definition that it cannot administer or that is based on end-uses, which would be contrary to Commerce's practices. Commerce stated that during the investigation, no party argued, beyond the broad arguments made here, that any of the identified imports were not within the scope of the investigation or were unsuitable for high quality printing. *Issue and Decision Memorandum* at 57. Thus, the issue of whether a particular product meets the physical definition of the scope but may be non-subject merchandise because it is not suitable for printing has not been presented to Commerce. Commerce's decision to avoid making a determination until the issue is actually presented is reasonable, as a party can establish that its particular product is not covered because it is not suitable for high quality printing.

[18] Under these procedures, Commerce must first determine that the language of the final order is subject to interpretation. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005). Commerce then determines whether a particular product is included within the scope of an order by considering: "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). If Commerce finds the above criteria are sufficient to resolve the issue, Commerce issues a scope ruling. *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1352 (Fed. Cir. 2010) (citing 19 C.F.R. § 351.225(d)). If not, Commerce initiates a scope inquiry to further consider: "(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

ply paperboard and recommended that the parties develop a record on these issues for use in subsequent scope inquiries should the issue arise. Scope Memo at 11; *Issue and Decision Memorandum* at 56–57. Thus, Commerce has proposed that it merely follow its existing procedures.[19]

Although Commerce cannot yet determine whether every multi-ply product entered into the United States is covered under the scope of the order, Commerce's conclusion that at least some multi-ply paper is included in the scope and therefore, that all multi-ply paper should not be excluded, is supported by substantial evidence on the record.

II. Industry Standing

Pindo Deli argues alternatively that if the scope was not improperly expanded, Commerce's final determination is contrary to law because the Petitioners lack industry standing. Pl.'s Br. at 3, 29. Defendant argues that Pindo Deli failed to exhaust its administrative remedies by timely objecting before Commerce and therefore, the argument is not properly before the court.[20] Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Admin. R. and App. 30–35 ("Def.'s Br."); Def.-Intervenors' Opp'n to Mot. for J. on the Agency R. of Pl. PT Pindo Deli Pulp and Paper Mills 34–35 ("Def.-Ints.' Br."). Pindo Deli argues that its failure to timely object should be excused because the Petition did not give

[19] Pindo Deli argued at oral argument that Commerce should exclude all multi-ply products and add multi-ply products that meet the scope definition through subsequent scope inquiries. Such a procedure would be contrary to law because Commerce cannot expand the scope of an order through scope inquiries. *See* 19 C.F.R. § 351.225(a) ("the Department issues 'scope rulings' that *clarify* the scope of an order . . . ." (emphasis added)); *Ericsson GE Mobile Commc'ns Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (concluding Commerce improperly expanded the scope of an order through a scope ruling).

[20] Commerce can consider comments relating to industry support within twenty days of the petition being filed. *See* 19 U.S.C. § 1673a(c)(1), (4)(E) (antidumping investigations); 19 U.S.C. § 1671a(c)(1), (4)(E) (countervailing investigations). Once Commerce initiates an investigation, it cannot reconsider industry support. 19 U.S.C. §§ 1673a(c)(4)(E), 1671a(c)(4)(E); *see* Uruguay Round Agreements Act ("URAA"), Statement of Administrative Action, H.R. Rep. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4194, 1994 WL 16137731 ("SAA") ("Arguments regarding industry support should not be made to either Commerce or the Commission following initiation."). Here, Pindo Deli first raised its objection to industry support after the initiation of the investigations. *See* Pl.'s Scope Cmts. at 10–12.

Moreover, before Commerce, Pindo Deli argued that industry support needed to be reexamined because the scope of the investigation had been improperly expanded to include multi-ply products. Pl.'s Scope Cmts. at 10. Commerce noted that it could not reconsider industry support but noted the scope had never been expanded. Scope Memo at 7. Commerce was never presented with the issue of whether the industry support determination was in error if the scope had never been expanded, which is the argument Pindo Deli presents to the court.

adequate notice that multi-ply products were included in the Petition's scope. Pl.'s Br. at 2; Pl.'s Reply to Def.'s and Def.-Ints.' Resp. Brs. 12–13 ("Pl.'s Reply").

Commerce is prohibited from reconsidering industry support after the initiation of an investigation. *See, e.g.*, 19 U.S.C. § 1673a(c)(4)(E). This limitation however, does not limit the court's ability to review Commerce's industry support determination. SAA, 1994 U.S.C.C.A.N. at 4194 ("Interested parties will continue to be able to challenge the adequacy of Commerce's industry support determination" after initiation if a final antidumping duty order is issued.). Nor does Plaintiff's failure to exhaust administrative remedies necessarily prevent the court from reviewing the agency determination.[21] *See* 28 U.S.C. § 2637(d) (the court shall require exhaustion "where appropriate"); *Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998) (holding exhaustion requirement discretionary and not jurisdictional). Thus, the question is not whether the court can review Commerce's industry standing determination, but what evidence the court should consider when conducting its review. Defendant-Intervenors argue that the court should limit its consideration to the evidence before the agency at the time of the agency's decision. Def.-Ints.' Br. at 31. It is not disputed that Petitioners have industry standing based on the evidence before the agency at the time of the *Initiation Notice*. Pindo Deli argues that the court should consider additional evidence presented after initiation that now demonstrates that Petitioners lack industry standing.[22] Pl.'s Br. at 33–34. The court concludes

[21] Commerce found there was no evidence of intentional gamesmanship by Petitioners to conceal the fact that multi-ply products were included in the Petition's scope. *Issue and Decision Memorandum* at 59. Even without intentional misconduct, the parties agreed at oral argument that a petition may fail to give sufficient notice, which may excuse the failure to object to industry standing before initiation of the investigation.

[22] On the one hand, it seems unlikely that Commerce, on its own, may reopen the record and conduct a new industry support determination. *See* 19 U.S.C. § 1673a(c)(4)(E) (after initiation, industry support shall not be reconsidered); SAA, 1994 U.S.C.C.A.N. at 4192 ("the question of industry support will be resolved conclusively at the outset of a proceeding . . . ."). If parties only had to wait until after a final order was issued to challenge industry support, parties would likely continue to supplement the agency record with evidence relating to industry support in order to preserve the evidence for judicial review, essentially continuing the prolonged litigation at the agency level that the URAA intended to curtail. *See id.* at 4192 (noting the change eliminated "the burden on petitioners under current law of potentially rearguing this issue after initiation"). On the other hand, the court has, at least once, remanded to Commerce to reconsider an industry support determination and to reopen the record. *See Save Domestic Oil, Inc. v. United States*, 24 CIT 994, 1015, 116 F. Supp. 2d. 1324, 1343 (2000) (holding Commerce's dismissal of a petition for lack of industry support not supported by the record and remanding for reconsideration and initiation of an investigation). Although it also seems likely that the court may order reopening based on agency error, as Plaintiff had adequate notice and has not presented evidence sufficient to warrant a remand, the court does not resolve this issue.

Pindo Deli's failure to submit its objections to industry support before the *Initiation Notice* cannot be excused for lack of notice and that even if the court were to consider Plaintiff's additional evidence, it fails to warrant a remand.

A. Notice

Pindo Deli argued at oral argument that the Petition did not give adequate notice that multi-ply products were included in the scope for two reasons, and its belated objection to standing should be excused by the court. First, while the Petitioners included most of the subheadings under HTSUS heading 4810, they excluded HTSUS classification 4810.92, which Pindo Deli argues is the proper classification for multi-ply products. *See* Pl.'s Br. at 19 n.3. Second, according to Pindo Deli, a previous 2006 petition submitted by the same Petitioners explicitly included multi-ply products, while the current Petition did not, giving Pindo Deli the impression that multi-ply products were excluded from the current Petition.[23]

Before the International Trade Commission, Pindo Deli stated that its "multi-ply board" from Indonesia was coming in under the relevant HTSUS classifications, but that they "should have come in under 481092." Pet'rs' Scope Cmts. at Ex. 2, 150. Thus, at the time of the Petition and the *Initiation Notice*, it appears at least some of Pindo Deli's multi-ply products were entering the United States under HTSUS classifications other than 4810.92. Only after the *Initiation Notice* did Pindo Deli argue that 4810.92 was the only proper category for its multi-ply products. Pindo Deli cannot claim a lack of notice that some of its multi-ply products would be subject to the Petition's scope when the Petitioners named Pindo Deli as a foreign producer of subject imports and some of Pindo Deli's multi-ply products were, at that time, entering under the "relevant HTS[US] classifications" contained in the Petition. Pet'rs' Scope Cmts. at Ex. 2, 150. Pindo Deli's subsequent discovery that 4810.92 is the proper classification for all of its products does not defeat the Petition's notice.

Moreover, Pindo Deli has not established that, at the time of the Petition, there was a clear practice of classifying all multi-ply products under 4810.92 so that the exclusion of 4810.92 could imply that multi-ply products would not be included in the scope. In support of

[23] Plaintiff did not make this argument in its brief. Moreover, there is no evidence on the record to support the allegation that the 2006 petition expressly included multi-ply products. Plaintiff relied on the notice of initiation for the 2006 investigation, but in that notice, Commerce's description of the scope does not mention the number of plies as a relevant characteristic. *See Initiation of Antidumping Duty Investigations: Coated Free Sheet Paper from Indonesia, the People's Republic of China, and the Republic of Korea*, 71 Fed. Reg. 68,537, 68,538 (Dep't Commerce Nov. 27, 2006).

its argument, Pindo Deli relies on a customs classification ruling that concluded the proper classification for a similar multi-ply product was 4810.92. Pl.'s Br. at 19 n.3 (citing NYRL N101355, 2010 U.S. Custom. NY Lexis 1518 (May 14, 2010)). This customs ruling cannot support Pindo Deli's argument because it was issued in May 2010, almost nine months after the Petition and therefore, cannot demonstrate an established practice as of 2009 or have influenced Pindo Deli's belief that the Petition did not include multi-ply paper.[24]

Pindo Deli also relies on its assertion that certain Chinese and Indonesian companies had been importing significant amounts of multi-ply products for packaging applications under 4810.92 for years prior to the Petition. Pl.'s Br. at 18–19. These entries do not establish a practice of classifying all multi-ply products under 4810.92 because although 4810.92 is likely the correct classification for some multi-ply goods, it is not the exclusive classification for all multi-ply products. *See, e.g.*, NYRL B80872, 1997 U.S. Custom. NY Lexis 330 (Jan. 16, 1997) (classifying multi-ply paperboard for packaging applications under 4810.39.2000). Subheading 4810.92 does not automatically apply to all multi-ply products. Instead, only those multi-ply products that are not "of a kind used for writing, printing or other graphic purposes."[25] There is also no evidence to show the historical entries

[24] The conclusion of the Customs ruling cited by Plaintiff is in conflict with a memorandum placed on the record by Defendants, which summarizes a Custom official's description of the HTSUS classification rules as they apply to multi-ply CCP and concluded classifications 4810.00–4810.29 are more appropriate than classification 4810.92. Phone Call Regarding Scope/HTS Classification Questions, Def.'s Confidential App. Tab 10, at 1. Based on these conflicting determinations, Commerce found that the classification of multi-ply CCP was "complicated" and the proper classification was "not obvious." *Issue and Decision* Memorandum at 55.

[25] Here, it is not disputed that 4810 is the proper heading. Once a HTSUS heading is determined, the General Rules of Interpretation ("GRIs") are to be re-applied to determine the classification of goods at the subheading level. GRI 1, 6; *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). The GRIs are applied to the subheading level "on the understanding that only subheadings at the same level are comparable." GRI 6. Here, the first level of subheadings to be compared include: "Paper and paperboard of a kind used for writing, printing or other graphic purposes, [and is not CFS paper]" and "Other paper and paperboard." *See* HTSUS 4810.22, 4810.92 (2009). This "Other paper and paperboard" category should be selected only if the other subheadings are not applicable. *See* GRI 3(a) ("The heading which provides the most specific description shall be preferred to headings providing a more general description."); *BASF Corp. v. United States*, 482 F.3d 1324, 1326 (Fed. Cir. 2007). Here, only if the paper is not used for "writing, printing or other graphic purpose" does it fall under the "Other paper and paperboard" category.

Once a subheading level is selected, the process is repeated at the second sub-heading level. Only at this second subheading level does multi-ply become a relevant characteristic. Thus, in order to conclude that these historic entries were classified under 4810.92 because they are multi-ply, the court must ignore the first level of subheadings, which is not permitted under the GRIs, or assume that all multi-ply paper is not "of a kind used for printing, writing, or other graphic purposes," which is not supported by the record.

are subject merchandise. The Petitioners' exclusion of a classification that applies to non-subject merchandise is not relevant to whether in-scope multi-ply products will be subject to the investigation. Pindo Deli's historic practice of classifying some products under 4810.92 thus does not establish a historic practice of using that classification for all multi-ply goods. As a result, the exclusion of 4810.92 from the Petition does not speak to whether multi-ply products were to be included in the scope. Instead, the Petitioners likely excluded 4810.92 because paper not "of a kind used for writing, printing or other graphic purposes" is likely not suitable for high-quality print graphics and therefore, is outside the scope of the Petition. In fact, the Petition excluded all subheadings applicable to paper not "of a kind used for writing, printing or other graphic purposes" including classification 4810.92 (multi-ply paper) and 4810.99 (single-ply paper).

Even if this interpretation of the HTSUS classification system is incorrect (the issue has not been placed squarely before the court), the uncertainty in determining the proper classification experienced by the parties, Commerce, and Customs strongly suggests that the classification of goods under 4810.92 was not so established as to justify Pindo Deli's assumption that the exclusion of 4810.92 signaled the exclusion of all multi-ply products. Thus, Pindo Deli has not demonstrated that the Petition did not give notice that multi-ply products that otherwise meet the scope parameters would be included in the investigation and there is no valid reason for excusing Pindo Deli's failure to present its objections to industry standing prior to the *Initiation Notice*.

B. Excluded U.S. Producers

Even if the court were to consider Pindo Deli's evidence presented after the *Initiation Notice*, such evidence does not cast doubt on Petitioners' standing sufficient to warrant a remand.[26] According to Pindo Deli, concluding multi-ply products were always within the scope of the Petition is tantamount to acknowledging that Commerce, in its industry standing analysis, failed to consider certain U.S. pro-

[26] Although not in relation to industry standing, Commerce did consider Plaintiff's evidence relating to the excluded U.S. producers of CCP products when considering whether to delete the phrase "suitable for high quality print graphics" from the scope definition. Scope Memo at 10 n.39. Commerce concluded that the evidence on the record, including the evidence submitted after initiation, "does not indicate that the producers identified by Respondents as package paper producers are significant producers of paper that Petitioners intended to be covered by these investigations." *Id.* To the extent this finding can be applied to a determination on industry standing, Commerce has already considered Plaintiff's evidence and made a finding that such evidence does not demonstrate a significant amount of domestic CCP production was excluded. Because Commerce's finding is not directly on point, the court will consider Plaintiff's evidence.

ducers of multi-ply paperboard. Pl.'s Br. at 34. Defendant argues there is no evidence on the record to show significant volumes of domestically produced multi-ply CCP were excluded. Def.'s Br. at 35. Plaintiff argues whether these producers produce a like-product in significant numbers is for Commerce to decide and these producer's overall revenues suggests that their production is not insignificant. Pl.'s Br. at 34; Pl.'s Reply at 5–6.

Plaintiff's evidence submitted after initiation shows that three U.S. companies, International Paper, Georgia-Pacific, and MeadWestVaco each produce at least one CCP product (i.e. meets the physical description, sold in sheets, and is suitable for printing). *See* Pl.'s Reply at 14. Specifically, Geogia-Pacific's MasterPrint and MasterPrint II, MeadWestVaco's Tango Advantage C1S, and International Paper's Everest and Fortress paper are, at least in part, CCP products. [27] *See* Pl.'s Add. Scope Cmts. at Attach. 2–3 (providing physical description and suitability); Pet'rs' Questionnaire Resp. at 6, 8–9 (confirming products available in sheets). For argument's sake, the court will assume the Coated Paper Products Survey ("CPP Survey") used by Petitioners and Commerce to estimate U.S. production of CPP did not capture the production of the CCP products noted above. [28] With this assumption, Plaintiff has shown that the industry data used to calculate industry support did not capture the entire domestic industry. Whether this also shows that Commerce's resulting industry standing determination was in error depends on the magnitude of the error in the industry data and whether data exists to demonstrate that error to Commerce. The record currently cannot answer these ques-

[27] MasterPrint and MasterPrint II products range in weight from 234 to 440 grams per square meter ("gsm"). *See* Pl.'s Add. Scope Cmts. at Attach. 2. Only that portion under 340 gsm would be subject merchandise. Although Everest products are advertized as designed for "[p]rinting [a]pplications," Pl.'s Req. to Re-examine the Dep't's Industry Supp. Calculation at Attachs., there is no evidence showing Fortress products are suitable for printing or high quality print graphics. Additionally, the record shows that only a portion of Everest and Fortress products are produced in sheets. *See* Pet'rs' Questionnaire Resp. at 8.

[28] The CPP Survey was developed by the American Forest and Paper Association, which aggregated data from the "coated paper" industry, including CFS and mechanical paper, and did not distinguish between multi-ply and single ply paper. *See* Petition at Todasco Ex. A. The record does not reflect whether the CPP Survey captured the production of these excluded producers. If the excluded production is mechanical paper, then the industry data is incorrect by stating that all the mechanical paper produced in the United States for 2008 was in rolls and not sheets. The production of the excluded producers may also not have been included in the CPP Survey because the CFS and paper for packaging applications industries are generally distinct in the United States. *See* Scope Memo at 10 n.39.

tions because Plaintiff has presented only overall revenues of the excluded U.S. producers, which say nothing about the production levels of the CCP products. [29]

The fact that the industry data is not perfect is not sufficient to suggest that Petitioners do not have industry standing. Industry standing calculations are not meant to be exact and proxies are routinely used to estimate the amount of U.S. production of a particular product. *See* 19 U.S.C. § 1673a(b)(1) (requiring the petition to contain information on the domestic industry "reasonably available" to petitioners). Thus, Plaintiff must do more than point out that the industry data was not perfect in order to show Petitioners lack industry standing. Plaintiff has not presented any evidence to show that there is a more accurate and available source of information that could alter Commerce's determination. Moreover, Commerce did not rely solely on the CPP Survey data but also considered "supplemental submissions, and other information readily available to the Department" and concluded the totality of this information "indicates that Petitioners have established industry support." *Initiation Notice*, 74 Fed. Reg. at 53,712. In sum, although Plaintiff has presented evidence that Commerce may have partially relied on industry data that was not a perfect proxy for the U.S. CCP industry, Plaintiff has not presented evidence to suggest the error was so great as to defeat Petitioners' standing, or that such evidence exists and could be submitted to Commerce on remand. Thus, Plaintiff's request for a remand is denied.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for judgment on the agency record is DENIED and the determination of Commerce is SUSTAINED in its entirety.

Dated: Dated this 16th day of March, 2012.
New York, New York

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

[29] If the record were reopened upon remand, it is possible that a party could submit information demonstrating that the calculation of industry standing was in error. It is also possible that Petitioners would submit evidence showing that these excluded U.S. producers are represented by USW and therefore, can be considered to support the Petition. *See* 19 C.F.R. § 351.203(e)(3). Even if Commerce were eventually to conclude that Petitioners lacked industry standing, Commerce could disregard the industry support calculation altogether and self-initiate a petition. 19 U.S.C. § 1673a(a). The court will not assume that Plaintiff's scenario is the most likely outcome and will not rely on such speculation as grounds for a remand.

Slip Op. 12–34

PT PINDO DELI PULP and PAPER MILLS, Plaintiff, v. UNITED STATES, Defendant, and APPLETON COATED LLC, NEWPAGE CORPORATION, S.D. WARREN COMPANY d/b/a SAPPI FINE PAPER NORTH AMERICA, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL CIO-CLC, Intervenor Defendants.

Jane A. Restani, Judge
Court No. 10–00370

[Plaintiff-Respondent PT Pindo Deli Pulp and Paper Mills' motion for judgment on the agency record in countervailing duty order scope matter denied.]

Dated: March 16, 2012

Daniel L. Porter and *James P. Durling*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for plaintiff. With them on the brief were *Matthew P. McCullough* and *Ross E. Bidlingmaier*.

Alexander V. Sverdlov, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David Richardson*, International Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

William A. Fennell, Stewart and Stewart of Washington, DC, and *Gilbert B. Kaplan*, King & Spalding, LLP, of Washington DC, argued for intervenor defendants. With them on the brief were *Elizabeth J. Drake* and *Terence P. Stewart*, Stewart and Stewart, of Washington, DC, and *Jeffrey M. Telep*, *Brian E. McGill*, and *Christopher T. Cloutier*, King & Spalding, LLP, of Washington, DC.

ORDER

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; Now therefore, in conformity with the decision issued in Court No. 10–00369, Slip Op. 12–33, it is hereby

ORDERED that Plaintiff PT Pindo Deli and Paper Mills' motion for judgment on the agency record is denied and the challenged determination of Commerce is SUSTAINED.

Dated: Dated this 16th day of March, 2012.
New York, New York.

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

Slip Op. 12–35

GLOBAL COMMODITY GROUP LLC, Plaintiff, v. UNITED STATES, Defendant, - and - ARCHER DANIELS MIDLAND COMPANY, CARGILL, INC., and TATE & LYLE AMERICAS, LLC, Defendant-Intervenors

Before: Gregory W. Carman, Judge
Court No. 11–00172

[Sustaining the Department of Commerce's scope determination]

Dated: March 19, 2012

George W. Thompson, *Russell A. Semmel* and *Maria E. Celis*, Neville Peterson, LLP, of New York, NY, for Plaintiff.

Carrie Anna Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Tony West*, Assistant Attorney General, and *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, and *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel.

Neil R. Ellis and *Jill Caiazzo*, Sidley Austin LLP, of Washington, DC for Defendant-Intervenors.

OPINION

CARMAN, JUDGE:

Plaintiff Global Commodity Group LLC ("GCG" or "Plaintiff") challenges a scope determination issued by the U.S. Department of Commerce ("Commerce") deciding that GCG's imported product falls within the scope of certain antidumping and countervailing duty orders on citric acid and certain citrate salts from the People's Republic of China. (Compl. ¶ 1.) For the reasons set forth below, Commerce's determination is sustained.

BACKGROUND

In 2009, Commerce issued antidumping and countervailing duty orders on citric acid and certain citrate salts from the People's Republic of China ("the Orders"). *Citric Acid and Certain Citrate Salts From Canada and the People's Republic of China: Antidumping Duty Orders*, 74 Fed. Reg. 25,703 (May 29, 2009); *Citric Acid and Certain Citrate Salts from the People's Republic of China: Notice of Countervailing Duty Order*, 74 Fed. Reg. 25,705 (May 29, 2009). The scope of each order is identical, and states, in relevant part, that the scope includes

> all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also

> includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend.

74 Fed. Reg. at 25,703, 25,705.

GCG imported a product consisting of 35% citric acid of Chinese origin and 65% citric acid originating from other countries, and on July 26, 2010 requested a determination from Commerce that this product falls outside the scope of the Orders. (Compl. ¶¶ 1, 4, 8–9.) GCG's theory was that this product was specifically excluded by the second clause of the second sentence of the scope language quoted above. That clause states that "blends [of citric acid] with other ingredients . . . where the unblended form(s) of citric acid . . . constitute[s] 40 percent or more, by weight, of the blend" are **included** within the scope of the order. 74 Fed. Reg. at 25,703, 25,705. GCG argued that (1) it had created a blend consisting of Chinese citric acid and other citric acid that was not subject to the Orders, (2) the unblended form of Chinese citric acid constituted less than 40 percent of the blend, and therefore (3) GCG's product should be **excluded** from the order by virtue of this clause. (Compl. ¶¶ 6, 8–9.)

Commerce did not agree. First in a preliminary determination on March 7, 2011, and again in its final determination on May 2, 2011, Commerce concluded that the Chinese citric acid in GCG's product fell within the scope of the Orders. Specifically, Commerce rejected GCG's contention that it had created a "blend" of citric acid, as that term is used in the scope language, noting that the product, as imported, was "[f]unctionally and chemically . . . indistinguishable from citric acid that comes from a single source." *Citric Acid and Certain Citrate Salts: Final Deterimation on Scope Inquiry for Blended Citric Acid from the People's Republic of China and Other Countries* ("Final Determination") 5, P.R. 53, (May 2, 2011). Because under the first sentence of the scope "all grades and granulation sizes of citric acid" are subject to the Orders, Commerce decided that the Chinese citric acid in GCG's product was encompassed by that language, and would be subject to the Orders. (*Id.* at 6.)

STANDARD OF REVIEW

In an action such as this, brought to contest a determination by Commerce "as to whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order," the Court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by

substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §§ 1516a(a)(2)(B)(vi), (b)(1)(B)(i). The courts grant "significant deference to Commerce's own interpretation" of the scope of its antidumping and countervailing duty orders, *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002) (*citing Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)), but Commerce cannot change the scope of such orders through interpretation, nor interpret them in a manner contrary to their terms, *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

ANALYSIS

Commerce's ultimate conclusion that the Chinese citric acid in GCG's product should be subject to the Orders is relatively noncontroversial. GCG plainly acknowledges that its product contains Chinese citric acid, *see* Final Determination 6, *and* Compl. ¶ 1, and Chinese citric acid plainly falls within the first sentence of the scope language, which "includes all grades and granulation sizes of citric acid," 74 Fed. Reg. at 25,703. Rather, the locus of GCG's dispute with Commerce is whether its product is excluded from the scope of the Orders by the second clause of the second sentence. That dispute, in turn, hinges on whether Plaintiff's product is a blend, and specifically on whether non-subject citric acid must qualify as "other ingredients" within the meaning of that clause. GCG says yes, Commerce says no.

Plaintiff argues that "other ingredients" **can only** be interpreted as **any ingredients other than subject (i.e., Chinese) citrates**. (Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("Pl.'s Mot.") 11.) According to GCG, this interpretation is "compelled by the sentence structure." (*Id.*) If Plaintiff was correct, and citrates from non-subject countries qualified as "other ingredients," then GCG's product would be considered a blend, and it would be excluded from the scope because it contained less than 40% Chinese citric acid. (*Id.*) Commerce's decision, however, is that the phrase "other ingredients" does not mean any product other than *subject* citrates, but rather means non-citrate products. Final Determination 5–6. The issue presented to the Court is whether this determination by Commerce is supported by substantial evidence on the record and otherwise in accordance with law. The Court concludes that it is.

Commerce's interpretation of the phrase "other ingredients" is not only permissible, it is eminently reasonable. First, the conclusion that "other ingredients" refers to non-citrate products is supported by the plain language of the scope, which cites sugar (rather than a non-subject citrate) as an example of an "other ingredient[]". 74 Fed. Reg. at 25,703, 25,705. Additionally, the Court regards Commerce's ac-

count of how this sentence came to be added to the scope as compelling. Upon reviewing the description of the merchandise contained in the petition, Commerce noted that the scope originally included citrates in pure forms, but did not address citrates in blended forms. Final Determination 5, *see also* 19 C.F.R. § 351.225(k) ("in considering whether a particular product is included within the scope of an order . . . [Commerce] will take into account the following: (1) The descriptions of the merchandise contained in the petition . . . ."). During the original investigation, Commerce queried petitioners about this gap, and petitioners proposed the language now found in the scope's second sentence. *Id.* On the basis of that history, Commerce concluded that the purpose of this sentence was to ensure that "something other than pure citrates, *i.e.*, different citrates mixed with one another or with non-citrate products," were included within the scope of the Orders. *Id.*

Commerce's interpretation is therefore not contrary to the terms of the scope, nor does it alter the language of the scope; it must be sustained in light of the significant deference to which Commerce is entitled in the interpretation of scope provisions. *See Eckstrom Indus.*, 254 F.3d at 1072; *see also Duferco*, 296 F.3d at 1094–95. Accordingly, because GCG's product does not qualify as a blend, it cannot be excluded from the scope of the Orders on that basis. Moreover, as noted above, because GCG's product plainly includes subject citric acid, Commerce's determination to assess antidumping duties on the portion of the product that is citric acid subject to the Orders is warranted.

CONCLUSION

For the reasons set out above, the Court sustains Commerce's determination that GCG's product falls within the scope of the Orders. Judgment will enter accordingly.

Dated: March 19, 2012
New York, New York

/*s*/ *Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 12–36

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and HILLTOP INTERNATIONAL, and OCEAN DUKE CORPORATION, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Court No. 10–00275

[Affirming Department of Commerce's remand redetermination]

Dated: March 20, 2012

Jordan C. Kahn, *Andrew W. Kentz*, *Nathaniel J. Maandig Rickard*, and *Kevin M. O'Connor*, Picard Kentz & Rowe LLP, of Washington, DC, for Plaintiff Ad Hoc Shrimp Trade Action Committee.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the briefs was *Shana Hofstetter*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Mark E. Pardo, Andrew T. Schutz, Brandon M. Petelin, and *Jeffrey O. Frank*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for the Defendant-Intervenors Hilltop International and Ocean Duke Corporation.

OPINION

Pogue, Chief Judge:

This case returns to the court following remand by *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 791 F. Supp. 2d 1327 (2011) ("*Ad Hoc I*"). In *Ad Hoc I*, the court reviewed the final results of the fourth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the People's Republic of China ("China")[1] and ordered the Department of Commerce ("the Department" or "Commerce") to further explain or reconsider its decision to rely exclusively on Customs and Border Protection Form 7501 data for entries designated as Type 03[2] ("Type 03 CBP Data") when selecting mandatory respondents in the review. *Id.* at 1334. In its *Final Results of Redetermination Pursuant to Court Remand*, ECF No. 50 ("*Remand Results*"), Commerce found that Type 03 CBP Data remains the best available information and reaffirmed its original determination. *Remand Results* at 28. Plaintiff continues to dispute this result.

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[1] *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 75 Fed. Reg. 49,460 (Dep't Commerce Aug. 13, 2010) (final results and partial rescission of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-570–893, ARP 08–09 (Aug. 9, 2010), Original Admin. R. Pub. Doc. 180 (adopted in *Final Results*, 75Fed. Reg. at 49,460) ("*I & D Mem.*").

[2] "Type 03" entries are consumption entries designated upon importation to be subject to an antidumping/countervailing duty.*See* U.S. Customs and Border Protection, Dep't of Homeland Security, *CBP Form 7501 Instructions* 1 (Mar. 17, 2011), *available at* http://forms.cbp.gov/pdf/7501_instructions.pdf (last visited Mar. 13, 2012) ("*Form 7501 Instructions*").

For the reasons that follow, the court affirms Commerce's decision to rely exclusively on Type 03 CBP Data as compliant with the remand order and supported by a reasonable reading of the record evidence.

The court has jurisdiction pursuant to § 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2006)[3] and 28 U.S.C. § 1581(c) (2006).

BACKGROUND

The facts necessary to the disposition of Plaintiff's request for review of the *Remand Results* are the following:[4]

In the administrative review at issue, Commerce relied exclusively on Type 03 CBP Data to determine the largest exporters by volume when choosing mandatory respondents. *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1332; *see also* 19 U.S.C. § 1677f-1(c)(2)(B) (permitting Commerce to limit individual review of respondents to the largest exporters by volume under certain circumstances). Ad Hoc Shrimp Trade Action Committee ("AHSTAC") challenged that decision before the Department, arguing that the Type 03 CBP Data was unreliable and did not accurately reflect the actual volume of subject imports;

therefore, Type 03 CBP Data did not form a reasonable data set for respondent selection. *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1330–31. In support of its position, AHSTAC placed on the record: (1) the final results of the third administrative review of this antidumping duty order, detailing discrepancies between the Type 03 CBP Data and verified import data for respondent Zhanjiang Regal Integrated Marine Resources Co., Ltd. ("Regal AR3 Verification");[5] (2) alternative import data sets — U.S. Census Import Data ("IM-145 Data")[6] and Automated Manifest Data ("AMS Data")[7] — showing import volume discrepancies when compared with Type 03 CBP Data; and (3)

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[3] All subsequent citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

[4] Familiarity with the court's prior decision is presumed.

[5] *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 74 Fed. Reg. 46,565 (Dep't Commerce Sept. 10, 2009) (final results and partial rescission of antidumping dutyadministrative review) ("*AR3 Final Results*"), and accompanying Issues & Decision Memorandum, A-570–893, ARP 07–08, Cmt. 7 at 23–24 (Aug. 28, 2009) (adopted in *AR3 Final Results*, 74 Fed. Reg.at 46,566) ("*AR3 I & D Mem.*").

[6] A summary of the IM-145 Data was provided by AHSTAC in its comments on respondent selection. Comments on Resp't Selection, A-570–893, ARP 08–09 (Apr. 9, 2009), Original Admin. R. Con. Doc.3 [Pub. Doc. 18], Ex. 3 ("AHSTAC's Apr. 9, 2009 Comments").

[7] A summary of the AMS Data was provided in the comments on respondent selection submitted by the American Shrimp Processor's Association ("ASPA") and the Louisiana Shrimp Association ("LSA"). Comments on Resp't Selection, A-570–893, ARP 08–09 (Apr. 10, 2009), Original Admin. R. Con. Doc. 2 [Pub. Doc. 20], Ex. 2 ("ASPA's & LSA's Apr. 10, 2009 Comments).

two reports to Congress — a United States Customs and Border Protection report ("CBP Report")[8] and a U.S. Government Accountability Office Report ("GAO Report")[9] — discussing investigations into misclassification and transshipment of Chinese shrimp imports to the United States. Commerce refused to consider AHSTAC's evidence and relied exclusively on Type 03 CBP Data in the *Final Results*. *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1331–32.

AHSTAC subsequently challenged Commerce's determination before this court. Ruling on that challenge, *Ad Hoc I* held — with specific reference to the Regal AR3 Verification — that "[b]ecause Commerce failed to take into account record evidence that fairly detracts from the weight of the evidence supporting its POR subject entry volume determinations, these determinations are not supported by substantial evidence." *Id.* at 1334. The court remanded the *Final Results* to Commerce to "take into account the record evidence of significant entry volume inaccuracies in Type 03 CBP Form 7501 data . . . and explain why it is nevertheless reasonable to conclude that the Type 03 CBP Form 7501 data used in this case are not similarly inaccurate, and/or otherwise reconsider its determination." *Id.*

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(1)).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), "tak[ing] into account whatever in the record fairly detracts from its weight," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In brief, the substantial evidence standard asks whether, based on the record evidence as a whole, the agency's action was reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

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[8] U.S. Customs and Border Protection, *Report to Congress on (1) U.S. Customs and Border Protection's Plans to Increase AD/CVD Collections and (2) AD/CVD Enforcement Actions and Compliance Initiatives, reprinted in* AHSTAC's Apr. 9, 2009 Comments, Ex. 1.

[9] U.S. Gov't Accountability Office, *Seafood Fraud: FDA Program Changes and Better Collaboration Among Key Federal Agencies Could Improve Detection and Prevention* (2009), *reprinted in* AHSTAC's Apr. 9, 2009 Comments, Ex. 2.

DISCUSSION

In *Ad Hoc I*, Commerce failed to take into account the record evidence as a whole. *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1333–34. In particular, Commerce failed to consider evidence on the record that detracted from the reliability of the Type 03 CBP Data. *Id.* at 1334. By not considering this evidence, Commerce failed to meet the basic requirements of the substantial evidence Court No. 10–00275 Page 7 test, *see Universal Camera*, 340 U.S. at 488, so the court remanded the determination to Commerce to:

> take into account the record evidence of significant entry volume inaccuracies in Type 03 CBP Form 7501 data for merchandise subject to this antidumping duty order, and explain why it is nevertheless reasonable to conclude that the Type 03 CBP Form 7501 data used in this case are not similarly inaccurate, and/or otherwise reconsider its determination,

Ad Hoc I, __ CIT at __, 791 F. Supp. 2d at 1334.

In the *Remand Results*, Commerce considered the evidence of inaccuracies that AHSTAC submitted and concluded that "the Type 03 data [relied upon in this review] is reliable and not similarly inaccurate, and remains the best available on which to base respondent selection." *Remand Results* at 4. Thus, Commerce has considered the evidence of inaccuracy, as required by the remand order, and the court must now decide whether the Department's decision to continue relying upon Type 03 CBP Data is reasonable. *See Nippon Steel*, 438 F.3d at 1351.

In making such a determination the court does not substitute its judgment for that of the agency. As the Court of Appeals for the Federal Circuit has stated:

> Although a reviewing court must take into account contradictory evidence or any evidence in the record that undermines the agency's finding, the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record.

Cleo Inc. v. United States, 501 F.3d 1291, 1296 (Fed. Cir. 2007) Court No. 10–00275 Page 8 (citing *Universal Camera*, 340 U.S. at 487–88).

The court will examine whether Commerce's decision is supported by substantial evidence, first, in light of the conflicting evidence AHSTAC presents and, second, in light of the alternative data sets

AHSTAC seeks. In the third part of the opinion, the court will address AHSTAC's challenge to Commerce's policy of reviewing only respondents that have suspended entries.

I. The Evidence of Inaccuracies in Type 03 CBP Data Is Insufficient to Render Commerce's Determination Unreasonable

AHSTAC has consistently challenged the Department's use of Type 03 CBP Data in this review by presenting three categories of evidence demonstrating what AHSTAC believes to be the unreliability of the Type 03 CBP Data: (1) the Regal AR3 Verification; (2) the IM-145 and AMS Data; and (3) the CBP and GAO Reports to Congress. AHSTAC now challenges the *Remand Results* on these same grounds, arguing that the Department's redetermination is unreasonable in light of the evidence on the record that the Type 03 CBP Data is unreliable. The court will treat each category of evidence in turn.

A. The Regal AR3 Verification is Unpersuasive in Light of the Fourth Administrative Review Verification

The first category of evidence AHSTAC submits is a finding from the third administrative review detailing inaccuracies in the Type 03 CBP Data. In particular, when Commerce verified respondent Regal's data in the third administrative review, the Court No. 10–00275 Page 9 Department found significant discrepancies in import volumes of subject merchandise compared with those reported on Form 7501. *AR3 I & D Mem.* Cmt. 7 at 23. The court in *Ad Hoc I* gave particular attention to this fact when ordering the remand:

> The fact that, in the immediately preceding review, Commerce discovered significant inaccuracies, [10] undetected by Customs, in the CBP entry volume data for subject merchandise from the very same respondents as those covered in this review casts sufficient doubt on the presumption that Customs has assured the accuracy of such data for this POR.

Ad Hoc I, __ CIT at __, 791 F. Supp. 2d at 1333.

Following verification in the fourth administrative review, however, Commerce found no such discrepancy. As the Department states in the *Remand Results*, "the record for AR4 shows that Regal's reported volume of subject exports, while not identical, is reasonably consistent with the volume provided in CBP Type 03 data." *Remand Results* at 14. While the results of the third administrative review did "cast doubt" on the accuracy of the Type 03 CBP Data used in the fourth

[10] As Commerce notes in the Remand Results, the inaccuracies were limited to a single respondent, Regal. *Remand Results* at 13.

administrative review, such doubt was subsequently resolved by the verified results of the fourth administrative review. Thus, the court finds reasonable Commerce's statement that,

> as Regal was fully reviewed in this fourth administrative review period, and the Department did not find *any* evidence that Regal misreported or underreported any sales of subject merchandise, we find that Petitioner's speculative argument regarding Regal's purported continuation of misreporting of sales is unfounded, based on the record evidence of this review period.

Remand Results at 25.

AHSTAC argues that the discrepancy discovered in the third administrative review represents widespread misclassification by importers. Pl. Ad Hoc Shrimp Trade Action Comm.'s Comments on *Final Results of Redetermination Pursuant to Court Remand* at 25–26, ECF No. 54 ("Pl.'s Comments"). AHSTAC's argument is premised on the bifurcation of responsibility between the respondent exporter/producer, whose records are verified in the administrative review, and the importer, who is responsible for completing Form 7501. According to AHSTAC's theory, the discrepancy discovered in the third administrative review means that importers should be presumed to be misclassifying imports until "record evidence demonstrates otherwise," *Id.* at 25. AHSTAC further argues that, as Regal is not an importer, evidence that misclassification has been corrected vis-a-vis Regal's merchandise does not prove that importers, generally, are not continuing to misclassify.

This argument is inconsistent with the record evidence in the current review. The record shows that in the third administrative review, the Type 03 CBP Data for Regal was inaccurate; however, in the fourth administrative review that inaccuracy was not present. Though it is true that the Court No. 10–00275 Page 11 "determination of data inaccuracies in a separate review of the same producer/exporter, subject to the same antidumping duty order, casts doubt on similar data regarding such producer/exporter in an adjacent review," *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1333 (construing *Home Products Int'l, Inc. v. United States*, 633 F.3d 1369, 1380–81 (Fed. Cir. 2011)), evidence from the latter review showing that the inaccuracy no longer exists resolves such doubt. Thus, evidence that an importer inaccurately completed Form 7501 in a prior review *but did not perpetuate similar inaccuracies in the review at issue* is insufficient to impugn the behavior of importers generally or the reliability of the data. The CBP data is presumed to be collected according to standards of regularity and, unless that presumption is

rebutted, such data may be considered reliable. *Pakfood Public Co. v. United States*, __ CIT __, 753 F. Supp. 2d 1334, 1345–46 (2011). In light of the accuracy of the Type 03 CBP Data for Regal in the fourth administrative review, the presumption stands for that review.

The Regal AR3 Verification was singled out in *Ad Hoc I* as relevant and persuasive because it pointed to specific and determinable evidence of unreliability in the Type 03 CBP Data. Given the lack of inaccuracy in the fourth administrative review, the prior inaccuracy is no longer persuasive. Therefore, the court turns to the more generalized evidence of inaccuracy put Court No. 10–00275 Page 12 forward by AHSTAC. Though it was not directly addressed in *Ad Hoc I*, the court will turn first to the IM-145 and AMS Data.

B. Inconsistency Between the IM-145/AMS Data and Type 03 CBP Data Is Not an Indication of Unreliability

AHSTAC argues that discrepancies between import volumes listed in the Type 03 CBP Data and the IM-145/AMS Data indicate that misclassification by importers has rendered the Type 03 CBP Data inaccurate. According to AHSTAC, because import volumes listed in the IM-145 Data are larger than in the Type 03 CBP Data, importers must be misclassifying imports on Form 7501 as non-subject merchandise. Pl.'s Comments at 31. AHSTAC further argues that the AMS data shows a growth in imports from Zhangjiang Guolian Aquatic Products Co., Ltd. ("Guolian"), which is not subject to the antidumping duty order, and that this indicates a likelihood that importers are misclassifying imports from producers/exporters subject to the antidumping duty order as imports from Guolian. *Id.* at 31–32.

Commerce responds to AHSTAC by arguing that the IM-145 Data is not limited to subject imports; therefore, discrepancies between IM-145 Data and Type 03 CBP Data may result from the overinclusiveness of the IM-145 Data rather than from misclassification. Def.'s Response to Pl.'s Remand Comments at 8–9, ECF No. 60 ("Def.'s Reply"). This analysis is reasonable. Because the IM-145 data is based on Harmonized Tariff Schedule of the United States ("HTSUS") categories covering a broader range of Court No. 10–00275 Page 13 merchandise than that subject to the antidumping duty order, it is not only unsurprising but expected that the IM-145 Data would show a positive volume discrepancy when compared to the Type 03 CBP Data. Therefore, such discrepancy does not impugn the reliability of the Type 03 CBP Data.[11]

[11] AHSTAC suggests that Commerce could "assess the extent to which these data are over-inclusive and rely on such analysis to support its decision-making." Pl.'s Comments at

For similar reasons, Commerce's decision not to rely upon the discrepancy between the AMS Data and the Type 03 CBP Data is also reasonable. According to AHSTAC, the growth in imports from Guolian, which is not subject to the order, suggests that importers are misclassifying merchandise from exporters/producers subject to the order as merchandise from Guolian to avoid duties. Such an explanation is plausible. However, Commerce puts forward an equally plausible explanation that "an excluded company like Zhangjiang Guolian logically would be competitive *vis-a-vis* other exporters subject to the order because its merchandise would naturally not be subject to antidumping duty cash deposit collection, suspension, or liquidation." Def.'s Reply at 9–10; *see also Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966) ("[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.").

C. The Reports to Congress Alone Are Insufficient to Challenge the Presumption of Reliability

Finally, AHSTAC argues that two reports to Congress, the CBP Report and the GAO Report, show ongoing problems of misclassification and transshipment, which suggests that the Chinese shrimp industry is "structured such that there is a likelihood of entry misclassification." Pl.'s Comments at 22.

Though these reports show that both misclassification and transshipment of Chinese shrimp exported to the U.S. has occurred in the past, they do not indicate current inaccuracies in the Type 03 CBP Data used for the fourth administrative review; nor do they indicate ongoing problems. First, the reports predate the administrative review at issue here.[12] Second, the reports do not indicate misclassification or transshipment specifically relevant to the determination of mandatory respondents in the fourth administrative review. Finally, issues noted in the reports were subsequently addressed through enforcement actions. While no one of these facts is necessarily fatal to

31. However, because the discrepancy between the IM-145 Data and the Type 03 CBP Data does not impugn the Type 03 CBP Data's reliability, there is no reason to burden Commerce with such analysis. Furthermore, Commerce notes that, "[d]espite Ad Hoc's claim, Commerce has no way of getting behind the data and excluding non-subject merchandise." Def.'s Reply at 9. Nor does AHSTAC provideany suggested methodology.

[12] While it is understandable that there is a lag time between when conduct occurs and when the report detailing the investigation of that conduct becomes public, *see* Pl.'s Comments at 22, this fact does not render the reports an account of the contemporary situation.

Plaintiff's argument, combined they significantly diminish the weight to be given the reports as evidence of irregularity in the fourth administrative review.

In light of these facts, it is simply not true that "[t]hese government reports vanquished the presumption of regularity ordinarily afforded to Type 03 CBP data and required Commerce to support its respondent selection with substantial evidence." *Id.* at 24 (citing *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1331–34, 1337). Rather, in *Ad Hoc I*, the court found that in light of all the evidence put forward by AHSTAC, but particularly in light of the Regal AR3 Verification evidence, the presumptive reliability of the Type 03 CBP Data was "call[ed] into question." *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1332–33. Because the Regal AR3 Verification is no longer persuasive and the IM-145/AMS Data is likewise unpersuasive, the CBP and GAO Reports must stand on their own. However, given the limitations on the applicability of the CBP and GAO Reports noted above, these reports are insufficient to impugn the presumption of regularity. *See Seneca Grape Juice Corp. v. United States*, 71 Cust. Ct. 131, 142, C.D. 4486, 367 F. Supp. 1396, 1404 (1973) ("In the absence of clear evidence to the contrary, the courts presume that public officers have properly discharged their duties . . . .").

Having determined that Commerce's reliance on the Type 03 CBP Data is supported by a reasonable reading of record evidence, the court now turns to whether Commerce's choice among alternative data sets was also reasonable.

II. The Court Defers to Commerce's Reasonable Choice Among Alternative Data Sets

In addition to its arguments challenging the reliability of the Type 03 CBP Data, discussed above, AHSTAC also contends that Commerce should either release Type 01 CBP data[13] to corroborate the Type 03 CBP Data or employ Quantity and Value Questionnaires ("Q&V Questionnaires") because Q&V Questionnaires provide a more complete, thorough, and accurate accounting of import volumes.

Where, as here, Commerce's decision is supported by a reasonable reading of record evidence, *see supra* Part I, the court will not upset Commerce's reasonable choice among alternative data sets, even if they may be available. *Cf. Peer Bearing Co.-Changshan v. United States*, 27 CIT 1763, 1770, 298 F. Supp. 2d 1328, 1336 (2003) ("The Court's role in this case is not to evaluate whether the information Commerce used was the best available, but rather whether Com-

[13] Type 01 CBP data includes consumption entries designated upon importation as free and dutiable on Form 7501. *See Form 7501 Instructions*, *supra*, at 1.

merce's choice of information is reasonable."); *see also Nucor v. United States*, __ CIT __, 594 F. Supp. 2d 1320, 1356 (2008) ("It is well-established that it is an agency's domain to weigh the evidence; therefore this Court must not upset the [agency's] reasonable conclusions supported by substantial evidence . . . .").

Furthermore, the court finds unpersuasive AHSTAC's arguments for the necessity and/or advantage of the alternative data sets. With regard to Type 01 CBP data, the court is not convinced that the release of such data is required. Though the court noted in *Ad Hoc I*, that "one way to corroborate the accuracy of CBP Type 03 entry volume data without undue administrative burden is to compare such data with CBP Type 01 entry volume data . . . ," *Ad Hoc I*, __ CIT at __, 791 F. Supp. 2d at 1334 n.19, this statement was a suggestion, not a mandate, to Commerce. The court is now convinced by Commerce's argument in the *Remand Results* that "[t]he classification itself does not yield any specific information that would assist the Department in expeditiously determining whether merchandise should have been reported as Type 03, or making any modifications to the Type 03 data for purposes of respondent selection." *Remand Results* at 15.[14] This is particularly the case in light of the fact that Plaintiff offered no further suggestions on how Type 01 data would be used in its Comments.

Regarding Q&V Questionnaires, the court finds unpersuasive the Department's argument that Q&V Questionnaires would not provide more accurate data. In support of its position, Commerce contends that "[i]f respondents and/or their importers participate in widespread misclassification schemes, they are unlikely to provide information in Q&V responses that are materially different from the data reported on CF-7501 as Type 03." *Remand Results* at 17. Commerce fails to address AHSTAC's well argued point that Form 7501 is completed by importers, while Q&V Questionnaires are completed by exporters/producers with more direct knowledge of merchandise and the channels of shipment; any suggestion by Commerce that misclassification on Form 7501 is the product of collusion between importers and exporters is mere speculation. Nor has Commerce addressed the fact that Q&V Questionnaires are simply more comprehensive and thorough for gathering relevant information than Form 7501.

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[14] Commerce goes on to explain that

> [t]ype 01 and Type 03 data are, by definition, mutually exclusive. Type 01 data are comprised of entries classified as non-subject merchandise; Type 03 data are comprised of entries classified as subject merchandise. The Department does not know, and Petitioners do not suggest, a way that the two datasets could be used to verify or corroborate each other.

Remand Results at 23.

Nonetheless, Commerce's decision not to use Q&V Questionnaires is a reasonable concession to administrative convenience. Under these circumstances, Commerce has a valid concern regarding the relative burdens placed on the Department by Q&V Questionnaires versus Type 03 CBP Data,[15] and "[a]dministrative convenience of the government constitutes a reasonable and rational basis for agency action." *Pakfood*, __ CIT at __, 753 F. Supp. 2d at 1343.

For these reasons, Commerce's decision to rely exclusively on Type 03 CBP Data rather than on other possible data sets is reasonable. The court now turns to the final issue, i.e., whether Commerce must review respondents with no suspended entries.

III. Whether Commerce May Limit Review to Only Respondents with Suspended Entries Is Not Ripe in this Case

The court remanded this case to Commerce to address AHSTAC's challenges to the reliability of the Type 03 CBP Data; however, in the post-remand briefing, a second issue emerged: whether Commerce may limit review to respondents with suspended entries. The issue arises from Commerce's statement in the *Remand Results* that "[i]t is [the] Department's longstanding practice to not conduct reviews for companies that do not have *any* suspended entries because there are no entries for which the Department can issue assessment instructions." *Remand Results* at 5.

AHSTAC challenges Commerce's articulated policy on several grounds. First, AHSTAC asserts that such a policy "delegates the determination of whether merchandise is covered by an AD order to importers who alone decide whether to identify merchandise as Type 03 on CF 7501." Pl.'s Comments at 10. Next, AHSTAC asserts that Commerce is putting forward a theory that "duties cannot be recovered on unsuspended entries." *Id.* [16] Finally, AHSTAC argues that

[15] "Relying on Q&V responses requires significant resources, and time, to send and track the delivery of Q&V questionnaires and responses, to issue follow-up questionnaires when appropriate, and to aggregate and analyze the numerous responses. The review covers nearly 500 companies, most of which were requested by Petitioner." *Remand Results* at 17.

[16] This argument is premised on Commerce's response to AHSTAC's comments on the Draft Remand Results. AHSTAC quotes from the *Remand Results*, noting "AHSTAC alerted Commerce to this problematic legal interpretation [in comments on the Draft Remand Results], prompting the agency to respond as follows:

> The Department's statement was not an admission that importers control the scope of an administrative review. The point, instead, was that *the Department does not waste administrative resources by conducting a full review that will not result in the assessment of duties*. . . . A policy whereby the Department would expend considerable resources to determine whether or not entries should have been suspended but were not, and *to determine the amount of dumping entries for which assessment cannot be effectuated would be futile exercise*.

this theory is contrary to the statutory requirement that "'if the United States has been deprived of duties,' CBP 'shall require such lawful duties . . . be restored,'" *Id.* (quoting 19 U.S.C. § 1592(d)), and that it is not a longstanding agency practice, *Id.* at 14–16.

Though both sides address considerable argument to these concerns, the controversy is not ripe on the facts of this case. As the Court of Appeals for the Federal Circuit has noted:

> The doctrine of ripeness is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Eurodif S.A. v. United States, 506 F.3d 1051, 1054 (Fed. Cir. 2007) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *rev'd on other grounds*, *United States v. Eurodif S.A.*, 555 U.S. 305 (2009)).

AHSTAC's challenge to Commerce's policy statement is not ripe because the record does not support the existence of a controversy on this issue. AHSTAC does not allege, nor has the court discovered, specific facts to support the contention that *any* respondent avoided review by misclassifying its entries as not subject to suspension. [17] More precisely for the purpose of this case, AHSTAC has not alleged that any respondents were excluded from the mandatory respondent selection process for failing to have any suspended entries.[18] Finally, AHSTAC dos not allege, except in the most general terms, that any unsuspended entries have led to the non-recovery of duties owed. Without specific factual allegations of the practice AHSTAC challenges, there is no actual controversy for the court to decide.

The lack of ripeness in this case is manifest in the disconnect between the parties' briefs. AHSTAC accuses Commerce of delegating the determination of dutiable merchandise to importers and arguing that duties are unrecoverable on unsuspended entries. Pl.'s Comments at 10. Commerce denies that these are its policies and argues in return that AHSTAC is seeking to use the review process as a

Pl.'s Comments at 10 (quoting *Remand Results* at 19–20 (footnote omitted)) (emphasis added in Pl.'s Comments).

[17] The court notes that the review was rescinded as to several companies upon receipt of no shipment certifications, which Commerce determined were accurate. *Final Results*, 75 Fed. Reg. at 49,460, 49,462. If AHSTAC is challenging this practice, it does not make such clear in its briefs.

[18] As AHSTAC notes in its Comments, whether Commerce will review a respondent with no suspended entries is irrelevant to the issue of whether Commerce's mandatory respondent selection was supported by substantial evidence, and therefore not before the court for adjudication. *See* Pl.'s Comments at 13–14.

forum for investigation and enforcement of fraud and negligence — responsibilities delegated to Customs not Commerce. Def.'s Reply at 15. This is just the sort of "abstract disagreement[] over administrative polic[y]" that the courts should avoid. *Eurodif*, 506 F.3d at 1054. Without an actual controversy, it is both difficult and imprudent for the court to intervene — not only are the relevant considerations obfuscated in the abstract, but the impact of the court's action is unknowable.

Contrary to AHSTAC's assertion, the *Remand Results* do not "hinge" on Commerce's practice regarding review of unsuspended entries. Pl.'s Comments at 16–17. Rather, the *Remand Results* hinge on whether the Type 03 CBP Data is a reasonable basis for determining the largest exporters by volume, pursuant to 19 U.S.C. § 1677f-1(c)(2)(B). It is not necessary for the court to Court No. 10–00275 Page 23 address the former issue in order to render a decision on the latter.[19] Nor does the court consider it wise to intervene in such an unripe dispute. *See Eurodif*, 506 F.3d at 1054 ("[The doctrine of ripeness] is drawn 'both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003))).

CONCLUSION

For all the foregoing reasons, the Department's *Final Results*, 75 Fed. Reg. 49,460, as explained by the *Remand Results*, will be affirmed.

Judgment will be entered accordingly.

It is **SO ORDERED.**

Dated: March 20, 2012
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

[19] Because the court finds that the use of Type 03 CBP Data is supported by substantial evidence, it also does not reach Commerce's argument that failure to enjoin all liquidations in this review renders moot the possibility of redetermining the mandatory respondents using data other than Type 03 CBP Data. *See Remand Results* at 20–21.

Slip Op. 12–37

TAMPA BAY FISHERIES, INC. and SINGLETON FISHERIES, INC., Plaintiffs, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, DAVID V. AGUILAR, (ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION), UNITED STATES INTERNATIONAL TRADE COMMISSION, AND DEANNA TANNER OKUN (CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION), Defendants.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Court No. 08–00404

[Dismissing certain claims as untimely; dismissing certain claims for lack of standing; and dismissing the remaining claims for failure to state a claim upon which relief can be granted; dismissing the action.]

Dated: March 20, 2012

John J. Kenkel, *J. Kevin Horgan*, deKieffer & Horgan of Washington, DC for Plaintiffs Tampa Bay Fisheries, Inc. and Singleton Fisheries, Inc.

Jessica R. Toplin, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendants United States and U.S. Customs and Border Protection. With her on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, and *Courtney S. McNamara* and *David S. Silverbrand*, Trial Attorneys. Of Counsel on the briefs were *Andrew G. Jones* and *Joseph Barbato*, Office of Assistant Chief Counsel for U.S. Customs and Border Protection of Washington, DC.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel for Litigation, and *Patrick V. Gallagher, Jr.*, Attorney Advisor, Office of General Counsel, U.S. International Trade Commission, of Washington, DC for Defendant U.S. International Trade Commission.

OPINION

Gordon, Judge:

This case arose from the actions of two agencies, the U.S. International Trade Commission (the "ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs"), that denied Plaintiffs, Tampa Bay Fisheries, Inc. ("Tampa Bay") and Singleton Fisheries, Inc. ("Singleton"), certain monetary benefits under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"), 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). The ITC did not include either Plaintiff on a list of parties potentially eligible for "affected domestic producer" ("ADP") status, which would have qualified Tampa Bay and Singleton for distributions of antidumping duties collected under antidumping

duty orders on imports of certain frozen shrimp from Brazil, Thailand, India, People's Republic of China, Socialist Republic of Vietnam, and Ecuador. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Brazil*, 70 Fed. Reg. 5,143, 5,143–45 (Feb. 1, 2005); . . . *from Thailand*, *id*. at 5,145–47; . . . *from India*, *id*. at 5,147–49; . . . *from People's Republic of China*, *id*. at 5,149–52; . . . *from Vietnam*, *id*. at 5,152–56; . . . *from Equador*, *id*. at 5,156–58 ("*Frozen Warmwater Shrimp Antidumping Duty Orders*"). Because Plaintiffs were not on the ITC's list of potential ADPs, Customs made no CDSOA distributions to Tampa Bay or Singleton.

Plaintiffs claim that Defendants' actions are inconsistent with the CDSOA, not supported by substantial evidence, and otherwise not in accordance with law. Plaintiffs also bring facial and as-applied constitutional challenges to the CDSOA under the First Amendment and the equal protection and due process guarantees of the Fifth Amendment.

Before the court are motions under USCIT Rule 12(b)(5) to dismiss for failure to state a claim upon which relief can be granted, filed by the ITC (Def. U.S. Int'l Trade Comm'n's Mot. to Dismiss for Failure to State a Claim upon which Relief can be Granted, ECF No. 39 ("ITC's Mot.")) and Customs (Def. U.S. Customs & Border Protection's Mem. in Supp. of the Mot. to Dismiss for Failure to State a Claim, ECF No. 41 ("Customs' Mot.")). The court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2006). *See Furniture Brands Int'l, Inc. v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1301, 1307–10 (2011). For the reasons set forth below, we conclude that certain of Plaintiffs' claims must be dismissed as untimely, certain claims must be dismissed for failure to state a claim upon which relief can be granted, and certain claims must be dismissed for lack of standing. Therefore, the motions to dismiss will be granted and this action dismissed.

I. Background

Following a 2003 petition filed by Ad Hoc Shrimp Trade Action Committee, Veraggi Shrimp Corporation, and Indian Ridge Shrimp Co., the U.S. Department of Commerce ("Commerce") initiated an antidumping investigation of certain frozen and canned warmwater shrimp from Brazil, Ecuador, India, the People's Republic of China, the Socialist Republic of Vietnam, and Thailand. *Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed.

Reg. 3,876 (Jan. 27, 2004); First Am. Compl. ("Am. Compl.") ¶¶ 2324, ECF No. 36. Contemporaneously, the ITC conducted an injury investigation. *Certain Frozen and Canned Warmwater Shrimp and Prawns From Brazil, China, Ecuador, India, Thailand, and Vietnam; Institution of Antidumping Investigations and Scheduling of Prelim. Phase Investigations*, 69 Fed. Reg. 1,301 (Jan. 8, 2004); Am. Compl. ¶ 23. During its injury investigation, the ITC sent questionnaires to the domestic industry that ask domestic producers to, *inter alia*, identify their position regarding the petition by checking one of three boxes indicating either support, opposition, or no position. Each Plaintiff filed responses but did not check the box indicating support for the petition on the questionnaire, and they explain that they may not have checked any of the three boxes. Pls.' Mem. in Opp'n to the Mot. of the U.S. Int'l Trade Comm'n to Dismiss for Failure to State a Claim at 3, ECF No. 44 ("Pls.' Opp'n").

Following an affirmative injury determination on frozen shrimp by the ITC in January 2005, Commerce published its amended final determinations of sales at less than fair value and issued the antidumping duty orders covering the subject merchandise. *Certain Frozen or Canned Warmwater Shrimp and Prawns From Brazil, China, Ecuador, India, Thailand, and Vietnam*, 70 Fed. Reg. 3,943 (Jan. 27, 2005) (ITC final inj. determ.); *Frozen Warmwater Shrimp Antidumping Duty Orders* ; Am. Compl. ¶¶ 27–28. Commerce since has revoked the antidumping duty order against Ecuador; however, the order remains in effect for the other countries. *Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador*, 71 Fed. Reg. 48,257 (Aug. 23, 2007); Am. Compl. ¶ 28.

Plaintiffs brought this action on November 14, 2008, contesting the denial of CDSOA distributions to each Plaintiff for Fiscal Years 2006–2008. Compl., ECF No. 5. Shortly thereafter, the court stayed this action pending a final resolution of other litigation raising the same or similar issues. Order (Dec. 29, 2008), ECF No. 15 (action stayed "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, Consol. Ct. No. 06–0290, that is, when all appeals have been exhausted.").

Following the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA Inc. v. United States*, 556

F.3d 1337 (2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010),[1] which addressed questions also present in this action, the court issued an order directing Plaintiffs to show cause why this action should not be dismissed. Order to Show Cause, Jan. 3, 2011, ECF No. 19. After receiving Plaintiffs' response, the court lifted the stay on this action for all purposes. Order Lifting Stay, Feb. 9, 2011, ECF No. 22. On March 18, 2011, Plaintiffs filed their Amended Complaint.[2] Am. Compl. Defendants filed motions to dismiss for failure to state a claim upon which relief can be granted on May 2, 2011 (ITC's Mot.) and May 3, 2011 (Customs' Mot.).

II. Standard of Review

In deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in plaintiff's favor. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993).

A plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). The basis of the court's determination is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference. *See Asahi Seiko Co. v. United States*, 33 CIT ___, ___, (2009), 2009 WL 3824745, at 4 (quoting *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)).

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[1] *SKF* reversed the decision of the Court of International Trade in *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006), which held the CDSOA requirement that limited affected domestic producer status to interested parties in support of the petition unconstitutional on Fifth Amendment equal protection grounds.

[2] The filing of the amendment as a matter of course was untimely under Rule 15(a). USCIT R. 15(a) ("[A] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."). The amendments would not have been untimely under Rule 15(a) as in effect prior to January 1, 2011, which rule allowed a party to amend its pleading once as a matter of course before being served with a responsive pleading. Because the other parties to this action have addressed in their Rule 12(b)(5) motions the complaint in amended form, the court exercises its discretion under USCIT Rule 89 to accept Plaintiffs' First Amended Complaint. USCIT R. 89 ("These rules and any amendments take effect at the time specified by the court. They govern . . . proceedings after that date in a case then pending unless: (A) the court specifies otherwise . . . .").

III. Discussion

In 2000, Congress amended the Tariff Act of 1930 to add section 754, the CDSOA, which provides distributions of assessed antidumping and countervailing duties to ADPs on a fiscal year basis. 19 U.S.C. § 1675c(d)(1).[3] To be an ADP, a party must meet several criteria, including the requirement that it have been a petitioner, or interested party in support of a petition, with respect to which an antidumping duty or countervailing duty order was entered. *Id.* § 1675c(b)(1). The CDSOA directed the ITC to forward to Customs, within 60 days of the issuance of an antidumping or countervailing duty order, lists of persons potentially eligible for ADP status, *i.e.*, "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1). In identifying the parties to be placed on the ITC's list, the ITC must consult with Commerce if either no injury determination was required or if the ITC's records "do not permit an identification of those in support of a petition." *Id.* Customs then publishes the lists of potential ADPs in the Federal Register annually, prior to each distribution. *Id.* § 1675c(d)(2). Customs distributes assessed duties to parties on the list of potential ADPs that certify that they meet the remaining eligibility criteria. *Id.* § 1675c(d)(2).

The ITC compiled lists of potential ADPs with respect to the antidumping duty orders on frozen shrimp, which lists it provided to Customs. Am. Compl. ¶ 34. Customs published the lists of potential ADPs for Fiscal Year 2006 on June 1, 2006, *id.*, for Fiscal Year 2007 on May 29, 2007, *id.* ¶ 35, and for Fiscal Year 2008 on May 30, 2008, *id.* ¶ 36. Neither Plaintiff appeared on any of these lists. *Id.* ¶¶ 34–36. Nevertheless, each Plaintiff certified to Customs its eligibility for CDSOA distributions for each of the fiscal years. *Id.* ¶ 37. Citing Plaintiffs' absence from the list of potential ADPs, Customs denied each Plaintiff's Fiscal Year 2006 certifications on November 17, 2006, stating that funds would be distributed to each Plaintiff "but for the fact that its name does not appear on the ITC list of eligible affected domestic producers and there is pending litigation to determine who

[3] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010 Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

is eligible." *Id.* ¶ 39. Customs later denied each Plaintiff distributions for the 2007 and 2008 Fiscal Years, stating each year that it was not distributing funds to Plaintiffs because "Tampa Bay and Singleton were not on the ITC's list of eligible affected producers." *Id.* ¶¶ 40–41. Tampa Bay and Singleton also filed letters with the ITC in November 2008 requesting placement on the list of potential ADPs. *Id.* ¶ 38. The ITC did not respond to these requests.

Plaintiffs challenge the validity and constitutionality of the Commission's and Customs' application of the CDSOA to Tampa Bay and Singleton. In Count 1 of the First Amended Complaint, Plaintiffs claim that the ITC's determinations not to include Tampa Bay and Singleton on the list of potential ADPs were inconsistent with the CDSOA, not supported by substantial evidence, and otherwise not in accordance with law. Am. Compl. ¶ 43. In Count 2, Plaintiffs challenge on First Amendment grounds the requirement in the CDSOA that, to qualify as ADPs, domestic producers who were not petitioners must have expressed support for a petition ("petition support requirement"), both facially and as applied to Tampa Bay and Singleton. *Id.* ¶¶ 45–46. In Count 3, Plaintiffs challenge the petition support requirement, both facially and as applied to Tampa Bay and Singleton, on Fifth Amendment equal protection grounds. *Id.* ¶¶ 48–49.

In Count 4, Plaintiffs challenge the petition support requirement as impermissibly retroactive in violation of the Fifth Amendment due process guarantee because Defendants based eligibility for ADP status, and thus eligibility for disbursements, on past conduct. *Id.* ¶ 51.

Finally, in Count 5, Plaintiffs claim that they satisfied the petition support requirement by paying $22,000 to the petitioners, prior to the filing of the petition, to assist the petitioners with legal fees necessary for preparing the petition for filing and for participating in the antidumping duty investigation. Am. Compl. ¶ 53. Plaintiffs claim that the payment of these monies "is vastly more demonstrative of support of the petition than the mere checking of a box in a questionnaire issued by the U.S. International Trade Commission." *Id.*

A. *Plaintiffs' Statutory Challenges to the Actions of the Two Agencies Must be Dismissed*

In Counts 1 and 5 in the Amended Complaint, Plaintiffs raise claims challenging on statutory grounds the actions of the ITC and Customs by which they were denied CDSOA distributions for Fiscal Years 2006 through 2008. Tampa Bay and Singleton challenge the ITC's excluding them from the list of potential ADPs, and they also challenge Customs' denying them those distributions. Am. Compl. ¶¶ 42–43 (Count 1); ¶¶ 52–53 (Count 5).

1. *Plaintiffs are Untimely in Contesting Their Exclusion from the ITC's List of Potential Affected Domestic Producers for Fiscal Year 2006*

We conclude that the claims challenging the ITC's exclusion of each Plaintiff from the list of potential ADPs for Fiscal Year 2006, as stated in Counts 1 and 5 of the Amended Complaint, are untimely.[4] These claims accrued on June 1, 2006, more than two years prior to the commencement of this action on November 14, 2008. *See* 28 U.S.C. § 2636(i) (2006) (Claims under 28 U.S.C. § 1581(i) are "barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues."); Compl. ¶ 16. We conclude, further, that Plaintiffs' claim challenging Customs' denial to Plaintiffs of CDSOA distributions for Fiscal Year 2006 is not barred by the statute of limitations.

Plaintiffs' statutory claims arose under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2006). *See* 28 U.S.C. § 2640(e) (2006) (stating that, when exercising jurisdiction pursuant to 28 U.S.C. § 1581(i), "the Court of International Trade shall review the matter as provided in section 706 of title 5."). APA claims can be filed upon notice of a final agency determination that adversely affects a plaintiff. 5 U.S.C. §§ 702, 704. On June 1, 2006, Plaintiffs were placed on notice of Customs' final determination when Customs published notice of intent to make CDSOA distributions for Fiscal Year 2006, which included the list of potential ADPs prepared by the ITC. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 71 Fed. Reg. 31,336 (June 1, 2006) ("*Fiscal Year 2006 Notice of Intent*"). On that date, Plaintiffs were placed on notice that a Fiscal Year 2006 CDSOA distribution would be made for the antidumping duty order on frozen shrimp. Each Plaintiff also was placed on notice, by its exclusion from the list prepared by the ITC of potential ADPs, of the ITC's final determination that it was ineligible to receive that distribution. Am. Compl. ¶ 34; 19 U.S.C. § 1675c(d)(2) (requiring Customs to base the published list of ADPs potentially eligible for the distribution "on the list obtained from the Commission . . . ."). Plaintiffs thus could have challenged the ITC's exclusion of them from the list, *i.e.*, the application to them of the petition support requirement, as of June 1, 2006. *See SKF*, 556 F.3d at 1348–49 (stating that claims accrue when an action can be commenced). Having first accrued on that date, each Plaintiff's cause of action chal-

[4] The court addresses the statute of limitations even though neither Defendant raised the issue of timeliness. The two-year limit on claims brought under 28 U.S.C. § 2636(i) is jurisdictional. *Pat Huval Restaurant & Oyster Bar, Inc. v. U.S. Int'l Trade Comm'n*, 36 CIT ___, Slip Op. 12–27 at 14–15 (Mar. 1, 2012).

lenging the ITC's denial of potential ADP status for Fiscal Year 2006 on statutory grounds is time-barred.

Each Plaintiff's statutory claim against Customs for denial of Fiscal Year 2006 benefits is not barred by the statute of limitations because those claims accrued on November 17, 2006, less than two years prior to Plaintiffs' commencement of this action on November 14, 2008. On November 17, 2006, Customs responded to Plaintiffs' certifications of eligibility for Fiscal Year 2006 CDSOA distributions, stating that funds would be distributed to each Plaintiff "but for the fact that its name does not appear on the ITC list of eligible affected domestic producers and there is pending litigation to determine who [is] eligible." Am. Compl. ¶ 39. This notice constitutes a final decision by Customs subject to challenge under the APA in that it notified Plaintiffs of Customs' declining to provide them a CDSOA distribution. Because the claims against Customs for Fiscal Year 2006, and the other statutory claims in this action, are timely, we reach the merits and, for the reasons discussed below, dismiss for failure to state a claim on which relief can be granted.

2. *Count 1 Fails to State Facts Sufficient to Qualify Either Plaintiff for Distributions under the CDSOA*

In Count 1, each Plaintiff challenges as unlawful under the CDSOA the ITC's determination not to place it on the list of potential ADPs and the failure of Customs to provide it distributions. *Id.* ¶¶ 42–43. Plaintiffs claim that both of these agency actions "were inconsistent with the CDSOA, were not supported by substantial evidence, and were otherwise not in accordance with law." *Id.* ¶ 43.

Plaintiffs state that the ITC "has never included Tampa Bay *et al.* in its list of eligible ADPs." *Id.* ¶ 30. However, we do not find within the complaint alleged facts that would have qualified either Plaintiff for inclusion on the ITC's list. According to the CDSOA, the ITC is to prepare "a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). In the Amended Complaint, Plaintiffs identify the petitioners on the relevant frozen shrimp antidumping duty orders as parties other than themselves. Am. Compl. ¶ 24. Therefore, neither Plaintiff qualifies for inclusion as "petitioners and persons with respect to each order . . . ." 19 U.S.C. § 1675c(d); *see id.* § 1675c(b)(1)(A) (including within the definition of an ADP "a petitioner . . . with respect to which an antidumping duty order . . has been entered"). The Amended Complaint also fails to allege facts by which either Tampa Bay or Singleton otherwise could qualify as a potential ADP with respect to

the orders on frozen shrimp: missing is an allegation that Plaintiffs are "persons who indicate support of the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1).

In summary, the Amended Complaint fails to allege facts from which we could find that the ITC erred in omitting Tampa Bay or Singleton from any list prepared under § 1675c(d)(1). For this reason, we must also dismiss the statutory claims Plaintiffs bring against Customs. We do not find within the Amended Complaint facts by which we could conclude that Customs lawfully could have made distributions to either Plaintiff. *See id.* § 1675c(d)(2) (requiring Customs to base its "list of affected domestic producers potentially eligible for the distribution . . . on the list obtained from the Commission under paragraph (1)"). We conclude, therefore, that the remaining claims in Count 1 must be dismissed for failure to state a claim on which relief can be granted.

3. *Count 5 Does Not State Facts Allowing the Court to Conclude that Either Plaintiff Satisfied the Petition Support Requirement*

Count 5 states that "Plaintiffs argue that they supported the petition." Am. Compl. ¶ 53. Count 5 alleges that Plaintiffs, "at the request of the purported petitioners, paid said petitioners $22,000 prior to the filing of the petition, to assist them in paying their attorneys to prepare the petition and participate in the ensuing antidumping investigation." *Id.* To qualify as an ADP, a party must "indicate support for a petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). A domestic producer who, for whatever purpose, pays money to parties who intend in the future to file an antidumping duty petition does not thereby satisfy this requirement. At the time the alleged payments were made, no petition existed, and the party who allegedly received the payments was not yet a petitioner nor petitioners' counsel. Moreover, Plaintiffs do not allege that what they characterize as support for a petition was expressed to the Government. Plaintiffs argue in Count 5 that "[a]ctual payment of money is vastly more demonstrative of support of the petition than the mere checking of a box in a questionnaire issued by the U.S. International Trade Commission." Am. Compl. ¶ 53. This argument is unavailing. Plaintiffs' allegations regarding the $22,000 payment establish no more than that Plaintiffs lent their "support" to parties who intended in the future to become petitioners. That is not the same as indicating support for a petition in the manner the statute requires, *i.e.*, by letter or through questionnaire response.

In support of Count 5 (and the related Count 1, as well), Plaintiffs contend that the ITC is not limited to the record of the original

investigation or the data found in responses to domestic industry questionnaires, in determining whether a domestic interested party supported a petition. Pls.' Opp'n at 8. Plaintiffs maintain that the ITC is required to consult with Commerce on the identification of the parties that should be included on the list of potential ADPs, arguing that the CDSOA requires, under certain circumstances, that "the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title." *Id.* (citing 19 U.S.C. § 1675c(d)(1)). This argument fails because this consultation requirement only applies in certain circumstances not present here: "In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition . . . . " 19 U.S.C. § 1675c(d)(1). An injury determination was required here. *See id.* § 1673d(c)(3). Moreover, each Plaintiff admits that in completing the ITC's questionnaire it did not express support for the petition, an admission that refutes any contention that the Commission's records did not permit an identification of those that supported the petition by letter or questionnaire response.

Plaintiffs also cite the legislative history of the CDSOA, arguing that the Commission's interpretation of the statute frustrates Congress' intent to "reward companies like Tampa Bay that do invest and create jobs in a troubled United States industry that has been injured by dumped imports." Pls.' Opp'n at 9 (citing Pub. L. 106387, § 1(a) [Title X, § 1002], Oct. 28, 2000, 114 Stat. 1549, 1549A–72). Plaintiffs' reliance on the legislative history is also unavailing. Where, as here, the plain meaning of a statute is clear, we need not speculate further on legislative intent. The CDSOA directs the Commission to provide to Customs "a list of persons that *indicate support of the petition* by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1) (emphasis added). Plaintiffs concede that they did not expressly indicate support of the petition in their questionnaire response during the ITC's investigation, and they have not alleged that they supported the petition through letter. *See* Am. Compl. ¶ 53; *see also* Pls.' Show Cause Brief at 2, ECF No. 20. We conclude, therefore, that the remaining claims in Count 5 must be dismissed for failure to state a claim on which relief can be granted.

B. *Plaintiffs' Constitutional Challenges Must be Dismissed*

In Counts 2 and 3, Plaintiffs bring facial and as-applied challenges to the petition support requirement of the CDSOA under the First

Amendment and Fifth Amendment equal protection guarantee. Am. Compl. ¶¶ 45–49. In Count 4, Plaintiffs challenge the petition support requirement as impermissibly retroactive under the Fifth Amendment due process guarantee. *Id.* ¶ 51. We conclude that the claims pertaining to Fiscal Year 2006 must be dismissed as time barred and that, as to the later Fiscal Years, the First Amendment and equal protection claims must be dismissed as foreclosed by binding precedent. The retroactivity claims must be dismissed for lack of standing.

1. *Plaintiffs' Claims Challenging the Petition Support Requirement with Respect to the Fiscal Year 2006 Distribution Are Time Barred*

Plaintiffs' constitutional challenges to the petition support requirement with respect to the Fiscal Year 2006 distribution accrued on June 1, 2006, the date Customs published the notice of intent setting forth the list of potential ADPs for the frozen shrimp antidumping duty order. Am Compl. ¶ 34; *Fiscal Year 2006 Notice of Intent*, 71 Fed. Reg. at 31,336. The ITC's omission of Plaintiffs from these lists constituted a final determination that neither Plaintiff had met the petition support requirement. 19 U.S.C. § 1675c(d)(1) (describing "a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response."). Because Plaintiffs did not commence this action until November 14, 2008, more than two years after accrual, these claims are time barred.

No constitutional claims accrued on November 17, 2006 as a result of the letter from Customs informing Plaintiffs that funds would be distributed to each Plaintiff "but for the fact that its name does not appear on the ITC list of eligible affected domestic producers and there is pending litigation to determine who is eligible." Am. Compl. ¶ 39. As discussed above, Plaintiffs' Fiscal Year 2006 statutory claims against Customs accrued on November 17, 2006, the date of Customs' letter. None of Plaintiffs' constitutional claims challenging the petition support requirement could have accrued on that date, however, because Customs did not apply the petition support requirement to Plaintiffs and had no authority to do so. 19 U.S.C. § 1675c(d)(2) ("the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission . . . .").

2. *Plaintiffs' First Amendment and Equal Protection Facial Challenges to the Petition Support Requirement are Foreclosed by Binding Precedent*

In Count 2, Plaintiffs claim that the petition support requirement of the CDSOA violates the First Amendment on its face because it

compels speech. Am. Compl. ¶ 45. Plaintiffs further claim that the CDSOA engages in impermissible viewpoint discrimination by conditioning receipt of a government benefit on a private speaker's expressing a specific viewpoint, *i.e.*, expression of support for an antidumping petition, and is therefore an unconstitutional restriction on speech. *Id.* ¶ 46.

In Count 3, Plaintiffs raise a facial challenge to the CDSOA, claiming that the petition support requirement violates the equal protection guarantee of the Fifth Amendment. *Id.* ¶¶ 48–49. Plaintiffs claim that the CDSOA creates a classification infringing on Tampa Bay's and Singleton's fundamental right to free speech that is not narrowly tailored to a compelling government objective. *Id.* ¶ 48. They also contend that the CDSOA impermissibly discriminates between Plaintiffs and other domestic producers who expressed support for the petition. *Id.* ¶ 49.

The Court of Appeals rejected analogous claims challenging the petition support requirement in *SKF*, in which it upheld the petition support requirement under the First Amendment and under the Fifth Amendment's equal protection guarantee. *SKF*, 556 F.3d at 1360 (stating that the "Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad."); *id.* at 1360 n.38 ("For the same reason, the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech."); *id.* at 1360 ("Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard."). Plaintiffs' facial constitutional challenges to the CDSOA, therefore, are foreclosed by the holding in *SKF*, and these challenges must be dismissed for failure to state a claim on which relief can be granted.

Plaintiffs argue that *SKF* is no longer good law because the decision of the Court of Appeals in *SKF* to uphold the petition support requirement using an intermediate level of scrutiny, the "*Central Hudson*" test, was implicitly overturned by a recent decision of the U.S. Supreme Court, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). Pls.' Opp'n at 15 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)). Plaintiffs construe *Snyder* to hold that all speech on matters of public concern "is entitled to maximum First Amendment protection" and view responses to the ITC's questionnaires as speech on a matter of public concern. *Id. Snyder* does not support a conclusion that *SKF* incorrectly applied only an intermediate level of First Amendment scrutiny. *Snyder* set aside as contrary to the First Amendment a jury verdict imposing substantial state law

tort liability on persons who picketed at a military funeral. *Snyder*, 131 S. Ct. at 1213–14, 20. The case does not hold that *all* speech addressing matters of public concern, such as a position taken in antidumping litigation, must receive a level of judicial scrutiny higher than that applied in *SKF*. *See Standard Furniture Mfg. Co. v. United States*, 36 CIT __, __, Slip Op. 12–21 at 16–17 (2012) (finding that *Snyder* did not compel a First Amendment analysis differing from that which was applied in *SKF*).

3. *Plaintiffs' Remaining First Amendment As-Applied Challenges Must be Dismissed*

In Count 2, Plaintiffs also assert an as-applied constitutional challenge under the First Amendment, claiming specifically that the CDSOA discriminates against those, such as Tampa Bay and Singleton, who did not express a specific viewpoint (support for the antidumping petition), and is, therefore, an unconstitutional restriction on speech. Am. Compl. ¶ 45–46. Plaintiffs argue that the holding in *SKF* that the petition support requirement did not violate the First Amendment is confined to situations in which parties actively opposed the petition and that *SKF* held that the ITC may consider only a party's actions, and not a party's expressed viewpoints, in determining whether a party supported the petition. Pls.' Opp'n at 13–14. They argue that the ITC's application of the CDSOA therefore violated the First Amendment to the extent the ITC based its determination that Plaintiffs did not qualify as potential ADPs on Plaintiffs' failing to indicate support of the petition by letter or questionnaire response. *Id.* at 14–15.

Plaintiffs' argument misinterprets *SKF*, which does not hold that the CDSOA would violate the First Amendment if applied to deny CDSOA benefits based solely on a party's failing to indicate support for the petition by letter or questionnaire response. *SKF* holds the opposite. The Court of Appeals determined that the appropriate First Amendment legal standard was the standard applying to regulation of commercial speech. It then concluded that the CDSOA, although requiring a non-petitioner, such as SKF, to express support for the petition in order to acquire ADP status, met that standard. *SKF*, 556 F.3d at 1354–55. The Court of Appeals did state, as Plaintiffs highlight, that "[t]he language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views" and that "a limiting construction of the statute is necessary to cabin its scope so that it does not reward a mere abstract expression of support." *Id.* at 1353; Pls.' Opp'n at 14. However, those statements were in the context of discussing statutory language as an alternative to previous discussion in the

opinion on congressional purpose. They were part of the analysis by which the Court of Appeals subjected the CDSOA to First Amendment standards for the regulation of commercial speech. They do not signify a holding that the First Amendment prohibits a government agency implementing the CDSOA from conditioning ADP status on the expression of support for a petition. *See Furniture Brands*, 35 CIT at __, 807 F. Supp. 2d at 1311–12 (rejecting the argument that *SKF* modified the meaning of the petition support requirement).

Plaintiffs also argue that, on these facts, Defendants applied the petition support requirement in a way that was overly broad, thereby violating the First Amendment according to the test applied by the Court of Appeals in *SKF*, the *Central Hudson* test. Pls.' Opp'n at 12–13 (citing *SKF*, 556 F.3d at 1357). Positing *SKF* to hold that "domestic producers who are not petitioners but nevertheless respond to Commission questionnaires have done enough to be regarded as supporting the petition," Plaintiffs argue that denying them CDSOA distributions served no governmental interest. *Id.* at 13. This argument is misguided. The Court of Appeals concluded in *SKF* that the CDSOA's providing benefits only to those who supported the petition, and not those who opposed or took no position on the petition, served a substantial governmental interest, directly advanced that interest, and was not more extensive than necessary in advancing that interest. *SKF*, 556 F.3d at 1355–59.

For the aforementioned reasons, Plaintiffs' as-applied First Amendment challenges are foreclosed by the holding in *SKF*. Plaintiffs have failed to allege any unique facts that would distinguish these claims from the binding precedent established by that holding, and, therefore, Tampa Bay and Singleton's First Amendment as-applied challenges must be dismissed.

4. *Plaintiffs' Remaining Fifth Amendment Equal Protection As-Applied Challenges Must Be Dismissed*

In Count 3, Plaintiffs claim that the CDSOA impermissibly discriminates between Plaintiffs and other domestic producers who expressed support for the underlying antidumping petition in that the petition support requirement, as applied to Tampa Bay and Singleton, was not rationally related to a legitimate governmental purpose and thereby contravened the equal protection guarantee of the Fifth Amendment. Am. Compl. ¶ 49. *See also* Pls.' Opp'n at 15.

Plaintiffs have alleged no facts that distinguish their equal protection claims from the equal protection claim addressed, and rejected, in *SKF*. The Court of Appeals held that the petition support requirement of the CDSOA does not abridge the equal protection guarantee,

holding that the petition support requirement is rationally related to the Government's legitimate purpose of rewarding parties who promote the Government's policy against dumping. *SKF*, 556 F.3d at 1360. *SKF* reasoned that it was "rational for Congress to conclude that those who did not support the petition should not be rewarded." *Id.* at 1359. For these reasons, relief cannot be granted on Plaintiffs' as-applied equal protection claims, which must be dismissed.

5. *Plaintiffs' Retroactivity Claims Must Be Dismissed for Lack of Standing*

Plaintiffs claim in Count 4 that the petition support requirement is impermissibly retroactive in violation of the Fifth Amendment due process guarantee because Defendants based eligibility for ADP status, and thus eligibility for disbursements, on past conduct. Am. Compl. ¶ 51.

Each Plaintiff completed its response to the ITC questionnaire, in which it did not express support for the petition on frozen and canned shrimp, after the 2000 enactment of the CDSOA. They lack standing to bring their due process retroactivity claims because the CDSOA was not applied retroactively to either of them. *See Ashley Furniture Indus., Inc. v. United States*, 36 CIT __, __, Slip Op. 12–14 at 28 (2012). Plaintiffs have conceded dismissal of the claims stated in Count 4. Pls.' Opp'n at 17. We will dismiss these claims according to USCIT Rule 12(b)(1).

IV. Conclusion

Plaintiffs' statutory claims against the ITC seeking CDSOA benefits for Fiscal Year 2006, as stated in Counts 1 and 5 of the Amended Complaint, must be dismissed as untimely. The remaining claims in Counts 1 and 5 must be dismissed because Plaintiffs fail to state facts sufficient to qualify either Plaintiff for distributions under the CDSOA. Plaintiffs' constitutional claims for Fiscal Year 2006 also must be dismissed as untimely. Plaintiffs' First Amendment and equal protection claims for distributions in the later fiscal years are foreclosed by binding precedent, and Plaintiffs' retroactivity claims must be dismissed for lack of standing. Plaintiffs already have availed themselves of the opportunity to amend their complaint and have not indicated that they desire to seek leave to amend their complaint further. Therefore, we conclude that it is appropriate to enter judgment dismissing this action.

Dated: March 20, 2012
New York, New York

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

Slip Op. 12–38

HEVEAFIL SDN. BHD., FILMAX SDN. BHD and HEVEAFIL USA INC., Plaintiffs, v. UNITED STATES, Defendant.

Before Richard W. Goldberg, Senior Judge
Court No. 04–00477

[Plaintiff's Motion for Judgment on the Agency Record is granted and the final results of the changed circumstances review are remanded.]

Dated: March 21, 2012

Walter J. Spak and *Jay C. Campbell*, *White & Case LLP*, for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; and *Stephen C. Tosini*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for the Defendant.

OPINION & ORDER

Goldberg, Senior Judge:

Plaintiffs Heveafil Sdn. Bhd., Filmax Sdn. Bhd., and Heveafil USA Inc. (collectively "Heveafil") contest the U.S. Department of Commerce's ("Commerce") final results in the changed circumstances review of the antidumping duty order on extruded rubber thread from Malaysia. *Extruded Rubber Thread from Malaysia: Final Results of Changed Circumstances Review of the Antidumping Duty Order and Intent To Revoke Antidumping Duty Order*, 69 Fed. Reg. 51,989 (Dep't Commerce Aug. 24, 2004) ("*Final Results*").

Background

In 1992, Commerce published an antidumping duty order for extruded rubber thread from Malaysia. *Extruded Rubber Thread from Malaysia: Antidumping Duty Order and Amendment of Final Determination of Sales at Less Than Fair Value*, 57 Fed. Reg. 46,150 (Dep't Commerce Oct. 7, 1992). Heveafil was subject to the order.

Commerce conducted an administrative review of the order for the period October 1, 1995 through September 30, 1996. *Extruded Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 12,752 (Dep't Commerce Mar. 16, 1998). Heveafil challenged the results of the 1995–1996 review. As a result, Commerce suspended liquidation of the entries covered by that review.[1]

[1] Liquidation of the 1995–1996 entries remains enjoined pursuant to 19 U.S.C. § 1516a(c)(2) in *Heveafil Sdn. Bhd. v. United States*, Ct. No. 98–04–00908, which is stayed pending the outcome of this appeal of the final results of the changed circumstances review.

In 2004, Heveafil requested a changed circumstances review. Heveafil contended that the sole United States manufacturer of domestic like product, North American Rubber Thread Co., Inc. ("NART"), had declared bankruptcy and ceased operations, warranting revocation of the order. Commerce initiated the requested changed circumstances review.

In the final results of the changed circumstances review, Commerce revoked the order effective October 1, 2003, the date of the last completed administrative review. At that time, the trustee in bankruptcy for NART supported Commerce's revocation date of October 1, 2003. Commerce selected the 2003 date despite Heveafil's assertion that the order should be revoked retroactively to October 1, 1995. Heveafil argued for an October 1, 1995 revocation date so as to include any unliquidated entries covered by the order. Commerce asserted that its practice is to revoke antidumping duty orders so that the effective date of revocation covers unliquidated entries that have not been subject to a completed administrative review.

In 2005, NART and Heveafil reached a settlement agreement. Subsequently, NART requested a second changed circumstances review of the order, expressing its support for an October 1, 1995 revocation date. Commerce refused to initiate NART's request for a second changed circumstances review. NART appealed Commerce's refusal. The Federal Circuit determined that NART was judicially estopped from arguing in favor of a revocation date of October 1, 1995. *See Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353 (Fed. Cir. 2010). The Federal Circuit explained that NART previously argued against that date and that NART did not provide an adequate reason for its change in position that would justify Commerce changing the effective revocation date of the order. *Id.* The Federal Circuit noted that there was still an opportunity for this Court to review the revocation date. *Id.* at 1356. Specifically, the revocation date could be reviewed if Heveafil challenged Commerce's decision in the first changed circumstances review. *Id.*

Now, Heveafil has brought this appeal to challenge the revocation date Commerce selected in the first changed circumstances review.

Jurisdiction and Standard of Review

This Court has jurisdiction pursuant to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006).

This Court must "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)

(1994)). When reviewing agency determinations, findings, or conclusions for substantial evidence, this Court determines whether the agency action is reasonable in light of the entire record. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

Discussion

Heveafil challenges the revocation date Commerce selected for the antidumping duty order for extruded rubber thread from Malaysia. Heveafil urges this Court to remand the matter for reconsideration of the revocation date.

The antidumping law authorizes Commerce to revoke an antidumping order based on changed circumstances. *See* Tariff Act of 1930, § 753, 19 U.S.C. § 1675(b), (d) (2000).[2] Commerce conducts a changed circumstances review when it receives a request by an interested party that "shows changed circumstances sufficient to warrant a review" of an antidumping order. 19 U.S.C. § 1675(b)(1). Commerce's regulations further elaborate that Commerce may revoke an order if "[p]roducers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoked) . . . pertains have expressed a lack of interest in the order, in whole or in part . . . ." 19 C.F.R. § 351.222(g) (2006); s*ee also Or. Steel Mills Inc. v. United States*, 862 F.2d 1541, 1545 (Fed. Cir. 1988) (holding that lack of industry support alone is a ground for revocation).

Commerce claims that 19 U.S.C. § 1675 "does not envision the inclusion of entries subject to completed administrative reviews within the scope of a changed circumstances review because such entries must be liquidated in accordance with Commerce's final results or [a] final court decision in [an] appropriate challenge . . . " Def. Br. at 11. Commerce previously claimed that 19 U.S.C. § 1675(a) precludes the inclusion of unliquidated entries subject to a completed administrative review within the scope of a changed circumstances review. *See Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 31 CIT 2040, 2043, 533 F. Supp. 2d 1290, 1294 (2007). Commerce insists that the antidumping rate determined in the final results of the 1995–1996 review must be assessed on the unliquidated entries from that review period.

However, as this Court previously noted, Commerce fails to account for § 1675(d)(3) in its analysis. *See id.* That portion of the statute provides that "[a] determination . . . to revoke an order . . . shall apply with respect to unliquidated entries of the subject merchandise which

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

are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering authority." 19 U.S.C. § 1675(d)(3). This section clearly states that revocation shall apply to *unliquidated* entries. However, this section does *not* state that revocation shall *not* apply to unliquidated entries that were already subject to completed administrative reviews. Rather, it gives the agency discretion to select the effective revocation date. Most notably, the statute does *not* limit Commerce's discretion to select a revocation date that predates a completed administrative review.

This Court previously rejected, and again rejects as unreasonable, Commerce's arguments that the principle of administrative finality prevails over any discretion the agency has in selecting an effective date of revocation or that the completion of an administrative review precludes the agency from retroactively revoking an order. Heveafil requested the changed circumstances review for Commerce to revoke the antidumping order because the domestic industry no longer existed. Commerce's assertion that the antidumping rate determined in the 1995–1996 review must be assessed on the unliquidated entries covered in that review contravenes the remedial purpose of the statute given the absence of a domestic industry. Therefore, Commerce's determination is unreasonable, not supported by substantial evidence, and not in accordance with law.

Conclusion and Order

For the foregoing reasons, this matter is remanded for reconsideration of the revocation date, and such proceedings shall be consistent with the opinions of this Court and the Federal Circuit.

Upon consideration of all proceedings and submissions herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record challenging the final results in the changed circumstances review of the antidumping duty order on extruded rubber thread from Malaysia, *Extruded Rubber Thread from Malaysia: Final Results of Changed Circumstances Review of the Antidumping Duty Order and Intent To Revoke Antidumping Duty Order*, 69 Fed. Reg. 51,989 (Dep't Commerce Aug. 24, 2004) ("*Final Results*") be, and hereby is, GRANTED; it is further

ORDERED that the Final Determination be, and hereby is, remanded to the U.S. Department of Commerce for redetermination in accordance with this Opinion & Order; it is further

ORDERED that, on remand, Commerce shall issue a Remand redetermination that is supported by substantial evidence on the record, and is in all respects in accordance with law; and it is further

ORDERED that Commerce shall file the Remand redetermination with the court by August 21, 2012, that plaintiff shall file any comments thereon within thirty (30) days of the date on which the Remand Redetermination is filed, and that defendant shall file any response to plaintiff's comments within twenty (20) days of the date on which plaintiff files comments.

Dated: March 21, 2012
New York, New York

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

Slip Op. 12–39

QINGDAO SEA-LINE TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, LLC, THE GARLIC CO., VALLEY GARLIC, and VESSEY AND CO., INC., Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 10–00304

[Plaintiff's motion for judgment on the agency record isgranted, in part, and the Department of Commerce's Final Resultsare remanded.]

Dated: March 21, 2012

Hume & De Luca, PC (*Robert T. Hume and Stephen M. De Luca*), for plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Richard P. Schroeder*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Ahran Kang McCloskey*), of counsel, for defendant.

Kelley Drye & Warren, LLP (*Michael J. Coursey* and *John M. Herrmann*), for defendant-intervenors.

OPINION AND ORDER

Eaton, Judge:

This matter is before the court on plaintiff Qingdao Sea-line Trading Co., Ltd.'s ("plaintiff" or "Sea-line") motion for judgment on the agency record, pursuant to USCIT Rule 56.2. *See* Pl.'s Br. in Supp. of Mot. J. Agency R. ("Pl.'s Br."). Defendant, the United States, and defendant-intervenors, the Fresh Garlic Producers Association, Christopher Ranch, LLC, The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, "defendant-intervenors"), op-

pose the motion. *See* Def.'s Mem. in Opp. to Pl.'s Mot. J. Agency R. ("Def.'s Br."); Def.-Ints.' Br. in Resp. to Pls.' Mot. J. Agency R. ("Def.-Ints.' Br.").

By its motion, plaintiff, an exporter of fresh garlic[1] from the People's Republic of China ("PRC"), challenges the Final Results of the United States Department of Commerce's ("Commerce" or the "Department") New Shipper Review in connection with the antidumping duty order on fresh garlic from the PRC for the period of review ("POR") November 1, 2008 through April 30, 2009. *See* Fresh Garlic from the PRC, 75 Fed. Reg. 61,130 (Dep't of Commerce Oct. 4, 2010) (notice of final results of new shipper review) ("Final Results"), and the accompanying Issues and Decision Memorandum (Dep't of Commerce Sept. 24, 2010) ("Issues & Dec. Mem."); Fresh Garlic from the PRC, 59 Fed. Reg. 59,209 (Dep't of Commerce Nov. 16, 1994) (antidumping duty order) (the "Order"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).

For the reasons set forth below, plaintiff's motion is granted, in part, and the Final Results are remanded.

BACKGROUND

Following plaintiff's request, the Department initiated the New Shipper Review under the Order on June 30, 2009. *See* Fresh Garlic from the PRC, 74 Fed. Reg. 31,241 (Dep't of Commerce June 30, 2009) (notice of initiation of new shipper review). Commerce then published its Preliminary Results on May 5, 2010. *See* Fresh Garlic from the PRC, 75 Fed. Reg. 24,578 (Dep't of Commerce May 5, 2010) (notice of preliminary results of new shipper review) ("Prelim. Results"). The contested Final Results of the New Shipper Review, in which Commerce calculated an antidumping duty rate of 155.33%, were published on October 4, 2010.

Plaintiff's motion challenges two main aspects of the Final Results. First, Sea-line disputes (a) the Department's selection of a surrogate to value whole garlic bulbs, and (b) the inflator used to adjust the value of the garlic bulbs. Second, plaintiff challenges the Department's choice of financial statements used to calculate the surrogate financial ratios.

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[1] Sea-line is an exporter of whole garlic bulbs, and is not itself a garlic grower. It exports the whole garlic bulbs grown by Jinxiang County Juxingyuan Trading Co., Ltd. ("Juxingyuan"). *See* Pl.'s Br. 2; Def.'s Br. 20 n.9; Fresh Garlic from the PRC, 75 Fed. Reg. 61,130 (Dep't of Commerce Oct. 4, 2010) (notice of final results of new shipper review).

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Surrogate Valuation of the Intermediate Input

A. Legal Framework

1. Calculation of Normal Value

Under 19 U.S.C. § 1675(a)(2)(B), upon request, Commerce shall conduct administrative reviews "for new exporters and producers." The purpose of these new shipper reviews is to determine whether exporters or producers, whose sales have not been previously examined, are (1) entitled to their own antidumping duty rates under the order resulting from the investigation, and (2) if so, to calculate those rates. *See Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005). To calculate these rates, Commerce must determine the normal value, export price,[2] and the antidumping duty margin[3] for each entry of the subject merchandise. 19 U.S.C. § 1675(a)(2)(A).

For merchandise exported from a nonmarket economy ("NME") country,[4] such as the PRC, Commerce, under most circumstances, determines normal value by pricing the factors of production (the "FOPs") used to produce the merchandise by using surrogate data from "one or more market economy countries that are--(A) at a level of economic development comparable to that of the [NME] country, and (B) significant producers of comparable merchandise." 19 U.S.C.

[2] The "export price" is generally defined as "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a).

[3] An antidumping duty margin is "the amount by which the normal price exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). If the price of an item in the home market (normal value) is higher than the price for the same item in the United States (export price), the dumping margin comparison produces a positive number, indicating that dumping has occurred.

[4] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004).

§ 1677b(c)(4)(A)–(B). Commerce then "add[s] an amount for general expenses and profit plus the cost of containers, coverings, and other expenses" to the surrogate FOP values. *Id.* § 1677b(c)(1). The Department calculates this amount using surrogate financial ratios. Here, because China is a NME country, Commerce, pursuant to 19 U.S.C. § 1677b(c)(1), selected India as the surrogate country for purposes of calculating normal value and to determine the financial ratios.

2. Intermediate Input Methodology

Following the Ninth Administrative Review, Commerce ceased using its regular method of tallying the FOPs as valued in a surrogate country to calculate normal value for garlic exported from the PRC. Commerce changed its methodology because of, what it found to be, vagaries and inconsistencies in the reporting of the FOPs for garlic farming in China. Commerce found the FOP data to be problematic because of environmental conditions, the long growing season for garlic, the unique land leasing arrangements, and the lack of adequate books and records allowing the Department to establish the accuracy of the reported FOPs. *See Jining Yongjia Trade Co. v. United States*, 34 CIT __, __, Slip Op. 10–134 at 8–11 (Dec. 16, 2010) (not reported in the Federal Supplement).

As a result, beginning with the Tenth Administrative Review,[5] the Department determined that, "[i]n order to eliminate the distortions in our calculation of [normal value] . . . , we have applied an intermediate-product valuation methodology to all companies," and endeavored to capture the complete costs of producing "fresh garlic" by valuing the "fresh garlic bulb" as an intermediate product. *See* Fresh Garlic from the PRC, 71 Fed. Reg. 26,329, 26,331 (Dep't of Commerce May 4, 2006) (final results and partial rescission of antidumping duty administrative reviews and final results of new shipper reviews). In other words, rather than basing normal value on the sum of the surrogate values for the upstream FOPs reported by respondents, Commerce assumed that these costs were all contained in the price of the intermediate product, the whole garlic bulb itself. *See Jining Yongjia*, 34 CIT at __, Slip Op. 10–134 at 11. No party objects to the methodology employing the whole garlic bulb as an intermediate input in this New Shipper Review.

Pursuant to statute, the information used by Commerce to value the FOPs (here, the whole garlic bulbs) must be the "best available

[5] The Tenth Administrative Review for garlic was not the first time that the Department used an intermediate input methodology; rather, it had previously been used in the *Certain Frozen Fish Fillets* less-than-fair-value determination. *See* Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 4986, 4993 (Dep't of Commerce Jan. 31,2003) (notice of preliminary determination of sales at less than fair value).

information regarding the values of such factors in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c)(1). In selecting the best available information for valuing the FOPs, Commerce's practice is to select surrogate values that "reflect[] a broad market average, [are] publicly available, contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports." *QVD Food Co. v. United States*, 34 CIT __, __, 721 F. Supp. 2d 1311, 1315 (2010).

B. The Garlic Bulb Valuation

Plaintiff first takes issue with the Department's selection of a non-contemporaneous surrogate value for the garlic bulbs. Using the intermediate input methodology, Commerce selected a surrogate value for whole garlic bulbs (the "intermediate input") derived from information in the Azadpur Agricultural Produce Marketing Committee's Market Information Bulletin ("APMC Bulletin").

Because plaintiff reported a garlic bulb input size of over 55 millimeters, Commerce determined that it was "Grade Super A."[6] As there were no Grade Super A prices reported in the APMC Bulletin for the POR of November 1, 2008 through April 30, 2009, Commerce used the Grade Super A prices for the preceding period of November 1, 2007 through February 6, 2008. The Department stated that it chose the earlier data because it considered garlic bulb size to be the most important criteria in valuing the garlic bulbs, overriding other factors, including contemporaneousness. Def.'s Br. 11 ("'The vast majority of evidence indicates that size of the garlic bulbs is given significant value in the marketplace.'" (citation omitted)). The Department then adjusted these prices for inflation using a wholesale price index for India published by the International Monetary Fund (the "IMF Index"). Using this approach, Commerce calculated a Grade Super A garlic surrogate value of 54.9902 rupees per kilogram.[7]

For plaintiff, however, the "best available information" to value the whole garlic bulb would have been the published APMC Bulletin prices for Grade A garlic (one size smaller than Grade Super A) during the POR itself. Pl.'s Br. 18 ("The Department's selection of non-contemporaneous information for the surrogate value of garlic bulbs deviates from the Department's normal practice of using contemporaneous information for selecting surrogate values. The data used by the Department was more than a year earlier than the [POR] and as

[6] "Grade Super A" refers to garlic bulbs of 55 millimeters or more. It is undisputed that all of Sea-line's exports under review are within the Super A range. Pl.'s Br. 10; Def.'s Br. 4.

[7] This final value reflects a clerical correction from the Preliminary Results; Commerce subtracted seven percent inmarket fees from the average Super A value in the APMC Bulletin.

a result of using non-contemporaneous information, the surrogate value for [the] garlic bulb was heavily skewed." (internal citation omitted)). Thus, while plaintiff appears to argue that contemporaneity must trump product-specificity, defendant urges that it reasonably concluded that size specificity for garlic was the more important factor. Def.'s Br. 10–13.

Although it may be that size is a more important factor than contemporaneity when valuing the whole garlic bulb, here Commerce's decision to use the earlier grade-specific data, rather than the contemporaneous data for a smaller garlic bulb, was not adequately explained. The Department determined that the "best available information" was that which most closely reflected the garlic size actually exported by plaintiff, even though the prices were for garlic sold outside of the POR. Commerce states that "garlic size is an important price factor," and therefore prices for Super A grade garlic are more "product-specific" to the garlic exported by Sea-line, in comparison to the contemporaneous garlic prices available for the smaller garlic size. Issues & Dec. Mem. at 6, 5.

Although it states that the "vast majority of evidence" supports the importance of garlic size, Def.'s Br. 11, the Department does not address this evidence, and has not explained why garlic bulb size is such an important factor that Commerce was justified in using prices outside of the POR. Rather, the Department has simply relied upon its conclusion that size was the most significant criterion when valuing the input, without further explanation. Issues & Dec. Mem. at 6. ("[T]he Department has determined that the size-specific garlic prices available from the Azadpur APMC are preferable because garlic size is an important price factor."). As a result, Commerce has failed to explain why garlic size (product-specificity) trumps contemporaneousness in its choice of garlic bulb prices, even though such an explanation is required under these circumstances. *See Allegheny Ludlum Corp. v. United States*, 29 CIT 157, 168, 358 F. Supp. 2d 1334, 1344 (2005) (Commerce "must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations.").

In light of the foregoing, the court holds that Commerce's determination that the APMC Bulletin prices from a prior POR for Super A grade garlic were the "best available information" was not supported by substantial evidence. Therefore, this determination is remanded.

C. Price Adjustment

While preserving its argument that Commerce should have used prices from the POR, plaintiff also objects to the use of the IMF Index

to adjust the surrogate garlic bulb prices from the 2007–2008 APMC Bulletin to an appropriate price during the POR. According to plaintiff, should the Department be permitted to use prices outside of the POR, these prices should not be adjusted by using the IMF Index because it does not account for garlic price decreases that occurred in 2008. Therefore, plaintiff insists that either of the two alternative methods it proposes for adjusting the price of the garlic bulb would have yielded more accurate values. *See* Pl.'s Br. 22 ("Either method takes into account the garlic specific price changes between the 07/08 period and the 08/09 period. The Department's methodology simply failed to reflect garlic specific price changes during a time of a world economic recession."); *see also* Case Br. from Resp. to Sec. of Commerce 4, A-570–831 (June 4, 2010) (P.R. Doc. 62) ("Pl.'s First Case Br."); Case Br. from Resp. to Sec. of Commerce 9, A-570–831 (August 6, 2010) (P.R. Doc. 67) ("Pl.'s Second Case Br.") ("The prices during the POR were dramatically lower than the corresponding period in 2007–2008."). Commerce, however, provides two reasons to support its use of the IMF Index for India. Issues & Dec. Mem. at 8–9.

1. Routine Use of a Single, Country-Wide Index

First, Commerce states that, for the purposes of adjusting prices, "it is the Department's practice to use a single, country-wide [wholesale price index]." Issues & Dec. Mem. at 8. Indeed, a single, country-wide wholesale price index was used in the Twelfth and Thirteenth Administrative Reviews of fresh garlic. Issues & Dec. Mem. at 8 ("[I]n prior reviews of fresh garlic, [Commerce] ha[s] also used the same [wholesale price index] methodology utilized in the instant case."); *see also* Def.'s Br. 7 ("Commerce . . . found that using a single countrywide wholesale price index was consistent with its practice . . . ."). With this history in mind, Commerce found "no reason to deviate from its established practice," and believes that it properly "exercised its discretion by using an 'all commodities' wholesale price index for India." Issues & Dec. Mem. at 9; Def's Br. 15.

Commerce's reliance on its past "routine practice" of using a single, country-wide wholesale price index standing alone, however, does not adequately support its determination. Indeed, Commerce must do more than simply state that its conclusions are justified because they are in accord with actions in prior reviews; rather, it must "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Therefore, were reliance on past practice its sole reason for determining that the IMF Index was the best available information, the court would find its explanation wanting. Here, however, the

defendant has provided additional support for its use of the IMF Index through its second argument, which the court finds convincing.

2. Plaintiff's Two Alternative Methodologies Are Not Supported by Substantial Evidence

Commerce's second argument is that the record lacks substantial evidence to support Sea-line's contention that either of the two alternative methods it proposes for adjusting the garlic bulb prices "would yield a more accurate adjustment to the garlic surrogate value than the method the Department used." Issues & Dec. Mem. at 8. With respect to its two proposed methodologies, plaintiff argues that Commerce should either have: (1) used the Grade Super A prices from the older 2007–2008 APMC Bulletin and adjusted them for inflation or deflation using the wholesale price index supplied by plaintiff, which was purportedly based upon data published by India's Ministry of Commerce and Industry, resulting in a surrogate value of 28.64 rupees per kilogram; or (2) calculated the ratio between the prices for Grades Super A and A garlic in the older 2007–2008 APMC Bulletin, and applied this ratio to the contemporaneous Grade A price to extrapolate a Grade Super A price for the POR, resulting in a surrogate value of 19.90 rupees per kilogram. Pl.'s Br. 15–16.

a. Plaintiff's Indian Wholesale Price Index

As to its first proposed method, Sea-line maintains that the prices should have been adjusted using data it claimed, during the administrative proceedings, were published by India's Ministry of Commerce and Industry. According to plaintiff, this data included garlic-specific prices, whereas the IMF Index was comprised of a "'mixture of prices of agricultural and industrial goods.'" Pl.'s Br. 20 (citation omitted).

Commerce insists, however, that plaintiff's proffered index was not a publicly-available index published by the Indian Ministry of Commerce. *See Allied Pac. Food (Dalian) Co. v. United States*, 30 CIT 736, 760, 435 F. Supp. 2d 1295, 1316 (2006) ("The regulations, in 19 C.F.R. § 351.408, provide that Commerce 'normally will use publicly available information to value factors.'"). Rather, Commerce asserts that the index was "created" by plaintiff based upon information that Sea-line stated it had sourced from the website of India's Ministry of Commerce and Industry. Def.'s Br. 16. Further, according to Commerce, "Sea-line . . . provided no information with respect to the government of India garlic price data which presumably underpins the garlic [wholesale price index] it calculated." Issues & Dec. Mem. at 8.

Sea-line submitted its index in its rebuttal to defendant-intervenors' submission of surrogate value data during the administrative proceedings, and subsequently reproduced the index in its administrative case briefs. Pl.'s First Case Br. 7; Pl.'s Second Case Br. 12. To support its submission, Sea-line provided, what turned out to be, an erroneous website address as the source of the data, and "provided no explanation or context for the data itself, that is, for how the government of India compiled the relevant data." Def.'s Br. 16. According to defendant, during the administrative proceedings it was determined that the website provided by plaintiff did not contain the data from which the index was compiled. Pl.'s Reply to Def. & Def.-Ints.' Br. 8 ("Pl.'s Reply); Def.'s Br. 16. Rather, the data used in plaintiff's index was later determined to have been derived from the website for the Office of the Economic Adviser to the Government of India,[8] as indicated by plaintiff's subsequent briefing in this action. Pl.'s Br. 22. The correct source of the data, though, was never presented to the Department during the administrative proceedings. Because Commerce was unable to verify the index, it claims that the index was reasonably rejected. Def.'s Br. 16.

While acknowledging that its "surrogate value data . . . contain[ed] an error," the plaintiff argues in its papers that "[i]f the Department questioned the validity of the garlic index, the [D]epartment had the time and resources to assess the garlic index." Pl.'s Reply 8; Pl.'s Br. 21. In like manner, at oral argument, plaintiff asked the court to find that Commerce had an affirmative duty to seek clarification or correction of the deficient filing, and asserted that the burden to create an adequate record lies with Commerce. *See also* Pl.'s Br. 21. According to plaintiff,

> [d]efendant does not cite to the record where these deficiencies are noted and we are unaware of the record evidence that Commerce ever notified Sea-line of any deficiencies or errors in its submissions(s) with respect to these claims. Nevertheless, Commerce had a responsibility to calculate the margins as accurately as possible. Commerce has the authority to ask parties to answer questions at any time and to extend deadlines. It is unclear how Commerce can justify rejecting surrogate value data that contains an error without allowing the party to respond.

Pl.'s Reply 8. To support this contention, plaintiff cites Commerce's regulation pertaining to "[e]xtension of time limits" in antidumping

[8] The website is located at http://www.eaindustry.nic.in.

reviews. 19 C.F.R. § 351.302(b) (2011) ("Unless expressly precluded by statute, [Commerce] may, for good cause, extend any time limit established by this part.").

Defendant counters that "Commerce explicitly addressed the garlic index [in the final results] and found that it lacked 'information with respect to the government of India garlic price data which presumably underpins the garlic [wholesale price index Sea-line] calculated.'" Def.'s Br. 17 (quoting Issues & Dec. Mem. at 8). Further, defendant argues that "Sealine's statement [concerning Commerce's duties with respect to the record] reflects a misunderstanding of the evidentiary burden that underlies Commerce's administrative proceedings." Def.'s Br. 17.

The court agrees with Commerce that Sea-line appears to misunderstand its role in these proceedings. As defendant points out, and as the Federal Circuit has recently reiterated, "[a]lthough Commerce has authority to place documents in the administrative record that it deems relevant, 'the burden of creating an adequate record lies with [respondents] and not with Commerce.'" *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)); *see also Wash. Int'l Ins. Co. v. United States*, 33 CIT __, Slip Op No. 09–00078 at 11 n.12 (July 29, 2009) (not reported in the Federal Supplement) ("It is the interested party to an administrative review who bears the burden of production on its claim."); *Chia Far Indus. Factory Co. v. United States*, 28 CIT 1336, 1354, 343 F. Supp. 2d 1344, 1362 (2004) ("Ultimately, the burden of creating an adequate record lies with the respondents, not Commerce."). It is particularly the duty of a party to complete the record when, as here, plaintiff is proffering data that it claims is the "best available information." Therefore, under the circumstances, it was simply not Commerce's duty to help Sea-line create an adequate record to support its position.[9]

[9] While the parties do not discuss it, there is a provision in the antidumping statute pertaining to "deficient submissions." *See* 19 U.S.C. § 1677m(d). This section states that if Commerce "determines that a response to a request for information under this title does not comply with the request, [Commerce] . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." *Id.* This provision, however, appears to be limited to cases involving "facts otherwise available" in the context of deficient responses to Commerce's questionnaires during antidumping investigations and reviews. As such, the "deficient submissions" requirement extends to submissions where the respondent is supplying information about its own company "in response to [Commerce's] request," which is distinguishable from surrogate valuation proceedings where, as here, a respondent voluntarily proposes surrogate value data for Commerce's consideration.

Thus, because the Department could not verify the accuracy of plaintiff's proffered index during its administrative proceedings, the court finds that Commerce reasonably concluded that plaintiff's contention that the index it created itself constitutes the "best available information," and that its use would yield a more accurate result, was not supported by substantial evidence.

b. Plaintiff's Ratio Methodology

In addition to its proposed index, Sea-line argues, in the alternative, that Commerce should have used the prices for Grade A garlic from the APMC Bulletin contemporaneous to the POR, as adjusted by using the ratio between Grade Super A and Grade A garlic from the older APMC Bulletin. To support the soundness of this methodology, plaintiff "presumes" that "the price relationship between Super-A grade and A grade prices remain 'relatively constant.'" Pl.'s Br. 23; *see also* Pl.'s First Case Br. 10; Pl.'s Second Case Br. 14–15 ("We can presume that [the Grade Super A/Grade A] ratio is relatively constant. Therefore, we can use the [Grade Super A/Grade A] ratio we know from the [2007–2008] APMC Bulletin . . . to derive [a Grade Super A] value during the POR.").

Defendant maintains, however, that plaintiff's proposed ratio methodology was properly rejected because there was insufficient evidence on the record to support the claimed constant ratio between the two grades. Def.'s Br. 17–18; *see also* Issues & Dec. Mem. at 9 ("[T]here is insufficient historical Azadpur APMC price data (Super-A grade and A grade) on the record of this review to serve as the basis for a meaningful price ratio."). Put another way, Commerce argues that one year's data on the price difference between the different grades of garlic bulbs was not sufficient to establish that the ratio would be consistent over time.

As with its arguments with respect to the Indian wholesale price index, however, plaintiff maintains that, if the Department found its submissions wanting, it was the duty of Commerce to seek clarification from plaintiff, and that the burden to create an adequate record lies with Commerce "which is responsible for conducting the review." Pl.'s Br. 23. Specifically, plaintiff states that "[i]t is unclear when or even if Sea-line was provided an opportunity to present . . . 'historical data' [establishing the ratio over time] and why the Department, which is responsible for conducting the review and frequently supplies the data, failed to check." Pl.'s Br. 23.

Defendant counters that "[o]nce again, Sea-line fails to recognize that respondents bear the burden of building a record adequate to support their arguments." Def.'s Br. 19. Furthermore, according to

defendant, "Sea-line had the opportunity [to] present historical data in its rebuttal to [defendant-intervenor's] surrogate value comments. Its failure to do so left Commerce with no factual basis for adopting Sealine's alternative proposal."[10] Def.'s Br. 19. Therefore, "because the reliability of Sea-line's [ratio] method could not be confirmed, Commerce acted within its discretion in rejecting it." Def.'s Br. 18

The court finds Sea-line's arguments regarding its evidentiary burden unpersuasive. That is, as discussed above, under circumstances such as these, it was not Commerce's duty to help Sea-line create an adequate record to support its position that the application of its proposed ratio would result in the "best available information." *See Chia Far Indus. Factory*, 28 CIT at 1354, 343 F. Supp. 2d at 1362 ("Ultimately, the burden of creating an adequate record lies with the respondents, not Commerce.").

The court also finds that, in the absence of evidence to support the accuracy of plaintiff's ratio methodology over time, Commerce reasonably concluded that the use of the proposed ratio was not supported by substantial evidence, and that the method was not the "best available information" on the record. That is, because plaintiff provided no evidence tending to establish that the ratio it proposed had been constant over a period of years, it was not established that using the ratio would result in a more accurate adjustment to the older garlic bulb prices than the method used by Commerce. *Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1735, 358 F. Supp. 2d 1236, 1242 (2004) ("Commerce is generally at liberty to discard one methodology in favor of another where necessary to calculate a more accurate dumping margin . . . .").

Finally, the court holds that Commerce's determination that the IMF Index constituted the "best available information" on the record was reasonable and supported by substantial evidence. First, as has been seen, plaintiff failed to demonstrate that its two alternatives proposed were the "best available information" on the record. Second, the use of the IMF Index to adjust the garlic bulb prices comports with the Department's preference, to which plaintiff does not object and which appears to be reasonable in this case, "to use, where possible, . . . publicly available [data] which is (1) an average non-export value; (2) representative of a range of prices within the . . . POR; (3) product-specific; and (4) duty and tax-exclusive." Issues & Dec. Mem. at 5. Therefore, Commerce's use of the IMF Index is sustained.

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[10] According to 19 C.F.R. § 351.301(c)(1), "[a]ny interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline . . . for submission of such factual information."

II. Surrogate Financial Ratios

A. Legal Framework for Surrogate Financial Ratios

As noted, to calculate the normal value for merchandise from a NME country, Commerce values the FOPs used to produce "identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(4). Here, the Department has determined that the upstream FOP values are captured in the intermediate product—the whole garlic bulb. This surrogate value, however, does not take into account the "'general expenses and profits' not traceable to a specific product." *Dorbest Ltd. v. United States*, 30 CIT 1671, 1715, 462 F. Supp. 2d 1262, 1300 (2006), *aff'd in part, vacated in part on other grounds* (citing 19 U.S.C. § 1677b(c)(1)). Therefore,

> in order to capture these expenses and profits, Commerce must factor (1) factory overhead ("overhead"), (2) selling, general and administrative expenses ("SG&A"), and (3) profit into the calculation of normal value. As with its calculation of the other factors of production, Commerce uses surrogate values to determine an importer's financial ratios.

Id. at 1715, 462 F. Supp. 2d at 1300 (citations omitted). The "surrogate financial ratios"[11] are then added to the surrogate values of the FOPs (or, as here, the value of the whole garlic bulb as the intermediate input). 19 U.S.C. § 677b(c)(1)(B) (Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and *to which shall be added an amount for general expenses and profit*." (emphasis added)).

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[11] These "surrogate financial ratios" are calculated as follows:

> Factory overhead includes such costs as the cost of machinery, spare parts, and rent. Commerce adds together all such costs, as expressed on a surrogate company's financial statement, to get the total overhead expenditure ("$Overhead_s$"); Commerce then divides the result by the surrogate firm's material, labor, and energy costs ("MLE_s"). Finally, Commerce multiplies the result by the derived manufacturing cost of the product in question of the investigated firm ("MLE_p"). The result is the overhead that may be allocated to the normal value of the merchandise in question ("$Overhead_p$"). . . .
>
> Next, Commerce adds the surrogate firm's MLE and Overhead (together "the cost of manufacturing") and determines an amount for general expenses ("$SG\&A_s$") including, for example, expenses such as bank charges, travel expenses, and office supplies. Commerce then calculates the ratios of the surrogate firms' SG&A toits cost of manufacturing and multiplies this ratio bythe sum of MLEp and $Overhead_p$; the result is the SG&A that may be allocated to the merchandise in question ("$SG\&A_p$"). . . .
>
> Last, Commerce adds an amount for profit. Commerce initially calculates the surrogate company's profit ratio which is the ratio of the surrogate company's before-tax profit ("$profit_s$") over the sum of MLE_s, $Overhead_s$, and $SG\&A_s$. Commerce then multiplies this result by the investigated company's derived MLE_p, $Overhead_p$, and $SG\&A_p$. The result is the profit that maybe allocated to the merchandise in question ("$profit_p$").

Dorbest, 30 CIT at 1715–16 n.36, 462 F. Supp. 2d at 1301 n.36 (citations omitted).

The surrogate values used to calculate the ratios are derived from surrogate financial statements. In selecting these statements, Commerce "normally will use nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(4). In doing so, Commerce "narrow[s] the list of financial statements meeting this criterion by consider[ing] the quality and specificity of the statements, as well as whether the statements are contemporaneous with the data used to calculate production factors." *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1374 (Fed. Cir. 2010). In addition, "Commerce [has] explained that its preference is 'to use multiple financial statements in order to eliminate potential distortions that may arise from using those of a single producer,' as long as those financial statements 'are not distortive or otherwise unreliable.'" *Dorbest*, 604 F.3d at 1374, 1368 ("Generally, if more than one producer's financial statements are available, Commerce averages the financial ratios derived from all the available financial statements."); *see also* 19 C.F.R. § 351.408(c)(4) (noting, in the plural, that Commerce "normally will use non-proprietary information gathered from *producers* of identical or comparable merchandise in the surrogate country") (emphasis added).

B. The Financial Statements

In this case, during the administrative proceedings defendant-intervenors submitted financial statements from two Indian companies, ADF Foods and Tata Tea, for use in calculating the surrogate financial ratios. Plaintiff submitted statements for four companies, including Garlico Industries Limited ("Garlico") and Limtex Tea Limited ("Limtex"), for the same purpose. In making its final determination, the Department chose to average the data from Tata Tea's and Limtex's statements to arrive at the surrogate financial ratios.

Defendant states that Commerce's use of the Tata Tea and Limtex financial data was reasonable because, in accordance with accepted financial ratio standards, "they were contemporaneous [and] publicly available." Def.'s Br. 21. Further, these financial statements "reflected tea production," Def.'s Br. 21, and "[s]ince the 2002–2003 administrative review [for garlic], the Department has considered tea processing to be sufficiently similar to garlic processing." Issues & Dec. Mem. at 12. Therefore, Commerce has relied upon the financial statements of tea producers and exporters since that review. No party objects to the use of surrogate financial statements from tea companies to determine the surrogate financial ratios in this case. Indeed, both the plaintiff and defendant-intervenors submitted financial

statements from Indian tea companies for Commerce's consideration, and Sea-line "conced[ed] tea financials can be appropriate." Pl.'s Br. 16.

1. Use of the Tata Tea Statement

Notwithstanding its concession that tea financials are appropriate for valuing garlic production, plaintiff argues that: (1) the Tata Tea statement does not reflect Sea-line's production process because: (a) it includes financial information from non-tea and non-garlic businesses, and (b) the financial statements reflect the processing of peeled garlic instead of whole garlic; (2) the Tata Tea financial statement consolidated information from countries other than India; and (3) the Department could have used a smaller subset of the Tata Tea data to more accurately represent garlic-related expenses and profits. Pl.'s Br. 16–17.

a. Financial Data Does Not Reflect Sea-Line's Production Process

Sea-line's first argument is that the Tata Tea financials were not appropriate "because they included substantial information for non-tea production." Pl.'s Reply 10. According to plaintiff, "[t]he products the Tata Tea Group [produces] range from tea to [c]offee, pepper, cardamom, sp[i]c[e]s & others, timber, veneer/plywood and mineral water. Among these products, the sale of coffee in the Tata Tea Group accounts [for] 20.88% of the sales and services." Pl.'s Second Case Br. 18–19. In connection with this argument, plaintiff states that Commerce had previously found that "coffee is not a comparable product [to] garlic." Pl.'s Second Case Br. 19.

While the Department acknowledges that Tata Tea's financial statement includes commodities other than tea, most significantly coffee, it argues that "sales of tea comprise the vast majority of Tata Tea Group's sales," while the other commodities listed by plaintiff (other than coffee) comprise an insignificant fraction of sales. Issues & Dec. Mem. at 13. For this reason, defendant maintains that "Commerce fulfilled its obligation [to chose the best available information] by acknowledging that tea did not account for 100 percent of Tata Tea's sales but finding that it still represented the 'vast majority' of Tata Tea's activity." Def.'s Br. 26. Therefore, defendant contends that "Sea-line has failed to demonstrate that Tata Tea's consolidated financial statements were not reasonably reflective of tea production." Def.'s Br. 25.

As to plaintiff's claim that Commerce has found that coffee production is not equivalent to tea production, Commerce grants that it had

previously found "'that the coffee industry is not as comparable with the operations of the respondent garlic companies as the tea industry. . . . [Therefore,] the coffee industry in India does not represent as accurate a surrogate for garlic production as does the tea industry.'" Issues & Dec. Mem. at 11 (citation omitted). Commerce goes on to argue, however, that "as conceded by Qingdao Sea-line, sales of tea comprise the vast majority of Tata Tea Group's sales, with sales of coffee representing less than one quarter of total sales." Issues & Dec. Mem. at 12–13. Thus, for Commerce, even though coffee production is not "as comparable" to garlic production as is tea production, Tata Tea's financials remain the best available information on the record, particularly when averaged with Limtex's financial information, because the great majority of Tata Tea's financials reflect tea production.

At bottom, Commerce's argument is that, while not reflecting costs related to the production of tea alone, the inclusion of Tata Tea's financial information in the average used to calculate the financial ratios, rather than relying solely on Limtex's alone, produced a more reliable result. *See* Def.'s Br. 28 ("Commerce acted within its discretion in following its well-established practice to use information from more than one surrogate producer to better represent the surrogate industry.").

Additionally, Commerce made the specific finding that the production processes used by Limtex and Tata Tea were similar to those of Sea-line's producer, Juxingyuan, and therefore the choice to use both surrogate companies was supported by substantial evidence. The Department explained that

> we are using Tata Tea's and Limtex's financial data, since tea is comparable to subject merchandise (*i.e.,* whole and peeled garlic) and each company's nonintegrated production process [i.e., they purchase rather than grow their raw material inputs] is similar to [Sea-line's producer] Juxingyuan. We find that the resulting financial ratios from the average of Tata Tea's and Limtex's financial data provide the best surrogate for the garlic industry in the PRC as a whole, based on the information on the record of this review.

Prelim. Results, 75 Fed. Reg. at 24,582 (unchanged in Final Results); *see also* Def.'s Br. 21. In other words, because Commerce determined that Tata Tea, Limtex, and Sea-line's producer Juxingyuan all purchased their raw material inputs, rather than growing them themselves, the statements from these companies were the "best available information" on the record.

Next, plaintiff claims that the Tata Tea financial statement is representative of peeled garlic production, and not the production of the whole garlic bulbs that Sea-line actually exported to the United States. Therefore, according to plaintiff, "the Department selected . . . financial information which does not reflect Sea-line's production processes [because] Sea-line's sale concerns whole garlic rather than peeled garlic." Pl.'s Br. 25. To plaintiff, Commerce's choice "neglects the fact that the subject merchandise under this review is whole garlic rather than peeled garlic. The production process of surrogate companies shall be specific to the respondent under [the] current review, instead of the 'the broader experiences of [the] *garlic industry* ' in the PRC." Pl.'s Second Case Br. 17–18. Plaintiff cites Commerce's determinations from previous reviews to support its argument. Specifically, Sea-line references the Thirteenth Administrative/New Shipper Reviews where "the Department determined that . . . 'Tata Tea's financial data . . . are more comparable [to] that of peeled garlic, which comprises an increasing share of all PRC garlic imports." Pl.'s Second Case Brief 17; *see also* Pl.'s First Case Brief 11–12. Sea-line also cites the Fourteenth New Shipper Review where "the Department continued to regard Tata Tea's production processes a[s] more comparable to that of peeled garlic, which comprises an increasing share of all PRC garlic imports." Pl.'s Second Case Brief 17; *see also* Issues & Dec. Mem. at 10.

Commerce does not directly dispute plaintiff's argument. Rather, the Department replies that it

> made no determination in the *Final Results* that Tata Tea was specifically representative of peeled garlic. Instead, Commerce determined that it was preferable to use more than one financial statement in its calculation and found that financial statements for both Limtex and Tata Tea satisfied its standards for surrogate financial ratios.

Def.'s Br. 26 (citing Issues & Dec. Mem. at 12). Thus, Commerce reiterates that its primary reason for including the Tata Tea statement was its desire to use more than one financial statement. Commerce thus explains its determination by maintaining that it

> was left with two imperfect scenarios: (1) use Limtex's ratios alone, thus losing the benefit of information that reflects the 'broader experience of the surrogate industry' desired by Commerce; or (2) include Tata Tea's ratios to produce an average, even though Tata Tea might be less representative of whole garlic production than Limtex.

Def.'s Br. 27 (internal citation omitted).

As an initial matter, the court concludes that, should it ultimately be found that Commerce did not err in relying on Tata Tea's financial statement, it was reasonable for Commerce to average the Limtex and Tata Tea financials. The Department's threshold decision to use the Tata Tea statement, even though it contained data for the production of commodities other than tea, was supported by substantial evidence because Commerce reasonably explained that the benefit of using more data outweighs the inclusion of a small amount of other products. Indeed, both parties have acknowledged that "sales of tea comprise the vast majority of Tata Tea Group's sales, with sales of coffee representing less than one quarter of total sales." Issues & Dec. Mem. at 13. As to the other commodities listed by plaintiff (i.e., pepper, cardamom, spices, timber, veneer/plywood, and mineral water), the record reveals that these sales were insignificant,[12] when compared to sales of tea. Therefore, it was reasonable for Commerce to conclude that the Tata Tea statement largely reflected the production of tea.

In addition, any negative effect that might result from the inclusion of coffee production in the financials would be reduced by the averaging of Tata Tea's and Limtex's financial data. As noted, Commerce has a reasonable preference to use multiple financial statements to eliminate distortions that may arise from using those of a single producer. In other words, Commerce has concluded that a greater number of financial statements, here two instead of one, will lead to more reliable data by evening out any abnormalities present in a single producer's data. *See Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1353 (2009) ("When averaging multiple financial ratios from several statements, Commerce generally finds that the greatest number of financial statements yields the most representative data from the relevant manufacturing sector, and thus provides the most accurate portrayal of the economic spectrum."). This is what Commerce intended to achieve here; i.e., any distortions resulting from the inclusion of coffee data in Tata Tea's financials would be lessened by averaging the data with Limtex's financials.

As to plaintiff's argument that Commerce failed to choose financial statements from surrogate companies with production processes that most closely reflect those of Sea-line, however, the court finds this issue must be remanded because the Department has not adequately

[12] While coffee comprised 20.88% of Tata Tea's sales, the other non-tea commodities cited by plaintiff all composed less than 0.5% of sales, ranging from 0.02% for cardamom to 0.45% for mineral water. Petitioners' Surrogate Data Submission, Ex. 4 at 108, A-570–831 (Jan. 14, 2010) (P.R. Doc. 40).

explained its decision to employ financials from Tata Tea that it had previously found to be "more comparable [to] that of peeled garlic." Issues & Dec. Mem. at 9. Pursuant to 19 C.F.R. § 351.408(c)(4), Commerce "normally will use nonproprietary information gathered from producers of *identical or comparable merchandise* in the surrogate country." 19 C.F.R. § 351.408(c)(4) (emphasis added). At no point, however, does Commerce explain how the choice of the Tata Tea financial statement conforms to this regulation. Instead, the Department relies solely on its preference for data from more than one source. *See* Issues & Dec. Mem. at 12 ("[W]e note that it is the Department's preference to use financial data from more than one surrogate producer to reflect the broader experience of the surrogate industry."). This explanation, however, is not adequate because Commerce appears to have ignored its own regulation in reaching its determination. Put another way, the Department's desire to use more than one source of financial data to avoid distortions cannot form a reasonable basis for relying on a financial statement that, as a whole, reflects the production of merchandise that is not "identical or comparable" to that exported by Sea-line.

For this reason, and because, as shall be seen in the discussion of the Garlico financial statement below, there may be other available information on the record, Commerce's decision to use the Tata Tea statement must be remanded.

b. Multinational, Consolidated Information

Plaintiff's second objection to Commerce's use of the Tata Tea statement is that Commerce ignored the directive in *Dorbest* that the Department use values from "comparable countries" when it relied on Tata Tea's consolidated financial statement, which included information for countries other than India. Defendant believes that plaintiff waived this argument because it failed to raise it before Commerce at the administrative level, and therefore it failed to exhaust its administrative remedies. Def.'s Br. 22–24 ("Although Sea-line objected in its case brief to Commerce's use of Tata Tea's consolidated financial statements, it did not advance any argument concerning the economic comparability of the countries in which Tata Tea's subsidiaries, associates, and joint ventures . . . were located.").

In its First Case Brief,[13] plaintiff's two arguments regarding the surrogate financial ratios were: (1) that the "Department Shall Not Use Tata Tea's Financial Ratios Because of the Department's Previ-

[13] Plaintiff submitted two different case briefs from the same counsel: one on June 4, 2010 and a subsequent brief on August 6, 2010. As neither brief was rejected by the Department, both were part of the record before Commerce and are part of the record in this action.

ous Decision That Tata Tea's Production Process Was More Comparable to That of Peeled Garlic"; and (2) that the "Department Shall Select Garlico Industries Ltd. as [the] Surrogate Company for Financial Ratios in the Final Results." Pl.'s First Case Br. 11, 12.

In its Second Case Brief, plaintiff retained its first argument as above, but replaced its second argument with "the Department Shall Not Use Tata Tea Consolidated Accounts for the Financial Ratios Because the Financial Information Includes Various Products other than Tea Products." Pl.'s Second Case Br. 18. Because these were the only arguments presented, Commerce did not address arguments related to "comparable countries" in the Final Results.

Recognizing that it did not explicitly make an argument with respect to the inclusion of countries other than India in the Tata Tea financial statement, plaintiff urges that its "listing of non-economically comparable countries" in its Second Case Brief, and its "mentioning Tata Tea was a multinational conglomerate," amounted to raising the issue, and that the *Dorbest* decision[14] should have "alert[ed] Commerce — indeed place[d] an affirmative obligation on Commerce — to scrutinize the Tata Tea financials." Pl.'s Reply 11; *see also* Pl.'s Second Case Br. 18.[15]

Under 28 U.S.C. § 2637(d), this Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); *see also Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) ("[A]bsent a strong contrary reason, the court should

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[14] In *Dorbest*, the Federal Circuit stated that "the statute requires the use of data from economically comparable countries 'to the extent possible.'" *Dorbest*, 604 F.3d at 13711372 (quoting 19 U.S.C. § 1677b(c)(4)(A)).

[15] The plaintiff's passing references to the multinational nature of Tata Tea are embedded in its other arguments. Specifically, in its First Case Brief, in its argument that Tata Tea's production process is more comparable to that of peeled garlic, rather than whole garlic, plaintiff states "[t]he company also has large scale and diversified business. It has subsidiaries such as Tata Coffee Limited Inc. in the United States and Mount Everest Mineral Water Ltd. a subsidiary dealing in mineral water business. Tata Tea's business and organizational management is far more advanced and matured than Sea-line." Pl.'s First Case Br. 12. This is the only reference to Tata Tea's multinational activities.

Similarly, in its Second Case Brief, plaintiff references Tata Tea's multinational activities in its argument that the Tata Tea statements are inappropriate because they include information for non-tea products. This reference is limited to the following:

> The consolidated financial statement includes financial information of Tata Tea Limited's subsidiaries, associates and joint ventures ("Tata Tea Group"). The Tata Tea Group covers 24 subsidiaries with voting power between 78.79 – 100% located in nine countries in the world, including U.S.A., U.K., Canada, Australia, Kenya, Malawi, Poland, Czech Republic and Cyprus. The Tata Tea Group also includes 15 joint ventures located in 6 overseas countries and 4 associates in 2 overseas countries.
>
> Although the Department stated that it does not examine "the surrogate company's 'business experience' (i.e. size, profit, etc.)", the diversified multinational operation also expands its products far beyond tea, which was determined by the Department to be a comparable product of garlic.

Pl.'s Second Case Br. 18 (internal citations omitted).

insist that parties exhaust their remedies before the pertinent administrative agencies."). Therefore, "[o]rdinarily, when a party fails to make an argument in proceedings below, the argument is waived." *CEMEX, S.A. v. United States*, 133 F.3d 897, 902 (Fed. Cir. 1998); *see also Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("With a few notable exceptions, such as some jurisdictional matters, appellate courts do not consider a party's new theories, lodged first on appeal.").

Here, the court finds that no matter how either of plaintiff's two case briefs is read, there can be no claim that it raised before Commerce the argument that the Tata Tea statement included data from many different, *non-economically comparable countries*, and therefore that argument cannot be considered here. That is, the mere listing of the countries covered by the Tata Tea statement, combined with the issuance of a decision by the Federal Circuit, cannot be construed as plaintiff having raised an argument that Commerce was bound to address. Indeed, the

> underlying principle [behind the exhaustion requirement] is that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." The doctrine of exhaustion thus works to serve two basic purposes: It allows the administrative agency to perform the functions within its area of special competence (to develop the factual record and to apply its expertise), and—at the same time—it promotes judicial efficiency and conserves judicial resources, by affording the agency the opportunity to rectify its own mistakes (and thus to moot controversy and obviate the need for judicial intervention).

Ta Chen Stainless Steel Pipe, Ltd. v. United States, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1206 (2004) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *see also Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) ("Exhaustion . . . serves 'the twin purposes . . . of protecting administrative agency authority and promoting judicial efficiency.'" (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998))). Accordingly, the court finds that because plaintiff failed to raise the issue of "comparable countries" during the administrative proceedings, and thus failed to exhaust its administrative remedies, it will not consider the issue here.

c. Use of Smaller Subset of Data to More Accurately Represent Garlic-Related Figures

Next, plaintiff contends that "if the Department wanted to use some Tata Tea data, the Department could have adjusted the Tata Tea data to represent more accurate garlic related figures." Pl.'s Br. 17. To accomplish this, plaintiff suggests that "in the alternative to the complete Tata Tea financials, if the Department continued to believe Tata Tea financials were appropriate, the Department could use the financial information of Tata Tea Limited, not the consolidated statements as these cover Tata Tea's international operations which are not comparable to Sea-line." Pl.'s Br. 26.

While plaintiff asserts that "Sea-line made a detailed calculation of the Tata Tea Limited financials" for Commerce to consider, Pl.'s Br. 26, the full description of this alternative, which only appears in plaintiff's Second Case Brief (not its First Case Brief) was limited to the following:

> For the purpose of comparison, Sea-line used financial information of Tata Tea Limited to derive the financial ratios. [The] Table . . . below provides the comparison of the financial ratios derived from Tata Tea consolidated accounts as submitted by the [defendant-intervenors] and the financial ratios derived from Tata Tea Limited.

Pl.'s Second Case Br. 19.

The "detailed calculation," however, was confined to a simple table listing certain values, with no information as to how Sea-line derived these "limited" values. Thus, Sea-line offers a table it claims was derived from Tata Tea Limited's financials, without revealing what was left out and what was included in the data. According to defendant, plaintiff offered no explanation as to how it constructed its submission. Defendant notes, moreover, that "Sea-line fails to explain how its alternative 'Tata Tea Limited' ratio would correct the alleged defect in Tata Tea's consolidated statement." Def.'s Br. 27. In other words, it was entirely unclear what was backed out of the complete Tata Tea statement and why.

The court finds that it was reasonable for Commerce to reject plaintiff's redacted Tata Tea data. In the absence of any explanation of how the data in plaintiff's proffered table was derived (i.e., what was included from the Tata Tea Consolidated data and what was left out), Commerce reasonably determined not to rely on it. Plaintiff provided the table "[f]or the purpose of comparison." Pl.'s Second Case Br. 19. It is apparent, however, that no comparison can be made without a clear idea of how the table was constructed, and how it

accomplished the purpose of being a more accurate representation of plaintiff's business than Tata Tea's consolidated statement. In light of Commerce's reasonable criteria of "consider[ing] the quality and specificity of the statements," *Dorbest*, 604 F.3d at 1374, it was reasonable for Commerce to conclude that the full Tata Tea financial statement, as published in its Annual Report, was more reliable than the subset extracted by plaintiff.

For these reasons, the court finds that Sea-line has not demonstrated that its submission was the "best available information" on the record, and therefore Commerce's decision to reject it was reasonable and supported by substantial evidence.

2. Use of the Garlico Statement

In addition to its objections to the use of the Tata Tea statement, plaintiff also argues for the use of the Garlico statement, stating that the "Garlico financial statements on the administrative record were more representative of Sea-line's business during the [new shipper] POR than the financial statements of Tata Tea." Pl.'s Br. 26. According to plaintiff, this is because Garlico "produces garlic-related products and engages in garlic production. It is the most comparable company for surrogate financial ratios." Pl.'s First Case Br. 3.

Defendant asserts, however, that "Sea-line . . . waived its Garlico argument when it failed to raise the argument in its case brief. Accordingly, Commerce was under no obligation to further address the issue." Def.'s Br. 29. Defendant-intervenors also take this position, stating that "the administrative record makes clear that Sea-line abandoned this [Garlico] argument during the proceedings before the Commerce Department" because

> Sea-line's August 6, 2010 case brief contains no argumentation urging the Department to rely on the Garlico financial statements to calculate surrogate financial ratios in the final results. Thus, the only reasonable conclusion is that Sea-line abandoned its argument concerning Garlico's financial statements and thereby failed to exhaust its administrative remedies with the Department.

Def.-Ints.' Br. 18–19 (internal citation omitted).

In its First Case Brief, however, plaintiff did argue that the "Department Shall Select Garlico Industries Ltd. as Surrogate Company for Financial Ratios in the Final Results." Pl.'s First Case Br. 12. Even though the Department had both the Garlico's financial statement and this argument before it, it is apparent that Commerce only addressed the arguments presented in plaintiff's Second Case Brief,

summarized as follows: "Sea-line contends the Department should not use Tata Tea's financial ratios for the final results because: 1) in the past, the Department has found Tata Tea's production process to be more comparable to that of peeled garlic, and 2) because Tata Tea's financial ratios include products other than tea." Issues & Dec. Mem. at 9. This is an accurate description of plaintiff's objections as presented in its Second Case Brief, *see* Pl.'s Second Case Br. 17–19, but it does not explain why Commerce did not address the Garlico issue raised in plaintiff's earlier papers.

Plaintiff's complete argument regarding Garlico in its First Case Brief is as follows:

> Sea-line submitted to the Department [the] financial ratios of Garlico. Garlico is a wholesaler dealing with various garlic products such as garlic slices, garlic flakes, raw garlic, garlic granules and garlic pow[d]er. Because of similar merchandise and business between Garlico and Sea-line, Garlico is the most comparable surrogate company in the current review. The Department shall select Garlico's financial ratios as surrogate financial rates.

Pl.'s First Case Brief 12 (internal citation omitted).

The court holds that because plaintiff's Garlico argument was raised in its First Case Brief, which Commerce did not reject, and thus that submission is part of the record, Commerce was obliged to evaluate the Garlico statement. Therefore, the Department should have explained, and supported with substantial evidence, why the Tata Tea and Limtex statements were nonetheless the best available information, taking the Garlico financial statement into account.

While Commerce made a threshold decision to use an average from two tea producers, not from garlic producers such as Garlico, this determination did not relieve Commerce of its responsibility to discuss its decision not to use the Garlico statement. *See Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) ("[I]t is well settled that an agency must explain its action with sufficient clarity to permit 'effective judicial review.'" (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973))); *see also Dorbest Ltd. v. United States*, 35 CIT __, __, 755 F. Supp. 2d 1291, 1296 (2011) ("At a minimum, in making its data choices, [Commerce] must explain the standards it applied and make a rational connection between the standards and the conclusion." (citing *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984))).

CONCLUSION AND ORDER

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record is GRANTED, in part, and Commerce's Final Results are REMANDED; it is further

ORDERED that Commerce issue, upon remand, a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that Commerce, in preparing the Remand Redetermination, shall fully explain its decision to use the garlic bulb prices from the older 2007–2008 APMC Bulletin to value the whole garlic bulb, and fully explain why garlic bulb size is such an important factor that it justifies using prices outside of the POR; it is further

ORDERED that Commerce, on remand, is directed to revisit its use of the Tata Tea financial statement and, if it continues to use the statement, explain why it constitutes the best available information, taking into account Commerce's previous finding that it better reflects the production of peeled garlic, as distinct from the production of Sea-line's whole garlic bulbs, and how its use satisfies Commerce's regulation regarding the use of "information gathered from producers of identical or comparable merchandise"; it is further

ORDERED that Commerce, in preparing the Remand Redetermination, shall evaluate the Garlico statement submitted by plaintiff, and determine if it constitutes the best available information for use, either by itself or together with the other

financial statements, to calculate the surrogate financial ratios; it is further

ORDERED that Commerce file the Remand Results on or before July 23, 2012; it is further

ORDERED that Comments to the Remand Results shall be due thirty (30) days following the filing of the Remand Results; it is further

ORDERED that Replies to such Comments shall be due fifteen (15) days following the filing of the Comments.

Dated: March 21, 2012
New York, New York

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