U.S. Customs and Border Protection

Slip Op. 13–126

DEACERO S.A. DE C.V. AND DEACERO USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, GERDAU AMERISTEEL U.S. INC., EVRAZ ROCKY MOUNTAIN STEEL, AND NUCOR CORPORATION, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 12–00345
PUBLIC VERSION

[The court remands the Department of Commerce's final affirmative determination of circumvention of the antidumping duty order on certain wire rod from Mexico.]

Dated: September 30, 2013

David E. Bond and *Jay C. Campbell*, White & Case LLP, of Washington, DC, for plaintiffs.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Mykhaylo Grylov*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors ArcelorMittal USA LLC, Gerdau Ameristeel U.S. Inc., and Evraz Rocky Mountain Steel.

Daniel B. Pickard, *Maureen E. Thorson*, and *Derick G. Holt*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiffs Deacero S.A. de C.V. and Deacero USA, Inc. (collectively, "Deacero") contest the Department of Commerce's ("Commerce" or the "Department") affirmative final determination of circumvention of the antidumping duty order on certain wire rod from Mexico. *See Carbon and Certain Alloy Steel Wire Rod from Mexico*, 77 Fed. Reg. 59,892 (Dep't Commerce Oct. 1, 2012) (affirmative final determination of circumvention) ("*Final Determination*"). In that determination, Commerce found that wire rod with an actual diameter of 4.75 millimeter ("mm") to 5.00 mm constituted a minor alteration of sub-

ject merchandise under 19 U.S.C. § 1677j(c) (2006), and that it was, accordingly, subject to the antidumping duty order. 77 Fed. Reg. at 59,893.

In the instant action, Deacero contends, *inter alia*, that 4.75 mm steel wire rod was not a circumventing minor alteration of subject merchandise because it was both in existence during the original investigation and specifically excluded from the scope of the subject merchandise as defined during the investigation. For the following reasons, the court agrees and remands to Commerce for reconsideration of its affirmative circumvention finding.

FACTUAL BACKGROUND

On August 31, 2001, U.S. wire rod producers petitioned for the imposition of antidumping duties on carbon and certain steel wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine at less than fair value. Admin. R. Pub. ("P.R.") Pt. 1, Doc. 10, Ex. 2; Admin. R. Conf. ("C.R.") Pt. 3, Doc. 4, Ex. 2. Following the International Trade Commission's ("ITC") and Commerce's investigations, Commerce published notice of an antidumping duty order on October 29, 2002 (the "Order"). *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945 (Dep't Commerce Oct. 29, 2002) (notice of antidumping duty orders). Adopting petitioners' scope recommendation, Commerce defined the Order's scope as follows:

> The merchandise subject to these orders is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.
>
> Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).
>
> Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. . . . All

> products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

Id. at 65,946. The ITC found a single like product "consisting of all carbon and certain alloy steel wire rod included within Commerce's scope, and including the grade 1080 tire bead and tire cord quality wire rod that has been excluded from Commerce's scope." P.R. Pt. 2, Doc. 14, Attach. at 7; C.R. Pt. 4, Doc. 15, Attach. at 7.

Several years later, Deacero—a Mexican steel wire rod manufacturer—began producing and selling 4.75 mm wire rod. On February 11, 2011, U.S. wire rod producers requested that the Department initiate either a scope inquiry or an anti-circumvention inquiry[1] to determine whether imports of Deacero's 4.75 mm wire rod should be subject to antidumping duties. P.R. Pt. 1, Docs. 1–2; C.R. Pt. 3, Docs. 1–2.

Commerce declined to initiate a scope inquiry, finding that the Order referred to actual diameter and that wire rod with an actual diameter of less than 5.00 mm was outside the scope of the Order. P.R. Pt. 1, Doc. 24 at 13; C.R. Pt. 3, Doc. 7 at 13. Moreover, as Commerce found that wire rod less than 5.00 mm in diameter was commercially available prior to issuance of the Order, Commerce did not initiate a later-developed product inquiry. *Id.* at 14. Commerce did, however, initiate a minor alteration inquiry to determine whether wire rod between 4.75 mm and 5.00 mm was "altered in form or appearance in minor respects," and includable within the scope of the Order. *See Carbon and Certain Alloy Steel Wire Rod from Mexico*, 76 Fed. Reg. 33,218, 33,219 (Dep't Commerce June 8, 2011) (initiation of anti-circumvention inquiry).

Throughout the proceeding, Deacero argued that 4.75 mm wire rod was not a minor alteration of subject merchandise. In support, Deacero noted that 4.75 mm wire rod existed before the wire rod investigation, and petitioners chose to exclude it from the Order's scope. *See, e.g.*, P.R. Pt. 2, Doc. 27 at 7–8; C.R. Pt. 4, Doc. 22 at 7–8. Commerce rejected Deacero's argument, finding that a product's existence before the investigation does not "preclude[] the Department from conducting a minor alterations analysis." P.R. Pt. 2, Doc. 47 at 4; C.R. Pt. 4, Doc. 26 at 4. As a result, Commerce proceeded with an analysis of the five analytical factors found in the legislative history accompanying the circumvention statute. *Id.* (citing S. Rep. No. 100–71, at 100 (1987)). The Department issued its final affirmative determination of

[1] The court uses the phrases "anti-circumvention inquiry" and "circumvention inquiry" interchangeably throughout this opinion.

circumvention on October 1, 2012. *Final Determination*, 77 Fed. Reg. at 59,893.

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and must sustain Commerce's final affirmative circumvention determination unless it is unsupported by substantial record evidence or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court reviews the substantiality of the evidence "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

The Court undertakes a two-part inquiry to assess whether Commerce's statutory interpretation is in accordance with law. *See Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, the Court asks whether Congress has directly spoken to the question at issue. *Id.* at 842. If it has, this Court must defer to Congress's unambiguously expressed intent. *Id.* at 843. To ascertain congressional intent, the Court "employ[s] the traditional tools of statutory construction." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (internal quotation marks omitted). Although the authoritative statement is the statute's text, resort to "the statute's structure, canons of statutory construction, and legislative history" is appropriate if necessary. *Id.*

If, after consideration of the traditional tools of statutory interpretation, a statute remains "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In deciding whether to defer to Commerce's statutory interpretation, this Court will not "substitut[e] its own construction of a statutory provision for" Commerce's own reasonable interpretation. *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992) (internal quotation marks omitted); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (providing that the agency's "view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts").

DISCUSSION

I. Legal framework for anti-circumvention inquiries

The language of an antidumping duty order conclusively determines its scope. *Polites v. United States*, 465 F. App'x 962, 965 (Fed. Cir. 2012). Accordingly, Commerce may not "impermissibly expand[]" an order by "chang[ing] the scope of that order" or by "interpret[ing] an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001). Nonetheless, when questions arise regarding an order's scope, Commerce may conduct a scope determination that clarifies or reasonably interprets an order. *See Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995).

A scope determination can take two forms. When Commerce initiates a scope inquiry under 19 C.F.R. § 351.225(k) (2012), it assesses "whether a particular product is included within the scope of an order." When Commerce initiates a circumvention inquiry pursuant to 19 C.F.R. § 351.225(g)–(j), however, it asks whether a product outside an order's literal scope should nonetheless be included within the scope as part of the class or kind of merchandise subject to the antidumping duty order. Circumvention inquiries cover four types of products, including products "altered in form or appearance in minor respects . . . whether or not included in the same tariff classification." 19 U.S.C. § 1677j(c).

Section 1677j(c) is silent regarding procedure for minor alteration inquiries, but legislative history offers general insight into what factors Congress expected Commerce to consider. Specifically, Commerce examines "such criteria as the overall characteristics of the merchandise, the expectations of ultimate users, the use of the merchandise, the channels of marketing[,] and the cost of any modification relative to the total value of the imported product." S. Rep. No. 100–71, at 100. Commerce has also previously considered other factors like the "commercial availability of the product at issue prior to the issuance of the order as well as the circumstances under which the products at issue entered the United States, the timing and quantity of said entries during the circumvention review period, and the input of consumers in the design phase of the product at issue." P.R. Pt. 1, Doc. 24 at 14; C.R. Pt. 3, Doc. 7 at 14.

Unless Commerce determines that it would be "unnecessary," Commerce will include within an order's scope circumventing merchandise that is "so insignificantly" changed from covered merchandise that it should be included in the order. *See* 19 U.S.C. § 1677j(c);

Wheatland Tube Co. v. United States, 161 F.3d 1365, 1371 (Fed. Cir. 1998). Unlike other circumvention proceedings, Commerce need not consult with the ITC regarding injury prior to reaching an affirmative minor alteration circumvention determination.[2]

II. U.S. law does not preclude conducting a minor alteration inquiry when the allegedly circumventing merchandise existed during the investigation

Deacero avers as a threshold legal matter that § 1677j(c) cannot reach 4.75 mm wire rod based on the unambiguous meaning of that statutory provision. Pl.'s Mot. for J. on Agency R. ("Deacero Br."), ECF No. 50, at 12. Specifically, Deacero maintains that because § 1677j(c) applies on its face to subject merchandise "altered" in minor respects to make it non-subject, it "cannot apply to pre-existing products that were excluded by [Commerce] and the petitioners from the scope of the original investigation and resulting order." *Id.* at 14. To assess Deacero's argument, the court applies the *Chevron* framework outlined above.

A. Application of traditional tools of statutory interpretation does not unambiguously reveal Congress's intent

The circumvention statute does not define the word "alter"; consequently, the court assumes that Congress intended to "incorporate the established meaning of the[] term[]." *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997). The court may consult dictionaries to ascertain established meaning. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). Dictionaries define the verb "alter" in the following ways: (1) "[t]o make (a thing) otherwise or different in some respect," Oxford English Dictionary 365 (2d ed. 1989); (2) "to make some change in character, shape, condition, position, quantity, value, etc. without changing the thing itself for another," *id.*; (3) "[t]o change or make different; modify," Am. Heritage Dictionary of the English Language 53 (4th ed. 2000). Although Deacero argues otherwise, these definitions focus on the

[2] In the other circumvention proceedings, Commerce must notify the ITC of its intention to include circumventing merchandise within the scope of an order. *See* 19 U.S.C. § 1677j(e). This requirement permits the ITC to evaluate whether inclusion of the circumventing merchandise would conflict with the ITC's affirmative injury determination. *See id.* Because the minor alteration provision only covers insignificant changes to subject merchandise, Congress apparently did not anticipate a conflict with an ITC injury determination in that limited scenario. *Wheatland Tube Co. v. United States*, 21 CIT 808, 826, 973 F. Supp. 149, 163 (1997). Nonetheless, "Congress did not approve, through the minor alterations provision, wholesale changes to the scope of orders." *Id.*

modification of an existing item and do not clearly require that the modification result in something entirely novel.

The structure of 19 U.S.C. § 1677j further undermines Deacero's position. The subsection pertaining to later-developed products, § 1677j(d), immediately follows the subsection governing minor alterations. In referring to "later-developed" products, § 1677j(d) expressly requires that Commerce determine when an allegedly circumventing product was developed. By comparison, the neighboring § 1677j(c) imposes no such temporal requirement.

It is a canon of statutory interpretation that the court generally cannot read restrictions into a statute that the legislature has not clearly expressed. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3221 (2010) (articulating this principle in the context of patent law). That principle is particularly relevant in this case, where Congress imposed a time-based limitation in one subsection of the circumvention statute (§ 1677j(d)) and not in another (§ 1677j(c)). Accordingly, the court declines to accept Deacero's proposed interpretation as the unambiguous will of Congress when it enacted the circumvention statute.

This finding is consistent with the sparse legislative history of the minor alteration provision, which fails to confirm Deacero's proffered interpretation. *See* Deacero Br. at 14 (citing S. Rep. No. 100–71, at 100; H.R. Rep. No. 100–40, at 135 (1987); H.R. Rep. No. 100–576 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1633).

For example, Senate Report Number 100–71, at 101, reads in pertinent part:

> An important purpose of this provision is to avoid results such as the one reached by the Commerce Department in a case involving portable electric typewriters from Japan, where a minor alteration resulted in portable typewriters with calculator or memory features being excluded from the scope of an existing antidumping order on portable typewriters. The Committee intends this provision to prevent foreign products from circumventing existing findings or orders through the sale of later developed products or of products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported into the United States at the time of the original investigation. . . .

Initially, that language describes a previous version of the anti-circumvention provision that collapsed later-developed and minor alteration inquiries into a single provision; it does not directly address the version of the statute presently before the court. Moreover, the report does not unambiguously preclude application of the minor

alteration provision to pre-existing merchandise. Instead, by using the phrase "such as" with respect to Japanese typewriters, the report provides but one example of the type of behavior Congress intended the anti-circumvention statute to reach (while not necessarily foreclosing a different type of application).

The language of House Report Number 100–40 is similarly open-ended. That report reiterates that the purpose of a minor alteration inquiry is to "prevent the practice whereby a foreign producer alters the merchandise in minor respects in form or appearance to circumvent an outstanding order." *Id.* at 135. The report then offers examples of when a minor alteration inquiry "might apply," like "when steel sheet is temper rolled prior to importation into the United States or when a fire resistance coating is applied to cookware prior to importation." *Id.* The court reads that language as merely exemplary of the statute's possible applicability and, in any event, the examples do not clearly impose a temporal limitation.

B. Commerce's interpretation was based on a permissible construction of § 1677j(c)

In sum, the minor alteration statute does not unambiguously impose an implicit temporal limitation on Commerce when conducting a minor alteration inquiry. Because § 1677j(c) neither mandates nor forbids a temporal inquiry, the court next asks whether Commerce's interpretation was reasonable. The court "may look to 'the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole'" to make this determination. *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007) (quoting *NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1297 (2002)).

Commerce's refusal to read an implicit limitation into the statute was reasonable when viewed in light of the structure of the circumvention statute detailed above. Commerce's interpretation is also consistent with the overall objective behind circumvention inquiries. Congress enacted the anti-circumvention statute because the existence of various legal "loopholes" was "seriously undermin[ing] the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings, and frustrat[ing] the purposes for which these laws were enacted." S. Rep. No. 100–71, at 101. To thwart increasing circumvention, Congress sought Commerce's "aggressive implementation" of the statute. *Id.*

Congress obviously intended for Commerce to have wide latitude to aggressively apply the circumvention statute. But under Deacero's logic, a product's mere existence during the investigation—regardless

of when or where it existed, and even if no one actually knew it existed—would foreclose a minor alteration circumvention inquiry if the pre-existing product were outside the literal scope of the resulting order. Imposing this rigid requirement would weaken the wide discretionary authority that Congress granted Commerce under the circumvention statute.

Commerce's interpretation likewise comports with case law interpreting the minor alteration provision. In *Wheatland*, 161 F.3d at 1366, a domestic pipe producer appealed from Commerce's final negative scope determination. The scope of the order in *Wheatland* expressly excluded "[s]tandard pipe . . . that enters the U.S. as line pipe of a kind used for oil or gas pipelines." *Id.* at 1367. When exporters began selling expressly excluded non-subject line pipe and using it in standard pipe applications, Commerce initiated a scope determination and ultimately found that the merchandise in question was outside the order's scope. *Id.* at 1368. The domestic pipe producers argued on appeal that Commerce erred in conducting a scope determination instead of a minor alteration inquiry. *Id.* at 1369.

The court upheld Commerce's decision *not* to conduct a minor alteration inquiry because it would have forced Commerce to interpret the order to both include and exclude the same merchandise. *Id.* at 1370. The inquiry was, "therefore, unnecessary because it [could] lead only to an absurd result" and would frustrate the purpose of antidumping laws by allowing the assessment of duties "on products intentionally omitted from the ITC's injury investigation." *Id.* at 1371. In reaching this determination, the Federal Circuit noted that "[s]ection 1677j(c) does not apply to products unequivocally excluded from the order in the first place." *Id.*

The Federal Circuit later clarified its *Wheatland* ruling in *Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed. Cir. 2000). The scope of the carbon steel order in *Nippon* excluded "other alloy steel," and "other alloy steel" in turn included steel with 0.0008 percent or more of boron. *Id.* at 1350. After the order went into effect, exporters began adding boron in amounts exceeding 0.0008 to take their product outside the order's scope. *Id.* Commerce initiated a minor alteration inquiry, but this court enjoined the inquiry on the basis of the holding in *Wheatland*. *Id.* at 1356. In reversing, the Federal Circuit distinguished the broad language from *Wheatland*. First, *Wheatland* only found that Commerce's decision not to conduct a minor alteration inquiry was reasonable, but it "did not hold that Commerce had *no authority* to conduct a minor alterations inquiry." *Id.* (emphasis added). Furthermore, *Wheatland* involved "two different products, both of which were well known when the order was issued," in con-

trast to the steel product in *Nippon*. *Id.*

III. Nonetheless, based on the facts of this case, an affirmative circumvention determination was an unreasonable expansion of the Order's scope

Concluding that the minor alteration provision could plausibly reach pre-existing merchandise does not end the court's inquiry. Congress intended § 1677j(c) to apply to products "so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alterations remove them from the order's literal scope." *Wheatland*, 161 F.3d at 1371. Section 1677j(c) "does not, however, abrogate the cases prohibiting changing or interpreting orders contrary to their terms" or to the domestic like product definition. *Id.* Thus, Commerce errs when it changes an order to cover more than "insignificantly changed" merchandise. Commerce appears to have done just that in this case.

Commerce found on the record that small diameter wire rod "was commercially available prior to the issuance of the *Wire Rod Order*." P.R. Pt. 1, Doc. 24 at 14; C.R. Pt. 3, Doc. 7 at 14.[3] Commercial availability means that a product is "present in the commercial market or fully developed, i.e., tested and ready for commercial production, but not yet in the commercial market." *Target Corp. v. United States*, 609 F.3d 1352, 1358 (Fed. Cir. 2010). Because small diameter wire rod was commercially available prior to the Order's issuance, petitioners could have included it in the Order's scope. Instead, using diameter as the defining characteristic, petitioners settled on a range between 5.00 mm and less than 19.00 mm. 4.75 mm wire rod is unequivocally outside of this carefully pre-determined range.

Essentially, then, Commerce determined that 4.75 mm wire rod was a circumventing "minor alteration" of subject merchandise even though (1) it was commercially available before the Order was issued, (2) diameter was the essential characteristic defining the Order's scope,[4] and (3) wire rod with an actual diameter of 4.75 mm unam-

[3] Specifically, Commerce based its determination on a technical report from Kawasaki Steel "indicat[ing] that the firm developed a four-roll mill capable of producing wire rod with . . . diameters as narrow as 4.2 mm in the 1990s and that such small diameter wire rod was put into commercial operation in 1998." P.R. Pt. 1, Doc. 24 at 14; C.R. Pt. 3, Doc. 7 at 14. Although Commerce reached its commercial availability conclusion in deciding not to initiate a later-developed product inquiry, that factual finding is on the record in this action. Petitioners have not instituted litigation to challenge that finding, so it is now "final and conclusive." *See Target Corp. v. United States*, 609 F.3d 1352, 1363 (Fed. Cir. 2010). Defendant-Intervenors aver in briefing in this action that 4.75 mm wire rod was not commercially available, but the court "may not entertain a collateral attack" at this juncture. *See id.*

[4] Commerce concluded below that 4.75 mm wire rod differed from subject wire rod only in diameter, and that 4.75 mm wire rod was otherwise "indistinguishable in any meaningful

biguously fell outside the Order. Commerce's determination was not supported by substantial record evidence. There is nothing minor or insignificant about producing 4.75 mm wire rod when diameter is the fundamental focus of the Order and the Order intentionally excludes wire rod less than 5.00 mm in diameter.

Commerce's justification of this illogical conclusion is unpersuasive. Specifically, Commerce rationalized in its initiation memorandum:

> In *Nippon Steel* the CAFC found that the Department may be precluded from conducting a minor alteration inquiry in instances in which the product is well-known prior to the order and was specifically excluded from the investigation. The *Wire Rod O[r]der* does not specifically exclude wire rod with an actual diameter between 4.75 mm and 5.00 mm and, thus, the conditions necessary for the Department to be precluded from conducting a minor alteration inquiry are not present.

See P.R. Pt. 1, Doc. 24 at 15; C.R. Pt. 3, Doc. 7 at 15 (internal citation omitted).

Commerce's summary analysis is flawed. While there may be *some* circumstances where it would be appropriate to apply the minor alteration provision to pre-existing merchandise, Commerce incorrectly assumed that it is *always* appropriate unless the product was well-known prior to the order and was specifically excluded from the investigation. This interpretation conflicts with Commerce's own admission that circumvention inquiries are inherently fact-specific. *See id.* at 14 ("Each case is highly dependent on the facts on the record, and must be analyzed in light of those specific facts.").

Moreover, Commerce's analysis of whether the Order specifically excludes 4.75 mm wire rod is conclusory and unsupported. Commerce apparently believes that 4.75 mm wire rod is not specifically excluded from the Order because there is no clause expressly excluding wire rod with diameters between 4.75 mm and 5.00 mm. However, 4.75 mm wire rod is unlike the other "specific exclusions" in the Order, which refer to articles otherwise falling within the specified diameter range. If 4.75 mm wire rod was a commercially available product before the investigation, setting the diameter range of subject merchandise from 5.00 mm to less than 19.00 mm could not be anything less than the specific exclusion of 4.75 mm wire rod. Commerce's

sense." Carbon and Certain Alloy Steel Wire Rod from Mexico, 76 Fed. Reg. 78,882, 78,884 (Dep't Commerce Dec. 20, 2011) (affirmative prelim. determination); P.R. Pt. 2, Doc. 47 at 10; C.R. Pt. 4, Doc. 26 at 10. But this analysis ignores that diameter is the most fundamental physical characteristic under the Order. Section 1677j(c) is intended to reach products that are changed in insignificant ways to remove them from an order's literal scope. *See Wheatland*, 161 F.3d at 1371. There is nothing "insignificant" about diameter here as it is the central focus of the Order.

contrary conclusion relies too heavily on whether Commerce actually used the phrase "specifically excluded" to refer to 4.75 mm wire rod.[5]

In sum, it seems that Commerce has impermissibly interpreted the Order contrary to its carefully crafted terms. Commerce included 4.75 mm wire rod within the Order's scope even though it was commercially available before the investigation and petitioners consciously chose to limit the Order's reach to certain steel products "5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter." *See* 67 Fed. Reg. at 65,946. Rather than address these important facts, Commerce simply asserted that its determination was reasonable because 4.75 mm wire rod was not specifically excluded from the Order and application of the five factors from the legislative history signaled that the two products were similar. By taking this rigid, and ultimately flawed, approach, Commerce issued a determination that was unsupported by substantial evidence and not in accordance with law.

In reality, petitioners want to rewrite the Order so it says what they wish it had said at its inception. This belated attempt (that Commerce sanctioned) was unfair to Deacero, which invested substantial amounts of money in manufacturing what it reasonably considered non-subject merchandise. If petitioners believe they are being injured by imports of 4.75 mm wire rod at less than fair value, they should petition for the imposition of antidumping duties on small diameter wire rod. Based on the court's present understanding, a circumvention inquiry was not the proper avenue for petitioners in this case.[6]

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[5] Citing Federal Circuit case law, three Defendant-Intervenors argue that 4.75 mm is only impliedly excluded, and that implied exclusions are not specific exclusions. *See* Arcelormittal USA LLC, Gerdau Ameristeel U.S. Inc., and Evraz Rocky Mountain Steel Resp. to Deacero's Rule 56.2 Mem. of Points & Authorities, ECF No. 61, at 7. However, the cases Defendant-Intervenors cite are readily distinguishable. In *Target Corp.*, 609 F.3d at 1363, the disputed scope language referred to certain "petroleum wax candles from petroleum wax and having fiber or paper-color wicks." The Federal Circuit found that the language did not clearly and unambiguously exclude mixed-wax candles containing only *some* petroleum wax. *Id.* Here, a range from 5.00 to less than 19.00 mm "clearly and unambiguously" excludes diameters outside that range. Similarly, in *King Supply Co. v. United States*, 674 F.3d 1343, 1346–47 (Fed. Cir. 2012), the scope language referred to certain pipe fittings and explained that such fittings "are used to join sections in piping systems." The Federal Circuit agreed with Commerce that the "are used" language was exemplary and was not an end-use exclusion absent "clear exclusionary language." *Id.* at 1349. This case does not involve an end-use provision, and the diameter range here cannot reasonably be considered exemplary.

[6] Were the court to conclude otherwise, it might "frustrate the purpose of the antidumping laws" by "allow[ing] Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation." *Wheatland*, 161 F.3d at 1371. This court would also indirectly encourage manipulation of the antidumping duty process. When defining the class of merchandise subject to an investigation, petitioners normally avoid over-broad product descriptions lest they risk a negative ITC injury determination. If the court

CONCLUSION AND ORDER

For the foregoing reasons, Commerce is instructed to reconsider its finding that 4.75 mm wire rod is circumventing the Order. If Commerce continues to conclude on remand that 4.75 mm wire rod is a circumventing minor alteration of subject merchandise, Commerce must thoroughly explain how the record and relevant law supports that determination in light of the preceding discussion.[7]

Accordingly, upon consideration of all papers and proceedings in this case and upon due deliberation, it is hereby

ORDERED that the *Final Determination* is remanded to Commerce for reconsideration and redetermination in accordance with this Opinion and Order;

ORDERED that Commerce shall file its remand redetermination within ninety (90) days of the date of this Opinion and Order, that Deacero and Defendant-Intervenors shall have thirty (30) days from the filing of the remand redetermination in which to file with the court comments on the remand redetermination, and that the Government shall have fifteen (15) days from the date of the last filing of such comments in which to file with the court any responses to other parties' comments.

Dated: September 30, 2013
New York, New York

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

Slip Op. 13–130

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and EHWA DIAMOND INDUSTRIAL CO., LTD., SH TRADING, INC., AND SHINHAN DIAMOND INDUSTRIAL CO. LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 06–00248
PUBLIC VERSION

[Remanding in part investigation of sales at less than fair value of diamond sawblades and parts from the Republic of Korea.]

extended the minor alteration provision beyond truly insignificant changes to subject merchandise, petitioners would have an incentive to narrowly define subject merchandise and later broaden an order's reach through use of a minor alteration inquiry. Congress could not have intended this result.

[7] Deacero also argues that Commerce's affirmative finding of circumvention was unsupported by substantial evidence given Deacero's legitimate commercial reasons for offering wire rod of that size. The court has not addressed that secondary argument in this opinion, but will consider it after remand if appropriate.

Dated: October 11, 2013

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OPINION AND ORDER

Musgrave, Senior Judge:

This opinion addresses the merits of consolidated challenges to aspects of the investigation into sales of diamond sawblades and parts thereof from the Republic of Korea at less than "fair" value ("LTFV"). *See Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006) (final LTFV determ.) ("*Final Determination*"), as ministerially amended by *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 75 Fed. Reg. 14126 (Mar. 24, 2010). Familiarity is presumed on the background of this matter[1] as well as the standard of judicial review,

[1] *See*, *e.g.*, *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea*, 70 Fed. Reg. 35625 (June 21, 2005) (initiation of investigation into LTFV sales), PDoc 75; *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 70 Fed. Reg. 77135 (Dec. 29, 2005) (notice of, *inter alia*, preliminary LTFV determ.), PDoc 345; *Final Determination*, 71 Fed. Reg. 29310; *Diamond Sawblades and Parts Thereof from . . . the Republic of Korea*, 74 Fed. Reg. 6570 (Feb. 10, 2009) (notice of court decision not in harmony with final determination of the antidumping duty ("AD") investigations); *Amended Final Determination*, 75 Fed. Reg. 14126; *Diamond Sawblades and Parts Thereof from . . . the Republic of Korea*, 74 Fed. Reg. 57145 (Nov. 9, 2009) (AD order); *Diamond Sawblades Manufacturers Coalition v. United States*, 35 CIT __, Slip Op. 11–117 (Sep. 22, 2011) (denying motion for temporary restraining order and preliminary injunction as unripe); Order of Oct. 13, 2011, ECF No. 56 (granting temporary restraining order in part and enjoining administrative lifting of suspension of liquidation); Order of Oct. 24, 2011, ECF No. 58 (granting motion for preliminary injunction against administrative lifting of suspension of liquidation and denying motion to enjoin revocation of AD duty order); *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof* [*f*]*rom the Republic of Korea*, 76 Fed. Reg. 66892 (Oct. 28, 2011); *Diamond Sawblades Manufacturers Coalition v. United States*, 35 CIT __, Slip Op. 11–137 (Nov. 3,

19 U.S.C. §1516a(b)(l)(B)(i) (whether the administrative determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law"), which necessarily frames the issues. The reasonableness of agency action is assessed in light of the record as a whole. *E.g.*, *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). On that basis, the case will be remanded as follows.

Discussion

Addressed in order, the defendant's International Trade Administration of the U.S. Department of Commerce ("Commerce") contends (I) jurisdiction is lacking over post-section-129-determination entries but (II) agrees to remand of the determination not to adjust the total indirect selling expenses ("ISEs") for respondent Ehwa Diamond Industrial Co., Ltd. ("Ehwa") to account for expenses attributable to Ehwa's "Industrial Division." The plaintiff, Diamond Sawblades Manufacturers Coalition ("DSMC"), additionally faults the *Final Determination* for the following: (III) non-inclusion of ISEs incurred in the transaction of subject merchandise through Ehwa and its U.S. affiliates to ultimate purchasers; (IV) non-collapse of various affiliations, namely (A) Ehwa and Shinhan Diamond Industrial Co., Ltd ("Shinhan"), (B) Shinhan and its Korean affiliates, and (C) Ehwa and its affiliates in the People's Republic of China ("PRC"), as well as (D) the impact such non-collapsing had on the weighted average CONNUMs of subject merchandise sold but not produced during the period of investigation ("POI") and the calculation of separate constructed export price ("CEP") offsets for Ehwa and Shinhan; (V) the country of origin determination for finished diamond sawblades; (VI) non-issuance of Section E questionnaires to respondents and therefore (VII) non-deducted further manufacturing costs from U.S. Net Price and unadjusted CEP profit; (VIII) non-application of the major input rule in the adjustment of prices for Ehwa's and Shinhan's purchases from affiliated suppliers; (XI) unadjusted costs of reported purchases from unaffiliated non-market economy ("NME") suppliers; (X) and the decision not to base Shinhan's financial expense rate on facts otherwise available and/or adverse inferences. The consolidated plaintiff Hyosung D&P Co., Ltd. ("Hyosung") and the defendant-intervenors Ehwa and Shinhan, joined by Shinhan's U.S. affiliate SH Trading, Inc., move to contest (XI) Commerce's determination to employ its traditional zeroing methodology.

2011) (publishing reasons for Order of Oct. 24, 2011); *Diamond Sawblades Manufacturers Coalition v. United States*, 36 CIT __, Slip Op. 12–46 (Mar. 29, 2012) (denying motion to amend injunction). As used above and herein, "PDoc" refers to the public administrative record and "CDoc" refers to the confidential administrative record.

I. Jurisdiction

Jurisdiction is here pursuant to 19 U.S.C. §1516a(a)(3) and 28 U.S.C. §1581(c), but the defendant again contends none exists with respect to Commerce's determination under section 129 of the Uruguay Round Agreements Act ("URAA") to revoke the AD order on subject merchandise, and therefore the court lacks jurisdiction over the entries effected thereby.

To repeat: The defendant is correct that no jurisdiction exists over the section 129 determination, since the DSMC did not challenge it, but that does not translate to automatic divestment of jurisdiction over the entries covered by the administrative decision to revoke. Following in the wake of the section 129 determination, Commerce's decision to revoke the AD order is independent of that determination, and the entries it would effect necessarily remain subject to this action. *See*, *e.g.*, 36 CIT ___, Slip Op. 12–46 (Mar. 29, 2012). In other words, the opportunity to challenge the section 129 determination is indeed a separate matter, but the decision to revoke the AD order is "final" only in the sense that the section 129 determination (upon which that revocation decision depends) may not be challenged judicially. That does not equate to a powerlessness to rescind the revocation, should the final outcome of this matter so require, because it is not the legality of the section 129 determination currently supporting revocation in the first instance that governs jurisdiction here. The outcome of this action in fact governs the "continued propriety" (for want of a better phrase) of that revocation,[2] and this court continues to adhere to the view that Commerce cannot act to divest this court of

[2] During the hearing on the DSMC's motion for preliminary injunction the court asked the DSMC whether the "cleaner" procedural avenue would be to bring a separate challenge to the section 129 determination and then consolidate that action with its LTFV action here. The DSMC argued that such a procedure was not only unnecessary but inappropriate, as the section 129 determination was technically correct as it stood, *i.e.*, based on the record before Commerce at the time and before any final judicial decision on this matter affecting the margin calculus, and therefore it had no lawful basis to contest that determination. Reflecting on the argument, the court agreed that a merely technical appeal of that section 129 determination was unnecessary in order for the DSMC to preserve a right of reinstatement of the AD order, were it to prevail on the issues it raises in its LTFV appeal here. *See*, *e.g.*, *Globe Metallurgical Inc. v. United States*, 31 CIT 1722, 1728, 530 F. Supp. 2d 1343, 1349 (2007) ("Commerce is bound to reinstate the order if the legal basis for revocation . . . is withdrawn"), quoting that defendant's reply brief at 4 (this court's ellipsis). Liquidation of the entries "subject to" the section 129 determination, *i.e.*, those made after the effective date of revocation, had been, and could continue to be, enjoined in order to preserve the DSMC's right to relief over those entries pending a final decision in *this* appeal, and therefore "requiring" a challenge to that section 129 determination, simply, *arguendo*, in order to "further" preserve the DSMC's rights with respect those entries impacted by the section 129 determination, was not only inappropriate but would have amounted to a waste of resources. The court therefore determined to continue that suspension of liquidation, even after the time for challenging the section 129 determination under 19 U.S.C.

the jurisdiction here retained, nor deprive the court of the ability to grant relief over any of the entries covered by such jurisdiction, and for which liquidation continues to be suspended. The *status quo* of this matter is of an AD order that is based upon an affirmative final determination of LTFV sales that Commerce has decided to revoke as a consequence of its implementation of the section 129 determination results. Were this matter ultimately to sustain an affirmative final determination of LTFV sales even in the absence of zeroing methodology, rescission of that revocation would not (continue to) be the lawful result. In that circumstance, if liquidation is permitted to occur between revocation and rescission of revocation, the DSMC will have been deprived of the full relief to which success in this matter entitles them, as compelled by the original *status quo* of this matter before Commerce. Therefore, the current *status quo* is not "like" the circumstance of an original negative determination of LTFV sales, where petitioners' precatory motions to a court to enjoin liquidation have been routinely denied. Or, if it is, then the situation is similar to petitioners having no immediate equitable right to enjoinder of liquidation when seeking to change the *status quo* of an original *negative* LTFV investigation and pursuant to which no AD order has issued, *i.e.*, respondents have no immediate equitable right to liquidation on the basis of a changed *status quo* occasioned by revocation of an AD order as the result of a section 129 determination that occurs in the midst of a judicial challenge to the underlying *affirmative* LTFV investigation and pursuant to which an AD order has issued. Administrative revocation pursuant to a section 129 determination in that circumstance can only be regarded as interlocutory, *i.e.,* provisional, and dependant upon the outcome of this matter, over which the court has jurisdiction, and the relief sought herein.[3] *Cf. Advanced Technology & Materials Co., Ltd. v. United States*, 37 CIT ___, Slip Op. 13–129 (Oct. 11, 2013).

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§1516a(a)(2)(A) & (B)(vii) had passed. *See* Slip Op. 12–46; *see also* Slip Op. 11–137. Entries suspended pursuant to litigation are to be liquidated in accordance with the final judgment in this action, *see* 19 U.S.C. §1516a(e), or pursuant to administrative review, *see infra* n.3, and in accordance with that statute, the DSMC averred that to the extent the final decision in this matter is of AD margins that are above *de minimis* and regardless of the absence of zeroing methodology employed in the section 129 recalculation, relevant suspended entries cannot be liquidated in a manner contrary to that final judgment. To that extent, they were, and are, correct.

[3] The court has become aware that Shinhan recently filed an unopposed motion to modify the injunction so as to permit liquidation as to entries covered by the completed first and second administrative reviews. The motion will be considered in due course.

II. Voluntary Remand for Recalculation of Ehwa's Divisional ISEs

The DSMC contest two aspects of Commerce's treatment during the investigation of Ehwa's reported indirect selling expenses (ISEs). These are fixed costs that a seller would incur regardless of whether a sale is made; they do not vary with the quantity sold or relate to a particular sale but may reasonably be attributed to such sales through proper cost accounting methodology.[4] *See* 19 C.F.R. §351.412(f)(2). On the first of its ISE claims, the DSMC point out that early in the investigation Ehwa originally reported that only its Stone & Construction division sells subject merchandise and based its reported ISEs on the expenses and sales of that division. *See* Issues and Decision Memorandum accompanying *Final Determination* ("*I&D Memo*"), PDoc 529, at cmt. 19. Subsequent to the preliminary results, Commerce issued a scope ruling that certain merchandise sold by Ehwa's Industrial Division, its only other division, was in-scope. The rationale behind Ehwa's divisional reporting having thus disappeared, the DSMC pointed this out in its case brief and requested that Commerce recalculate and apply Ehwa's ISEs on a company-wide basis. PDoc 528, CDoc 231, at 74. Commerce agreed in principle, but declined to make the adjustment at the time on the belief that the impact would be negligible. It now requests remand in order to reconsider, and the DSMC concur. Ehwa opposes for various reasons, but Commerce's request does not appear to involve a change in or interpretation of policy or frivolousness or bad faith. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1027–30 (Fed. Cir. 2001). The matter will be remanded accordingly.

III. Exclusion of Ehwa's Inter-Company ISE's

The second ISE claim concerns sales of some of Ehwa's subject merchandise being transacted through one, two, or sometimes three

[4] Commerce typically allocates ISEs by calculating an ISE ratio derived by dividing the total ISEs (x) by the total sales value (y). The defendant explains that x and y are linked: if an expense is included in x, then the sales value is included in y, and *vice versa*, and the ISE ratio is multiplied by the price of each sale. *See*, *e.g.*, *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea,* 67 Fed. Reg. 11976, 11979 (Mar. 18, 2002) (final AD review results) and accompanying issues and decision memorandum at cmt. 1. Commerce thus includes ISEs in its calculations by first dividing the value of a company's ISEs by the total value of the company's sales, and then applying the same ratio to all sales. Its general practice has been to calculate separate ISEs for each separate company and regardless of whether separate companies are affiliated. *See*, *e.g.*, *Carbon and Alloy Steel Wire Rod from Trinidad and Tobago*, 71 Fed. Reg. 65077, 65079 (Nov. 7, 2006) (prelim. AD review results). Commerce will also accept an intra-company divisional calculation and corresponding application of ISEs where a respondent can show that only certain divisions sold subject merchandise and can accurately segregate those divisions' ISEs from those of divisions not selling subject merchandise.

affiliates before ultimately being transacted to unaffiliated customers. The DSMC argued for inclusion in the dumping calculation of ISEs incurred at each step of such sale processes. *See* DSMC Br. at 22–25. Commerce agreed in the *Final Determination* that separate ISEs should be calculated for Ehwa and each of its selling affiliates, but it declined to "stack expenses associated with transferring merchandise from one affiliate to the next in addition to the expenses that each affiliate experiences when preparing to sell to external customers." *I&D Memo* at cmt. 20. Commerce reasoned that the intercompany expenses and sales values between Ehwa and its U.S. affiliates are not includable ISEs "because selling expenses are incurred when selling to external customers, not for transfers between affiliates", *id*., and it thus included only ISEs incurred by the entity selling to the first unaffiliated customer in its calculations.

The DSMC contend this was inappropriate and illogical. They argue that each of Ehwa's U.S. selling affiliates was involved in eventual sales of subject merchandise to unaffiliated customers in the U.S., *see* PDoc 147, CDoc 46, at A-13–14 and Ex. A-6, and that Commerce should capture all of Ehwa's and its affiliates' ISEs that are attributable to sales of subject merchandise. According to the DSMC, this would involve separate calculations of ISE ratios for each affiliate and having the denominator for each ratio reflect the total sales value for each company, inclusive of transfer price, not the U.S. sales value net of inter-company sales.

In opposition, the defendant contends Commerce's practice of not deducting expenses associated with sales made to affiliated customers should be sustained:

> When the ISE ratio is applied to the price of total sales, the resulting ISE that is deducted from the CEP represents the portion of the sales that Commerce deems to represent the ISE associated with that sale. If Commerce were to include the affiliate transfers in the ISEs (x) and total sales value (y) in the ISE ratio for each selling affiliate, Commerce would be including at least a portion of the affiliate-related expense in the ISE that is eventually deducted from the CEP[, which] . . . would run afoul of Commerce's practice of not deducting expenses related to sales made to affiliated importers in the United States.

Def's Resp. at 63. The defendant's apparent reference point for this contention, in addition to the *I&D Memo* 's analysis, is *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir. 2001) ("Commerce logically must deduct only those expenses incurred solely in CEP

transactions, *i.e.*, only those expenses associated with the sale of subject merchandise to an unaffiliated purchaser in the United States by a party affiliated with the foreign producer or exporter").

The court will defer to administrative policy that is reasonably explained, but the reasons here, on why intra-transfer costs are not ISEs that are borne by the ultimate customer, appear *ipse dixit*, and the defendant's explanation of that practice, if it exists, appears circular. To "incur" means "[t]o suffer or bring on oneself (a liability or expense)." *Black's Law Dictionary*, p. 782 (8th ed. 2004). The parties' main difference on this point seems philosophical, but the DSMC's argument has a certain accounting logic behind it, in that an ISE "incurred" with respect to the ultimate customer is no less "incurred" at each stage of transacting the merchandise, in this instance from Ehwa through each relevant affiliate to the ultimate purchaser, which the defendant apparently concedes. *See supra*. While intra-company transfers do not impact cash flow, there are apparent associated selling costs that might properly be considered ISEs in accordance with 19 U.S.C. §1677a(d)(1)(D). *Cf.* 243 F.3d at 1306 (ISEs include, *e.g.*, rents on sales office space, salespersons' salaries, and certain inventory carrying costs). By contrast, the court does not discern a double-counting concern in Commerce's "stacking" point. Whether that is indeed the case, the matter needs clarification before proceeding further and will therefore be remanded for that purpose. On remand, Commerce is not precluded from reconsidering the issue anew, as long as it provides a reasonable explanation therefor.

IV. Determination Not To Collapse Ehwa, Shinhan, and Affiliates

Commerce may calculate a single AD rate for producers where (1) they are affiliated, (2) have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (3) there is a "significant potential" for the manipulation of price or production. 19 C.F.R. §351.401(f).[5] In the investigation, Commerce found that Shinhan and Ehwa satisfy the first two criteria: they are affiliated with each other, and they have production facilities for similar or identical merchandise. Shinhan is also affiliated with other Korean firms from which it procures inputs. Ehwa is also affiliated with certain PRC firms from which it too procures inputs. For the *Final Determination*, nonetheless, Ehwa was not collapsed with Shinhan,

[5] Commerce originally selected "significant potential" as the appropriate standard to address the problem of prospective manipulation. *See Antidumping Duties; Countervailing Duties*; 62 Fed. Reg. 27296, 27345–46 (final rule) (May 19, 1997) ("*Preamble*").

Shinhan was not collapsed with its Korean affiliates, and Ehwa was not collapsed with its PRC affiliates.

The DSMC's arguments here concern only Commerce's findings and conclusion on the significance of the potential for price or production manipulation. *See* 19 C.F.R. §351.401(f)(1). That significance depends upon a non-exhaustive list of such factors as (1) the level of common ownership, (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and (3) whether operations are intertwined, such as through sharing of sales information, involvement in production and pricing decisions, sharing of facilities or employees, or significant transactions between affiliated producers. 19 C.F.R. §351.401(f)(2). The determination is based upon the totality of the circumstances, not upon any single factor. *See*, *e.g.*, *JTEKT Corp. v. United States*, 33 CIT 1797, 1825, 675 F. Supp. 2d 1206, 1233 (2009).

A. Determination Not to Collapse Ehwa and Shinhan

Commerce preliminarily determined to collapse Ehwa and Shinhan on the ground that "[[ ]] have the ability and the potential to coordinate their actions in order to direct Ehwa and Shinhan to act in concert with each other, given the management overlap by the companies' senior managers, *i.e.*, [[ ]] hold senior management positions and board of director positions in Ehwa and Shinhan." Memorandum, re: *Petitioner's Allegation Regarding the Business Relationship Between Two Respondents* (Dec. 20, 2005) (preliminary collapsing memorandum), PDoc 335, CDoc 123, at 7–8.

For the *Final Determination*, Commerce reversed course. In concluding that as between Ehwa and Shinhan there did not exist a significant potential for price and production manipulation, Commerce specifically found as follows: (1) "there are no individuals jointly employed by both Shinhan and Ehwa, or serving as members of each company's board of directors"; (2) [[ ]] are in the minority on each company's board of directors, [[ ]]; (3) "there is no evidence that Ehwa and Shinhan have shared any employee, let alone a senior manager, for the last 18 years since [[ ]] left in 1987"; (5) "there are no persons that sit on the board of directors of both Ehwa and Shinhan, or are otherwise shared by both companies"; (6) "even though [[ ]], there is no one person or persons shared by both companies that can effectuate and coordinate the activities of both companies"; (7) "there are no intertwined operations between Ehwa and Shinhan"; (8) "[d]uring verification, the Department was unable to identify any business connections between the companies"; (9) "during verifica-

tion, [it also] found evidence that Ehwa and Shinan do not cooperate with each other", specifically (a) there were no transactions between the companies for 10 years; (b) there were no shared patents; (c) Ehwa had [[ ]]; (d) Ehwa and Shinan have competing overseas offices; and (10) although the CEO of Shinhan owns 18 percent of Ewha, "the Department verified that he [[ ]]" Memorandum, re: *Collapsing for the Final Determination* at 8–10 (May 15, 2006) ("*FCM*"), PDoc 536, CDoc 241, at 9–10. Thus, "Ehwa and Shinhan[,] while having substantial common ownership, do not have the significant potential for price or production manipulation given the absence of interlocking boards of directors, no shared managers, no intertwined operations, and evidence of non-cooperation" in the form of [[ ]]. *Id*. at 10. *See I&D Memo* at cmt. 13.

Despite the foregoing, the DSMC argue that Commerce's decision was not adequately explained and that the record demonstrates a strong potential for manipulation of price and/or production between these parties. In particular, they point to Commerce's acknowledgment that [[ ]] sat on the boards of directors of both Ehwa and Shinhan, that [[ ]], and that there is "substantial common ownership." The DSMC contend there is no evidence on the record to prove a separation of professional and personal interaction between [[ ]], that Commerce's final "belief" that coordination of activities between the two companies could not be effected through [[ ]] is insufficiently explained, and that there is no new evidence between the preliminary and final determinations to justify the opposite conclusion that collapse was not warranted. *E.g.*, DSMC Reply at 2–3, referencing Def's Resp. at 17 & PDoc 515, CDoc 217, at 22–32. The DSMC also contend Commerce's practice as it existed in 2006 supported collapsing companies even in the absence of intertwined operations so long as there was common control and overlapping boards.

These arguments are insufficient to undermine the substantiality of the evidence of record in support of Commerce's determination. Apart from the fact that the cases to which the DSMC refer[6] post-date the investigation at bar, even if Commerce's practice in 2006 existed as contended it could not be construed as a *per se* rule, since Commerce specifically rejected that approach when it adopted 19 C.F.R.

[6] *See* DSMC Br. at 9–10, referencing *Chlorinated Isocyanurates from the People's Republic of China*, 74 Fed. Reg. 68575 (Dec. 28, 2009) (final AD new shipper review results); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 Fed. Reg. 11349 (Mar. 17, 2009) (final AD admin. and new shipper reviews)

§351.401(f).[7] And regarding the absence of new facts between the preliminary and final determinations, that circumstance does not, without more, render the latter decision unreasonable on its own, since, by definition, a preliminary determination is without the force of law. *See*, *e.g.*, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *NEC Corp. v. United States*, 151 F.3d 1361, 1374 (Fed. Cir. 1998); *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998) ("*SCBD*"). The only relevant question for the court is whether substantial record evidence supports the final conclusion that there was no potential for price or production manipulation based on the totality of the evidence. *Cf. SCBD*, 143 F.3d at 523.

On a more precise tack, the DSMC also stress that Commerce failed to address a report alleging that the president of Ehwa "created a sales subsidiary in the United States under his wife['s] name[,] . . . began exporting product to the United States at a 10 percent discounted price, . . . [and] misappropriated the additional profit of $2.55 million and the U.S. subsidiary's sales profit, for a total of $4.37 million", and that "evidence of a previous criminal scheme involving price manipulation was clearly relevant to the question of whether there was a significant potential for the manipulation of price". They also mention that both Ehwa and Shinhan in their Section A questionnaires [[

]]. *See* DSMC 56.2 Br. at 9–13, referencing Petitioners' letter to Commerce dated December 6, 2005, re: *Collapsing of Shinhan and Ehwa*; DSMC Reply at 4; *see also* DSMC Collapse Request, PDoc 293, CDoc 106, at 2.

Ehwa contends it provided rebuttal to Commerce to show that Ehwa's president was never arrested nor charged with any criminal scheme involving price manipulation but was instead charged with failing to report to the Korean Ministry of Finance his purchase and ownership of real estate in the United States, for which penalties were suspended upon the presumption that he had been unaware of his reporting requirement as a permanent resident of the United States. Ehwa also contends Commerce verified the evidence it provided to contradict the claim of [[

[7] *See Preamble*, 62 Fed. Reg. at 27345–46 (any finding of potential for price manipulation would lead to collapsing in almost all circumstances in which producers are affiliated, which "is neither the Department's current nor intended practice"; collapsing "requires a finding of more than mere affiliation"). Commerce also refused to include examples because collapsing is "very much fact-specific in nature, requiring a case-by-case analysis". *Id*. at 27246.

]]. *See* Ehwa Resp. at 14–15; CDoc 202 at 5–6, referencing Ex. 4 at 30A-30B thereto. The defendant adds that Commerce considered the relevancy of the arrest allegation "unclear" to the collapsing analysis, that Commerce can pick and chose which factors are relevant and make factual findings as to those factors, and that an explanation is not required in instances "where the agency's decisional path is reasonably discernible." Def's Resp. at 24, referencing, *inter alia*, *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966), *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998), and *JTEKT*, *supra*, 33 CIT at 1826, 675 F. Supp. 2d at 1234. The defendant and Ehwa both argue that Commerce examined the issues thoroughly,[8] and that in the final analysis Commerce's conclusion not to collapse Ehwa and Shinhan was reasonable because a party cannot be required to provide indisputable proof of a negative, *i.e.*, of a lack of professional and personal interaction between [[

]]. *See Allied Tube*, 24 CIT at 1374–75, 127 F. Supp. 2d at 222–23.

The absence of evidence is not evidence of absence,[9] of course, *cf. id.*, but Commerce is duty-bound to consider the available evidence on the level of common ownership and the extent to which there are shared board members. *See*, *e.g.*, *JTEKT*, 33 CIT at 1826–27, 675 F. Supp. 2d at 1234. The court cannot substitute its own judgment on such matters but can only review on the basis of substantial evidence on the record or for abuse of discretion. At the same time, however, the agency's explanation of its decision must be clear enough to enable judicial review, and cannot "leave vital questions, raised by comments which are of cogent materiality, completely unanswered." *United States v. Nova Scotia Food Prods.*, 568 F.2d 240, 252 (2d Cir. 1977).[10]

The material issue here is the potential for price or production manipulation. From the fact that Commerce did not discuss the DSMC's evidence or arguments with respect to the arrest and [[

[8] *See* Shinhan Cost Verification Report, CR 193; Ehwa Cost Verification Report, CR 194; Shinhan Home Market and Export Price Sales Verification Report, CR 198. Shinhan CEP Sales Verification Report, CR 199; Ehwa CEP Sales Verification Report, CR 201; Ehwa Home Market and Export Price Sales Verification Report, CR 202.

[9] *See*, *e.g.*, *Porter v. Secretary of Health and Human Services*, 663 F.3d 1242, 1264 (Fed. Cir. 2011), parenthetically quoting *Gass v. Marriott Hotel Servs., Inc.*, 558 F.3d 419, 436 (6th Cir. 2009) (Boggs, C.J., dissenting).

[10] According to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, Pub. L. No. 103–465, H. Doc. 103–316, vol. VI (1994) ("*SAA*"), at 892, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4215, "[e]xisting law does not require that an agency make an explicit response to every argument made by every party, but instead requires that issues material to the agency's determination be discussed so that the path of the agency may reasonably be discerned by the reviewing court" (internal citations omitted).

]] allegations of record in the *I&D Memo* or in the final collapsing memorandum for Ehwa and Shinhan, it may be inferred that Commerce determined that the DSMC's evidence was insignificant, immaterial, or not seriously undermining enough to merit discussion. In that regard, the DSMC do not persuade that Commerce's determination on the evidence of record before it was unreasonable. *See Altx, Inc. v. United States*, 370 F.3d 1108, 1113 (Fed. Cir. 2004) (an agency must "address significant arguments and evidence which seriously undermines its reasoning and conclusion" but "need not address every argument and piece of evidence"). More broadly, the DSMC do not persuade that Commerce's determination not to collapse Ehwa and Shinhan was unreasonable at the time. Although Ehwa and Shinhan are not only affiliated but [[ ]], Commerce essentially concluded that the other evidence of record showed the two to be competitive, not cooperative or potentially cooperative. The court cannot re-weigh the evidence in support thereof and substitute judgment therefor.

B. Determination Not to Collapse Shinhan with its Korean Affiliates

The threshold question in a collapsing inquiry is whether the affiliate is a producer of the subject merchandise or the foreign like product. *See* 19 C.F.R. §351.401(f)(1). Commerce determined not to collapse Shinhan and three of its Korean affiliates, Technoplus Co., Ltd. ("TPC"), Namdong Tools ("Namdong"), and INCOM, "because TPC, INCOM, and Namdong have not been demonstrated to be producers of either subject merchandise or the foreign like product". Shinhan Collapsing Memo, PDoc 235, CDoc 242, at 5. More precisely, Commerce observed that the "petitioner notes that TPC [[ ]] and that INCOM provided Shinhan, through TPC, [[ ]]" and it found that a review of the scope language evidenced that "[[ ]] are neither subject merchandise [n]or the foreign like product"; therefore, Commerce found that neither TPC nor INCOM were producers as required by the regulation. Shinhan Collapsing Memo, PDoc 235, CDoc 242, at 4–5. Commerce thus found no record evidence to demonstrate that during the POI either Namdong or INCOM have production facilities for producing subject merchandise or foreign like or similar products that would not require substantial retooling in order to restructure manufacturing priorities, and it rejected the DSMC's argument that the likelihood that they possessed such facilities should be assumed. *See id*. Commerce further found that TPC's facility had not been used before the POI to make subject merchandise or foreign like product,

and from the fact that Shinhan had [[ ]] during the POI Commerce concluded that TPC did not "make use" of the production facility during the POI. *Id*.

The DSMC contest those determinations, but they do not appear to be unreasonable. They argue that the fact that TPC [[ ]] in no way demonstrates or supports finding that TPC did not make use of the facility during the POI, that there is no other evidence of record to support the assertion, and that the very fact that [[ ]] demonstrates that TPC met the second requirement for collapse, *i.e.*, that it "has" a facility that would not require substantial retooling in order to produce subject merchandise or foreign like product. The argument overlooks the standard of judicial review, however. The collapsing regulation does not delimit the extent to which producers "have" the necessary facilities to qualify under the regulation. Possession being nine-tenths of the law, the court is unable to find Commerce's interpretation of its regulation in this instance unreasonable.

The DSMC also contend Commerce points to no evidence supporting its finding that Namdong and INCOM were not producers of subject merchandise. That, however, does not accurately characterize the standard for satisfying the particular collapsing criterion, *see Allied Tube*, *supra* (re: proof of a negative), or the reviewing standard here. The administrative determination is based on a lack of evidence on the record that these affiliates produced subject merchandise. Commerce's finding with respect to INCOM is based upon the DSMC's own description of INCOM's production. PDoc 235, CDoc 242, at 5. With respect to Namdong, Commerce found no record to demonstrate that the goods it produces were in fact subject merchandise or foreign like product, *id.*, and Commerce verified that all the transactions on Namdong's domestic sales ledger for fiscal year 2004 were for tolling services for Shinhan. *Id.* Reasonable minds may differ over the same set of facts, but it appears Commerce investigated the issue and reasonably construed the available record in making its finding. The court, once again, cannot substitute judgment on the matter even were it to agree with the DSMC on the issue. *See Consolo*, *supra*, 383 U.S. at 620.

C. Determination Not to Collapse Ehwa with Certain PRC Affiliates

Weihai Xingguang Mechanical Ind. Co., Ltd. ("Weihai") and Fujian Ehwa Diamond Industries ("Fujian") are Ehwa's [[ ]] PRC affiliates. They provided inputs used in the production of Ehwa's subject merchandise in Korea. Weihai and Fujian both pro-

duced [[ ]], and Ehwa reported [[ ]] from both of these affiliates. The operations of all these entities were intertwined by significant [[ ]] arrangements between them. *See* PDoc 528, CDoc 231, at 64–65; Ehwa's Sec. A QR (Aug. 26, 2005), PDoc 147, CDoc 46, at A-4, A-7 & Ex. A-4; Ehwa's Supp. Sec. A QR (Sep. 29, 2005), PDoc 185, CDoc 56, at SA-6. For the *Final Determination*, Commerce concluded that the AD statute precludes it from collapsing producers across country lines, and it therefore determined not to collapse Ehwa with its PRC affiliates. *See I&D Memo* at cmt. 15, referencing *Stainless Steel Bar from Italy*, 67 Fed. Reg. 3155 (Jan. 23, 2002) (final LTFV determ.), and accompanying issues & decision memorandum at cmt. 8. *See Slater Steels Corp. v. United States*, 27 CIT 1786, 297 F. Supp. 2d 1362 (2003).[11]

The DSMC argue that but for Commerce's conclusion that it is statutorily precluded from collapsing across country lines, Ehwa and its PRC affiliates would meet that test, since Commerce's regulation asks, among other considerations, whether there is "involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers" 19 C.F.R. §351.401(f)(2)(iii). The DSMC point out that the definition of "affiliated persons" in 19 U.S.C. §1677(33) is not limited to any type of geographical location and that Commerce's collapsing regulation only asks whether those affiliates "have production facilities for simi-

[11] Commerce's reasoning in *Slater Steels*, as restated and sustained by the court at the time, may be reduced to the following: the definition of "normal value" in 19 U.S.C. §1677b(a)(1)(B) is the price of "foreign like product" sales in the home market, in a third country, or constructed value, and the definition of "foreign like product" under 19 U.S.C. §1677(16) is identical or similar merchandise that is "produced" in the "same country" as the subject merchandise; *ergo*, Commerce can only analyze for purposes of collapsing that production that occurs in the same country as the foreign like product or the subject merchandise -- and notwithstanding any cross-border production line. *See* 27 CIT at 1788, 297 F. Supp. 2d at 1364–65. Commerce also gleaned support from the definition of "country" in 19 U.S.C. §1677(3), which does not permit more than one country from being aggregated and treated as an "association" for purposes of AD proceedings. *See id*.; *see also* 19 U.S.C. 1677(12) ("attribution of merchandise to country of manufacture or production": "[f]or purposes of part I of this subtitle, merchandise shall be treated as the product of the country in which it was manufactured or produced without regard to whether it is imported directly from that country and without regard to whether it is imported in the same condition as when exported from that country or in a changed condition by reason of remanufacture or otherwise"). Commerce emphasized for the *Final Determination* that its regulation makes "clear" that collapsing is relevant to "an antidumping proceeding," which "only involves the subject merchandise of one country", *I&D Memo* at cmt. 15, referencing 19 C.F.R. §351.401(f), and it further stated that when it has used information from two companies to calculate a single weighted-average margin for those companies, it has done so only within the confines of "single proceeding, which involved a single country", *id*., referencing *Gray Portland Cement and Clinker From Mexico*, 66 Fed. Reg. 14889 (Mar. 14, 2001) (final AD admin. rev. results).

lar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. §351.401(f)(1). They also point out that Congress specifically provided for cross-border analysis in several instances such as the "special rule for multinational corporations," which requires, when certain conditions are met, normal value to be determined by reference to the value at which the foreign like product is sold from one or more facilities outside the exporting country. 19 U.S.C. §1677b(d).[12]

It is undisputed that this was a "single proceeding" to determine the viability of an AD order on subject merchandise from a "single country" and that the merchandise that is the subject of the investigation consists, at least in relevant part, of Ehwa-exported products of Korea comprised of inputs manufactured by Weihai and Fujian and transferred to Ehwa. The DSMC are correct in pointing out that the AD statute does contemplate cross border analysis in certain situations, and that *Slater Steels* does not amount to a blanket prohibition against such analysis in every instance, *see* 27 CIT at 1788, 297 F. Supp. 2d at 1364 ("[*e*]*xcept for* specific enumerated exceptions to the rule, consolidating . . . data across country lines for [AD] investigations is prohibited")[13] (italics added), but the fact that cross-border

[12] Ehwa argued before Commerce that section 1677b(d) was "inapposite" to the facts of this case because that provision pertains to situations where normal value is determined by being based, in part, on sales in a third country, whereas the *Final Determination* is based entirely on a normal value of home market sales. The *Final Determination* does not rest on such ground, but that may well be the case, as there are three criteria that must be met before section 1677b(d) is invoked: (1) subject merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of the foreign like product which are located in one or more third countries; (2) the market in the country from which the merchandise is exported to the United States is "not viable" because either (a) the foreign like product is not sold for consumption in the exporting country; (b) the aggregate quantity (or value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States; or (c) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price; and (3) the normal value of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country. *See* 19 U.S.C. §1677b(d).

[13] It has been observed that the most "vital" consideration to preserving the integrity of AD orders is the determination of the "country of origin" of "production", not only of subject merchandise but also of the foreign like product. *See E.I. Du Pont de Nemours & Co. v. United States*, 22 CIT 370, 375, 8 F. Supp. 2d 834, 859 (1998). In those determinations, the necessity of cross-border analysis is readily apparent in other contexts. For example, the anti-circumvention statute specifically precludes completion or assembly operations -- which are indisputably a part of "production" -- from attaching a different country of origin

analysis is required in certain instances does not render Commerce's broad interpretation of preclusion from "collapsing" "producers" across country lines unreasonable, and the DSMC's arguments do not persuade that calculating a single weighted-average margin that would include Ehwa's PRC affiliates within the ambit of the order pursuant to Commerce's collapsing methodology would be permissible under the AD statute. The DSMC's concerns implicate the whole of the production line, including one that cuts across country borders, but a degree of protection from manipulation of "production" (as Commerce interprets that term) may be afforded in the forms of the anti-circumvention statute, 19 U.S.C. §1677j, as well as the present AD order on diamond sawblades and parts thereof from the PRC from that separate proceeding.

D. Incidental Issues Implicated By Collapsing

In addition to the foregoing, the DSMC contest the effect of the determination not to collapse Ehwa and Shinhan upon the calculation of separate constructed export price (CEP) offsets and CONNUMs sold but not produced during the POI that were not weight-averaged. These issues being derivative, the foregoing obviates their further consideration.

V. Country of Origin for Finished Diamond Sawblades

Commerce typically uses a three-part "substantial transformation" test to determine a product's country of origin: (1) whether the processed downstream product falls into a different class or kind of product when compared to the upstream product, (2) whether the essential component of the merchandise is substantially transformed in the country of exportation, and (3) the extent of processing in the exporting country. *See I&D Memo* at cmt. 3; *see*, *e.g., Advanced Technologies & Materials Co. v. United States*, 35 CIT __, Slip Op. 11–122

to subject merchandise. 19 U.S.C. §1677j. Congress has also recognized a state of subject merchandise "exportation from an intermediate country" in which production of foreign like product is also occurring. In that instance, subject to certain exceptions, normal value is to be determined "in" such intermediate country based on that foreign like product. 19 U.S.C. §1677b(a)(3). Thus, under such analyses, the foreign like product that is used for the determination of normal value is not considered "produced" in the "same country" as that in which the subject merchandise has actually been produced -- as otherwise "required" by 19 U.S.C. §1677(16). *And cf.* 19 U.S.C. §1677b(d) (special rule for multinational corporations). In other words, the analyses required by the "exceptions" to which *Slater Steels* alludes can only be achieved without violating the "produced in the same country" mandate of section 1677(16)(A) via cross-border analyses. But, that, perhaps, is merely to restate the obvious.

(Oct. 12, 2011) ("*Advanced Tech II*"), at 8. In this instance, Commerce ultimately determined that the place where the segments and cores are joined governs the finished diamond sawblades' country of origin.

The DSMC argue this result is an invitation for circumvention. They contend the first of the above factors clearly supports finding a lack of substantial transformation, in that cores, segments and sawblades were all considered the same "class or kind" of merchandise, *see* Def.'s Br. at 54, and that Commerce has failed to explain how it could logically make that determination and also find that joining two of those items into the third constitutes a "substantial transformation."

The court again cannot agree Commerce's reasoning was illogical or unsupported by substantial evidence. As in the investigation of subject merchandise from the PRC, Commerce had to make a choice, and it resolved the factual issues by reference to *Erasable Programmable Read Only Memories (EPROMs) From Japan*, 51 Fed. Reg. 39680 (Oct. 30, 1986) (final LTFV determ.) and *3.5″ Microdisks and Coated Media Thereof From Japan*, 54 Fed. Reg. 6433 (Feb. 10, 1989) (final LTFV determ.) ("*Microdisks*"). Commerce found the fact that finished diamond sawblades, segments and cores are all one "class or kind" not dispositive because substantial transformation can occur between upstream and downstream products within the same class or kind of merchandise under investigation. Commerce concluded that the substantial transformation test in such instances is not controlled by whether there is a "change" in the class or kind of merchandise but by what the "essential quality" is that is imparted to the imported merchandise through such transformation, as well as the extent of manufacturing and processing. The DSMC argued that the diamond segments are what give a finished diamond sawblade its essential character, but Commerce concluded

> it appears that neither the cores nor the segments *alone* constitute the essential component of the product under investigation. A finished DSB is not *functional* until the segments are attached to the core . . . [and i]t is apparent that even the petitioner recognizes the importance of the attachment process in imparting the essential quality of the finished product. Therefore, given the priority that both the petitioner and a respondent have placed on the importance of attaching cores and segments, the Department finds that the essential quality of the product is not imparted until the cores and segments are attached to create a finished DSB.

I&D Memo at cmt 3 (italics added).

The DSMC here contend Commerce never explained what qualities or quality it deemed essential in this instance. If that is technically true, it is not fatal to the agency's determination. Commerce could not tell whether segments or cores impart the "essential quality" of a finished diamond sawblade, but it found that the attachment process governs when that essential quality -- whatever it is -- comes into being, *i.e.*, when the functional finished product is created. The DSMC regard "essential quality" as extant in the diamond segments, not the cores. That may be true, but Commerce regarded "essential quality" as a function of the "finished" product. The DSMC contend this "finding" has the potential to "turn[ ] the entire concept of 'substantial' transformation on its head", DSMC Br. at 38 n.9, referencing *National Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993) (finding that finishing operations applied to hand tool forgings did not substantially transform the forgings, as the forgings were in the basic shape of the finished tool, and thus could not have been processed except into finished tools), but that is not this case. Although the court can aid resolution of esoteric factual disagreements, it has not been so tasked in the AD context, *see* 19 U.S.C. §1516a(b)(l)(B)(i), and cannot weigh in.

In accordance with *EPROMs* and *Microdisks*, Commerce also considered the extent of processing and found that both segment manufacturing and the attachment process required "substantial capital investment[s] and great technical expertise." *I&D Memo* at cmt 3. Commerce determined that this finding did not alter its conclusion that the country of origin is determined by the location where segments and cores are attached to create a finished product. The DSMC would here juxtapose the record of production costs for segments, which it argues typically represent approximately [[ ]], against the process of joining segments to the blade, which is typically a much smaller percentage of production cost (as low as [[ ]]), *see* CDoc 157, PDoc 412 at 8 & Exhibit 1; CDoc 231, PDoc 528 at 46, to argue that the agency has not adequately explained how finding that both segment processing and core-segment-attachment processing require substantial capital investments and technical expertise supports its country of origin determination, especially when considered in conjunction with the "same class or kind" of merchandise factor of the substantial transformation test, but Commerce appears to have considered this production cost point, as well as the numbers of workers employed in both processes, in "continu[ing] to find that the country of origin is determined by the location where segments and cores are attached to create finished DSB." *I&D Memo* at cmt 3. In the final analysis, Commerce reached a country-of-origin

conclusion that accorded with both parties' arguments on the "priority" of the attachment process in the making of a finished diamond sawblade. Here again, the court cannot re-weigh the evidence and substitute judgment on these issues for that of Commerce.

VI. Section E Questionnaire Exemptions

Commerce sends out "Section E questionnaires" to request information pertaining to respondents' value added in the United States via further manufacturing or assembly of subject merchandise prior to delivery to unaffiliated United States customers. *See Antidumping Manual*, Ch. 4, §III.A.5. (Dep't Comm. 2009); *see*, *e.g.*, *Kawasaki Steel Corp. v. United States,* 24 CIT 684, 686, 110 F. Supp. 2d 1029, 1031–32 (2000). A respondent may obtain an exemption from Section E questioning if it persuades Commerce that its United States sales of further manufactured subject merchandise constitute a small percentage (typically less than 5 percent) of its overall United States sales. *See*, *e.g.*, *Certain Cold-Rolled Carbon Steel Flat Products From Belgium*, 67 Fed. Reg. 62130 (Oct. 3, 2002) (final LTFV determ.) and accompanying issues and decision memorandum (Sep. 23, 2002) at cmt. 1. Ehwa and Shinhan reported further manufacturing operations in the United States and requested Section E exemption after claiming such sales constituted a small percentage of total sales. DSMC's opposition to such exemption was unavailing, and Commerce issued no Section E questionnaires to them.

A. Exhaustion

The DSMC's objections before Commerce are in the form of several filed submissions. CDoc 50, PDoc 157 (Sep 7, 2005); PDoc 164, CDoc 53 (Sep. 9, 2005); PDoc 213, CDoc 71. These argue that Section E questionnaires were necessary prior to the case briefing stage of the investigation, but Commerce either rejected or ignored the DSMC's objections. The DSMC then raised claims in their administrative case brief arising from the non-issuance of Section E questionnaires, namely the impact this had on adjustments to United States net price and CEP profit to reflect further manufacturing costs. *See*, *e.g.*, PDoc 528, CDoc 231, at 35 ("under the statute, Commerce *must* require respondents to place all necessary information on the record in order to calculate 'Total Expenses' including further manufacturing expenses") (DSMC's emphasis).

Commerce and the defendant-intervenors here argue that the DSMC failed to exhaust their administrative remedies over the issue of Section E questionnaires issuance. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). The DSMC respond that they did indeed pursue those claims, albeit in the context of claims that arose

as a necessary consequence of Section E questionnaire non-issuance, and that the issue thus remained "live" in their administrative brief.

The court will require the exhaustion "where appropriate," 28 U.S.C. §2637(d), which is generally regarded as a "strict" requirement. *See*, *e.g.*, *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). In light of the current *status quo*, the court can agree with the defendant to the extent that the DSMC would have better served their cause had they more directly and forcefully described their objection in their administrative case brief, but this is not an instance where a party did not even attempt to raise its argument before the agency. *Cf. L.A. Tucker Truck Lines*, 344 U.S. at 35 ("Appellee did not offer . . . any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding"); *Corus Staal*, 502 F.3d at 1378 ("Corus acknowledges that it failed to raise any issue relating to the duty absorption issue in the [administrative] case brief"); *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 453 (1991) ("[r]elying on the futility exception as a defense, Plaintiff nonetheless conceded at oral argument that Commerce never refused to hear its contentions"). Commerce's immoveable stance on the DSMC's repeated objections to the Section E questionnaire exemptions is apparent from the record, and exhaustion does not require Sisyphean repetition or exactitude in wording in order that an objection be noted and preserved. *Cf.*, *e.g.*, *L.A. Tucker Truck Lines*, 344 U.S. at 35; *Corus Staal*, 502 F.3d at 1379; *Budd Co.*, 15 CIT at 453.

An argument satisfies the exhaustion requirement "if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it." *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 761, 347 F. Supp. 2d 1326, 1352 (2004), citing, *inter alia*, *Hormel v. Helvering*, 312 U.S. 552 (1941). Here, the DSMC did not "abandon" their objection in their administrative brief, it is implicit in their argument that all U.S. further manufacturing cost information must be placed on the record in order to accurately adjust U.S. net price and CEP profit. *See infra*, section VII. Therein couched, their brief presented "all arguments that continue[d] in the submitter's view to be relevant to the Secretary's final determination or final results" and "includ[ed] any arguments presented before the date of publication of the preliminary determination or preliminary results". *See* 19 C.F.R. §351.309(c)(2). Since the record adequately reflects the DSMC's attempt to rectify Commerce's stance on Section E questionnaires issuance, the underlying record is adequate for judicial review.

B. Merits

Commerce indicated during the original investigation that "if we issue an [AD] order in this case, we expect to examine these issues during the first administrative review conducted in this proceeding if sales are made under these same conditions." *E.g.*, PDoc 199, CDoc 64, at 2. The DSMC interpret this as follows:

> When the exemptions were granted, the Department merely postponed examination of this issue to the first administrative review. Ehwa Exemption, PR 199, CR 64, at 2; Shinhan Exemption, PR 200, at 2. In so doing, the Department seems to have acknowledged the appropriateness of examining the respondents' further manufactured sales, but for unarticulated reasons, chose not to conduct the examination at that time. Although the DSMC repeatedly objected to the exemptions, there was, arguably, no real harm to the DSMC *at that time*, in light of what w[ere] likely to be substantial dumping margins. Now, however, the *status quo* has changed. The margins at issue are now *de minimis*, and failure to raise them above *de minimis* in this appeal will result in liquidation of relevant entries without duties, . . . a prospect that would cause irreparable harm to the domestic diamond sawblades industry. Therefore, to the extent that the Department's failure to conduct a full and appropriate original investigation is now contributing to serious prejudice to one of the parties, including the potential revocation of the [AD] order, the DSMC respectfully submits that equity counsels in favor of remanding this decision for reconsideration.

DSMC 56.2 Br. at 19–20 (citations omitted in part, italics in original).

In their reply brief, the DSMC argue that an agency decision may be deemed "unreasonable" if the decision has "entirely failed to consider an important aspect of the problem". *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*,463 U.S. 29, 43 (1983). They argue the lack of Section E questionnaires from respondents was unreasonable because Commerce relied only on Ehwa's and Shinhan's representations that further manufactured sales comprised only a small volume of U.S. sales. *See* PDoc 199, CDoc 64, at 1–2; PDoc 200 at 2. The DSMC argue that when sales value is taken into account, the record shows otherwise.[14] DSMC 56.2 Br. at 18, referencing PDoc 213, CDoc 71, at 2.

[14] One of the respondents reported a percentage derived by dividing the total value of segment exports by the total of U.S. sales of Korea-origin products plus Korean origin segments. The DSMC argued that this figure understates, and that a significantly higher

"Full" and "appropriate" (*see* above) are not synonymous, and the court interprets Commerce's statement not as an admission of error in not issuing Section E questionnaires but rather in light of the strict time constraints imposed on the investigation. *See, e.g.*, 19 C.F.R., Part 351, Annex III (2005). The administrative expedient of disregarding U.S.-affiliate sales amounting to less than five percent is arguably authorized by statute, *cf.* 19 U.S.C. §1677a(e) (requiring at least "a sufficient quantity of sales to provide a reasonable basis for comparison"), and was at least based upon the respondents' representations at the time, but with time Commerce's unexplained reaction to the DSMC's objection has taken on new life. At this point, front and center perhaps, the effect of the Section E questionnaire exemptions, and the consequent *ipso facto* absence of further manufacturing cost information (*see infra*, section VII), may very well be case determinative in light of the administrative decision to revoke the AD order as a result of the section 129 determination requiring recalculation of the margins without zeroing methodology. *See supra*, section I; *see also* 36 CIT ___, Slip Op. 12–46 (Mar. 29, 2012). Ehwa argues that is beside the point, since it raised the zeroing methodology issue in its administrative case brief, and the DSMC were on notice

> from the outset that the Department ultimately would conclude that Ehwa was entitled to a *de minimis* margin in this investigation, [and therefore] the 'harm' to Petitioner arising from the Department's other subsidiary conclusions in 2006 (*e.g.*, failure to require that Ehwa complete a Section E response) was no different from the harm today. This being the case, there has been no change in the *status quo* and no reason for this Court to consider equitable claims.

Ehwa Resp. at 22–23.

The *I&D Memo*, however, ultimately dismissed the zeroing argument as "premature," since the URAA section 123 determination to which Ehwa alludes (*see infra* section XI) had yet to reach finality, and thus the argument above is a stretch as to notice of what "would" be the *status quo* at this point. If the *status quo* had truly remained unchanged, the court might come to a different conclusion, but it has now been altered, Commerce is now less constrained by statutory time limits, and Commerce did express expectation that the issue of Section E questionnaire issuance would be revisited in the future. Shinhan contends there is no need, because the exemptions were

percentage appears if based on the total sales value of U.S. manufactured finished products divided by the total U.S. sales of Korea-origin products plus the sales value of U.S. manufactured finished products.

granted through calculation of the relevant percentage based solely on volume figures and in accordance with Commerce's longstanding practice,[15] but even if that is so, the *Final Determination* does not address the DSMC's argument that Commerce's prior Section E practice should not be construed as applicable on a record of allegedly "substantial" further-manufacturing-added value to the merchandise, which the DSCM contends is the case here, *see* CDoc 64, PDoc 199 at 1–2; PDoc 200 at 2, as well as the DSMC's allegation of an understated percentage of Ehwa's further manufactured sales that were based on [[ ]], *see id.*, as well as the DSMC's argument on the fact that the respondents argued before the U.S. International Trade Commission that their U.S. further manufacturing were of such significance that they should be considered part of the domestic industry, *see generally* PDoc 260, CDoc 88. Commerce's full consideration of these objections is necessary in order to reach a final and just decision on this matter, and the determination not to issue Section E questionnaires will therefore be remanded to address the DSMC's concerns.

In addition, because Commerce has requested remand in order to consider aspects of Ehwa's ISEs that apparently entails additional fact finding, and because soliciting and analyzing responses to a request for Section E information would not appear to add onerous hardship to the parties' burdens, and also since "the basic purpose of the statute [is] determining . . . margins as accurately as possible," *see Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990), Commerce is not precluded from soliciting Section E responses upon remand. For the analysis, Commerce is also requested to explain its alleged policy of exempting Section E questionnaire responses based on a respondent's claim of sales *volume*, when Section E questionnaires are purportedly for the purpose of eliciting information about further manufacturing or assembly *value* added in the United States.

VII. Adjustments to U.S. Net Price and CEP Profit

The decision not to solicit Section E questionnaire responses from Ehwa and Shinhan impacts the deduction of "further manufacturing costs" from Commerce's constructed export price ("CEP") and CEP

[15] *See* Shinhan's Resp. at 25. *Cf. Pure Magnesium from the Russian Federation*, 66 Fed. Reg. 49347 (Sep. 27, 2001) (final LTFV determ.) and accompanying issues and decision memorandum (Sep. 14, 2001) at cmt 10; *Hot Rolled Flat Rolled Carbon Quality Steel Products from Japan*, 64 Fed. Reg. 8291, 8295 (Feb. 19, 1999) (prelim. LTFV determ.); *Coated Groundwood Paper from Finland*, 56 Fed. Reg. 56363, 56365, 56371 (Nov. 4, 1991) (final LTFV determ.); *Sweaters Wholly or in Chief Weight of Man-Made Fiber From Taiwan*, 55 Fed. Reg. 34585, 34588, 34597 (Aug. 23, 1990) (final LTFV determ.).

profit calculations for them. *See I&D Memo* at cmt. 5 (*i.e.*, on the basis that Ehwa and Shinhan were "excused . . . from reporting their further manufactured sales"). Commerce took the position that "implicit" in the additional statutory adjustments to CEP provided in 19 U.S.C. §1677a(d)(2) is that the "further manufacturing costs to be deducted actually [have been] incurred with respect to the particular transaction providing the basis for the CEP starting price." *Id*. As above indicated, the fact that Section E questionnaire responses were not solicited is used as cover for the fact that further manufacturing cost information that may "actually" have been incurred is not on the record. The DSMC contend that section 1677a(d)(2) is unambiguous in directing Commerce to reduce "the price used to establish" CEP by "the cost of *any* further manufacture or assembly (including additional material and labor)" (italics added). *Micron*, *supra,* "agree[s] that the word 'any' necessarily includes 'all'. . .", 243 F.3d at 1308, but the issue of Section E questionnaire non-issuance, implicating this issue, is being remanded, above, and the court will defer to Commerce's reasonable interpretation of statute and regulation. *Cf*. 243 F.3d at 1308 (". . . the real question here is 'all of what'"?) *with Antidumping Manual*, Ch. 7, §III.C.3.a ("[a]s a rule of thumb, if the expense is incurred in the United States by the affiliated importer or the exporter, it should be deducted").

VIII. Non-Application of the Major Input Rule

The DSMC also contend Commerce erred in not fully addressing their arguments or validly explaining its determination not to apply the "major input rule," 19 U.S.C. §1677b(f)(3), to Ehwa's and Shinhan's purchases from affiliated suppliers. The "rule" is that if the production of subject merchandise involves transaction of a "major" input from one affiliate to another and Commerce has "reasonable grounds to believe or suspect" that the amount reported as the value of the input is below the cost of production, Commerce may calculate the value of the input on the basis of the information available regarding its cost of production, if such cost exceeds the market value of the input (as determined under subsection 1677b(f)(2)). 19 U.S.C. §1677b(f)(3). Commerce interprets the statute as permitting valuation of an affiliate party's major[16] input based on the highest of: (1) the actual transfer price for the input; (2) the market value of the input; or (3) the cost of producing the input. 19 C.F.R. §351.407(b).

[16] Designed to evaluate whether the sale of a major input was made at arm's-length, the determination of whether an input is "major" is necessarily made on a case by case basis. *See Huvis Corp. v. United States*, 32 CIT 845, 845 (2008); *Torrington Co. v. United States*, 25 CIT 395, 40708, 146 F. Supp. 2d. 845, 865 (2001); *see also SAA* at 838, 1994 U.S.C.C.A.N. at 4174–75.

Towards that end, Commerce will consider both the percentage of an individual input purchased from affiliated parties and the percentage each individual input represents in relation to the product's total cost of manufacturing, among other factors in that determination. *See I&D Memo* at cmt. 10; *see*, *e.g.*, *Stainless Steel Plate in Coils from Belgium*, 70 Fed. Reg. 72789 (Dec. 7, 2005) (final AD admin. review results) at cmt 1.

During the investigation, the DSMC argued to Commerce that the record shows that Ehwa owns [[ ]] of Weihai, its PRC subsidiary, that the inputs in question are major, *i.e.*, that the [[ ]] purchased from Weihai were significant in quantity, accounting for [[ ]] sold in the home market during the POI, and significant in total cost, accounting for [[ ]] percent thereof when calculated on the basis of the DSMC's estimate of the actual value of the [[ ]] rather than on the [[ ]] Ehwa used for the calculation, and that Commerce has acknowledged that prices from an NME producer are inherently tainted because they are not based on market-determined factors. *See* DSMC's Case Br., PDoc 528, CDoc 231, at 25–29; Major Input Allegation re Ehwa (Dec. 12, 2005), PDoc 295, CDoc 103, at 5–6; *see also* Ehwa's Second Supp. Section A QR at Ex. 3 (Nov. 21, 2005), PDoc 257, CDoc 87; Ehwa's Section D QR at D-5, D-6 (Nov. 21, 2005), PDoc 256, CDoc 90; Rebuttal Br., PDoc 515, CDoc 217, at 10; Import Admin. Policy Bull. No. 94.1 (Mar. 25, 1994); *I&D Memo* at cmt. 12 ("the Act generally assumes that prices for goods produced in NMEs cannot be relied upon for purposes of a price-based analysis"). Similarly, the DSMC pointed out that Shinhan sources [[ ]] from TPC, [[ ]] in the form of [[ ]] from TPC and Namdong, [[ ]] through TPC, and [[ ]] from Qingdao Shinhan. *See* Major Input Allegation re Shinhan (Dec. 12, 2005), PDoc 292, CDoc 105, at 2. The DSMC thus urged Commerce to value such inputs using the same surrogate value factors of production analysis Commerce uses in determining normal value in non-market economy investigations. *See* 19 U.S.C. §1677b(c).

Commerce agreed with the DSMC in part, and adjusted the respondents' purchases from affiliated suppliers to the higher of the reported transfer price or market value. In passing, Commerce noted that 19 U.S.C. §1677b(f)(2) requires adjusting input cost to account for below market price transfer prices between affiliates, so for some of the inputs it used the respondent's cost of producing the input as a market surrogate. But, it also "determine[d] that inputs purchased by Ehwa and Shinhan from affiliates are not significant in relation to the total costs incurred to produce subject merchandise and[,] accord-

ingly, are not major inputs". *I&D Memo* at cmt. 10.

The DSMC argue Commerce's reasoning is conclusory and does not address their substantive arguments. Responding, the defendant proffers percentages of the respondents' total cost of manufacturing accounting for the affiliated inputs. It contends that Ehwa's purchase of the input [[ ]] accounted for only [[ ]] of the total cost of manufacturing for all subject merchandise and that Ehwa's purchase of the input [[ ]] only accounted for [[ ]] of the total cost of manufacturing for all subject merchandise Def.'s Br. at 43, referencing Ehwa's Supp. Sec. D (Jan. 17, 2006), CDoc 138 at 3–4. Regarding Shinhan, the defendant points out as fact that Shinhan sourced from Technoplus [[ ]] percent of its [[ ]], [[ ]] percent of its [[ ]], [[ ]] percent of its [[ ]], and [[ ]] percent of its [[ ]], which made up only [[ ]] percent, [[ ]] percent, [[ ]] percent, and [[ ]] percent, respectively, of the cost of manufacturing. *Id*, referencing Shinhan's Section D Supp. QR, CDoc 132 at App. S-57. It also points out that the tolling services provided by Technoplus and [[ ]] accounted for [[ ]] percent and [[ ]] percent, respectively, of all the tolling services purchased and [[ ]] percent and [[ ]] percent, respectively, of the total cost of manufacturing. *Id*., referencing *id*. It further points out that the carbon and steel frames purchased from [[ ]] accounted for [[ ]] percent of Shinhan's total carbon and steel frame purchases, but represented only [[ ]] percent and [[ ]] percent, respectively, of the total cost of manufacturing. *Id*., referencing *id*.

The DSMC reply that such reasoning is *post hoc*[17] and that to the extent the calculations are based on unadjusted or non-market prices they therefore conflict with Commerce's expressed opinions on such matters. *See supra* & *I&D Memo* at cmt. 10 ("the transfer prices between the respondents and their affiliates could be unreasonably low due to their affiliation") & cmt. 12 ("the Act generally assumes that prices for goods produced in NMEs cannot be relied upon for purposes of a price-based analysis"). Further, they contend the calculations do not address their substantive point with respect to Ehwa that when the cost of the [[ ]] is adjusted to reflect the actual value of the [[ ]] (as based on the [[ ]] of another [[ ]] manufacturer)

[17] *See*, *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168–69 (1962) ("courts may not accept . . . *post hoc* rationalizations for agency action"); *NEC Home Electronics, Ltd.*, 54 F.3d at 743 (the court is "powerless to affirm an administrative action on a ground not relied upon by the agency") (citation omitted).

rather than "unrealistically low" (according to the DSMC) transfer prices, the [[ ]] represent [[ ]] percent of Ehwa's total cost of manufacturing. *See* PDoc 295, CDoc 103, at 6. At this point, the court considers the DSMC's arguments unrebutted.

Commerce also concluded that the inputs and services received from Shinhan's affiliates do not constitute a significant percentage of Shinhan's total cost of manufacturing. *See* Def.'s Br. at 43–44. This was apparently based upon Commerce's examination of Shinhan's purchase of these inputs at verification, at which it verified that Shinhan had purchased them at above the suppliers' costs of production even after adjusting for G&A expenses. *See* Shinhan Cost Verification Report, CDoc 193, at 28–29; Shinhan's Supp. Sec. D QR (Jan. 11, 2006), CDoc 132, at App. S-57. The DSMC contend that in order to reach this conclusion, Commerce again had to have used the transfer prices that were supplied by Shinhan in its supplemental Section D questionnaire response. *See* Def.'s Br. at 44. The DSMC contend that although Shinhan claimed that the transfer prices reflected market prices, it provided no documentation to support that claim. *See* CDoc 105, PDoc 292 at 2. They reiterate that Commerce recognized that transfer prices between Shinhan and its affiliates are not a valid basis for comparison, and they also argue that even based upon Commerce's calculated percentages at least some of Shinhan's purchases from affiliates should have been considered "major" inputs, *e.g.,* the tolling services provided by TPC accounted for [[ ]] percent of Shinhan's total cost of manufacturing, *see* Def.'s Br. at 44, and that Commerce in the past has conferred major inputs status to material goods that constitute as little as two percent of the total cost of production of a finished good. *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 Fed. Reg. 38139, 38162 (July 23, 1996) (final LTFV determ.).

The defendant characterizes the DSMC's points as an invitation to re-weigh the evidence, and that Commerce in fact considered the inputs' *per* -affiliate percentages and cost ratios based on market prices for the inputs and each company's total cost of production ("COP"). The DSMC's points, however, present not a "choice of two fairly conflicting views" but substantial contradiction of Commerce's declaration and its precedent, and their points therefore detract from the reasonableness of the *Final Determination* as it stands. The issue as a whole requires fuller proof on the record by way of fuller explanation or reconsideration. If on remand Commerce continues to find 19 U.S.C. §1677b(f)(2) applicable, it shall further state why the respondents' cost of producing the input is a "reasonable surrogate" for

the market price of the disregarded transaction(s) for which it found no comparative unaffiliated sales to use as a market price for comparison to the transfer price. *Cf Antidumping Manual*, Ch. 9, §II.D.1. ("[i]f a transaction is disregarded . . . and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated").

IX. Non-Adjustment of Costs of Purchases From Unaffiliated Non-Market Economy Suppliers

The DSMC also take issue with the fact that Commerce refused to adjust respondents' reported costs for inputs purchased from unaffiliated NME suppliers. *See I&D Memo* at cmt. 12. Commerce will "normally" use the costs as recorded in the respondent's books and records in calculating COP if: (1) those records are kept in accordance with the respondent's home country's generally accepted accounting principles, and (2) those recorded costs reasonably reflect the costs associated with the production and sale of the subject merchandise. 19 U.S.C. §1677b(f)(1). *See Magnesium Metal from the Russian Federation*, 70 Fed. Reg. 9041, 9043 (Feb. 24, 2005) (final LTFV determ.). For an NME producer, 19 U.S.C. §1677b(c) requires a factors-of-production based methodology. Consequently, Commerce will not use a price-based method for such producers unless the record evidence demonstrates that a market-oriented industry exists. *See* 19 C.F.R. §351.408. For the *Final Determination*, Commerce stated that it had

> reviewed the relative percentages that these inputs represent of the respondent's COP and compared the NME prices to either market based prices or the cost of producing the input. We have determined that the use of such prices does not result in an unreasonable reflection of the cost associated with the production and sale of the merchandise. Thus, while we may consider this issue in future cases, for the final determination in this case we have not restated the prices recorded by respondents for inputs purchased from NME suppliers.

I&D Memo at cmt. 12.

Defending this conclusion, the government points to the example of Ehwa's purchases of [[ ]] from [[ ]], which constituted only [[ ]] percent (by volume) and [[ ]] percent (by value) of Ewha's total purchases of cores during the period of investigation and only [[ ]] of Ehwa's total costs. Def's Resp. at 46, referencing Ehwa Supp. Sec. D QR, PDoc 159, CDoc 133 (Jan. 11, 2006), at

SD-3; Ehwa Second Supp. Sec. A QR, PDoc 257, CDoc 87 (Nov. 21, 2005), at 9. It argues that when considering the record evidence, Commerce reasonably determined that Ehwa's inputs from unaffiliated NME suppliers were not major and did not result in an unreasonable reflection of Ehwa's COP for subject merchandise. *Id.*, referencing *Consolo*, *supra*, 383 U.S. at 620.

The DSMC contend that Commerce's calculation results from using the NME values of the sourced inputs, and they remind that elsewhere Commerce has recognized the inherent distortions in NME transfer prices, that the record shows that prices from NME suppliers in this investigation were significantly below market prices insofar as Commerce verified that both the market price and self-production costs for the inputs purchased from such NME suppliers [[ ]], PDoc 515, CDoc 217, at 10, and that the conclusion that the "amount" of inputs sourced from unaffiliated NME suppliers was "negligible" is itself undercut by the referenced fact that Ehwa purchased [[ ]] by value of its [[ ]] from one unaffiliated NME supplier.

Commerce did not determine that the "amount" was negligible but "that any distortion they may create as percentage of the respondents' total COP is negligible." *I&D Memo* at cmt. 12. Nonetheless, the DSMC's allegation directly contradicts Commerce's simple declaration of comparison of the NME prices of the inputs to market-based prices or the COP of the input. Since the prices of inputs sourced from *all* of Ehwa's NME suppliers are indeed relevant, and since the determination is that the NME prices themselves do not unreasonablyreflect the cost associated with the production and sale of the subject merchandise, a fuller explanation of, and/or redetermination on, those comparisons upon remand would assist the court's and parties' understanding. *See supra*.

X. Use of Facts Otherwise Available or Adverse Inferences

The DSMC also contest Commerce's calculation of Shinhan's financial expense rate. Shinhan provided as part of its Section A questionnaire responses the audited unconsolidated financial statements for itself and each of its affiliated companies. *See* Shinhan's Section A QR, CDoc 47 at Exs. A-11 to A-16. Commerce instructed Shinhan via the the Section D questionnaire to calculate its financial expense based on the consolidated audited fiscal year financial statements of the highest consolidation level available. *See I&D Memo* at cmt. 44. At verification, Commerce "discovered" that Shinhan had not provided the financial statements of its parent company TPC and had

not reported its financial expense rate as instructed, and Commerce requested Shinhan to submit TPC's consolidated financial statements. *See* Shinhan's Cost Verification Report, CDoc 193 (Apr. 4, 2006). Shinhan complied. Although Commerce's verification report provides the caveat "[t]his report does *not* draw conclusions as to whether the reported information was successfully verified, and further does *not* make findings or conclusions regarding how the facts obtained at verification will ultimately be treated," Shinhan Cost Verification Report, CDoc 193 at 1 (emphasis in original), Commerce recalculated Shinhan's expense ratio based on the newly submitted information, and the *I&D Memo* holds as sufficient that "[d]uring the verification, the Department analyzed TPC's consolidated financial statements and compared them to TPC's unconsolidated financial statements".

The DSMC contended the situation compelled the use of facts otherwise available or adverse inferences under 19 U.S.C. §1677e, arguing in their administrative rebuttal brief that Shinhan's late filing had deprived them of any meaningful opportunity to analyze and comment upon the financial statements. *Cf.* PDoc 255, CDoc 89 (Nov. 22, 2005). After noting that the argument was improperly raised by way of rebuttal, Commerce rejected it on the merits by reasoning that it had the authority to request and accept Shinhan's information for TPC pursuant to 19 C.F.R. §351.301(b)(1). "While we agree with the petitioner that Shinhan should have provided these financial statements when initially asked, we do not believe Shinhan intentionally failed to do so in an effort to impede the investigation. Accordingly, we do not deem it appropriate to resort to facts available with regard to calculating the interest expense rate for Shinhan." *I&D Memo* at cmt. 44.

There are two distinct parts of 19 U.S.C. §1677e that respectively address two distinct circumstances of administrative receipt of less than the full and complete facts needed to make a determination. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). In either circumstance, "Commerce first must determine that it is proper to use facts otherwise available before it may apply an adverse inference." *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) (citation omitted). To do so, Commerce must follow the statutory outline governing the propriety of that determination. The first part, of section 1677e, subsection (a) ("In general"), provides that if -

> (1) necessary information is not available on the record, *or*
>
> (2) an interested party or any other person--

> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> the administering authority and the Commission *shall*, *subject to section 1677m(d)* of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. §1677e(a) (italics added).

Commerce's regulation interpreting the above provisions provided (during the investigatory proceeding) in relevant part as follows:

> (a) Introduction. The Secretary *may* make determinations on the basis of the facts available *whenever* necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information.

19 C.F.R. §351.308 (2005--2006) (italics added).

The DSMC emphasize that the Court of Appeals for the Federal Circuit stated "[t]he mere failure of a respondent to furnish requested information -- for any reason --*requires* Commerce to resort to other sources of information to complete the factual record on which it makes its determination". *Nippon*, 337 F.3d at 1381 (italics added). The DSMC contend that whether Commerce believed that Shinhan had not significantly impeded the investigation, or that the necessary information was (eventually) on the record, Shinhan failed to provide information by the deadlines for submission of its Section D questionnaire response in the form and manner requested by Commerce. DSMC Reply at 19, referencing 19 U.S.C. §1677e(a)(2)(A)&B).

The argument, in effect, is that whenever, at a particular point in time, there is less-than-perfect compliance with an administrative request for information, resort to facts otherwise available is required in that circumstance. *See Nippon*. 19 C.F.R. §351.308 also appears to support the proposition. But, the relevant and operative point in time

for determining whether "necessary information is not available on the record" is at that point in time when Commerce must "use the facts otherwise available in *reaching* the applicable determination", 19 U.S.C. §1677e(a) (italics added), not "whenever" the necessary information is not available on the record.

Be that as it may, 19 C.F.R. §351.301, the regulation governing time limits for submission of factual information, provided in relevant part as follows during the investigation:

> (b) *Time limits in general*. Except as provided in paragraphs (c) and (d) of this section and §351.302, a submission of factual information is due no later than:
> (1) For a final determination in . . . an antidumping investigation, seven days before the date on which the verification of any person is scheduled to commence, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed[.]
> * * *
> (c) *Time limits for certain submissions* -
> * * *
> (2) *Questionnaire responses and other submissions on request*.
> (i) Notwithstanding paragraph (b) of this section, the Secretary may request any person to submit factual information at any time during a proceeding.
> (ii) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested form and manner by the date specified *may* result in use of the facts available under [19 U.S.C. 1677e] and [19 C.F.R.] §351.308.

19 C.F.R. §351.301(b)&(c) (2005--2006) (italics added in part).

And, as noted, Commerce, relied on the latter part of subsection (b)(1), above, to find that necessary information was not missing from the record; thus, the information concerning TPC was simultaneously "discovered" missing and "requested" by Commerce at verification. Such an interpretation obviates, or obfuscates, the fact that the information had been requested from Shinhan at an earlier point in time, and had been due in accordance with the first clause of section 351.308(a) as well as subsection 351.301(c)(2)(ii), governing written requests.

A failure to provide timely, mannerly or formally factual submissions is "subject to" the "deficient submissions" provision of 19 U.S.C. §1677m(d). This provision curtails the ability to reject information that is necessary for the administrative record and has otherwise been properly submitted, subject to the following conditions. When Commerce makes any of the enumerated "final" determinations in section 1677m(e) (including the determination at bar), Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established" by Commerce if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by Commerce with respect to the information, and (5) the information can be used without undue difficulties. 19 U.S.C. §1677m(e). In addition, 19 U.S.C. §1677m(d) requires that from the time Commerce determines that a response to a request for information does not "comply" with its prior request, it must "promptly" inform the person submitting the information of the nature of the deficiency and provide an opportunity to remedy or explain the deficiency "in light of the time limits established for the completion" of the administrative proceeding. The statute provides Congress' expectation of how the unexpected discovery of information missing from the record is to be addressed, whether at verification or otherwise. And, Commerce is to be accorded "substantial" deference in the reasonable interpretation of the AD statute and its own regulations. *See*, *e.g.*, *Torrington Co. v. United States*, 156 F.3d 1361, 1363 (Fed. Cir.1998).

However, administrative discretion, over the "required" use of facts otherwise available in the face of less-than-perfect compliance with a request for information, is not unrestricted. Commerce cannot, of course, engage in partisanship, *cf.*, *e.g.*, 19 C.F.R. §351.301(c)(2) (2005) (Commerce "may" request any person to submit factual information at any time during a proceeding and "will" specify in its written request for a written response to a questionnaire or for other factual information that failure to submit requested information in the requested form and manner by the date specified "may" result in use of the facts available), nor can it deprive a party of meaningful opportunity to analyze and comment upon any significant new factual development, *cf id*. *with* 19 C.F.R. §351.301(c)(1) (2005) (providing ten days after submission of factual information for a non-

submitter to rebut) *and with China Kingdom Import & Export Co., Ltd. v. United States*, 31 CIT 1329, 1350, 507 F. Supp. 2d 1337, 1357 (2007) (noting that defendant's argument that verifying and using substitute information "would be unfair to the petitioners and other interested parties in the proceeding by depriving them of an opportunity to meaningfully comment"). The "discovery" of any necessary factual material that had been missing from the record to that point necessarily triggers a section 1677e(a)(1) analysis, in order that the record should reflect why the information was missing, and regardless of whether the information is subsequently deemed acceptable for the record and proper for consideration.

Here, Commerce stated that it "do[es] not believe Shinhan intentionally failed to [disclose] in an effort to impede the investigation," thus providing explanation, albeit cursory, that might in some context satisfy section 1677e(a)(2)(C). But Commerce does not provide further context or commentary to satisfy section 1677e(a)(2)(B), and the record is reviewably vague as to what called Commerce's attention to Shinhan's non-provision of TPC's consolidated financial statements. *Cf.* CDoc 192 at 3 ("[a]t verification, we discovered that SDC's parent, TPC[,] prepared consolidated financial statements for the year end 2004"). It is undisputed that Commerce "instructed Shinhan to calculate its financial expense based on the consolidated fiscal year financial statements of the highest consolidation level available," and that "Shinhan did not provide the financial statements of its parent company (TPC), which were the highest level of consolidated financial statements." Def.'s Br. at 47. Was it the case that TPC had not yet prepared consolidated financial statements by the time Shinhan submitted its responses to Commerce's questionnaire requests? If TPC had, then even if Commerce's Section D request to Shinhan could reasonably be construed as expressing patent ambiguity regarding the information requested, the DSMC here are no less correct that Commerce's acceptance and incorporation of TPC's consolidated financial statements into the *Final Determination* without addressing each relevant section 1677e(a) factor would appear to be an abuse of discretion and therefore not in accordance with law: the burden would have been on Shinhan to seek clarification prior to responding in that circumstance. But if, as a result of its "discovery" of the missing information at verification, Commerce concluded that its prior Section D request had presented some reasonably latent or inconspicuous ambiguity that was revealed only in light of Shinhan's prior response(s) to the question(s) posed (*i.e.*, Shinhan's interpretation of the questions asked could be construed as reasonable and therefore excusable), and that the failure to produce TPC's consoli-

dated financial statement was unintentional and inadvertent, then the request therefor at verification would fall squarely within 19 U.S.C. §1677m(d), and the ultimate conclusion Commerce reached might not be unreasonable. As the court cannot discern which is the circumstance at bar, it requests guidance via reconsideration on remand.

In addition, the DSMC vociferously argue that the circumstance called for application of adverse inferences and that Commerce must address the statutory standard for its application -whether the respondent failed to cooperate by not acting to the best of its ability regardless of motive or intent; *see Nippon Steel Corp.*, 337 F.3d at 1383 -- including examination in accordance with agency practice of the extent to which the respondent may benefit from its own lack of cooperation. *See Gourmet Equipment (Taiwan) Corp. v. United States*, 24 CIT 572, 577 (2000) ("Commerce is to consider the extent to which a party may benefit from its own lack of cooperation"), citing *SAA* at 870, 1994 U.S.C.C.A.N. at 4199. Since Commerce must first determine whether resort to facts available is appropriate, further discussion of that contention is here deferred, although Commerce may choose to address it on remand.

XI. Use of Zeroing

The defendant-intervenors' Rule 56.2 motions for judgment focus again on Commerce's use of zeroing to argue it was unreasonable for Commerce not to have determined that the investigation was "pending" for purposes of the applicability of Commerce's change of policy on zeroing in investigations announced in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006), with effect from January 16, 2007. According to them, because Commerce had not yet issued its AD order when the URAA section 123 proceeding that underpins that announced "final modification" was concluded, the investigation of diamond sawblades from Korea was allegedly "pending" and therefore covered by that section 123 determination.

This court has previously rejected similar challenges on two occasions in the appeals of the diamond sawblades from the PRC investigation. *See Advanced Technology & Materials Co. v. United States,* 35 CIT ___, Slip Op. 11–105 (Aug. 18, 2011) ("*Advanced Tech I*") at 13–16. In that case, the Court recognized that Commerce's "policy change with respect to 'zeroing[ ]' . . . became effective after the final determination . . . but before issuance of an [AD] order." *Advanced Tech I* at 2 (footnote omitted). The court considered that

> the question that Commerce needed to resolve here did not require a survey of the various alternative ways that an investigation might be termed "pending"; the task, rather, was to interpret the meaning of that term *as it was used in the Section 123 Determination*. More precisely, to determine which investigations the Department was describing [in that Determination] when it referred to "all investigations pending before the Department."

Id. at 15 (italics added). The court concluded that Commerce had properly determined that the diamond sawblades investigation was not one of those "pending" before the agency (and to which the section 123 determination specifically alluded), and therefore Commerce had properly determined that the diamond sawblades investigation "did not qualify for the policy change." *See id*. at 25; *see also Advanced Tech II*, *supra*, at 2 n.1 ("[T]he court . . . need not address ATM's first contention because argument thereon was addressed in Slip Op. 11–105. To the extent any arguments remain, past precedent of this Court has shown them to be without merit.").

There are no material factual or legal distinctions between this case and past precedent. The court will therefore dismiss the defendant-intervenors's challenge to Commerce's use of zeroing methodology in the *Final Determination*.

The defendant-intervenors argue that *Advanced Tech I* is inapplicable because it was decided under the arbitrary and capricious standard of review accompanying actions challenging changed circumstances reviews brought under 28 U.S.C. §1581(i), whereas this case is brought pursuant to 28 U.S.C. §1581(c) to challenge a less than fair value determination. *See* Shinhan Br. at 17 n.1; Ehwa Br. at 10–11. That is not a valid distinction. *Advanced Tech II* concerned an LTFV challenge instituted pursuant to section 1581(c), and the opinion relied exclusively upon the reasoning contained in *Advanced Tech I* as determinative. The respondents' claim in *Advanced Tech I* was that the diamond sawblades investigation did not "properly receive" the benefit of that section 123 determination. The court found jurisdiction over such a claim in section 1581(i). That does not mean, however, that the court entertained jurisdiction over the section 123 determination itself. If a party believed Commerce should have included a particular LTFV investigation within the section 123 determination as one of those "pending" before Commerce, the party had the opportunity to challenge that in a separate proceeding, but at-

tempting to characterize such a claim as "subject to" section 1581(c) jurisdiction, in the context of a LTFV challenge, would be subject to dismissal.

The defendant-intervenors argue that according to 19 C.F.R. §351.211(a) and §351.102(b)(30), an "investigation" is "pending" beyond the issuance of a final LTFV determination up until the issuance of an AD order. *See* Shinhan Br. at 20–23; Hyosung Br. at 8–11. However, as before, the legal definitions of the term "pending" that defendant-intervenors would advance here are "ultimately immaterial" to the issue of whether the investigation of diamond sawblades from Korea was "pending" before Commerce. Insofar as what may properly be considered within the context of this matter is concerned (*i.e.*, the section 1581(i) jurisdictional issue), Commerce "would have no legal authority to apply the section 123 determination in a manner that ignores the express legal directive set forth therein" in any event.[18] *See Advanced Tech I* at 24.

Further, it was not inconsistent with its regulations for Commerce to interpret the section 123 determination's meaning of "pending" as meaning those proceedings that were in the midst of (and subject to) further proceedings before it prior to the final LTFV determination issuance. The defendant-intervenors apparently expand the meaning of the pendency of the LTFV investigation before Commerce into the pendency of the investigation as a whole, including the injury investigation before the ITC, but the regulations differentiate between investigation proceedings before Commerce that lead up to the "final affirmative determination," 19 C.F.R. §351.211(a), and the overall investigation proceedings before both Commerce and the ITC that ultimately lead to an AD order. *See id*.

The publication of an AD order is a purely ministerial act. *Royal Business Machines, Inc. v. United States*, 1 CIT 80, 86, 507 F. Supp. 1007, 1012 (1980). Irrespective of that, once Commerce issues its final LTFV determination, no issues are "pending" before Commerce, and nothing in the statute or regulations suggests that Commerce could continue its proceedings, accept more submissions, or change its decision after it issued its final determination in its investigation.

[18] And, in any event, neither of those regulations defined "pending," either in 2006 or currently. In 2006, section 351.102 defined (and section 351.102(b)(30) currently defines) the term "investigation" as "that segment of a proceeding that begins on the date of publication of notice of initiation of investigation and ends on the date of publication of the earliest of: (i) Notice of termination of investigation, (ii) Notice of rescission of investigation, (iii) Notice of a negative determination that has the effect of terminating the proceeding, or (iv) An order." The "order" referenced in section 351.102 is also referenced in section 351.211(a), and likewise then as now: "The Secretary issues an order when both the Secretary and the Commission . . . have made final affirmative determinations. The issuance of an order ends the investigative phase of a proceeding."

Rather, the statute and regulations contemplate that, if Commerce issues an affirmative less than fair value determination, and the ITC issues an affirmative injury determination, an order should issue. Indeed, the parties' own behavior confirms the finality of these individual steps. The DSMC appealed the *Final Determination* to this court in 2006, long before Commerce issued the AD order. But the statute contemplates this, confirming that the *Final Determination* was indeed "final" and not "pending" at the time that Commerce issued its section 123 determination. *See* 19 U.S.C. §§ 1516a(a)(2)(B)(i), 1673d. Equally obvious is that if the determination was still "pending," then it was not "final," and the court would have had no jurisdiction to entertain a challenge to it.

Sub silencio, the court has also considered the defendant-intervenors remaining arguments, in particular those concerning inconsistency in abandonment of zeroing in investigations but not in administrative reviews, but finds they do not merit further discussion. *See*, *e.g.*, *Union Steel v. United States*, 36 CIT ___, 823 F. Supp. 2d 1346, *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013).

Conclusion

For the above reasons, *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006), as amended by *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 75 Fed. Reg. 14126 (Mar. 24, 2010), is hereby remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings not inconsistent with this opinion.

The parties shall provide comment, or indication of none, on the sufficiency of the information indicated to be redacted from the confidential version of this opinion (indicated above by double bracketing) to the Clerk of the Court within seven (7) days, including any indication of information that should be but is not presently indicated as subject to redaction.

The results of remand shall be due Monday, February 3, 2014, comments thereon by Monday, March 3, 2014, rebuttal by Friday, March 28, 2014.

So ordered.

Dated: October 11, 2013
New York, New York

/s/ R. Kenton Musgrave

R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–131

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF INDUSTRIE S.P.A., SOMECAT S.P.A., SKF GMBH, AND SKF (U.K.) LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00284

[Affirming the Department's use of zeroing in the final results of the twentieth administrative reviews of antidumping duty orders on ball bearings and parts thereof and declaring unlawful the Department's policy, rule, or practice of issuing liquidation instructions fifteen days after the publication of final results of an administrative review]

Dated: October 25, 2013

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, for plaintiffs. With him on the brief were *Alice A. Kipel* and *Laura R. Ardito*.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Geert M. De Prest, Stewart and Stewart, of Washington, DC, for defendant-intervenor. With him on the brief was *Terence P. Stewart*.

OPINION

Stanceu, Judge:

Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF Industrie S.p.A., Somecat S.p.A., SKF GmbH, and SKF (U.K.) Limited (collectively, "SKF") contest the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), in the twentieth administrative reviews of antidumping orders on imports of ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom for the period May 1, 2008 through April 30, 2009 ("period of review"). Compl. ¶ 1 (Sept. 15, 2010), ECF No. 2; *see Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review*, *and Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010) ("*Final Results*"). Plaintiffs challenge the Department's use of the zeroing methodology in the twentieth administrative reviews to determine SKF's

weighted-average dumping margins.[1] Compl. ¶¶ 31–35. Plaintiffs also challenge the Department's policy, rule, or practice of issuing liquidation instructions to U.S. Customs and Border Protection ("Customs" or "CBP") fifteen days after the date on which the final results of a review are published (the "fifteen-day policy"). *Id*. ¶¶ 13–18.

Before the court is plaintiffs' motion for judgment upon the agency record, made pursuant to USCIT Rules 56.2 (for the claim challenging the use of zeroing in the *Final Results*) and 56.1 (for the claim challenging the fifteen-day policy). Pls.' Mot. for J. upon the Agency R. Pursuant to Rules 56.1 and 56.2 (Oct. 7, 2011), ECF No. 52 ("Pls.' Mot."). Opposing plaintiffs' motion are defendant United States and defendant-intervenor, the Timken Company ("Timken"), the petitioner in the original investigation. Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. (Dec. 6, 2011), ECF No. 54 ("Def.'s Opp'n"); Resp. Br. of the Timken Co. Opposing the Rule 56.2 Mot. of SKF USA Inc., et al. (Dec. 6, 2011), ECF No. 55 ("Def.-intervenor's Opp'n").

For the reasons stated herein, the court determines that plaintiffs are not entitled to relief on their claim challenging the Department's use of zeroing. The court also determines that plaintiffs are entitled to a declaratory judgment on their claim that the fifteen-day policy is unlawful as applied to plaintiffs in the effectuation of the *Final Results*.

I. BACKGROUND

Commerce initiated the twentieth administrative reviews on June 24, 2009. *Initiation of Antidumping and Countervailing Duty Admin. Reviews and Requests for Revocation In Part*, 74 Fed. Reg. 30,052 (June 24, 2009). On April 28, 2010, Commerce published its preliminary determination. *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Duty Admin. Reviews, Preliminary Results of Changed-Circumstances Review, Rescission of Antidumping Admin. Reviews In Part, and Intent To Revoke Order In Part*, 75 Fed. Reg. 22,384 (Apr. 28, 2010). On September 1, 2010, Commerce published

[1] In their motion for judgment on the agency record, plaintiffs withdraw two of their four original claims: (1) that Commerce erred in deducting constructed export price ("CEP") profit from the U.S. sales price for all CEP sales, including sales of Somecat S.p.A. bearings exported by SKF (U.K.) Limited's SNFA operations, resulting in double-counting of profit, Compl. ¶¶ 19–22 (Sept. 15, 2010), ECF No. 2; and (2) that Commerce erred in using home market freight and packing expenses incurred by entities other than SKF Industrie S.p.A. and SKF France S.A. to cap home market freight and packing revenues charged by SKF Industrie S.p.A. and SKF France S.A., Compl. ¶¶ 23–30. Br. in Supp. of SKF's Rules 56.1 and 56.2 Mot. for J. upon the Agency R. 1–2 (Oct. 7, 2011), ECF No. 52–1.

the *Final Results*, which stated the Department's intent to issue liquidation instructions to Customs fifteen days after that publication date. *Final Results*, 75 Fed. Reg. at 53,663.

On September 15, 2010, plaintiffs filed their summons, Summons, ECF No. 1, and complaint, Compl. 1, and on October 7, 2011, plaintiffs moved for judgment on the agency record, Pls.' Mot. 1. Defendant and defendant-intervenor filed responses to this motion on December 6, 2011. Def.'s Opp'n 1; Def.-intervenor's Opp'n 1.

On June 4, 2012, the court ordered this action stayed until thirty days after the final resolution of all appellate proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248, which involved a claim challenging the Department's use of zeroing in an administrative review of an antidumping duty order similar to the zeroing claim presented in this action. Order, ECF No. 67.

On April 16, 2013, the Court of Appeals for the Federal Circuit ("Court of Appeals") issued its decision in *Union Steel*, affirming the Department's use of zeroing in an administrative review. *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013). Pursuant to the court's Order, the stay expired on July 10, 2013.

II. DISCUSSION

A. Jurisdiction and Standards of Review

Section 201 of the Customs Courts Act of 1980 grants this court subject matter jurisdiction over this action. 28 U.S.C. § 1581(c) (for the claim challenging the use of zeroing), 1581(i) (for the claim challenging the fifteen-day policy).[2] For plaintiffs' claim contesting the *Final Results*, the court is directed to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *See* Tariff Act of 1930 ("Tariff Act") § 516A, 19 U.S.C. § 1516a(b)(1). For plaintiffs' claim challenging the fifteen-day policy, the court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act ("APA") § 706(2), 5 U.S.C. § 706(2); 28 U.S.C. § 2640(e).

B. Plaintiffs Are Not Entitled to Relief on their Claim Challenging the Use of Zeroing

Plaintiffs challenge the Department's use of zeroing to calculate SKF's weighted-average dumping margins in the twentieth administrative reviews. Br. in Supp. of SKF's Rules 56.1 and 56.2 Mot. for J.

[2] All statutory citations herein are to the 2006 edition of the U.S. Code.

upon the Agency R. 11 (Oct. 7, 2011), ECF No. 52–1 ("Pls.' Br."). To calculate a weighted-average dumping margin in an administrative review, Commerce determines both the normal value and the export price ("EP"), or, if the EP cannot be determined, the constructed export price ("CEP"), for the subject merchandise under review. Tariff Act § 751, 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines a dumping margin by calculating the amount by which the normal value exceeds the EP or CEP. *Id.* §§ 1675(a)(2)(A)(ii), 1677(35)(A). When Commerce determines a dumping margin using zeroing, as it did in the twentieth administrative reviews, it assigns a value of zero, not a negative margin, where the normal value is less than the EP or CEP. *Union Steel*, 713 F.3d at 1104. Finally, Commerce aggregates these margins to calculate a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

In *Union Steel*, the Court of Appeals affirmed the Department's use of zeroing in circumstances analogous to those presented by this case. *Union Steel*, 713 F.3d at 1103. The court considers *Union Steel* dispositive of the zeroing claim raised in this action and sustains the Department's use of zeroing in the Final Results.

C. Plaintiffs Are Entitled to a Declaratory Judgment on the Department's Fifteen-Day Policy

In the *Final Results*, Commerce stated its intention to "issue liquidation instructions to CBP 15 days after publication of these final results of reviews." *Final Results*, 75 Fed. Reg. at 53,663. Plaintiffs' remaining claim challenges the Department's application of this fifteen-day policy with respect to SKF. Pls.' Br. 5. Plaintiffs ask this court to find, either under collateral estoppel or on the merits, that the Department's application of the fifteen-day policy was unlawful. Pls.' Br. 6–8. Despite this policy, plaintiffs successfully obtained an injunction preventing liquidation of their subject merchandise. *See* Order (Sept. 21, 2010), ECF No. 13 (granting consent motion for preliminary injunction). Therefore, the only relief available is a declaratory judgment that the fifteen-day policy was contrary to law as applied to plaintiffs.

Plaintiffs argue that the Department's choice of a fifteen-day liquidation timeline was unlawful because the Department failed to show that it had "considered any alternatives to or any relevant factors competing with the time deadline set by 19 U.S.C. § 1504(d)," including the ability of parties to seek meaningful judicial review. Pls.' Br. 2, 6. Plaintiffs also argue that the fifteen-day policy "unacceptably burdens and causes injury to SKF[] and is arbitrary and capricious." *Id.*

Plaintiffs' collateral estoppel argument relies on this Court's previous determinations that the fifteen-day policy was unlawful as applied to SKF upon completion of one or more administrative reviews of the antidumping duty orders at issue in this action. *Id.* at 6, 7. This Court's decision regarding the nineteenth administrative reviews held that Commerce failed to provide adequate reasoning for its decision to apply its fifteen-day policy to SKF, concluding as follows:

> Commerce offers nothing beyond an unsupported conclusion that the 15-day rule is reasonable and a recitation of language from a prior decision of this court. Missing is any reasoned discussion of the Department's weighing of the competing factors that must inform a decision to allow only fifteen days for the filing of the summons, complaint, motion for injunction, and, should consent to an injunction not be forthcoming, an application for a temporary restraining order. While pointing to the six-month deemed liquidation period as the reason for the 15-day rule, the Decision Memorandum offers no explanation of why the Department decided to afford Customs all but fifteen days of that period in order to accomplish the liquidation of entries.

SKF USA Inc. v. United States, 35 CIT __, __, 800 F. Supp. 2d 1316, 1328 (2011) (citations omitted). This court awarded a declaratory judgment that the application of the fifteen-day policy to SKF's subject merchandise in the nineteenth administrative reviews was contrary to law. *Id.*

According to the collateral estoppel doctrine, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted). Collateral estoppel applies in this instance because the Department's rationale for implementing the final results of the twentieth administrative reviews according to its fifteen-day policy does not differ materially from the reasoning the court found inadequate as to the nineteenth administrative reviews. *Compare SKF USA Inc.*, 35 CIT at __, 800 F. Supp. 2d at 1328, *and* Issues & Decision Mem., A-100–001, ARP 04–09, at 30 (Sept. 1, 2010) (Admin.R.Doc No. 1423), *available at* http://enforcement.trade.gov/frn/summary/MULTIPLE/2010–21839–1.pdf (last visited Oct. 21, 2013) ("*Decision Mem. (AR 20)*"), *with* Issues & Decision Mem., A-100–001, ARP 04–08, at 12 (Aug. 25, 2009), *available at* http://enforcement.trade.gov/frn/summary/multiple/E9–20980–1.pdf (last visited Oct. 21, 2013) ("*Decision Mem. (AR 19)*").

In this case, Commerce offered the same three reasons in support of its fifteen-day policy that it offered for the nineteenth administrative reviews. With respect to both the nineteenth and twentieth sets of administrative reviews, Commerce described its policy as "based upon administrative necessity" due to the holding in *International Trading Co. v. United States*, 281 F.3d 1268 (Fed. Cir. 2002), that the six-month period for liquidation of entries by Customs established by 19 U.S.C. § 1504(d) begins from the publication of the final results of an administrative review.[3] *Decision Mem. (AR 20)* 30; *Decision Mem. (AR 19)* 12. Both times, Commerce stated that "[e]xtreme consequences follow from deemed liquidation, specifically the government's inability to collect duties calculated." *Decision Mem. (AR 20)* 30; *Decision Mem. (AR 19)* 12. In each instance, Commerce also stated that its revised fifteen-day policy, which followed its previous policy of issuing liquidation instructions *within* fifteen days of publication of final results, accords with this Court's decision, which pertained to the sixteenth administrative reviews, that the right provided in 19 U.S.C. § 1516a(c)(2) implies "some reasonable opportunity in which a plaintiff may seek to obtain the specific type of injunction described" in the statute. *Decision Mem. (AR 20)* 30; *Decision Mem. (AR 19)* 12 (both citing *SKF Inc. v. United States*, 33 CIT 370, 385, 611 F. Supp. 2d 1351, 1364 (2009)).

The remaining discussion of the fifteen-day policy in the Decision Memoranda for both the twentieth and nineteenth administrative reviews focuses on refuting arguments made by SKF. These two very similar discussions do not provide a basis on which the court could conclude that the issue decided in the nineteenth administrative reviews is different from the issue presented by this case.

In summary, Commerce provided a rationale for applying its fifteen-day policy to implement the twentieth administrative reviews that is not distinguishable in any material way from the one it offered to support the application of the policy in the nineteenth administrative reviews. As a result, the issue litigated by the parties in this action already has been considered and decided by this Court in a previous case that culminated in a declaratory judgment in favor of plaintiffs. The court therefore declines, on the basis of collateral estoppel, to consider the merits of defendant's argument in support of

[3] Under Section 504(d)(2) of the Tariff Act, 19 U.S.C. § 1504(d), an entry is generally treated as liquidated at the "duty, value, quantity, and amount of duty asserted by the importer of record" if not liquidated within six months of the date Customs and Border Protection receives notice from the Department of Commerce or other appropriate agency, or a court with jurisdiction over the entry, that suspension of liquidation required by statute or court order has been removed.

the fifteen-day policy as applied to implement the twentieth administrative reviews and will award plaintiffs declaratory relief.

III. CONCLUSION

For the reasons discussed above, the court denies plaintiffs' request for relief on their claim challenging the use of zeroing in the *Final Results*. With respect to their second claim, plaintiffs are entitled to a declaratory judgment that the Department's fifteen-day policy was contrary to law as applied to them. Judgment will be entered accordingly.

Dated: October 25, 2013
New York, New York

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

Slip Op. 13–132

GPX INTERNATIONAL TIRE CORPORATION, AND HEBEI STARBRIGHT TIRE CO., LTD., Plaintiffs, TIANJIN UNITED TIRE & RUBBER INTERNATIONAL CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant, BRIDGESTONE AMERICAS, INC., BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, TITAN TIRE CORPORATION, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 08–00285
Public Version

[Commerce's redetermination in countervailing duty case is sustained.]

Dated: October 30, 2013

William H. Barringer, *Daniel L. Porter*, *James P. Durling*, *Matthew P. McCullough*, and *Ross E. Bidlingmaier*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for the Plaintiffs GPX International Tire Corporation and Hebei Starbright Tire Co., Ltd.

Mark B. Lehnardt, Lehnardt & Lehnardt, LLC, of Liberty, MO, argued for Consolidated Plaintiff Tianjin United Tire & Rubber International Co., Ltd.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the Defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, *Loren M. Preheim*, Trial Attorney, and *John J. Todor*, Trial Attorney. Of counsel on the brief were *Daniel J. Calhoun* and *Matthew D. Walden*, Attorneys, U.S. Department of Commerce, of Washington, DC.

Elizabeth J. Drake, Stewart and Stewart, of Washington, DC, argued for the Defendant-Intervenors Titan Tire Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO CLC. With her on the brief were *Terence P. Stewart*, *Geert M. De Prest*, *William A. Fennel*, *Eric P. Salonen*, and *Wesley K. Caine*.

Joseph W. Dorn, *J. Michael Taylor*, *Daniel L. Schneiderman*, *Jeffrey M. Telep*, *Kevin M. Dinan*, *Prentiss L. Smith*, and *Christopher T. Cloutier*, King & Spalding, LLP, of Washington, DC, for Defendant-Intervenors Bridgestone Americas Tire Operations, LLC and Bridgestone Americas, Inc.

OPINION

Restani, Judge:

This matter is before the court following a remand to the Department of Commerce ("Commerce") in *GPX Int'l Tire Corp. v. United States*, 893 F. Supp. 2d 1296 (CIT 2013) ("*GPX VII*"). Plaintiffs GPX International Tire Corporation ("GPX") and Hebei Starbright Tire Co., Ltd. ("Starbright"),[1] Consolidated Plaintiff Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC"), and Defendant-Intervenors Titan Tire Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, AFL-CIO-CLC (collectively, "Titan") challenge various aspects of the Final Results of Redetermination Pursuant to Remand, ECF No. 394 ("*Remand Results*"). For the reasons set forth below, Commerce's *Remand Results* are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinions. *See generally GPX VII*, 893 F. Supp. 2d at 1318–34. For ease of understanding, however, a brief summary is provided below.

This case involves challenges to Commerce's final determination in a countervailing duty ("CVD") investigation of certain pneumatic off-the-road tires from the People's Republic of China ("PRC"). *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480 (Dep't Commerce July 15, 2008); *see also* Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People's Republic of China, C-570–913, POI: 1/01/06–12/30/06 (July 7, 2008), *available at* http://ia.ita.doc.gov/frn/

[1] Starbright is a fully owned subsidiary of GPX. Resp't Pl.'s App. - Confidential, Tab 12, Ex. B at 2. At times throughout this opinion, the names of the two companies are used interchangeably where a distinction is unimportant.

summary/prc/E8–16154–1.pdf (last visited Oct. 21, 2013) ("*I & D Memo*"). In its previous order, the court instructed Commerce to address five issues raised in the initial rounds of briefing in this matter. *See GPX VII*, 893 F. Supp. 2d at 1319–33. Specifically, the court ordered Commerce to: 1) re-weigh the evidence related to the arm's-length nature of the Hebei Tire Co., Ltd. ("Hebei Tire") asset sale; 2) examine the veracity of appraisals proffered by GPX in determining whether Hebei Tire's assets were sold for fair market value ("FMV"); 3) explain its inability to offset any subsidy determined to have been transferred to Starbright by any amount of the purchase price that reflected payment for the subsidy; 4) explain its loan benefit calculation and whether Titan's alternative methodology constitutes a legitimate attempt to avoid a distorted calculation; and 5) consider evidence concerning the transfer of TUTRIC debt holdings and reduce TUTRIC's benefit calculation by the amount of any payment made by or on behalf of TUTRIC. *See id.* On remand, Commerce: 1) determined that the sale of Hebei Tire's assets was not conducted at arm's length; 2) determined that the appraisals proffered by GPX are unsatisfactory for benchmarking purposes; 3) explained its inability to calculate a purchase price offset; 4) explained its loan benefit calculation and why it rejected Titan's alternative; and 5) considered TUTRIC's evidence, continued to find that TUTRIC benefited from countervailable debt forgiveness, and reduced TUTRIC's benefit calculation as ordered. *See Remand Results* at 1–2.[2]

GPX continues to challenge Commerce's findings concerning the nature of the Hebei Tire asset sale. Resp't Pl.'s Cmts. on the U.S. Dep't of Commerce's Remand Redetermination, ECF No. 397 ("GPX Cmts.") 1–9.[3] Titan argues that Commerce's loan benefit calculations are unlawful and unsupported by substantial evidence. Cmts. of the Titan Tire Corp. and the United Steelworkers Union on the Dep't of Commerce's Redetermination Pursuant to Remand, ECF No. 398

[2] Commerce indicated that its redetermination was completed under protest, but it failed to specify which aspects of the *Remand Results* the protest covered. The only legitimate purpose of registering a protest in a remand determination is to preserve a particular issue for appeal where the agency has been compelled to take a particular step that results in an outcome not of its choosing. At oral argument, government counsel conceded that the final TUTRIC determination is the only one that may be so described, i.e. the agency was compelled to consider new determinative facts in valuing the subsidy to TUTRIC. Whether the general expression of disagreement is sufficient to preserve this specific issue for appellate review cannot be decided here. Putting aside appearance issues, specificity would eliminate ambiguity for these purposes.

[3] Although GPX's rate has been reset by an intervening administrative review, *see New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 Fed. Reg. 23,286, 23,288 (Dep't Commerce Apr. 26, 2011), this case is relevant to whether countervailing duties are owed at all.

("Titan Cmts.") 2–7. Although TUTRIC's rate of countervailing duties was reduced on remand from 6.85% to 3.93% because the allegedly forgiven debt was partially repaid, TUTRIC argues that Commerce failed to reasonably consider the evidence concerning its debt financing and that Commerce's determination is contrary to law. Cmts. on Remand Redetermination of Tianjin United Tire and Rubber Int'l Co., Ltd., ECF No. 400 ("TUTRIC Cmts.") 10–19. Defendant United States responds that Commerce's determinations are supported by substantial evidence and in accordance with law. Def.'s Resp. to Cmts. on the Final Redetermination Pursuant to Ct. Remand, ECF No. 412 ("Def. Cmts.") 10–31.[4]

JURISDICTION AND STANDARD OF REVIEW

The court has continuing jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold any determination by Commerce that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

DISCUSSION

I. Change in Ownership of Hebei Tire

GPX challenges Commerce's determination on remand that Starbright received countervailable subsidies when it acquired Hebei Tire's assets in 2006. GPX Cmts. 1–9. Defendant argues that Commerce's determination is supported by substantial evidence and in accordance with law. Def. Cmts. 10–23.

To find a countervailable subsidy, Commerce is required by statute to identify a financial contribution given by an authority that conferred a benefit on an entity. 19 U.S.C. § 1677(5)(B). "A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction." *Id.* § 1677(5)(F). The statute, however, does not explain under what conditions a subsidy will be extinguished upon the sale of the subsidized company. As the court discussed in its previous opinion, Commerce has promulgated a series of regulations attempting to establish a reasonable methodology for determining whether a purchaser continues to benefit from a countervailable subsidy given to its predecessor. *See GPX VII*, 893 F. Supp. 2d at 1321–24.

[4] Antidumping duty issues were resolved previously. *See generally GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337 (CIT 2010).

Under its current practice, Commerce begins with a baseline presumption that non-recurring subsidies continue to benefit the recipient for the average useful life of the recipient's assets. *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37,125, 37,127 (Dep't Commerce June 23, 2003) ("*Final Modification*"). Where a transaction is at arm's length and for fair market value, Commerce will consider the subsidy extinguished. *See id.* Commerce first examines whether the transaction was conducted at arm's length. *Id.* at 37,127. In so doing, Commerce looks for a relationship between the parties and whether the seller sought to pursue public interests. *Id.* at 37,127, 37,130, 37,132–33. Commerce also examines whether the purchaser paid FMV. *Id.* at 37,127. Under this prong, however, Commerce does not focus on comparing a numerical estimate of FMV to the purchase price. *Id.* at 37,131. Instead, Commerce employs a process-based approach that looks to whether the parties relied on independent evaluations before or during negotiations to establish a price, whether the sale was sufficiently open to allow for competitive bidding, whether the sale was awarded to the highest bidder, and whether there were requirements for future investment.[5] *Id.* at

[5] According to the methodology:

> A primary consideration in this regard normally will be whether the government failed to maximize its return on what it sold, indicating that the purchaser paid less for the company or assets than it otherwise would have had the government acted in a manner consistent with the normal sales practices of private, commercial sellers in that country.

Final Modification, 68 Fed. Reg. at 37,127.

To determine whether this condition is satisfied, Commerce has identified a non-exhaustive list of four considerations:

> (1) Objective analysis: Did the government perform or obtain an objective analysis in determining the appropriate sales price? Did it implement the recommendations of such objective analysis for maximizing its return on the sale, including in regard to the sales price recommended in the analysis?
>
> (2) Artificial barriers to entry: For example, did the government impose restrictions on foreign purchasers or purchasers from other industries, or overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for, or the purchase price of, the company?
>
> (3) Highest bid: For example, was the highest bid accepted and was the price paid in cash or close equivalent? Why or why not?
>
> (4) Committed investment: For example, were there price discounts or other inducements in exchange for promises of additional future investment that private commercial sellers would not normally seek (*e.g.*, retaining redundant workers or unwanted capacity)? Did the committed investment requirements serve as a barrier to entry, or in any way distort the value that bidders were willing to pay for what was being sold?

Id.

37,127. Again, under Commerce's methodology, both findings are necessary conditions to Commerce finding that the subsidies were extinguished. *Id.* at 37,127–28.

In its previous decision, the court sustained Commerce's initial determination that Hebei Tire was not fully privatized at the time of the sale at issue, and therefore Commerce need not presume that the sale was at arm's length and for FMV. *GPX VII*, 893 F. Supp. 2d at 1325. The court concluded, however, that Commerce's arm's-length and FMV analyses required revisiting. *Id.* at 1327–28. With respect to the arm's-length analysis, the court held that although Commerce had reasonably determined that a worker retention agreement and shareholder-employee side payment attached to the sale could have undermined the arm's length nature of the transaction, Commerce had adopted a distorted view of the actions of Hebei Tire's chairman in communicating a pre-negotiated purchase price to the auction house that administered the sale. *See id.* at 1325–26. As Commerce's determination that the sale was not conducted at arm's length rested on its analysis of both the worker retention agreement/payment and the chairman's actions, the court instructed Commerce to re-weigh the evidence. *Id.* at 1326. With respect to the FMV analysis, the court held that although Commerce is entitled to deference in determining what weight to assign the various components in its process-based methodology, Commerce cannot completely disregard company appraisals on the record. *Id.* at 1327. As Commerce had done so with respect to appraisals proffered by GPX, the court instructed Commerce to examine the veracity of these appraisals. *Id.* In view of Commerce's analysis of these issues, the court sustains Commerce's determination on remand.

A. *Arm's-Length Analysis*

GPX first argues that Commerce's determination as to the arm's-length nature of the sale is inconsistent with the court's instruction and unsupported by substantial evidence. GPX Cmts. 1–6. On remand, Commerce determined that the Hebei Tire chairman's actions were inconsistent with the transaction having been conducted at arm's length and that the worker retention agreement/payment independently defeated the arm's-length nature of the transaction. *Remand Results* 7–10, 37–38. The latter determination is supported by substantial evidence.

As an initial matter, the court finds that Commerce has maintained a distorted view of the chairman's interaction with the auction house. In its previous decision, the court found that Commerce had "failed to point to evidence that in setting the reserve price, according to the

mandatory auction rules, the chairman somehow acted contrary to Hebei Tire's interest in securing a winning bid, from any buyer, in light of its ongoing foreclosure proceedings." *GPX VII*, 893 F. Supp. 2d at 1326. Critically, the court noted that the chairman's actions appeared "consistent with Hebei Tire ensuring that a bid would be made, as well as be accepted, during the auction, as a previous auction had failed to solicit any winning bids." *Id.* Nevertheless, Commerce determined on remand that the chairman need not have acted contrary to Hebei Tire's interests for Commerce to find that his actions were inconsistent with the transaction having been conducted at arm's length. *Remand Results* at 9. Instead, Commerce determined that its finding was reasonable because the purchase price "embodied the conjoined interests of both buyer and seller." *Id.* This position is without merit.

Although an "arm's length transaction" is not defined by statute, the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA") defines it for purposes of 19 U.S.C. § 1677(5)(F) as "a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." H.R. Doc. 103–316 (1994), at 928, *reprinted in* 1994 U.S.C.C.A.N. 4040, at 4241 ("*SAA*"). The issue, therefore, is whether Hebei Tire's chairman failed to act in his company's interest, not whether the purchase price reflected the interests of both Starbright and Hebei Tire.[6] Moreover, it seems perfectly self-interested that the chairman, having been unsuccessful once before, would take proactive measures to ensure that the auction house's procedures not stand in the way of the only sale in sight. All the chairman advocated for was a lower price floor, not a price ceiling. Commerce cannot determine reasonably that such efforts to ensure closure of the deal defeat the arm's-length nature of a transaction. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) ("[W]hile various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case.

[6] Defendant also argues that the chairman's actions were inconsistent with the definition of "arm's length transaction" provided in the *Final Modification*. Def. Cmts. 12. Defendant characterizes the *Final Modification* as defining an arm's-length transaction as "a transaction where the buyer and seller, as well as their interests, are separate." *Id.* The *Final Modification* says no such thing; rather, the *Final Modification* provides only that Commere "will be guided by the SAA's definition of an arm's-length transaction." *Final Modification*, 68 Fed. Reg. at 37,127. There is no reason to believe an arm's-length transaction can never occur where interests overlap in part, such as an interest in finalizing an agreed-upon transaction.

Form should be disregarded for substance and the emphasis should be on economic reality." (internal quotation marks, citations, and brackets omitted)).

Despite this error, however, Commerce determined in the alternative that the arm's length nature of the sale was independently defeated by the worker retention agreement, combined with the side payment to the shareholder-employees.[7] Remand Results at 37–38. The court found in its previous opinion that Commerce could conclude reasonably that this agreement created a conflict between the interests of profit maximization and job security such that Hebei Tire may have been less likely to negotiate for the highest possible price than it otherwise would have. *GPX VII*, 893 F. Supp. 2d at 1326. With the benefit of this analysis and Commerce's new determination that this was an independent basis for finding that the transaction was not at arm's length, the court sustains Commerce's determination that the sale was not conducted at arm's length.

B. *FMV Analysis*

GPX also challenges Commerce's FMV analysis. GPX Cmts. 6–8. GPX argues that Commerce failed to reasonably consider the appraisals on the record and that Commerce's FMV determination is unsupported by substantial evidence. *Id.* Commerce contends at the outset that because the transaction must be both at arm's length and for FMV, it is unnecessary to consider one prong if the court finds that the other has not been met. *See Remand Results* at 10. Nonetheless, Commerce determined on remand that the appraisals proffered by GPX, one commissioned by Starbright and another commissioned by Hebei Tire, are unsatisfactory for benchmarking FMV. *Id.* at 14–18. As to the Starbright-commissioned appraisal, Commerce supported its determination with statements in the appraisal attesting to its incomplete and cursory coverage, as well as with evidence that Hebei Tire's records were poorly managed.[8] *Id.* at 15–17. As to the Hebei Tire-commissioned appraisal, Commerce supported its determination

[7] Commerce repeated its analysis of the worker retention agreement on remand. *Remand Results* at 7–8. Although GPX seems to acknowledge that the court held Commerce's treatment of the worker retention agreement to be reasonable in its previous opinion, GPX again argues that Commerce did not reasonably consider this agreement, perhaps under the view that Commerce altered its prior analysis on remand. *See* GPX Cmts. 2–4. Defendant rightly asserts that Commerce merely elaborated on the significance of the agreement, as per the court's instruction to re-weigh the evidence. Def. Cmts. 14. The court declines to revisit this issue.

[8] Specifically, Commerce found: that the appraisal states that its coverage is partial; that the appraisal states as its objective to provide only "a general idea" of the assets' value; that the appraisal states that off-the-books equipment is excluded from the valuation; that the appraisal may not have included certain mortgaged equipment; that beyond land use

with evidence concerning the timing and duration of the appraisal, the scope of the appraisal, and the appraisers' levels of experience, as well as with statements in the appraisal conditioning its veracity on the quality of Hebei Tire's records. *Id.* at 17–18. GPX contends that Commerce's determination relies on unreasonable inferences from the evidence. *See* GPX Cmts. 6–7. This claim is without merit.

The court turns first to Commerce's assertion that the FMV analysis is rendered unnecessary by a finding by Commerce that the transaction was not at arm's length or vice versa. Commerce's position is based on its present methodology that requires both conditions be met. *See Final Modification*, 68 Fed. Reg. at 37,127, 37,130. In adopting its process-based methodology, Commerce explained that it focuses on the arm's-length nature of the sale as a means for determining whether FMV was paid: if the transaction was at arm's length, Commerce presumes FMV was paid. *See id.* Although this presumption is a reasonable interpretation of the statute, Commerce is precluded from adopting a per se rule that the absence of an arm's-length transaction always prevents subsidies from being extinguished, regardless of whether FMV is actually paid, absent some finding of a sham transaction. Such a position lacks support in the statute, which merely indicates that an arm's length transaction does not necessarily extinguish a subsidy, such as absent the payment of FMV for the company. *See* 19 U.S.C. § 1677(5)(F). The SAA clarifies that Commerce must exercise its discretion in examining the sale of a subsidized company "carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied." *SAA* at 928. The case law of the Court of Appeals for the Federal Circuit also places the emphasis in this analysis on the question of whether FMV was paid for the acquired assets, because if so, no benefit continues to accrue to the buyer. *See Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1346 (Fed. Cir. 2004) ("*Allegheny I*") (rejecting a previous methodology that did not consider directly "the economic indicators of the repayment of a past subsidy"); *Allegheny Ludlum Corp. v. United States*, 29 CIT 157, 162, 358 F. Supp. 2d 1334, 1339 (2005) ("*Allegheny II*") ("Therefore, the payment of fair market value means that the *purchasing firm* did not receive more than it paid for (assuming the government did not distort the market in a manner affecting the sale.)"). Previous methodologies adopting per se rules have been rejected as chronicled in the court's previous opinion. Commerce must analyze all relevant information in this fact-intensive analysis.

rights, the appraisal includes no intangible property; and that the appraisal's accuracy turns on the quality of Hebei Tire's records, which an outside due diligence report on the record found deficient. *Remand Results* at 15–17.

Although the court in *GPX VII* recognized that Commerce's change-in-ownership methodology is a reasonable method of establishing presumptions for the extinguishment or non-extinguishment of subsidies based on a process-based approach, it also held that where there is probative, direct evidence on the record rebutting a presumption that FMV was not paid, Commerce cannot ignore relevant evidence by adopting a methodology that refuses to consider it. The essence of the inquiry is whether FMV was paid, thereby extinguishing the subsidies. Commerce may select from a variety of reasonable methodologies, including imperfect ones based on reasonable presumptions, but it may not foreclose an avenue of relevant inquiry in doing so or disregard relevant evidence. Commerce's repeated references to certain evidence, such as bottom-line objective analyses, not being dispositive misses the point. Commerce must consider all probative evidence, whether it finds it independently dispositive or not. Accordingly, where as here, Commerce is presented with allegedly direct, objective evidence of FMV,[9] it must analyze that evidence and support by substantial evidence any determination with respect to that evidence.[10]

Turning to the appraisals at issue in this case, GPX first asserts, without setting out any substantive arguments, that the Starbright-commissioned appraisal demonstrates that Hebei Tire's assets were sold for FMV. GPX Cmts. 6. This claim plainly fails in the light of the various indications that the appraisal was cursory and its coverage partial. "[W]hen a valuation study, or valuation studies, have not considered all the facts and circumstances, reliance thereon is misplaced." *Allegheny II*, 29 CIT at 169, 358 F. Supp. 2d at 1345.

As to the Hebei Tire-commissioned appraisal, GPX first disputes Commerce's finding that due to the timing and duration of the appraisal, it was likely a results-oriented document commissioned to comply with regulatory requirements. GPX Cmts. 6–7. GPX argues that Commerce failed to explain why the timing and duration of the appraisal necessarily leads to the conclusion that its analysis was

[9] Throughout its analysis, Commerce emphasizes that it does not calculate a numerical FMV within its process-based approach. Commerce seems to go further by treating its process-based methodology as an end unto itself. At bottom, however, FMV is by definition a value, either a fixed number or a range of numbers. Although FMV may be amorphous and difficult for Commerce to calculate, this fundamental concept cannot be ignored by Commerce when it determines that an objective analysis calculating FMV is not probative.

[10] The court notes that this does not mean Commerce must base its determinations in change-in-ownership situations on objective evidence of the numerical value of FMV, and in fact, given the problems likely to arise in many appraisals, as here, Commerce's ultimate determination often may be to reject the appraisals as faulty and base its decision instead on its process-based analysis.

cursory. *Id.* Commerce is required, however, only to arrive reasonably at its conclusions, and the circumstances of the appraisal readily support Commerce's finding.[11] GPX additionally argues that Commerce failed to reasonably consider the fact that the appraisal is actually three different appraisals, i.e. not an *in toto* valuation. *Id.* at 7. Commerce explained, however, that the separate appraisals fail to account for certain intangible sources of value, such as goodwill and intellectual property. *Remand Results* at 41 n.33.

GPX also contests Commerce's finding that the appraisers likely lacked adequate experience for valuing the assets of a tire company. GPX Cmts. 7. Commerce's finding was based on the response of a Hebei Tire official during verification that "there was only one tire manufacturer in Xingtai" when asked whether the appraiser had experience in valuing tire equipment. *Remand Results* at 18. GPX argues that the statement of the Hebei Tire official does not imply that the appraiser lacked adequate experience. GPX Cmts. 7. The court is satisfied, however, that Commerce's skepticism is supported by the evidence, even if Commerce's determination is not the only reasonable conclusion supported by the record.

Finally, GPX argues that Commerce's position assumes, and requires, that Hebei Tire lied to or withheld information from the appraisers. GPX Cmts. 7. This claim is without merit. Commerce was instructed to examine the veracity of the appraisals, and record evidence demonstrates that Hebei Tire's records were managed poorly and therefore unlikely to have provided the appraisers with the information necessary for a full and accurate appraisal. *See Remand Results* at 16, 18 (citing Starbright's April 8, 2008 questionnaire response at Exhibit VCVD-1 (due diligence report)). Commerce has noted that appraisals of companies are inherently difficult and rely on numerous, often subjective, factors. Here, Commerce pointed to a slew of problems with the appraisals on the record. Accordingly, Commerce's determination that the appraisals are not valuable in determining FMV is supported by substantial evidence. Because Commerce considered and reasonably rejected evidence undermining its presumption that FMV was not paid in this non-arm's-length transaction, Commerce's remand determination is supported by substantial evidence and is in accordance with law.

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[11] Specifically, the appraiser valued [[ ]] pieces or sets of equipment in [[ ]], and also may have valued [[ ]]. *Remand Results* at 17–18.

C. Purchase Price Offset

GPX finally argues that Commerce failed to provide a credible explanation for its inability to offset the amount of subsidy transferred to Starbright by the amount of the purchase price that reflected payment for the subsidy. GPX Cmts. 8–9. Commerce determined on remand that the use of a purchase price offset would be inappropriate. *Remand Results* at 24–25. Commerce also determined that such a calculation is not practicable without satisfactory appraisals and explained how this calculation differs from those involving the determination of benefits pursuant to 19 U.S.C. § 1677(5)(E). *Id.* at 25–28. Defendant argues that Commerce's explanation is consistent with the court's instructions and should be sustained. Def. Cmts. 20–23.

As an initial matter, the court rejects Commerce's assertion that a purchase price offset would be inappropriate under the statute. *Remand Results* at 24–25. Commerce decided on remand that such an offset is unnecessary because Commerce already conducted a countervailing duty analysis of Hebei Tire, and it merely continued to allocate existing subsidies over the average useful life of the assets. *Id.* Essentially, Commerce takes the position that a subsidy is either extinguished in its entirety via the payment of FMV in a change in ownership transaction or it continues in full force, without any possible abatement based on the purchase price. This argument, however, runs contrary to the previous holdings of the court and cannot be credited. *See Acciani Speciali Terni S.p.A. v. United States*, 28 CIT 2013, 2026, 350 F. Supp. 2d 1254, 1265–67 (2004) ("Commerce should examine *the totality of the economic circumstances* to determine whether the pre-privatization subsidy carries over to the post-privatization entity." (emphasis added)) (citing *Allegheny I*, 367 F.3d at 1347–48); *see also Allegheny II*, 29 CIT at 162, 358 F. Supp. 2d at 1339 ("The fair market value of the company takes into account all of a company's liabilities and assets including assets that were incurred with government support. Therefore, the payment of fair market value means that the *purchasing firm* did not receive more than it paid for (assuming the government did not distort the market in a manner affecting the sale.)").

Commerce reasonably found in this case, however, that no reliable evidence quantifying repayment of the subsidies exists on the record. As the court discussed *supra* in the context of Commerce's FMV analysis, Commerce reasonably determined that the appraisals on the record are unsatisfactory for calculating FMV. Determining the extent to which Hebei Tire's purchase price reflected payment for Hebei Tire's subsidies, therefore, would require that Commerce cal-

culate the precise numerical value of FMV of Hebei Tire. *Remand Results* at 25–28. This calculation, in turn, would require Commerce to value a large number of specialized machines, buildings, and intangible assets, an inquiry not contemplated under its process-based methodology.[12] *Id.* The court is persuaded that in the present matter Commerce possesses neither the expertise nor the resources to undertake such an endeavor where no credible record evidence exists. Indeed, Commerce's process-based methodology was upheld in part on these grounds. *See GPX VII*, 893 F. Supp. 2d at 1327. The court notes, however, that this is not to say that Commerce could refuse to consider evidence placed on the record demonstrating that full or nearly-full FMV was paid, thereby compensating the seller for any subsidy benefit that would otherwise be received and rebutting Commerce's presumption of non-extinguishment.

GPX also argues that Commerce's explanation is inconsistent with its practices elsewhere, including its dismissal of the appraisals proffered by GPX in this matter and its ability to value difficult assets like land in its investigations. GPX Cmts. 8–9. These arguments are without merit. First, Commerce determined in the present matter that GPX's appraisals were unsatisfactory on the basis of qualitative, process-based considerations. *See Remand Results* at 15–18. Commerce did not evaluate the veracity of each individual valuation in the appraisals or undertake its own competing appraisal. *Id.* Second, where Commerce has benchmarked land in the past, it has done so by reference to either available benchmark figures placed on the record or a process-based methodology. *See, e.g.*, *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Germany*, 62 Fed. Reg. 54,990, 54,994 (Dep't Commerce Oct. 22, 1997); *Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 72 Fed. Reg. 67,893, 67,909 (Dep't Commerce Dec. 3, 2007). Readily accessible benchmark figures are not available on this record for the specialized machines and buildings that would have to be valued for Commerce to determine the FMV of a large tire factory or even figures for comparable companies. *Remand Results* at 25–27. The court declines to impose such a burden on Commerce to develop the record with this information when the statute does not require it. Accordingly, Commerce's decision, on this record, not to

[12] Commerce noted on remand that the appraisals indicate that the Hebei Tire facility contained [[ ]] pieces of equipment. *Remand Results* at 25 n.17. Commerce also noted on remand that the facility comprised [[ ]] buildings. *Remand Results* at 26 n.18. GPX contests neither assertion. *See* GPX Cmts. 8–9.

offset the subsidy benefit allocated to Starbright is supported by substantial evidence and is in accordance with law.

III. Titan's Loan Benefit Calculation Challenge

Titan argues that Commerce failed to explain adequately on remand why an inflation-based adjustment is a suitably proxy for a currency expectation adjustment to a loan interest rate benchmark in the context of the Chinese economy and why the omission of this adjustment would not avoid a distorted benefit calculation. Titan Cmts. 3–7. Defendant argues that Commerce complied with the court's instruction and that its determination is supported by substantial evidence. Def. Cmts. 28–31. With the benefit of Commerce's explanation on remand, the court will sustain the determination.

In its previous opinion, the court instructed Commerce to "explain why it uses a currency expectation adjustment for comparing domestic interest rates, why an inflation adjustment is a suitable proxy for a currency expectation adjustment, and whether the proposed adjustment by [Titan] is essentially an attempt to countervail against China's distorted inflation rate or a legitimate attempt to avoid a distorted benefit calculation." *GPX VII*, 893 F. Supp. 2d at 1330–31. In its initial investigation, Commerce found that the companies under investigation had not received any comparable market-based loans in the past and that no comparable commercial benchmark rates existed within the PRC due to market distortions. I & D Memo at 104–05. Accordingly, Commerce calculated a benchmark rate based on a basket of interest rates from a variety of developmentally similar countries. *Id.* at 109–10. Typically, Commerce applies a currency expectation adjustment to interest rates calculated for loans to account for the portion of the rate attributable to expected exchange rate fluctuations. *Id.* As robust forward exchange rate data were unavailable for the set of developmentally similar countries, however, Commerce instead used an inflation rate adjustment as a proxy for the exchange rate adjustment. *Id.* at 110.

The statute provides that a benefit received from a subsidized loan is equal to the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." 19 U.S.C. § 1677(5)(E)(ii). In calculating this difference, Commerce looks to comparable loans based on similar structural features including interest calculation, currency, and maturity. 19 C.F.R. § 351.505(a)(2). Where the examined firm does not have any comparable past loans, Commerce normally will examine the national average interest rate for comparable commercial loans, when

such a market exits. *Id.* § 351.505(a)(3)(ii). When this does not exist on a commercial basis, Commerce looks to interest rates in other comparable markets. *See id.* § 351.505(a)(2)(ii). "In making the comparison . . . , the Secretary normally will rely on effective interest rates." *Id.* § 351.505(a)(1).

As a preliminary matter, the court notes that Commerce explained on remand why it uses a currency expectation adjustment to compare cross-country domestic interest rates. *Remand Results* at 33–34. In short, Commerce has determined that reaching an apples-to-apples cross-country comparison of borrowing costs requires, where available, the use of forward exchange rates to adjust for the extent to which expectations about future movement in currency markets are priced into interest rates, even for domestic loans. *Remand Results* at 33–34; Def. Cmts. 29. This explanation has not been challenged and is consistent with the regulations.

Defendant's argument, not clearly delineated in the *Remand Results*, is that Commerce used an inflation adjustment here both as a proxy for a currency adjustment as well as an independent method of obtaining an apples-to-apples comparison. Titan first challenges Commerce's determination that an inflation-based adjustment is a reasonable proxy for exchange rate expectations in the context of the Chinese economy. Titan Cmts. 3–6. Commerce explained on remand the basic proposition that inflation represents a loss in purchasing power and, all else equal, the devaluation of a currency relative to others. *Remand Results* at 34. Titan argues that although Commerce determined that its methodology should adjust for inflation to the extent that Chinese lenders and borrowers rely on inflation when setting the price of credit, Commerce made no factual determination that this proposition holds in the case of the PRC and ignores record evidence to the contrary. Titan Cmts. 3–6 (citing *Remand Results* at 35–36). The statement relied upon by Titan deals with Commerce's preference for an adjustment based on the consumer price index ("CPI") versus a gross domestic product ("GDP") deflator and does not represent a Commerce policy of using an inflation adjustment only when there is a perfect correlation between interest rates and inflation rates. *See* Remand Results at 35–36. The court holds that Titan's evidence fails to undermine Commerce's reliance on the relationship between inflation and interests rates in its calculation and that Commerce's determination is supported by substantial evidence.

Commerce cites textbook authority providing empirical support for the positive correlation between inflation and exchange rates. *Remand Results* at 35 (citing Stephen G. Kellison, *The Theory of Interest* 299 (2d ed. 1991) ("[D]espite the difficulty of precisely measuring

[inflation] expectations, the evidence clearly indicates that the relationship [between expected rates of inflation and interest rates] does exist.")). Titan notes in response that Commerce previously found that interest rates in the PRC are set subject to Government of China ("GOC")-imposed deposit rate ceilings and lending rate floors, not on the basis of unencumbered market forces such as inflation. Titan Cmts. 4 (citing *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China*, C-570–907 (Oct. 17, 2007) at 68, *available at* http://ia.ita.doc.gov/frn/summary/prc/E7–21046–1.pdf (last visited Oct. 21, 2013)). Titan also notes that the GOC, unlike many other governments, declines to use interest rates to control inflation for fear of unmanageable capital inflows. Titan Cmts. 4–5 (citing *Pet'r's Cmts. on Loan Benchmarks* (Nov. 9, 2007), PD 145, at 5–6). Neither observation, however, undermines a determination that inflation and interest rates are positively correlated in the Chinese economy, at least to some extent, or that lenders and borrowers are subject to the impact of inflation, albeit possibly suppressed inflation. As Titan failed to put forward information rendering unreasonable Commerce's conclusion that inflation and interest rates are correlated in the Chinese economy, the court rejects Titan's challenge and holds that Commerce complied with the court's order. *See* Titan Cmts. 5. Furthermore, because the meaning of an "effective rate" within the regulations is ambiguous, Commerce was permitted to interpret it in any reasonable manner. Commerce's decision to use a real interest rate as the "effective rate" is a reasonable interpretation of this regulation. Additionally, any argument by Titan in this regard was waived when Titan failed to challenge the interpretation in its comments before the court.

Titan also challenges Commerce's rejection of the alternative calculation Titan proposed during the remand proceeding and in earlier briefing. Titan Cmts. 6–7. Titan asserts as its primary position that no inflation adjustment should be applied because such an adjustment understates the interest rates paid by Chinese borrowers and because inflation differentials within the benchmark basket of nominal interest rates are averaged out by virtue of their aggregation. *Id.* at 6. Commerce determined on remand that Titan's proposal would distort the benefit calculation by failing to account for the extent to which inflation affects domestic interest rates in the PRC. *See Remand Results* at 35. Titan does not substantively argue in its brief for its earlier proposal that the GDP deflator be used as a substitute for Commerce's chosen inflation adjustment, arguing instead that no

adjustment should be used. *See* Titan Cmts. at 6; *Remand Results* at 35–36, 48–50. The court accordingly does not reach Commerce's rejection of this alternative, although it notes that this appears to be a choice between two acceptable measures, each with its own flaws, and Commerce retains discretion in selecting between them. Titan also does not justify why the lack of any adjustment is not equally distortive. Although Commerce does not always adjust benchmarks to fully reflect economic factors in China, the court is not persuaded that Commerce's decision to do so here is unreasonable. As Defendant acknowledged at oral argument, various imperfect methods exist to calculate a benchmark rate, and Commerce's choice here seems a reasonable attempt at arriving at a difficult determination. Therefore, Commerce's choice between its chosen adjustment and no adjustment at all is a reasonable exercise of its discretion under the statute, and the court sustains it.

IV. TUTRIC's Debt Forgiveness

TUTRIC challenges Commerce's determination that TUTRIC's submissions failed to provide information sufficient to overcome the inference that TUTRIC's unpaid debt obligations were forgiven pursuant to governmental action. TUTRIC Cmts. 10–19. Defendant argues that Commerce's determination is supported by substantial evidence and is in accordance with law. Def. Cmts. 23–28. The court sustains Commerce's determination.

When Commerce determines that necessary information is not available on the record, it may use facts otherwise available to reach a determination. 19 U.S.C. § 1677e(a). If an interested party has failed to cooperate in providing valid data upon which Commerce can calculate trade remedy duty rates, Commerce may calculate a rate using inferences that are "adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). In so doing, Commerce may rely on information derived from the petition, a final determination in the investigation, any previous review, or any other information placed on the record. *Id.* Even when applying adverse facts available ("AFA"), the resulting rate "must be 'a *reasonably accurate estimate* of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (quoting *F.lli de Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

Typically, Commerce cannot rely on an unaffiliated party's failure to cooperate to justify the application of an AFA rate unless the exporter under investigation also is found responsible for the behavior in some way. *See* 19 U.S.C. § 1677e(b) (noting that Commerce must determine that a party did not act "to the best of its ability"); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (requiring Commerce to examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation before applying adverse inferences); *Tianjin Magnesium Int'l Co. v. United States*, Slip Op. 1117, 2011 Ct. Int'l Trade LEXIS 16, at *5–10 (Feb. 11, 2011) (rejecting the application of an AFA rate based on the actions of another party); *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1275–77 (CIT 2009) (finding unlawful the application of an AFA rate to a cooperative respondent in order to encourage the compliance of an unaffiliated supplier).[13]

The court has recognized that in the CVD context, often the government, rather than the respondent in the investigation, possesses the information needed by Commerce to evaluate accurately the alleged subsidies. *See, e.g.*, *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1260–62 (CIT 2012). When Commerce has access to information on the record to fill in the gaps created by a lack of cooperation by the government, however, it is expected to consider such evidence. *Id.* at 1262. If an alternative benchmark meets the regulatory criteria and is neutral with respect to a cooperating party, that benchmark would be superior to the one that adversely affects the cooperating party. *Id.* at 1262 & n.10.

In the present matter, Commerce sought in its initial investigation information from the GOC concerning the transfer of TUTRIC debt holdings from Bank of China ("BOC") to China Cinda Asset Management Co., Ltd. ("Cinda"), a GOC-owned asset management company, and then to Avenue Capital Group ("Avenue Asia"), a U.S.-based investment firm. *I & D Memo* at 116. Commerce explained that this information was material to its investigation because the transfer agreements could contain provisions forgiving portions of TUTRIC's debt or limiting in some way the purchaser's ability to collect. *Id.* The GOC refused to release any information, claiming that the information was proprietary and that the companies involved in the transaction did not consent to its release. *Id.* Although the GOC acknowledged that it held controlling interests in the banks and debt servicer, it claimed that it had a policy of not intervening in the operations of

[13] To the extent that *Mueller Comercial de Mexico v. United States*, 887 F. Supp. 2d 1360 (CIT 2012), can be read to allow a cooperator's rate in an AD case to be based on the noncooperation of another party, the court rejects it.

the companies. *Id.* Thus, Commerce applied AFA directly against the GOC and indirectly against TUTRIC in relation to this debt forgiveness. *Id.* No party argued that TUTRIC had access to these third-party agreements during the investigation,[14] and it was undisputed that TUTRIC partially settled its outstanding debt with Avenue Asia and, as requested, produced documents confirming this agreement.[15] Br. in Supp. of Pl. Tiajin United Tire & Rubber Int'l Co., Ltd.'s Rule 56.2 Mot. for J. upon the Agency R. ("TUTRIC Mot.") 16.

In its previous decision, the court instructed Commerce to consider TUTRIC's submission of the BOC-Cinda transfer agreement, which Commerce had previously rejected, if the agreement appeared reliable and its consideration mitigated the collateral effects of the adverse inference taken against the GOC. *GPX VII*, 893 F. Supp. 2d at 1333.[16] TUTRIC also provided during the remand proceeding a second submission of what appeared to Commerce to be affidavits from a TUTRIC official and a Cinda official attesting to the value of the debt transferred from Cinda to Avenue Asia. Remand Results at 29. Commerce determined that a clause in the BOC-Cinda agreement indicates that associated agreements limiting collection rights may exist. *Remand Results* at 28–29. Commerce also determined that the second submission failed to demonstrate that associated agreements did not attach to the Cinda-Avenue Asia transfer. *Remand Results* at 29–30. TUTRIC contests both findings. TUTRIC Cmts. 10–19.

TUTRIC first argues that Commerce failed to consider reasonably the language in the BOC-Cinda agreement transferring any associated agreements to Cinda.[17] TUTRIC Cmts. 10–13. TUTRIC con-

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[14] The *Remand Results* assert that TUTRIC conceded on remand that it had the Cinda-Avenue Asia agreement but did not provide it. *Remand Results* at 45. Both TUTRIC and the Defendant have recognized that this concession was based on a misreading of a document submitted by TUTRIC, but not authored by it. *See* Def. Cmts. 28; TUTRIC Cmts. 17. Defendant does not claim that this can serve as a basis for AFA.

[15] No documents on the record explain how the amount of forgiveness eventually provided to TUTRIC was determined, except that it was ultimately embodied in a settlement agreement.

[16] Defendant does not assert that TUTRIC may be held to account for the GOC's noncooperation as a part of the the GOC. TUTRIC has been held to be an independent entity. *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China; Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 73 Fed. Reg. 9278, 9284, 9286 (Dep't Commerce Feb. 20, 2008).

[17] The agreement states:

[[

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TUTRIC's Resp. to Commerce's Jan. 11, 2013, Req. For Info. at Ex. R-1, CD 1 at bar code 3115117–01 (Jan. 16, 2013), ECF No. 416 (Aug. 1, 2013) ("TUTRIC Jan. 11 Resp.").

tends that this language is boilerplate, noting the generalized quality of the language,[18] the size of the transaction, and certain characteristics of the document.[19] *Id.* Although the court agrees that the language may be boilerplate, it declines to take the additional step of finding Commerce's consideration of the language unreasonable. Any associated agreement, in fact, was transferred to Cinda under the transfer agreement, and the use of boilerplate language does not suggest that an associated agreement does not exist. This conclusion is further supported by the brevity of the document and the undisputed fact that a portion of the debt ultimately was forgiven. The language, therefore, provides some evidence to support the inference that such an agreement could exist based on facts available.

TUTRIC further argues, however, that additional considerations demonstrate that no such agreement exists. Specifically, TUTRIC argues that the language at issue indicates that any associated agreement would be in its possession, that it affirmed to Commerce that it disclosed all relevant information in its possession, and that Commerce failed to find at verification any evidence to the contrary. TUTRIC Cmts. 14–15. This argument also is unavailing. First, although the language implies TUTRIC's possession of any agreement to which it is a party,[20] the set of agreements about which Commerce is concerned is not limited to those identified in the transfer agreement. *Remand Results* at 46–47. Second, although Commerce has an obligation to consider neutral evidence when making inferences to fill in record gaps, as TUTRIC was a cooperating party, Commerce is not obliged to fill the gaps proactively as part of its verification procedures. *See Max Fortune Indus. Co. v. United States*, Slip Op. 13–52, 2013 Ct. Intl. Trade LEXIS 57, at *11 (Apr. 15, 2013) ("The purpose of verification is to 'verify the accuracy and completeness of submitted factual information.'" (quoting 19 C.F.R. § 351.307(d) (2012))); *see also Chia Far Indus. Factory Co., Ltd. v. United States*, 28 CIT 1336, 1344, 343 F. Supp. 2d 1344, 1354 (2004) ("The statute and regulation require Commerce to verify information but generally leave the scope of verification and the procedures for conducting it to Commerce's discretion."). TUTRIC also argues that its second submission providing the statements of a TUTRIC official and a Cinda official regarding the

[18] TUTRIC argues that the word [[ ]] in the phrase [[ ]] is indefinite and ambiguous, suggesting only that such an agreement may exist. TUTRIC Cmts. 11. TUTRIC also argues that the word [[ ]] in the [[ ]] demonstrates that any associated agreement, if one does exist, does not necessarily concern [[ ]]. *Id.*

[19] TUTRIC cites [[ ]], including the following: [[ ]] TUTRIC Cmts. 12–13. TUTRIC also points to the Chinese-language document, which includes [[ ]] *Id.* at 13.

[20] TUTRIC cites the phrase [[ ]] TUTRIC Cmts. 14.

value of the holdings transferred from Cinda to Avenue Asia establishes that Avenue Asia received the full value of creditor's rights originating from the BOC-issued debt. TUTRIC Cmts. 16–18. This evidence, however, speaks only to the nominal value of the debt and does not speak to the possible existence of associated agreements limiting collection rights. *Remand Results* at 29; Def. Cmts. 26–27.

TUTRIC argues generally that Commerce has put it in the impossible position of proving a negative. TUTRIC Cmts. 15–16. Although the court is not without considerable concern for the collateral effects of adverse inferences due to government non-cooperation, the evidence submitted by TUTRIC during the remand proceeding fails to address directly the possibility of ancillary agreements. Such evidence would come directly form the non-cooperating GOC. The record includes uncontested evidence of debt forgiveness as well as transfer agreements that reference possible ancillary agreements concerning debt collection. Additionally, there is no direct evidence that the debt forgiveness originated with Avenue Asia, as no record evidence discusses the reasons for the particular amount of debt forgiveness embodied in the settlement agreement.

Here, Commerce was confronted with analyzing the transfer and eventual settlement of loans that never were considered fully-collectible commercial debt, at least by the time of the transfer from the BOC to Cinda. The history of these loans, with no regular payments, repeated renegotiations, inexplicable interest waivers, and no serious efforts to minimize the lender's loss, indicate that the loans were not treated by the BOC as ordinary commercial debt. *See* Final Calculation Memorandum for Tianjin United Tire & Rubber International Co., Ltd. at 5–8, CD 591 (July 7, 2008). Only when the loans were transferred to an external entity, Avenue Asia, did they take on any commercial indicia and appear as something more than government equity infusions. Relying on the amount forgiven (as now conservatively calculated by Commerce) seems a particularly fair way to value the subsidy. Had the whole "loan" amounts been seen as equity infusions from the outset or at one of the earlier debt forgiveness stages, no doubt the rate of subsidization would be greater. Instead, Commerce decided to approach the convoluted history of these renegotiated loans by treating them as debt forgiveness at the time they were transferred by the last GOC entity holding them to Avenue Asia.[21] When taken as a whole, the evidence on the record provided sufficient support for Commerce's determination that governmental

[21] The loans were bundled and sold as part of a "bad debt sale initiative" along with RMB 21.5 billion in other "non-performing loans" covering 1,500 debtors. *See* TUTRIC Mot. 5; TUTRIC Supp. Questionnaire Resp., Ex. SCVD-11 at 2, CD 200 (Nov. 27, 2007). TUTRIC

subsidization occurred in the amount now established based on facts otherwise available, without the need for drawing an adverse inference against TUTRIC. *See* 19 U.S.C. § 1677e(a) ("If . . . necessary information is not available on the record . . . [Commerce] shall . . . use the facts otherwise available in reaching the applicable determination . . . ."). Accordingly, the court sustains Commerce's determination on this basis.

CONCLUSION

For the foregoing reasons, the determination of Commerce is SUSTAINED. Judgment will be entered accordingly.

Dated: October 30, 2013
New York, New York

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

Slip Op. 13–133

UNITED STATES, Plaintiff, v. LAFIDALE, INC., Defendant.

Before: Jane A. Restani, Judge
Court No. 12–00397

[Plaintiff's motion for default judgment against defendant Lafidale, Inc. in Customs penalty action denied with leave to refile.]

Dated: October 30, 2013

Carrie Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director.

OPINION AND ORDER

Restani, Judge:

Before the court is plaintiff United States' motion for default judgment seeking $324,687.00 in civil penalties plus post-judgment interest against defendant Lafidale, Inc. ("Lafidale") for alleged grossly negligent violations of section 592(a) of the Tariff Act of 1930, 19 U.S.C. § 1592(a) (2006). The complaint's well-pled facts establish defendant's liability for a civil penalty. As explained below, however, the penalty calculation offered by plaintiff appears to be internally

agreed at oral argument that the loans were sold for below the face value of the debt. Although it is one more fact missing from the record, given the state of the debt, one may infer that the discount was steep.

inconsistent and to impose a penalty in excess of the statutory maximum. Plaintiff's motion for default judgment is therefore denied with leave for plaintiff to refile its motion for default judgment with a proper affidavit fully explaining plaintiff's penalty calculation.

BACKGROUND

Between June 20, 2006, and April 22, 2009, Lafidale entered or attempted to enter handbags and wallets into the United States on 46 separate occasions. Compl. ¶ 4, ECF No. 2. The handbags were classified under Harmonized Tariff Schedule of the United States ("HTSUS") 4202.29.10 and the wallets were classified under HTSUS 4202.39.50; these classifications apply to plastic handbags and wallets that are "wholly or mainly covered with paper." *Id.* ¶ 6. None of the imported entries qualified as "wholly or mainly covered with paper." *Id.* Rather, the items should have been classified under different HTSUS subheadings, primarily HTSUS 4202.22.15, covering, *inter alia*, handbags and wallets "[w]ith outer surface of sheeting of plastic," which would have imposed higher *ad valorum* duty rates than the subheadings used by Lafidale. *Id.*

U.S. Customs and Border Protection ("CBP") determined the domestic value of the 46 entries was $753,929.00 and that the misclassification caused an actual and potential loss of revenue of $81,171.63. *Id.* ¶ 9. CBP issued a notice of penalty to Lafidale for $324,687.00, an amount corresponding to four times the lost revenue, on September 30, 2010. *Id.* ¶ 10. Lafidale has yet to pay any part of the penalty. *Id.* ¶ 12. Plaintiff filed a complaint against Lafidale on December 3, 2012, seeking a civil penalty for gross negligence in the amount of $324,687.00. *Id.* at 4. Default was entered against Lafidale on June 13, 2013, for failing to plead or otherwise defend within 20 days of being served with the summons and complaint. Entry of Default, ECF No. 10. Plaintiff filed this motion for default judgment on July 11, 2013. Pl.'s Mot. for Default J., ECF No. 11. Lafidale did not respond.

JURISDICTION

The court has jurisdiction pursuant to 28 U.S.C. § 1582(1), providing for jurisdiction over cases initiated by the United States to recover civil penalties under, *inter alia*, section 592 of the Tariff Act of 1930.

DISCUSSION

Plaintiff has moved for a default judgment. Under USCIT Rule 55(b), default judgment is warranted when (1) the defendant has been defaulted, and (2) the claim is for a sum certain, supported by an

affidavit showing the amount due. Default was entered against Lafidale on June 13, 2013. Entry of Default. Plaintiff seeks civil penalties in the amount of $324,687.00, *see* Compl. at 4, and its motion for default judgment was supported by an affidavit purporting to explain this figure. *See* Thierry Decl., ECF No. 11–1. Plaintiff therefore has met the requirements for default judgment under USCIT Rule 55(b). The court, however, must ensure that the pled facts amount to a legitimate cause of action before granting the relief requested. *United States v. Scotia Pharms. Ltd.*, Slip Op. 09–49, 2009 WL 1410437, at *3 (CIT May 20, 2009). The court accepts as true all well-pled facts in the complaint other than those pertaining to the amount of damages. *Id.*

I. PLAINTIFF'S COMPLAINT SUFFICIENTLY ESTABLISHES A LEGITIMATE CAUSE OF ACTION

Plaintiff seeks civil penalties for grossly negligent violations of section 592 of the Tariff Act of 1930. Section 592(a) provides in part that "no person, by fraud, gross negligence, or negligence–(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or (ii) any omission which is material." 19 U.S.C. § 1592(a)(1)(A). The well-pled facts in plaintiff's complaint must demonstrate that Lafidale entered or attempted to enter merchandise into the commerce of the United States by means of false information that was material and that Lafidale's representations in its documents were grossly negligent.

A material statement is one that has a natural tendency to influence or can influence the decisions made by CBP. *See United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986); *see also* 19 C.F.R. pt. 171, App. B(B) (2013) ("A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing . . . a Customs action regarding: (1) Determination of the classification, appraisement, or admissibility of merchandise [or] (2) determination of an importer's liability for duty . . . ."). Plaintiff alleges that because of the incorrect classifications represented by Lafidale, CBP collected duties at an *ad valorem* rate that was lower than the rate that should have applied. Compl. ¶¶ 6–7. The complaint thus demonstrates that the false classifications influenced CBP's classification of merchandise and its determination of an importer's liability for duty, and the statements therefore were material.

Gross negligence, for purposes of section 592, is behavior that is willful, wanton, or reckless, or demonstrates an "utter lack of care." *United States v. Ford Motor Co.*, 29 CIT 827, 845, 395 F. Supp. 2d

1190, 1206 (2005), *aff'd in part, rev'd in part on other grounds*, 463 F.3d 1267 (Fed. Cir. 2006). Here, plaintiff has met its burden, pleading sufficient facts that illustrate an "utter lack of care" by Lafidale. Lafidale classified its merchandise in 46 separate entries as "wholly or mainly covered with paper," and every entry lacked this obvious characteristic. Compl. ¶ 6. Rather, the handbags and wallets were covered in plastic. *Id.*

Plaintiff's complaint is sufficient to establish liability for a grossly negligent violation of section 592.

II. PLAINTIFF HAS NOT SHOWN THAT IT IS ENTITLED TO THE CIVIL PENALTIES REQUESTED

Under the penalty scheme of section 592, when gross negligence affects the assessment of duties, importers are subject to penalties in an amount up to "the lesser of–(i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(2)(A).

The court has doubts that plaintiff is entitled to the sum it seeks in civil penalties. Plaintiff's motion for default judgment is supported by the declaration of Robert P. Thierry and an accompanying chart to explain the basis for the penalties calculation. Thierry Decl. The declaration and accompanying chart fail to provide a consistent and coherent explanation for how the civil penalties sought were calculated.

The first issue pertains to CBP's valuation of the merchandise. Plaintiff's complaint and motion for default judgment state that the "domestic value" of the 46 entries was $753,929.00. Compl. ¶ 9; Pl.'s Mot. for Default J. at 5. Thierry's declaration, however, states that the "dutiable value" of the merchandise was $753,929.00. Thierry Decl. ¶ 3. "Domestic value" and "dutiable value" are not the same. *Compare* 19 U.S.C. § 1592(c)(2)(A)(i) (referring to "the domestic value of the merchandise") *with* 19 U.S.C. § 1592(c)(2)(B) (referring to "the dutiable value of the merchandise"); *see also United States v. Pan Pac. Textile Grp, Inc.*, 30 CIT 138, 140 & n.2 (2006) ("Dutiable value and domestic value are not equivalent measures of entered merchandise."). The loss in revenue calculation underlying the penalty calculation should have been based on the "dutiable value" of the merchandise, but the court cannot be sure that CBP used the proper value because of the conflicting terminology in the plaintiff's filings.[1]

[1] The court also notes that 19 U.S.C. § 1592(c)(2)(A) caps the maximum civil penalty at the lesser of the domestic value of the merchandise or four times the loss in revenue. CBP's correct usage of the different valuations is essential to ensuring compliance with this statutory requirement as well.

The second issue is whether CBP used the correct tariff rates to calculate the loss in revenue. Thierry declares that:

> Lafidale classified its handbags and wallets under Harmonized Tariff Schedule (HTS) No. 4202.29.1000, which applies to plastic handbags that are "wholly or mainly covered with paper," and/or HTS No. 4202.39.500, which applies to plastic wallets that are "wholly or mainly covered with paper" at *ad valorem* duty rates of 5.3% and 7.8% respectively.

Id. ¶ 5. The chart containing the actual calculation for the loss of revenue, however, only lists entries coming in under 4202.29.10. *Id.* at 4. Additionally, it appears that the loss in revenue for almost every entry roughly corresponds[2] to the difference between the duty applicable for 4202.29.10 (5.3%) and the rate that should have been applied had the items been properly classified under 4202.22.15 (16%).[3] This raises two problems. First, the declaration's description of the calculation methodology for the penalties and the methodology reflected in the chart are inconsistent. Second, if the loss of revenue calculation is based only on rates for HTSUS 4202.29.10 (5.3%) and 4202.22.15 (16%), a difference of 10.7%, this would overstate plaintiff's loss for the wallets entered under 4202.39.50, which is a difference of only 8.2% (16% - 7.8%). Plaintiff may only recover a multiple of the duties of which it was or may be deprived. 19 U.S.C. § 1592(c)(2). Because the loss of revenue calculation in the chart appears to inflate the duties of which plaintiff was or may be deprived, at least for any entries of the wallets, the use of this calculation would result in a penalty above the statutory maximum.

Because the court is unable to determine the actual and potential loss of revenue suffered by plaintiff, it cannot determine whether the sum requested by plaintiff would result in a penalty in excess of the statutory maximum. For this reason, plaintiff's motion for default judgment is denied. Plaintiff will be given leave to refile its motion so that it may provide an explanation for its penalty calculation that the court can assess properly.

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[2] The court notes that the chart does not contain sufficient information to understand clearly how CBP arrived at its loss of revenue for each entry. For example, there is no breakdown as to the value of the different commodities within each entry, nor are the HTSUS subheadings for each entry fully and/or correctly listed.

[3] Thierry states that this is the proper classification and rate for most entries. Thierry Decl. ¶ 6. He notes that several entries contained merchandise that should have been classified under other subheadings with different corresponding tariff rates. *Id.* The chart fails to show adequately how the loss of revenue resulting from the entry of this other merchandise was calculated.

CONCLUSION AND ORDER

Plaintiff's complaint sufficiently establishes that Lafidale was grossly negligent in violating section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592. Plaintiff, however, has failed to show that it is entitled to the civil penalty requested in its motion for default judgment. It is therefore hereby

ORDERED that plaintiff's motion for default judgment be and is DENIED; it is further

ORDERED that plaintiff shall have sixty days from the date of this Opinion and Order in which to refile its motion for default judgment with adequate support for its penalty calculation.

Dated: October 30, 2013
New York, New York

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