U.S. Customs and Border Protection

Slip Op. 13–115

MID CONTINENT NAIL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and ITOCHU BUILDING PRODUCTS CO., INC., et al., Defendant-Intervenors.

Court No. 11–00119
PUBLIC

[Granting in part and denying in part Plaintiff's Amended Motion for Judgment on the Agency Record]

Dated: August 30, 2013

Adam H. Gordon, Wiley Rein LLP, of Washington, D.C., argued for Plaintiff. With him on the brief was *Robert E. DeFrancesco, III*.

Carrie Dunsmore, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With her on the brief were *Tony West*, Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *Nathaniel J. Halvorson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, New York, argued for Defendant-Intervenors. With him on the brief were *Bruce M. Mitchell* and *Andrew T. Schutz*, of New York, New York, and *Mark E. Pardo*, *Jeffrey O. Frank*, and *Elaine F. Wang*, of Washington, D.C.

OPINION

RIDGWAY, Judge:

In this action, the Plaintiff domestic producer of steel nails Mid Continent Nail Corporation ("Mid Continent") contests the final results, as amended, of the U.S. Department of Commerce's first administrative review[1] of the antidumping duty order covering steel nails from the People's Republic of China ("PRC"). *See* Certain Steel Nails From the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review, 76 Fed. Reg. 16,379 (March 23, 2011) ("Final Results"); Certain Steel Nails From the

[1] The period of review for this first administrative review is January 23, 2008 to July 31, 2009. *See* Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review (March 14, 2011) (Pub. Doc. No. 381) ("Issues & Decision Memorandum") at 2.

People's Republic of China: Amended Final Results of the First Antidumping Duty Administrative Review, 76 Fed. Reg. 23,279 (April 26, 2011) ("Amended Final Results").[2]

Pending before the court is Mid Continent's Amended Motion for Judgment on the Agency Record. Mid Continent contests two aspects of Commerce's Final Results – specifically, Commerce's selection of mandatory respondents for individual review, and Commerce's treatment of certain entries of merchandise that were initially wrongly attributed to one particular company. *See generally* Amended Memorandum in Support of Mid Continent Nail Corporation's Rule 56.2 Amended Motion for Judgment on the Agency Record ("Pl.'s Brief"); Reply Brief of Mid Continent Nail Corporation ("Pl.'s Reply Brief").[3]

The Government as well as the Defendant-Intervenors – comprising a total of 15 producers, exporters, and importers of steel nails subject to the antidumping duty order – maintain that Mid Continent's claims are baseless and that the Final Results should be sustained. *See generally* Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record

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[2] Because business proprietary information was submitted in the course of the administrative review, there are two versions of the administrative record – a public version and a confidential version. The public version of the record consists of copies of all documents in the record of this action, with confidential information redacted. The confidential version consists of complete, unredacted copies of only those documents that include confidential information.

Documents in the public version of the administrative record are numbered sequentially, and are cited herein as "Pub. Doc. No. ____." Documents in the confidential version of the administrative record are also numbered sequentially, but differently from the public version. Documents in the confidential version of the administrative record are cited as "Conf. Doc. No. ____."

Mid Continent and Defendant-Intervenors filed both public and confidential versions of all briefs. Citations to briefs are to the public versions whenever possible, and except as specified. Citations to the confidential version of a brief are prefaced with "Conf."

[3] Seven of the 10 counts in the Complaint that Mid Continent filed in this action (Court No. 11–00119) were consolidated into Court No. 11–00102 (now Consol. Court No. 11–00102) – a companion case contesting the same final results which was commenced by The Stanley Works (Langfang) Fastening Systems Co., Ltd. and The Stanley Works/Stanley Fastening Systems. *See* Order (Sept. 16, 2011). Of the three remaining counts set forth in its Complaint in this action, Mid Continent has briefed only two – Count I (challenging Commerce's selection of mandatory respondents) and Count V (challenging the agency's determination concerning the liquidation of certain entries of merchandise that were entered using another company's exporter-producer specific combination rate). Mid Continent has elected not to pursue Count VI, which alleged that Commerce improperly included in the review three respondents that were not mandatory respondents and had not requested review. *See* Pl.'s Brief at 1 n.2.

("Def.'s Brief"); Defendant-Intervenors' Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record ("Def.-Ints.' Brief").[4]

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[5] As detailed below, Mid Continent's Amended Motion for Judgment on the Agency Record must be granted in part and denied in part.

I. *BACKGROUND*

In this action, Mid Continent mounts two attacks on the Final Results in the first administrative review of the antidumping duty order on steel nails from the PRC. First, Mid Continent challenges Commerce's selection of two respondents for individual examination. *See generally* Pl.'s Brief at 1, 6–10, 15; Pl.'s Reply Brief at 1–9. And, second, Mid Continent contests Commerce's determination concerning the liquidation instructions issued to the Bureau of Customs and Border Protection ("Customs") for certain entries of merchandise that were initially attributed to Certified Products International Inc. ("CPI"). *See generally* Pl.'s Brief at 1–2, 13–15; Pl.'s Reply Brief at 9–15. The relevant facts are summarized below.

A. *Commerce's Selection of Respondents for Individual Review*

In an antidumping administrative review, Commerce generally is required to establish an individual dumping margin for "each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1). However, when a review involves a "large number" of exporters and producers, the statute authorizes Commerce to limit its determination of individual dumping margins to a "reasonable number" of exporters or producers, which are referred to as "mandatory respondents." *See* 19 U.S.C. § 1677f-1(c)(2); Antidumping Manual, Chap. 10 at 6 (Dep't Commerce Oct. 13, 2009) ("AD Manual").

[4] The 15 Defendant-Intervenors are Itochu Building Products Co., Inc., Certified Products International Inc. ("CPI"), Chiieh Yung Metal Ind. Corp., Huanghua Jinhai Hardware Products Co., Ltd., Tianjin Jinghai County Hongli Industry & Business Co., Ltd., Tianjin Jinchi Metal Products Co., Ltd., Shandong Dinglong Import & Export Co., Ltd., Tianjin Zhonglian Metals Ware Co., Ltd., Hengshui Mingyao Hardware & Mesh Products Co., Ltd., Huanghua Xionghua Hardware Products Co., Ltd., Wintime Import & Export Corporation Limited of Zhongshan, Shanghai Jade Shuttle Hardware Tools Co., Ltd., Romp (Tianjin) Hardware Co., Ltd., China Staple Enterprise (Tianjin) Co., Ltd., and Qidong Liang Chyuan Metal Industry Co., Ltd.

[5] All citations to federal statutes are to the 2006 edition of the United States Code. Similarly, all citations to federal regulations are to the 2008 edition of the Code of Federal Regulations.

The dumping margins for respondents that qualify for a separate rate but are not subject to individual examination are based on the weighted average of the mandatory respondents' dumping margins, excluding rates that are zero, *de minimis*, or based entirely on adverse facts available. AD Manual, Chap. 10 at 7. Companies subject to a review that do not respond to Commerce's requests for information are considered to be part of the "non-market economy-wide entity" ("NME-wide entity") and are assigned the "NME-wide rate." *Id*.[6]

The first issue in this action is whether Commerce's decision to limit the number of mandatory respondents to two was lawful. Shortly after the administrative review in question was initiated, Commerce signaled its intent – in light of the large number of exporters and producers involved in the review – to use U.S. import data from Customs to select a limited number of respondents for individual review; and Commerce invited comments on that proposal. Mandatory Respondent Selection Notice at 1 (Pub. Doc. No. 26). In its first comments on respondent selection, Mid Continent stated that "analysis of the [customs] data indicates that [*Commerce*] *reasonably should determine to limit the number of respondents in this review to two*." Mid Continent First Comments on Respondent Selection at 3 (Pub. Doc. No. 35) (emphasis added). Mid Continent emphasized that "[*n*]*either the statute nor the regulations set* [*s*] *a minimum or limit on the number of respondents . . . , or the volume of imports that should be covered*," opining that "those numbers will depend on a variety of factors, including the number of producers . . . included in the review, the nature of the business operations, and the types of products that the respondents produce." *Id*. (emphasis added).

Mid Continent specifically urged Commerce to select Stanley and CPI as the two mandatory respondents for individual review. Mid Continent First Comments on Respondent Selection at 4. Mid Continent stated that, among other things, Stanley and CPI would "provide a representative sample of respondent types," because CPI sourced subject merchandise from multiple Chinese producers. *Id*.

[6] Because this administrative review involved a non-market economy ("NME"), the People's Republic of China, Commerce began "with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate." Certain Steel Nails From the People's Republic of China: Notice of Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review, 75 Fed. Reg. 56,070, 56,073 (Sept. 15, 2013). Typically, to obtain a "separate rate," exporters must demonstrate independence through absence of both *de jure* and *de facto* government control over export activities. *Id*., 75 Fed. Reg. at 56,073. However, The Stanley Works (Langfang) Fastening Systems Co., Ltd. fell within an exception for wholly foreign-owned companies and was preliminarily granted a separate rate. *Id*., 75 Fed. Reg. at 56,073.

In making its respondent selection decision, Commerce determined that, in light of the fact that review had been requested as to 159 exporters and producers, and given the agency's resource constraints, it simply was not practicable to calculate individual margins for all respondents. *See* First Respondent Selection Memorandum at 2–3 (Pub. Doc. No. 123). Instead, relying on customs data, Commerce selected as mandatory respondents the two largest exporters by volume for the relevant period – specifically, Stanley and CPI, the two respondents that Mid Continent had advocated. *See id*. at 5; 19 U.S.C. § 1677f-1(c)(2)(B).

From the first days of the review, CPI had argued to Commerce that it should not be selected as a mandatory respondent, because it had no shipments to the United States during the period of review. *See* CPI Comments on Respondent Selection at 2–5 (Conf. Doc. No. 17). In the First Respondent Selection Memorandum, Commerce advised that, "if CPI claims it had no shipments during this [period of review], [Commerce] will consider it a no shipment respondent and then select another respondent." First Respondent Selection Memorandum at 5. Commerce subsequently deselected CPI as a mandatory respondent in light of its claim of no shipments (*see* CPI "No Shipment" Letter at 2–3 (Pub. Doc. No. 124)), and replaced CPI with Tianjin Xiantong Material & Trade Co., Ltd., which, together with Stanley, "account[ed] for the largest volume of exports that [could] be reasonably examined." *See* Second Respondent Selection Memorandum at 2–3 (Pub. Doc. No. 142).

In response to Commerce's decision to replace CPI with one additional respondent, Mid Continent submitted comments, in which it argued, among other things, that Commerce should "select as mandatory respondents no fewer than five and up to eight of the largest exporters identified by the [customs] data." Mid Continent Additional Comments on Respondent Selection at 11 (Conf. Doc. No. 66). One month later, when Tianjin Xiantong refused to participate in the administrative review, Mid Continent urged Commerce to select the next three largest exporters by export volume as mandatory respondents. Mid Continent Supplemental Comments on Respondent Selection at 2 (Conf. Doc. No. 74). Commerce replaced Tianjin Xiantong with Shandong Minmetal Co., Ltd., the next largest exporter by volume. *See* Third Respondent Selection Memorandum at 2 (Pub. Doc. No. 175).

Commerce thereafter issued its Preliminary Results, reflecting dumping margins of 6.48% for Stanley and 51.25% for Shandong

Minmetal. *See* Certain Steel Nails From the People's Republic of China: Notice of Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review, 75 Fed. Reg. 56,070, 56,077 (Sept. 15, 2010) ("Preliminary Results"). In addition, Commerce assigned dumping margins of 13.31% to the 24 "separate rate respondents" who were not individually reviewed based on the weighted average of the publicly available U.S. sales values for Stanley and Shandong Minmetal. *See id*., 75 Fed. Reg. at 56,074, 56,077. Eighty-two companies for which a review was requested did not apply for separate rate status and were thus assessed at the PRC-wide rate of 118.04%. *Id*., 75 Fed. Reg. at 56,074–75.

After the Preliminary Results were released, Mid Continent filed an administrative case brief with Commerce, contesting various aspects of the agency's analysis. *See generally* Mid Continent Case Brief (Pub. Doc. No. 337). In general, when a party files an administrative case brief, that submission must address all of the party's objections, even those arguments that the party "presented before the . . . preliminary results," in order to preserve an issue for further consideration. *See* 19 C.F.R. § 351.309(c)(2). However, although Mid Continent had previously voiced concerns about Commerce's respondent selection process and although its positions on respondent selection had changed over time, Mid Continent's administrative case brief was silent on the issue. *See* Mid Continent Case Brief.

After the Preliminary Results were released but before the Final Results issued, Shandong Minmetal ceased its participation in the administrative review. *See* Final Results, 76 Fed. Reg. at 16,380. As a result, Stanley became the sole mandatory respondent for the Final Results, and the weighted average margins of the separate rate respondents were adjusted to 13.90%, Stanley's rate. *See id*., 76 Fed. Reg. at 16,381–82. The Amended Final Results, which accounted for a ministerial error in Commerce's calculation of Stanley's margin, further adjusted the dumping margins of Stanley and the separate rate respondents downward from 13.90% to 10.63%. *See* Amended Final Results, 76 Fed. Reg. at 23,280.

The Issues & Decision Memorandum that accompanied the Final Results did not address Commerce's selection of mandatory respondents, because Mid Continent's administrative case brief, filed with the agency after issuance of the Preliminary Results, had not raised the issue. *See* Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review (March 14, 2011) (Pub. Doc. No. 381) ("Issues & Decision Memorandum").

B. *Commerce's Treatment of Entries Initially Mis-Attributed to CPI*

In non-market economy ("NME") investigations and administrative reviews, Commerce "begins with a rebuttable presumption that all companies within the country are essentiallyoperating units of a single, government-wide entity and, thus, should receive a single antidumping duty rate (*i.e.*, an NME-wide rate)." AD Manual, Chap. 10 at 3. If an exporter can establish that it is separate from the government-wide entity, it may obtain a "separate rate." *Id*.; *see also* n.6, *supra* (explaining how exporters establish that they qualify for separate rate). All separate rates assigned in NME investigations are specific to an exporter, and to the producer that supplied the exporter during the period of investigation. These rates are called "combination rates." *See* Import Administration Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries (2005) ("Policy Bulletin 05.1") at 6–7. Commerce uses these exporter-producer-specific "combination rates" as a tool to prevent companies from "funneling" subject merchandise through exporters with the lowest rates. *See id*. at 6–7.

The second issue presented in this action concerns Commerce's rejection of Mid Continent's request that Commerce impose the PRC-wide rate, 118.04% – the highest rate in this review – on certain companies that entered goods under the combination rates assigned to CPI, one of the defendant-intervenors in this case. CPI (discussed in section I.A, above) is a Taiwan-based company that does not produce nails, but, instead, purchases them from various unaffiliated producers in mainland China and resells them to customers in the United States. *See* CPI "No Shipment" Letter at Exh. 1.

In the antidumping investigation that preceded this administrative review, Commerce assigned exporter-producer-specific combination rates to CPI as an exporter with respect to 29 different Chinese producers. *See* Notice of Antidumping Duty Order: Certain Steel Nails From the People's Republic of China, 73 Fed. Reg. 44,961, 44,963–64 (Aug. 1, 2008) ("Antidumping Order") (listing CPI's various combination rates). The combination rate for each such exporter-producer pair was 21.24%. *See id*., 73 Fed. Reg. at 44,963–64.

During the period of review, 23 of CPI's unique combination rate codes from the investigation were used by importers to enter subject merchandise into the United States. *See* Issues & Decision Memorandum at 24. However, as discussed above, shortly after the administrative review began, CPI explained to Commerce that it had not

exported any subject merchandise during the period of review and thus should not be considered the exporter of the entries that customs data attributed to CPI. *See generally* CPI "No Shipment" Letter at 2–3; section I.A, *supra*.[7] On the other hand, CPI acknowledged purchasing nails for *resale* (but not for export) from many of the 23 unaffiliated producers that had entered goods into the U.S. using CPI's combination rates during the period of review. *See* CPI Comments on Respondent Selection at 2–5.[8]

Commerce's "no shipment" review of CPI involved extensive investigation. In determining that CPI made no shipments, Commerce concluded that the entries that were initially attributed to CPI resulted from other companies entering merchandise under CPI's combination rates. Partial Rescission Memorandum at 3–5 (Conf. Doc. No. 129). CPI acknowledged that it had sourced nails from 13 of the 23 companies that had entered subject merchandise under CPI's combination rates during the period of review, and that those producers had knowledge that the goods sold to CPI were destined for the United States. *Id*. at 4. CPI also provided sample sales trace packages for the 13 companies. *Id*.

Commerce concluded that, where companies had knowledge that goods sold to CPI were destined for the United States, those companies (rather than CPI) would be considered the actual exporters, and CPI would be considered a reseller. Partial Rescission Memorandum at 3–4. Commerce confirmed with Customs that CPI itself had not

[7] Under the "knowledge test," if a producer knows or has reason to know at the time of sale that goods sold to a reseller are destined for export to the United States, the producer – not the reseller – is considered to be the exporter. *See* Trade Agreements Act of 1979, Statements of Administrative Action, H.R. Doc. No. 96–153, Part II at 411 (1979), *reprinted in* 1979 U.S.C.C.A.N. 665, 682.

CPI's "No Shipment" Letter confirmed that the company is a "Taiwanese reseller of nails made in China [and] subject to an antidumping duty order, and that during the [period of review], 1/23/08–7/31/09, all of its sales, shipments and entries of subject merchandise into the United States consisted of merchandise which CPI purchased from unaffiliated vendors in China who had actual knowledge that the goods were destined for the United States prior to time of sale to CPI. Thus, during the [period of review], CPI had no shipments, sales or entries to the United States of subject merchandise, since CPI was not the exporter of subject merchandise, as the term exporter is defined by [Commerce]." CPI "No Shipment" Letter at Exh. 1.

[8] Imports from 13 of the 23 producers comprised [[ ]] of all imports that were entered at CPI's cash deposit rate. *See* CPI Comments on Respondent Selection at Exh. 2. Imports associated with the other 10 CPI combination rates accounted for all of the remaining imports attributed to CPI during the period of review. *See id*. CPI "reconfirmed that its exports during [the period of review] were limited to subject nails purchased from 13 vendors." *Id*. at Exh. 7 (entitled "Red Herring No. 3").

made any relevant shipments, and then obtained from Customs entry packages for each of the 23 companies whose Customs case number related to CPI. *See id*. at 4, Att. 4.

Commerce determined that entries from 13 of the companies accounted for "the vast majority of the entries attributed to CPI" and that the 13 companies – and not CPI – should be considered the exporters. Partial Rescission Memorandum at 4. Commerce further determined that the combination rates shared by CPI and the other 10 companies "account for a minuscule percentage of the entries," and indicated that those errors were explained as "coding errors upon entry or differences in timing." *Id*. After reviewing Customs entry packages for the remaining 10 companies, Commerce concluded that "examination of the entry documents demonstrates that they did not pertain to the combination under which they were entered," and that they were therefore not attributable to CPI. *Id*.

In its Preliminary Results, Commerce announced that – after investigating CPI's claim that it had no shipments to the United States during the period of review – the agency was preliminarily rescinding the administrative review with respect to CPI. *See* Preliminary Results, 75 Fed. Reg. at 56,071.[9] In the administrative case brief that Mid Continent filed with Commerce following issuance of the Preliminary Results, Mid Continent challenged the various companies' use of CPI's combination rates. Mid Continent Case Brief at 11–16. Mid Continent argued that "exporters deliberately used CPI's combination [rates] to take advantage of [CPI's] cash deposit rate," and asserted that Commerce should address "this type of exporter fraud" by instructing Customs to apply the highest rate in the proceeding – the PRC-wide rate – to steel nails exported by those companies using CPI's combination rates. *Id*. at 14–15.

In its Issues & Decision Memorandum supporting the Final Results, Commerce explained that – as to the 23 companies with entries that were initially mis-attributed to CPI – the agency would instruct Customs to liquidate the entries at issue depending on whether the company was one of the 13 companies that had knowledge that its goods were destined for the United States or one of the 10 companies for which no record evidence demonstrated a connection to CPI. Issues & Decision Memorandum at 24–25. For the 13 companies that had knowledge that goods sold to CPI were destined for the United

[9] Ultimately, based on the submissions of CPI and its unaffiliated producers, Commerce removed CPI as a mandatory respondent and rescinded the agency's review with respect to CPI. *See* Second Respondent Selection Memorandum at 2–3; Final Results, 76 Fed. Reg. at 16,380.

States, Commerce stated that it would instruct Customs to liquidate entries at "the separate rate they earned either in the [underlying antidumping] investigation or in this review, as applicable." *See id*. at 24. For the 10 companies with entries that were initially misattributed to CPI but did not appear to be connected to CPI, Commerce indicated that it would instruct Customs to "assess [antidumping] duties at the rate in effect at the time of entry." *See id*. at 25. In addition, noting that "record evidence" indicated that "some entries may have been classified under the incorrect combination rate," Commerce advised that it was referring the matter to Customs for consideration of possible enforcement action. *See id*.

This action followed.

II. *STANDARD OF REVIEW*

In an action reviewing an antidumping determination by Commerce, the agency's determination must be upheld except to the extent that it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same). Moreover, any evaluation of the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." Suramerica de Aleaciones *Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (*quoting Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. Am. Silicon Techs. v. *United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

While Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319. Nevertheless, "the path of Commerce's decision must be reasonably discernable," to support judicial review. *Id*. (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43

(1983)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

Finally, under the familiar *Chevron* framework, Commerce's statutory interpretation is reviewed using a two step analysis, first examining "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, courts must "give effect to the unambiguously expressed intent of Congress." *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239 (2004) (*citing Chevron*, 467 U.S. at 842–43). If instead Congress has left a "gap" for Commerce to fill, the agency's interpretation is "given controlling weight unless [it is]arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 843–44; *see also* Household Credit, 541 U.S. at 239.

As a rule, courts afford "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The agency's construction need not be the only reasonable one or the result that the court would have reached had the question first arisen in a judicial proceeding. *Id*. (*citing Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 153 (1946)). Courts thus are not to "weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." Suramerica de *Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992) (*citing Chevron*, 467 U.S. at 866).

III. *ANALYSIS*

Mid Continent first contends that Commerce's decision to limit its individual review to two respondents contravened the statute. In addition, Mid Continent disputes Commerce's determinations concerning the treatment of the entries that were initially attributed to CPI.

For the reasons set forth in the analysis that follows, Mid Continent's challenge to Commerce's selection of respondents is unavailing. *See* section III.A, *infra*. However, one of Mid Continent's arguments on the second issue raises concerns that warrant remand. *See* section III.B, *infra*.

A. *Commerce's Selection of Respondents for Individual Review*

As a threshold matter, Defendant-Intervenors point out that Mid Continent failed to exhaust its administrative remedies as to Com-

merce's respondent selection process. Defendant-Intervenors assert that Mid Continent therefore is not entitled to press its respondent selection claim here. *See generally* Def.-Ints.' Brief at 2–3, 28–31. Mid Continent contends that it was not required to exhaust its remedies under the circumstances of this case. *See generally* Pl.'s Reply Brief at 5–9.

On the merits, Mid Continent argues that Commerce was obligated by statute to conduct individual reviews of more than two companies, and that the agency erred in not selecting additional respondents for individual review. *See generally* Pl.'s Brief at 1, 6–10, 15; Pl.'s Reply Brief at 1–5. For their part, the Government and Defendant-Intervenors defend Commerce's respondent selection determinations, maintaining that they were in all respects supported by substantial evidence and otherwise in accordance with law. *See generally* Def.'s Brief at 7, 9–12, 18; Def.-Ints.' Brief at 2–3, 20–28, 39.

As detailed below, Mid Continent's failure to exhaust its administrative remedies is fatal to its respondent selection claim. However, even if Mid Continent's respondent selection claim were to be considered on its merits, Mid Continent nevertheless would not prevail.

1. *Exhaustion of Administrative Remedies*

Commerce's regulations authorize a party that is dissatisfied with the preliminary results in a proceeding to file an administrative case brief, which "must present all arguments that continue in the submitter's view to be relevant" to a final determination by the agency, including "any arguments presented before the date of publication of the . . . preliminary results." *See* 19 C.F.R. § 351.309(c)(1)-(2).[10]

[10] As the Court of Appeals recently observed, Commerce's regulations do not expressly "impose [on all parties in an international trade proceeding] duties to file" administrative case briefs with the agency. *See Itochu Building Prods. v. United States*, ____ F.3d ____, ____ n.1, 2013 WL 4405863 * 4 n.1 (Fed. Cir. 2013) (discussing 19 C.F.R. § 351.309). However, it is well-established that the parties' filing of administrative case briefs fulfills a critical function for other parties, the agency, and even the courts, in light of the highly complex and extremely time-compressed nature of such proceedings. Thus, while no party is *required* to file an administrative case brief (certainly not if the party has no objections to voice), and without regard to any imperfections in the language of the existing regulations, it is generally understood (and longstanding, accepted practice) in the field that a party wishing to preserve an issue for Commerce's further consideration in the Final Results (as well as for potential future litigation) generally must raise that issue in the party's administrative case brief filed following issuance of the Preliminary Results. Issues that are not addressed in an administrative case brief filed with the agency are generally deemed abandoned.

In any event, as *Itochu* acknowledges, 19 C.F.R. § 351.309 clearly applies in administrative review proceedings (such as the administrative review at issue in this action); and – on its face – the regulation requires that, if a party files an administrative case brief (as Mid Continent did here), that case brief "must include all arguments the submitter believes

remain pertinent." *See Itochu*, ____ F.3d at ____ n.1, 2013 WL 4405863 * 4 n.1 (discussing 19 C.F.R. § 351.309(b)(1) & (c)(2)). Indeed, as noted above, Commerce's regulations expressly require that a party's administrative case brief include even those arguments that the party "presented before the . . . preliminary results," in order to preserve an issue for further consideration. *See* 19 C.F.R. § 351.309(c)(2). It is therefore of no moment that Mid Continent raised concerns about respondent selection in various submissions prior to Commerce's issuance of the Preliminary Results. *See* Pl.'s Brief at 3–4, 6–7 (summarizing various Mid Continent submissions concerning respondent selection); Pl.'s Reply Brief at 3, 6, 7–8 (same); Def.-Ints.' Brief at 4, 9–11, 29–31 (same). Under the agency's regulations, any such prior submissions could not excuse Mid Continent from the requirement to present its concerns in its administrative case brief.

In fact, as Defendant-Intervenors observe, Mid Continent took inconsistent positions on respondent selection over the course of the administrative review, making it all the more critical that Mid Continent definitively articulate in detail its position and its supporting arguments on respondent selection – once and for all – in the administrative case brief that it filed with Commerce. *See* Def.-Ints.' Brief at 2–3, 30–31. Under the circumstances, Commerce had, as a practical matter, little or "no way of understanding the basis for [Mid Continent's] claim unless [Mid Continent] filed a Case Brief with [Commerce] discussing the respondent selection issue." *Id*. at 31. These facts, among others, serve to distinguish this case from *Itochu*. *Compare Itochu*, ____ F.3d at ____, ____, 2013 WL 4405863 * 5, 7 (emphasizing that, given the specific, "rare" circumstances of that case, "no purpose was served by requiring Itochu to have resubmitted its . . . argument after Commerce announced the preliminary results"). Similarly, in *Itochu*, "a concrete interest in prompt judicial review [was] impaired by requiring Itochu's resubmission of earlier comments." *Id*., ____ F.3d at ____, 2013 WL 4405863 * 6. In contrast, there was no apparent reason for Mid Continent not to continue to press its objections to the respondent selection process in its administrative case brief. Certainly Mid Continent has cited no such reason. *See* Pl.'s Reply Brief at 5–9 (responding to argument that it failed to exhaust its administrative remedies by not pursuing its respondent selection arguments in its case brief, and identifying no negative consequences that might have flowed from doing so); *see also*, *e.g.*, *Asahi Seiko Co. v. United States*, 35 CIT ____, ____, 755 F. Supp. 2d 1316, 1327 (2011) (emphasizing that party reiterated its respondent selection objections in its administrative case brief filed in nineteenth administrative review of antidumping duty orders on ball bearings from a number of countries, even though those objections had already been asserted "in response to [Commerce's] solicitation of comments on the issue"); *Asahi Seiko Co. v. United States*, 34 CIT ____, ____, 751 F. Supp. 2d 1335, 1341 (2010) (same, in eighteenth administrative review of same antidumping duty orders); *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 33 CIT 1125, 1127, 637 F. Supp. 2d 1260, 1262 (2009) (same, in fifth administrative review of antidumping duty order on honey from PRC).

As in *Corus Staal*, Commerce's position on Mid Continent's respondent selection concerns here turned on administrative and policy considerations (not some perceived statutory mandate), and, as in *Corus Staal*, Mid Continent here "could and should have tried to make a more comprehensive argument to Commerce regarding how to exercise [its] discretion." *See Itochu*, ____ F.3d at ____, 2013 WL 4405863 * 6 (discussing *Corus Staal BV v. United States*, 502 F.3d 1370, 1380 (Fed. Cir. 2007)); *see also* section III.A.2, *infra* (noting that, if Mid Continent had pressed its respondent selection claims in its administrative case brief, and particularly if it had highlighted the inherent issues of statutory construction and more clearly articulated its "representativeness" argument, Commerce would have addressed those issues in its Final Results, and might well have more clearly and specifically addressed Mid Continent's points, significantly aiding judicial review – even assuming that including Mid Continent's respondent selection claims in its case brief would not have resulted in Commerce's selection of additional respondents for individual review, the specific relief that Mid Continent sought). Further, if Mid Continent had pressed its respondent

Emphasizing that Mid Continent did not object to any aspect of Commerce's respondent selection determinations in the administrative case brief that Mid Continent filed in the course of the administrative review, Defendant-Intervenors argue that the doctrine of exhaustion of administrative remedies bars Mid Continent from raising any such objection now. *See generally* Def.-Ints.' Brief at 2–3, 16, 28–31.

The doctrine of exhaustion holds generally that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (*quoting McKart v. United States*, 395 U.S. 185, 193 (1969)) (internal quotation marks omitted). It is thus a well-settled principle of administrative law that "[a] reviewing court usurps the agency's function when it sets aside [an agency] determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *see*, *e.g.*, *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

"[T]he prescribed administrative remedy for challenging aspects of the preliminary results with which a party disagrees" is for the party to set forth its objections in its administrative case brief filed with the agency. *Corus Staal BV v. United States*, 502 F.3d 1370, 1378 (Fed. Cir. 2007); *see generally id*., 502 F.3d at 1378–81 (holding, in context of administrative review, that party failed to exhaust administrative remedies by not raising issue in administrative case brief filed with agency). "If a party does not exhaust available administrative remedies, 'judicial review of [Commerce's actions] is inappropriate.'" *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (*quoting Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988)). "'[T]he [Court of International Trade] generally takes a "strict view" of the requirement that parties exhaust their administrative

selection claims in its administrative case brief (and particularly if Mid Continent had taken the opportunity to clarify for the record any seeming inconsistencies in its position as it evolved over time, and if Mid Continent had taken the opportunity to elaborate on and amplify its arguments), Defendant-Intervenors would have had an opportunity to respond to Mid Continent's points in their rebuttal brief filed with the agency (*see* Transcript of Oral Argument at 136) – and Commerce would have had the benefit of that input as well in preparing the Final Results. And Defendant-Intervenors' rebuttal brief might well have aided judicial review (whether or not it was of any assistance to Commerce, and even if it had no effect on the Final Results). However, because Mid Continent elected not to address respondent selection in its administrative case brief, Defendant-Intervenors were not permitted to address the topic in their rebuttal brief. The relatively thin administrative record on this issue is the result.

remedies.'" *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (*quoting Corus Staal*, 502 F.3d at 1379 (citations omitted)).

Requiring exhaustion even in a discretionary, non-jurisdictional context is sound policy, because it allows the agency to apply its expertise, to correct its own mistakes, and to compile an adequate record to support judicial review, advancing the dual purposes of protecting agency authority and promoting judicial efficiency. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (discussing two main purposes of doctrine of exhaustion, *i.e.*, protecting "administrative agency authority" and promoting judicial economy); *Itochu Building Prods. v. United States*, ____ F.3d ____, ____, 2013 WL 4405863 * 4 (Fed. Cir. 2013) (same); *Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) (same). Accordingly, in actions challenging determinations in antidumping administrative reviews, the Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d); *see also Corus Staal*, 502 F.3d at 1379 (stating that 28 U.S.C. § 2637(d) "indicates a congressional intent that, absent a strong contrary reason," court should require exhaustion of administrative remedies); *Itochu*, ____ F.3d at ____, 2013 WL 4405863 * 4 (same, *citing Corus Staal*); *McCarthyv. Madigan*, 503 U.S. 140, 144 (1992) (explaining that, even "where Congress has not clearly required exhaustion, sound judicial discretion governs").

There are a handful of limited exceptions to the requirement that a party exhaust its administrative remedies. *See*, *e.g.*, 5 J. Stein, G. Mitchell, & B. Mezines, *Administrative Law* § 49.02, at 49–47 (2012) (summarizing exceptions, including inadequacy of administrative remedy, impending irreparable harm, *ultra vires* agency action, futility, and pure legal question); *Itochu*, ____ F.3d at ____, ____, 2013 WL 4405863 * 4, 5 (noting that "[c]ourts have recognized several recurring circumstances in which institutional interests are not sufficiently weighty or application of the doctrine would otherwise be unjust," including situations where the "futility" and "pure question of law" exceptions apply, and where requiring exhaustion would cause harm to party).[11] In the case at bar, much like the importer in *Corus Staal*, Mid Continent "has provided nothing by way of affirmative

[11] *See also* 2 R. Pierce, *Administrative Law Treatise* §§ 15.2–15.8, 15.10 (5 ed. 2010) (summarizing doctrine of exhaustion and discussing exceptions); 4 C. Koch, *Administrative Law and Practice* § 12:22 (3d ed. 2010) (discussing exceptions); *SeAH Steel Corp. v. United States*, 35 CIT ____, ____, 764 F. Supp. 2d 1322, 1325–26 (2011) (summarizing exceptions); *Corus Staal BV v. United States*, 30 CIT 1040, 1050 n.11 (2006), *aff'd*, 502 F.3d 1370 (Fed. Cir. 2007) (same); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 645 n.18, 342 F. Supp. 2d 1191,1206 n.18 (2004) (same).

justification for its failure to raise the [respondent selection] issue in its case brief." *Corus Staal*, 502 F.3d at 1381. Mid Continent nevertheless seeks refuge within the narrow confines of the exceptions for "futility" and "pure legal question." *See generally* Pl.'s Reply Brief at 5–9.

Mid Continent strains to cast its respondent selection claim as a "pure legal question." *See* Pl.'s Reply Brief at 5–9. But that shoe won't fit. Contrary to its assertions, Mid Continent's respondent selection claim has factual, as well as legal, components. *See*, *e.g.*, *Asahi Seiko Co. v. United States*, 35 CIT ____, ____, 755 F. Supp. 2d 1316, 1329–30 (2011) (rejecting party's attempt to invoke "pure legal question" exception where "[t]he actual claim . . . delves into factual issues implicating the evidence on the administrative record"). For example, Mid Continent's contention that Commerce erred in deciding that two was a sufficient number of mandatory respondents implicates the agency's reasons for selecting two respondents, which are factual in nature (including considerations such as the percentage of total period of review imports represented by the selected mandatory respondents). *See* First Respondent Selection Memorandum at 4. Also relevant are facts concerning whether an alternative selection of companies might have been more appropriate. *See* Third Respondent Selection Memorandum at 2–3 (summarizing reasons for selecting a certain company and noting administrative burden). Mid Continent's reliance on the "pure legal question" exception to the doctrine of exhaustion therefore is misplaced.

Nor can Mid Continent shoehorn itself into the "futility" exception. *See generally* Pl.'s Reply Brief at 5–9. As the Court of Appeals has emphasized, the futility exception – like the other exceptions to the doctrine of exhaustion – "is a narrow one." *See Corus Staal*, 502 F.3d at 1379 (sustaining trial court's rejection of futility exception in civil action challenging final results of administrative review). Thus, "[t]he mere fact that an adverse decision may have been likely does not excuse a party from . . . exhaust[ing] [its] administrative remedies." *Id*. "[E]ven if it is likely" that Commerce would have rejected Mid Continent's arguments, "it would still have been preferable, for purposes of administrative regularity and judicial efficiency, for [Mid Continent] to make its arguments in its case brief and for Commerce to give its full and final administrative response in the final results." *Id*., 502 F.3d at 1380.

Although Mid Continent maintains that Commerce fully addressed Mid Continent's arguments in the agency's Third Respondent Selection Memorandum, that document was not necessarily designed to be "Commerce's last word on the matter." *See* Pl.'s Reply Brief at 7;

Corus Staal, 502 F.3d at 1380. If Mid Continent had addressed the issue of respondent selection in its administrative case brief, Commerce would have provided a "full and final administrative response [to Mid Continent's arguments] in the final results." *Id*. When Mid Continent failed to pursue the issue in its administrative case brief, Commerce (and the other parties) were reasonably entitled to assume that Mid Continent had elected to abandon the fight. *See*, *e.g.*, *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 1906, 1919, 675 F. Supp. 2d 1287, 1300 (2009) (Wallach, J.) (explaining that, where a party raised objections to respondent selection process earlier in a proceeding, but then failed to raise any issue as to respondent selection in its administrative case brief, "Commerce could reasonably have concluded that [the party] was no longer pursuing its respondent selection challenge").[12]

"[R]equiring [Mid Continent] to set forth its factual and legal arguments [on respondent selection] in detail in its case brief would have had potential value either by resulting in possible relief for [Mid Continent] *or at least providing the agency an opportunity to set forth its position in a manner that would facilitate judicial review*." *Corus Staal*, 502 F.3d at 1380 (emphasis added); *see also Itochu*, ____ F.3d at ____, 2013 WL 4405863 * 6 (same, quoting and discussing *Corus Staal*). By its silence, Mid Continent failed to properly preserve its respondent selection claim for judicial review. Its failure to exhaust its administrative remedies renders it unnecessary to reach the merits of those claims.

2. *The Merits of Mid Continent's Respondent Selection Claim*

Even if Mid Continent's challenge to Commerce's respondent selection process were not barred by the doctrine of exhaustion, Mid Continent would lose on the merits. The gravamen of Mid Continent's complaint is that Commerce erred in limiting the agency's individual review in the underlying administrative proceeding to a total of two respondents. *See generally* Pl.'s Brief at 1, 6–10, 15; Pl.'s Reply Brief at 1–5. *But see* Def.'s Brief at 7, 9–12, 18; and Def.-Ints.' Brief at 2–3, 20–28, 39.

[12] This highlights yet another significant distinction between *Itochu* and the facts of this case. In *Itochu*, Commerce's Final Results "referred to Itochu's position and again ruled on [Itochu's claim] on the merits." *Itochu*, ____ F.3d at ____, 2013 WL 4405863 * 5. Here, the Final Results make no mention of Mid Continent's objections to the respondent selection process, because Mid Continent did not press those objections in its administrative case brief. *See id*., ____ F.3d at ____, 2013 WL 4405863 * 6 (quoting and distinguishing *Corus Staal* from *Itochu*, observing that, *inter alia*, "because Corus did not set forth its factual and legal arguments in detail before the agency, Commerce did not have the 'opportunity to set forth its position in a manner that would facilitate judicial review'").

As summarized above, the statute requires – as a general rule – that Commerce calculate individual weighted average dumping margins "for each known exporter and producer" of the merchandise at issue. 19 U.S.C. § 1677f-1(c)(1); section I.A, *supra*. However, the statute also carves out an exception to that general rule, which applies when – as here – it is "not practicable" for Commerce to calculate individual margins for each known exporter or producer "because of the large number of exporters or producers involved in the . . . review." 19 U.S.C. § 1677f-1(c)(2). In such cases, the statute directs Commerce to select a "reasonable number" of respondents for individual review, by using either of two alternative methods: (1) by using a statistically valid "sample of exporters, producers or types of products," or (2) by selecting the exporters and producers "accounting for the largest volume of the subject merchandise . . . that can be reasonably examined." 19 U.S.C. § 1677f-1(c)(2)(A) & (B); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 at 872–73 (1994), *reprinted in* 1994 U.S.C. C.A.N. 4040, 4200–01 ("SAA").[13]

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[13] In its entirety, 19 U.S.C. § 1677f-1(c) provides:

> (1) General rule. In determining weighted average dumping margins under section 734(d), 735(c), or 751(a) [*i.e.*, § 1673b(d), 1673d(c), or 1675a(a)], [Commerce] shall determine the individual weighted average dumping margin for each known exporter or producer of the subject merchandise.
>
> (2) Exception. If it is *not practicable* to make individual weighted average dumping margin determinations under paragraph (1) ["General rule"] because of the *large number* of exporters or producers involved in the investigation or review, [Commerce] may determine the weighted average dumping margins for a *reasonable number* of exporters or producers by limiting its examination to –
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to [Commerce] at the time of selection, or
>
> (B) exporters and producers *accounting for the largest volume of the subject merchandise* from the exporting country that can be *reasonably* examined.

19 U.S.C. § 1677f-1(c) (emphases added).

The Statement of Administrative Action ("SAA") acknowledges that, "[a]s a practical matter . . . . Commerce may not be able to examine all exporters and producers, for example, when there is a large number of exporters and producers," and explains that, "[i]n such situations, Commerce either limits its examination to those firms accounting for the largest volume of exports to the United States or employs sampling techniques." *See* SAA, H.R. Doc. No. 103–316, vol. 1 at 872, *reprinted in* 1994 U.S.C.C.A.N. at 4200. The SAA notes that there was opposition to allowing regulatory authorities such as Commerce to conduct individual reviews of limited numbers of companies: "During the Uruguay Round negotiations, certain countries sought a requirement that national authorities examine *all* firms producing or exporting a product subject to an antidumping investigation." *Id*., H.R. Doc. No. 103–316, vol. 1 at 872, *reprinted in* 1994 U.S.C.C.A.N. at 4200 (emphasis in the original). However, as the SAA explains, that position did not prevail, because, among other things, it "would have made it virtually impossible for authorities to impose antidumping duties in a WTO-consistent manner in many cases." *See id*., H.R. Doc. No. 103–316, vol. 1

Distilled to its essence, Mid Continent's claim is that, in a series of three cases – *Zhejiang, Carpenter*, and *Schaeffler* – the Court of International Trade has in effect established a "floor" on the number of respondents to be individually reviewed, such that (according to Mid Continent) Commerce is now required to individually review "at least four to eight" respondents, "whether the pool of respondents is eight, 10, or 159." *See* Pl.'s Brief at 9[14]; *see generally Zhejiang Native*

at 872, *reprinted in* 1994 U.S.C.C.A.N. at 4200.

The SAA further addresses the two statutorily-authorized methods of selecting respondents for individual review in cases where individual review of all exporters and producers is not practicable. *See* 19 U.S.C. § 1677f-1(c)(2)(A) & (B). Specifically, the SAA states:

> New section 777A(c)(2) [*i.e.*, 19 U.S.C. § 1677f-1(c)(2)(A) & (B)] provides that where there are large numbers of exporters, producers, importers, or products involved in an investigation, Commerce may limit its examination to: (1) a statistically valid sample of exporters, producers or types of products; or (2) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can reasonably be examined. Consistent with the Antidumping Agreement, [19 U.S.C. § 1677f-1(c)(2)(A) & (B)] recognizes that the authority to select samples rests exclusively with Commerce, but, to the greatest extent possible, Commerce will consult with exporters and producers regarding the method to be used.
>
> The phrase "statistically valid sample" [for purposes of 19 U.S.C. § 1677f1(c)(2)(A)] is intended merely to conform the language of the statute with that of the Antidumping Agreement, and is not a substantive change from the current phrase "generally recognized sampling techniques." Commerce will employ a sampling methodology designed to give representative results based on the facts known at the time the sampling method is designed. This important qualification recognizes that Commerce may not have the type of information needed to select the *most* representative sample at the early stages of an investigation or review when it must decide on a sampling technique.

SAA, H.R. Doc. No. 103–316, vol. 1 at 872–73, *reprinted in* 1994 U.S.C.C.A.N. at 4200–01 (emphasis in the original).

[14] *See also* Pl.'s Brief at 10 (asserting that "Commerce must, at the very least, select between four and eight respondents for review"); Pl.'s Reply Brief at 5 (same, *verbatim*).

As explained elsewhere herein, *Zhejiang*, *Carpenter*, and *Schaeffler* deal with a fundamentally different situation than that presented here. In each of those cases, the court held that the number of "exporters or producers involved in the investigation or review" was not a "large number" within the meaning of 19 U.S.C. § 1677f-1(c)(2). Thus, contrary to Mid Continent's assertions, those cases *cannot* stand for the proposition that where – as here – there *is* a "large number" of exporters or producers, Commerce is required to individually examine "at least four to eight" respondents, "whether the pool of respondents is eight, 10, or 159." *See* Pl.'s Brief at 9.

Moreover, contrary to Mid Continent's claims, *Zhejiang*, *Carpenter*, and *Schaeffler* do not even stand for the proposition that Commerce is required to individually examine "*at least four to eight*" respondents in an investigation or administrative review that *does not* involve a "large number" of exporters or producers. Instead, those cases stand for the proposition that, in such a case, Commerce is required to individually examine *all* respondents. *See generally Zhejiang*, 33 CIT at 1128–31, 637 F. Supp. 2d at 1263–65; *Carpenter*, 33 CIT at 1725–32, 662 F. Supp. 2d at 1340–46; *Schaeffler*, 35 CIT at ____, 781 F. Supp. 2d at 1362–63.

Contrary to Mid Continent's implications, there is nothing whatsoever "magic" (*i.e.*, significant) about the figures "four to eight," other than the fact that those figures were

Produce & Animal By-Products Import & Export Corp. v. United States, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009); *Schaeffler Italia S.R.L. v. United States*, 35 CIT ____, 781 F. Supp. 2d 1358 (2011). These three cases are the linchpin of Mid Continent's respondent selection claim. *See generally* Pl.'s Brief at 1, 6–10 (discussing three cases); Pl.'s Reply Brief at 1–3, 5 (same). But Mid Continent misrepresents the holdings of all three cases.

Contrary to Mid Continent's assertions, *Zhejiang*, *Carpenter*, and *Schaeffler* have nothing to do with the particular respondent selection issue that Mid Continent seeks to press in this case. Specifically, *Zhejiang*, *Carpenter*, and *Schaeffler* each concerned whether the number of exporters and producers in the case was sufficiently "large" to render it "not practicable" for Commerce to conduct individual reviews of all respondents. In other words, each of those three decisions addresses whether, under the specific facts of the particular case, it was permissible for Commerce to invoke the statutory exception to the general rule requiring the agency to conduct individual reviews of all exporters and producers – an issue that is very different than the particular issue that Mid Continent seeks to raise here. *See* 19 U.S.C. § 1677f-1(c)(2); *Zhejiang*, 33 CIT at 1128–31, 637 F. Supp. 2d at 1263–65 (rejecting Commerce's reliance on statutory exception, based on determination that four respondents is not a "large number" as that term is used in statute); *Carpenter*, 33 CIT at 1728–29, 662 F. Supp. 2d at 1343–44 (same; eight respondents is not a "large number"); *Schaeffler*, 35 CIT at ____, 781 F. Supp. 2d at 1362–63 (same; two respondents is not a "large number"); *see also* Def.'s Brief at 10–11 (emphasizing that cases cited by Mid Continent "all address . . . whether the total number of producers in a review constitute[s] a 'large number,' not whether the number of respondents selected is a 'reasonable number'"); Def.-Ints.' Brief at 24–28 (similar).[15]

relevant in light of the case-specific facts of *Zhejiang*, *Carpenter*, and *Schaeffler*. The figures "four to eight" have no particular relevance even to other cases that do not involve a "large number" of exporters or producers (to say nothing of cases that do).

[15] There is thus no truth, for example, to Mid Continent's claim that "[i]n both *Zhejiang* and *Carpenter*, the Court addressed the number of respondents that must be selected for individual examination to be considered '*reasonable*.'" *See* Pl.'s Brief at 7 (emphasis added); *compare* 19 U.S.C. § 1677f-1(c)(2) (providing that, where a review involves a "*large number*" of exporters or producers, rendering it "not practicable" to conduct individual reviews of all of them, statutory exception authorizes Commerce to limit individual reviews to a "*reasonable number*" of companies) (emphases added). As a matter of law, that issue simply was not presented in the cases on which Mid Continent relies.

Mid Continent also plays fast-and-loose with certain key record facts. Thus, for example, in its opening brief, Mid Continent flatly represents that "[a]t the start of the review," Mid Continent "urged Commerce to select at least five 'mandatory' respondents." Pl.'s Brief at 3;

Simply stated, the applicability of the exception to the general rule requiring individual review of all respondents is not in dispute in this action. Mid Continent candidly concedes – as it must – that 159 is, in fact, a "large number," and that it was "not practicable" for Commerce to individually review all 159 respondents. *See* Pl.'s Brief at 7 (confirming that Mid Continent "does not . . . challenge" Commerce's determination not to individually review "all 159 respondents," and thus does not dispute agency's invocation of statutory exception); 19 U.S.C. § 1677f-1(c)(2); *see also*, *e.g.*, *Ad Hoc Shrimp Trade Action Comm.*, 33 CIT at 1918, 675 F. Supp. 2d at 1299 (holding 136 to be sufficiently "large number" of companies to trigger statutory exception to general rule requiring individual review of all respondents). Thus, quite unlike the plaintiffs in *Zhejiang*, *Carpenter*, and *Schaeffler*, Mid Continent here does not challenge Commerce's right to rely on the statutory exception to limit the number of respondents subject to individual review in this case.

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see also, *e.g.*, *id*. at 7 (representing that "both Mid Continent and Stanley urged Commerce to individually examine four or five (or more) Chinese exporters"). However, shortly after the review was initiated, in Mid Continent's very first submission to Commerce concerning respondent selection, Mid Continent argued to Commerce that "analysis of the [Customs] data indicates that [Commerce] reasonably should determine to *limit the number of respondents in this review to two*." *See* Mid Continent First Comments on Respondent Selection at 3 (Pub. Doc. No. 35) (emphasis added). In its reply brief, Mid Continent was forced to acknowledge its earlier misrepresentation. *See* Pl.'s Reply Brief at 3 (admitting that "Defendant-Intervenors are correct that Plaintiff initially requested that Commerce select the two largest respondents, Stanley and CPI").

It bears repeating that USCIT Rule 11(b) provides that an attorney's signature on court papers certifies, among other things, that each of "the claims, defenses, and other legal contentions" therein "are warranted by existing law" (or a non-frivolous argument for the extension or modification of the law) and that all "factual contentions have evidentiary support." USCIT Rule 11(b). "Inherent in that certification is the assertion that *the existing law*, as well as *the facts of record*, have been stated 'accurately and correctly.'" *Diamond Sawblades Mfgrs.' Coalition v. United States*, 34 CIT ____, ____, 2010 WL 517477 * 5 (2010) (emphases added) (*quoting Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1356 (Fed. Cir. 2003)); *see*, *e.g.*, *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 31 CIT 1600, 1683–85 & n.108, 519 F. Supp. 2d 1291, 136465 & n.108 (2007). As the Court of Appeals recently observed, "the 1993 advisory committee note explains . . . [that] this rule [*i.e.*, Rule 11(b)] 'requires litigants to "stop-and-think" before initially making legal or factual contentions.'" *Raylon, LLC v. Complus Data Innovations, Inc.*, 700 F.3d 1361, 1367 (Fed. Cir. 2012). Of course, counsel must be free to zealously represent the interests of their clients. However, that obligation must be balanced against other (sometimes competing) ethical obligations. Thus, for example, counsel must exercise care to "properly temper[] enthusiasm for a client's cause with careful regard for the obligations of truth, candor, accuracy, and professional judgment that are expected of them as officers of the court." *Oliveri v. Thompson*, 803 F.2d 1265, 1267 (2d Cir. 1986); *see also*, *e.g.*, *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 32 CIT 1032, 1034 (2008) (and authorities cited there).

As such, the section of the statute that is the subject of analysis in *Zhejiang*, *Carpenter*, and *Schaeffler* – focusing on the term "large number" – has no relevance to this case. The three cases on which Mid Continent predicates its argument are, in short, inapposite. And Mid Continent's claim that those three cases required Commerce here to individually review "four to eight" respondents necessarily fails of its own weight.[16]

[16] In its briefs, Mid Continent makes several passing allusions to statements in *Zhejiang*, *Carpenter*, and *Schaeffler*, as well as *Asahi Seiko*, which criticized Commerce for – in effect – "predetermining" the number of respondents that it would individually review and which rejected Commerce's attempts to rely on "resource constraints" to seek to avoid individual review of all respondents in the proceedings there at issue without rational determinations that each of the proceedings involved a "large number" of respondents. *See* Pl.'s Brief at 8–9 (referring to treatment of Commerce's claims of "resource constraints" in *Zhejiang* and *Carpenter*); *id*. at 9 (arguing that, in *Zhejiang*, *Carpenter*, and *Schaeffler*, "Commerce pre-determined the number of respondents that it could . . . 'reasonably consider'"); Pl.'s Reply Brief at 1–2 (arguing, *inter alia*, that "[t]aken together, [*Zhejiang* and *Carpenter*] stand for the proposition that Commerce cannot severely limit the number of respondents for individual examination based on its claimed resource constraints"); *id*. at 2 (arguing that *Carpenter* "concluded that Commerce [in that case] had effectively prejudged the number of respondents it could examine," in contravention of the statute; that *Asahi Seiko* found that Commerce "improperly pre-determined that its available resources enabled the agency to examine only three mandatory respondents out of a possible twelve"; and that "Commerce cannot pre-determine its available resources before first considering the number of respondents for individual examination").

To be sure, it is true that *Zhejiang*, *Carpenter*, and *Schaeffler*, as well as *Asahi Seiko*, rejected Commerce's respondent selection determinations in the proceedings there at issue, based on findings that the agency had improperly invoked resource constraints and/or had prejudged the number of respondents that the agency could individually review, absent a proper determination that the existence of a "large number" of respondents justified limiting the number of respondents subject to individual review. *See generally Zhejiang*, 33 CIT at 1128–29, 637 F. Supp. 2d at 1263–64 (rejecting agency's decision to individually review only two respondents, reasoning that four was not a "large number" of respondents, that "[t]he statute focuses solely on the practicability of determining individual dumping margins based on the large number of exporters or producers involved in the review at hand," and that "Commerce may not rely upon its workload caused by other antidumping proceedings in assessing whether the number of exporters or producers [in a particular proceeding] is 'large'"); *Carpenter*, 33 CIT at 1726–32, 662 F. Supp. 2d at 1341–46 (rejecting agency's decision to review only two out of eight total respondents, relying heavily on rationale in *Zhejiang*); *Schaeffler*, 35 CIT at ____, ____, 781 F. Supp. 2d at 1361, 1362–66 (holding that Commerce improperly relied on resource constraints in determining that agency would individually review only one out of two total respondents, but concluding that there was no remedy available where, *inter alia*, plaintiffs failed to exhaust administrative remedies by failing to pursue request for voluntary respondent status); *Asahi Seiko*, 34 CIT at ____, 751 F. Supp. 2d at 1340–45 (ruling, *inter alia*, that, where "Commerce decided that its own resources allowed it to examine individually only three mandatory respondents from a total of twelve subject to review," the agency "exceeded its statutory authority in severely limiting the number of respondents for individual examination based on its own general resource constraints," but concluding that no remedy was available because plaintiff failed to exhaust administrative remedies by withdrawing its request for review and by failing to pursue voluntary respondent status).

Mid Continent's claim turns instead on a different part of the statute – in particular, on the language stating that, in a proceeding like that at issue here (which indisputably involved a "large number" of respondents, rendering individual review of all respondents "not practicable"), Commerce instead may identify a "reasonable number" of respondents for individual review, using either of the two methodologies specified in the statute. 19 U.S.C. § 1677f-1(c)(2)(A) & (B). In this instance, Commerce, in exercising its statutory discretion, decided to limit individual review to those "exporters and producers accounting for the largest volume of the subject merchandise . . . that [could] be reasonably examined." *See* 19 U.S.C. § 1677f-1(c)(2)(B); First Respondent Selection Memorandum at 1, 3, 5 (memorializing Commerce determination to limit the number of exporters/producers subject to individual review, due to, *inter alia*, "the significant number of companies requesting to be reviewed," and to select for individual review "the two largest exporters by volume").[17] Accordingly, to prevail on the merits of its respondent selection claim, Mid Continent must establish that – in identifying companies for individual review in the underlying proceeding by "accounting for the largest volume of the subject merchandise . . . that can be reasonably examined" – Commerce acted unreasonably in selecting the two respondents that

Yet again, however, the cases that Mid Continent cites do nothing to advance its cause, because – in each of those cases – Commerce could not show that the administrative proceeding there at issue involved a "large number" of respondents, entitling the agency to limit the number of companies selected for individual review. In contrast, in the case at bar, there is no question but that the proceeding at issue involved a "large number" of respondents. And no party disputes that Commerce was entitled, as a matter of law, to limit the number of companies selected for individual review.

Moreover, in identifying companies for individual review under 19 U.S.C. § 1677f1(c)(2)(B), Commerce here was required to select those "exporters and producers accounting for the largest volume of the subject merchandise . . . *that* [*could*] *be reasonably examined*." *See* 19 U.S.C. § 1677f-1(c)(2)(B) (emphasis added). Thus – on its face – the statute contemplates that, in circumstances such as these, Commerce's selection of respondents for individual review will take into account the agency's resource constraints.

[17] It appears that, historically, when limiting the number of respondents for individual review in reliance on the statutory exception in 19 U.S.C. § 1677f-1(c)(2), Commerce's typical practice has been to "select[] respondents with the largest volume" (pursuant to § 1677f-1(c)(2)(B)), as the agency did in this instance, although sampling (pursuant to § 1677f-1(c)(2)(A)) occasionally has been employed. *See Ad Hoc Shrimp Trade Action Comm.*, 33 CIT at 1917 & n.5, 675 F. Supp. 2d at 1298–99 & n.5 (explaining, *inter alia*, that selecting respondents based on volume of imports is Commerce's "normal practice"); *see also* Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comment, 75 Fed. Reg. 78,678 (Dec. 16, 2010) (explaining that, "in virtually every one of its proceedings," Commerce has selected respondents for individual review based on import volume, rather than using sampling).

it did. 19 U.S.C. § 1677f-1(c)(2)(B). *Zhejiang*, *Carpenter*, and *Schaeffler* do not speak to that issue.[18] And Mid Continent offers precious little by way of argument beyond its (misplaced) reliance on those three cases.[19]

Thus, for example, not only does Mid Continent seek to build its respondent selection claim on three cases that do not concern the particular respondent selection issue at stake in this action, but, in addition, Mid Continent ignores the cases that in fact *do* bear on that issue – all of which cut against Mid Continent's claim. *See Ad Hoc Shrimp Trade Action Comm.*, 33 CIT at 1917–18, 675 F. Supp. 2d at 1298–99 (sustaining Commerce's determination to limit individual review to the four respondents accounting for the largest volume of subject imports); *Pakfood Public Co. v. United States*, 35 CIT ____, ____, 753 F. Supp. 2d 1334, 1336–48 (analyzing and rejecting challenge to agency determination to limit individual review to the two producer/exporter entities accounting for the largest volume of subject imports), *aff'd*, 453 F. Appx. 986 (Fed. Cir. 2011); *Longkou Haimeng Mach. Co. v. United States*, 32 CIT 1142, 1143–57, 581 F.

[18] *Cf. Schaeffler*, 35 CIT at ____, 781 F. Supp. 2d at 1362–63 (in *dicta*, offering the incontrovertible observation that "[t]he plural term '*reasonable* number of *exporters* or *producers*,' read according to its plain meaning, does not encompass a quantity of one").

[19] For the first time in its reply brief, Mid Continent appears to be attempting to formulate an argument that leverages the three cases on which it principally relies (concerning the meaning of a "large number" of respondents) and seeks to link them to the requirement that Commerce individually review a "reasonable number" of respondents in those proceedings where it is not required to conduct individual reviews of all respondents. 19 U.S.C. § 1677f-1(c)(2). Specifically, Mid Continent asserts in its reply brief that, "[w]hen the potential pool of respondents is 159 companies, Commerce cannot limit the number of individually examined companies to two, when Commerce would have been required to select between four and eight companies for individual review if the pool of potential respondents were eight to twelve." *See* Pl.'s Reply Brief at 3. According to Mid Continent, such an interpretation "would read the term 'reasonable' out of the statute." *Id*. In essence, Mid Continent belatedly endeavors to juxtapose the statutory terms "large number" and "reasonable number," and to reason that – if Commerce is required to review all four to eight respondents if the number of respondents in a case *is not* "large" – Commerce logically cannot be permitted to review *fewer* than four to eight respondents where the number of respondents *is* "large." *See id*. Mid Continent's formulation is linguistically clever, and – at first blush – has a certain superficial appeal. But the proposition does not withstand closer scrutiny.

There is no need to consider this argument in detail here. Mid Continent raised this more nuanced argument too late in this action, and, even then, has failed to adequately brief the point, depriving the other parties (and the court) of the ability to reasonably evaluate and address it, and relieving all of the need to do so. It is, however, in any event clear that Mid Continent is conflating the analysis, and mixing apples and oranges. Moreover, to state the obvious: If Congress had wished to establish an absolute "floor" on the number of respondents to be the subject of individual review in an investigation where there are a "large number" of respondents, Congress plainly could have done so. The fact that Congress elected not to do so means that interpretation of the statute is committed to Commerce's discretion, at least in the first instance.

Supp. 2d 1344, 1347–57 (2008) (affirming agency determination to limit individual review to three companies accounting for the largest volume of subject imports, in rejecting claim that Commerce was required to conduct individual reviews of all voluntary respondents); *Laizhou Auto Brake Equip. Co. v. United States*, 32 CIT 711, 712–14, 722–28 (2008) (affirming agency determination to limit individual review to five companies selected using "probability-proportional-to-size" sampling methodology); *see generally* Def.-Ints.' Brief at 20–24 (analyzing the four cases referenced here); *id*. at 24 (observing that Mid Continent "ignores the judicial precedent which clearly supports [Commerce's] respondent selection process," while "direct[ing] . . . attention to three decisions [*i.e.*, *Zhejiang*, *Carpenter*, and *Schaeffler*] . . . [that] are readily distinguishable from the facts in this case").[20]

In addition to its basic claim that *Zhejiang*, *Carpenter*, and *Schaeffler* required Commerce to individually review "at least four to eight" respondents (discussed above), Mid Continent also argues in its briefs that Commerce's respondent selection process was flawed because the respondents selected for individual review were "not representative of the Chinese industry as a whole." Pl.'s Brief at 6; *see also id*. at 7, 9–10; Pl.'s Reply Brief at 3–5. Mid Continent asserts that the Chinese nail industry is made up of both large, efficient producers and exporters (including the subsidiaries of foreign multinational companies, such as Stanley) and – according to Mid Continent – "literally hundreds of small and medium sized producers and exporters, with vastly different production efficiencies and pricing practices." Pl.'s Brief at 6–7. Mid Continent maintains that, had Commerce selected more respondents in the underlying administrative proceeding, "even with the refusal of certain companies to participate[,] the rate assigned to the other unreviewed Chinese exporters would have been more representative." *Id*. at 9–10.[21]

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[20] *But cf*. Pl.'s Reply Brief at 8–9 (briefly discussing *Ad Hoc Shrimp Trade Action Comm.*, 33 CIT at 1908–10, 1918–19, 675 F. Supp. 2d at 1292–94, 1300, solely in context of analysis of applicability of doctrine of exhaustion of administrative remedies).

[21] The Government astutely notes that – to the extent that Mid Continent argues that Commerce could have avoided the situation where the "all others" rate was calculated only by selecting additional respondents at the outset of the administrative proceeding – Mid Continent's hypothetical fails. *See* Def.'s Brief at 11–12. As the Government explains:

> [H]ad Commerce selected four respondents (as Mid Continent claims it should have) at the beginning of the review, the outcome of the proceeding would have been exactly the same. Because Commerce determined to review the largest companies by volume, as provided by § 1677f-1(c)(2), even if Commerce had chosen more respondents at the outset, those companies would have been Stanley, CPI, Tianjian, and Shandong, the same companies [that Commerce] attempted to review over the course of this proceeding. The result thus would be exactly the same as in the current situation, *i.e.* the final rate for non-reviewed respondents would still be based only on Stanley's rate.

This "representativeness" claim is not only barred by the doctrine of exhaustion, it is also beyond the scope of Mid Continent's Complaint in this matter.[22] But, in any event, like Mid Continent's basic respondent selection claim, Mid Continent's representativeness claim too is without merit.

Mid Continent insists that the statute "clearly contemplates a situation where the sample size of respondents is 'statistically valid' or *the number of respondents selected is large enough to reasonably approximate the experience of all known exporters or producers that could not be examined*." Pl.'s Reply Brief at 4 (emphasis added). Mid Continent further contends that "selecting exporters or producers for review based on volume must involve enough respondents *to reflect the experience of a 'reasonable ' volume of subject merchandise*." *Id*. (emphasis added). However, Mid Continent cites no authority for these novel propositions, which find no support in either the text of 19

Def.'s Brief at 11–12.

The Government further explains that Commerce could not reasonably have been expected to choose yet another company to replace Shandong Minmetals when it stopped participating: "Given Commerce's limited resources and given the late stage in the proceedings – Shandong dropped out after the preliminary results had been issued – it was far too late in the proceedings to choose another respondent." Def.'s Brief at 12.

[22] Specifically, as to the respondent selection process, Mid Continent's Complaint stated simply that "[Commerce] unlawfully chose to limit the number of mandatory respondents in the challenged administrative review to only two respondents – based on a claim of 'resource constraints.' [Commerce's] decision to limit the number of mandatory respondents to only two companies on this basis is not supported by substantial evidence on the record and is otherwise not in accordance with law." *See* Complaint, Count I. It is possible to read the Complaint's reference to "resource constraints" as a reference to *Zhejiang*, *Carpenter*, *Schaeffler*, and *Asahi Seiko* (*see* n.16, *supra*), and as covering Mid Continent's basic (albeit misguided) respondent selection claim that *Zhejiang*, *Carpenter*, and *Schaeffler* together established some kind of "floor" requiring Commerce to individually review "at least four to eight" respondents in the administrative proceeding. However, there is nothing in the language of the Complaint to put a reader on notice of any respondent selection "representativeness" claim.

As discussed above, Mid Continent's failure to exhaust its administrative remedies by raising its concerns about the respondent selection process in its administrative case brief filed with Commerce precludes Mid Continent from challenging that process in this forum. *See* section III.A.1, *supra*. But, even assuming that Mid Continent's failure to exhaust did not bar Mid Continent from challenging any aspect of Commerce's selection of respondents (which it does), a plaintiff is not permitted to use its briefs to expand its claims beyond those identified in its complaint. Accordingly, to the extent that Mid Continent now seeks to assert a claim contesting the "representativeness" of the respondents that Commerce chose, that claim is twice-barred – first because Mid Continent failed to raise *any* respondent selection issue in its administrative case brief, and, second, because the specific language of the Complaint raised only Mid Continent's basic respondent selection claim – *i.e.*, that Commerce erred in limiting individual review to two respondents, based on "resource constraints" (a claim which goes fundamentally to the basis, or grounds, for limiting individual review to two respondents) – and cannot fairly be read to cover "representativeness" (which goes essentially to the consequences of limiting review to two respondents).

U.S.C. § 1677f-1(c)(2) or the legislative history. To the extent that those sources speak to Mid Continent's "representativeness" claim, they contravene it. *See generally* 19 U.S.C. § 1677f-1(c)(2); SAA, H.R. Doc. No. 103–316, vol. 1 at 872–73, *reprinted in* 1994 U.S.C.C.A.N. at 4200–01.

On its face, the specific provision at issue expressly authorizes Commerce to limit individual review to a "reasonable number" of "exporters or producers accounting for the *largest volume* of the subject merchandise . . . that can be reasonably examined." 19 U.S.C. § 1677f-1(c)(2)(B) (emphasis added). Nothing in the language of that provision even hints that the exporters and producers selected for individual review must be "representative." *See id.*; *see also* Def.'s Brief at 11 (stating that "[a]ccepting Mid Continent's argument . . . would negate Section 1677f-1(c)(2)(B) of the statute completely"). The focus in 19 U.S.C. § 1677f-1(c)(2)(B) is thus on capturing the greatest volume of merchandise possible – a relatively straightforward methodology that seems likely in many instances (including this case) to lead to results that differ from the results yielded by the type of random sampling that is the alternative authorized under the other prong of the statute, § 1677f1(c)(2)(A).

Similarly, nothing in the relevant legislative history supports Mid Continent's assertion that Commerce's selection of respondents for individual review on the basis of volume (§ 1677f1(c)(2)(B)) is constrained by concerns about representativeness. Thus, for example, the SAA notes generally that the new statutory provision, 19 U.S.C. § 1677f-1(c)(2), "provides that where there are large numbers of exporters, producers, importers, or products involved in an investigation, Commerce may limit its examination to: (1) a statistically valid sample of exporters, producers or types of products; or (2) exporters and producers accounting for the largest volume of the subject merchandise . . . that can reasonably be examined." SAA, H.R. Doc. No. 103–316, vol. 1 at 872, *reprinted in* 1994 U.S.C.C.A.N. at 4200–01. The SAA then goes on to address sampling in some detail: The SAA recognizes that "the authority to select samples rests exclusively with Commerce, but, to the greatest extent possible, Commerce will consult with exporters and producers regarding the method to be used." *Id.*, H.R. Doc. No. 103–316, vol. 1 at 872, *reprinted in* 1994 U.S.C.C.A.N. at 4201. In addition, the SAA explains that "[t]he phrase 'statistically valid sample' . . . is not a substantive change from . . . 'generally recognized sampling techniques.'" *Id.* Even more to the point, the SAA expressly provides that "Commerce will employ a

sampling methodology designed to give *representative* results based on the facts known at the time the sampling method is designed," and underscores that "[t]his important qualification recognizes that Commerce may not have the type of information needed to select the *most representative* sample at the early stages of an investigation or review when [Commerce] must decide on a sampling technique." *Id*., H.R. Doc. No. 103–316, vol. 1 at 872–73, *reprinted in* 1994 U.S.C.C.A.N. at 4201 (emphasis on "most" in the original; other emphases added). In other words, the SAA reflects concerns about the statistical validity and "representativeness" of the "sample of exporters, producers, or types of products" that is the subject of 19 U.S.C. § 1677f-1(c)(2)(A). But the SAA reflects no such concern as to the methodology authorized under § 1677f-1(c)(2)(B), the specific provision at issue here, where the emphasis is on maximum volume.

Under the circumstances, it is enough to add that – notwithstanding Mid Continent's repeated use of the phrase in its representativeness argument[23] – neither the statute nor the legislative history makes any reference to "reasonable volume" (only "the *largest volume* of the subject merchandise . . . that can be reasonably examined"), just as the statute and the legislative history make no reference to "representativeness" in the context of respondents selected for individual review pursuant to 19 U.S.C. § 1677f-1(c)(2)(B). (Emphasis added.) Accordingly, even if it were to be considered on its merits, Mid Continent's claim that Commerce was required to select respondents for individual review with an eye toward capturing "potential variability across the population" would be unavailing. *See* Pl.'s Reply Brief at 4–5 (*quoting* Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comment, 75 Fed. Reg. 78,678 (Dec. 16, 2010)).[24]

[23] *See, e.g.*, Pl.'s Reply Brief at 3–4 (arguing that "selecting exporters or producers for review based on volume [*i.e.*, as authorized by 19 U.S.C. § 1677f-1(c)(2)(B)] must involve enough respondents to reflect the experience of a '*reasonable' volume* of the subject merchandise") (emphasis added); *id*. at 4 (asserting that, if selecting the two largest exporters or producers out of a total of 159 companies accounts for only a certain percentage of total subject import volume, "this does not appear to reflect the experience of a '*reasonable' volume* of shipments of the subject merchandise") (emphasis added); *id*. at 5 (arguing that "selecting respondents by largest import volumes implies that the import volumes must be large enough to reflect the experience of a '*reasonable' volume* of the subject merchandise") (emphasis added).

[24] In its reply brief, Mid Continent supports its representativeness argument by citing to a proposal that Commerce floated in late 2010 concerning its methodology for selecting respondents in proceedings where the "large number" of respondents precludes the agency's individual review of all companies. *See* Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comment, 75 Fed. Reg. 78,678 (Dec. 16, 2010) ("Proposed Methodology"); Pl.'s Reply Brief at 4–5. Mid Continent emphasizes that, under the proposal, Commerce would select respondents via sampling (pursuant to 19 U.S.C. § 1677f-1(c)(2)(A)) – rather than by import volume (pursuant to 19 U.S.C. § 1677f-1(c)(2)(B))

The bottom line is that none of Mid Continent's arguments undermines in any way Commerce's interpretation and application of 19

– except in certain circumstances, including "when the largest companies by import volume account for at least 75 percent of total imports." Proposed Methodology, 75 Fed. Reg. at 78,678; Pl.'s Reply Brief at 5. According to Mid Continent, that language in the proposal "indicates that selecting respondents by largest import volumes implies that the import volumes must be large enough to reflect the experience of a 'reasonable' volume of the subject merchandise, thereby representing the experience of unreviewed respondents." *Id*.

The proposal acknowledges that – as Mid Continent argues – one consequence of Commerce's general practice of selecting respondents based on volume (rather than by sampling) is that "companies under investigation or review with relatively smaller import volumes have typically not been selected . . . for individual examination," such that their experience is not necessarily reflected in Commerce's analysis and calculations. Proposed Methodology, 75 Fed. Reg. at 78,678. However, beyond establishing that general proposition (which is not in dispute here), the proposal does little else to advance Mid Continent's argument.

Because the proposal is addressed only in a single paragraph in Mid Continent's reply brief, detailed consideration is not warranted. It is nevertheless worth noting that, first, Commerce has published nothing further concerning the proposal since late 2010. Thus, not only was the proposed methodology not in place at the time of the administrative review at issue here, but, even now, the proposed methodology has not been adopted. Moreover, as Mid Continent acknowledges (*see* Pl.'s Reply Brief at 5), the proposal itself states that Commerce generally would not use sampling "[i]f, due to resource constraints, [Commerce] is unable to examine at least three companies." Proposed Methodology, 75 Fed. Reg. at 78,678. Accordingly, even if the proposal had been in place at the time of the review at issue, the new methodology would not have applied in this case, because Commerce here determined that agency resource constraints limited individual review to two companies. *See* First Respondent Selection Memorandum at 1, 3, 5 (memorializing Commerce determination to select for individual review "the two largest exporters by volume").

Further, even Mid Continent does not contend that Commerce is required by statute or regulation – or even any existing standard practice – to select a sufficient number of individual respondents to capture at least 75% (or any other specific percentage) of total import volume. Under the proposal, Commerce generally would "forgo sampling" in instances "when the largest companies by import volume account for at least 75 percent of total imports." Proposed Methodology, 75 Fed. Reg. at 78,678. But, while adoption of the proposal perhaps would establish a standard agency practice (with all the attendant implications that would flow from that, as a matter of administrative law), that does not mean that Commerce then would be obligated to select mandatory respondents by sampling any time selection by volume *would not* capture 75% of total imports. In addition, the proposal takes pains to make it clear, using hedging language, that – while the proposal would, in essence, establish sampling as the "default" option for respondent selection (in lieu of selecting respondents based on import volume) – sampling would be used "where possible," and that sampling "in general" would not be used in certain enumerated circumstances (two of which are outlined above). *See generally id*.

Finally, and most fundamentally, the very broad discretion that Congress has accorded Commerce (both in general, and specifically with respect to respondent selection) obviously permits the agency itself to exercise its discretion and determine – on a case-by-case basis, or as a general matter of policy – that sampling is preferable to selecting respondents based on import volume (or *vice versa*). But Commerce, in any event, will retain the full measure of statutory authority and the abundant discretion that Congress has unambiguously conferred on the agency, authorizing Commerce to select respondents for individual review in a case such as this one either by use of sampling or by reference to import volume. *See*

U.S.C. § 1677f-1(c)(2)(B) in the circumstances of this case.[25] Mosttelling is the conspicuous absence from Mid Continent's briefs of any reference to *Chevron* vis-a-vis the statutory provision at issue, including the key terms "*reasonable number* of exporters or producers" and "exporters and producers *accounting for the largest volume* of the subject merchandise . . . that can be *reasonably* examined." 19 U.S.C. § 1677f-1(c)(2)(B) (emphases added); *Chevron*, 467 U.S. at 842–45; *compare*, *e.g.*, *Pakfood*, 35 CIT at ____, 753 F. Supp. 2d at 1342 (noting that "neither the [antidumping duty] statute nor any of Commerce's regulations directly address[es] the methodology by which [Commerce] is to arrive at the number of 'exporters and producers accounting for the largest volume of subject merchandise . . . that can be reasonably examined,'" and invoking *Chevron* standard); *Schaeffler*, 35 CIT at ____, 781 F. Supp. 2d at 136263 (applying *Chevron* analysis to interpret terms "reasonable number of exporters or producers" and "large number of exporters or producers"); *Carpenter*, 33 CIT at 1727–29, 662 F. Supp. 2d at 134243 (interpreting term "large number of exporters or producers" pursuant to *Chevron* analysis).

In sum, there is no merit to Mid Continent's basic claim that "Commerce's decision to select only two Chinese exporters for individual examination, based on claimed 'resource constraints,' is contrary to law." *See* Pl.'s Brief at 1; *see also* Complaint, Count I. Commerce's decision not to conduct individual reviews of all respondents was properly based on the agency's determination that the proceeding here involved a "large number" of exporters and producers – a determination that Mid Continent does not contest. *See* 19 U.S.C. § 1677f

19 U.S.C. § 1677f-1(c)(2)(A) & (B). In this case, Commerce relied on the statute and, in its discretion, selected respondents for individual review based on volume of imports. Nothing in the proposal that Mid Continent has cited suggests that Commerce's actions here abused the agency's ample discretion.

[25] Nothing herein should be understood to suggest that Commerce's discretion to choose between the two methodologies specified in 19 U.S.C. § 1677f-1(c)(2) is wholly unfettered, or that "representativeness" could never constrain Commerce's ability to rely on 19 U.S.C. § 1677f1(c)(2)(B) or affect a determination as to whether a specific number of exporters and producers is "reasonable" given the facts of a particular case. Those issues are not presented here. It is enough to note that Mid Continent here has proffered no *Chevron* analysis of the statute or cited *any* statutory authority other than 19 U.S.C. § 1677f-1(c)(2), which Mid Continent candidly acknowledges sets no "minimum . . . on the number of respondents . . ., or the volume of imports that should be covered" by respondents subject to individual review. *See* Mid Continent First Comments on Respondent Selection at 3. Under the circumstances of this case, on the strength of the administrative record developed by the parties before the agency, and based on the briefs filed with the court, Mid Continent has failed to demonstrate that Commerce erred in any way in its selection of respondents for individual review in the administrative review at issue.

1(c)(2); Pl.'s Brief at 7 (confirming that Mid Continent does not contest that proceeding in question involved "large number" of exporters and producers).

Moreover, under the circumstances, there was nothing unlawful about Commerce's reference to agency resource constraints. *See*, *e.g.*, First Respondent Selection Memorandum at 1–3 (explaining basis for Commerce's determination that 159 exporters/producers constitutes a "large number," and outlining basis for limiting individual examination to two companies; referring, *inter alia*, to Commerce's "current resource constraints," the agency's "available resources," the "significant" resources "that would be necessary to individually examine all 159 exporters/producers," "the finite available resources and [Commerce's] already heavy workload," and the lack of "resources to fully examine all of the companies for which [Commerce] received a request for review"). The line of cases that Mid Continent cites – including *Zhejiang*, *Carpenter*, and *Schaeffler* – holds only that, in proceedings that do not involve a "large number" of exporters and producers, Commerce may not rely on resource constraints to avoid conducting individual reviews of all respondents. Mid Continent has cited no authority to support its claim that, in proceedings which involve a "large number" of exporters and producers (such as this one), Commerce is prohibited from considering its resource constraints in determining the number of respondents to be subject to individual review. Quite to the contrary, the relevant statutory provision clearly contemplates Commerce's consideration of agency resource constraints, among other factors. *See* 19 U.S.C. § 1677f-1(c)(2)(B) (referring to "the largest volume of the subject merchandise . . . *that can be reasonably examined*") (emphasis added). There was thus nothing unlawful about Commerce's consideration of resource constraints here, where the agency also properly concluded that the proceeding involved a "large number" of exporters and producers, rendering individual review of all respondents impracticable.

Commerce's determination to limit the number of mandatory respondents to the two respondents selected is similarly supported by substantial evidence and in accordance with law. Mid Continent has barely fleshed out, much less adequately supported, its contentions that two was not a "reasonable number" and that Commerce's selection of respondents failed to "account[] for the largest volume of the subject merchandise . . . that [could] be reasonably examined." *See* 19 U.S.C. § 1677f-1(c)(2)(B). As noted above, Mid Continent has not

analyzed the key terms of the statute pursuant to *Chevron*; and Commerce's determinations in the administrative record do not directly address the issues of statutory construction that are implicated by Mid Continent's claims.[26]

Nevertheless, Commerce's implicit construction of the statute in this case must be reviewed in accordance with the fundamental *Chevron* framework. The first issue is thus whether Congress has directly spoken to the precise question at issue. If so, the court must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842–43. On the other hand, "if the statute is silent or ambiguous with respect to the specific issue" presented, the agency's construction must prevail, provided that it is a permissible construction of the statute. *Id*., 467 U.S. at 843. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation" that is proffered by the agency that is charged with administering and implementing the statute. *Id*., 467 U.S. at 844.

Certainly Congress has not spoken specifically to whether two is a "reasonable number" of respondents for individual review in a case such as this. *See* 19 U.S.C. § 1677f-1(c)(2). Nor has Congress spoken directly to more generally define "reasonable number," except to the extent that the text of 19 U.S.C. § 1677f-1(c)(2)(B) – *i.e.*, the reference to "exporters and producers accounting for the largest volume of the subject merchandise . . . that can be reasonably examined" – can be read to constitute the definition of "reasonable number." *See* 19 U.S.C. § 1677f-1(c)(2)(B).[27]And Congress has not spoken directly to

[26] Nor has the Government identified any other document or proceeding where Commerce has formally articulated its construction of 19 U.S.C. § 1677f-1(c)(2)(B).

[27] In 19 U.S.C. § 1677f-1(c)(2)(B), Congress has instructed Commerce that – where the agency elects to select mandatory respondents based on import volume – Commerce is to select the "exporters and producers accounting for *the largest volume* of the subject merchandise . . . that *can be reasonably examined*." *See* 19 U.S.C. § 1677f-1(c)(2)(B) (emphases added). The statute thus appears to require Commerce to survey its available resources (and to evaluate any other relevant factors), and, based on that assessment, to then identify those exporters and producers that will yield "the largest volume" of imports for individual review in the proceeding. However, as a general canon of statutory interpretation, the language of a statute is to be construed to avoid treating terms as surplusage. *See Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, ____ U.S. ____, ____, 131 S. Ct. 2188, 2196 (2011); 2A N. Singer & J. Singer, *Sutherland Statutory Construction* § 46.7, at 265–66 (7th ed. 2007). And, if the statute is read as suggested immediately above, it is not clear that the phrase "reasonable number" in the introductory language of 19 U.S.C. § 1677f-1(c)(2) has any meaning – unless 19 U.S.C. § 1677f-1(c)(2)(B) actually serves to define the term "reasonable number" for those instances where Commerce decides to use import volume to limit the number of respondents for individual review. *See generally* 19 U.S.C. § 1677f-1(c)(2). Moreover, while it seems possible (perhaps even likely) that the language of 19 U.S.C. § 1677f-1(c)(2)(B) is intended to define "reasonable number" for those instances where Commerce decides to use import volume to limit the number of respondents for individual review, it is less clear that the language of 19 U.S.C.

the meaning of "the largest volume of the subject merchandise . . . that can be reasonably examined" to the extent that those terms are implicated by Mid Continent's claims. *Cf. Pakfood*, 35 CIT at ____, 753 F. Supp. 2d at 1342 (explaining that, because "neither the [anti-dumping duty] statute nor any of Commerce's regulations directly address[es] the methodology by which [Commerce] is to arrive at the number of 'exporters and producers accounting for the largest volume of the subject merchandise . . . that can be reasonably examined,' . . . the court will uphold Commerce's methodology if it is reasonable, . . . and is not arbitrarily applied").

The administrative record here documents that Commerce properly gave thoughtful and careful consideration to various factors, including its resource constraints, and – at each stage of the proceeding – determined how to select respondents so as to "account[] for the largest volume of the subject merchandise . . . that [could] be reasonably examined." *See* 19 U.S.C. § 1677f-1(c)(2)(B); First Respondent Selection Memorandum (concerning selection of Stanley and CPI); Second Respondent Selection Memorandum (concerning selection of Stanley and Tianjin Xiantong, which replaced CPI); Third Respondent Selection Memorandum (concerning selection of Stanley and Shandong Minmetal, which replaced Tianjin Xiantong).[28] In the process, Commerce (at least implicitly) construed the statute in such a way as to mean that, under the circumstances of this case, the mandatory respondents that the agency selected "account[ed] for *the largest volume of the subject merchandise* . . . that [could] be *reasonably* examined." *See* 19 U.S.C. § 1677f-1(c)(2)(B) (emphases added). Under the circumstances of this case, the agency's construction of the statute appears to be a permissible one, and therefore must be sustained.

§ 1677f-1(c)(2)(A) can be read as serving the same purpose with respect to those instances where Commerce elects to use sampling to limit the number of respondents for individual review.

For purposes of the instant analysis, it is unnecessary to definitively resolve this issue. However, a clear, cohesive construction of the statute by Commerce would be useful. Such a construction might have been forthcoming in the Final Results in this proceeding, particularly if Mid Continent had raised its respondent selection claims in the administrative case brief that it filed with the agency following issuance of the Preliminary Results, and if Mid Continent had properly "teed up" the statutory interpretation issues that are inherent in those claims.

[28] *See, e.g.*, *Longkou*, 32 CIT at 1152–53, 581 F. Supp. 2d at 1354 (affirming agency determination to limit individual review to three companies, based on, *inter alia*, record evidence showing that "Commerce conducted a careful evaluation of its resource capabilities," including an examination of "the number of cases, respondents, and analysts it had at its disposal"; concluding that "Commerce's decision to limit its review . . . to the three mandatory respondents [was] reasonable, and supported by substantial evidence").

Mid Continent offers nothing to cast doubt on Commerce's implicit construction of 19 U.S.C. § 1677f-1(c)(2)(B). Mid Continent similarly points to no concrete record evidence to substantiate its suggestion that Commerce's resources would have permitted the agency to individually review additional respondents and thus to increase the volume of merchandise subject to such review.[29] In any event, as a

[29] *See generally Laizhou*, 32 CIT at 726 (affirming reasonableness of agency determination to limit individual review to five companies, explaining, *inter alia*, that "[t]he record does not show, and Plaintiffs did not demonstrate, that Commerce could have conducted more individual examinations without undue burden and without inhibiting the timely completion of the investigation"); *Longkou*, 32 CIT at 1152–53, 581 F. Supp. 2d at 1353–54 (sustaining agency determination limiting individual review to three companies, refuting plaintiffs' contention that acceptance of additional respondents "would not have significantly increased Commerce's administrative burden," and rejecting plaintiffs' assertion that Commerce "'failed to offer any evidence to support its claim that reviewing more than three companies would have created an undue burden'").

International trade proceedings are, by definition, complicated and complex; and some are even more demanding than others, forcing Commerce to simultaneously juggle many constantly-changing priorities and demands, and to make difficult determinations about the optimal allocation of the agency's finite resources. In the instant case, from the outset, Commerce was faced with 159 respondents subject to review; and, in addition to conducting individual examinations of the two mandatory respondents, Commerce – at Mid Continent's urging – also undertook an intensive and wide-ranging review of CPI's "no shipment" claim. At the same time, the agency was analyzing separate rate applications and certifications submitted by literally dozens of companies, and determining the status of the remaining respondents who were not participating in the proceeding. The numerous other facets of the proceeding included Commerce's on-site verification of one of CPI's suppliers at the supplier's nail-producing facility in the PRC, where, *inter alia*, Commerce interviewed company officials, analyzed the company's structure and financial records, and reviewed the company's sales and production processes. *See* Third Respondent Selection Memorandum at 2–3; Commerce's Verification Outline (Pub. Doc. No. 328); *see also* Def.-Ints.' Brief at 2, 17, 23, 27 (describing Commerce's multiple competing priorities).

In addition to the pressures and strains of this proceeding, the same Commerce staffers were also charged with responsibility for numerous concurrent antidumping proceedings, including complex investigations and administrative reviews, and a multitude of scope ruling requests, as well as several court remands. *See* First Respondent Selection Memorandum at 2–3. Making matters worse, "the deadlines for a number of the cases coincide[d] and/or overlap[ped] with the deadlines in this antidumping proceeding." *Id*. at 3.

For obvious reasons, courts are generally chary of playing "Monday morning quarterback," second-guessing agency decisions concerning enforcement priorities and resources. For the same reasons, the courts have been understandably reluctant to second-guess Commerce's determinations concerning resources, feasibility, and respondent selection determinations in investigations and administrative reviews in antidumping and countervailing duty proceedings. *See generally*, *e.g.*, *Longkou*, 32 CIT at 1152, 581 F. Supp. 2d at 1353–54 (rejecting plaintiffs' contention that accepting additional respondents "would not have significantly increased Commerce's administrative burden," emphasizing that, "[w]hile conducting an administrative review of an antidumping duty order Commerce is charged with a number of different tasks," including "the analysis of each company's response, the collection and analysis of surrogate value data for each unique part used by

matter of sound public policy, "agencies with statutory enforcement responsibilities," such as Commerce, "enjoy broad discretion in allocating investigative and enforcement resources." *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (*citing Heckler v. Cheney*, 470 U.S. 821, 831 (1985)). As the Court of Appeals emphasized in *Torrington*, any different allocation of authority between the agency and the courts would be unworkable, "put[ting] the Court of International Trade and [the Court of Appeals] in the position of routinely second-guessing [Commerce's] decisions" on a wide range of matters (including the minutiae of respondent selection) in individual cases – "a role for which courts are ill-suited and one that could be quite disruptive of Commerce's efforts to establish enforcement priorities" in the conduct of antidumping investigations and administrative reviews. *Torrington*, 68 F.3d at 1351.[30]

The long and the short of the matter is that, even if consideration of Mid Continent's challenge to Commerce's selection of mandatory respondents were not barred, the challenge is lacking in merit. Commerce here reasonably exercised its broad discretion by selecting for individual review the two respondents that imported the largest volume of subject merchandise. Mid Continent's challenge therefore must be rejected, and Commerce's selection of mandatory respondents sustained.

B. *Commerce's Treatment of Entries Initially Mis-Attributed to CPI*

Mid Continent casts its second claim – which challenges Commerce's determinations concerning the treatment of the entries of 23 companies that were initially mis-attributed to CPI – as an example of a "serious" and "growing" phenomenon of "obvious evasion" of antidumping duties, to which Mid Continent claims Commerce has "turned a blind eye." *See* Pl.'s Brief at 11, 13; *see generally* Pl.'s Brief at 1–2, 10–14; Pl.'s Reply Brief at 9–15. Specifically, according to Mid Continent, "[t]he misuse of combination rates is being observed in an increasing number of Commerce proceedings, and reflects, in many cases, deliberate efforts by foreign exporters and/or U.S. importers to

each respondent, and performing the margin calculations for each respondent," each of which "require[s] the expenditure of significant resources").

[30] The public policy concerns that motivated the Court of Appeals in *Torrington* have found thoughtful application in cases involving challenges to Commerce's respondent selection determinations. *See, e.g.*, *Longkou*, 32 CIT at 1151, 581 F. Supp. 2d at 1353 (*quoting Torrington*, and underscoring that "any assessment of Commerce's operational capabilities . . . must be made by the agency itself"); *Laizhou*, 32 CIT at 726 (*quoting Torrington*); *Ad Hoc Shrimp Trade Action Comm.*, 33 CIT at 1917–18, 675 F. Supp. 2d at 1299 (same).

take advantage of a different company's duty deposit rate that is significantly lower than their own." Pl.'s Brief at 10–11.

As detailed in section I.B above, Commerce explained in the Issues & Decision Memorandum issued in support of the Final Results that the agency was instructing Customs to liquidate the entries at issue depending on whether the company was one of the 13 companies that had knowledge that its goods were destined for the United States or one of the 10 companies for which no record evidence demonstrated a connection to CPI. *See* section I.B, *supra* (discussing Issues & Decision Memorandum at 24–25). For the group of 13 companies, Commerce stated that it would instruct Customs to liquidate entries at "the separate rate [the companies] earned either in the [underlying antidumping] investigation or in this review, as applicable." *See* Issues & Decision Memorandum at 24.[31] As to the other 10 companies, Commerce indicated that it would instruct Customs to "assess [antidumping] duties at the rate in effect at the time of entry." *See id*. at 25.[32] In addition, acknowledging record evidence indicating that "some entries may have been classified under the incorrect combination rate," Commerce advised that it was also referring this matter to Customs for possible enforcement action. *See id*.

Mid Continent takes strong exception to these determinations by Commerce, and maintains that all of the entries at issue should be subject to the PRC-wide rate – the highest rate in the proceeding, 118.04%. *See* Pl.'s Brief at 11, 13; Pl.'s Reply Brief at 11, 14–15. Mid Continent asserts broadly that the 23 companies in question "repeatedly misidentif[ied] significant volumes of imports in order to claim CPI as the exporter and apply its duty deposit rate," and are guilty of "obvious evasion." Pl.'s Brief at 2; Pl.'s Reply Brief at 10. In addition, Mid Continent raises a handful of legal arguments. *See* Pl.'s Brief at 11, 13–14; Pl.'s Reply Brief at 10, 14–15.

For their part, the Government and Defendant-Intervenors argue that – without regard to whether there is (as Mid Continent contends)

[31] Based on Commerce's instructions, the entries of those of the 13 companies that earned a separate rate in the administrative review would be liquidated at 10.63%, while the entries of those that earned a separate rate in the investigation but not in the administrative review would be liquidated at 21.24%. *See* Antidumping Order, 73 Fed. Reg. at 44,963–64 (listing CPI's various combinations, all of which earned rate of 21.24% in investigation); Amended Final Results, 76 Fed. Reg. at 23,280 (listing certain companies that held combination rates with CPI, all of which earned separate rate of 10.63% in administrative review).

[32] Based on Commerce's determination, entries attributed to these 10 companies would be liquidated at 21.24%, the rate at which the entries came into the United States (*i.e.*, CPI's cash deposit rate). Antidumping Order, 73 Fed. Reg. at 44,963–64 (listing CPI's multiple combinations, all of which were assigned rate of 21.24% in investigation).

a "'growing and serious' problem with combination rates" and evasion in other proceedings – the instant proceeding cannot fairly be portrayed as an example of any such phenomenon, and, moreover, that it would have been entirely inappropriate for Commerce to have based its actions here on Mid Continent's "bare speculations of fraud [and] illegal activity." Def.'s Brief at 17; Def.-Ints.' Brief at 36. The Government and Defendant-Intervenors reject Mid Continent's other arguments as similarly lacking in merit, and maintain that Commerce's determinations concerning the treatment of the entries at issue are supported by substantial evidence and otherwise in accordance with law, and therefore should be sustained. Def.'s Brief at 7–8, 12–13; Def.-Ints.' Brief at 32, 35; *see generally* Def.'s Brief at 7–8, 12–17; Def.-Ints.' Brief at 3, 31–38.

As outlined below, Mid Continent's arguments are largely unavailing. However, its contention that Commerce's actions here were inconsistent with the agency's established, longstanding practice in market economy reviews requires a remand. *See generally* Pl.'s Brief at 2, 13–14; Pl.'s Reply Brief at 14–15.

1. *Mid Continent's Arguments Challenging Record Facts*

Mid Continent's second claim is – at its core – fundamentally predicated on Mid Continent's allegations that the 23 companies that initially mis-attributed entries to CPI did so deliberately and intentionally, for the purpose of "improperly avoid[ing] (or evad[ing])" antidumping duties. *See* Pl.'s Brief at 5. According to Mid Continent, the 23 companies were "shopping for the lowest cash deposit rate," in an "obvious manipulation" of the antidumping duty system. *See id*.; Pl.'s Reply Brief at 14. The evidence belies Mid Continent's assertions.[33]

Mid Continent argues that the record does not support Commerce's liquidation instructions for entries of the 13 companies with which CPI acknowledged doing business. Specifically, Mid Continent accuses the 13 companies and/or their importers of "deliberately us[ing] CPI's combination rate codes to take advantage of [CPI's] cash deposit rate." Pl.'s Brief at 12. However, neither the companies responsible for exporting virtually the entire volume of the merchandise initially

[33] Mid Continent also contends that application of the PRC-wide rate is required even if there is "no [finding] of 'malfeasance' on the part of the Chinese exporters (and/or the U.S. importers who brought in the goods)." Pl.'s Reply Brief at 10. This assertion goes to whether Commerce has a blanket policy of taking action against companies that use the wrong exporter's rate (whether purposefully, or otherwise), and is addressed below. *See* section III.B.3, *infra*.

mis-attributed to CPI, nor their importers, had any motive or incentive whatsoever to "take advantage" of CPI's cash deposit rate.

Twelve of the 13 Chinese producers in question were entitled to enter steel nails during the review period at the same rate as entered without using the combination rate they shared with CPI. In addition to sharing a combination rate with CPI (in which CPI was the exporter), each of those 12 companies also had combination rates in which they were listed as exporter. *See* Antidumping Order, 73 Fed. Reg. at 44,963–65 (showing that 12 companies had combination rates as producers and as exporters, all of which were 21.24%); *see* Def.-Ints.' Brief at 32. Thus, as a practical matter, their rates were the same, either way. Those 12 companies – which accounted for essentially all of the import volume mis-attributed to CPI – simply had nothing to gain by using the combination rate they shared with CPI.[34] Mid Continent fails to explain why, in light of these facts, the companies would "deliberately use[] CPI's combination rate[s]" or how the mis-attribution of entries to CPI constituted "tak[ing] advantage" of CPI's cash deposit rate. As for the sole remaining company, there is not a scintilla of record evidence to substantiate Mid Continent's claim that the company was deliberately using CPI's combination rate to take advantage of CPI's cash deposit rate. *See* Def.'s Brief at 12–13, 16–17; Def.-Ints.' Brief at 35.[35]

Mid Continent also charges that Commerce ignored the possibility that CPI's suppliers were being used as conduits for other nail suppliers. Pl.'s Brief at 12. Yet again, the sole evidence of record is to the contrary. To follow up on Mid Continent's allegations, Commerce conducted an on-site verification of one of the 13 companies, Tianjin Jinchi Metal Products Co., Ltd. Through that verification, Commerce confirmed that all but a tiny fraction of the nails exported to the United States by Tianjin Jinchi were, in fact, produced by Tianjin Jinchi. *See* Tianjin Jinchi Verification Results at 5 (Conf. Doc. No. 149).[36]

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[34] The 12 companies accounted for [[ ]] of the total volume of imports attributed to CPI. *See* CPI Comments on Respondent Selection at Exh. 2 (indicating quantity of subject merchandise attributable to each company that shared combination rate with CPI).

[35] [[ ]] was the only one of the 13 companies that did not receive its own combination rate as an exporter in the antidumping investigation. *See* Antidumping Order, 73 Fed. Reg. at 44,963–65.

[36] Specifically, Commerce's investigation revealed that all but a portion of less than [[ ]] of the nails exported to the United States by Tianjin Jinchi were produced by Tianjin Jinchi itself. *See* Def.-Ints.' Conf. Brief at 17 (*citing* Tianjin Jinchi Verification Results at Exh. I).

Mid Continent cites no proof in support of its claims as to Tianjin Jinchi or any of the other companies. Instead, Mid Continent attempts to analogize this case to *Jia Farn*, a case in which Commerce received information that an exporter not covered by an antidumping order was shipping sweaters manufactured by other producers that were covered by an antidumping order (and thus subject to antidumping duties that those producers were not paying). *See generally Jia Farn Mfg. Co. v. Sec'y of Commerce*, 17 CIT 187, 194, 817 F. Supp. 969, 975 (1993); Pl.'s Brief at 12. But, in this case, unlike *Jia Farn*, there is no evidence of intentional evasion by any entity.

Ultimately, the burden of creating an adequate record lies with interested parties, not with Commerce. *QVD Food Corp. Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Here, Mid Continent has failed to adduce any evidence to support its claims that CPI's suppliers were being used as conduits, or were otherwise abusing the system in any way. Commerce investigated Mid Continent's charges by conducting an on-site verification of Tianjin Jinchi, and found no evidence that other companies were using Tianjin Jinchi as a conduit. As a matter of law, Commerce has discretion over how to verify factual information; and there is no indication that Commerce abused its ample discretion here. *See* 19 C.F.R. § 351.307(b)(3). As such, Mid Continent's claims are not supported by the record, and must therefore be rejected.

Mid Continent further contends that the record does not support Commerce's determination that entries attributed to the other 10 companies that shared rates with CPI should be liquidated at the rates they claimed at the time of entry. *See* Pl.'s Brief at 12–13; Pl.'s Reply Brief at 13–14. However, CPI explained on the record that the entries at issue were the product of clerical "coding errors upon entry or differences in timing," not intentional evasion. *See* Partial Rescission Memorandum at 4; *see also* CPI Response to Mid Continent Comments on Respondent Selection at 2–3 (Conf. Doc. No. 12); CPI Comments on Respondent Selection at Exh. 7 (exhibit entitled "Red Herring No. 3"). Mid Continent has proffered no evidence to the contrary. In light of the explanation on the record, and particularly in the absence of any proof of evasion, Commerce reasonably exercised its considerable discretion and declined to impose what would (in effect) be a punitive rate on the subject entries.

Speculation and surmise are no substitute for affirmative evidence. Here, Mid Continent's allegations of deliberate misuse of CPI's cash deposit rate find no support in the administrative record and therefore must be rejected.

2. *Mid Continent's Legal Arguments*

In addition to its assertions that the 23 companies intentionally mis-attributed entries to CPI, Mid Continent also raises several legal arguments in an effort to support its claim that the entries at issue should be subject to the PRC-wide rate. As discussed below, however, Mid Continent's arguments and authorities do little to advance its cause.

Citing Policy Bulletin 05.1, Mid Continent argues that Commerce's decision not to take action in response to the alleged misuse of CPI's duty deposit rate contradicts the agency's practice of applying combination rates only to the specific exporter and producer to whom a particular combination rate is specifically assigned. *See* Pl.'s Brief at 11 (*citing* Import Administration Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries (2005) ("Policy Bulletin 05.1") at 6). Policy Bulletin 05.1 outlines Commerce's policy of assigning exporter-producer-specific combination rates in investigations. But the bulletin is silent as to the consequences, if any, when merchandise is entered at the wrong exporter's rate. In other words, contrary to Mid Continent's implication, Policy Bulletin 05.1 does not establish any agency practice or document any legal obligation requiring Commerce to use the PRC-wide rate – even in circumstances where (unlike here) abuse of the combination rate system has been proved.

Moreover, as a practical matter, the problem to which Policy Bulletin 05.1 in particular, and the combination rate system more generally, are addressed is not present here. The purpose of the combination rate system is to prevent companies from seeking to circumvent the imposition of antidumping duties by "shifting exports through exporters with the lowest assigned cash-deposit rates." Policy Bulletin 05.1 at 7. However, as explained above, 12 of the companies in question – representing virtually all of the import volume at issue – could have entered steel nails during the review period at the same rate as entered without using the combination rate they shared with CPI, because each of those 12 companies also had combination rates in which they were listed as exporter, and those rates were the same as the combination rates that each shared with CPI. As such, Commerce's decision to allow the use of CPI's duty deposit rates for entries exported by Chinese companies does not contradict

Policy Bulletin 05.1 by encouraging or enabling companies to shift exports in any meaningful way. Mid Continent's reliance on Policy Bulletin 05.1 is thus misplaced.

Invoking 19 U.S.C. § 1592(a) and 19 C.F.R. §§ 162 & 171 (Appendix B), Mid Continent further asserts that "[e]ntering goods from one exporter using the [antidumping duty] margin of another is a violation of law and a subversion of administrative process." Pl.'s Brief at 11 (*citing* 19 U.S.C. § 1592(a) ("Penalties for fraud, gross negligence, and negligence": "Prohibition"); 19 C.F.R. § 162 ("Inspection, Search, and Seizure") & 171 (Appendix B) ("Customs Regulations, Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592")). It is of course true that entering goods at an improper rate may involve negligence, or even fraud. But mis-attribution also may be the result of "[c]lerical errors or mistakes of fact." *See* 19 U.S.C. § 1592(a)(2) ("Exception") (specifying that "[c]lerical errors or mistakes of fact are not violations . . . unless they are part of a pattern of negligent conduct"). In any event, neither the statute nor the regulations cited by Mid Continent mandates that Commerce apply the PRC-wide rate to entries that were entered at an incorrect rate – which is the result that Mid Continent advocates.

Further, under the statute cited by Mid Continent – *i.e.*, 19 U.S.C. § 1592, it is Customs, not Commerce, that is charged with responsibility for enforcement of the laws prohibiting material false statements and omissions in customs entry documentation. *See* 19 U.S.C. § 1592(b).[37] As such, even assuming that violations such as those alleged by Mid Continent may have occurred, the investigation of any such potential violations would fall squarely within Customs' domain. Commerce here thus acted properly in referring to Customs the issue of whether certain companies may have acted negligently or fraudulently in using CPI's rate. *See* Issues & Decision Memorandum at 25 (taking note of "record evidence that some entries may have been classified under the incorrect combination rate," and advising that the matter was being referred to Customs for possible enforcement action).

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[37] In general, 19 U.S.C. § 1592(a) prohibits the use of material false statements and material omissions to "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States." 19 U.S.C. § 1592(a)(1) ("General Rule"). 19 U.S.C. § 1592(b) details enforcement procedures. 19 U.S.C. § 1592(b) ("Procedures"). Section 1592(b)(1)(A) provides, in general, that "[i]f *the Customs Service* has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further proceedings are warranted, it shall issue to the person concerned a written notice of its intention to issue a claim for a monetary penalty." 19 U.S.C. § 1592(b)(1)(A) (emphasis added).

Mid Continent's third legal argument is based on *Jia Farn* and *Tung Mung*. *See generally* Pl.'s Reply Brief at 10 (*citing Jia Farn*, 17 CIT at 194, 817 F. Supp. at 975; *Tung Mung Development Co. v. United States*, 26 CIT 969, 978–79, 219 F. Supp. 2d 1333, 1343 (2002), *aff'd*, 354 F.3d 1371 (Fed. Cir. 2004)). Relying on those two cases, Mid Continent asserts broadly that, "[b]y allowing the 23 Chinese exporters, and/or their U.S. importers, to misuse CPI's duty deposit rate," Commerce violated its "*duty* to administer the antidumping law in a manner to prevent evasion, *i.e.*, to prevent exporters who receive high rates, and importers who purchase their products, from using a third company's dumping rate to import goods at a margin rate lower than their own." Pl.'s Reply Brief at 10 (emphasis added). In fact, the two cases contribute little to Mid Continent's position.

Notwithstanding Mid Continent's characterization, the language in *Jia Farn* to which Mid Continent alludes states simply that, given the specific circumstances of that case, "Commerce acted reasonably to prevent possible circumvention of antidumping duties." *Jia Farn*, 17 CIT at 194, 817 F. Supp. at 975. There is no mention of any affirmative "duty" on Commerce's part; nor does *Jia Farn* refer to such an "obligation" or "responsibility" (or any other synonym for "duty") on the part of the agency.

Tung Mung is only slightly more helpful to Mid Continent on the asserted existence of some affirmative "duty." Although the relevant section of the opinion is captioned "Department Fulfilled its Duty of Preventing Circumvention of The Antidumping Statute," it is apparent from the pertinent excerpt (quoted below), reinforced by a review of the decision itself, that the existence (or not) of such a "duty" was not an issue before the *Tung Mung* court, and the court's use of the word "duty" in the caption and in the text of the opinion in the case was not particularly deliberate or studied:

> As stated in the Remand Determination, Commerce has a *duty* to avoid the evasion of antidumping duties. Remand Determination at 3. "The ITA [International Trade Administration, within Commerce] has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion [to act] . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law." *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1046, 700 F. Supp. 538, 555 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990). Defendant-Intervenors claim that [Commerce] has created a test which undermines this fundamental duty.

Tung Mung, 26 CIT at 978–79, 219 F. Supp. 2d at 1343 (emphasis added).[38] The most that can be said about the text quoted above is that either it gives no indication as to what authority (if any) the Remand Results that are paraphrased in *Tung Mung* cited as support for Commerce's asserted "duty," or – alternatively – that the support cited by the Remand Results was *Mitsubishi*. And, as the quote above makes plain, *Mitsubishi* actually says nothing about any "duty" on Commerce's part. Instead, *Mitsubishi* refers to Commerce's *discretion* to act in order to "prevent[] the intentional evasion or circumvention of the antidumping duty law." *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1046, 700 F. Supp. 538, 555 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990). "Discretion" and "duty" are two very different things.[39]

The facts of Mid Continent's two cases also lend little or no support to its position. As discussed above, in *Jia Farn*, Commerce had received information that an exporter who was not subject to an existing antidumping duty order was helping other manufacturers evade the order by shipping their goods (which were subject to the order), thus aiding them in avoiding payment of antidumping duties. *See generally Jia Farn*, 17 CIT at 187–88, 817 F. Supp. at 970. The exporter brought the action at issue, seeking to enjoin Commerce from investigating the allegations through a "changed circumstances" proceeding and a then-ongoing administrative review. In brief and in summary, the focus of the decision in *Jia Farn* is the agency's authority to use the two types of proceedings despite the fact that the exporter was not covered by the relevant antidumping duty order. The court analyzed the statutes governing the two types of proceedings, and ruled that the agency was entitled to proceed, ultimately concluding generally that "Commerce acted reasonably to prevent possible circumvention of antidumping duties." *See Jia Farn*, 17 CIT

[38] In addition, immediately before the captioned "Conclusion" of the opinion, *Tung Mung* sums up, referring once again – in passing, and without citation to any supporting authority – to Commerce's asserted "duty": "Accordingly, Commerce has fulfilled its *duty* of preventing the evasion of antidumping duties . . . ." *Tung Mung*, 26 CIT at 978, 219 F. Supp. 2d at 1344 (emphasis added).

[39] Indeed, review of the quoted *Mitsubishi* excerpt, in context, reveals that *Mitsubishi* pairs the concept of "discretion" with "authority" – again, two concepts that are very different from "duty":

> [Commerce] has been vested with *authority* to administer the antidumping laws in accordance with the legislative intent. To this end, [Commerce] has a certain amount of *discretion* to expand the language of a petition to encompass the literal intent of [an antidumping] petition, . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.

Mitsubishi, 12 CIT at 1046, 700 F. Supp. at 555 (emphases added).

at 190–94, 817 F. Supp. at 972–75. Significantly, in *Jia Farn*, the nature and extent of the evidence against the exporter was not at issue. In contrast, in the case at bar, there is no concrete evidence of any intentional evasion. Moreover, as noted above, nothing in *Jia Farn* suggests that Commerce has an affirmative *duty* to prevent evasion of antidumping duties. Instead, the case reflects a judicial determination that, in the exercise of the agency's *discretion*, Commerce had the *legal authority* to take the action that it took.

In *Tung Mung*, a case involving "middleman dumping," the court concluded that Commerce properly declined to (in effect) penalize producers for dumping when there was no record evidence that they knew, or had any reason to know, that their merchandise would be "dumped" by a middleman. *See Tung Mung*, 26 CIT at 969–81, 219 F. Supp. 2d at 1334–44. Thus, *Tung Mung* holds, in essence, that where – as here – there is no record evidence of a party's evasion, Commerce acts properly by not imposing on the party what would, in effect, constitute a penalty. *See id*., 26 CIT at 980–81, 219 F. Supp. 2d at 1344 (rejecting domestic industry's arguments, including, *inter alia*, argument that "by not penalizing a producer considered not to be responsible for middleman dumping," Commerce's use of combination rates "will further encourage . . . middleman dumping"; emphasizing that "[s]ince no evidence of collusion surfaced during verification of the producer and the middleman, [the domestic producers'] argument amounts to pure speculation").

In sum, although both decisions address Commerce's role vis-a-vis allegations of evasion of antidumping duties, neither *Jia Farn* nor *Tung Mung* supports Mid Continent's claim that Commerce failed to fulfill its obligations in this case, given the record facts here. And, contrary to Mid Continent's implication, neither case addresses whether or not Commerce has an affirmative "duty" to prevent evasion of the antidumping statute, much less the nature and the precise metes and bounds of any such duty. Like Mid Continent's other arguments (discussed above), this one too must fail.

3. *Mid Continent's Allegations of Inconsistent NME and Market Economy Practices*

Mid Continent's final argument attacks the liquidation determinations here as "contrary to [Commerce's] approach to the same issue in cases involving market economy countries." Pl.'s Brief at 13; *see also id*. at 13–14; Pl.'s Reply Brief at 14. As summarized below, although the argument consumes but a few short paragraphs in Mid Continent's briefs, the argument raises potentially significant concerns

about the reasonableness of Commerce's practice. Nevertheless, the Government and Defendant-Intervenors give the argument short shrift in their briefs, and do not grapple at all with its merits. *See generally* Def.'s Brief at 17; Def.-Ints.' Brief at 36–38. The matter therefore must be remanded to Commerce for its consideration.[40]

Mid Continent argues that when an importer attributes an entry to a firm that did not report sales to that importer during the period of review, Commerce's duty assessment practice should be the same whether the administrative review is a market economy review or a non-market economy ("NME") review. However, until recently, Commerce's methodologies have been inconsistent. *See generally* Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 Fed. Reg. 34,046 (June 10, 2011) ("Proposed Policy Statement"). In NME administrative reviews in the past, Commerce has instructed Customs to assess duties on such entries at the rate at which they were entered into the United States (*i.e.*, the rate declared by the importer at the time of entry). *Id.*, 76 Fed. Reg. at 34,046. In contrast, in market economy reviews, Commerce (since 2003) has instructed Customs to assess duties not at the rate entered into the United States, but, rather, at the "all-others" rate. *Id.*

As support for its argument, Mid Continent highlights the fact that Commerce recently changed its policy in order to address this inconsistency in agency practice. Specifically, after the Final Results issued in this case, Commerce published notice of a proposal designed to conform the agency's approach to the assessment of antidumping duties in NME proceedings in the circumstances outlined above to the agency's practice in market economy cases. *See* Pl.'s Brief at 13–14 (*citing* Proposed Policy Statement, 76 Fed. Reg. at 34,046–47); *see also* Pl.'s Reply Brief at 14. The Proposed Policy Statement was finalized before briefing in this action was complete. *See* Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 Fed. Reg. 65,694 (Oct. 24, 2011) (finalizing Proposed Policy Statement) ("Final Policy Statement").[41]

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[40] It does not appear that Mid Continent included this argument in its administrative case brief, or otherwise raised the argument at the administrative level. However, neither the Government nor Defendant-Intervenors have argued that consideration is barred by the doctrine of exhaustion. *See generally* section III.A.1, *supra*.

[41] Commerce's Proposed Policy Statement contrasted Commerce's practice in market economy proceedings with its practice in NME proceedings:

> In the past, in both [market economy] and NME cases, [Commerce] instructed [Customs] to assess [antidumping] duties on entries not examined and/or not otherwise covered by the final results of review for a firm that was subject to the review at the rate at which the merchandise entered the United States, *i.e.*, at the cash-deposit rate in effect at the time of entry. However, in May 2003, [Commerce] announced a change to its

Neither the Government nor Defendant-Intervenors have responded directly to Mid Continent's challenge to the (apparently now resolved) inconsistency between Commerce's practice in market economy *versus* NME proceedings. Instead, the Government and Defendant-Intervenors assert that Mid Continent's argument lacks merit because the Proposed Policy Statement was released more than a month after the Amended Final Results were issued and is explicitly prospective in nature. *See* Def.'s Brief at 17; Def.-Ints.' Brief at 37 n.3; *see also id*. at 36–37 (arguing that policy statement "does not affect the entries subject to this civil action"). But the heart of Mid Continent's argument is not that Commerce's liquidation instructions in this action are inconsistent with Commerce's new policy for NME proceedings. Mid Continent's argument is much more fundamental – that is, that Commerce's liquidation instructions in this action (an NME review) are not consistent with the agency's practice in market economy proceedings, and that this inconsistency renders the liquidation instructions unreasonable. Pl.'s Brief at 14. In other words, Commerce's change in policy provides support for Mid Continent's argument; but the policy change is not the basis for the argument. The points that the Government and Defendant-Intervenors make concerning the timing of the Policy Statement therefore miss the mark.[42]

> practice. In [market economy] cases with an anniversary month of May 2003 or later, [Commerce] began instructing [Customs] to assess duties at the rate applicable to a party that did not have its own antidumping duty rate, *i.e.*, the all-others rate, on entries that were suspended at the deposit rate of the producer subject to review but that were not covered by the final results of review for that firm subject to review. *See* Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 [Fed. Reg.] 23954 (May 6, 2003) ("2003 Antidumping Duties Notice"). In other words, to the extent that a firm did not report sales to a particular importer or customer during a given review period, the customer or importer is not entitled to a rate that [Commerce] previously established for that firm. [Commerce] stated that its prior practice "often result[ed] in the use of an inaccurate rate for duty assessment where [Commerce] conduct[ed] a review. [T]he duty rate for non-reviewed resellers (which do not have their own rate and where the deposit rate at the time of entry becomes the final rate of duty) is based on a previous review of the producer's selling experience, not the reseller's selling experience." *Id*., 68 [Fed. Reg.] at 23955.
>
> Because discussions had not fully explored [Commerce's] revised practice in the NME context, to date, [Commerce] has not applied the 2003 Antidumping Duties Notice in NME cases. Nevertheless, in both [market economy] and NME proceedings, [Commerce]maintains an interest in having entries liquidated in a manner that is consistent with the final results of its administrative reviews. *Id*., 68 [Fed. Reg.] 23958.
>
> Proposed Policy Statement, 76 Fed. Reg. at 34,046–47.

[42] Defendant-Intervenors also contend that Mid Continent misconstrues the scope of the policy refinement. Def.-Ints.' Brief at 36–38. Defendant-Intervenors point to language in the Final Policy Statement which indicates that Commerce evaluates export transactions "on a

The Final Policy Statement explains that the goal of the practice of liquidating non-reviewed entries at the countrywide rate in market economy proceedings is "the accurate assignment of duties based on information obtained in a review," which "is not unique to [market economy] proceedings but is necessary in all antidumping proceedings." Final Policy Statement, 76 Fed. Reg. at 65,695. The Final Policy Statement also notes that, with the adoption of the change in policy, Commerce's liquidation practices in NME proceedings are "consistent with . . . the same liquidation practice in market economy . . . proceedings." *Id*.

There may be a reasonable basis for Commerce's decision to take an approach to liquidation in this review that seems to conflict with its approach in market economy proceedings. However, no such rationale appears on the existing record. Remand is therefore necessary.

On remand, Commerce shall address all facets of Mid Continent's argument, including specifically whether, in light of their status, the entries initially mis-attributed to CPI fall within the scope of the Final Policy Statement. In addition, more generally, Commerce shall, *inter alia*, articulate its rationale for not applying the NME-wide rate to those entries given the agency's longstanding practice in market economy proceedings. To the extent that Commerce on remand may conclude that it is appropriate to apply the NME-wide rate to some or all of the entries at issue, Commerce shall detail the basis for that determination.

IV. *CONCLUSION*

For the reasons set forth above, Mid Continent's Motion for Judgment on the Agency Record is granted in part and denied in part. Mid Continent's motion is denied as to Commerce's selection of mandatory respondents for individual review; and Mid Continent's motion is granted as to Commerce's liquidation instructions for entries initially mis-attributed to CPI, to the extent explained above.

This matter is remanded to the U.S. Department of Commerce for further action not inconsistent with this opinion. A separate order will enter accordingly.

case-by-case basis within the context of an administrative review" and that Commerce "is able to examine additional documentation to decide which entity was the exporter for purposes of making NME [antidumping] determinations." *Id*. at 37–38 (*quoting* Final Policy Statement, 76 Fed. Reg. at 65,695). But this clarification of the meaning of the term "exporter" in the Final Policy Statement does not establish that Mid Continent has misconstrued the scope of the policy refinement.

Dated: August 30, 2013
New York, New York

/s/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY JUDGE

Slip Op. 13–139

THAI PLASTIC BAGS INDUSTRIES CO., LTD, et. al., Plaintiffs, v. UNITED STATES, Defendant, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, AND SUPERBAG CORPORATION, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00408[1]

[affirming the Department of Commerce's remand redeterminations]

Dated: November 13, 2013

Irene H. Chen, Chen Law Group LLC, of Rockville, MD, and *Mark B. Lehnardt*, Lehnardt & Lehnardt, LLC, of Liberty, MO, for Thai Plastic Bags Industries, Co., Ltd.

Joseph W. Dorn and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation.

Ryan M. Majerus, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. Also on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION

Pogue, Chief Judge:

This case returns to court following remand to the Department of Commerce ("Commerce" or "the Department") by *Thai Plastic Bags Industries Co., Ltd. v. United States*, 37 CIT ____, 904 F. Supp. 2d 1326 (2013) ("*TPBI Remand Order*").[2] The Department responded to the *TPBI Remand Order* by issuing its *Results of Remand Redetermination Pursuant to Court Remand*, A-549–821, ARP 09–10 (Jul. 10, 2013), ECF Nos. 87, 89 ("*Remand Results*").

The parties here raise two challenges to the Remand Results. First, respondent Plaintiffs claim that Commerce improperly increased Thai Plastic Bags Industries Co., Ltd.'s ("TPBI") home market gen-

[1] This action was consolidated with Court No. 11–00409 and Court No. 11–00416.

[2] All citations to the TPBI Remand Order are to the Federal Supplement.

eral and administrative ("G&A") expenses by failing to exclude from, or "offset," those expenses by the amount of revenue from the sale of certain assets. Second, Defendant-Intervenors Polyethylene Retail Carrier Bag Committee, Hilex Poly Company, LLC, and Superbag Corporation (collectively the "Domestic Producers") claim that the Department has improperly reduced the surrogate selling expenses for respondent Landblue (Thailand) Co., Ltd. ("Landblue"). In the alternative, the Domestic Producers argue that the Department should, if allowed to reduce Landblue's selling expenses, calculate a profit amount derived from the same source (TPBI) rather than the surrogate producer selected by the Department, Thantawan Industry Public Company Limited ("Thantawan").

For the reasons stated below, the Department's remand determinations are affirmed. Commerce's denial of an offset to G&A expenses for revenue from the sale of land and buildings properly applies a Department policy intended to increase the accuracy of dumping margin calculations in a manner supported by the record evidence presented. The reduction of surrogate selling expenses, which reflects the distinction between direct and indirect costs, is neither beyond the discretion of the Department nor unsupported by substantial evidence on the record. Finally, the Department was not obliged to seek additional information from TPBI to calculate a profit amount after it reasonably determined to use Thantawan as a surrogate for Landblue.

BACKGROUND

A. *Department of Commerce Determinations and the TPBI Remand Order*

The TPBI Remand Order followed a review of the Department's determinations in *Polyethylene Retail Carrier Bags From Thailand*, 76 Fed. Reg. 59,999 (Dep't Commerce Sept. 28, 2011) (final results) ("*Final Results*") and accompanying Issues & Decision Mem., A-549–821, ARP 09–10 (Sept. 21, 2011) ("*I&D Memo*"). The *Final Results* calculated dumping margins for the two exporter/respondent companies under review, TPBI and Landblue. In making these calculations, the Department exercised its authority under section

773(e)(2)(B) of the Tariff Act of 1930, 19 U.S.C. § 1677b(e)(2)(B)[3] to "construct" or estimate actual costs of a respondent's sales where valid comparison sales in the exporting country were not available. *See Final Results* at 60000, 60001. Both the Domestic Producers and the Plaintiff exporter/respondents challenged aspects of the Department's constructed value ("CV") calculations in a consolidated action here. *TPBI Remand Order*. Of these challenges, the *TPBI Remand Order* identified two issues requiring additional consideration.

First, the Department had calculated a reduction in its estimates of TPBI's G&A expenses by "offsetting" or reducing those expenses by the amount of revenues from certain asset sales taking place during the period of review ("POR"). *I&D Memo* at cmt. 1. In doing this, the Department applied a general policy allowing reductions for any gains made in the "routine disposition of assets" in order to more accurately calculate the dumping margin. *Id.*[4] The *TPBI Remand Order* concluded that the Department's grant to TPBI of an offset for revenue from the sale of certain land and fixed assets, despite indicia that the sale was not conducted in the routine course of business, was not adequately supported by evidence on the record. *TPBI Remand Order* at 1331. The decision to provide an offset for these revenues was therefore remanded to the Department for further consideration.

Second, the Department calculated a normal or home market value for Landblue by approximating Landblue's selling expenses using Landblue's own ratio of direct to indirect selling expenses and apply-

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[3] Further references to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

[4] In calculating the cost of production for purposes of establishing a dumping margin, the Department is required by 19 U.S.C. § 1677b(b)(3)(B) to include "an amount for selling, general, and administrative expense based on actual data pertaining to production and sales [. . .]." In making this calculation, the Department's regular practice is to offset expenses by revenues from the sale of equipment or capital goods so long as such sales are routine parts of the production process. *Remand Results* at 3. This practice recognizes that "The gains or losses on the routine disposal or sale of assets of this type relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations." *Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 73,437 (Dep't Commerce Dec. 12, 2005) (final results) and accompanying Issues & Decision Mem., A-122–838 ("*Softwood I&D Memo*") at cmt. 8.

In contrast, the Department interprets "pertaining to production and sales" in 19 U.S.C. § 1677b(b)(3)(B) as properly excluding costs that are not routine and recurring in the normal course of production and sales. *See id.* Reflecting this, the Department has consistently made a distinction between routine transactions relating to production and singular or "one off" transactions. These two types of transactions are distinguished for the purpose of calculating revenue offsets to G&A expenses based on an analysis of their "nature, significance, and the relationship of that activity to the general operations of the company." *Remand Results*, at 15 (quoting *Certain Frozen Canned Warmwater Shrimp from Brazil*, 69 Fed. Reg. 76,910 (Dep't Commerce Dec. 23, 2004) (final determination) and accompanying Issues & Decision Memo, A-351–838 at cmt. 8.)

ing that ratio to the selling expenses reported by Thantawan, a Thai surrogate company selected because, during the POR, it produced "similar merchandise, [had] a similar customer base, and operated with a profit." *I&D Memo* at cmt. 5.[5] The decision to apply the Landblue ratio to Thantawan's selling expenses represented an acknowledgement by the Department that Thantawan's reported selling expenses did not disaggregate direct expenses associated with export sales from indirect expenses that would apply to both domestic and export sales. *Id.* Because Thatawan's expenses were not allocated or identified as direct and indirect, the Department determined that the accuracy of the CV calculated for Landblue would be greater if some correction were made for the over-inclusion of selling expenses in the surrogate's financial statement. *Id.*; *Remand Results* at 7. To make this correction, the Department applied Landblue's direct/indirect expense ratio to Thantawan's reported selling expenses to generate the amount. But the decision to use Landblue's own direct/indirect expense ratio was based on assumptions about the similarity of the expenses incurred by the two companies.

The *TPBI Remand Order* found these assumptions to be contradicted by facts on the record. Specifically, the Department did not address the fact that Landblue, with no domestic sales at all, was likely to incur a different ratio of direct and indirect selling expenses than a company selling largely within its home market. *TPBI Remand Order* at 1334. As a result, it was not clear from the record evidence that applying the Landblue ratio would serve the statutory purpose of making as accurate a determination as possible. This determination was also therefore remanded to the Department for reconsideration.

B. *Challenged Remand Results*

To address the two issues on remand, the Department gathered additional information and revised its determinations based on the resulting, more complete factual record.

First, the Department's reconsideration of the revenue offsets allowed for TPBI's sale of assets was based on answers submitted by TPBI to a Department questionnaire intended to better identify the type of sales that generated the contested revenues. *Remand Results* at 4. Based on its analysis of this additional information, the Department determined that the portion of revenues attributable to the sale of an office building and associated land should not be classified as part of the company's routine operations. Instead, the Department

[5] Landblue did not have any home market or third country sales. *I&D Memo* at 13.

found that this was a singular sale of fixed assets generating nonrecurring gains. This determination was based on both the relative size of the transaction and the business circumstances that surrounded the sale. *Id.* at 5–6. Therefore the Department, on remand, eliminated the deduction of that portion of TPBI's gain from its calculation of its G&A expenses. *Id.* at 6.

Second, Commerce addressed the remaining issue on remand by opening the record to collect additional data from both Landblue and TPBI regarding the breakdown of their direct and indirect selling expenses. Commerce then re-examined the use of Thantawan as a surrogate for calculating Landblue's selling expenses and reconsidered the application of a direct/indirect ratio to Thantawan's reported selling expenses. *Remand Results*, app. B at 2; id. app. A ("*Analysis Memo*") at 3; *id.* at 13, 17. Based on the additional data collected from Landblue and TPBI, the Department a) affirmed its determination that using Thantawan as a surrogate for Landblue's selling expenses is justified, b) affirmed the determination that applying some reduction to Thantawan's selling expenses is justified, and c) determined that the types of selling expenses incurred by Thantawan and TPBI were sufficiently similar to justify applying TPBI's direct/indirect selling expense ratio — rather than Landblue's - to the reported selling expenses in calculating a CV for Landblue. Finally, the Department declined to re-open its determination of an appropriate profit figure for Landblue to use surrogate data rather than TPBI's proprietory information.

STANDARD OF REVIEW

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

This standard precludes arbitrariness in the application of antidumping laws. An agency decision is arbitrary, *inter alia*, if it applies different standards of judgment to similar cases without adequate explanation and factual support on the record. *See Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) ("an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently.")

DISCUSSION

A. *The Exclusion of Revenues From the Sale of Land in Calculating TPBI's G&A Expenses*

Based on the additional information gathered by the Department, revenue from TPBI's sale of a parcel of land and associated buildings have been appropriately excluded from gains incurred in the routine operation of business and therefore not used as the basis for an offset or deduction from TPBI's G&A expenses.[6]

TPBI argues that this analysis has not been properly conducted in classifying their reported sale of an office building and parcel of land. *Plaintiffs' Comments Concerning Commerce's Final Results of Redetermination*, ECF No. 92 at 5. Noting that in some prior determinations the Department has found that land sales are classified as routine expenses which are appropriately the basis for a G&A revenue offset, TPBI claims that the Department has determined that the land and building sales were significant and non-routine "without material analysis or discussion." *Id.* at 4–5.

Despite Plaintiffs' claim, the analysis and evidence submitted with the *Remand Results* are sufficient to support the Department's classification of this transaction. *See Analysis Memo* at 2. The Department distinguishes between the sale of capital equipment and the sale of an office building and associated land, reviews the criteria for considering such a sale to be outside the scope of routine business operations, and notes that the large scale of the revenues from the building transaction relative to the other transactions conducted during the same period make it "significant" as the term is used in this type of analysis. *Id.* at 2,3.[7] The analysis conducted by the Department in the *Analysis Memo* is comparable to the analysis that determined the result cited by the Plaintiff in *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 75 Fed. Reg. 70,901 (Dep't of Commerce Nov. 19, 2010) (final results) and accompanying Issues & Decision Mem., A-580–807 at cmt. 3. In both cases, the character of the transaction and its significance were evaluated – the former by its relationship to the company's line of business and the latter based on the revenue generated relative to other transactions. The Department's classification is therefore consistent with its established practice and supported by a reasonable reading of the facts on the record.

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[6] *See supra* note 4.

[7] See especially Table 1, emphasizing the scale of this transaction relative to other asset sales.

B. *Application of TPBI's Ratio of Direct to Indirect Selling Expenses to Thantawan's Reported Selling Expenses*

As noted above, in response to this aspect of the *TPBI Remand Order*, Commerce gathered additional information and made three significant conclusions based on an evaluation of the expanded record. First, it affirmed its determination that Thantawan represents an adequate surrogate for Landblue's selling expenses. *Remand Results* at 11. Second, it affirmed the previous determination that the goal of calculating the most accurate CV requires that Thantawan's financial statement of its selling expense be modified to reflect the distinction between direct and indirect expenses. *Remand Results* at 10, 19. Third, the Department determined that the similarity in market positions between Thantawan and TPBI makes the use of TPBI's ratio of direct to indirect selling expenses - rather than Landblue's - the most accurate way of calculating a CV for Landblue. *Remand Results* at 10.

Of these determinations, the Domestic Producers object to the second on the same grounds articulated in their initial brief prior to the *TPBI Remand Order*. *See Reply Brief of the Polyethylene Retail Carrier Bag Committee, et. al. in Support of Their Motion for Judgment on the Agency Record*, ECF Nos. 50, 51 ("*Domestic Producer*'s Brief") at 10–12. Specifically, the Domestic Producers argue that Commerce has had a consistent practice since 2007 of never disaggregating line items on financial statements because of the Department's concern that doing so might introduce distortions rather than increase accuracy. *See Defendant-Intervenors' Comments Concerning Commerce's Final Results of Redetermination Pursuant to Court Remand*, ECF No. 91 ("*Domestic Producers' Comments*") at 3. If such a practice exists, the court is obliged to ascertain whether the determination in this case has been supported by sufficient reasons for deviating from the practice and treating similar situations differently. *See Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996).

In support of their argument, the Domestic Producers cite four prior antidumping determinations claimed to articulate this general policy of never disaggregating line-items. *See Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60,632 (Dep't Commerce Oct. 25, 2007) (final determination) and accompanying Issues & Decision Memorandum, A570–906 ("*Free Sheet Paper*") at cmts. 4, 5; *Wooden Bedroom Furniture from the People's Republic of China*, 76 Fed. Reg. 49,729 (Dep't Commerce Aug. 11, 2011) (final results) and accompanying Issues & Decision Mem., A-570–890

("*WBF 2011 I&D Memo*") at cmt. 19(A)(iv); *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 77 Fed. Reg. 14,493 (Dep't Commerce Mar. 12, 2012) (final results) and accompanying Issues & Decision Mem., A-570–924 ("*PET Film 2012*") at Issue 1[8]; *Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 Fed. Reg. 59,217 (Dep't Commerce Sep. 27, 2010) (final determination) and accompanying Issues & Decision Mem., A-570–958 ("*Coated Paper*") at cmt. 32. In addition, the Domestic Producers allege that this Court has acknowledged the existence of Commerce's practice in *Dongguan Sunrise Furniture Co., Ltd. v. United States*, 36 CIT ___, 865 F. Supp. 2d 1216, 1244 (2012).

To determine whether such a policy exists and whether the Department is engaged in arbitrary behavior by violating that policy in this instance, it is necessary to examine the Domestic Producers' claims in detail. Conceding that Department policy allowed it to disaggregate balance sheet line items in 2005, the Domestic Producers claim that the Department introduced a new policy in "late 2007" that precluded disaggregating line items in a financial statement.[9]

The first authority cited by the Domestic Producers to support this claim is *Free Sheet Paper* at comments 4 and 5. While the Department in this determination did refuse to disaggregate a balance sheet line item, it neither established a new policy on this question nor dismissed its prior practice of balancing the chance of improving accuracy against the danger of introducing distortion. Instead, the Department expressed a "preference" for using unmodified surrogate

[8] This determination, in which the Department rejects a complex proposal to modify cost estimates for a company in one country, based on the balance sheets of an affiliated producer in another country, offers only indirect support for the Domestic Producers' claim. *Id.* at Issue 1.

[9] The Domestic producers concede that the Department's policy as of 2005, when it decided *Certain Hot-Rolled Carbon Steel Flat Products from Romania*, 70 Fed. Reg. 34,448 (Dep't Commerce June 14, 2005) (final results) and accompanying Issues & Decision Mem., A-485–806 ("*HRS from Romania*") at cmt. 7, allowed it to do precisely what it has done in the *Remand Results* – disaggregate a financial statement line items when doing so is likely to result in greater accuracy. *Domestic Producers' Comments* at 4. The Domestic producers claim that this policy was changed in late 2007 (presumably in the *Free Sheet Paper* determination) to eliminate the practice or test of balancing the likelihood of increasing accuracy against the danger of introducing distortion. Since 2007, according to the Domestic Producers, the Department "does not evaluate the 'unique facts' of each case regarding whether an adjustment might add accuracy without causing distortion. It refrains from such an analysis and applies a generalized policy not to go behind the financial statement line items." *Domestic Producers' Comments* at 5.

data,[10] justified its decision specifically with reference to the balancing test that the Domestic Producers claim it discarded,[11] and explained how the then instant case differed from the *HRS from Romania* determination of 2005 in ways that justified a different outcome.[12] Thus, based on a close examination of *Free Sheet Paper* Determination in 2007, it is difficult to accept the Domestic Producers' claim that this 2007 determination establishes a new policy or rejects in principle the disaggregation of balance sheet line items under all circumstances. The balancing of the need to improve accuracy and the danger of introducing distortion was still used in this determination, but the Department found that, given the facts and circumstances in that case, the test justified its preference not to go behind balance sheet line items when doing so was not supported by adequate data on the record. *Id.* at cmt. 4.

The second citation presented by the Domestic Producers to support their claim that the Department has a policy of never going behind financial statement line items comes from the *WBF 2011 I&D Memo*. The extended quotation from this memo presented by the Domestic Producers, however, has a number of problems. First, roughly half of

[10] At issue in this determination was the failure of the surrogate to disaggregate manufacturing and non-manufacturing labor costs. The surrogate was an Indian company deemed comparable to a Chinese exporter. Petitioner argued that failing to disaggregate costs from different types of labor overstated the CV of costs faced by the Chinese producer and resulted in a distorted estimate of SG&A costs. The petitioner suggested that Commerce could apply a ratio to the aggregate labor cost figure based on data provided by the India Labor Bureau's Annual Survey of Industries, a public source.

Commerce determined that it would not disaggregate labor costs, relying primarily on Wooden Bedroom Furniture from the People's Republic of China, 72 Fed. Reg. 46,957 (Dep't Commerce Aug. 22, 2007) (amended final results) and accompanying Issues & Decision Mem., A-570–890 ("WBF 2007 I&D Memo") at cmt. 26 as an authority for the Department's practice: "The Department has noted its preference for using financial statements of surrogate companies that produce merchandise that is comparable or identical to subject merchandise without making adjustments to individual line items in the financial statement." *Free Sheet Paper* at cmt. 4 (emphasis added).

[11] Commerce explained that a lack of information about the surrogate and the difference between a non-market economy ("NME") producer and a market economy ("ME") surrogate made it impossible to be certain that an adjustment to this balance sheet item would improve accuracy: "[b]ecause [the Department] does not know all of the components that contribute to the costs of a surrogate producer, it cannot be certain of the individual components which comprise the various line items in surrogate financial statements.

"Therefore, adjusting those statements may not make the many more accurate and indeed may only provide the illusion of precision." *Free Sheet Paper* at cmt. 4.

[12] The Department addressed its prior decision to disaggregate in *HRS from Romania* and differentiated that decision from the fact pattern in *Wooden Bedroom Furniture*:

"Given this extreme fact pattern [described in *HRS From Romania*], the Department concluded that significant overhead costs were missing and an adjustment needed to be made. This extreme situation is not present in the instant investigation as both the factory overhead and SG&A ratios used here are based on numerous expenses." *Free Sheet Paper* at cmt. 4.

the quotation provided is quoted in turn from *Pure Magnesium in Granular Form from the People's Republic of China*, 66 Fed. Reg. 49,345 (Dep't Commerce Sept. 27, 2001) (final determination) and accompanying Issues & Decision Mem., A-570–864 ("*Pure Magnesium from China*") at cmt. 4, a determination made in 2001.[13] It therefore appears that the Domestic Producers are supporting a claim regarding a new policy, alleged to come into existence in 2007, by ultimately citing a determination written in 2001 - a time in which the Domestic Producers admit that the Department's policy allowed "going behind" financial statement line items. As significantly, *Pure Magnesium from China* based its decision on a line of determinations running back to the mid-1990's that were developed specifically to avoid distortions when the surrogate for an NME producer was unlikely to face costs similar to those of the ME surrogate or when differences in national accounting systems made disaggregating costs likely to produce distortions.[14] In addition, *Pure Magnesium from China* justifies the Department's decision by referring to *Pure Magnesium from the Russian Federation*, 66 Fed. Reg. 49,347 (Dep't Commerce Sept. 27, 2001) (final determination) and accompanying Issues & Decision Mem., A-821–813 ("*Pure Magnesium from Russia*") at cmt. 2, a determination made concurrently and on the same grounds. In *Pure Magnesium from Russia*, the Department justified its decision not to go behind financial statement line items as the best

[13] The omission of internal citations from the quote provided by the Domestic Producers makes this source both complex and misleading. Almost all of the quote provided (from "to not make" in the second line forward) is actually quoted directly from *Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 Fed. Reg. 59,217 (Dep't Commerce Sept. 27, 2010) (final determination) and accompanying Issues & Decision Memorandum, A-570–958 at cmt. 32, which is in turn directly quoting *Wooden Bedroom Furniture from the People's Republic of China*, 75 Fed. Reg. 50,992 (Dep't Commerce Aug. 18,2010) (final results) and accompanying Issues & Decision Memorandum, A-570–890 at cmt. 30A. From this point, the citation combines direct quotes from two sources, but the ultimate origin of the statement is in *Pure Magnesium from China* at cmt. 4.

[14] In *Pure Magnesium from China*, Commerce applied its policy to elements of factory overhead and subcontractors rather than direct and indirect selling expenses. The adjustments related to the fractions of labor, depreciation, and energy costs faced by different producers. In addition, the surrogate firm in *Pure Magnesium from China* used a different processing technology than the Chinese firm, leading to the difficult problem of comparing any line item between the surrogate and target balance sheets and making any attempt to "correct" specific line items a necessarily subjective and arbitrary decision. *See Pure Magnesium from China* at cmt. 4 (discussion of subcontractor costs and comparison of energy costs). The reasons why Commerce would be reluctant to try to correct balance sheet items in *Pure Magnesium from China* are thus absent in the present case, which features a comparison of the direct and indirect selling costs faced by firms a) producing the same product, b) shipped using the same three methods, c) using the same national accounting standards, and d) located in the same country (which is a designated ME).

way to achieve accuracy in the absence of sufficient information; that is, when certain circumstances are present such as a comparison between an NME producer and an ME surrogate, the balance can be presumed to weigh against uninformed modification of balance sheet items.[15]

Simply put, it appears that the Domestic Producers are correct that Commerce has articulated a practice of not going behind line items, but the Domestic Producers neglect to mention factors in the cited determinations that a) place limiting conditions on the application of that policy and b) explain the reasons why this general practice was adopted – reasons that are absent in the present case. The policy, applied since at least 1996 and consistent with *HRS from Romania* in 2005, is repeatedly stated to serve the goal of balancing increasing accuracy against the danger of introducing distortions in cases where either the difference between NME and ME producers or differences between the nationality of producers would make line-by-line comparisons misleading. Each of the Determinations cited by the Domestic Producers explain the Department's decision not to disaggregate surrogate balance sheet items in those cases with reference to this balancing test and support the decision not to disaggregate by citing either problems of incommensurability or a lack of reliable data on the record.[16] Neither of these circumstances are present in the instant case, making the Department's application of the underlying

[15] Both the limiting conditions of this policy and the fact that it is intended to serve as a guideline in applying the balancing test are made clear by referring to a line of determinations going back to 1996: "[r]arely, if ever, will it be known that there is an exact correlation between overhead expense components of the NME producer and the components of the surrogate overhead expenses. Therefore [. . .] the Department normally bases normal value completely on factor values from a surrogate country on the premise that the actual experience in the NME cannot meaningfully be considered. Accordingly, Department practice is to accept a valid surrogate overhead rate as wholly applicable to the NME producer in question." *Pure Magnesium from Russia* at cmt. 2 (citing *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the Republic of Romania*, 61 Fed. Reg. 51,429 (Dep't Commerce Oct. 2, 1996) (final results) and accompanying Issues & Decision Mem., A-485602 ("*TRB from Romania*") at cmt. 7.)

[16] *See WBF 2011 I&D Memo* at cmt. 19(A)(iv) ("*In NME cases*, it is generally not possible for the Department to dissect the financial statements of a surrogate company as if the surrogate company were the respondent under review, because the information necessary to do so is typically not available." (emphasis added)); *Coated Paper* at cmt. 32 ("However, *in NME cases*, it is impossible for the Department to further dissect the financial statements of a surrogate company as if the surrogate company were an interested party to the proceeding, as the Department has no authority to either ask questions or verify the information from the surrogate company." (emphasis added)). It is also worth noting that the Department has been reluctant to alter line items even in market economies based on comparison with parallel firms in other market economies, suggesting that differing accounting conventions and business practices across countries as well as the NME status of a producer can raise sufficient concerns about the danger of introducing distortions to trigger the presumption against disaggregation. *See PET Film 2012* at Issue 1.

balancing test an appropriate exercise of discretion similar to *HRS from Romania*.[17]

Finally, the Domestic Producers cite an acknowledgement by this court of the alleged policy in 2012. *See Dongguan Sunrise Furniture Co., Ltd. v. United States*, 36 CIT ___, 865 F. Supp. 2d 1216, 1244 n.43 (2012). Both the decision in that case and the precedent relied upon by the court in reaching it, however, are clearly permissive rather than mandatory.[18] The court acknowledged in both cases that the Department has the discretion under 19 U.S.C. § 1677b(c)(4) to refrain from disaggregating balance sheet line items when there was significant uncertainty that disaggregation would produce more accuracy.

Based on this examination of the determinations cited by the Domestic Producers, a better understanding of the Department's policy emerges. At least since the 1996 *TRB from Romania* Determination, the Department has developed a preference for accepting surrogate balance sheet items *in toto* for three reasons. First, the difficulty of comparing the costs facing ME and NME producers in detail made it unlikely that correcting individual surrogate balance sheet items would improve accuracy and highly likely that they would introduce distortion.[19] Second, different national accounting standards and production processes made it likely that introducing corrections based on surrogates in other countries would introduce distortions.[20] Third, the inability to gather detailed information about non-party surro-

[17] Note that the factors that marked *HRS from Romania* as an "extreme fact pattern" in *Free Sheet Paper* (*see* Note 12, *supra*) are less extraordinary when examining both producers and surrogates in the same market economy that use the same accounting standards, produce identical products, and export to the same markets.

[18] The governing precedent cited in *Dongguan Sunrise* is *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999). This case finds that "[g]iven [several listed] uncertainties, the broad statutory mandate directing Commerce to use, 'to the extent possible,' the prices or costs of factors of production in a comparable market economy country does not require item-by-item accounting [. . .]." It is not reasonable to read this as requiring that the Department refrain from item-by-item accounting when better data is available on the record and doing so is unlikely to introduce distortions. The court in *Dongguan Sunrise* affirms the permissive interpretation of this decision. 865 F. Supp. 2d 1216 at 1244 n.43 ("Commerce is not *required* to do a line-by-line analysis[. . .]" (emphasis added)).

[19] The inherent problems of creating a record that favored disaggregating balance sheets for NME producers using market economy surrogates were emphasized in *Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1104 (1996), *aff'd* 166 F.3d 1364 at1372. ("There is no evidence on the record that MagCorp's method of allocating inventory better reflects the subject NME country realities [. . .]").

[20] *See, e.g., PET Film 2012* at Issue 1 (determining that incompatibilities between national accounting standards in the Philippines and Thailand were more important than possible distortions through subsidies in determining which country to use as a surrogate); *Coated*

gates in third countries meant that disaggregation of balance sheet line items would likely be based on incomplete information.[21]

Applying these criteria to the present case supports the Department's position. First and most obvious, the Department's policy against disaggregation is intended to apply in NME cases where a CV is being calculated based on a surrogate producer in a third country. Landblue does not present such a case, as both Thantawan and TPBI are, like Landblue, operating in the same market economy. Second, the policy is intended to guard against the uncertainties that arise when comparing producers operating in different national environments where accounting standards, industry norms, or other factors increase the danger of introducing distortions by attempting to "correct" balance sheet items. These dangers are absent here; the record shows that both the respondent and the surrogate are Thai producers operating in the same economic environment and producing similar products for similar markets. Only the third criterion – the problem of gathering record evidence directly from the surrogate – would weigh against disaggregation.[22]

Based on this, the Department here has adequately justified the application of its longstanding balancing test between improving accuracy and the danger of introducing distortion in this case. The policy articulated in *HRS from Romania* in 2005 was not discarded or superseded in *Free Sheet Paper*, but distinguished by the Department on the grounds noted above. The Determinations cited by the Domestic Producers do not demonstrate that a new policy was introduced in 2007. The Department's "determination based upon the facts unique to each case, and pursuant to a consistent goal" of balancing the possibility of increasing accuracy against the danger of introducing distortion is therefore neither arbitrary nor inconsistent. *Remand Results* at 18. Accordingly, the Department's decision to disaggregate Thantawan's reported selling expenses based on the ratio derived from TPBI's direct to indirect expenses to calculate a CV for Landblue is affirmed.

Paper at cmt. 32 (distinguishing that case from *Woven Electric Blankets from the People's Republic of China*, 75 Fed. Reg. 38,459 (Dep't Commerce Jul. 2,2010) (final determination) and accompanying Issues & Decision Mem., A-570–951 at cmt. 4, on the basis of whether surrogate financial statements were sufficiently detailed to allow exact classification of costs).

[21] *See Coated Paper* at cmt. 32.

[22] *See Id.* at Comment 32.

C. *Profit*

Finally, the Department's remand determination declined to reopen its choice of an appropriate surrogate amount for Landblue's profit. Nothing in the *TPBI Remand Order* required it to do so. Rather that remand order specifically affirmed Commerce's determination on this issue.

CONCLUSION

For the foregoing reasons, the Department's determinations in response to the remand are affirmed. Judgment shall be entered accordingly.

Dated: November 13, 2013
New York, NY

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

Slip Op. 13–140

HOME MERIDIAN INTERNATIONAL, INC. D/B/A SAMUEL LAWRENCE FURNITURE CO. D/B/A PULASKI FURNITURE CO., Plaintiff, GREAT RICH (HK) ENTERPRISES CO., LTD., DONGGUAN LIAOBUSHANGDUN HUADA FURNITURE FACTORY, NANHAI BAIYI WOODWORK CO., LTD., AND DALIAN HUAFENG FURNITURE GROUP CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 11–00325

[Final Results of Redetermination in antidumping review sustained.]

Dated: November 14, 2013

Kristin H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Rebecca M. Janz*, *Sarah M. Wyss*, and *Susan L. Brooks*, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiff and Consolidated Plaintiffs Great Rich (HK) Enterprises Co., Ltd. and Dongguan Liaobushangdun Huada Furniture Factory.

Ned H. Marshak, *Bruce M. Mitchell*, and *Mark E. Pardo*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY and Washington, DC, for Consolidated Plaintiff Nanhai Baiyi Woodwork Co., Ltd.

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, for Consolidated Plaintiff Dalian Huafeng Furniture Group Co., Ltd.

Carrie A. Dunsmore and *Stephen C. Tosini*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With them 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 *Justin R. Becker*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

J. Michael Taylor, *Daniel L. Schneiderman*, *Joseph W. Dorn*, *Mark T. Wasden*, and *Prentiss L. Smith*, King & Spalding, LLP, of Washington, DC, for Defendant-Intervenors.

OPINION

Restani, Judge:

This matter is before the court following a remand to the Department of Commerce ("Commerce") in *Home Meridian International, Inc. v. United States*, 922 F. Supp. 2d 1366 (CIT 2013) ("*HMI*"). The court found that Commerce's application of its surrogate valuation methodology was not supported by substantial evidence in this case. *Id.* at 1376–77. Furthermore, the court found that the use of Insular Rattan and Native Products' ("Insular Rattan") 2009 financial statement was improper. *Id.* at 1382. The court remanded these issues to Commerce, which issued a Final Results of Second Redetermination Pursuant to Court Order, ECF No. 130 ("*Remand Results*"). For the reasons stated below, Commerce's Remand Results are sustained.

BACKGROUND

In *HMI*, the court addressed two issues. First, Plaintiff Home Meridian International, Inc. contested the use of surrogate values to value Consolidated Plaintiff Dalian Huafeng Furniture Group Co., Ltd.'s ("Huafeng") factors of production for wood inputs. *See HMI*, 922 F. Supp. 2d at 1370. The court determined that Commerce did not support by substantial evidence its decision to use surrogate values in the light of reliable evidence regarding Huafeng's market-economy purchases of these inputs. *Id.* at 1375–77. Second, the court held that Commerce did not support by substantial evidence its finding that Insular Rattan's financial statement was acceptable for financial ratio calculations. *Id.* at 1382. The court gave Commerce an opportunity to seek to reopen the record regarding Huafeng's wood inputs. *Id.* Commerce declined to do so. Otherwise, the court ordered Commerce to 1) use Huafeng's market-economy wood input purchase values to calculate normal value and 2) omit Insular Rattan's financial statement in its financial ratio calculations. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdictions pursuant to 28 U.S.C. § 1581(c) (2006). "The court shall hold unlawful any determination, finding, or conclu-

sion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . .” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Value of Huafeng’s Wood Inputs

In its initial determination, Commerce used surrogate values to calculate the normal value of Huafeng’s products. *See HMI*, 922 F. Supp. 2d at 1370. Plaintiff argued that the method employed by Commerce for the calculation was not the method required under the relevant statutory provisions. *Id.* The court determined that the statute was written ambiguously such that Commerce could use any reasonable method of valuation it found appropriate, provided that its determination was supported by substantial evidence. *Id.* at 1374. The use of Commerce’s chosen surrogate values in this case was not supported by substantial evidence, and therefore the court ordered that Commerce either seek to reopen the record or use Huafeng’s actual market-economy wood input purchases to value the inputs. *Id.* at 1382. In its *Remand Results*, Commerce used Huafeng’s actual market-economy wood input purchases and calculated a margin of 11.79 percent. *Remand Results* at 17. Commerce has complied with the court’s order in this respect.

Defendant-Intervenors American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (“AFMC”) summarily adopt the arguments in their previously denied request for reconsideration in order to preserve them for appeal. *See* AFMC’s Cmts. Concerning Commerce’s Final Results of Second Redetermination Pursuant to Court Order, ECF No. 133, 1–2. Because AFMC does not attempt to raise any new argument with respect to the *Remand Results*, the court will not reconsider AFMC’s arguments at this juncture. As no other party challenges this aspect of the *Remand Results*, the court sustains Commerce’s redetermination.

II. Insular Rattan’s 2009 Financial Statement

Commerce initially used Insular Rattan’s 2009 financial statement to calculate surrogate financial ratios. *See HMI*, 922 F. Supp. 2d at 1380. AFMC previously argued that Commerce used this incomplete financial statement contrary to evidence that called into question its reliability. *Id.* In *HMI*, the court held that Commerce could not use Insular Rattan’s incomplete financial statement. *See id.* at 1382.

Commerce complied with this order, and the parties have not contested this aspect of the *Remand Results* in their comments before the court.

CONCLUSION

For the foregoing reasons, the court finds that Commerce has complied with the court's order in *HMI*, and the *Remand Results* are SUSTAINED. Judgment will issue accordingly.

Dated: November 14, 2013
New York, New York

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

Slip Op. 13–141

PAPIERFABRIK AUGUST KOEHLER SE, Plaintiff, v. UNITED STATES, Defendant, and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 13–00163

[Plaintiff's Motion for Expedited Briefing and Consideration is denied.]

Dated: November 14, 2013

F. Amanda DeBusk and *Matthew R. Nicely*, Hughes Hubbard & Reed LLP, of Washington, DC, for plaintiff.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica M. Forton*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Daniel L. Schneiderman and *Gilbert B. Kaplan*, King & Spalding LLP, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Tsoucalas, Senior Judge:

Before the court is plaintiff Papierfabrik August Koehler SE's ("Koehler") Motion for Expedited Briefing and Consideration, ECF No. 59 (Nov. 5, 2013) ("Mot. to Expedite"). Plaintiff asks the court to expedite briefing and consideration of its Motion to Compel Commerce to Strike Information Or, In the Alterative, Compel Commerce to Disclose the Information, ECF No. 57 (Nov. 5, 2013) ("Mot. to

Compel"). Defendant U.S. Department of Commerce ("Commerce") and defendant-intervenor Appvion, Inc. ("Appvion"),[1] oppose Koehler's motion. For the reasons stated below, the Mot. to Expedite is denied.

Koehler's Mot. to Compel concerns certain bracketed and double-bracketed proprietary information contained in allegations Appvion made to Commerce during the administrative proceeding under review in the instant case. *See* Mot. to Compel at 1. Appvion alleged that Koehler undertook a transshipment scheme to conceal home market sales, *id.* at 1–2, which Koehler admitted to during the review. *See Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review on Lightweight Thermal Paper from Germany* at 7–8 (Apr. 10, 2013), A-428–840. Koehler contests the bracketing of certain information contained in Appvion's allegations because Commerce imposed adverse facts available ("AFA") "[b]ased in significant part on those allegations." Mot. to Compel at 2.

Koehler moves to expedite briefing and consideration of the Mot. to Compel so that it will be able to account for the outcome of that motion in its motion for judgment on the agency record. Mot. to Expedite at 1–2. According to Koehler, it does not have sufficient time under the current briefing schedule because its motion for judgment on the agency record is due December 6, 2013. *Id.* Koehler insists that expedition will not prejudice the opposing parties because the Mot. to Compel "addresses a very narrow and discrete question." *Id.* at 2.

This Court may expedite any "action that [it] determines, based on motion and for good cause shown, warrants expedited treatment." USCIT R. 3(g)(5). Here, Koehler fails to demonstrate that good cause "warrants expedited treatment" of the Mot. to Compel. In its Mot. to Compel, Koehler argues that Commerce violated its statutory and constitutional due process rights, as well as Commerce's own regulations, by allowing Appvion to bracket and double-bracket certain information pertaining to the transshipment scheme. *See* Mot. to Compel at 3. Koehler insists that these issues are narrow, but they are new substantive allegations that Koehler did not raise in its complaint,[2] *see* Compl. at 6–7, and opposing parties must have a full opportunity to address them. Moreover, the contents of the bracketed

[1] On May 13, 2013, Appleton Papers Inc. changed its name to Appvion, Inc. *See* Letter to the Clerk of the Court, re:Papierfabrik August Koehler SE v. United States, Ct. No. 13–00163, ECF No. 25 (June 21, 2013).

[2] In the "Procedural Background" of its complaint, Koehler mentions that Appvion's allegations were "liberally 'double bracketed,'" but it does not allege any constitutional, statutory, or regulatory violations. *See* Compl. at 3, 6–7, ECF No. 6 (Apr.24, 2013).

information are tangential to the claims Koehler raises in its complaint, as Koehler admitted that it conducted the transshipment scheme Appvion alleged. *See I&D Memo* at 7–14. Because it fails to demonstrate that good cause warrants expedition, Koehler's motion is denied. *See* USCIT R. 3(g)(5).

ORDER

Upon consideration of plaintiff's Motion for Expedited Briefing and Consideration, the responses thereto, and all papers and proceedings herein, and in accordance with the above, it is hereby

ORDERED that plaintiff's motion (ECF No. 59) is **DENIED**. Responses to plaintiff's Motion to Compel Commerce to Strike Information Or, In the Alternative, Compel Commerce to Disclose the Information (ECF No. 57) are to be filed on or before November 25, 2013.

Dated: November 14, 2013
New York, New York

/*s*/ *Nicholas Tsoucalas*
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 13–143

NSK CORPORATION, et al., Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant.

Before: Judith M. Barzilay, Senior Judge
Consol. Court No. 06–00334

JUDGMENT

In accordance with the Federal Circuit's decision in *NSK Corp. v. ITC*, 716 F.3d 1352 (Fed. Cir. 2013), and pursuant to the Federal Circuit's mandate issued on November 6, 2013, it is hereby

ORDERED that the ITC's negative material injury determination set forth in the *Third Remand Results* issued on August 25, 2010 is vacated; it is further

ORDERED that the ITC's negative material injury determination set forth in the *Fourth Remand Results* issued on March 1, 2011 is vacated; and it is further

ORDERED that the ITC's affirmative material injury determination set forth in the *Second Remand Results* issued on January 5, 2010 is reinstated.

Dated: November 18, 2013
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE