# U.S. Customs and Border Protection

Slip Op. 14–55

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

**PUBLIC VERSION**
Before: Donald C. Pogue, Chief Judge
Court No. 10–00275
Court No. 11–00335

[affirming two remand redeterminations]

Dated: May 20, 2014

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## ***OPINION***

**Pogue, Chief Judge:**

This opinion addresses litigation arising out of the fourth and fifth administrative reviews of an antidumping duty order covering certain warmwater shrimp from the People's Republic of China ("PRC" or "China"). During the subsequent sixth administrative review of this order, Commerce found that respondent Hilltop International ("Hilltop") had made material misrepresentations regarding its affiliations and corporate structure throughout the entire history of the order.[1] At the time of this finding, liquidation of entries covered by the fourth and fifth administrative reviews remained enjoined pending

[1] *See* Issues & Decision Mem., A-570–893, ARP 10–11 (Aug. 27, 2012) accompanying *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 77 Fed. Reg. 53,856 (Dep't Commerce Sept. 4, 2012) (final results, partial rescission of sixth antidumping duty administrative review and determination not to revoke in part) ("*AR6 I & D Mem.*") cmt. 1 at 12–17.

the final outcome of judicial review.[2] Concluding that the evidence of Hilltop's misconduct was equally applicable to the fourth and fifth reviews, Commerce requested and was granted permission to reopen the records of those reviews in order to consider the effect of this new evidence on Hilltop's calculated dumping margins.[3] Hilltop now challenges the results of Commerce's redeterminations.[4]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[5] and 28 U.S.C. § 1581(c) (2006).

As explained below, Commerce's reasonable determination not to rely on Hilltop's representations, and to therefore treat Hilltop as part of the PRC-wide entity in the fourth review, is sustained on the same grounds as those supporting the affirmance of Commerce's essentially identical determination in the (revisited) fifth review.[6] In addition, Commerce's corroboration analysis, supporting the use of the 112.81 percent countrywide rate in the revised results of the fourth and fifth reviews, is also sustained.

## PROCEDURAL BACKGROUND

Because the results of the fifth review were already being reconsidered pursuant to remand at the time that new evidence of Hilltop's misconduct came to light during the sixth review, Commerce's decision regarding the effect of this new evidence on Hilltop's margin calculations came to court first on the (reopened) record of the fifth review. Reexamining this supplemented record, Commerce determined that Hilltop had misrepresented information regarding the

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[2] *See* Order Granting Consent Mot. Prelim. Inj., Ct. No. 10–00275, ECF No. 11; Order Granting Consent Mot. Prelim. Inj., Ct. No. 11–00335, ECF No. 10.

[3] *See* Order Remanding *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 75 Fed. Reg. 49,460 (Dep't Commerce Aug. 13, 2010) (final results and partial rescission of antidumping duty administrative review) ("*AR4 Final Results*") and accompanying Issues & Decision Mem., A-570–893, ARP 08–09 (Aug. 9, 2010) ("*AR4 I & D Mem.*"), Ct. No. 10–00275, ECF No. 71; Order Granting Mot. Expand Scope of Remand of *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 51,940 (Dep't Commerce Aug. 19, 2011) (final results and partial rescission of antidumping duty administrative review) ("*AR5 Final Results*") and accompanying Issues & Decision Mem., A-570–893, ARP 09–10 (Aug. 12, 2011) ("*AR5 I & D Mem.*"), Ct. No. 11–00335, ECF No. 70.

[4] Because Hilltop's challenges to the (revisited) fourth and fifth reviews present identical legal issues, as applied to essentially identical facts, this single opinion is addressed to both legal actions. A third action, challenging essentially identical determinations in the sixth administrative review, has been stayed pending the final outcome of any appeals from this decision. *See* Order Apr. 23, 2014, Ct. No. 12–00289, ECF No. 80.

[5] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

[6] *See Ad Hoc Shrimp Trade Action Committee v. United States*, __ CIT __, 925 F. Supp. 2d 1315, 1319–24 (2013) ("*Ad Hoc II*").

scope of its affiliates and corporate structure, and moreover that the circumstances of these misrepresentations – in particular Hilltop's failure to provide a persuasive explanation for the material errors, as well as its refusal to answer Commerce's follow-up questions regarding potential as-yet undisclosed affiliates – were such that Hilltop's remaining representations regarding corporate ownership and control were not reliable.[7] Because Commerce had initially granted Hilltop separate rate status based solely on these no longer reliable representations, it accordingly determined that Hilltop had failed to submit reliable evidence to rebut the presumption of government control attaching to all exporters covered by this antidumping duty order.[8] Commerce consequently assigned to Hilltop the 112.81 percent countrywide rate, which was derived from the petition to initiate these proceedings (the "Petition") and last corroborated during Commerce's initial investigation into unfair pricing (the less than fair value or "LTFV" investigation).[9]

Commerce's unreliability determination and decision in the fifth review to assign the PRC-wide rate to Hilltop were affirmed on judicial review.[10] However, Commerce's (redetermined) results of the fifth review were remanded for reconsideration of the corroboration analysis Commerce used to satisfy itself that the countrywide rate derived from the Petition had probative value with respect to the likely pricing behavior of the non-cooperating PRC-wide entity.[11]

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[7] *See Ad Hoc II*, __ CIT __, 925 F. Supp. 2d at 1318–19 (discussing Final Results of Redetermination Pursuant to Court Remand, Ct. No. 11–00335, ECF No. 74 ("*AR5 1st Remand Results*")).

[8] *Ad Hoc II*, __ CIT __, 925 F. Supp. 2d at 1318–19, 1322–24. Commerce presumes that all exporters from non-market economy ("NME") countries like China operate under government control and hence requires respondents to submit reliable evidence to the contrary in order to receive an antidumping duty rate that is separate from the countrywide entity ("separate rate status"). *Transcom, Inc. v. United States*, 294 F.3d 1371, 1373(Fed. Cir. 2002) (citing *Sigma Corp. v. United States*, 117 F.3d1401 (Fed. Cir. 1997) (affirming this practice)).

[9] *Ad Hoc II*, __ CIT __, 925 F. Supp. 2d at 1318–19, 1324–25.

[10] *Id*. at 1324 (sustaining Commerce's determination to deny separate rate status to Hilltop in the fifth review).

[11] *Id*. at 1326–27. *See* 19 U.S.C. 1677e(c) (requiring Commerce to "corroborate" "secondary information," defined as "information [other than that] obtained in the course of an investigation or review"); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994) ("SAA") at 870 (explaining that "secondary information" includes "information derived from the petition that gave rise to the [LTFV] investigation or [subsequent administrative] review," and further explaining that "corroboration" within the meaning of Section 1677e(c) requires that Commerce satisfy itself of the information's "probative value").

Commerce then revisited its corroboration analysis, the results of which are one of the matters now before the court.[12]

Meanwhile, the (revisited) results of the fourth review – wherein Commerce made essentially identical findings and conclusions with respect to Hilltop, based on identical evidence, as it did in the (revisited) fifth review – are also before the court.[13] In its redetermination of Hilltop's antidumping duty assessment rate in the fourth review, Commerce also revisited its corroboration of the countrywide rate, which it assigned to Hilltop also in that revisited review. This corroboration analysis (as well as the countrywide rate itself) is identical to that employed pursuant to remand of the results of the fifth review.[14] Hilltop now challenges Commerce's unreliability determination and decision to assign to Hilltop the PRC-wide rate in the fourth review, as well as Commerce's corroboration analysis for the countrywide rate in both the (revisited) fourth and fifth reviews.[15]

## STANDARD OF REVIEW

The court will sustain Commerce's antidumping determinations, including redeterminations made pursuant to remand, so long as such determinations are supported by substantial evidence, are otherwise in accordance with law and, in the case of redeterminations, are consistent with the court's remand order. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Trust Chem Co. v. United States*, __ CIT __, 819 F. Supp. 2d 1373, 1378 (2012). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining "substantial evidence")), and the substantial evidence standard of review can be roughly translated to mean "is the determination unreasonable?" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (internal quotation and alteration marks and citation omitted). "The specific determination we make is whether the evidence and reasonable inferences from the record support" Commerce's findings. *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (internal quotation marks and citation omitted).

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[12] *See* Results of Redetermination Pursuant to Court Remand, Ct. No. 11–00335, ECF No. 106–1 ("*AR5 2d Remand Results*").

[13] *See* Final Results of Redetermination Pursuant to Court Remand,Ct. No. 10–00275, ECF No. 77–1 ("*AR4 Remand Results*").

[14] *Compare AR4 Remand Results* at 29–34, *with AR5 2d Remand Results* at 3–7.

[15] Def.-Intervenors' Comments in Opp'n to Final Remand Results, Ct. No. 10–00275, ECF No. 83 ("Hilltop's AR4 Br."); Def.Intervenors' Comments in Opp'n to Final Remand Results, Ct. No. 11–00335, ECF No. 110 ("Hilltop's AR5 Br.").

## DISCUSSION

*I. Context*

In initiating each of these reviews, Commerce reiterated its policy of assigning to all exporters and producers from NME countries – including China – a single countrywide antidumping duty rate unless respondents qualify for "separate rate status" by affirmatively demonstrating freedom from government control over export activities.[16] Also in each review, Commerce preliminarily granted Hilltop separate rate status based on Hilltop's representations that it is located in Hong Kong (which is treated as a market economy) and that neither it nor any of its Chinese affiliates are controlled by any government entity.[17]

Subsequently, however, in the course of the sixth administrative review, Commerce discovered that Hilltop's part owner and general manager (To Kam Keung or "Mr. To") had incorporated, invested significant funds in, and served on the board of an undisclosed Cambodian affiliate (Ocean King (Cambodia) Company Limited or "Ocean King"). Hilltop had repeatedly certified the contrary to Commerce throughout the prior history of this antidumping duty order. Not only did Hilltop fail to disclose this affiliation in its initial responses to Commerce's inquiries in all segments of this antidumping proceeding, but Hilltop then also explicitly denied the affiliation's existence when questioned specifically about Ocean King on multiple occasions. Only after Commerce obtained and placed on the record public registration documents showing Mr. To to have incorporated and invested large sums in Ocean King did Hilltop concede that, contrary to Mr. To's repeated affirmations denying any knowledge of an affiliation with or investment in Ocean King, Hilltop was in fact affiliated with Ocean King throughout the history of this order.[18]

[16] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 74 Fed. Reg. 13,178, 13,178–79 (Dep't Commerce Mar. 26, 2009) (notice of initiation of administrative reviews and requests for revocation in part); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 75 Fed. Reg. 18,154, 18,154–55 (Dep't Commerce Apr. 9, 2010) (notice of initiation of administrative reviews and requests for revocation in part). *See also supra* note 8.

[17] *See Certain Frozen Warmwater Shrimp from the People's Republic of China*, 75 Fed. Reg. 11,855, 11,858–59 (Dep't Commerce Mar. 12, 2010) (preliminary results, preliminary partial rescission of antidumping duty administrative review and intent not to revoke, in part) ("*AR4 Prelim. Results*"); *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 8338, 8341 (Dep't Commerce Feb. 14, 2011) (preliminary results and preliminary partial rescission of fifth antidumping duty administrative review) ("*AR5 Prelim. Results*").

[18] *See AR6 I & D Mem.* at 3–6; *AR5 1st Remand Results* at 11–13 (relying on Hilltop's

Hilltop provided no explanation of its failure to disclose and subsequent repeated denial of its affiliation with Ocean King beyond a vague statement that the error may have been due to Mr. To's lack of personal involvement with Ocean King (despite unequivocal record evidence of his personal involvement and substantial investment during Ocean King's incorporation), "or for whatever reason."[19] Moreover, beyond admitting that which was irrefutably demonstrated by the record evidence, Hilltop refused to respond to Commerce's follow-up inquiries regarding possible additional undisclosed affiliations.[20]

In all three administrative review proceedings, Commerce determined that the circumstances of Hilltop's nondisclosure, outright denial, and ultimate admission to an undisclosed affiliation with Ocean King were such that the agency could no longer rely on Hilltop's prior representations regarding its corporate structure and freedom from government control, the accuracy of which had been certified by the same Mr. To whose credibility was impeached when the record revealed his personal involvement with Ocean King despite having repeatedly sworn the contrary to Commerce.[21] Having found the representations that had formed the basis for Hilltop's separate rate status to be undermined, Commerce decided that Hilltop had failed to affirmatively demonstrate its eligibility for a separate rate and therefore assigned to Hilltop the countrywide rate in each of these proceedings. *Id.*

## *II. Commerce's Determination to Assign to Hilltop the Countrywide Rate in the Fourth and Fifth Reviews*

Commerce may disregard deficient submissions and "use the facts otherwise available" when a respondent withholds requested information or otherwise significantly impedes the administrative review and fails to either explain or adequately remedy the deficiency. 19

representations during the fifth reviewand the new evidence from the sixth review); *AR4 Remand Results* at 11–13 (relying on Hilltop's representations during the fourth review and the new evidence from the sixth review). *See also* Ad Hoc II, __ CIT __, 925 F. Supp. 2d at 1318, 1321–24 (discussing the evidence, first placed on record during the sixth review,that was subsequently added to the record of the fifth (as wellas the fourth) review).

[19] *See AR6 I & D Mem*. cmt. 1 at 16 (quoting Hilltop's representation during the sixth review); *AR5 1st Remand Results* at 19 (same); *AR4 Remand Results* at 20 (same). *See also Ad Hoc II*, __ CIT __, 925 F. Supp. 2d at 1323 (discussing this evidence).

[20] *See AR6 I & D Mem.* cmt. 1 at 17 & n.80, 18 & n.85; *AR5 Remand Results* at 8, 21 & n.83, 44–47; *AR4 Remand Results* at 8, 21–24. *See also* Ad Hoc II, __ CIT __, 925 F. Supp. 2d at 1323 & n.35 (discussing the evidence).

[21] *See AR6 I & D Mem.* cmt. 1 at 16–17; *AR5 1st Remand Results* at 17–22 (relying on the new evidence from the sixth review); *AR4 Remand Results* at 17–26 (same).

U.S.C. §§ 1677e(a)(2), 1677m(d); *Jiangsu Changbao Steel Tube Co. v. United States*, __ CIT __, 884 F. Supp. 2d 1295, 1302 (2012). Here, Commerce found that Hilltop's representations regarding its corporate structure, ownership, and control were deficient because they contained false information, which Hilltop repeatedly refused to correct until faced with irrefutable evidence to the contrary.[22] Because Hilltop failed to persuasively explain the circumstances surrounding, or its motivation for, withholding not only that information to which it was ultimately forced to admit but also additional requested information regarding its corporate structure and ownership, Commerce determined to disregard Hilltop's remaining representations concerning its ownership and control as unreliable. *Id.*

In the absence of a reliable affirmative demonstration of freedom from government control through Hilltop's disclosed and possibly additional undisclosed Chinese affiliates,[23] Commerce presumed – as it does with respect to all NME respondents who fail to demonstrate freedom from government control[24] – that Hilltop was part of the countrywide entity.[25]

In its challenge, Hilltop argues, first, that Commerce improperly disregarded those of Hilltop's representations that formed the basis for its separate rate status in the fourth review[26] because Hilltop's non-disclosure of an affiliation with Ocean King was immaterial, asserting that Ocean King was not involved in the production of subject merchandise during the POR.[27] Although record evidence indicates that Ocean King was likely involved in the repackaging and re-export of shrimp subject to U.S. antidumping duties,[28] suggesting at least the possibility of additional undisclosed involvement in the production and sale of subject merchandise, Commerce did not make

[22] *See supra* note 18. *See also AR6 I & D Mem.* cmt. 1 at 12–17; *AR5 Remand Results* at 16–22; *AR4 Remand Results* at 16–26.

[23] See *supra* note 20 (citing to Commerce's discussion of Hilltop's refusal to respond to the agency's follow-up inquiries regarding possible additional undisclosed affiliations).

[24] *See supra* note 8.

[25] *See supra* note 21.

[26] Note that Commerce's decision to disregard the representations that had formed the basis for Hilltop's separate rate status in the fifth review was sustained in *Ad Hoc II*, __ CIT __,925 F. Supp. 2d at 1324.

[27] *See* Hilltop's AR4 Br. at 7–20.

[28] See, e.g., Ex. 1 to Ad Hoc Shrimp Trade Action Committee's Comments on [Commerce's] Preliminary Determination to Grant Hilltop's Request for Company-Specific Revocation Pursuant to 19 C.F.R. 351.222(b) (2) and Comments in Anticipation of Hilltop's Forthcoming Verification, A-570–893, ARP 10–11 (Mar. 12, 2012), *reproduced in, e.g.*, App. of Docs. Supporting Def.'s Resp. Comments Regarding Remand Results, Ct. No. 10–00275, ECF No. 110–4 at Tab 9, at Attachs. 14 (internal emails discussing whether shrimp sent to Ocean King from the Socialist Republic of Vietnam (which, like the subject merchandise from

(and need not have made) a finding that Ocean King was in fact so involved. Contrary to Hilltop's characterizations, Commerce's decision to invalidate Hilltop's separate rate representations as unreliable was not based on a definitive finding of transshipment, but rather on the impeachment of Hilltop's credibility as a consequence of evidence reasonably indicating that Hilltop deliberately withheld and misrepresented information requested of it, which misrepresentation may reasonably be inferred to pervade the data in the record beyond that which Commerce has positively confirmed as misrepresented.[29]

Thus the material information that Commerce ultimately found to be missing from the record was a reliably accurate representation of Hilltop's corporate structure and the extent of government control potentially exercised through its Chinese affiliates.[30] Because the accuracy of all representations in this regard was certified by Mr. To, who also certified the accuracy of repeated false statements in response to direct inquiries regarding Ocean King, Commerce reasonably discredited these representations as unreliable.[31] Commerce repeatedly requested Hilltop to provide information specifically about its affiliation with Ocean King, which Hilltop repeatedly falsely denied.[32] The material information that was withheld, therefore, is not merely the undisclosed affiliation with Ocean King, but also all other complete and accurate information which Hilltop failed to provide in

China, were also subject to U.S. antidumping proceedings) should "reuse all white cartons of Vietnam and stick MC labels in Cambodia" or instead "print new master cartons for Cambodia origin products" rather than "sticker[ing] over Product of Vietnam cartons"), 19 (internal email in which Mr. To discusses Ocean King's establishment) and 20 (internal email cautioning Mr. To that Hilltop's predecessor-in-interest "cannot have any Involve [sic] or any paper related! [to Ocean King]").

[29] *See supra* note 18.

[30] *See supra* note 22.

[31] *See AR6 I & D Mem.* cmt. 1 at 12. ("Because Hilltop repeatedly made material misrepresentations with regard to its affiliations, while certifying to the accuracy of such false information, and because Hilltop refused our repeated requests for information that was relevant to our analysis, we find that we cannot rely on any of the information submitted by Hilltop in this review."); *AR5 1st Remand Results* at 23–24 (same); *AR4 Remand Results* at 28 (same). *Cf. Changbao*, __ CIT at __, 884 F. Supp. 2d at 1309 (holding that, to the extent that a respondent's submissions contain solely representations made by that respondent, the conclusion that such representations are unreliable follows logically from Commerce's finding that the company officer(s) who certified the accuracy of such representations were themselves unreliable sources of truthful and accurate information).

While Hilltop emphasizes independent record evidence that it is registered in Hong Kong, *see, e.g.*, Hilltop's AR4 Br. at 24–33 (relying on evidence of Hilltop's Hong Kong Business License and Hilltop's Hong Kong Business Registration Form), Hilltop's registration in Hong Kong is not in itself dispositive because it does not address the potential for government control through Hilltop's disclosed and possibly additional undisclosed PRC affiliates. *Ad Hoc II* __ CIT at __, 925 F. Supp. 2d at 1324 n.39.

[32] *See AR6 I & D Mem.* at 3–4; *see also supra* note 18.

response to Commerce's repeated attempts at clarification until Hilltop finally was faced with irrefutable evidence to the contrary.[33]

Similarly, Hilltop also argues that Commerce improperly discredited the totality of Hilltop's representations regarding corporate ownership and government control based on Hilltop's concealment of an affiliation with Ocean King because this affiliation did not concern a "core," rather than purely "tangential," area of Commerce's antidumping analysis.[34] But again, this is not a case of inadvertent omission of tangential information. Hilltop did not merely omit an affiliation in its initial accounting to Commerce. First, Hilltop misrepresented its corporate structure – stating that none of its managers held any positions or investments in any undisclosed firm when its part owner and general manager was in fact a board member and shareholder at Ocean King, an undisclosed affiliate.[35] And then Hilltop additionally and explicitly denied numerous subsequent inquiries regarding this undisclosed affiliation, repeatedly certifying to Commerce that it had no additional affiliations, and even specifically stating that "Hilltop is not affiliated with Ocean King" and that "neither the company, nor its owners or officers, invested any funds in Ocean King."[36] In reality, as Hilltop was eventually forced to admit, Hilltop's part owner and general manager – the same person who

[33] *Cf. Changbao*, __ CIT at __, 884 F. Supp. 2d at 1306 ("It is reasonable for Commerce to infer that a respondent who admits to having intentionally deceived Commerce officials, and does so only after Commerce itself supplies contradictory evidence, exhibits behavior suggestive of a general willingness and ability to deceive and cover up the deception until exposure becomes absolutely necessary. . . . [I]n the absence of additional reassurance or an explanation sufficient to rehabilitate [the respondent]'s damaged credibility, Commerce ha[s] no way of knowing whether or not [the respondent] may have been less than straightforward with regard also to its remaining submissions and representations . . . .").

[34] Hilltop's AR4 Br. at 20–24 (relying on *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 199 n.13, 360 F. Supp.2d 1339, 1348 n.13 (2005); *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, No. 10–00059, 2011 WL 4829947(CIT Oct. 12, 2011)). *See Shanghai Taoen*, 29 CIT at 199 n.13, 360 F. Supp. 2d at 1348 n.13 (holding that where Commerce finds a respondent to be not credible with regard to "core, not tangential" information, the agency may reasonably disregard the totality of information submitted by the discredited respondent because "there is little room for substitution of partial facts"); *Foshan*, 2011 WL 4829947 at *14 (holding that Commerce reasonably determined to disregard the entirety of a respondent's factors of production and sales information where inaccuracies with respect to "core, not tangential" information pervaded the respondent's responses to Commerce's inquiries) (quoting *Since Hardware (Guangzhou) Co. v. United States*, No. 09–00123, 2010 WL 3982277, at *7 (CIT Sept. 27, 2010) (quoting *Shanghai Taoen*, 29 CIT at 199 n.13, 360 F. Supp. 2d at1348 n.13)).

[35] *See supra* note 18.

[36] Hilltop's Reply to Pet'rs' Resp. to CBP Import Data, A-570–893, ARP 10–11 (May 31, 2012)

certified the accuracy of all of Hilltop's submissions in these reviews[37] – was both a board member and substantial shareholder in Ocean King during all three periods of review.[38]

Also contrary to Hilltop's contentions, the Cambodian location of Ocean King and Commerce's silence regarding whether there were any entries of shrimp from Cambodia during the relevant time periods do not make Hilltop's false statements "tangential" rather than "core." What places Hilltop's false statements at the core of Commerce's analysis is that Mr. To repeatedly certified the accuracy of Hilltop's representations regarding its corporate structure while either knowing that these representations were false or else exhibiting gross negligence in failing to keep himself informed as to the nature and extent of his company's affiliations. Whether through fraudulent concealment of the truth or through negligent inability to be informed of the relevant facts, Mr. To's certifications regarding the accuracy of the corporate structure represented in the submissions whose accuracy he certified are no longer reliable. Rather than reflecting a tangential matter, these circumstances clearly concern the core of the accuracy and reliability of Hilltop's remaining statements to Commerce regarding its corporate structure, which had formed the basis for Commerce's preliminary separate rate determinations.[39] Having discredited these statements as unreliable, Commerce reasonably concluded that the record presented no reliable evidence of Hilltop's freedom from presumed government control and therefore reasonably assigned Hilltop the countrywide rate. *See Transcom*, 294 F.3d at 1373; *Changbao*, __ CIT at __, 884 F. Supp. 2d at 1309–12.

Accordingly, Commerce's determination to assign to Hilltop the PRC-wide antidumping duty assessment rate in the fourth review is sustained on the same grounds as those supporting the court's affirmance of Commerce's identical determination in the revised results of the fifth review. *See Ad* Hoc II, __ CIT __, 925 F. Supp. 2d at 1319–24.

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at 6, *reproduced in, e.g.*, Public App. to Pl. Ad Hoc Shrimp Trade Action Committee's Reply to Comments on Final Results of Redetermination Pursuant to Ct. Remand, Ct. No. 10–00275, ECF No. 108–1 at Tab 12.

[37] *See AR6 I & D Mem.* cmt. 1 at 16; *AR5 1st Remand Results* at 1920; *AR4 Remand Results* at 20.

[38] *See supra* note 18.

[39] *See supra* note 17.

### *III. Corroboration of the PRC-wide Rate Assigned to Hilltop in the Fourth and Fifth Reviews*

#### *A. AR5 Remand Order*

Although the court sustained Commerce's decision to apply the countrywide rate to Hilltop in the fifth review, Commerce's corroboration of this PRC-wide rate – which had initially been based on data from the LTFV investigation and, in the absence of evidence rebutting the presumption of continued validity, *see KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010)[40], carried over into every subsequent review – was remanded because the margin calculations on which Commerce's original corroboration was based were subsequently altered pursuant to judicial review, ultimately reducing the comparison margins. *See Ad Hoc II*, __ CIT at __, 925 F. Supp. 2d at 1325–27. The court required that, "[o]n remand, Commerce must either adequately corroborate the 112.81 percent rate and explain how its corroboration satisfies the requirements of 19 U.S.C. 1677e(c), or else calculate or choose a different countrywide rate that better reflects commercial reality, as supported by a reasonable reading of the record evidence." *Id*. at 1327.

#### *B. The Corroboration Analysis in the AR5 2d Remand Results and AR4 Remand Results*

In its remand proceedings concerning the fourth and fifth reviews, Commerce revisited its corroboration of the PRC-wide rate. Acknowledging that the margins used to initially corroborate this rate in the LTFV investigation (which corroboration analysis was then relied upon in all subsequent reviews) were altered following judicial review, Commerce employed record data that were recalculated to reflect any changes that were made pursuant to litigation. AR5 2d

[40] (discussing "[t]he presumption that a prior dumping margin imposed against an exporter in an earlier administrative review continues to be valid if the exporter fails to cooperate in a subsequent administrative review"); *see also id*. at 766 ("Commerce is permitted to use a 'common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less.'") (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990) (emphasis in original)) (also quoting *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) ("Incases in which the respondent fails to provide Commerce with the most recent pricing data, it is within Commerce's discretion to presume that the highest prior margin reflects the current margins.")); *AR4 Prelim. Results*, 75 Fed. Reg. at 11,859 ("For the China-wide entity, we have assigned the entity's current rate and the only rate ever determined for the entity in this proceeding.") (unchanged in *AR4 Final Results*, 75 Fed. Reg. at 49,463); AR5 Prelim. Results, 76 Fed. Reg. at 8342 (same) (unchanged in *AR5 Final Results*, 76 Fed. Reg. at 51,942).

Remand *Results* at 8; *AR4 Remand Results* at 35.[41] Specifically, Commerce employed a file that was created in connection with a recent Section 129 proceeding,[42] implementing the outcome of dispute settlement proceedings at the WTO. This file (the "Red Garden Margin File") lists every CONNUM-specific margin[43] calculated for Shantou Red Garden Foodstuff Company ("Red Garden"), who was a mandatory respondent in the LTFV investigation and sold the highest volume of sales during the period of investigation ("POI").[44] But while the Red Garden Margin File was created using the data submitted by Red Garden in the LTFV investigation, the CONNUM-specific margin calculations reflect the adjustments necessitated by judicial review.[45]

Analyzing these CONNUM-specific margins for the largest exporter of subject merchandise during the POI,[46] Commerce found that, "despite the reduction of calculated weighted-average margins subsequent to litigation, a significant quantity and value of CONNUM-specific margins higher than [112.81 percent] remain for at least one respondent [i.e., Red Garden]." AR5 2d Remand Results at 13; AR4 Remand Results at 40. Specifically, Commerce found that

[41] The data were also recalculated "to allow offsets for non-dumped sales," pursuant to the outcome of dispute settlement before the World Trade Organization's ("WTO") Dispute Settlement Body ("DSB"). *Id*.

[42] "Section 129" refers to proceedings undertaken in response to a decision by the WTO's DSB that some particular determination by a U.S. trade agency was not consistent with the United States' obligations as a Member of the WTO's Antidumping and/or Subsidies and Countervailing Measures Agreements. *See* 19 U.S.C.§ 3538(b); *see generally Andaman Seafood Co. v. United States*, __ CIT __, 675 F. Supp. 2d 1363, 1370–72 (2010) (discussing the mechanism and legal effect of Section 129 proceedings).

[43] In antidumping proceedings, different control numbers ("CONNUMs") are used "to identify the individual models of products for matching purposes." *AR5 2d Remand Results* at 5 n.18. "Identical products are assigned the same CONNUM in both the comparison market sales database (or in a non-market economy context, the factors of production database) and U.S. sales database." *Id*. (citing Ch. 4 of the Antidumping Manual (Oct. 13, 2009) at 10). "CONNUM-specific margins result in calculated margins that represent the pricing behavior related to groups of sales," grouped by model type. *Id*. at 13.

[44] Although Commerce had previously stated that a different respondent had sold the highest volume of subject merchandise during the POI, Commerce has revisited the evidence and determined that in fact Red Garden had the highest volume of sales during the POI. *AR5 2d Remand Results* at 6 n.22. No party challenges this determination.

[45] *See AR5 2d Remand Results* at 8; *AR4 Remand Results* at 35; *Ad Hoc II*, __ CIT __, 925 F. Supp. 2d at 1326 (discussing the legal actions that ultimately resulted in revisions to the dumping margins initially calculated by Commerce in the LTFV investigation).

[46] In addition to being the largest exporter of subject merchandise by volume during the POI, Commerce found that "Red Garden's margins are relevant for purposes of corroboration of a margin based on information from the Petition" because "Red Garden produced merchandise under consideration using all [factors of production ("FOPs")] described in the Petition and under the same production standards as the Petition." *AR5 2d Remand Results* at 6; *see also AR4 Remand Results* at 33–34 (same).

"more than half of the CONNUMs examined in Red Garden's margin calculation had positive margins [and,] [o]f those CONNUMs with positive margins, . . . the percentage with dumping margins exceeding 112.81 percent[[47]] is sufficient to demonstrate the probative value of the lowest Petition margin of 112.81 percent." AR5 2d Remand Results at 6–7; *AR4 Remand Results* at 34. In addition, Commerce found that, by quantity, "CONNUMs accounting for a significant volume of merchandise under consideration were sold at prices that resulted in margins which exceeded 112.81 percent." AR5 2d *Remand Results* at 7; *AR4 Remand Results* at 34.[48]

Based on these findings, Commerce concluded that "the Petition rate continues to be relevant to this investigation, even after taking into account subsequent changes to the original calculations pursuant to remand redetermination, and the rate to be corroborated [in] this [proceeding]." *Id.* Accordingly, finding "no other information that would call into question the reliability of that [Petition-based] rate," *AR5 2d Remand Results* at 14; *AR4 Remand Results* at 41,[49] Commerce concluded that "the commercial reality" – i.e., that a significant quantity and value of CONNUMs were sold by a cooperating separate rate respondent at prices that resulted in antidumping margins exceeding 112.81 percent – confirmed "the continued reliability of the 112.81 percent rate and relevance to the PRC-wide entity as a whole." *Id.*[50] On the basis of this analysis, Commerce concluded that the

[47] [[ ]] percent. *See* Attach. 1 to *AR4 Remand Results* (Business Proprietary Mem. for Red Garden, A-570–893, ARP 08–09 (Sept. 26, 2013), ("*Red Garden BPI Mem.*")), Ct. No. 10–00275, ECF No. 78–1, at 2; Attach. I to *AR5 2d Remand Results*, Ct. No. 11–00335, ECF No. 107–1 (same).

[48] Specifically, Commerce found that CONNUMs accounting for [[ ]]kg of subject merchandise were sold at prices that resulted in margins exceeding 112.81 percent. *Red Garden BPI Mem.* at 2. In concluding that this amount accounted for a significant volume of merchandise under consideration, Commerce noted that a total sales volume reflecting this amount "would have ranked Red Garden ahead of [[ ]] other companies at the respondent selection phase of this investigation." *Id.*; *see also LTFV Final Results*, 69 Fed. Reg. at 70,998 (referring to a total of 58 respondents in the LTFV investigation – four mandatory respondents, 53 respondents who requested a separate rate, and the composite PRC-wide entity).

[49] Commerce also noted that Hilltop, who objects to the agency's corroboration analysis in the *AR5 2d Remand Results* and the *AR4 Remand Results* (as discussed below) has offered no new credible information that would rebut the presumption that a reliable rate from a prior segment retains its reliability in subsequent segments, absent rebutting evidence. *Id.; cf. KYD*, 607 F.3d at 767 (discussing this presumption).

[50] *See Ad Hoc II*, __ CIT __, 925 F. Supp. 2d at 1325 ("Commerce correctly posits that the PRC-wide rate need not be corroborated with respect to each particular respondent who, like Hilltop, is found to form a part of the PRC-wide entity and thus to be subject to the PRC-wide rate.") (citing *Peer Bearing Co. –Changshan v. United States*, 32 CIT 1307, 1313, 587 F. Supp. 2d 1319, 1327 (2008) ("[T]here is no requirement that the PRC-wide entity rate . . . relate specifically to the individual company. . . . [This] rate must be corroborated according to its reliability and relevance to the countrywide entity as a whole.") (citation

112.81 percent PRC-wide rate "has probative value." *AR5 2d Remand Results* at 7; *AR4 Remand Results* at 34; *cf.* SAA at 870 (linking "corroboration" to an evaluation of "probative value").

### C. *Discussion*

Hilltop challenges Commerce's corroboration of the 112.81 percent PRC-wide rate assigned to it in the fourth and fifth reviews.[51] Specifically, Hilltop challenges the methodology Commerce employed to corroborate the country-wide rate, arguing that 1) Commerce's reliance on sales data from a single respondent, without comparing such data to the documented pricing behavior of other respondents, was unreasonable[52]; 2) Commerce's reliance on a single respondent's subset of CONNUM-specific margins (those at or exceeding 112.81 percent) unreasonably cherry picks only those transactions that support an affirmative corroboration, while ignoring the remaining transactions that do not[53]; and 3) Commerce's reliance on data from the LTFV investigation to corroborate the countrywide rate applied in the fourth and fifth administrative reviews unreasonably presumes that pricing data from the LTFV investigation remain probative with respect to the later review periods.[54]

#### 1. Commerce's Decision to Rely Solely on Red Garden's Data

As explained above, Commerce examined all CONNUM-specific margins calculated for the largest exporter of subject merchandise by volume during the POI. These CONNUM-specific margin calcula-

omitted); *Shandong Mach. Imp. & Exp. Co. v. United States*, 33 CIT 810, 816 (2009) (not reported in the Federal Supplement) (explaining that Commerce has no obligation to corroborate the PRC-wide rate as to an individual party where that party has failed to qualify for a separate rate)).

[51] Hilltop's AR4 Br. at 47–55; Hilltop's AR5 Br. at 3–12. The like domestic industry's party to this proceeding – the Ad Hoc Shrimp Trade Action Committee – does not object to the agency's corroboration analysis. *See, e.g.*, [AHSTAC]'s Reply to Comments on Final Results of Determination Pursuant to Court Remand, Ct. No. 11–00335, ECF No. 118, at 4–19 (arguing in support of Commerce's corroboration analysis).

[52] *See* Hilltop's AR4 Br. at 49 (emphasizing the documented pricing behavior of cooperative separate rate respondents throughout the history of this antidumping duty order); Hilltop's AR5 Br. at 6 (same); *see also* Hilltop's AR4 Br. at 51 (arguing that Commerce should have compared Red Garden's data to "additional margin data from other respondents"); Hilltop's AR5 Br. at 8 (same).

[53] *See* Hilltop's AR4 Br. at 49–50 (arguing that the quantity, value, and volume of POI sales made at or exceeding a 112.81 percent dumping margin were not sufficiently significant to support an inference of commercial reality for the countrywide entity); Hilltop's AR5 Br. at 6–7 (same). *Cf. supra* note 48 (discussing the volume of subject merchandise sold by Red Garden at or exceeding a 112.81 percent dumping margin).

[54] *See* Hilltop's AR4 Br. at 48; Hilltop's AR5 Br. at 5.

tions do not suffer from the defects previously identified by the court with regard to the comparison data initially used by the agency to corroborate the countrywide rate in the LTFV investigation and in every segment of this antidumping proceeding thereafter.[55] Hilltop argues that Commerce unreasonably looked solely at Red Garden's data, without comparing such data to the pricing behavior of other respondents.[56] In response, Commerce argues that the analysis it employed to corroborate the probative value of the lowest Petition-based rate for the PRC-wide entity "was the same well-established methodology employed in the original investigation and many other proceedings." *AR5 2d Remand Results* at 13; *AR4 Remand Results* at 40.[57]

To "corroborate" "secondary information" (including, as here, information derived from the Petition), Commerce must satisfy itself that the information has "probative value." *See* SAA at 870. The corroboration requirement ensures that antidumping duty rates calculated for non-cooperative respondents present "a reasonably accurate estimate of the respondent's actual [dumping] rate, albeit with some built-in increase intended as a deterrent to non-compliance."[58] In particular, while "the statute explicitly allows for use of the 'the petition' to determine relevant facts when a respondent does not cooperate," *De Cecco*, 216 F.3d at 1032 (quoting 19 U.S.C. § 1677e(b)), "Commerce may not use the petition rate to establish the dumping margin when its own investigation reveal[s] that the petition rate was not credible." *Gallant*, 602 F.3d at 1323 (relying on *De Cecco*, 216 F.3d at 1033).

In reviewing the results of LTFV investigations involving merchandise from market economies, for example, the courts have rejected Commerce's use of the petition rate for non-cooperating respondents when the dumping margins actually calculated for similarly-situated cooperating respondents are much lower than the margins alleged in the petition.[59] But where (as here) the non-cooperating respondent is

[55] *See Ad Hoc II*, __ CIT __, 925 F. Supp. 2d at 1326.

[56] *See* Hilltop's AR4 Br. at 51; Hilltop's AR5 Br. at 8.

[57] *See also AR5 2d Remand Results* at 4–5 (describing the identical methodology initially used to corroborate the countrywide Petition-based rate in the LTFV investigation, although the agency initially used data from a different respondent, who at the time had been (erroneously) deemed to be the largest exporter by volume, *see id.* at 6 n.22); *AR4 Remand Results* at 31–32 (same).

[58] *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (quoting *F.lli De Cecco Di Filippo Fara S. Martino, S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

[59] *See Gallant*, 602 F.3d at 1323–24 ("Commerce calculated the [57.64 percent non-cooperative respondent's] rate based on the highest dumping margin alleged in the petition.

a NME countrywide entity – definitionally presumed to set prices without regard to market conditions[60] – the actual pricing behavior of the cooperative respondents that have demonstrated eligibility for a separate rate (precisely because they have differentiated themselves from the countrywide entity) does not bear upon the credibility of dumping allegations against the NME countrywide entity in the way that the pricing behavior of cooperative market economy respondents reflects on the credibility of dumping allegations against their similarly-situated market participants. Simply put, the NME countrywide entity is, by definition, not similarly-situated to the cooperative separate rate respondents.[61] For while the pricing behavior of the cooperative respondents may be relevant to the commercial reality of non-cooperating exporters from a *market* economy – constrained as such exporters are by the market forces of competition – no analog exists in the NME context, where the countrywide government entity is presumed to act unimpeded by such forces. In the NME context, therefore, the inference that the countrywide entity as a whole may be dumping at margins significantly above the cooperating separate rate market participants is not unreasonable.[62]

Another critical aspect of the evidentiary record presented here is that the countrywide rate at issue was not only the rate applied to the PRC-wide entity in the initial LTFV investigation, but has also been the rate applied to that entity in at least five subsequent administrative reviews. *Cf. KYD*, 607 F.3d at 767 (distinguishing *Gallant* and, by analogy, *De Cecco*, because "the presumption that a prior dumping margin imposed against an exporter in an earlier administrative review continues to be valid if the exporter fails to cooperate in a subsequent review" was not at play in those cases). As the Court of

The fact that Commerce ultimately imposed dumping margins between 5.91 percent and 6.82 percent for the same products after its initial investigation shows the possession of better information and shows that the adjusted petition rate was aberrational."); *De Cecco*, 216 F.3d at 1032–34 (affirming the Court of International Trade's holding that Commerce may not rely on a 46.67 percent petition-based rate for a non-cooperating respondent because Commerce's investigation had ultimately resulted in dumping margins ranging from 0.67 percent to 2.80 percent for similarly situated respondents).

[60] *See* 19 U.S.C. § 1677(18)(A) ("The term 'nonmarket economy country' means any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures . . . .").

[61] *See, e.g., AR5 Prelim. Results*, 76 Fed. Reg. at 8342 ("We consider the influence that the government has been found to have over the economy to warrant determining a rate for the entity that is distinct from the rates found for companies that have provided sufficient evidence to establish that they operate freely with respect to their export activities.").

[62] *Cf.* Hilltop's AR4 Br. at 48–50 (comparing the countrywide rate to rates calculated for cooperative separate rate respondents throughout the history of this antidumping duty order); Hilltop's AR5 Br. at 5–7 (same).

Appeals for the Federal Circuit explained, "it [is] reasonable for Commerce to conclude, given [a respondent's] refusal to cooperate in the [subsequent] administrative review [or, as here, in the next *five* such reviews], that [such respondent] had not altered its past pricing practices and that its previous rate is reflective of its current pricing practices." *Id.* at 764 (internal quotation marks omitted).

Here, as in *KYD*, the PRC-wide entity's failure to cooperate in these reviews "deprived Commerce of the most direct evidence of [the PRC-wide entity's] actual dumping margin." *See KYD*, 607 F.3d at 767. But also as in *KYD*, "Commerce was able to fill that evidentiary gap by looking to high-volume [CONNUM]-specific margins for [a] cooperative compan[y] that were higher than and close to the [112.81] rate, from which Commerce concluded that that [this] margin does not lie outside the realm of actual selling practices." *Id.* (internal quotation marks omitted).[63] Commerce reasoned that if a significant percentage of the largest cooperating respondent's sales, by both quantity and volume, were sold at or above the 112.81 percent dumping rate, then it is reasonable to conclude "that a non-responsive, or uncooperative, respondent could have made all of its sales at the same rate." *AR5 2d Remand Results* at 14; *AR4 Remand Results* at 41. This is a reasonable approach that, by its terms, does not require any analysis of data beyond that of the largest cooperative respondent. Hilltop has not submitted any data or analysis that refutes the inferences Commerce draws from this data. Accordingly, Commerce did not act unreasonably when it determined to limit the data used in its corroboration analysis to that contained in the Red Garden Margin File.[64]

2. Commerce's Determination that the Evidence Sufficiently Corroborates the Countrywide Rate from the LTFV Investigation

Next, Hilltop challenges Commerce's corroboration methodology in so far as it relies on CONNUM-specific margins, arguing that doing so permits the agency to cherry pick the transactions that support affirmative corroboration, while ignoring those that do not. But as Commerce explains, "CONNUM-specific [i.e., model-specific] margins result in calculated margins that represent the pricing behavior re-

[63] *See supra* note 48 (discussing the volume of subject merchandise sold by Red Garden at or exceeding a 112.81 percent dumping margin).

[64] *Cf. KYD*, 607 F.3d at 764–68 (affirming corroboration of 122.88 percent Petition-based rate, despite the low margins (ranging from 0.80 percent to 1.87 percent) calculated for other respondents, because that rate was supported by 1) evidence submitted with the petition; 2) high-volume transaction-specific margins for cooperative companies at or above that rate; and 3) "the presumption that an exporter's prior margin continues to be valid if the exporter fails to cooperate in a subsequent proceeding").

lated to groups of sales, rather than individual sales, and, consequently, do not result from cherry picking of individual transactions." AR5 2d *Remand Results* at 13; *AR4 Remand Results* at 40.[65] Moreover, the percentage of Red Garden's sales made at prices resulting in dumping margins at or exceeding 112.81 percent covered a volume of subject merchandise sufficiently significant to support a reasonable inference that this rate is probative of the non-cooperating countrywide entity's actual pricing behavior.[66]

3. Commerce's Determination that the LTFV Investigation's Countrywide Rate Remains Probative for the Fourth and Fifth Reviews

Finally, Hilltop argues that Commerce's corroboration analysis is flawed because it relies on data from the LTFV investigation to corroborate a rate applied in later review periods. But Hilltop ignores judicial precedent holding that the continued reliability and relevance of data from prior segments of an antidumping proceeding is presumed absent rebutting evidence. *KYD*, 607 F.3d at 764–68 (discussing cases).

The rate applied to the PRC-wide entity throughout the history of this antidumping duty order was calculated in the underlying LTFV investigation.[67] It was the lowest of a range of rates calculated using information derived from the Petition.[68] To satisfy itself that this rate had probative value regarding the non-cooperating PRC-entity's actual pricing behavior, Commerce evaluated the supporting evidence and also compared this rate to the model-specific dumping margins calculated for a cooperating respondent who produced its merchandise using all of the same factors of production and under the same production standards as the Petition.[69] Based on this analysis, Commerce concluded that, because a significant percentage of the quantity and value of this cooperating respondent's sales represented

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[65] *See also supra* note 43 (explaining CONNUM-specific margins).

[66] See *supra* note 48 (discussing the volume of subject merchandise sold by Red Garden at or exceeding a 112.81 percent dumping margin).

[67] *See Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 Fed. Reg. 70,997, 71,003 (Dep't Commerce Dec. 8, 2004) (notice of final determination of sales at less than fair value) ("*LTFV Final Results*") (assigning 112.81 percent as the PRC-wide rate).

[68] *Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 Fed. Reg. 42,654, 42,662 (Dep't Commerce July 16, 2004) (notice of preliminary determination of sales at less than fair value) (unchanged in the final determination, 69 Fed. Reg. at 71,003).

[69] *See, e.g.*, *AR4 Remand Results* at 31–32 (describing the initial corroboration of the PRC-wide rate during the LTFV investigation).

prices at or above the lowest Petition dumping margin of 112.81 percent, that margin had probative value regarding the likely pricing behavior of the non-cooperating PRC-wide entity as a whole. Now, having revisited its calculations to implement the outcome of judicial review, Commerce continues to draw the same reasonable conclusions from the (revised) evidence.[70]

Hilltop has presented no new evidence to suggest that the Petition-based countrywide rate, as corroborated using (appropriately recalculated) contemporaneous data from the largest cooperating respondent during the POI, has lost its probative value. *See AR5 Remand Results* at 14 (citing *KYD*, 607 F.3d at 767); *AR4 Remand Results* at 41 (same); *see also* SAA at 870 (linking "corroboration" to "probative value"). While Commerce has assigned this rate to the PRC-wide entity throughout the entire history of this antidumping duty order – including in three prior reviews before the two reviews now at issue – neither the PRC-wide entity nor any other respondent has come forward with any more accurate information. Accordingly, in addition to corroborating the probative value of this rate by examining the evidence submitted along with the Petition from which it is derived and the pricing behavior of the largest cooperating exporter during the POI, Commerce reasonably inferred that the PRC-wide margin assigned in the prior segments of this antidumping proceeding "is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less." *KYD*, 607 F.3d at 766 (emphasis in original) (internal quotation marks and citation omitted).[71]

## CONCLUSION

For all of the foregoing reasons, Commerce's *AR5 2d Remand Results* and the *AR4 Remand Results* are each sustained. Judgments will issue accordingly.

Dated: May 20, 2014
New York, NY

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

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Slip Op. 14–57

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. United States, Defendant.

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[70] *See supra* notes 46–48.

[71] *See also supra* note 64 (noting the similarity of this case to the facts in *KYD*).

**PUBLIC VERSION**
Before: Donald C. Pogue,
Chief Judge
Court No. 12–00290[1]

[affirming the Department of Commerce's final results of antidumping duty administrative review]

Dated: May 27, 2014

*Andrew W. Kentz*, *Jordan C. Kahn*, *Nathaniel Maandig Rickard*, and *Nathan W. Cunningham*, Picard Kentz & Rowe LLP, of Washington, DC, for the Plaintiff.

*Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

## *OPINION*

### Pogue, Chief Judge:

This action arises from the sixth administrative review by the United States Department of Commerce ("Commerce") of the antidumping duty order on certain frozen warmwater shrimp from the People's Republic of China ("PRC" or "China").[2] Plaintiff Ad Hoc Shrimp Trade Action Committee ("AHSTAC") – an association of domestic warmwater shrimp producers that participated in this review[3] – challenges Commerce's determinations to I) limit its examination to two mandatory respondents; II) rely exclusively on certain entry data obtained from United States Customs and Border Protection ("CBP") to make relative sales volume determinations when selecting respondents for individual review; and III) use data from a single surrogate country to value the labor factor of production when calculating normal values.[4]

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[1] This case was previously consolidated with *Hilltop Int'l v. United States*, Ct. No. 12–00289, *see* Order Dec. 11, 2012, ECF No. 18, but has subsequently been severed therefrom. *See* Order Apr. 23, 2014, ECF No. 19.

[2] *See Certain Frozen Warmwater Shrimp from the People's Republic of China*, 77 Fed. Reg. 53,856 (Dep't Commerce Sept. 4, 2012) (final results, partial rescission of sixth antidumping duty administrative review and determination not to revoke in part)("*Final Results*") and accompanying Issues & Decision Mem., A-570–893, ARP 10–11 (Aug. 27, 2012) ("*I & D Mem.*").

[3] Compl., ECF No. 2, at ¶ 7.

[4] *See* Mem. of L. in Supp. of [AHSTAC]'s Mot. for J. on the Agency R., Ct. No. 12–00289, ECF No. 31 ("AHSTAC's Br."). A public version of ASHTAC's (confidential) brief is available at ECF No. 32.

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[5] and 28 U.S.C. § 1581(c) (2006).

As explained below, Commerce's determinations to limit its examination of respondents pursuant to 19 U.S.C. § 1677f-1(c)(2)(B); rely on Type 03 CBP data to make relative sales volume determinations when selecting respondents for individual examination; and value surrogate wage rates using data from the chosen primary surrogate country are each affirmed.

## STANDARD OF REVIEW

The court upholds Commerce's antidumping determinations if they are in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Where, as here, the antidumping statute does not directly address the question before the agency, the court will defer to Commerce's construction of its authority if it is reasonable. *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (relying on *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938), and "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United* States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citation omitted, alteration in the original).

## DISCUSSION

I. *Commerce's Determination to Limit Individual Examination to Two Mandatory Respondents*

AHSTAC's challenge to Commerce's determination to limit its examination to two mandatory respondents, AHSTAC's Br. at 30–35, is rooted in Commerce's statutory obligation to "determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise" when conducting administrative reviews of antidumping duty orders. 19 U.S.C. § 1677f-1(c)(1). But the statute also permits Commerce to limit its examination if the review "involve[s]" a "large number of exporters or producers." *Id.* at § 1677f-1(c)(2) (the "large number exception"). Pursuant to the large number exception, Commerce may limit its examination to, *inter alia*, "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reason-

[5] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

ably examined." *Id.* at § 1677f-1(c)(2)(B).[6]

AHSTAC contends that Commerce improperly invoked the large number exception here because the number of exporters or producers "involved" in this review was not a "large number." AHSTAC's Br. at 32–35. Although the review was initiated for 84 producers or exporters,[7] AHSTAC asserts that the number of respondents "involved" in the review should be determined based on CBP import data, which AHSTAC contends show that significantly fewer than 84 producers or exporters exported subject merchandise to the United States during the period of review ("POR"). AHSTAC's Br. at 33–35.[8] Commerce, on the other hand, maintains that the number of producers or exporters "involved" in the review is the number for which review was initiated and not subsequently rescinded. *See I & D Mem.* cmt. 8 at 41.[9]

The first question before the court, therefore, is the meaning of the phrase "involved in the . . . review." 19 U.S.C. § 1677f-1(c)(2). Because the statute itself does not unambiguously define this contested term,[10] Commerce's construction is entitled to deference if it is reasonable. *See Chevron*, 467 U.S. at 842–43.

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[6] Those respondents who are not selected for individual examination and do not demonstrate eligibility for a separate rate are assigned the countrywide rate. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002) (discussing Commerce's practice of assigning to all exporters from non-market economy ("NME") countries like China a countrywide antidumping duty rate unless they affirmatively demonstrate eligibility for a "separate rate"). Those respondents who do demonstrate separate rate eligibility are assigned the "all others" rate. *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013) ("The separate rate for eligible non-mandatory respondents is generally calculated following the statutory method for determining the 'all others rate' under [19 U.S.C.] § 1673d(c)(5)(A). As such, Commerce will typically use the weighted average of all mandatory respondents' rates, excluding any *de minimis* and AFA rates [i.e., rates calculated using adverse inferences employed based on a finding of failure to cooperate, *see* 19 U.S.C. § 1677e(b)]. If all dumping margins established are only *de minimis* or AFA rates, Commerce accordingly applies the exception found in § 1673d(c)(5)(B) [permitting Commerce to 'use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated'].") (additional citations omitted).

[7] *Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review*,76 Fed. Reg. 17,825, 17,827–28 (Dep't Commerce Mar. 31, 2011) ("*Initiation Notice*") (listing 84 companies as covered by the 2010–11 review of the antidumping duty order on certain frozen warmwater shrimp from the PRC).

[8] *See also id*. at 18 ("The Type 03 CBP data that Commerce used to select respondents [for individual examination] reflected [[ ]] exporters of subject merchandise during the POR.").

[9] *See also* Def.'s Resp. in Opp'n to Pls.' Mots. for J. Upon the Agency R., Ct. No. 12–00289, ECF No. 50 ("Def.'s Br."). *See supra* note 1 regarding this action's prior consolidation history. A public version of Defendant's (confidential) brief is available at ECF No. 51.

[10] *See, e.g., Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 1727–28, 662 F. Supp. 2d 1337, 1342 (2009) (noting that "Congress did not define the term 'large number of exporters or producers involved in the . . . review,' as used in 19 U.S.C.§ 1677f-1(c)(2)" and opining that "the term might be seen as inherently ambiguous in some contexts").

Commerce submits that each producer or exporter for whom review is initiated and not subsequently rescinded is involved in the review. *See I & D Mem.* cmt. 8 at 41. This construction is consistent with the statute's Statement of Administrative Action ("SAA"),[11] which affirms that § 1677f-1(c) codified Commerce's preexisting practice of "attempt[ing] to calculate individual dumping margins for all producers and exporters . . . *for whom an administrative review is requested*." H.R. Doc. 103–316, at 872 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4200 (emphasis added). Thus the SAA supports Commerce's reading that the phrase "each known exporter and producer of the subject merchandise," to which the phrase "exporters or producers involved in the . . . review" refers, *see* 19 U.S.C. § 1677f-1(c), contemplates the entities for whom review was requested, initiated, and not rescinded, and does not require Commerce to first evaluate whether or to what extent those entities shipped subject merchandise during the POR.

AHSTAC essentially suggests that Commerce should have rescinded its review – and thus discharged its duty to assign dumping margins – with respect to all those respondents for whom review was requested and initiated but who AHSTAC maintains (based on its reading of the CBP data) had no exports of subject merchandise during the POR.[12] But Commerce's consistent and judicially-affirmed practice has been that CBP data alone are insufficient to compel rescission based on a finding of no shipments.[13]

Indeed the procedure for rescinding a review based on a finding of no shipments reveals that all producers or exporters for whom review

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[11] *See* 19 U.S.C. § 3512(d) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

[12] *See* AHSTAC's Br. at 33–34; *see also* 19 C.F.R. § 351.213(d)(3) (permitting Commerce to rescind review of producers or exporters who had no exports, sales, or entries of subject merchandise during the POR).

[13] *See, e.g.*, *Fresh Garlic from the People's Republic of China*, Issues & Decision Mem., A-570–831, ARP 07–08 (June 14, 2010) (adopted in 75 Fed. Reg. 34,976 (Dep't Commerce June 21, 2010) (final results and partial rescission of the 14th antidumping duty administrative review)) ("*Garlic from China I & D Mem.*") cmt. 2 at 8–9 ("CBP data is not sufficiently comprehensive to serve as a reliable basis for a conclusive determination that a particular producer or exporter made no shipments or entries of subject merchandise during the POR."); *Hyosung Corp. v. United States*, Slip Op. 11–34, 2011 WL 1882519, at *5 (CIT Mar. 31, 2011) ("Commerce is not obligated to rescind the review, but it *may* if it determines that a particular company did not have entries, exports, or sales. . . . [A]s Commerce explained, [however,] CBP data alone is not a conclusive statement of whether a respondent had shipments because it does not capture all entries, such as those not made electronically.") (emphasis in original).

was initiated are "involved" in the review – demanding the use of Commerce's resources – until rescission is in effect. As Commerce has previously stated:

> [P]rior to rescinding a review pursuant to 19 C.F.R. [§] 351.213(d)(3), [Commerce] must begin a factual examination and engage[] its resources to make [the] factual finding [as to whether or not the producers or exporters in question had shipments of subject merchandise during the POR]. In some cases, there is little controversy over the facts (i.e., the company has filed a timely no-shipment certification, the CBP data indicates no shipments, any response from CBP to [Commerce]'s no shipments inquiry does not contain any contrary evidence of possible shipments, and no other party presents other information). In other cases, the evidence may be less clear and may require [Commerce] to issue supplemental questionnaires, do further research into CBP data, allow time for parties to comment and submit further information, and ultimately consider and weigh potentially conflicting data and, where necessary and appropriate, scheduling and conducting verification of the respondent's claims of no shipments.

*Garlic from China I & D Mem.* cmt. 2 at 7 (citation omitted). Commerce's reading of the word "involved" in § 1677f-1(c) is thus further supported by the agency's judicially-affirmed practice of not rescinding reviews based on CBP data alone.[14]

Accordingly, Commerce's reading of the statute – that the number of exporters or producers "involved" in a review, as contemplated by the exception contained in 19 U.S.C. § 1677f-1(c)(2), is the number for whom review was initiated and not subsequently rescinded – is sustained as reasonable.[15]

Here, the number of exporters or producers "involved" in the review at the time that Commerce invoked the large number exception – i.e.,

[14] *See supra* note 13.

[15] AHSTAC also makes an argument rooted essentially in the doctrine of judicial estoppel. *See* ASHTAC's Br. at 33 ("Commerce released the CBP data at the outset of the review and consistently maintained that they accurately reflect import volumes during the POR. Commerce should not be able to benefit from the administrative convenience afforded by these data while simultaneously using the number of respondents on which review has been requested as the relevant figure in evaluating whether to limit is examination.") (citations omitted). It is true that, "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation marks and citation omitted). But this is not such a case. Commerce is not attempting to gain unfair advantage from inconsistent positions – its position that CBP data present reliable information regarding relative sales volumes is not inconsistent with

the number of exporters or producers for whom review was initiated and not rescinded – was 83.[16] AHSTAC does not contest that 83 is a sufficiently large number to invoke the large number exception. *See* AHSTAC's Br. at 30–35 (arguing only that the number of respondents allegedly shown in the CBP data to have exported subject merchandise during the POR is not a large number). Because 83 is, non-controversially, a large number, Commerce properly invoked § 1677f-1(c)(2) in this review.

II. *Commerce's Exclusive Reliance on Type 03 CBP Data to Make Relative Sales Volume Determinations*

AHSTAC's next claim also proceeds from the statutory provision, noted above, that permits Commerce to limit its examination to, *inter alia*, "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined," if the number of respondents involved in an antidumping review is so large as to make individual examination of all respondents not practicable. 19 U.S.C. § 1677f-1(c)(2)(B). Here, Commerce determined to limit its examination to the two largest exporters. *I & D Mem.* cmt. 8 at 40–41 (relying on 19 U.S.C. § 1677f-1(c)(2)(B)). As Commerce explained, "the CBP data demonstrates that [the two chosen mandatory respondents] account for the overwhelming majority of the total reported quantity of imports of subject merchandise to the United States during the POR,"[17] and "it would be an unnecessary allocation of [Commerce]'s limited resources to individually examine the remaining quantity as it is extremely small."[18] AHSTAC contends that Commerce's determination regard-

its position that every exporter and producer for whom review is requested is involved in the review unless and until the review is specifically rescinded following the proper procedures therefor.

[16] *See Initiation Notice*, 76 Fed. Reg. at 17,827–28 (listing 84 companies as covered by the 2010–11 review of the antidumping duty order on certain frozen warmwater shrimp from the PRC); *Certain Frozen Warmwater Shrimp form the People's Republic of China*, 77 Fed. Reg. 12,801, 12,803 (Dep't Commerce Mar. 2, 2012) (preliminary results, partial rescission, extension of time limits for the final results, and intent to revoke, in part, of the sixth antidumping duty administrative review) ("*Preliminary Results*") (rescinding the review with respect to an entity that filed a "certification indicating that it did not export subject merchandise to the United States during the POR," regarding which Commerce's inquiry to CBP and request for comments from interested parties yielded no contrary information).

[17] *Id*. at 41 (citing *Certain Frozen Warmwater Shrimp from the [PRC]*, Resp't Selection Mem., A-570–893, ARP 10–11 (May 9, 2011) ("*Resp't Selection Mem.*") at Attach. 1, *reproduced in* App. of Docs. Supporting [Def.'s Br.] ("Def.'s App."), Ct. No. 12–00289, ECF No. 58–1, at Tab 5).

[18] *Id.* (citing *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (1995)).

ing which respondents exported the largest volume of subject merchandise during the POR was not supported by substantial evidence. AHSTAC's Br. at 19–30.

*A. The Regal Discrepancy*

First, AHSTAC relies on a discrepancy between the volume of sales reported for respondent Zhanjiang Regal Integrated Marine Resources Company Limited ("Regal") in the CBP data used to rank respondents' relative export volumes and the data reported by Regal itself in response to Commerce's inquiry. AHSTAC's Br. at 23; *see also* Def.'s Br. at 4 ("Commerce noted a 15 to 18 percent discrepancy between the volume of exports reported for Regal in the Type 03 CBP data and the greater volume of exports Regal reported in its questionnaire responses.") (citation omitted).[19] AHSTAC contends that this discrepancy (the "Regal discrepancy") demonstrates that the CBP data on which Commerce's relative sales volume determinations were based are unreliable, and therefore provide insufficient evidentiary support for Commerce's conclusion that the chosen mandatory respondents accounted for the largest sales volumes of subject merchandise relative to the remaining respondents. *See* AHSTAC's Br. at 24.

Commerce may base its § 1677f-1(c)(2)(B) relative sales volume determinations on Type 03 CBP data[20] in the absence of evidence indicating that such data are inaccurate or otherwise unreliable. *See Pakfood Pub. Co. v. United States*, __ CIT __, 753 F. Supp. 2d 1334,

[19] Entries are designated by the importer, under penalty of the law for fraud and/or negligence, 19 U.S.C. § 1592, with a two-digit code. *See* U.S. Customs & Border Prot., Dep't of Homeland Sec., *CBP Form 7501 Instructions* 1 (July 24, 2012), *available at* http://forms.cbp.gov/pdf/7501_instructions.pdf (last visited Apr. 28, 2014). "The first digit of the code identifies the general category of the entry (i.e., consumption = 0, informal = 1, warehouse = 2). The second digit further defines the specific processing type within the entry category." *Id.* Consumption entries covered by an antidumping duty order must be designated as Type 03, whereas consumption entries that are free and dutiable are designated as Type 01. *Id*. AHSTAC suggests that Type 03 CBP data were unreliable in this case because some unknown portion of subject merchandise may have been incorrectly entered as Type 01. *See* AHSTAC's Br. at 23–27.

[20] AHSTAC argues that Commerce should be required to also consider and release to the parties under protective order Type 01 data. *See* AHSTAC's Br. at 26–27; *see generally supra* note 19. But Type 01 data, whether alone or in conjunction with Type 03 data, do not provide information that could lead Commerce to easily identify any Type 01 entries as subject merchandise. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 828 F. Supp. 2d 1345, 1355 (2012) ("The classification [as Type 01 or 03] itself does not yield any specific information that would assist [Commerce] in expeditiously determining whether merchandise should have been reported as Type 03, or making any modifications to the Type 03 data for purposes of respondent selection.") (internal quotation marks, citation, and footnote omitted).

1345–46 (2011).[21] Where the record presents evidence that rebuts the presumption that CBP has assured the accuracy of such data, Commerce must account for such evidence when making its relative sales volume determinations. *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 791 F. Supp. 2d 1327, 1333–34 (2011) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.")).

Here, Commerce acknowledged the Regal discrepancy but determined that this discrepancy did not impugn the accuracy of the *relative* (rather than exact) volumes of subject entries attributable to the respective respondents subject to this review. *See I & D Mem.* cmt. 8 at 42–45; *see also* Def.'s Br. at 17–18 ("Commerce reasonably explained in the final results that it does not require Type 03 CBP data to be flawless or free from discrepancies in order for it to be a reliable source for the limited purpose of identifying the largest exporters and producers during respondent selection.") (citing *I & D Mem.* cmt. 8 at 42–43). The question before the court, therefore, is whether it was reasonable for the agency to conclude that Regal was one of the largest exporters/producers of subject merchandise during the POR, notwithstanding the Regal discrepancy.

Commerce's conclusion that Regal was one of the largest exporters/producers of subject merchandise during the POR, regardless of the 15–18 percent discrepancy between the sales reported in CBP data and those reported by Regal in response to Commerce's questionnaire, is reasonably supported by the evidence on record. *See I & D Mem.* cmt. 8 at 42–43 ("The [CBP] data are not used to

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[21] ("In the absence of evidence in the record that the CBP data – for merchandise entered during the relevant POR and subject to the [antidumping] duty order at issue – are in some way inaccurate or distortive, the agency reasonably concluded that such data, collected in the regular course of business under penalty of law for fraud and/or negligence, presents reliably accurate information. Because Customs officers have a duty to assure the accuracy of information submitted to that agency by penalizing negligent or fraudulent omissions and/or inaccurate submissions, the presumption of regularity entails the reasonable conclusion that, in the absence of evidence to the contrary, the data obtained by Customs officials in their regular course of business is accurate.") (citing, *inter alia*, 19 C.F.R. § 162.77(a) ("If the [appropriate Customs] Officer has reasonable cause to believe that a violation of [19 U.S.C. § 1592 (prohibiting fraudulent and/or negligent submission and/or omission of material information to Customs)] has occurred ... he shall issue to the person concerned a notice of his intent to issue a claim for a monetary penalty."); *Seneca Grape Juice Corp. v. United States*, 71 Cust. Ct. 131, 142, 367 F. Supp. 1396, 1404 (1973) (noting "the general presumption of regularity that attaches to all administrative action," namely that "[i]n the absence of clear evidence to the contrary, the courts presume that public officers have properly discharged their duties. . . . [and] [t]his presumption, of course, also attaches to the official actions taken by customs officers") (additional citations omitted).

*definitively* determine any particular respondent's actual quantity of subject merchandise shipped during the POR . . . [but rather are used solely as] a reasonably accurate reflection of the relative position of the exporters under review") (emphasis in original); *id.* at 44 ("[T]he discrepancy between the CBP data and Regal's sales quantity would not have precluded [Commerce] from selecting Regal [as one of the largest exporters/producers of subject merchandise during the POR] . . . ."). Specifically, the record reveals that the magnitude of the Regal discrepancy is far outweighed by the magnitude of Regal's POR sales (with or without accounting for the discrepancy) relative to the remaining respondents.[22] From this it is reasonable to conclude that the Regal discrepancy did not impugn the accuracy of Commerce's finding that Regal was one of the largest exporters/producers of subject merchandise during the POR. *See I & D Mem.* cmt. 8 at 44.

*B. Transshipment Allegations*

AHSTAC also argues that the "indicia of transshipment" on this record "provide further 'new evidence'" that the CBP data used to determine respondents' relative POR sales volumes were unreliable for this purpose. AHSTAC's Br. at 27–28. Specifically, AHSTAC contends that "[t]he documented transshipment through Cambodia to evade the [antidumping duty] order on shrimp from China rebuts the presumption of reliability ordinarily attaching to CBP data." *Id.* at 28.

But notwithstanding AHSTAC's characterization of the record, the evidence does not indisputably "document[] transshipment through Cambodia" during the POR. On the contrary, no imports of shrimp from Cambodia (potentially transshipped or otherwise) during the POR are documented on the record of this review.[23] "In the absence of evidence in the record that the CBP data – *for merchandise entered during the relevant POR* and subject to the [antidumping] duty order at issue – are in some way inaccurate or distortive, [Commerce may] reasonably conclude[] that such data . . . present reliably accurate information." *Pakfood*, __ CIT at __, 753 F. Supp. 2d at 1345. AHSTAC has not pointed to any record evidence that the CBP data for subject

[22] *See* Def.'s Br. at 4 ("If included in the CBP data, the discrepancy would have increased even further Regal's more than [[ ]] times greater volume of exports compared to those of the next largest exporter.") (citing Resp't Selection Mem.at Attach. 1).

[23] *See Certain Frozen Warmwater Shrimp from the [PRC]*, Customs Data of U.S. Imports of Certain Frozen Warmwater Shrimp from Cambodia, A-570–893, ARP 10–11 (May 17, 2012) at Attach. I, *reproduced in* Def.'s App., Ct. No. 12–00289, ECF No. 58–6, at Tab 32 (showing no imports of shrimp from Cambodia during the POR); *see also Final Results*, 77 Fed. Reg. at 53,856 (noting that the relevant POR was February 1, 2010, through January 31, 2011).

merchandise entered during this POR incorrectly reported any portion of the volume of merchandise imported from China as originating in Cambodia. *See* AHSTAC's Br. at 27–28. Accordingly, AHSTAC's transshipment allegations are also insufficient to impugn the accuracy of the CBP data used to determine respondents' relative sales volumes in this review.

Commerce "enjoy[s] broad discretion in allocating [its] investigative and enforcement resources," *Torrington*, 68 F.3d at 1351, and the agency's finding that the two chosen mandatory respondents accounted for the "overwhelming majority of the total reported quantity of imports of subject merchandise to the United States during the POR," *I & D Mem.* cmt. 8 at 41, is supported by a reasonable reading of the record.[24] No further showing is required. *See* 19 U.S.C. § 1677f-1(c)(2). Accordingly, Commerce's application of § 1677f-1(c)(2)(B) in this case is sustained.

III. *Commerce's Calculation of Surrogate Labor Rates*

A. *Background*

Because Commerce treats China as a non-market economy ("NME") country, Commerce determines the normal value of merchandise from China by using surrogate market economy data to calculate production costs and profit. *See* 19 U.S.C. § 1677b(c)(1). In doing so, Commerce's valuation of the factors of production ("FOPs") must be "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [agency]." *Id.* "[T]o the extent possible," Commerce is required to use data from countries that are both economically comparable to the NME and significant producers of comparable merchandise. *Id.* at § 1677b(c)(4).

In the past, Commerce generally valued the labor FOP for NME countries by using "regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries." 19 C.F.R. § 351.408(c)(3) (2010). Regression-based NME wage rates estimated the linear relationship between yearly per capita gross national income ("GNI") and hourly wage rate ("wage") to arrive at the wage for an NME country by using the NME's GNI.[25] But 19 C.F.R. § 351.408(c)(3) was invalidated as con-

[24] *See Resp't Selection Mem.* at Attach. 1; *see also supra* note 17 and accompanying text.

[25] *Zhejiang DunAn Hetian Metal Co. v. United States*, __ CIT __,707 F. Supp. 2d 1355, 1366 (2010) (footnote omitted), *vacated on other grounds*, 652 F.3d 1333 (Fed. Cir. 2011); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371 (Fed. Cir. 2010) ("Commerce determines a linear trend that best fits the data, providing a way to predict the labor rate for a country with any given gross national income.").

trary to the statute because, rather than evaluating the extent to which it was possible to base surrogate FOP calculations on data from countries that are economically comparable to the NME and significant producers of comparable merchandise, the regulation instead formulaically required reliance on data from countries that did not satisfy one or both of these statutory requirements.[26]

In response to *Dorbest* and *Shandong*, Commerce reconsidered its approach to surrogate labor valuation, including an opportunity for public comment. The agency then published its *New Labor Rate Policy*, explaining its change in policy from a preference for using data from multiple market economies when constructing surrogate labor rates to a policy of relying on data from a single market economy to calculate all surrogate FOPs, including labor.[27] For its final results of this review, Commerce employed the *New Labor Rate Policy* to arrive at the surrogate wage rate used to construct normal value, *see I & D Mem.* cmt. 11 at 51–52, which AHSTAC now challenges. *See* AHSTAC's Br. at 38–41.

Significantly, AHSTAC also challenged Commerce's application of its *New Labor Rate Policy* in the fifth administrative review of an antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam.[28] In adjudicating that challenge, this Court sustained the *New Labor Rate Policy* as reasonable on its face, holding that "Commerce reasonably determined that, in general, the administrative costs of engaging in a complex and lengthy analysis of additional surrogate data for the labor FOP may outweigh the accuracy-enhancing benefits of doing so."[29] But because the particular evidentiary record of that proceeding included specific evidence

[26] *See Dorbest*, 604 F.3d at 1371–72 (holding that because the statute requires Commerce to use data from economically comparable countries "to the extent possible," Commerce may not employ a methodology that requires using data from both economically comparable and economically dissimilar countries, in the absence of a showing "that using the data Congress has directed Commerce to use is impossible"); *Shandong Rongxin Imp. & Exp. Co. v. United States*, __ CIT __, 774 F. Supp. 2d 1307, 1316 (2011) (holding that because the statute requires Commerce to use, "to the extent possible," data from countries that are "significant" producers of comparable merchandise, Commerce may not employ a methodology that requires using data from "countries which almost certainly have no domestic production – at least not any meaningful production, capable of having influence or effect").

[27] *Antidumping Methodologies in Proceedings Involving Non-MarketEconomies: Valuing the Factor of Production: Labor*, 76 Fed. Reg.36,092 (Dep't Commerce June 21, 2011) ("*New Labor Rate Policy*").

[28] *See Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 880 F. Supp. 2d 1348 (2012) ("*Camau I*").

[29] *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 968 F. Supp. 2d 1328, 1336 (2014) ("*Camau III*") (citing *Camau I*, __ CIT __, 880 F. Supp. 2d at 1358).

that could fairly be read to detract from Commerce's conclusion that its chosen primary surrogate country provided the best available information regarding all relevant FOPs (including labor), Commerce's application of its *New Labor Rate Policy* in that proceeding was remanded for Commerce to "to weigh and analyze the conflicting evidence and provide a reasoned explanation for the outcome of such weighing."[30]

*B. Analysis*

AHSTAC argues that Commerce's application of its *New Labor Rate Policy* when calculating surrogate labor FOP values in this review should be remanded on the same grounds as in *Camau*. *See* AHSTAC's Br. at 39, 41. But AHSTAC mischaracterizes the holdings in *Camau*.[31]

Generally, there is nothing inherently unreasonable in Commerce's decision to value all surrogate FOPs (including labor) using relevant data from a single surrogate country. *Camau I*, __ CIT at __, 880 F. Supp. 2d at 1358; *Camau III*, __ CIT at __, 968 F. Supp. 2d at 1336. The necessity for remand in *Camau* arose from the presence of specific record evidence – stemming from the actual GNI disparity between the chosen surrogate and the exporting NME – that fairly detracted from the reasonableness of Commerce's data-set selection. *See Camau III*, __ CIT at __, 968 F. Supp. 2d at 1336.[32]

[30] *Id.*

[31] For example, AHSTAC contends that Commerce's determination in the proceeding at issue in *Camau* was remanded to address prior findings regarding "wage rate variability." AHSTAC Br. at 39. But in fact the court upheld Commerce's *New Labor Rate Policy*, which implements the agency's conclusion that the accuracy-enhancing benefits of addressing wage rate variability among economically comparable potential surrogates are generally outweighed by the administrative costs of engaging in a complex and lengthy analysis (as necessary to satisfy the statutory criteria) of surrogate labor data from more than one country. *See Camau I*, __ CIT __, 880 F. Supp. 2d at 1358; *see also Camau III*, __ CIT at __, 968 F. Supp. 2d at 1336.

[32] The concern in *Camau* was that Commerce had initially chosen Bangladesh as the primary surrogate for Vietnam *without considering* the reasonableness of using Bangladeshi wage data as a surrogate for Vietnam's labor rate (because Bangladesh was chosen as the primary surrogate in that review at a time when Commerce's policy was to use multiple countries' data to calculate surrogate labor FOP values, before the *New Labor Rate Policy* went into effect). Indeed Commerce had even previously specifically rejected the use of Bangladeshi wage data for this purpose, based on the discrepancy in GNI between Bangladesh and Vietnam. *See Camau III*, __ CIT at __, 968 F. Supp. 2d at 1332. Then, applying the *New Labor Rate Policy* (which went into effect in the interim between the preliminary and final results of the proceeding at issue in *Camau*), Commerce did not in any way reevaluate whether Bangladesh was still the best potential surrogate from which to value *all* FOPs, including labor. On the contrary, Commerce did not even acknowledge that the record contained conflicting evidence and findings in this regard, including the

Here, by contrast, AHSTAC does not point to any record evidence specific to this review. AHSTAC does not suggest that the particular GNI difference between Thailand and China makes the use of Thai labor data unreasonable for the purpose of estimating fair market labor rates in China. AHSTAC makes no mention of any specific GNI values at all. *See* AHSTAC's Br. at 38–41. Instead, its challenge to Commerce's reliance on the *New Labor Rate Policy* in this review is essentially a challenge to the new policy generally, without regard to the specific evidence on this record. *See id.*

Specifically, AHSTAC argues that Commerce's reliance on its *New Labor Rate Policy* in this review should be remanded to account for Commerce's prior findings of a general correlation between wage rate and GNI and the consequent wage rate variability among countries with GNIs that Commerce treats as economically comparable. *See id.* at 39. But these are findings of a general nature, whose impact was already considered and weighed by Commerce in the context of reasoning through its *New Labor Rate Policy*.[33] In *Camau*, it was additionally argued that the record evidence indicated that the specific GNI difference between Bangladesh and Vietnam was sufficiently great as to significantly understate the estimated labor FOP, a factor which Commerce had failed to consider and weigh against the remaining evidence suggesting that Bangladesh's data as a whole were the best available on record from which to value all of the surrogate FOPs, all things considered.[34]

Because AHSTAC makes no arguments specific to the evidence on the record of this review, its challenge is essentially a renewed facial challenge to Commerce's *New Labor Rate Policy*. *See* AHSTAC's Br. at 39–41. But as AHSTAC presents no new arguments in this respect, the reasonableness of Commerce's *New Labor Rate Policy* is sustained on the same grounds as stated in *Camau I* and *Camau III*. *See Camau I*, __ CIT at __, 880 F. Supp. 2d at 1358; *Camau III*, __ CIT at __, 968 F. Supp. 2d at 1336.

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agency's own prior finding that, due to the particular GNI disparity between Bangladesh and Vietnam, Bangladeshi wage data are likely to significantly understate the estimated wage rate for Vietnam (given the generally linear relationship between GNI and wage). *See id.* at 1334, 1336–38.

[33] *See New Labor Rate Policy*, 76 Fed. Reg. at 36,093; *Camau III*, __ CIT at __, 968 F. Supp. 2d at 1336.

[34] Thus the remand in *Camau* was so that Commerce may explicitly engage in such weighing of the specific evidence on the record of that proceeding, *not* because Commerce was required to reevaluate the *general* conclusions underlying its new policy (which include the conclusion that "in general, the administrative costs of engaging in a complex and lengthy analysis of additional surrogate data for the labor FOP may outweigh the accuracy-enhancing benefits of doing so"). *Camau III*, __ CIT at __, 968 F. Supp. 2d at 1336.

## CONCLUSION

For all of the foregoing reasons, Commerce's *Final Results* are sustained against the challenges presented in this action. Judgment will issue accordingly.

Dated: May 27, 2014
New York, NY

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

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Slip Op. 14–69

FOSHAN SHUNDE YONGJIAN HOUSEWARES & HARDWARE CO., LTD., and POLDER, INC., Plaintiffs, v. UNITED STATES, Defendant, and HOME PRODUCTS INTERNATIONAL, LTD., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 10–00059
**PUBLIC VERSION**

[The Department of Commerce's determination is remanded.]

Dated: June 20, 2014

*William E. Perry*, Dorsey & Whitney LLP, of Seattle, WA, argued for plaintiffs. With him on the brief were *Emily Lawson* and *Derek A. Bishop*.

*Michael D. Snyder*, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for the defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rachael Wenthold Nimmo*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington D.C.

*Frederick L. Ikenson,* Blank Rome LLP, of Washington D.C., argued for defendant-intervenor. With him on the brief was *Larry Hampel*.

## *OPINION AND ORDER*

### EATON, Judge:

Before the court is the Department of Commerce's (the "Department" or "Commerce") Second Final Results of Redetermination Pursuant to Court Remand of the administrative review of the antidumping duty order on floor-standing metal top ironing tables and certain parts thereof from the People's Republic of China ("PRC"). Final Results of Redetermination Pursuant to Ct. Remand (ECF Dkt. No. 110) ("Second Remand Results"). On remand, Commerce was instructed to sufficiently corroborate the secondary information it relied on to assign Foshan Shunde Yongjian Housewares and Hardware Co., Ltd. ("Foshan Shunde" or, collectively with jointly represented

plaintiff/importer Polder, Inc., "plaintiffs") a rate based on adverse inferences.[1] To comply with the remand instructions, the Department was given the option to (a) supplement the record with additional information, or (b) further explain "why the Customs Data" it relied upon in the First Remand Results was substantial evidence corroborating the secondary information it relied upon when assigning the antidumping rate to plaintiff. *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 37 CIT __, __, Slip Op. 13–47, at 14 (2013) ("*Foshan Shunde II*"); Final Results of Redetermination Pursuant to Ct. Remand at 1, 3–5 (ECF Dkt. No. 71) ("First Remand Results").

## STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). "The results of a redetermination pursuant to court remand are Court No. 10–00059 Page 3 also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (citation omitted) (internal quotation marks omitted).

## DISCUSSION

### I. Background

This matter is before the court on plaintiffs' challenge to the Department's final results of the fourth administrative review of the antidumping duty order on floor-standing metal-top ironing tables and certain parts thereof from the PRC for the period of review ("POR") August 1, 2007 through July 31, 2008. *See* Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the PRC, 75 Fed. Reg. 3,201 (Dep't of Commerce Jan. 20, 2010), and the accompanying Issues & Decision Memorandum (collectively, the "Final Results"). Because of inadequacies in Foshan Shunde's questionnaire responses relating to production and sales information, in the Final Results Commerce disregarded those submissions and, after applying facts otherwise available, drew adverse inferences[2] as to the facts

[1] The Department uses the shorthand phrase "AFA" when it draws an adverse inference as permitted by 19 U.S.C. § 1677e(c).

[2] Where the Department has applied "facts otherwise available" under 19 U.S.C. § 1677e(a) to determine a rate and made an additional finding that the lack of useable evidence on the record was the result of an interested party's failure to cooperate with the Department's request for information to the best of its ability, the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b) (2006).

relating to Foshan Shunde's factors of production and sales data. Based on the same inadequacies, the Department also disregarded Foshan Shunde's submissions regarding its independence from the PRC government, determining that Foshan Shunde could not demonstrate an entitlement to separate-rate status and assigning plaintiff the PRC-wide rate of 157.68 percent. *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT __, __, Slip Op. 11–123, at 4–5 (2011) ("*Foshan Shunde I*"). In *Foshan Shunde I*, the court sustained Commerce's determination to draw adverse inferences as to the facts relating to Foshan Shunde's factors of production and sales data, but remanded the case for the Department to reexamine the facts surrounding its separate rate determination and the antidumping duty rate applied to Foshan Shunde's merchandise. *Id.* at __, Slip Op. 11–123, at 40–42.

In the First Remand Results, the Department determined that Foshan Shunde "demonstrated entitlement to a separate rate," but that the record was devoid of any useful information to calculate a rate because Foshan Shunde provided inadequate factors of production and sales data. First Remand Results at 1. Relying on the finding in the Final Results, later sustained by the court, that Foshan Shunde had failed to cooperate to the best of its ability with the Department's requests for information, the Department, based on adverse inferences, assigned a 157.68 percent rate to Foshan Shunde. This rate was the calculated rate for a cooperating respondent during the investigation.[3] First Remand Results at 1, 3–5, 7.

The Department argued the rate assigned to Foshan Shunde was supported by substantial evidence and in accordance with law because (1) the rate was based upon secondary information that was corroborated as required by 19 U.S.C. § 1677e(c), (2) the assigned rate was "an individually calculated rate for a cooperative respondent in the investigation," (3) the rate "ha[d] been used repeatedly as the rate assigned to the China-wide entity representing the rate for the industry," and (4) data derived from imports of the subject merchandise into the United States during the POR ("Customs Data") showed that some market participants were importing subject merchandise while being subject to the 157.68 percent rate. First Remand Results at 8, 9.

In *Foshan Shunde II*, the court sustained the Department's determinations that Foshan Shunde was entitled to a separate rate and to

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[3] The period of investigation was from October 1, 2002 through March 31, 2003. In the final results of the investigation, rates of 9.47 percent, 72.29 percent, and 157.68 percent were calculated or assigned. *See* Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the PRC, 69 Fed. Reg. 47,868 (Dep't of Commerce Aug. 6, 2004) (notice of amended final determination of sales at less than fair value).

use adverse inferences to determine Foshan Shunde's rate. The court, however, further held that the Department had not sufficiently corroborated the secondary information it used to assign the rate. In particular, it held that the mere repeated assignment, in other reviews, of a rate that was calculated during the investigation, could not be used as corroboration for assigning the 157.68 percent rate to Foshan Shunde. *Foshan Shunde II*, 37 CIT at __, Slip Op. 13–47, at 9 (citing 19 U.S.C. § 1677e(c); 19 C.F.R. § 351.308(d) (2008)).

As to the claimed corroboration of the 157.68 percent rate by relying on evidence that some importers had been subject to the rate during the POR, the court held that customs information was an appropriate independent source to corroborate secondary information as a general matter. *See* 19 U.S.C. § 1677e(c) ("When [the Department] relies on secondary information, . . . [it] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal."). The court further found, however, that the specific Customs Data relied upon by the Department was lacking. Specifically, the relevance of the relied upon data to plaintiff's commercial reality was not supported by substantial evidence because, among other things, nothing on the record expressly identified the entries listed in the Customs Data as being entries of subject merchandise. *Foshan Shunde II*, 37 CIT at __, Slip Op. 13–47, at 13.

*The Second Remand Results*

In the Second Remand Results, the Department again drew an adverse inference as to the facts relating to Foshan Shunde's rate and, using the investigation rate as secondary information, again assigned Foshan Shunde a 157.68 percent rate. Second Remand Results at 1. To corroborate the 157.68 percent rate, the Department again relied solely on the Customs Data as its independent source. Second Remand Results at 1. In so doing, the Department limited itself to the evidence present on the record prior to remand and concluded that the rate selected "is to the extent practicable corroborated by information from independent sources pursuant to 19 U.S.C. § 1677e(c)." Second Remand Results at 1.

The Department observed that "the information from independent sources is limited to the Customs data," that "[n]o average unit value or price list data is on the record of this proceeding," and that it "has identified no other independent sources beyond these Customs data that could assist the Department in determining the probative value of the 157.68 percent AFA rate assigned to Foshan Shunde." Second Remand Results at 5.

In its effort to comply with the court's instruction to provide additional explanation as to the relevance of the Customs Data to Foshan Shunde, Commerce makes several points. First, the Department argues that the rate is relevant to Foshan Shunde because it had "already been calculated in a prior segment of the proceeding at the time Foshan Shunde took the risk of providing unusable data to the Department in this review." Second Remand Results at 6. That is, for Commerce, because "Foshan Shunde's actions demonstrate that it preferred to avoid providing to the Department the necessary information for calculating its true margin . . . Foshan Shunde knowingly chose to [accept the] risk" of receiving the selected rate and, thus, the selected "rate is relevant to Foshan Shunde by virtue of its choice not to cooperate." Second Remand Results at 6. "Thus, even before looking to the corroborative evidence, the 157.68 percent rate is relevant to Foshan Shunde by virtue of its choice not to cooperate." Second Remand Results at 6.

Second, the Department argues that the entries not only show that some market participants had imported subject merchandise at the 157.68 percent rate during the POR, but that some of those imports were of Foshan Shunde merchandise. The Department insists that the Customs Data represented subject merchandise because "the column 'AD_Rate'[4] specifically includes shipments subject to antidumping duty liabilities. [The Department] thus maintain[s] that the portion of the entries for which Customs assessed an antidumping duty were subject to the antidumping duty order, and of the tariff classification specific to ironing tables." Second Remand Results at 7. In other words, the Department argues that although the Customs Data spreadsheet does not contain language identifying the tariff heading of the entries it covers, the heading can be inferred from the application of a 157.68 percent liquidation rate. In addition, the Department insists that, since some of the entries were Foshan Shunde's merchandise, these entries represented some subject merchandise and are, thus, probative of Foshan Shunde's commercial reality. Second Remand Results at 7–8.

The Department acknowledges that the entries of Foshan Shunde merchandise reflected in the Customs Data were of "small quantities" and that those entries represented "both subject and non-subject merchandise." Second Remand Results at 7, 8. However, Commerce argues that the quantity of merchandise imported from other producers at the 157.68 percent rate "support[s] the conclusion that exporters can, and have chosen to, participate in the U.S. market while

[4] The "AD_RATE" or "antidumping rate" column is one of eleven columns in the Customs Data. The "AD_RATE" column contains the value [1.5768] for each entry.

being assessed" that rate and, thus, the rate "reflects the commercial reality of Foshan Shunde."[5] Second Remand Results at 8–9, 9. The Department also argues that the Customs Data is relevant to Foshan Shunde because one entry of a large value was made by an alleged affiliate of Foshan Shunde. Second Remand Results at 9. Taken as a whole, it is the Department's position that the liquidation rate of these entries tends to prove that Foshan Shunde could, and did, do business in subject merchandise during the POR while its products were subject to the 157.68 percent rate.

In response to Foshan Shunde's comments during the remand proceedings, the Department rejected arguments that it had failed to explain sufficiently why the Customs Data was relevant to Foshan Shunde's commercial reality. In particular, plaintiffs asserted that the Customs Data was not relevant to Foshan Shunde because the Customs Data did not identify the tariff heading of the imported merchandise or the names of the importers. Moreover, the Department did not credit plaintiffs' argument that, because the 157.68 percent rate was imposed on domestic importers at liquidation and those importers were unaware of what their ultimate rate would be at the time they imported the goods, the rate was not corroborated by the entries. That is, for plaintiffs, because the 157.68 percent rate was imposed months after importation, the rate can not be said to represent any importer's or exporter's commercial reality during the POR. Second Remand Results at 9–11.

## II. Discussion

### *A. The Corroboration Requirement of 19 U.S.C. § 1677e(c)*

When Commerce relies on secondary information to assign a rate based on an adverse inference it must, "to the extent practicable," corroborate that secondary information using "information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). In creating this requirement, Congress[6] expressly intended to check the Department's ability to select potentially suspect second-

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[5] It is worthwhile noting that, in accordance with case law, Commerce is acknowledging here that it is not commercial reality in general that is important, but rather Foshan Shunde's commercial reality. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1371 (Fed. Cir. 2012) (Observing that "because nothing in the record . . . tied the AFA rate . . . to [the respondent], we concluded that the AFA rate was unrelated to commercial reality and not a reasonably accurate estimate of [the respondent's] actual dumping, hence, not supported by substantial evidence.").

[6] The corroboration requirement of 19 U.S.C. § 1677e(c) was added as part of the Uruguay Round Agreements Act. *See* Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 870, *reprinted* in 1994 U.S.C.C.A.N. 4040, 4198–99 (1994).

ary information when drawing adverse inferences. Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 870, *reprinted* in 1994 U.S.C.C.A.N. 4040, 4199 (1994) ("SAA") ("Secondary information may not be entirely reliable because, for example, as in the case of the petition, it is based on unverified allegations, or as in the case of information from prior section 751(a) reviews, it concerns a different time frame than the one at issue.").

Thus, as explained in *Foshan Shunde II*, the statute requires that the assignment of a rate resulting from an adverse inference based on secondary information be corroborated by evidence showing that the rate is "reliable and relevant to the particular respondent." *Foshan Shunde II*, 37 CIT at __, Slip Op. 13–47, at 9 (collecting cases); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1371 n.2 (Fed. Cir. 2012) ("Commerce ha[s] interpreted 'corroborate' to mean that [Commerce] will, to the extent practicable, examine the reliability and relevance of the information submitted." (citation omitted)); *Hubscher Ribbon Corp. v. United States*, 38 CIT __, __, Slip Op. 14–43, at 8 (2014) ("In practice, 'corroboration' involves confirming that the secondary information has 'probative value' by examining its 'reliability and relevance.'" (citations omitted)); *Essar Steel Ltd. v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1306, 1310 (2013); *Nan Ya Plastics Corp. v. United States*, 37 CIT __, __, 906 F. Supp. 2d 1348, 1351–52 (2013).

To demonstrate the reliability and relevance of its selected secondary information, the Department is required by the statute to locate "independent sources that are reasonably at [its] disposal" that bear on the facts about which the Department is drawing the adverse inference. 19 U.S.C. § 1677e(c). Commerce is then to compare the secondary information it is relying on to the independent sources it has gathered to *see* if it has selected "secondary information that has some grounding in [the] commercial reality" of the respondent during the POR. *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010).

It is important to note that Congress placed the obligation to corroborate secondary information using independent sources on the Department, not on the interested parties who are normally responsible for generating the administrative record. Indeed, the legislative history demonstrates that Congress intended the Department to look beyond the record compiled by the parties when corroborating secondary information. For instance, the SAA's examples of "independent sources" make this clear: "Independent sources may include, for example, published price lists, official import statistics and customs

data, *and* information obtained from interested parties during the particular investigation or review." SAA at 4199 (emphasis added). The "information obtained from interested parties during the particular investigation or review" is precisely what constitutes the record as built by the parties. The inclusion of other independent sources as examples (published price lists and import statistics) is, then, demonstrative of Congress' intent that the Department must go beyond the record built by the parties, to the extent practicable, when seeking to corroborate its selected secondary information with independent sources.

The Department's regulations mirror this understanding of its duty when corroborating secondary information. There, again, examples of independent sources expressly include information beyond that placed on the record by the parties: "Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review." 19 C.F.R. § 351.308(d) (2008).

The upshot of Congress' direction is that the Department is not excused from its obligation to corroborate secondary information used to draw an adverse inference simply because the interested parties have placed no corroborative information on the record. *See Washington Int'l Ins. Co. v. United States*, 34 CIT __, __, Slip Op. 10–16, at 5 n.3 (2010) ("Nothing in the antidumping statute indicates the measure or standard by which such secondary information must be corroborated, but 'to the extent practicable' cuts a wide swath. In this regard, at least it may be opined that Congress intended Commerce to exert its utmost to remove doubt as to the reliability of any secondary information it would rely upon."). The Department has some leeway when the parties have failed to put sufficient corroborative evidence on the record, but it still must make a serious attempt to point to independent sources reasonably at its disposal that indicate the relevance of the secondary material to the respondent. *See, e.g.*, *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 36 CIT __, __, Slip. Op. 12–83, at 8–10 (2012) (finding secondary information properly corroborated where the Department compared the selected information with the plaintiff's sales data in the most recent review for which it had been given a calculated rate). Put another way, Commerce may not satisfy its obligation to corroborate simply by saying that the record is empty of useful information and that corroboration is "not practicable" as a result.

### B. *The Department Has Failed to Demonstrate the Relevance of the Customs Data*

In the Second Remand Results, the Department determined not to reopen the record to obtain additional information "reasonably at [its] disposal" that would corroborate the investigation rate, even though it did so when the case was remanded for the first time. *See* First Remand Results at 9 ("To further corroborate the rate, we have reviewed entry documentation and U.S. Customs and Border Protection (CBP) liquidation data which support the conclusion that the 157.68 percent rate represents 'commercial reality.' *See* CBP ACS Data available at Exhibit 1 of the *Draft Redetermination Memorandum*."). Rather, the Department continues to rely on the Customs Data it placed on the record during the remand proceedings following *Foshan Shunde I*. In *Foshan Shunde II*, the Department was instructed to explain the relevance of the Customs Data to the commercial reality of Foshan Shunde. Because the court found that the Department failed to identify any record evidence indicating that the Customs Data represented entries of subject merchandise, the Department was further directed to identify such record evidence or add such evidence to the record. *Foshan Shunde II*, 37 CIT at __, Slip Op. 13–47, at 14. The Department was permitted to reopen the record if additional evidence was required to comply with the court's instruction. Based on the existing record, however, Commerce's explanation as to why it has sufficiently corroborated the assignment of the 157.68 percent rate is unconvincing.

First, the Department's assertion that the rate is automatically relevant as a result of Foshan Shunde's failure to comply with the Department's requests for information to the best of its ability during the review stretches a point. Commerce has a long history of seeking to rely on presumptions as substitutes for actual evidence. Indeed, its argument in this case is little more than a new attempt to satisfy the corroboration requirement with a modified form of the *Rhone Poulenc* presumption. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990). *Rhone Poulenc* was a pre-Uruguay Round Agreements[7] case that permitted the Department to infer that the highest

[7] That *Rhone Poulenc* was decided prior to the Uruguay Round Agreements is important because that case "reflected the state of the law prior to the enactment of the Act that implemented the Agreements' negotiated terms." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1336, 1347 (2011) (citing *Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 947, 491 F. Supp. 2d 1326, 1351 (2007)). As part of the Uruguay Round Agreements Act, "Congress directed Commerce to make additional findings in AFA cases." *Id*. at __, 722 F. Supp. 2d at 1348 (citing 19 U.S.C. § 1677e(c)). Among the additional findings that Congress required of the Department was the corroboration of secondary information used to make an adverse inference under 19 U.S.C. § 1677e(c). Accordingly, the

prior margin of a particular respondent was the most probative evidence of that party's rate when the respondent failed to answer the Department's questionnaires. *Rhone Poulenc*, 899 F.2d at 1190 ("[I]t reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less.").

This Court has previously rejected attempts to "dispense with [the] corroboration requirement by employing the *Rhone Poulenc* presumption" and it does so again now. *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1336, 1348 (2011). Indeed, the court has already rejected its application in this case. *Foshan Shunde II*, 37 CIT at __, Slip Op. 13–47, at 10 n.4 ("This is not a case where the *Rhone Poulenc* presumption that the highest prior margin is probative applies."). To the extent that the *Rhone Poulenc* presumption can be used within the current statutory framework, the Federal Circuit has limited its applicability to situations where (1) the rate used was calculated in a prior review segment for the party now failing to cooperate, and (2) the party failing to cooperate did not respond to the Department's questionnaires in any way. *See KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010).

Neither of these situations is present in this case. The 157.68 percent rate, that the Department wishes to use here, was not calculated for Foshan Shunde and Foshan Shunde did, in fact, respond to the Department's questionnaires, albeit in an unacceptable manner. More importantly, the presumption Commerce wishes to rely on here is not based on a "common sense inference." That is, in this review, plaintiff answered questionnaire inquires as to the amount of each input by using a "weight based" methodology that the Department had found acceptable in the first administrative review. In this review, however, Commerce chose not to accept this "weight based" methodology, but rather sought to probe more deeply into the amount of each input used in the manufacture of the ironing tables. The Department did this by issuing supplemental questionnaires, each of which Foshan Shunde answered. The court sustained the determination to apply adverse inferences based on plaintiff's failure to cooperate to the best of its ability, because it was not until Foshan Shunde answered the fourth supplemental questionnaire that it provided the production notes that more clearly identified the amount of each input used to manufacture the subject merchandise, and because plaintiff was slow to produce evidence of the kind of steel that it used.

decision in *Rhone Poulenc* "necessarily did not hold that the presumption could replace actual corroboration." *Id.* at __, 722 F. Supp. 2d at 1348.

These facts, however, do not bear even a passing resemblance to those that led the Federal Circuit to permit the use of the *Rhone Polenc* presumption in *KYD*. There, the Federal Circuit focused on the exporter's failure to cooperate entirely, submitting no information. In addition, the rate the *Rhone Polenc* presumption was used to corroborate in *KYD* was a rate assigned to the same exporter in a prior segment of the review. *KYD*, 607 F.3d at 767. Here, Foshan Shunde submitted record evidence of its inputs and the rate the Department seeks to support is not one that has previously been assigned to Foshan Shunde. Accordingly, this is not a case where a respondent willfully chose not to comply with the Department's information requests knowing that had it complied the result would have been a higher rate. Therefore, no "common sense inference" can be drawn and the Department can not satisfy its obligation to corroborate the 157.68 percent rate on the basis of the presumption it wishes to use.

Second, the Department's determination that the Customs Data represents subject merchandise is not based on substantial evidence. In order to demonstrate that subject merchandise was imported at a 157.68 percent rate and, thus, that the rate is reflective of Foshan Shunde's commercial reality, the Department relies on entries that were liquidated at a 157.68 percent antidumping duty rate and entered during the POR. The Department, however, only points to the liquidation rate of the entries, and that some entries were made by Foshan Shunde and a Foshan Shunde affiliate, as evidence to corroborate the 157.68 percent rate. Notably absent from Commerce's analysis, however, is any direct evidence that the entries were classified under the HTS heading for ironing tables, or any assertion that no other products imported during the POR were liquidated at the 157.68 percent rate. At its core, the Department's explanation is that because certain products imported during the POR were liquidated at a rate of 157.68 percent, those products were necessarily entries of subject merchandise. Boot-strapping on this assertion, the Department claims that, since some of the entries were the products of Foshan Shunde and a claimed affiliate, as well as others, the entries represent Foshan Shunde's commercial reality with respect to its subject ironing tables. Thus, the Department is attempting to use the 157.68 percent liquidation rate to demonstrate that the data represents entries of subject merchandise and then to use that conclusion to show the relevance of the rate to plaintiff. In other words, the only record support of the relevance of the rates in the Customs Data are the rates themselves.

Had the Department pointed to some record evidence that no other type of merchandise, imported during the POR, was liquidated at a rate of 157.68 percent, its conclusion that the entries represented subject merchandise might be supported by substantial evidence. Commerce, however, cites no evidence to support this proposition. *See* Second Remand Results at 7 ("The Customs data consist of a summary spreadsheet that lists . . . the manufacturer (variable MFR-NAME), the antidumping duty liquidation rate (variable AD_Rate) and the quantity of merchandise liquidated at the 157.68 percent rate (variable LIQ_AMT). Regarding the tariff classification of the entries that were liquidated at that rate, we note that the column 'AD_Rate' specifically includes shipments subject to antidumping duty liabilities. We thus maintain that the portion of the entries for which Customs assessed an antidumping duty were subject to the antidumping duty order, and of the tariff classification specific to ironing tables."). This failure is particularly striking because Commerce has been able to produce Customs information, which includes the classification of the entered merchandise, in previous cases. *See, e.g.*, *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT __, __, Slip Op. 13–71 at 13 n.5 (2013).

Similarly, if the record contained evidence that Foshan Shunde only exported subject merchandise to the United States during the POR, then the conclusion that the entries of its merchandise were entries of subject merchandise might be sufficiently supported. The Department, however, cites no record evidence that Foshan Shunde exported only subject merchandise during the POR, and its analysis of the Customs Data indicates an awareness that Foshan Shunde does, in fact, export non-subject merchandise. *See* Second Remand Results at 7– 8. Thus, there is no record evidence that only entries of subject merchandise were subjected to a 157.68 percent rate or that the importations of Foshan Shunde merchandise reflected in the Customs Data were necessarily importations of subject merchandise.

Moreover, even if there were substantial evidence to support that the entries listed in the Customs Data were entries of subject merchandise, the Customs Data would still fail to demonstrate the relevance of the 157.68 percent rate to Foshan Shunde. This is because the Customs Data shows only the liquidation rates[8] of entries of

[8] The preliminary injunction entered in this case restrained the Department from liquidating subject merchandise "exported from the [PRC] to the United States by Foshan Shunde . . . and imported by Polder" during the POR. Prelim. Inj. at 2 (ECF Dkt. No. 19). Other entries of subject merchandise during the POR, which the Department argues are what the Customs Data reflects, were not suspended from liquidation and may have been liquidated at the 157.68 percent rate the Department applied in the Final Determination. If the entries in the Customs Data are indeed of subject merchandise, their liquidation at the 157.68 percent rate is, thus, on account of the Final Determination.

allegedly subject merchandise imported during the POR. At the time of importation only the cash-deposit rates were known. The ultimate liquidation rate of merchandise subject to a review of an antidumping duty order is unknown until after the completion of the review itself. Thus, for Commerce to assert that Foshan Shunde or other exporters "chose" to participate in the U.S. market knowing that its products were subject to a 157.68 percent rate simply assumes too much.[9] The Customs Data contains no information as to the cash-deposit rates, which would have been the rate at which Foshan Shunde or other exporters of subject merchandise would have voluntarily made sales. Therefore, despite the Department's arguments to the contrary, the Customs Data sheds no light on whether "exporters can, and have chosen to, participate in the U.S. market while being assessed antidumping duties of 157.68 percent." Second Remand Results at 8–9. That is, there is no evidence Foshan Shunde sold subject merchandise into the United States knowing that the liquidation rate would ultimately be determined to be 157.68 percent. Foshan Shunde's commercial reality is thus not demonstrated by this set of facts.

### *C. Commerce Has Not Adequately Explained Why Corroboration Is Not Practicable*

In the Second Remand results, the Department asserts that it "has identified no other independent sources beyond these Customs data that could assist the Department in determining the probative value of the 157.68 percent AFA rate assigned to Foshan Shunde." Second Remand Results at 5. The Department, however, makes no mention of what other independent sources it attempted to identify. Considering the Department's past practice, it seems unlikely that no other independent sources were available to it for the purposes of corroboration. For instance, as has been noted, the Department has acquired Customs importation information that identifies both the tariff heading of the imported merchandise and the rate of antidumping duty imposed in other cases. *See, e.g.*, *Since Hardware*, 37 CIT at __, Slip Op. 13–71 at 13 n.5. Moreover, the SAA and Commerce's regulations themselves identify "published price lists" and "official import statistics" as examples of independent sources that the Department could consult to corroborate secondary information. SAA at 4199.

[9] An importer's willingness to purchase products ultimately subject to a particular antidumping duty rate is not particularly probative of a producer's or exporter's commercial reality. Because of the retrospective nature of the United States' antidumping regime, what an importer may be willing to pay at the time of importation may not resemble what it is ultimately called upon to pay at liquidation. In addition, factors such as existing contractual obligations, test sales for new importers, or other commercial considerations may divorce an importer's decision to purchase from the cash-deposit rate it initially pays.

Where the Department states that it has been unable to identify independent sources to corroborate its selected secondary information, without more, the reasonable conclusion to be drawn under the statute is not that corroborating its selected secondary information is "not practicable." Rather, the reasonable conclusion is that Commerce's selected secondary information is not probative and that the Department should rethink its selection of that secondary information. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1380 (Fed. Cir. 2013) ("[T]his court finds no support in this court's precedents or the statute's plain text for the proposition that limited resources . . . can override fairness or accuracy. . . . '[I]f the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" (citations omitted)); *Gallant Ocean*, 602 F.3d at 324–25 (remanding the Department's determination where it failed to corroborate its selected secondary information and other "reliable information suggest[ed] the application of a much lower margin.").

The "to the extent practicable" limitation on the duty to corroborate was intended to permit the Department to rely on relevant independent sources whose data is "reasonably at [its] disposal." 19 U.S.C. § 1677e(c). The statute and this Court do not require the Department to go to extraordinary lengths to corroborate secondary information where the record is deficient. *See, e.g.*, *PSC VSMPO-AVISMA Corp. v. United States*, 35 CIT __, __, Slip Op. 11–115, at 5 (2011) (using Global Trade Atlas data); *Hubscher Ribbon*, 38 CIT at __, Slip Op. 14–43, at 14–16 (using petition data); *Nan Ya Plastics*, 38 CIT at __, 906 F. Supp. 2d at 1351–53 (using data from prior segments of the review and collecting cases); *Tianjin Mach.*, 36 CIT at __, Slip. Op. 12–83, at 10– 13 (using data from prior segments of the review). Nonetheless, the Department is not permitted to rely solely on a claimed absence of corroborating independent information to support its conclusions without an explanation. Rather, the Department must still seek relevant independent sources to corroborate its secondary information, and if it cannot locate such information, it must describe the steps that it has taken so that a reviewing Court can determine if the Department's finding that corroboration was not practicable is supported by substantial evidence and in accordance with law. *See Toyota Motor Sales, U.S.A., Inc. v. United States*, 22 CIT 643, 651, 15 F. Supp. 2d 872, 877–79 (1998) ("For purposes of judicial review, the evidence before this Court is limited to the evidence contained in the administrative record. The Court is not to substitute its own determination for the agency's but rather is to determine whether Com-

merce's determination is supported by substantial evidence on the record and is otherwise in accordance with law." (citations omitted)).

Accordingly, if on remand the Department continues to maintain that there are no other independent sources reasonably at its disposal which are relevant to the probative value of its selected secondary information, it shall explain what steps it took to locate relevant independent sources and why those steps bore no fruit.

## CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the Second Remand Results are REMANDED; it is further

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

ORDERED that should the Department continue to assign Foshan Shunde the 157.68 percent rate, the Department shall open the record and make all reasonably practicable efforts to identify independent sources reasonably at its disposal that bear on the relevance of the 157.68 percent rate to Foshan Shunde; it is further

ORDERED that should the Department be unable to identify any independent sources that bear on the relevance of the 157.68 percent rate, it will explain what independent sources it considered and why those sources contained no relevant information; it is further

ORDERED that should the Department decline to continue to assign the 157.68 percent rate, it shall determine a separate rate for Foshan Shunde that is supported by substantial evidence and in accordance with law; and it is further

ORDERED that the remand results shall be due on September 13, 2014; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: June 20, 2014
New York, New York

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

Slip Op. 14–78

JBF RAK LLC, Plaintiff, v. UNITED STATES, Defendant, and MITSUBISHI POLYESTER FILM, INC., DUPONT TEIJIN FILMS and SKC, INC., Defendant-Intervenors.

Before: Judith M. Barzilay, Senior Judge
Court No. 13–00211

[Commerce's final results are sustained.]

Dated: July 1, 2014

*Jack D. Mlawski* and *John J. Galvin*, Galvin & Mlawski, for Plaintiff.

*Stuart F. Delery*, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, (*Melissa M. Devine*), Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of counsel, *Devin S. Sikes*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

*Ronald I. Meltzer*, *Patrick J. McLain*, *David M. Horn*, and *Jeffrey I. Kessler*, Wilmer Cutler Pickering Hale and Dorr LLP, for Defendant-Intervenors.

## *OPINION*

**BARZILAY, Senior Judge:**

Before the court is Plaintiff JBF RAK LLC's ("JBF RAK") motion for judgment on the agency record under USCIT Rule 56.2, challenging Defendant U.S. Department of Commerce's ("Commerce") final results of the administrative review covering polyethylene terephthalate film ("PET Film") from United Arab Emirates for the November 1, 2010 through October 31, 2011 period of review. *See Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates*, 78 Fed. Reg. 29,700 (Dep't Commerce May 21, 2013) (final results) ("*Final Results*"); *Issues and Decision Memorandum for Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates*, A-520–803 (May 13, 2013) ("*Issues and Decision Memorandum*"), *available at* http://enforcement.trade.gov/frn/summary/uae/2013–12086–1.pdf (last visited July 1, 2014). Specifically, JBF RAK claims that (1) Commerce unlawfully applied its targeted dumping methodology in the context of an administrative review; (2) Commerce improperly considered petitioners' allegation of targeted dumping; (3) Commerce unlawfully issued a post-preliminary determination; (4) Commerce failed to consider certain facts about JBF RAK's pricing practices in its targeted dumping determination; (5) Commerce's improperly applied its model matching methodology; and (6) Commerce unlawfully applied its 15-Day Rule for issuing liquidation instructions. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and (i). For the reasons set forth below, the court sustains Commerce's *Final Results*.

### I. STANDARD OF REVIEW

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court

of International Trade sustains Commerce‘s determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is "reasonable and supported by the record as a whole." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotations and citation omitted). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) ("*Chevron*"), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

## II. BACKGROUND

JBF RAK is a manufacturer and exporter of PET Film from the United Arab Emirates. JBF RAK and other interested parties requested that Commerce conduct an administrative review of the antidumping duty order on PET Film covering the November 1, 2010 through October 31, 2011 period of review. After Commerce initiated the review, but before publishing the preliminary results, petitioners filed an allegation of targeted dumping against JBF RAK. Commerce published its preliminary results and assigned JBF RAK a dumping margin of 5.31% using its average-to-average comparison methodology. *See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates*, 77 Fed. Reg. 73,010 (Dep't Commerce Dec. 7, 2012) (preliminary results) ("*Preliminary Results*"). Commerce, though, indicated that it did not have sufficient time to analyze the targeted dumping issue and therefore addressed it later in the proceeding.

Commerce published a post-preliminary determination addressing the issue of targeted dumping on March 8, 2013. *See 2010–2011 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Post-Preliminary Analysis and Calculation Memorandum of JBF RAK LLC*, A-520–803 (Dep't Commerce Mar. 8, 2013) ("*Post-Preliminary Determination*"). Commerce preliminarily concluded that JBF RAK had engaged in targeted dumping and assigned a revised dumping margin of 9.80% using its average-to-transaction comparison methodology. Commerce then invited interested parties to comment on its targeted dumping analysis. In the *Final Results*, Commerce continued to apply the average-to-transaction comparison methodology and assigned JBF RAK a dumping margin of 9.80%. *See Final Results*, 78 Fed. Reg. 29,700.

## III. DISCUSSION

### *A. Targeted Dumping in Administrative Reviews*

JBF RAK argues that there is no statutory authority for Commerce to consider an allegation of targeted dumping in the context of an administrative review. JBF RAK Br. 6. It claims that 19 U.S.C. § 1677f-1(d) authorizes Commerce to apply its average-to-transaction comparison method in the context of an investigation, but does not authorize Commerce to apply that methodology in the context of a review. JBF RAK Br. 7–8. JBF RAK claims that Commerce's application of the average-to-transaction comparison methodology in the context of a review violates the statute. JBF RAK Br. 8–9. The court disagrees.

In an administrative review, the statute requires Commerce to review and determine the amount of any antidumping duty, 19 U.S.C. § 1675(a)(1)(B), by calculating the normal value and export price (or constructed export price) of each entry of subject merchandise, and the dumping margin of each such entry. § 1675(a)(2)(A). The term "dumping margin" is defined by statute as "the amount by which normal value exceeds the export price or constructed export price of the subject merchandise. § 1677(35)(A). Section 1677f-1(d), in turn, establishes three different methods by which Commerce may compare normal value with export price to determine whether merchandise is being sold for less than fair value (*i.e.*, dumping). *See also* H.R. Doc. No. 103316 vol. I (1994), reprinted in 19 U.S.C.C.A.N. 3373 ("SAA"). Although the statute places some restrictions on Commerce's selection of a particular methodology in investigations, *see* §

1677f1(d)(1), it is silent with respect to administrative reviews. *See* § 1677f-1(d)(2). Commerce, therefore, has exercised its gap-filling discretion by applying a comparison methodology in reviews that parallels the methodology used in investigations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings,* 77 Fed. Reg. 8,101, 8,102 (Dep't of Commerce Feb. 14, 2012). Commerce promulgated a regulation that codifies its approach in both investigations and reviews. *See* 19 C.F.R. § 351.414. It states that in "an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case." *Id.* § 351.414(c)(1). This gives Commerce discretion to apply its average-to-transaction methodology when the facts of a particular case justify using it rather than the average-to-average methodology.

Contrary to JBF RAK's claims, Commerce's decision to apply its average-to-transaction comparison methodology in the context of an administrative review is reasonable. As Commerce explained,

> The silence of the statute with regard to application of an alternative comparison methodology in administrative reviews does not preclude the Department from applying such a practice. Indeed, the Court of Appeals for the Federal Circuit (Federal Circuit) has stated that courts "must, as we do, defer to Commerce's reasonable construction of its governing statute where Congress 'leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances.'" Further, the Court of International Trade has stated that this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious.'" We find that the above discussion of the extension of the statute with respect to investigations is a logical, reasonable, and deliberative method to fill the silence with regard to administrative reviews.
>
> Further, the Department's revision of its practice with regard to administrative reviews, and to follow its World Trade Organization (WTO)-consistent practice for investigations, was a deliberate decision on the part of the Executive Branch pursuant to the authority provided in section 123 of the Uruguay Round

> Agreements Act. Specifically, the Executive Branch solicited public comments, consulted with the appropriate congressional committees, and issued a preliminary and final determination. This decision was made in order to implement several adverse WTO reports in which it was found that the United States was not meeting its WTO obligations.

*Issues and Decision Memorandum* at 6.

Commerce has provided a legitimate explanation for applying its targeted dumping methodology in this context. It is logical for Commerce to borrow the comparison methodologies it uses to uncover dumping in investigations and apply those same methodologies in administrative reviews. The fact that the statute is silent with regard to administrative reviews does not preclude Commerce from filling gaps in the statute to properly calculate and assign antidumping duties. In fact, this is precisely the type of the situation where Commerce would be expected to establish comparison methodologies to apply in administrative reviews. This deliberate policy choice by Commerce does not violate the statute or SAA. Moreover, it does not violate any rules of statutory interpretation as suggested by JBF RAK. JBF RAK Br. 8. It is therefore a reasonable exercise of Commerce's gap-filling authority under 19 U.S.C. 1677f-1(d). Indeed, this Court has already considered another case in which Commerce applied its targeted dumping methodology in the context of an administrative review. *See Timken Co. v. United States*, 38 CIT __, 968 F. Supp. 2d 1279 (2014) ("*Timken*"). Although this particular issue was never raised, *Timken* does imply that Commerce may lawfully apply its targeted dumping methodology in reviews.

JBF RAK cites several court decisions to support its argument but, unfortunately, has cherry-picked various quotes and mischaracterized the legal principles established in those decisions to advance its preferred outcome. JBF RAK Br. 8 (citing *FAG Italia S.p.A. v. United States*, 291 F.3d 806 (Fed. Cir. 2002), *Nken v. Holder*, 556 U.S. 418, 430 (2009), *Brown v. Gardner*, 513 U.S. 115, 120 (1994)). Commerce explained, and the court agrees, that these cases have no application here. *See Issues and Decision Memorandum* at 6–7 ("With respect to *FAG Italia*, JBF mischaracterizes the Federal Circuit's holding. In that case, and unlike the instant review, the Federal Circuit determined that the statute unambiguously did not provide the Department with the authority to take action because the 'absence of a statutory probation cannot be the source of agency authority.' . . . [T]he Act provides the Department with the authority to engage in comparisons between normal value and export price to calculate

dumping margins; however, as explained above, in the context of an administrative review, the Act does not state explicitly which method the Department must use in so doing. The Department has reasonably filled that gap to allow it to use the A-T comparison method when it encounters certain patterns of export prices. Thus, *FAG Italia* is inapposite to the current proceeding. Similarly, in *Brown*, the Supreme Court found the relevant statutory language at issue to include express terms that resolved the inquiry. 513 U.S. at 120. However, as explained above, the provision at issue in this proceeding does not expressly resolve the issue. Consequently, *Brown* does not support JBF's arguments. Finally, as to *Nken*, that case did not involve an interpretation of a statute under the *Chevron* framework by which the Department also must interpret the Act and, thus, concerns a different scenario than that faced by the Department in this proceeding."). The court will therefore sustain Commerce's decision to apply its average-to-transaction methodology in the context of an administrative review as a permissible construction of the statute.

*B. Timeliness of Targeted Dumping Allegation*

JBF RAK also claims that Commerce improperly considered the targeted dumping allegation because it was filed too late in the administrative proceedings. More specifically, JBF RAK argues that petitioners failed to file their targeted dumping allegation at least thirty-days before the preliminary determination as required by the *old* regulation, 19 C.F.R. § 351.301(d)(5) (2007) (repealed). JBF RAK Br. 9–10. This argument implicates a secondary argument concerning whether Commerce properly withdrew its targeting dumping regulations in 2008. JBF RAK Br. 10 (citing *Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT __, 918 F. Supp. 2d 1317 (2013) ("*Gold East*")). Alternatively, JBF RAK argues that if the old regulation does not apply, then petitioners' targeted dumping allegation is nevertheless untimely under 19 C.F.R. § 351.301(b)(1)(2) and 19 C.F.R. § 351.301(c)(1). JBF RAK Br. 11–14.

JBF RAK has failed to exhaust its administrative remedies on its claims involving 19 C.F.R. § 351.301(d)(5) (2007) and 19 C.F.R. § 351.301(b)(1)(2).

> Requiring exhaustion can protect administrative agency authority and promote judicial efficiency. *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S. Ct. 1081, 117 L.Ed.2d 291 (1992). The requirement can protect an agency's interest in being the initial decisionmaker in implementing the statutes defining its tasks. *Id*. And it can serve judicial efficiency by promoting development of an agency record that is adequate for later court review and

> by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution. *Id.* at 145–46, 112 S. Ct. 1081. At the same time, "the interest of the individual in retaining prompt access to a federal judicial forum" is taken into account in deciding when exhaustion is demanded in order to protect "institutional interests." *Id.* at 146, 112 S. Ct. 1081.

*Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013).

JBF RAK did not present these arguments to Commerce when it had the opportunity. It did not mention that 19 C.F.R. § 351.301(d)(5) and 19 C.F.R. § 351.301(b)(1)(2) prohibited Commerce from considering petitioners' targeted dumping allegation. *See* JBF RAK Admin. Case Br. 5; JBF RAK Resp. to Post-Prelim. Results 5. It could have raised these arguments in its comments to the post-preliminary determination or its administrative case brief. *Id.* By not presenting them at the appropriate time, JBF RAK deprived Commerce of the opportunity to "apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review-advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006).

JBF RAK contends that requiring exhaustion is not appropriate with respect to its argument involving 19 C.F.R. § 351.301(d)(5) because *Gold East* represents intervening legal authority (effectively reinstating the regulation) and therefore qualifies as an exception to the exhaustion requirement. JBF RAK Reply Br. 11. This presents an interesting academic question but it is one the court need not answer. Even if the court were to accept that the targeted dumping regulations are somehow operative in this case, the government may waive its procedural deadlines under general principles of administrative law. *See, e.g.*, *Am. Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538 (1970) ("Thus there is no reason to exempt this case from the general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."). The burden, therefore, is on JBF RAK to demonstrate that it was substantially prejudiced by Commerce's supposed violation of its regulatory deadlines. JBF RAK has made no showing that it was substantially prejudiced by Commerce's

decision to review the targeted dumping allegation. It appears instead that JBF RAK is attempting to avoid application of the targeted dumping remedy based on a technicality. This is ultimately a losing argument.

JBF RAK's also challenges Commerce's decision to consider the allegation of targeted dumping under 19 C.F.R. § 351.301(a) & (c)(1).[1] JBF RAK argues that the allegation of targeted dumping constitutes rebuttal factual information under the regulation. JBF RAF Br. 13. According to JBF RAK, Commerce should have rejected the allegation as untimely factual information. JBF RAK Br. 13. This argument is not persuasive.

Section 351.301(a) provides:

> The Department obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding. This section sets forth the time limits for submitting such factual information, including information in questionnaire responses, publicly available information to value factors in nonmarket economy cases, allegations concerning market viability, allegations of sales at prices below the cost of production, countervailable subsidy allegations, and upstream subsidy allegations. Section 351.302 sets forth the procedures for requesting an extension of such time limits. Section 351.303 contains the procedural rules regarding filing, format, translation, service, and certification of documents.

19 C.F.R. § 351.301(a) (2012). Section 351.301(c)(1) then states:

> Any interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline provided in this section for submission of such factual information. If factual information is submitted less than 10 days before, on, or after (normally only with the Department's permission) the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than 10 days

[1] During the course of this review, Commerce modified subsections (a), (b) and (c) to 19 C.F.R. § 351.301. *See Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. 21,246 (Dep't of Commerce Apr. 10, 2013). Those modifications did not apply to the underlying review. The 2012 version of section 351.301 is available at http://www.gpo.gov/fdsys/pkg/CFR-2012-title19-vol3/pdf/CFR-2012-title19-vol3-part351.pdf.

> after the date such factual information is served on the interested party or, if appropriate, made available under APO to the authorized applicant.

19 C.F.R. § 351.301(c)(1) (2012).

In the *Final Results*, Commerce did not view petitioners' allegation of targeted dumping as "factual information" under § 351.301(c)(1). Commerce explained:

> JBF's arguments on the timeliness of the allegation are unpersuasive. While 19 C.F.R. § 351.301(c)(1) pertains to rebuttal factual information, Petitioners' targeted dumping allegation cannot reasonably be characterized as rebuttal factual information, as JBF claims. Rather, Petitioners used the information on the record of this review for purposes of advocating that the Department consider using a different method to compare normal value and export price (or constructed export price). However, that does not transform Petitioners' allegation into the submission of facts, for the facts that served as the basis for Petitioners' claim already were on the record. In other words, Petitioners did not submit additional facts to disprove anything that JBF previously submitted; instead, Petitioners relied upon the very facts submitted by JBF to make an allegation. Moreover, in its regulations, the Department explicitly has delineated factual submissions from documents containing allegations similar to Petitioners' targeted dumping allegation. Because the nature of the filings listed in 19 C.F.R. § 351.301(d) closely resemble Petitioners' targeted dumping allegation, (and in fact the now-withdrawn targeted dumping allegation was listed under that very provision), it stands to reason that the Department properly considered Petitioners' submission as an allegation and not rebuttal factual information.

*Issues and Decision Memorandum* at 7–8.

Commerce reasonably rejected JBF RAK's argument on this issue. Petitioners used factual information already on the record (submitted by JBF RAK) as the basis for their targeted dumping allegation. The allegation of targeted dumping cannot be characterized as rebuttal factual information under § 351.301(c)(1). *Cf. PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760–61 (Fed. Cir. 2013) ("*PSC VSMPO*"). The 10-day deadline mentioned in the regulation does not apply here. Allegations, such as an allegation of targeted dumping, are covered by 19 C.F.R. § 351.301(d) (2012). The court's understanding of the regulations is consistent with Commerce's own interpreta-

tion of its regulations, which is afforded "substantial deference unless an alternative reading is compelled by the regulation's plain language." *Mason v. Shinseki*, 743 F.3d 1370, 1374–75 (Fed. Cir. 2014) (internal quotations omitted) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

Moreover, even if the allegation was untimely under a given regulation, Commerce may "relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *PAM S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006) (quoting *Am. Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538–39 (1970)). Therefore, Commerce's decision to review petitioners' targeted dumping allegation represents an acceptable exercise of agency discretion.

*C. Post-Preliminary Determination*

JBF RAK next argues that Commerce violated 19 U.S.C. § 1675(a)(2)(B)(iv) by issuing a post-preliminary determination. JBF RAK claims that § 1675(a)(2)(B)(iv) only contemplates a preliminary and final determination and therefore any additional determination issued by Commerce is not authorized by the statute (or regulation). JBF RAK Br. 14–15. JBF RAK has advanced a superficial legal argument that ignores general principles of administrative law.

Commerce enjoys considerable discretion in the conduct of its administrative proceedings. The Federal Circuit has stated that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *PSC VSMPO*, 688 F.3d at 760 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Counsel, Inc.*, 435 U.S. 519, 543–44 (1978)). Although § 1675(a)(2)(B)(iv) establishes statutory deadlines for Commerce to publish its preliminary and final results, which Commerce satisfied here, it does not prevent Commerce from fashioning procedures to properly administer the antidumping statute. In the *Final Results*, Commerce explained:

> [W]hile the Act and the regulations provide deadlines for preliminary and final determinations in administrative reviews, the Department is not limited by any statutory or regulatory provision to issuing only preliminary and final results in such a proceeding. In this proceeding, the Department issued its Preliminary Results by the applicable deadline and is issuing these final results by the applicable deadline. Moreover, the Department enjoys wide discretion in conducting its proceeding, includ-

> ing the allocation of resources to develop suitable approaches for new policies such as the Final Modification for Reviews. Issuing a Post-Preliminary Analysis and providing all parties with an opportunity to comment on that analysis embodies the principles of transparency and openness underlying the Act and administrative law in general. For example, when issues arise or information is submitted too late in a proceeding to be considered for the preliminary results, issuing a Post-Preliminary Analysis ensures that parties are aware of all issues before the Department releases final results and that they have an adequate opportunity to provide comments to the Department. Because all parties were provided an opportunity to comment on the Post-Preliminary Analysis (the same opportunity they were provided to comment on the Preliminary Results), JBF was not disadvantaged by this approach.

*Issues and Decision Memorandum* at 8.

Contrary to JBF RAK's claim, Commerce's decision to issue a post-preliminary determination did not violate the statute. Commerce made a decision to consider petitioners' allegation of targeted dumping in a separate determination because there was insufficient time to consider the issue given the statutory deadline for publishing the preliminary determination. Commerce gave the parties an opportunity to file comments on its *Post-Preliminary Determination* and still managed to issue the *Final* Results within the statutory time-frame. JBF RAK was not prejudiced by Commerce's decision to modify the proceedings. This is a reasonable exercise of agency discretion. *See PSC VSMPO*, 688 F.3d at 760. Indeed, Commerce has issued post-preliminary determinations in the past without issue. *See, e.g.*, *Timken*, 968 F. Supp. 2d 1279. Commerce's decision to issue a post-preliminary determination in this case was reasonable.

*D. Targeted Dumping Analysis*

JBF RAK claims that Commerce's targeted dumping analysis under 19 U.S.C. § 1677f1(d)(1)(B) failed to provide an explanation "as to why and how the alleged targeted customers, and time periods were selected and thus allegedly resulted in targeted dumping." JBF RAK Br. 15. According to JBF RAK, "such explanation is necessary for the Department to initiate a targeted dumping inquiry, because it is required to determine whether any observed pricing pattern is the result of intentional targeted dumping strategy." JBF RAK Br. 15. The court disagrees.

Section § 1677f-1(d)(1)(B) provides:

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using [the A-A methodology or the transaction-to-transaction methodology].

§ 1677f-1(d)(1)(B). The "'pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time' is what is referred to as 'targeted dumping.'" *Timken*, 968 F. Supp. 2d at 1282. Targeted dumping, therefore, is a statutorily defined set of pricing patterns that permit Commerce to apply an alternative comparison methodology in antidumping investigations and reviews.

Commerce has established a methodology known as the *Nails* test to determine whether a targeted dumping analysis is appropriate. *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008); *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 Fed. Reg. 33,985 (Dep't Commerce June 16, 2008). The *Nails* test involves a two-step analysis:

> In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's (*i.e.*, purchaser, region or time period) sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted- average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., by CONNUM) using the weighted-average prices for the alleged targeted group and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the *Nails* Test. If that volume exceeded 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second

> stage of the *Nails* Test.
>
> In the second stage, the "gap test," we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for allegedly targeted group and the next higher weighted-average price of sales to the non-targeted groups exceeds the average price gap (weighted by sales volume) for the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group's sales were not included in the non-targeted groups; the allegedly targeted group's average price was compared only to the average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and these sales passed the *Nails* Test.

*Issues and Decision Memorandum* at 9. The Court has upheld the *Nails* test as reasonable. *See Mid Continent Nail Corp. v. United States*, 34 CIT __, __, 712 F. Supp. 2d 1370, 1376–80 (2010).

Here, Commerce determined that JBF RAK's sales satisfied the *Nails* test and applied its average-to-transaction comparison methodology to calculate JBF RAK's dumping margin. *See Issues and Decision Memorandum* at 9–10. Commerce, however, did not consider *why* JBF RAK's sales demonstrated a pattern of export prices that differ significantly among purchasers, regions, or periods of time. *See id.* Commerce rejected JBF RAK's argument suggesting that Commerce must consider whether a given respondent *intended* to engage in targeted dumping to satisfy the statute. *See id.* at 10. Commerce is correct.

Section 1677f-1(d)(1)(B) does not require Commerce to investigate the various reasons why a particular respondent's U.S. sales demonstrate a pattern of targeted dumping. Rather, the statute instructs Commerce to look at U.S. sales price only in making a determination of targeted dumping. *See id.* The *Nails* test implements the statute by providing greater specificity on how Commerce evaluates these prices across the targeted group's sales of the subject merchandise. *See Issues and Decision Memorandum* at 9. This constitutes a permissible construction of the statute. JBF RAK, though, urges the court to read

into the statute some sort of "intent" requirement not mentioned in the text of the statute or legislative history. The court cannot adopt such an interpretation. It would add a new element to the targeted dumping analysis, requiring Commerce to also consider whether respondents intended to engage in targeted dumping. *See Viraj Group v. United States*, 476 F.3d 1349, 1357–58 (Fed. Cir. 2007). This "would create a tremendous burden on Commerce that is not required or suggested by the statute." *Id.* at 1358.

*E. Home Market Sales: Model Matching*

JBF RAK next claims that Commerce erred by not comparing home market sales of non-prime merchandise (grade B film) with United States sales of prime merchandise (grade A film). JBF Br. 18–21. Unfortunately, though, JBF RAK has recycled its argument from its administrative case brief (verbatim) without attempting to analyze Commerce's findings and conclusions against the operative standard of review. *Compare* JBR RAK Admin. Case Br. 1013, *with* JBF RAK Br. 18–21; *see* USCIT R. 56.2(c)(1) ("briefs . . . must include . . . the issues of law presented together with the reasons for contesting or supporting the administrative determination, specifying how the determination may be arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law, unsupported by substantial evidence; or, how the determination may be unwarranted by the facts to the extent that the agency may or may not have considered facts which, as a matter of law, should have been properly considered."). JBF RAK attempted this same form of litigation in a previous proceeding, which this court summarily rejected. *See JBF RAK LLC v. United States*, 38 CIT __, __, 961 F. Supp. 2d 1274, 1281 (2014). Arguments made before the administrative agency may, of course, be restated in a judicial proceeding but must conform to the different requirements of each process. Here, JBF RAK's arguments do not. Therefore, the court will do the same as it did in the previous case and deem the issue waived.

*F. 15-Day Liquidation Policy*

JBF RAK's final claim is a challenge to Commerce's 15-day liquidation policy. JBF RAK Br. 21. JBF RAK argues, as it did in the previous proceeding, that the *SKF* cases render Commerce's 15-day liquidation policy unlawful as a matter of law. *See JBF RAK LLC*, 961 F. Supp. 2d at 1279. It therefore argues that Commerce is ignoring the Court's declaratory judgment by continuing to apply its policy to other respondents involved in trade disputes before the agency. Commerce, for its part, contends that the court lacks jurisdiction to review

this issue because JBF RAK did not suffer any harm and therefore does not have standing to challenge Commerce's 15-day policy. Def. Br. 35. Alternatively, Commerce argues that Commerce's 15-day liquidation policy is a reasonable interpretation of the statute. Def. Br. 38.

The court has already considered and rejected Commerce's jurisdictional argument on this issue in a previous proceeding. *See JBF RAK LLC v. United States*, Court No. 11–00141, Docket Entry No. 30 (Oct. 12, 2011) (order denying motion to dismiss). In the court's view, JBF RAK has properly established jurisdiction under 28 U.S.C. § 1581(i) and may therefore challenge Commerce's 15-day liquidation policy. *See* Amended Compl. ¶¶ 2, 49, 50. The real question here is whether JBF RAK has presented this issue in a manner suitable for judicial review. The answer is no.

JBF RAK has framed this issue as though the *SKF* decisions render Commerce's 15-day policy unlawful as a matter of law. JBF RAK Br. 20–23. As the court has already explained, *see JBF RAK LLC*, 961 F. Supp. 2d at 1279, this is incorrect. The *SKF* decisions represent persuasive authority. But there are other decisions by the Court that have held Commerce's 15-day liquidation policy to be a reasonable interpretation of the statute. *See Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1141, 502 F. Supp. 2d 1295, 1313 (2007); *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 736, 491 F. Supp. 2d 1273, 1279 (2007); *Mukand Int. Ltd. v. United States*, 30 CIT 1309, 1312, 452 F. Supp. 2d 1329, 1332 (2006). These decisions are also persuasive authority. JBF RAK does not mention these other decisions as contrary authority, nor does it attempt to distinguish them from this particular case.

JBF RAK also fails to apply the *Chevron* framework (as the court must do) to analyze the many competing policy issues implicated by this legal question. *See, e.g., Fine Furniture (Shanghai) Ltd. v. United States*, 2014 WL 1613883 at *3 (Fed. Cir. 2014). JBF RAK does not address Commerce's findings and conclusions on this issue in the *Final Results*. *See Issues and Decision Memorandum* at 13–14. It simply quotes language from selected *SKF* decisions and then states in conclusory terms that Commerce's 15-day policy is unlawful. JBF RAK Br. 20–23. If the court were to review the issue in this context, it would first have to assume the role of coplaintiff, reframe JBF RAK's arguments under the *Chevron* framework, wrestle with the existing decisions on this issue, and analyze Commerce's 15-day policy under that framework. The court would effectively be litigating

the issue for JBF RAK, which is something it cannot do. *See United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1578, 659 F.Supp.2d 1303, 1308 (2009) ("'[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'") (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Accordingly, the court deems the issue waived.

## IV. CONCLUSION

For the foregoing reasons, Commerce's *Final Results* are sustained. Judgment will be entered accordingly.

Dated: July 1, 2014
New York, New York

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

Slip Op. 14–79

GOLD EAST PAPER (JIANGSU) CO., LTD., NINGBO ZHONGHUA PAPER CO., LTD., and GLOBAL PAPER SOLUTIONS, Plaintiffs, v. UNITED STATES, Defendant, and APPLETON COATED LLC, NEWPAGE CORP., S.D. WARREN COMPANY d/b/a SAPPI FINE PAPER NORTH AMERICA, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 10–00371

[Remanding administrative redetermination on investigation of sales at less than fair value of certain coated paper from the People's Republic of China.]

Dated: July 2, 2014

*Daniel L. Porter* and *Ross E. Bidlingmaier*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington DC, for the plaintiffs.

*Alexander V. Sverdlov*, 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*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Terence P. Stewart* and *William A. Fennell*, Stewart and Stewart, of Washington, DC, and *Gilbert B. Kaplan*, *Christopher T. Cloutier*, and *Daniel L. Schneiderman*, King & Spalding, LLP, of Washington DC, for the defendant-intervenors.

## OPINION AND ORDER

**Musgrave, Senior Judge:**

This opinion addresses the *Final Results of Redetermination Pursuant to Court Remand* ("*Redetermination*") that concern the antidumping duty investigation on *Certain Coated Paper from the PRC* ("*Final Determination*").[1] Familiarity with the prior opinion on the case, 38 CIT ___, 918 F. Supp. 2d 1317 (2013), is here presumed.

Pursuant to the order of remand, the International Trade Administration, U.S. Department of Commerce ("Commerce") undertook to (1) calculate the value of certain inputs using only market economy purchase prices, (2) use the purchase prices from South Korea and Thailand for the inputs therefrom, (3) correct certain programming

[1] *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 Fed. Reg. 59217 (Sept. 27, 2010), Public Record Document ("PDoc") 360, as amended by *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Final Determination of Sales at Less than Fair Value and Antidumping Order*, 75 Fed. Reg. 70203 (Nov. 17, 2010), PDoc 369.

errors in the targeted dumping calculation, (4) reconsider the classification of certain sales of the Gold East Companies[2] as export price sales, resulting in no change of that classification, and (5) employ average-to-average comparison methodology in the targeted dumping analysis after finding that, as a result of the revisions with respect to the remanded issues, that method adequately accounted for pricing differences.

Commerce contends the *Redetermination* complies with the remand order. Two issues remain in dispute here, however. The domestic industry petitioners[3] argue that Commerce's original determinations in the *Final Determination* of not treating the reported input prices from Thailand and South Korea as market economy purchases and of using average-to-transaction methodology as the targeting-dumping remedy for the Gold East Companies were proper and correct. Responding, the plaintiffs argue the results of remand should be sustained as is. Considering those results and comments thereon, the court concludes remand is again required.

### ***Discussion***

I. Inputs from South Korea and Thailand

The issue concerning the claimed market economy purchase ("MEP") prices for the inputs from Thailand and South Korea was previously remanded because the record provided insufficient support for believing or suspecting the prices in question had been distorted by subsidies. *See* 38 CIT at ___, 918 F. Supp. 2d at 1324; *see also* 19 U.S.C. §1677b(c)(1) (2006); 19 C.F.R. §351.408(c)(1) (2008). Commerce disagrees with the order either to reopen the record and make particularized findings to support the conclusion of distorted input prices or to reverse the decision not to use the input price data and concomitant recalculation of the margin. It opted for the latter under protest. *Redetermination* at 16.

Having reversed its prior decision, Commerce reiterates that if a country maintains broadly available, non-industry specific export subsidies, its practice has been to find the existence of such subsidies a sufficient reason to exclude the affected input from the factors of production values. Its stated position on not reopening the record is based on its inference of "the existence" of such subsidies, from which

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[2] Gold East Paper (Jiangsu) Co., Ltd., Gold Huasheng Paper Co., Ltd., Gold East (Hong Kong) Trading Co., Ltd., Ningbo Zhonghua Paper Co., Ltd., and Ningbo Asia Pulp and Paper Co., Ltd. (collectively, "Gold East Companies" or "APP-China").

[3] *I.e.,* Defendant-intervenors Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a/ Sappi Fine Paper North America, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

it presumes the relevant inputs to have benefitted, and it maintains it is "longstanding practice to not obtain further evidence or conduct a formal investigation to determine whether such prices are subsidized, but instead to base [the] decision only on information available to it at the time it makes its determination." *Id.* (bracketing added), referencing *inter alia Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 Fed. Reg. 20594 (Apr. 16, 2004), and accompanying I&D Memo ("*CCTR*") at comment 7.

The petitioners requested during remand that Commerce reopen the administrative record. Petitioners' Letter to the Department of Commerce dated July 26, 2013, Remand Public Document ("RPDoc") 1. Commerce declined. Commenting on the draft remand results, the petitioners raised the substance of Memorandum from the Office of Policy to DAS and Office Directors, "NME investigations: procedures for disregarding subsidized factor input prices" (Feb. 2002), which advised that all factor inputs from *inter alia* South Korea and Thailand should be disregarded. The petitioners pointed out that: (1) it has been Commerce's consistent position since the memorandum's publication to infer that the prices of inputs purchased from those countries are likely distorted; (2) Commerce has identified a number of subsidy programs that benefit exporters from Thailand, including the Royal Thai Government's Tax Coupon Program ("TCP") and the Investment Promotion Act ("IPA") ("in existence" they claim since 1977), as recently discussed in Commerce's 2013 determination on warmwater shrimp from Thailand, covering a period of investigation in 2011 that would have obviously post-dated the POI here[4]; (3) the TCP was specifically available for the type of input in question here, and the IPA identified producers of that input as a favored industry; and (4) the court has found that the agency's determination that a company supplying an NME producer was listed as approved for promotion by the Thai Board of Investment under the IPA constituted a showing "by specific and objective evidence" that there was "reason to believe or suspect" that the supplier received subsidies in *Fuyao Glass Indus. Group Co. v. United States*, 29 CIT 109, 117–18 (2005).[5] *See* Petitioners' Comments on Prelim. Remand at 6–7, Remand Confidential Document ("RCDoc") 10; RPDoc. 10.

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[4] *I.e.*, January 1, 2009, through June 30, 2009.

[5] It will be recalled that the three-prong test of *Fuyao Glass* is whether (1) subsidies of the industry in question "existed" in the supplier countries during the period of investigation, (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies, and (3) it would have been unnatural for a supplier not to have taken advantage of such subsidies. *Fuyao Glass*, 29 CIT at 114.

The petitioners further criticize the remand results as simply a recalculation of the margin using the MEP values on remand. They argue that without any analysis of whether those values are the best available information leading to the calculation of the most accurate margin, Commerce has given the remand order an interpretation that renders it legally erroneous. Petitioners' Comments at 9, referencing *Borlem S.A.- Empreedimentos Industriais v. United States*, 13 CIT 231, 234, 710 F. Supp. 797, 799 (1989) (when issuing remand orders courts must be "mindful of the doctrine of primary jurisdiction" whose "central purpose . . . is to permit courts to give effect to legislative intent underlying the established regulatory scheme by referring matters involving agency expertise back to the agency so that it may, in the first instance, pass upon the issue from its unique administrative perspective").[6] More precisely, they contend that the record to date is devoid as to any information that would indicate the South Korean or Thai companies that supplied the Gold East Companies with inputs were not subsidized, that Commerce has not determined that the pricing data from these countries is the best available, that *Fuyao Glass* rejected this same approach, 30 CIT 165, 168–69 (2006), and that Commerce's attempt to distinguish *Fuyao Glass* on the basis that it ordered Commerce to "concur" or reopen the record, in contrast to the remand order in this case to "reverse" or reopen the record, does not render *Fuyao Glass*'s finding of inadequate explanation inapplicable. *Id*. at 8–9.

On the argument that the record is devoid as to information that the inputs were not subsidized, the contention assumes the validity of Commerce's presumption that they were. On that aspect, the plaintiffs argue that the question as addressed by the court is that the record lacked positive evidence of subsidization. That characterization is not entirely accurate, however. Based on the standard pursuant to which Congress directed Commerce to operate, the question to be answered was whether there was positive evidence on the record for "the belief or suspicion of" subsidization relevant to the POI, a standard that requires sufficient (*i.e.*, substantial) evidence on the record to give rise, *prima facie*, to that presumption.

On the argument that Commerce did not determine that the claimed MEP values represented the best information available, the argument has some merit,[7] but on the more precise argument that

[6] The petitioners' implicit characterization of the prior opinion is magnanimous.

[7] Commerce "has an obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable." *Olympia Industrial, Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998). The "overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible". *Parkdale*

the agency's interpretation of the remand order renders the order legally erroneous, the court does not fault an administrative attempt to follow a remand order's literal terms unless the intention thereby would be to produce a reversible result. *Cf. Redetermination* at 16 ("The Department does not believe that in this case the [c]ourt requires the agency to concur with its decision and thereby possibly undermine its options with respect to any potential appeal."), citing *Viraj Group, Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003), & *cf.* 343 F.3d at 1376 (technicality of prevailing-party status would not preclude appeal by Commerce when it "adopted under protest a contrary position forced upon it by the court"). Commerce may have merely followed orders out along an arguable reach, but however that may be, remand results provided "under protest" are unhelpful to interested readership whenever the explanation on remand merely amounts to repetition of the agency's original position. Feedback, via remand results and comments thereon detailing any perceived deficiency in an opinion or concerning the overlying order itself, aids in reaching the correct result.

The petitioners' other implied points are well-taken. Regarding their subtle argument that the *Redetermination*'s resistance to "reopening" the administrative record is an implicit contest over the legality of the prior order, it is true, as Commerce implies, that where an interested party bears the burden of creating an accurate record with respect to a particular fact, courts should "declin[e] to require reopening of the record, except in the most extraordinary circumstances." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974). *See, e.g.*, *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277–78 (Fed. Cir. 2012) ("[t]he decision to reopen the record is best left to the agency"). That is deferentially appropriate. But while interested parties bear the burden of proffering information to support their case, the burden is on Commerce, not interested parties, to include in the record the *prima facie* "information available to it at the time" that it claims as providing the reasonable basis to believe or suspect the existence of distorted input prices.[8] *See* H.R. Conf. Rep. No. 100–576 (1988) at 590–91, *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24 ("the conferees do not intend for

*International v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007), citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir.1990). The appellate court has also stated that "there is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so." *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)

[8] For the sake of further clarity, here noted is that to the extent APP-China argued the onus should be on Commerce to place on the record evidentiary information that shows the

Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information *generally available* to it at that time") (italics added); *see also Sichuan Changhong Electric Co., Ltd. v. United States*, 30 CIT 1481, 1494–96 & n.16, 460 F. Supp. 2d 1338, 1350–52 & n.16 (2006) (Commerce bears burden of providing specific and objective evidence for the record to support a belief or suspicion of distorted MEPs); *cf. Essar Steel*, 678 F.3d at 1277–78, referencing *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) (upholding court order that International Trade Commission consider extra-record evidence on remand in antidumping injury investigation); *cf. also Borlem*, 913 F.2d at 940 (directive to reconsider in light of intervening factual correction "is no different from a reversal and remand for reconsideration because a fact relied on is unsupported by the evidence").

Necessarily, judicial remand in its own right "will compel the agency to reopen or reconsider its decision", Charles H. Koch, Jr. and Richard Murphy, 2 *Admin. L. & Prac.* § 5:71 (3d ed.), and as previously discussed, the administrative record was not found to provide sufficient support for the determination reached.[9] The intention of the order of remand was only, if not more, to point out that reopening the record was one of two apparent consequences of a record that lacked the substantial evidence necessary to support the legal viability of the presumed fact of input price distortion. But given Commerce's position on (not) reopening the record on remand, as expressed in the *Redetermination*, at this point the court must consider whether the language of the remand order may have inadvertently engendered misinterpretation.

*CCTR*, *supra*, is referenced in the *Redetermination* as support for the proposition of not opening the record. That determination does not facially explain why inclusion in the record of the substantial, specific, and objective "information available to it at the time" that is necessary to show "the existence" during the POI of relevant "broadly available, non-industry specific export subsidies" from which input

relevant inputs to be "indisputably" distorted, such an argument overstates the *prima facie* "substantial evidence" case that would give rise to a valid presumption, and incorrectly disregards the shift in the burden of proof resulting therefrom.

[9] *See* 38 CIT at ___, 918 F. Supp. 2d at 1324 ("[a]s the record currently stands, there is insufficient evidence to support Commerce's refusal to use the Thai and Korean price data", *i.e.*, to presume those data distorted).

price distortion could properly be presumed is precluded.[10] *CCTR* rather appears only to reiterate Commerce's general policy of excluding inputs from, *inter alia*, South Korea and Thailand "because of *known*, generally available, non-industry specific export programs in those countries" as stated in Commerce's 2002 memorandum on the subject. *CCTR* at comment 7 (italics added). But here, at least insofar as the court can discern, there is nothing apparent, *e.g.*, a vested right, that would estop or preclude supplementation of the record with that level of substantial, specific, and objective "information

[10] Specifically in the event Commerce construed the order of remand as requiring some type of "formal" inquiry as opposed to simply requiring placement on the record of the "substantial, specific, and objective eviden[tiary]" support, *see China National Machinery Import & Export Corp. v. United States*, 27 CIT 255, 267, 264 F. Supp. 2d 1229, 1240 (2003), of "information available to it at the time," for finding that South Korea and Thailand maintained broadly available, non-industry specific export subsidies during the POI, which is the necessary precursor for justifying the belief or suspicion that MEPs for inputs purchased from those counties are distorted, the court will here again dispel that notion: as implied in the prior opinion, the court as a whole has years of awareness that Congress, in directing that Commerce may rely on a "belief or suspicion" of input price distortion to justify disregard of distorted input prices in its factors of production analysis, indicated that a "formal" investigation into the distortion problem is unnecessary-- not to mention impractical, given the time constraints of these administrative proceedings. *See* H.R. Conf. Rep. No. 100–576 (1988) at 590–91, *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24; *see*, *e.g.*, *Shenzhen Xinboda Industrial Co. v. United States*, 38 CIT ___, ___, 976 F. Supp. 2d 1333, 1373–74 (2014); *Clearon Corp. v. United States*, 35 CIT ___, ___, 800 F. Supp. 2d 1355, 1358 (2011); *Jinan Yipin Corp. v. United States*, 35 CIT ___, ___, 774 F. Supp. 2d 1238, 1244 (2011); *Zhejiang Machinery Import & Export v. United States*, 31 CIT 159, 163–64, 473 F. Supp. 2d 1365, 1370 (2007); *Shandong Huarong Machinery Co. v. United States*, 31 CIT 30, 37 (2007); *Sichuan Changhong Electric*, *supra*, 30 CIT at 1493–94, 460 F. Supp. 2d at 1350; *Goldlink Industries Co. v. United States*, 30 CIT 616, 628, 431 F. Supp. 2d 1323, 1334 (2006); *Fuyao Glass*, *supra*, 30 CIT at 169; *Hangzhou Spring Washer Co. v. United States*, 29 CIT 657, 668–69, 387 F. Supp. 2d 1236, 1247 (2005); *Shandong Huarong Machinery Co. v. United States*, 29 CIT 484, 494–95 (2005); *Fuyao Glass*, *supra*, 29 CIT at 111 n.3; *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 738, 347 F. Supp. 2d 1326, 1334 (2004); *Crawfish Processors Alliance v. United States*, 28 CIT 646, 654, 343 F. Supp. 2d 1242, 1251 (2004), *rev'd on other grounds*, 477 F.3d 1375 (Fed. Cir. 2007); *Peer Bearing Co.-Changshan v. United States*, 27 CIT 1763, 1765, 298 F. Supp. 2d 1328, 1331 (2003); *China National Machinery Import & Export Corp. v. United States*, 27 CIT 1553, 1554, 293 F. Supp. 2d, 1334, 1335 (2003); *Yantai Oriental Juice Co. v. United States*, 27 CIT 477, 479 (2003); *Rhodia, Inc. v. United States*, 25 CIT 1278, 185 F. Supp. 2d 1343, 1352 (2001); *Baoding Yude Chemical Industry Co. v. United States*, 25 CIT 1118, 1124, 170 F. Supp. 2d 1335, 1342 (2001); *Taiyuan Heavy Machinery Import and Export Corp. v. United States*, 23 CIT 701, 708 (1999); *Coalition for Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States*, 23 CIT 88, 117 n.51, 44 F. Supp. 2d 229, 251 n.51 (1999); *Nation Ford Chemical Co. v. United States*, 21 CIT 1371,1374, 985 F. Supp. 133, 135 (1997); *Kerr-McGee Chemical Corp. v. United States*, 21 CIT 1353, 1366, 985 F. Supp. 1166, 1177 (1997); *but cf. Catfish Farmers of America v. United States*, 33 CIT 1258, 1276, 641 F. Supp. 2d 1362, 1380 (2009) (observing Commerce taking the position that the "mere mention" in a financial statement that a subsidy was received does not mean that a countervailable subsidy exists).

available to [Commerce] at the time" that would be necessary to satisfy the judicial standard of review. For that matter, Commerce has, in fact, "reopened" the record. *See infra*.

Mere "belief or suspicion" is a thin reed to support a determination of input price distortion. Again: "in order for reasonable suspicion to exist[,] there must be 'a particularized and objective basis for suspecting' the existence of certain proscribed behavior, taking into account the totality of the circumstances, the whole picture." *China National Machinery*, *supra*, 27 CIT at 266, 264 F. Supp. 2d at 1239, quoting *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 247, 575 F. Supp. 1277, 1280 (1983), which discussed, *inter alia*, *Terry v. Ohio*, 392 U.S. 1 (1968). Consequently, and in accordance with the substantial evidence standard of review, the first prong of the *Fuyao Glass* test requires specific and objective evidence showing that "subsidies" (or subsidization) of the industry in question in fact "existed". 29 CIT at 114. Detailed positive evidence of that existence -- during the POI -- of broadly-available, non-industry specific subsidies has been held to satisfy this prong, *see CS Wind Vietnam Co., Ltd. v. United States*, 38 CIT ___, ___, 971 F. Supp. 2d 1271, 1292 (2014), as well as the substantial evidence standard of review, *see Zhejiang Machinery, supra*, 31 CIT at 164–71, 473 F. Supp. 2d at 1370–76, but the "general policy" concerning "broadly available, non-industry specific subsidies" as outlined in Commerce's 2002 memorandum regarding, *inter alia*, Thailand and South Korea has been held "not [to] provide the court with the specific and objective evidence necessary for Commerce to meet its burden", because that memorandum includes only "general findings" thereon and "does not explain the findings in any way." *Sichuan Changhong Electric*, 30 CIT at 1494 n.16, 460 F. Supp. 2d at 1350 n.16. This is so, because the agency's stated practice cannot be interpreted to amount to a presumption of law: in order to be held consistent with congressional intent to avoid using distorted factor prices, Commerce's general policy must be, and it has been, construed as amounting to a presumption of fact, *i.e.*, "[a] type of rebuttable presumption that may be, but as a matter of law need not be, drawn from another established fact or group of facts".[11]

[11] *Black's Law Dictionary* 1377 (10th ed. 2014). A presumption of fact's validity is dependent upon proof: the secondary fact that would give rise to the presumption must be "established" and must have probity to the particular proceeding as well as the presumed fact, *see, e.g.*, *United States v. Reyburn*, 31 U.S. 352 (1832), whereas a presumption of law "appl[ies] *in the teeth of the facts*, as means of implementing authorized law or policy". *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 815 (1990) (Scalia, J., dissenting; emphasis in original). *Cf. Redetermination* at 16 ("[i]f a country maintains broadly available, non-industry specific export subsidies, our practice is to find the existence of such subsidies sufficient reason to exclude it from import data used to calculate FOP values").

In this matter, Commerce again proceeded down its familiar path to prove the validity of the presumption, albeit in a rather cursory manner. In the original *Final Determination*, Commerce declared "the existence" of generally-available non-industry specific subsidy programs during the period of investigation to be a fact. *See* I&D Memo at comment 17. But given the review standard of substantial evidence (and precedent), the court could not accept such an *ex* -record appeal, to generalized official notice[12] of knowledge of "the existence" of such subsidy programs, as substantial evidence to justify presuming therefrom that the input prices in question were distorted. Such an appeal falls short of being "somewhere between proof and simple recognition of a fact as so well accepted as to be beyond debate." *See* 2 *Admin. L. & Prac.* § 5:55. That continues to be the case (and law) at this point. *Cf. CS Wind Vietnam*, *supra*, 38 CIT at ___ n.14, 971 F. Supp. 2d at 1292 n.14 ("Commerce must either abide by the standard set out in *Fuyao Glass* or propose another reasonable means of evaluating whether it has sufficient evidence to support a belief or suspicion that the market economy inputs in the particular case at hand were subsidized").

Commerce also maintains, in the original *Final Determination* as well as on remand, that in other proceedings it has found it appropriate to disregard input prices from South Korea and Thailand pursuant to its "longstanding" practice of disregarding surrogate values if it has reason to believe or suspect that the source data may be subsidized. I&D Memo at comment 17. That may well be true, but flat appeal to "the past" does not inherently explain the determination that is being made in the present. More precisely, the fact that Commerce has found it appropriate to disregard prices from Korea and Thailand in past determinations does not give rise to a valid inference of "the existence" during the POI of generally-available, non-industry specific subsidy programs that would be necessary to justify a belief or suspicion that the input prices in question were distorted at the time of the POI of *this* matter.[13] *Cf. Sichuan Chang-*

[12] Official notice is a method of "authoriz[ing] the finder of fact to waive proof of facts that cannot seriously be contested." *Galina v. INS*, 213 F.3d 955, 958–59 (7th Cir. 2000) (citations omitted). It is "a broader concept than judicial notice" in that "[b]oth doctrines allow adjudicators to take notice of commonly acknowledged facts, but official notice also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise." *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986).

[13] By way of further explanation, the court earlier noted, but did not elaborate on, the fact that the I&D Memo for the matter at bar first stated that Commerce "has previously found that it is appropriate to disregard such prices from South Korea and Thailand because we have determined that these countries maintain broadly available, non-industry specific export subsidies". I&D Memo at comment 17. Commerce then stated:

*hong Electric*, *supra*, 30 CIT at 1496, 460 F. Supp. 2d at 1352 ("[i]t is simply not reasonable to assume that subsidy programs, once established, exist in perpetuity"). It thus behooves Commerce to relate a relevant and contemporaneous factual predicate to the particular period of investigation, not merely to avoid the appearance of ossification of administrative practice, but also as a necessary part of the particularized findings that will suffice for the purpose of the substantial evidence standard of review.

*CS Wind*, *supra*, 38 CIT ___, 971 F. Supp. 2d 1271, is illustrative of that sufficiency. Concerning an administrative record that also encompassed input prices that Commerce had believed or suspected had been distorted by subsidies and that Commerce had analyzed along the similar path as the matter at bar (and that of many others), *CS Wind* reiterated that the test of *Fuyao Glass* is one reasonable method for evaluating the sufficiency of the evidence upon which Commerce bases its belief or suspicion that input prices are subsidized. After analyzing the record in relation to each of the three *Fuyao Glass* prongs (*see supra* note 4), *CS Wind* held Commerce's analysis satisfactory because of the relevancy, contemporaneity, and particularity of the referenced proceedings to the administrative record therein considered. 971 F. Supp. 2d at 1292.

The parties have not had opportunity to provide input on *CS Wind*, but its analysis appears sound in its own right. The matter at bar, at

> Based on *the existence* of these subsidy programs that were generally available to all exporters and producers in these countries *at the time of the POI*, the Department finds that it is reasonable to infer that all exporters from South Korea and Thailand may have benefitted from these subsidies. This is consistent with past practice, where the Department has rejected MEPs from Thailand and Korea.

*Id.* (italics added).

The closest temporal references cited to support that proposition for the purpose of the matter at bar were *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 74 Fed. Reg. 2512 (Jan. 15, 2009), which addresses a period of events that had occurred three years prior to the POI, *i.e.*, for that review, January 1, 2006, through December 31, 2006, and *Wire Decking From the People's Republic of China*, 75 Fed. Reg. 32905 (June 10, 2010) ("*Wire Decking*"), which justified the belief or suspicion of subsidies from South Korea with respect to inputs for that relevant subject merchandise upon *Citric Acid and Certain Citrate Salts From the People's Republic of China*, 74 Fed. Reg. 16838 (Apr. 13, 2009) (final less than fair value determination) ("*Citric Acid*"), which covered the period October 1, 2007 to March 31, 2008. The trail ends at *Citric Acid*, which simply states, without further citation or support, "[w]e excluded South Korea because we have reason to believe or suspect that prices of inputs from South Korea have been subsidized." Issues and decision memorandum on *Citric Acid* at comment 11B n.135.

*Ipse dixit* declarations are not substantial evidence, and having to root through a bureaucratic *matryoshka*-doll of administrative determinations to get to the source of an evidentiary point does not provide ease of understanding. In this instance, it did not prove "the existence" of relevant, broadly available, non-industry-specific export subsidies for purposes of the POI at bar in any event.

least with respect to the *Final Determination*, differs from that case as to the lack of any asserted and analyzed contemporaneity in the referenced administrative determinations and demonstrated relevance to the POI to support the belief or suspicion that prices of the relevant inputs were distorted during the POI. It also lacks particularity or specificity on what are being claimed as the "broadly-available, non-industry specific export subsidies" from South Korea and Thailand. It may well be true that those countries maintained such subsidies during the period in question. But those facts were, and are, neither apparent nor inherent in the administrative record: it requires *some* primary source from which it could reasonably be concluded that such programs were *in fact* in existence and operable during the POI, with a degree of specificity in describing the relevant program(s), before the possibility of believing or suspecting that the relevant MEPs during the POI were likely distorted by such programs could even arise.[14]

In the final analysis, the court is not here persuaded that Commerce on remand has provided a legally correct result, as argued by the petitioners, not least because (its expressed position to the contrary notwithstanding) in the *Redetermination* Commerce has, in fact, supplemented the administrative record -- with references to *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 36168 (June 17, 2013) (reviewing the Nov. 1, 2010 to Oct. 31, 2011 period) and accompanying I&D Memo at comment 8, and *Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012*, 78 Fed. Reg. 70533 (Nov. 26, 2013) (reviewing the Apr. 1, 2011, through Mar. 31, 2012 period) and accompanying I&D Memo at comment 5, both of which were apparently undertaken after and covered periods subse-

[14] The administrative record is generally considered as all the information the agency used to make the rule in question. While it may be the "general administrative law view" that an agency may rely on any useful information whether or not physically contained in the administrative file, for purposes of the substantial evidence standard to which this type of matter is subject it is the agency's inherent duty to develop a complete record. "Reopening" the record on remand, thus, would not have been for the purpose of a "formal" investigation into whether the inputs from South Korea and Thailand are distorted "in fact", *see supra*, note 9, it would simply have been for the purpose of providing that "information available to it at the time" necessary under the reviewing standard to justify the belief or suspicion that they are distorted, which would encompass specific evidence and particular descriptions of the generally available, non-industry specific export programs -- even one example -- claimed to have been in actual contemporary existence and operation during the POI that could reasonably lead to such an inference. The court merely notes in passing here its superficial awareness of Commerce's "subsidies enforcement library," maintained publically and electronically for the time being at http://enforcement.trade.gov/esel/eselframes.html, but that has not been made part of this record, let alone any relevant part thereof related or explained with specificity or objectivity.

quent to the POI. *See Redetermination* at 16. But beyond being claimed as support for the practice of inferring that all exporters from a country that "maintains" broadly available, non-industry specific export subsidies may be presumed to have benefitted from such subsidies, those determinations are unexplained, specifically whether they may legally provide the evidentiary sufficiency for excluding APP-China's declared MEP input prices from South Korea and Thailand. They are, however, apparent evidence of record and in apparent contradistinction to reversal on remand of the decision not to use the pricing data from South Korea and Thailand. Further remand is therefore required to more fully address the record as it stands, or as may yet be supplemented by other "information available to it at the time" as Commerce in its discretion may determine is appropriate (*cf.*, *e.g.*, RCDoc. 10, *supra*), in accordance with the foregoing. Simply put, Commerce must reach and explain, with precision, whatever result the substantiality of the evidence compels.

II. Targeted Dumping Determination

The petitioners also challenge the *Redetermination* with respect to the targeted dumping methodology and remedy applied by Commerce. *See* 19 U.S.C. § 1677f-1(d)(1)(B) (2006); 19 C.F.R. §351.414(f) (2008).

By way of background, it will be recalled that in the *Final Determination* Commerce applied its *Nails* test[15] and found that APP-China's sales' prices had a pattern of pricing that differed significantly among U.S. customers for comparable merchandise during the POI. Specifically, the analysis found that targeted sales met both the "significant deviation test" threshold and the "gap test" threshold. *See* I&D Memo at comment 3. Consequently, in order to compute dumping margins for the *Final Determination*, instead of employing standard average-to-average ("A-A") comparison methodology, which would have concealed differences in pricing patterns between targeted and non-targeted groups, Commerce applied the average-to-transaction ("A-T") comparison methodology[16] in accordance with 19

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[15] *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33977 (June 16, 2008) and accompanying issues and decision memorandum at comments 1 through 8; *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 Fed. Reg. 33985 (June 16, 2008) and accompanying issues and decision memorandum at comments 1 through 8. *See* 38 CIT at __, 918 F. Supp. 2d at 1328.

[16] A-A methodology compares the weighted average of the normal values to the weighted average of the export prices for comparable merchandise, whereas A-T methodology compares the weighted average of the normal values to the export price of individual transactions for comparable merchandise.

C.F.R. §351.414(f)(1) (2008), albeit to all of APP-China's sales. But subsection (f)(2) of that regulation, as proclaimed at the time, provided that Commerce will also "normally" limit the A-T method to those sales that "constitute targeted dumping." The prior opinion held that Commerce's announced "interim final rule," without providing for advance notice and comment, had not properly withdrawn that subsection.[17] 38 CIT at ___, 918 F. Supp. 2d at 1327. Thus, "[a]ssuming the finding of targeted dumping remains positive after reconsideration of other issues addressed in this opinion, Commerce must limit application of the targeted dumping remedy to targeted sales, or provide an adequate explanation as to why the situation is not a 'normal' one before applying the remedy to all APP-China sales." *Id*. at ___, 918 F. Supp. 2d at 1328.

After making the changes to the calculations in the *Final Determination* with respect to other issues addressed in the prior opinion, Commerce continued to find targeted dumping, in that APP-China's sales prices had a pattern of pricing that differed significantly among U.S. customers for comparable merchandise during the POI, and that the targeted sales met both the "significant deviation test" threshold and the "gap test" threshold. *Redetermination* at 14. However, Commerce declined to apply a targeted dumping remedy after finding that the weighted-average margin under both the A-A comparison methodology and the A-T methodology, as limited to the sales that were found to be targeted, is below the *de minimis* threshold. *Id*. Commerce thus[18] applied the standard A-A methodology to all sales to determine the weighted-average dumping margin. *Id*. at 14–15.

In their comments on the draft remand results, the petitioners argued that failure to apply alternate targeted dumping methodology to all U.S. sales of the exports of subject merchandise by APP-China constitutes error. RCDoc 10 (Oct. 28, 2013) at 11 (comments on prelim. remand); RCDoc. 13 (Nov. 18, 2013) at 7 ("Comments on Disclosure"). They urge that Commerce (re)consider and find APP-China's

[17] *See Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74930 (Dec. 10, 2008). Commerce has since published *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 78 Fed. Reg. 60240 (Oct. 1, 2013), "propos[ing] to continue to not apply the withdrawn provisions governing targeted dumping in antidumping investigations" and soliciting comments on the action, followed by *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 79 Fed. Reg. 22371 (Apr. 22, 2014) (final rule) (unchanged).

[18] Commerce also disagreed "that the price differences identified cannot be taken into account using the standard [A-A] methodology", albeit due to the fact that the weighted average margins under both the A-A methodology and the A-T methodology as limited to sales found to be targeted were below the *de minimis* threshold. *See Redetermination* at 14.

targeted dumping to be not normal. They here argue that in promulgating the targeted dumping regulation, Commerce noted that the Limiting Rule approach would not always be "limited" in application, because there may be situations in which targeted dumping by a firm is so pervasive that the A-T method becomes the benchmark for gauging the fairness of that firm's pricing practice. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27375 (May 19, 1997) (final rule) ("where a firm engages extensively in the practice of targeted dumping, the only adequate yardstick available to measure such pricing behavior may be the [A-T] methodology").

The petitioners also contend that notwithstanding whatever result Commerce reaches with regard to the first issue discussed above, *supra*, Commerce's current record consists of legally–relevant extensive, or "widespread" or "pervasive,"[19] sales by APP-China in terms of percentage volume and value in their own right and also when examined using "Cohen's d" testing, which as used by Commerce measures the extent of price differentiation in U.S. sales.[20] *See* Petitioners' Comments on Disclosure (output listing, p. 270), RPDoc 12,

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[19] *See* 62 Fed. Reg. at 27375; *see also Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (Feb. 27, 1996).

[20] *See Hardwood and Decorative Plywood From the People's Republic of China: Antidumping Duty Investigation*, 78 Fed. Reg. 25946 (May 3, 2013) (preliminary), and accompanying I&D Memo (Apr. 29, 2013) ("*Determination to Apply an Alternative Methodology* . . . B. *Differential Pricing Analysis*"):

> . . . The Cohen's d test is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group. First, for comparable merchandise, the Cohen's d test is applied when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's d coefficient is calculated to evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's d test: small, medium or large. Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. The difference was considered significant if the calculated Cohen's d coefficient is equal to or exceeds the large (*i.e.*, 0.8) threshold.
>
> Next, a ratio test assesses the extent of the significant price differences for all sales as measured by the Cohen's d test. If the value of sales to purchasers, regions, and time periods that pass the Cohen's d test account for 66 percent or more of the value of total sales, then the identified pattern of EPs that differ significantly supports the consideration of the application of the [A-T] method to all sales as an alternative to the [A-A] method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's d test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an [A-T] method to those sales identified as passing the Cohen's d test as an alternative to the

RCDoc 13 (memorandum to file). They claim their results show that if the alternate methodology were applied only to sales identified by the Cohen's d test, or even to all sales, the result would be a non-*de minimis* margin. *See id*. (output listing, p. 292). Thus they argue that the alternate methodology should be applied to all of APP-China's sales. *See id*. at 7.

Since the other issue being remanded may impact the calculations employed for the targeted dumping analysis, the court need not opine further at this point, but upon remand Commerce is specifically requested to consider and address in greater detail the petitioners' points as raised in their confidential comments filed with the court.

### *Conclusion*

This matter is hereby remanded for further proceedings not inconsistent with the foregoing. The finalized results thereof shall be due October 1, 2014; comment briefs for the court on those results to be filed October 31, 2014; and rebuttal commentary by November 17, 2014.

**So ordered**.

Dated: July 2, 2014
New York, New York

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

average-to-average method. If 33 percent or less of the value of total sales passes the Cohen's d test, then the results of the Cohen's d test do not support consideration of an alternative to the [A-A] method.