U.S. Customs and Border Protection

Slip Op. 14–100

XIAMEN INTERNATIONAL TRADE AND INDUSTRIAL CO., LTD., ZHEJIANG ICEMAN GROUP CO., LTD., AND FUJIAN GOLDEN BANYAN FOODSTUFFS INDUSTRIAL CO., LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 11–00411
PUBLIC VERSION

[Sustaining the Department of Commerce's remand redetermination.]

Dated: August 28, 2014

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, for plaintiffs.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Goldberg, Senior Judge:

This matter returns to the court following a remand of the U.S. Department of Commerce's ("Commerce") final results in an administrative review of the antidumping duty order on certain preserved mushrooms from the People's Republic of China ("PRC"). *See Xiamen Int'l Trade & Indus. Co. v. United States*, 37 CIT __, __, 953 F. Supp. 2d 1307, 1327 (2013) ("*XITIC*"). Commerce issued its final remand results on April 21, 2014. Final Results of Redetermination Pursuant to Court Remand, ECF Nos. 29–30 ("*Remand Results*"). Plaintiffs Xiamen International Trade and Industrial Co., Ltd. ("XITIC"), Zhejiang Iceman Group Co., Ltd. ("Iceman Group"), and Fujian Golden Banyan Foodstuffs Industrial Co., Ltd. ("Golden Banyan") assert that the *Remand Results* did not comply with the court's remand order and that another remand is needed. *See* Pls.' Comments on Remand Results, ECF No. 32 ("Pls.' Cmts."). As set forth below, the court sustains the *Remand Results*.

BACKGROUND

Many of the facts relevant to this case were identified in the court's opinion in *XITIC*. *See* 37 CIT at __, 953 F. Supp. 2d at 1310–27. To briefly summarize, Plaintiffs instituted this litigation to challenge several findings from the 2009–2010 administrative review of the antidumping duty order covering certain preserved mushrooms from the PRC. *See Certain Preserved Mushrooms from the People's Republic of China*, 76 Fed. Reg. 56,732, 56,732–33 (Dep't Commerce Sept. 14, 2011) (final admin. review) ("*Final Results*"); *Certain Preserved Mushrooms from the People's Republic of China*, 76 Fed. Reg. 70,112 (Dep't Commerce Nov. 10, 2011) (am. final admin. review) ("*Amended Final Results*"). Specifically, XITIC contested Commerce's surrogate values for several of XITIC's inputs (lime, mushroom spawn, and fresh mushrooms) and for XITIC's labor and financial ratios. Pls.' Mot. for J. on Agency R. 5–25, Ct. No. 11–00378, ECF No. 23–1 ("Pls.' Br."). Uninvestigated respondents Golden Banyan and Iceman Group challenged the rate assigned to separate rate companies, and Iceman Group separately challenged the legality of its inclusion in the administrative review. *Id.* at 25–40.

The court granted Commerce's request for a voluntary remand to recalculate the surrogate values for XITIC's labor and financial ratios. *See XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1321. The court also found that Commerce did not identify substantial evidence supporting a conclusion that Commerce used the "best available information" regarding the market value of XITIC's lime and mushroom spawn inputs. *Id.* at 1315, 1317. Lastly, the court identified an "unexplained anomaly" in Commerce's separate rate methodology that required further explanation. *Id.* at 1326–27.

On remand, Commerce adopted XITIC's proposed surrogate value for lime but continued to value mushroom spawn using the same data from its original determination. *Remand Results* 6, 12. Commerce also used its revised labor methodology to calculate a surrogate value for XITIC's labor. *Id.* at 13. Finally, Commerce continued to use the same separate rate methodology on remand and offered an explanation for the seemingly anomalous figure resulting from that methodology. *Id.* at 16–21.

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and must sustain Commerce's remand redetermination if it is supported by substantial record evidence, accords with law, and is con-

sistent with the remand order. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014).

DISCUSSION

Plaintiffs do not contest Commerce's resolution of the surrogate values for lime and labor,[1] but maintain that the *Remand Results* otherwise fail to accord with the court's remand orders. For the following reasons, the court sustains the *Remand Results*.

I. Commerce's decision to use GTA import data to value XITIC's mushroom spawn input was supported by substantial evidence

XITIC first argues that Commerce's surrogate value for XITIC's white button mushroom spawn input was not supported by substantial evidence. In particular, XITIC claims that Commerce failed to explain why Global Trade Atlas ("GTA") import data for HTS subheading 0602.90.10 were the best available information regarding the market value of XITIC's input. XITIC's primary contention is that the GTA data are insufficiently specific.

A. Legal framework

In non-market economy ("NME") proceedings, Commerce constructs a hypothetical market value for the merchandise subject to an antidumping duty order. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999). Commerce arrives at this figure by valuing the factors of production used in producing subject merchandise plus "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). 19 U.S.C. § 1677b(c)(1) requires that Commerce value factors of producing using "the best available information regarding the values of such factors in a market economy country" or other appropriate countries. *Id.*

Because there is no statutory definition of the "best available information," Commerce has established a series of policy preferences. Specifically, Commerce prefers surrogate values "that are contemporaneous with the period of review, publicly available, product-specific, representative of broad market average prices, and free of taxes and import duties." *XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1312–13 (citing I&D Mem. 7, PD II 10 (Sept. 6, 2011), Ct. No. 11 00378, ECF

[1] Because Plaintiffs agree with Commerce's determinations regarding XITIC's surrogate labor rate and financial ratios and the surrogate value for lime, the court sustains the *Remand Results* on those issues.

No. 16 (Dec. 12, 2011) ("*I&D Mem.*")). Section 1677b(c)(1) does not require perfection, and Commerce must often make "a judgment call" about which of multiple flawed data sets constitutes the "best" information. *See Lifestyle Enter., Inc. v. United States*, 751 F.3d 1371, 1378 (Fed. Cir. 2014). The court's role in reviewing Commerce's surrogate value selections is not to reweigh the evidence, but to determine "whether a reasonable mind could conclude that Commerce chose the best available information." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quotation mark and citation omitted).

B. Background

With that framework in mind, some background is helpful. Prior to remand, Commerce used GTA import data for Indian HTS subheading 0602.90.10 (mushroom spawn) to value XITIC's spawn input at 217.37 Rupees/kilogram ("Rs./kg."). Prelim. Surrogate Value Mem. 6, PD I 110 (Feb. 28, 2011), Ct. No. 11–00378, ECF No. 16 (Dec. 12, 2011). Commerce thus rejected XITIC's proposed surrogates—values of 115.38 Rs./kg. contained in a 2004–2005 annual report from Agro Dutch Limited ("Agro Dutch") and 36.97 Rs./kg. contained in a 2007-2008 annual report from Himalya International Limited ("Himalya"). *See* XITIC Proposed Surrogate Values 3, PD I 92 (Nov. 22, 2010), Ct. No. 11–00378, ECF No. 16 (Dec. 12, 2011). Commerce dismissed XITIC's proposed surrogates because they were "not representative of broad market averages, free of taxes and import duties, or contemporaneous with the" review period. *I&D Mem.* 28. Commerce also dismissed the reliability of the Agro Dutch and Himalya data based on a series of questionable inferences. Specifically, Commerce relied on language from a 2009–2010 annual report for a different Indian mushroom producer, Flex Foods Limited, to conclude that Agro Dutch and Himalya purchased low quality spawn and that their spawn did not match XITIC's high-quality spawn.[2] *See id.* At no point did Commerce explain why the GTA data that it selected to value mushroom spawn were the "best available information" regarding the market value of XITIC's input. *See* 19 U.S.C. § 1677b(c)(1).

XITIC challenged Commerce's decision before this court, and the court agreed that Commerce's surrogate value was not grounded in substantial evidence. Because Commerce's analysis was entirely focused on the flaws in XITIC's proposed surrogate values, Commerce neither critically evaluated the GTA data nor explained why that data

[2] On remand, Commerce conceded that the record did not contain any information regarding the quality of spawn used by XITIC, Agro Dutch, or Himalya. *Remand Results* 11. Commerce thus abandoned reliance on that portion of its analysis. *Id.*

were superior. *See XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1316. Furthermore, the court cited Commerce's unsupported findings regarding spawn quality and concluded that Commerce poorly reasoned its rejection of XITIC's proposed surrogate values. *Id.* at 1317. Absent a more searching analysis, the court determined that substantial evidence did not support a conclusion that the GTA data were the "best available information" to value mushroom spawn. *See id*.

Commerce continued to find on remand that the GTA data were the "best available" information to value mushroom spawn because that data "satisf[ied] the breadth of the Department's selection criteria." *Remand Results* 27. But this time Commerce offered a more thorough explanation for its decision. Commerce first found that XITIC used white button mushroom spawn in its production process. *Id.* at 8. Commerce then compared the three potential surrogate values against its preference for broadly representative, contemporaneous, publicly available, tax-free, import duty-free, and product-specific data. *Id.* at 8–12.

Commerce concluded that the GTA data satisfied all but arguably the last of these criteria. *Id.* at 8–9. In particular, Commerce found that the GTA data covered mushroom spawn and were thus specific to XITIC's input, but acknowledged that the data *may* include varieties of spawn other than white button mushroom spawn. *Id.* However, Commerce was unable to reach any meaningful conclusions regarding the specificity of the GTA data because nothing on the record established either that the GTA data included multiple varieties of mushroom spawn or that spawn prices varied significantly by mushroom type. *Id.* at 8–10. Commerce lastly found that the GTA data were contemporaneous with the review period, publicly-available, representative of a broad market average, and tax- and import-duty free. *Id.* at 9.

The Agro Dutch and Himalya data were comparatively less appropriate as valuation sources. *Id.* Regarding the Himalya data, Commerce concluded that nothing on the record established that the Himalya annual report was specific to white button mushrooms. *Id.* at 10. For that reason, Himalya's data were not demonstrably more or less specific to XITIC's input than the GTA data. *Id.* However, unlike the GTA data, the Himalya data were also not contemporaneous with the review period, not representative of broad market averages, and possibly not tax- and import-duty free. *Id.* at 11. Commerce found that the data from Agro Dutch's annual report were similarly deficient, except that there was evidence supporting a conclusion that Agro Dutch principally produced white button mushrooms during the

period covered by the annual report. *Id.* at 9–10. As a result, Commerce determined that the Agro Dutch data were "likely more specific than the GTA data." *Id.* at 10.

C. Substantial evidence supports Commerce's surrogate value for XITIC's mushroom spawn input

XITIC asserts that Commerce's surrogate value for mushroom spawn continues to be unsupported by substantial evidence and fails to accord with the court's instructions in *XITIC*. Specifically, XITIC argues that the *Remand Results* again focus heavily on flaws in the Agro Dutch and Himalya data while ignoring specificity concerns in the GTA data. Pls.' Cmts. 5. According to XITIC, product specificity is "fundamental" to the selection of surrogate values and "[i]f a set of data is not sufficiently product specific, it is of no relevance whether or not the data satisfy the other criteria." *Id.* XITIC submits that Commerce's behavior in this case was particularly "perplex[ing]" because Commerce has previously rejected basket GTA data in favor of surrogate values that more closely matched a company's actual input. *See id.* at 6–8.

The court disagrees that Commerce's analysis on remand merely identified flaws in the Agro Dutch and Himalya data without critically assessing the GTA data. Commerce applied the same analytical criteria to all three data sets in this case and found that the GTA data fit its policy preferences better than the other data. *See Remand Results* 27. Although XITIC argues otherwise, Commerce neither elevated contemporaneity (or any other factor) above specificity nor accorded undue weight to a particular factor in its surrogate value analysis.

Citing the court's opinion in *Taian Ziyang Food Co. Ltd. v. United* States, 35 CIT __, 783 F. Supp. 2d 1292 (2011), XITIC evidently believes that product specificity necessarily trumps all other considerations when valuing a NME company's inputs. Pls.' Cmts. 5. However, the language in *Taian* that suggested specificity was of utmost importance cannot be taken out of context. *See* 35 CIT at __, 783 F. Supp. 2d at 1330. The *Taian* court was merely illustrating that the overriding purpose of the surrogate value analysis is to construct a normal value based on a company's *actual* inputs. Thus, the *Taian* court noted that Commerce could not reasonably use data on fishing rods to value cardboard packing cartons regardless of whether the fishing rod data satisfied the rest of Commerce's preferred criteria.

Commerce's actions in this case do not resemble the hypothetical example from *Taian*. GTA data for mushroom spawn undeniably includes XITIC's input of white button mushroom spawn. Commerce

did not use data for fishing rods to value mushroom spawn; Commerce used data for mushroom spawn to value mushroom spawn. While the GTA data *may* encompass other spawn varieties not used in XITIC's production process, XITIC identifies no evidence confirming that possibility. Nor does XITIC cite any proof that the GTA figure was artificially inflated due to these other varieties of spawn or some other distortion like low import volume.

Specificity is an important consideration in Commerce's analysis, and Commerce ideally (and reasonably) prefers perfectly specific data over less specific, broader HTS data.[3] But Commerce's decision in this case was not between perfect, specific data and perfect, less-specific data. Rather, all possible data sources were flawed and Commerce had to make a "judgment call" regarding which of the flawed sources was the "best." *See Lifestyle*, 751 F.3d at 1378. While the 2004–2005 Agro Dutch annual report contained data that were likely slightly more specific to XITIC's input, the report was also several years old, represented only one company's experience in the market, and may have included taxes or import duties. Although the Himalya annual report was comparatively more recent, Commerce concluded that nothing in that report established that Himalya only produced white button mushrooms.[4] The Himalya data were thus not conclusively more specific to XITIC's input and in any event suffered from flaws

[3] In an effort to undermine Commerce's *Remand Results*, XITIC cites certain administrative proceedings and cases where Commerce and the court have expressed a preference for specific data over basket import data. *See* Pls.' Cmts. 6–7. But a preference does not amount to an unyielding rule and, in any event, XITIC's citations do not involve substantially similar facts to those at issue here. For instance, XITIC argues that Commerce's rejection of HTS import data in this administrative review to value cow manure is inconsistent with its acceptance of HTS import data when valuing mushroom spawn. *Id.* at 6. But the import data proposed to value cow manure was demonstrably broader than that used to value mushroom spawn, as the HTS category by its very terms covered both animal and vegetable fertilizers. *See I&D Mem.* 12; *Remand Results* 26. Furthermore, unlike with mushroom spawn, Commerce had an alternative source to value cow manure that was contemporaneous, input-specific, publicly available, and likely representative of broad market averages. *See I&D Mem.* 12.

[4] XITIC apparently misunderstands Commerce's conclusions regarding the specificity of XITIC's proposed surrogate values. Commerce never concluded that the Agro Dutch *and* Himalya data were "not more specific to XITIC's input than the GTA data." *Cf.* Pls.' Cmts. 3. In fact, Commerce reached that conclusion only with regard to the Himalya data and XITIC cites no record evidence undermining that finding. *See Remand Results* 10. Instead, XITIC submits without any evidentiary support that "Himalaya [sic] has been reviewed several times as a producer and processor of white button mushrooms under the Indian antidumping duty order." Pls.' Cmts. 5. XITIC also appears to rely on 2009–2010 annual reports for Flex Foods Limited and Agro Dutch to establish that white button mushrooms are important to India's mushroom industry and Himalya thus produced white button mushrooms from 2007–2008. *See id.* at 4–5. But it is unclear how those reports, which are two years older than Himalya's report and which do not appear to reference Himalya, establish that proposition. *See Remand Results* 25–26.

not present in the GTA data (the data were not contemporaneous, did not represent broad market averages, and may have included taxes or import duties).

After weighing all data sets, Commerce concluded that the GTA data satisfied the "breadth of the Department's selection criteria." *Remand Results* 27. Based on the record before the court, a reasonable mind could agree that Commerce selected the best available information to value mushroom spawn. *See Jacobi Carbons AB v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1360, 1373 (2014) (sustaining Commerce's decision not to use data with a "slight superiority in specificity" where the data were flawed in several other respects). The court declines to reweigh the evidence and sustains Commerce's supported decision.

II. Commerce has articulated a reasonable explanation for its continued use of its original separate rate methodology

Uninvestigated separate rate respondents Golden Banyan and Iceman Group next claim that Commerce's *Remand Results* did not identify substantial evidence supporting a 74.14% separate rate. Golden Banyan and Iceman Group specifically argue that Commerce's analysis on remand failed to explain how a figure of 74.14%—seemingly distorted by the inclusion of a 266.13% margin—reflected the economic reality of cooperative separate rate respondents.

A. Legal framework

Commerce usually determines individual weighted average dumping margins for all known exporters and producers of subject merchandise. 19 U.S.C. § 1677f-1(c)(1). However, Commerce may limit the number of companies that it investigates if, "because of the large number of exporters or producers involved in the . . . review," individual investigation is impracticable. *Id.* § 1677f-1(c)(2). If Commerce reasonably reaches that determination, Commerce frequently limits its individual examination to the largest known producers or exporters of subject merchandise during the period under review. *Id.* § 1677f-1(c)(2)(B). Companies selected for individual review are called "mandatory respondents," and the rates calculated for those respondents are presumed to represent all respondents. *See Navneet Publ'ns (India) Ltd. v. United States*, Slip Op. 14–87, 2014 WL 3825886, at *9 (CIT July 22, 2014).

Commerce often at least partially bases rates for uninvestigated, cooperative companies on mandatory respondent rates. In market economy cases, the rate assigned to uninvestigated, cooperative com-

panies is called an "all-others rate" and is calculated using the tiered methodology from 19 U.S.C. § 1673d(c)(5). Section 1673d(c)(5)(A) requires as a "[g]eneral rule" that Commerce calculate all-others rates using the weighted average of the weighted average dumping margins for individually investigated companies, excluding zero or *de minimis* rates and rates based "entirely" on facts available. However, if no rates remain after making those exclusions, § 1673d(c)(5)(B) instructs Commerce to use "any reasonable method." The Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act contains guidance on what constitutes a "reasonable method" for purposes of § 1673d(c)(5)(B) and clarifies that the "reasonable method" must generate a rate that is "reasonably reflective of potential dumping margins for non-investigated exporters or producers." *See* H.R. Rep. No. 103–316, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201.

Although not compelled by statute, Commerce uses the methodology from § 1673d(c)(5) to calculate separate rates in NME cases. *See XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1322. Separate rate companies have established a certain degree of independence from the NME-wide entity that justifies assigning those companies a different rate than would otherwise be imposed against the country-wide entity. *Id.* The country-wide rate is usually based entirely on adverse facts available ("AFA"). *Id.*

B. Background

In this case, Commerce used the "[g]eneral rule" in § 1673d(c)(5)(A) to calculate separate rates for uninvestigated, cooperative respondents Golden Banyan and Iceman Group (among other companies). Specifically, Commerce calculated separate rates by weight averaging the weighted average dumping margins calculated for mandatory respondents XITIC, Blue Field (Sichuan) Food Industrial Co., Ltd. ("Blue Field"), and Guangxi Jisheng Foods, Inc ("Jisheng"). *Final Results*, 76 Fed. Reg. at 56,733. Jisheng's margin of 266.13% was substantially greater than the margins calculated for XITIC (13.12%) and Blue Field (2.17%) and even exceeded the country-wide rate based entirely on AFA (198.63%). *See id.* at 56,733–34 (containing final margins for XITIC, Jisheng, and PRC-wide entity); *Amended Final Results*, 76 Fed. Reg. at 70,113 (containing final margin for Blue Field). Nonetheless, because § 1673d(c)(5)(A) expressly requires the exclusion only of rates determined "entirely" under facts available, Commerce did not exclude Jisheng's *partial* AFA margin from its calculations.

Golden Banyan and Iceman Group argued that Commerce's methodology was neither supported by substantial evidence nor in accordance with law. Those companies disagreed that Commerce could include Jisheng's partial AFA margin in its calculations when it would have excluded Jisheng's margin had Jisheng been assigned a comparatively lower PRC-wide rate. Pls.' Br. 37. Golden Banyan and Iceman Group asserted that Commerce's actions were based on an unreasonable interpretation of the statute and undercut § 1673d(c)(5)'s purpose of preventing unrepresentatively high margins from distorting cooperative, uninvestigated respondent rates. *Id.* Golden Banyan and Iceman Group argued alternatively that Commerce at a minimum could not use a seemingly unrepresentative margin without further explanation. *Id.* at 38–40.

The court determined that Commerce reasonably interpreted § 1673d(c)(5)(A) to permit the separate rate methodology that it used in this case. *See XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1326 (noting that statute required the exclusion of rates based "entirely" on facts available, and Jisheng's rate was based only partially on facts available). Nonetheless, the court agreed that it could not sustain the separate rates assigned to Golden Banyan and Iceman Group without further explanation. *Id.* at 1327. In so holding, the court rejected the Government's suggestion that Commerce was not required to consider whether margins calculated under § 1673d(c)(5)(A) reasonably reflected economic reality for separate rate respondents because that analysis applied only when Commerce proceeded under § 1673d(c)(5)(B). *Id.* While holding that the Government was "correct as a general rule," the court found it "illogical not to expect that the preferred methodology should also reasonably reflect potential dumping margins." *Id.* Consequently, the court concluded, "where the data used clearly indicates an unexplained anomaly, Commerce must articulate a reasonable basis for its use of the anomalous result." *Id.*

On remand, Commerce used the same methodology to calculate a revised separate rate of 74.14% (down from 76.12% in the *Final Results* due to the intervening change in XITIC's weighted average dumping margin). *See Remand Results* 17. However, Commerce offered a more thorough justification for its use of Jisheng's margin. Commerce first found that Jisheng was one of the largest producers of subject merchandise during the review and that Jisheng's sales practices represented the pricing behavior of other respondents. *Id.* Furthermore, Commerce found that Jisheng's average shipment volume was comparable to the range exported by XITIC and Blue Field and that the merchandise sold was physically similar to merchandise

sold by Blue Field. *Id.* at 18. Commerce also concluded that the application of partial AFA had a relatively minor impact on Jisheng's overall margin. *Id.* at 18–19. Indeed, Commerce calculated that Jisheng still would have received a weighted-average dumping margin of [[ ]]% even omitting the U.S. sales to which AFA had been applied. *Id.* at 19. Finally, Commerce noted that Jisheng's margin was not anomalous when compared against mandatory respondents' margins of 308.33% (later revised to 82.04% on remand) and 223.74% in the subsequent review of the mushroom order. *Id.* at 20 (citing *Certain Preserved Mushrooms from the People's Republic of China*, 77 Fed. Reg. 55,808, 55,809 (Dep't Commerce Sept. 11, 2012) (final admin. review)); *see also* Order, Ct. No. 12–320, ECF No. 51 (sustaining remand results)).

C. Commerce articulated a reasonable explanation for the separate rate that it calculated in the *Remand Results*

Golden Banyan and Iceman Group submitted comments arguing that Commerce again failed to explain why the inclusion of a margin of 266.13% is somehow less distortional than the total AFA margin of 198.63% that would have been excluded from Commerce's margin. Pls.' Cmts. 9. It appears that Golden Banyan and Iceman Group seek the altogether exclusion of Jisheng's margin from Commerce's calculations.

But with the benefit of additional explanation, the court declines to require further analysis from Commerce. As noted, Commerce calculated the separate rate in this case using § 1673d(c)(5)(A)'s preferred methodology. When enacting § 1673d(c)(5)(A), Congress evidently decided that margins calculated for individually investigated respondents that were neither zero, *de minimis*, nor based entirely on facts available reflected potential dumping margins for uninvestigated, cooperative respondents. Thus, Congress did not expressly require separate consideration of the representativeness of mandatory respondent rates unless Commerce proceeded under the alternative methodology of § 1673d(c)(5)(B).

Nevertheless, the court sought further analysis in this case because of the possibility that Commerce's preferred methodology resulted in a figure not fairly representative of Golden Banyan's and Iceman Group's sales practices. *See XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1327. Specifically, the court noted the large gap separating Jisheng's margin from Blue Field's and XITIC's margins and expressed concern that the application of partial AFA in this case had an unusually large impact on Jisheng's margin or that some other unknown factor rendered Jisheng's margin anomalous and unrepresentative.

On remand, Commerce offered additional insight into Jisheng's margin. *See Remand Results* 16–21. Commerce found that (1) Jisheng was one of the largest known exporters of subject merchandise during the review, (2) Jisheng's data paralleled mandatory respondent data in terms of average shipment volume and range of products, (3) Jisheng's margin was consistent with a mandatory respondent margin calculated in the subsequent administrative review; and (4) Jisheng's margin almost certainly would have [[ ]] the PRC-wide rate even if based exclusively on Jisheng's own reported data.

Golden Banyan and Iceman Group contest none of these findings. Taken as a whole, then, the record now establishes with substantial evidence that there is no clear distortion in Jisheng's margin except that the margin is substantially higher than the margins calculated for other mandatory respondents. But a wide range in margins, without identifying any distortion, does not override the assumption inherent in 19 U.S.C. § 1673d(c)(5)'s structure that mandatory respondent rates that are not zero, *de minimis*, or based entirely on facts available reflect uninvestigated respondents' margins as a whole. The court thus sustains the *Remand Results* as they pertain to the calculation of Golden Banyan's and Iceman Group's separate rates.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are sustained. Judgment will enter accordingly.

Dated: August 28, 2014
New York, New York

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

Slip Op. 14–106

DUPONT TEIJIN FILMS CHINA LIMITED, DUPONT HONGJI FILMS FOSHAN CO., LTD., DUPONT TEIJIN HONGJI FILMS NINGBO CO., LTD., AND DUPONT TEIJIN FILMS U.S. LIMITED PARTNERSHIP, Plaintiffs, TIANJIN WANHUA CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant, TERPHANE, INC., MITSUBISHI POLYESTER FILM, INC., AND SKC, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 13–00229

[Motion for judgment on the agency record in antidumping administrative review granted regarding valuation of recycled input and brokerage and handling expenses; Commerce's final results in all other respects sustained.]

Dated: September 11, 2014

John D. Greenwald and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for plaintiffs. With them on the brief were *Robert C. Cassidy* and *Thomas M. Beline*.

David J. Craven, Riggle & Craven, of Chicago, IL, argued for plaintiff-intervenor. With him on the brief were *David A. Riggle* and *Saichang Xu*.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Carrie A. Dunsmore*, Trial Attorney. Of counsel on the brief was *Michael T. Gagain*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Restani, Judge:

This matter is before the court on the motions for judgment on the agency record pursuant to USCIT Rule 56.2 filed by plaintiffs DuPont Teijin Films China Limited, DuPont Hongji Films Foshan Co., Ltd., DuPont Teijin Hongji Films Ningbo Co., Ltd., and DuPont Teijin Films U.S. Limited Partnership (collectively "DuPont") and consolidated plaintiff Tianjin Wanhua Co., Ltd. ("Wanhua"). DuPont and Wahua challenge various aspects of the Department of Commerce's ("Commerce") final results in the third antidumping duty administrative review of polyethylene terephthalate film, sheet, and strip ("PET film") from the People's Republic of China ("PRC"). *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 35,245 (Dep't Commerce June 12, 2013) ("*Final Results*"). DuPont contends that Commerce erred in calculating its dumping margin, alleging that Commerce misvalued DuPont's recycled PET chips, indirect selling expenses, and brokerage and handling expenses. Mem. of Points and Auths. in Supp. of Pls.' Mot. for J. on the Agency R., ECF No. 46–2 ("DuPont Br."). Wanhua challenges Commerce's selection of mandatory respondents, which did not include Wanhua, and Commerce's decision to assign DuPont's rate to Wanhua. Mem. in Supp. of Mot. of Consol. Pl. Tianjin Wanhua Co., Ltd. for J. on the Agency R., ECF No. 48–1 ("Wanhua Br."). DuPont and Wanhua also challenge Commerce's use of the targeted dumping analysis in administrative reviews. DuPont Br. 1–2 n.2; Wanhua Br. 15–19. Defendant United States ("the government") argues that the *Final Results* are based on substantial evidence and are in accordance with law. Def.'s Resp. in Opp. to Mots. for J. upon the Admin. R., ECF No. 57 ("Gov. Br."). For the reasons stated below, the court remands in part and sustains in part the *Final Results*.

INTRODUCTION

Commerce published an anitdumping duty order covering PET film from the PRC on November 10, 2008. *Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China and the United Arab Emirates: Antidumping Duty Orders and Amended Final Determination of Sales at Less than Fair Value for the United Arab Emirates*, 73 Fed. Reg. 66,595 (Dep't Commerce Nov. 10, 2008). Following requests from several interested parties, Commerce initiated an administrative review of that order on December 23, 2011, covering the period of November 1, 2010, through October 31, 2011. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 82,268, 82,269, 82,273 (Dec. 30, 2011). On February 8, 2012, Commerce selected as mandatory respondents the two largest exporters by volume, DuPont and Shaoxing Xiangyu Green Packing Co., Ltd. ("Green Packing").[1] Memorandum Pertaining to Respondent Selection at 7, PD 35 (Feb. 8, 2012) ("Respondent Selection Memo"). In determining the largest exporters by volume, Commerce relied on data from U.S. Customs and Border Protection ("CBP") and voluntarily submitted quantity and value ("Q&V") data from several companies that Commerce found rebutted the CBP data as it pertained to those companies. Respondent Selection Memo at 5–6.

Before the agency, disputes arose over the valuation of DuPont's reprocessed waste PET film that was reintroduced into the production process ("recylced PET chips"), the calculation of DuPont's indirect selling expenses, the calculation of DuPont's brokerage and handling ("B&H") expenses, and Commerce's use of the so-called "targeted dumping" methodology, among other issues. Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review at 18–33, A-570–924 (June 5, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–13985–1.pdf (last visited Sept. 3, 2014) ("*I&D Memo*"). Wanhua also argued that it should have been chosen as a mandatory respondent and given its own rate. *See id.* at 3–8. In the *Final Results*, Commerce calculated a weighted average dumping margin of 0.00% for Green Packing and 12.80% for DuPont. *Final Results*, 78 Fed. Reg. at 35,247. In calculating the margin for cooperative separate rate respondents not se-

[1] Commerce initially selected only DuPont Teijin Films China Limited and Green Packing as mandatory respondents. Memorandum Pertaining to Respondent Selection at 7, PD 35 (Feb. 8, 2012). Commerce ultimately collapsed DuPont Teijin Films China Limited, DuPont Hongji Films Foshan Co., Ltd., and DuPont Teijin Hongji Films Ningbo Co., Ltd. into a single entity. *See* Decision Memorandum for Preliminary Results at 3, PD 233 (Dec. 3, 2012).

lected for individual review, including Wanhua, Commerce relied on the margin calculated for DuPont, because it was the only rate for a mandatory respondent that was not zero or de minimis. *I&D Memo* at 8. Wanhua thus received DuPont's rate of 12.80%. *See Final Results*, 78 Fed. Reg. at 35,247.

DuPont challenges three aspects of the *Final Results*: 1) Commerce's decision to value DuPont's recycled PET chips the same as its virgin PET chips without providing any by-product offset was arbitrary and unsupported by substantial evidence; 2) Commerce's rejection of DuPont's proposed indirect selling expense ratio was unsupported by evidence and not in accordance with law; and 3) Commerce erred in calculating DuPont's B&H expenses by relying on data that was not the most contemporaneous data on the record, including expenses for two documents that DuPont generates internally, and failing to segregate shipping costs into per-container and per-shipment costs. DuPont Br. 10–33. DuPont also adopts Wanhua's challenge to Commerce's use of the targeted dumping analysis in administrative reviews. *Id.* at 1–2 n.2; Wanhua Br. 15–19.

Wanhua raises three challenges to Commerce's mandatory selection process: 1) Commerce lacked the authority under 19 U.S.C. § 1677m(a) to limit the number of mandatory respondents in this case because the number of respondents was not "large,"[2] and thus all respondents should have been reviewed; 2) Commerce acted arbitrarily and unreasonably in relying on inconsistent data in selecting the mandatory respondents, namely by relying on a mix of CBP data and voluntary Q&V data, when Commerce should have relied on a single data source to make this determination; 3) Wanhua should have been selected as a mandatory respondent in lieu of, or in addition to, DuPont because DuPont's margin was not representative of Wanhua's rate, as DuPont's margin was subject to manipulation by a U.S. producer of PET film and DuPont sold certain quantities of PET film in the U.S. after further manufacturing. Wanhua Br. 6–12. Wanhua also makes a more general argument that it was unfair and unreasonable for Commerce to assign DuPont's rate to Wanhua be-

[2] 19 U.S.C. § 1677m(a) (2012) provides in relevant part: In a . . . review under section 1675(a) of this title in which [Commerce] has, under section 1677f-1(c)(2) of this title . . ., limited the number of exporters or producers examined, . . . [Commerce] shall establish . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such section[] who submits to [Commerce] the information requested from exporters or producers selected for examination, if—

(1) such information is so submitted by the date specified—(A) for exporters and producers that were initially selected for examination . . .; and

(2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

cause the potential manipulation of DuPont's margin and DuPont's further manufacturing activities rendered DuPont's rate unrepresentative of Wanhua's commercial reality. *Id.* at 12–14. Finally, should the court reject its arguments that it should receive its own rate, Wanhua argues that it should be given DuPont's corrected rate if DuPont is successful on any of its challenges. *Id.* at 15.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Recycled PET Chips Valuation

A. *Background*

The PRC is considered by Commerce to be a non-market economy[3] ("NME"). In NME antidumping[4] duty cases, Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). In calculating normal value, "the valuation of the factors of production shall 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 administering authority." *Id.* These surrogate values are to be based, "to the extent possible," upon data from an economically comparable country that is a "significant producer[] of comparable merchandise." *Id.* § 1677b(c)(4). The surrogate values at issue in this case were used to compute DuPont's normal value, representing the cost of production for DuPont had it operated in a hypothetical market economy. *See id.* § 1677b(c)(1).

"Nowhere does the statute speak directly to any methodology Commerce must employ to value the factors of production, indeed the very

[3] A nonmarket economy country is "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18).

[4] Dumping is defined as the sale of goods at less than fair value, calculated by a fair comparison between the export price or constructed export price and normal value. *See* 19 U.S.C. §§ 1677(34), 1677b(a).

structure of the statute suggests Congress intended to vest discretion in Commerce by providing only a framework within which to work." *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 (1999); *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (recognizing that Commerce is entitled to deference in interpreting the undefined term "best available information"). Nonetheless, selection of the best available information must be in line with the overall purpose of the antidumping statute, which the Court of Appeals for the Federal Circuit has explained to be "determining current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) ("[T]here 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."). In calculating normal value in the NME context, the particular aim of the statute is to determine the non-distorted cost of producing the subject merchandise. *See Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1081, 810 F. Supp. 314, 316–17 (1992).

Some producers produce by-products as part of their production process. In some cases, these by-products are used as inputs in the same, or other, production processes of a company. If a good subject to an antidumping order is produced using a by-product from a prior production run, Commerce must somehow account for the by-product when calculating normal value. *See* 19 U.S.C. § 1677b(c)(1). The antidumping statute, however, does not require a particular method of accounting for by-products. *See id.* § 1677b(c).

In cases where by-products are reused as inputs for producing the same good, double counting of input costs can occur. The cost of the raw material from which the by-product is derived is included in the calculation of normal value when the raw material is first used. Double counting of costs can occur if Commerce assigns a value to the raw material and then another cost to the recycled raw material without providing some form of offset to account for the fact that the recycled material did not need to be purchased.[5] Double counting should be avoided, as it does not provide a fair price comparison. *Holmes Prods. Corp. v. United States*, 16 CIT 628, 632, 795 F. Supp. 1205, 1208 (1992).

Commerce has used two methods to avoid double counting recycled by-product inputs. First, Commerce has assigned a zero value to

[5] Of course, Commerce can account for any processing costs incurred by the company in converting the raw material into the recycled version of the input.

by-products that are reused as inputs in the production process, for purposes of calculating normal value, as there is no additional material cost for the recycled input. *See e.g., E.I. Dupont De Nemours & Co. v. United States*, 22 CIT 220, 225, 4 F. Supp. 2d 1248, 1253 (1998) (accepting as reasonable SKC's method of valuing recycled PET chips at zero); *Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 60 Fed. Reg. 42,835, 42,836 (Dep't Commerce Aug. 17, 1995) ("*PET Film from Korea*") (valuing recycled chips at zero because the cost of producing recycled chips has been captured in the cost of production for virgin chips). More recently, however, Commerce's practice generally has been to grant the producer a credit or offset for by-products generated in the manufacturing process that are either sold or reintroduced into production, instead of valuing the recycled input at zero. *See e.g., Mittal Steel Galati S.A. v. United States*, 31 CIT 1776, 521 F. Supp. 2d 1409 (providing an offset for recycled scrap input after Commerce's decision to assign a surrogate value to recycled inputs was found to be unreasonable in *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1130, 502 F. Supp. 2d 1295, 1303 (2007)); *Guangdong Chemicals Imp. & Exp. v. United States*, 30 CIT 1412, 1426, 460 F. Supp. 2d 1365, 1376 (2006) (applying a credit for by-products made in the manufacturing process of sebacic acid).

Dupont's PET film is produced using two forms of a single material input: virgin PET chips and recycled PET chips (derived from prior production runs). DuPont Br. 4. In the preliminary results of this review, Commerce did not grant Dupont a by-product offset for the recycled PET chips generated during the PET film manufacturing process in calculating normal value. Decision Memorandum for Preliminary Results at 16, PD 233 (Dec. 3, 2012) ("Preliminary Results Memo"). Commerce, however, did not assign any value to the recycled PET chips used in production. *See I&D Memo* at 18–19.

Commerce, in the *Final Results*, decided to include recycled PET chips as a factor of production for normal value, and it assigned the recycled chips the same value as virgin PET chips. *See id.* at 19–21. Commerce admitted that, theoretically, DuPont's recycled chips reintroduced into production should be offset by the quantity of recycled chips produced, but Commerce failed to do so, alleging that DuPont did not provide support for the quantity of by-product generated. *Id.* at 19.

DuPont challenges Commerce's valuation of the recycled PET chips at the same value as virgin PET chips. DuPont Br. 2. DuPont alleges that Commerce's determination is not in accordance with the law

because it unreasonably departs from Commerce's past practice of valuing recycled chips at zero, a practice the court has sustained in other cases. *Id.* at 13–15. Additionally, DuPont contends that Commerce arbitrarily treated it differently from other parties in this proceeding, specifically Green Packing, who was not assigned a value for recycled PET chips because it did not report its usage of recycled PET chips. *Id.* at 15. Next, DuPont argues that Commerce impermissibly double counted the cost of recycled PET chips based upon a misunderstanding of DuPont's position, alleging that Dupont wanted to completely exclude the chips as a factor of production. *Id.* at 16–18. DuPont asserts that the recycled chips should be valued at zero because the cost of purchasing virgin PET chips encompasses the cost of the recycled PET chips and the costs of reprocessing waste PET film into recycled chips are captured elsewhere. *Id.* at 18. In response to Commerce's assertion that DuPont failed to substantiate its offset request, DuPont contends that it did not request a by-product offset or provide an alternate surrogate value, as it believed the recycled PET chips would be valued at zero. *Id.* at 19–20; Pl.'s Reply to Def.'s Resp. to Mot. for J. on the Agency R. 12, ECF No. 64 ("DuPont Reply").

B. *Analysis*

Commerce unreasonably assigned a surrogate value to recycled PET chips equivalent to virgin PET chips while failing to give DuPont a by-product offset for recycled PET chips produced, resulting in double counting of the recycled PET chips. *See Holmes*, 16 CIT at 632, 795 F. Supp. at 1208; *Mittal Steel*, 31 CIT at 1125–32, 502 F. Supp. 2d at 1299–1305. Commerce acknowledged that it had valued recycled PET chips at zero in prior proceedings, and that this had been upheld by the court. *See I&D Memo* at 20. Commerce explained that applying the same valuation in these proceedings, however, would lead to inaccurate margins. These explanations are unpersuasive.

First, Commerce explained that because each product DuPont manufactures requires different amounts of recycled PET chips and because the record did not show that the by-product reintroduced into production for any particular product matched the by-product generated during the production of that product, it was improper to exclude the by-product input on the basis that it is balanced by the by-product output. *Id.* at 19–20. The underlying concern appears to be that cost shifting can occur by taking recycled PET chips generated from one product and reintroducing it into another product line to reduce the cost of manufacturing that second product, presumably to obtain a lower dumping margin. These same concerns, however, were raised in

E.I. Dupont and were rejected by Commerce and the court because there was no evidence that this type of cost shifting was occurring. *PET Film from Korea*, 60 Fed. Reg. at 42,835–36; *E.I. Dupont De Nemours*, 22 CIT at 225. Commerce did not cite any evidence that such cost shifting occurred here, and the government concedes that Commerce made no such finding. *See* Gov. Br. 29.

Second, Commerce asserted that assigning a zero value to the recycled PET chips would undervalue DuPont's overhead costs, as the surrogate overhead ratio used by Commerce in calculating normal value is multiplied by the cost of manufacturing, which includes raw materials, labor, and energy. *I&D Memo* at 20. Commerce was concerned that by valuing the recycled chips at zero, the raw costs of the raw materials would be undervalued. *Id.* But the full value of the raw materials in the recycled chips is captured in the initial costs of the virgin chips, which is already included in this calculation, and Commerce did not dispute DuPont's contention that the other costs in reprocessing the waste film into recycled PET chips were already included in the labor and energy factors. The court has previously held that assigning zero value to recycled PET, but including the costs of processing the waste into recycled PET chips, "reasonably capture[s] the value of recycled PET chips re-introduced into the production process." *E.I. DuPont*, 22 CIT at 225 (citing *E. I. DuPont De Nemours & Co. v. United States*, 20 CIT 373, 377–78, 932 F. Supp. 296, 300–01 (1996)). Commerce has not provided any reasonable explanation for coming to the opposite conclusion in this case.

Finally, the government argues that "[t]o value a material input at zero in a nonmarket economy case would be equivalent to removing that input altogether from the calculation of normal value." Gov. Br. 15. According to the government, this would violate 19 U.S.C. § 1677b(c)(3)(B), which requires Commerce to value the "quantities of raw materials employed." Gov. Br. 15 (citing *I&D Memo* at 19). But zero is a value. The surrogate value analysis is designed to determine DuPont's costs of production as if it operated in a hypothetical market economy. *See Rhodia, Inc. v. United States*, 25 CIT 1278, 1285, 185 F. Supp. 2d 1343, 1351 (2001). Assuming that DuPont operated in a market economy, it still would not have to pay for PET chips that are recycled from its prior production run. Thus, assigning zero as the material costs of the recycled chips is consistent with the statute.

Commerce's double counting of the recycled PET chips is clearly unreasonable in the light of DuPont's reasonable alternative of valuing the recycled chips at zero. *See Holmes*, 16 CIT at 632, 795 F. Supp. at 1208. Commerce should "reconsider its approach, and adopt a

methodology that does not result in double-counting costs, insofar as reasonably avoidable."[6] *Id.*

II. Commerce's Calculation of DuPont's Brokerage and Handling Costs

A. *Selection of the 2011 Doing Business Report*

DuPont challenges Commerce's use of "Doing Business 2011: Economy Profile Indonesia" ("Doing Business 2011"), to calculate the brokerage and handling ("B&H") surrogate value. DuPont Br. 28–29. DuPont suggests that "Doing Business 2013: Economy Profile Indonesia" ("Doing Business 2013") was a more contemporaneous source to value B&H because it contained 2011 information covering ten months of the period of review, whereas Doing Business 2011 contained 2010 data that only overlapped with two months of the period of review. *Id.* at 29.

Commerce's practice generally treats valuation information contemporaneous with the period of review as the best available information, and Commerce will select the most contemporaneous information available when all other factors are held equal. *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 30 CIT 1173, 1177–79 (2006); *aff'd*, 228 F. App'x 1001 (Fed. Cir. 2007). Commerce selected Doing Business 2011, published by the World Bank, to calculate the surrogate value for B&H. *I&D Memo* at 24.

[6] The court notes that Commerce, after it refused to value the recycled chips at zero, declined to provide a by-product offset for the recycled chips generated, explaining that DuPont did not support with adequate accounting records the quantities of the by-product chips claimed in the worksheets DuPont submitted to Commerce. *I&D Memo* at 19–20. At oral argument, DuPont attempted to tie various documents in the record together to address Commerce's concerns, but it does not appear that such an explanation was provided to Commerce in the first instance. On the other hand, it does not appear that DuPont was made aware of the alleged deficiencies of its responses until the *Final Results*. *See* 19 U.S.C. § 1677m(d) (requiring that Commerce to "promptly inform [a] person submitting [a deficient] response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency"). In fact, the by-product issue was largely irrelevant to DuPont until Commerce issued the *Final Results*, as Commerce previously had valued the recycled chips at zero and thus there was no need for an offset. *Cf. Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1237 (2009) (holding that exhaustion doctrine did not apply when Commerce changed its position in the final results, explaining that a party "is not required to predict that Commerce [will] accept other parties' arguments and change its decision"). Because Commerce's double counting of the recycled chips was unreasonable when DuPont offered a reasonable alternative in valuing the recycled chips at zero, the court need not determine whether DuPont satisfied Commerce's requests in supporting the by-product quantities claimed in the worksheets. On remand, should Commerce prefer to apply a by-product offset, rather than value the recycled chips at zero, in order to remedy the double counting, Commerce may reopen the record for DuPont to supplement or clarify its earlier submissions regarding the claimed offset if so necessary.

Doing Business 2011 contained data from 2010. *Id.* at 25. Commerce found that Doing Business 2011 offered the best available information for valuing B&H because, as Commerce often states, the data were based on broad market averages, were publicly available, were free of taxes and duties, and were contemporaneous with the POR. *Id.* at 24. Commerce also examined Doing Business 2013, but concluded that this report was not the best available information because it contained B&H information that was not specifically dated. *Id.* at 24–25. Because Doing Business 2011 contained 2010 data, Commerce reasoned that the data contained in Doing Business 2013 was from 2012, which was after the period of review. *Id.* at 25.

Commerce's decision to reject Doing Business 2013 was reasonable, as it is unknown whether that data was contemporaneous with the period of review. Doing Business 2013 does not specifically provide the date for the data used to calculate the B&H costs. *I&D Memo* at 24–25. Although Doing Business 2013 technically contains 2011 information, and in fact contains data from 2004–2013, this information is a chart giving historical data for various indicators and does not contain a breakdown of the B&H costs for 2011. *See* Letter from Cromwell & Morning LLP to Acting Sec. of Commerce Pertaining to DuPont Companies Additional Surrogate Data, PD 254 (Jan. 7, 2013). There is no basis to conclude that because Doing Business 2013 contains a historical data chart with data spanning ten years, including 2011, the B&H costs were specifically from 2011. Commerce reasonably concluded that the data was likely from 2012, because the Doing Business 2011 data was from the previous year, 2010. *See I&D Memo* at 25. Data from 2012 would not be contemporaneous with the period of review. Doing Business 2011 contains the necessary breakdown of costs and clearly labels the data as being from 2010, which is contemporaneous with at least part of the period of review. *See* Memo from IA to File Pertaining to Interested Parties Surrogate Memo-Part 3 Exhibit 7, PD 236 (Dec. 3, 2012) ("B&H Methodology"). Thus, the court concludes that Commerce's decision to use Doing Business 2011 as the most contemporaneous data source for the surrogate B&H value is supported by substantial evidence and is in accordance with the law.

B. *Adjustment of Document Expenses*

B&H expenses include the time and costs necessary to complete every procedure for exporting goods, including document preparation, customs clearance and technical control, and port and terminal han-

dling. *See id.* Doing Business 2011 lists five documents included in the document preparation costs: memorandum of understanding, packing list, bill of lading, commercial invoice, and customs export declaration. *Id.* The document preparation cost, however, is not separated into costs for each specific document; rather, it lists only the total cost for all five documents. *Id.*

DuPont argues for a proportional reduction in the document preparation expense because DuPont internally produces two of the documents included in the document preparation value and therefore does not incur expenses for those documents. DuPont Br. 29–30. Commerce will usually make adjustments to calculations when data are clearly identified. *I&D Memo* at 25. Commerce did not dispute that DuPont internally produced two of the documents included in the document preparation expense. *See I&D Memo* at 25. Commerce explained, however, that Doing Business 2011 contained an aggregate figure for document preparation and there was no way to determine the cost of any single document within that aggregate figure. *I&D Memo* at 25. Because the costs of each document could not be separated, Commerce included the entire value of the document preparation expense component in calculating B&H costs. *Id.* DuPont alleges that by including the full value of all documents, Commerce chose an "admittedly distorted" value as opposed to a value that was "potentially distorted." DuPont Br. 32. DuPont argues that in selecting a value that Commerce knew was distorted, Commerce's calculation was unlawful. *Id.* at 31. The court disagrees.

Commerce acted reasonably in using the entire document preparation value in calculating B&H. The documents DuPont produces internally could comprise a large or small portion of the aggregate document preparation expense. Because the document costs are not separated, but are given in an aggregate figure, there is no way to discern on this record the relative value of the documents and whether or not a proportional reduction would be appropriate. DuPont provided no information regarding the relative values of the documents included in the document preparation expense, so Commerce had no basis to subtract expenses from the aggregate figure. For example, if the two documents accounted for a very small percentage of the overall document expenses, DuPont's proposed methodology could result in an even greater distortion than the one used by Commerce. Because Commerce had no way to discern whether DuPont's proposed proportional adjustment would lead to any greater accuracy, Commerce's use of the entire aggregate document preparation expense value is supported by substantial evidence and in accordance with the law.

C. *Segregation of "Per-Shipment" and "Per-Container" Costs*

DuPont challenges Commerce's calculation of B&H costs based on a shipment of one container. DuPont Br. 32. DuPont alleges that Commerce's method of assuming that a shipment contains one container overvalues DuPont's B&H document preparation expenses and other expenses that are incurred per shipment. *Id.* at 32–33. DuPont claims that it often ships multiple containers in one shipment and therefore incurs only one set of customs clearance and technical control expenses ("customs clearance costs") and one set of document preparation expenses for a shipment of multiple containers. *Id.* at 33; Case Brief of DuPont Companies at 28, CD 138 (Jan. 28, 2013) ("DuPont Case Br.") DuPont instead proposed that Commerce separate the components of B&H and allocate them as either "per-shipment" or "per-container" expenses. DuPont Case Br. at 28.

As explained above, Commerce relied on Doing Business 2011 to calculate a surrogate value for B&H. *I&D Memo* at 24. Doing Business 2011 surveyed freight forwarders, shipping lines, customs brokers, port officials, and banks on the costs and procedures to ship certain goods. B&H Methodology. The World Bank uses the survey results to calculate and report values for various exporting and importing expenses. *See id.* The reported figures are based on exporting and importing a standardized cargo of goods in a 20-foot, full container load weighing ten tons. *Id.* Commerce totaled the components of the B&H costs applicable to the shipments here, and converted the B&H cost into a per kilogram value based on the weight of a filled twenty-foot container so the rate could be scaled up or down based on the kilograms involved in a shipment. Gov. Br. 49. This resulted in a surrogate value of $0.0544/kg for all B&H costs. B&H Methodology; DuPont Case Br. at 24. When DuPont objected to this methodology on the grounds that it overstated the customs clearance costs and document preparation expenses, Commerce replied that making adjustments to specific components of the aggregate figure would distort the calculation, and there was no way to go behind the data to determine the specific cost elements that were reported. *I&D Memo* at 26. Additionally, Commerce asserted that because the underlying survey data came from many diverse entities that ship across borders, the aggregate figure accounted for both companies that ship one container and companies that ship multiple containers per shipment, like DuPont. *Id.* ; Gov. Br. 49.

Commerce's B&H calculation rests on an assumption that the $210 for document preparation expenses and the $169 for customs clearance costs mentioned in the report "was derived from a formula by which the exporter pays [these expenses] based on the weight of the

goods, which simply is not representative of reality." *See CS Wind Vietnam Co., Ltd. v. United States*, 971 F. Supp. 2d 1271, 1295 (CIT 2014). Accordingly, Commerce's methodology incorrectly assumes that a shipment weighing less will incur lower document preparation and customs clearance costs, while a shipment weighing more will incur higher preparation costs. Common sense indicates that a half-full, twenty-foot container would incur the same document preparation and customs clearance costs as a full twenty-foot container of a single type of good. The court has recognized previously that increasing the surrogate value for B&H proportionally based on the weight of the shipment or the size of the container may not always be reasonable. *See Since Hardware (Guangzhou) Co. v. United States*, 911 F. Supp. 2d 1362, 1380–81 (CIT 2013). Commerce's reasoning is not based on simple logic, and the analysis from *Since Hardware* applies here. In converting the document preparation expenses and customs clearance costs to a per kilogram value based on the weight of a hypothetical twenty-foot container, and multiplying that value by the weight of DuPont's actual shipments, Commerce has applied a proportional increase in the B&H costs. Commerce has failed to explain why document preparation and customs clearance costs would change depending on the size or weight of the shipment. If DuPont, for example, were to ship five full twenty-foot containers, it would incur document preparation and customs clearance costs for five containers, when realistically DuPont should pay these expenses once, as all five containers are contained in one shipment. Commerce's position is contrary to common sense and commercial reality. Although the court understands that Commerce commonly converts all surrogate values into a per kilogram amount for use in calculating dumping margins, its method of doing so here, based on the weight of the containers and not based on the shipment as a whole, is unreasonable and unsupported by substantial evidence. One reasonable conversion methodology appears to be to calculate a per kilogram surrogate value allocating the $210 document cost and the $169 customs clearance cost over the weight of an entire shipment. Accordingly, the court remands this issue to Commerce for recalculation.

III. Indirect Selling Expense Ratio

A. *Background*

Commerce is required to make certain adjustments to a respondent's reported constructed export price[7] in order to properly assess

[7] Constructed export price is the first sale by a seller affiliated with the producer to an unaffiliated purchaser in the United States. *See* 19 U.S.C. § 1677a(b).

the amount by which normal value exceeds that price. *See* 19 U.S.C. § 1677a(c)–(d). Adjustments are made because a respondent's reported home market prices and U.S. prices "represent prices in different markets affected by a variety of differences in the chain of commerce," and the adjustments are made "in an attempt to reconstruct the price at a specific, common point in the chain of commerce, so that value can be fairly compared on an equivalent basis." *SKF USA Inc. v. INA Walzlager Schaeffler KG*, 180 F.3d 1370, 1373 (Fed. Cir. 1999) (internal quotation marks omitted). One of the adjustments made to constructed export price in order to make an "apples to apples" comparison is to deduct indirect selling expenses. *See* 19 U.S.C. § 1677a(d)(1)(D).

Indirect selling expenses are those costs that "would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at lest in part) to such sales," while direct selling expenses are expenses that "bear[] a direct relationship to" the particular sales in question. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 823–24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4164. Commerce generally allocates indirect selling expenses by multiplying each sale price by the ratio of total indirect selling expenses to total sales revenue. *See Diamond Sawblades Mfrs. Coal. v. United States*, Slip Op. 13–130, 2013 Ct. Intl. Trade LEXIS 137, at *13 n.4 (CIT Oct. 11, 2013). Commerce is not obligated by statute to calculate this ratio in any particular way. Commerce generally accepts proposed allocation methodologies that are calculated on as specific a basis as feasible and do not distort or inaccurately reflect the indirect selling expenses. *See* 19 C.F.R. § 351.401(g) (2014). Commerce will not reject an allocation method solely because it contains expenses incurred or priced adjustments made regarding sales of non-subject merchandise. 19 C.F.R. § 351.401(g)(4).

In its submissions to Commerce, DuPont provided Commerce with a calculation of its indirect selling expense ratio that excluded expenses related *solely* to non-subject merchandise. *See* DuPont Section C and D Supplemental Questionnaire Response, PD 149, CD 71 (May 25, 2012). The pool of remaining (presumably mixed subject and non-subject) expenses were multiplied by a ratio aimed at excluding non-subject merchandise expenses, and then put over a denominator of sales revenue of subject merchandise to calculate the overall indirect selling expense ratio. DuPont Reply 18.

Commerce instead chose to recalculate DuPont's indirect selling expenses using a different ratio from that provided by DuPont. *I&D Memo* at 22–23. Commerce did not subtract expenses related solely to

non-subject merchandise, but instead multiplied all indirect selling expenses (for subject and non-subject merchandise) by a ratio of sales of subject merchandise over total sales in an attempt to exclude expenses relating to non-subject merchandise. DuPont Reply 17–19. Commerce used the same denominator as did DuPont (sales of subject merchandise) to calculate the indirect selling expense ratio. *Id.* at 18. In rejecting DuPont's method, Commerce relied on DuPont's inability to segregate the indirect selling expenses remaining after DuPont excluded certain expenses related solely to non-subject merchandise. *I&D Memo* at 22. As a result, Commerce found the ratio did not accurately reflect DuPont's indirect selling expenses. *Id.*

DuPont challenges Commerce's decision to reject DuPont's methodology for its indirect selling expense ratio. DuPont Br. 22. DuPont puts forth two arguments to support its position that Commerce acted improperly in rejecting its indirect selling expense ratio calculation. First DuPont argues that Commerce acted contrary to 19 C.F.R. § 351.401(g)(4) which states that Commerce will not reject a methodology solely because is includes expenses related to non-subject merchandise. *Id.* at 26. DuPont alleges that Commerce's rejection of DuPont's methodology because DuPont could not segregate the remaining expenses is inconsistent with this regulation. *Id.* Next, DuPont asserts that Commerce has a past practice of excluding expenses solely relating to non-subject merchandise from the pool of indirect selling expenses, and that by not excluding these expenses, Commerce acted inconsistently with its judicially affirmed practice. *Id.* at 26–27; *see also id.* at 24–25 (citing *U.S. Steel Corp. v. United States*, 712 F. Supp. 2d 1330 (CIT 2010); *NSK Ltd. v. United States*, 29 CIT 1, 17–18, 358 F. Supp. 2d 1276, 1291 (2005); *NSK Ltd. v. United States*, 27 CIT 56, 109–10, 245 F. Supp. 2d 1335, 1378–79 (2003); and *Timken Co. v. United States*, 26 CIT 590, 598–99, 209 F. Supp. 2d 1373, 1381 (2002)). DuPont believes its calculation, which first excludes expenses solely related to non-subject merchandise is much more accurate than Commerce's calculation, which includes expenses related to non-subject merchandise. DuPont Br. 24–28. DuPont identified many expenses related to non-subject merchandise including sales, customer service, administration, and IT costs largely related to manufacturing non-subject merchandise. *Id.* at 26–27; *I&D Memo* at 22–22.

The government maintains that Commerce acted properly in rejecting DuPont's proposed calculation methodology for its indirect selling expenses as distortive. Gov. Br. 30. Additionally, the government argues that DuPont failed to exhaust its administrative remedies

with regard to its argument that Commerce's conduct was inconsistent with its regulations. *Id.* at 34–35.

B. *Analysis*

Regarding DuPont's claim that the rejection of its methodology violated 19 C.F.R. § 351.401(g)(4), the court holds that DuPont failed to exhaust its administrative remedies, because DuPont never made this argument to Commerce. A party that is dissatisfied with Commerce's preliminary results has the option of filing a case brief to express its disapproval in a final attempt to persuade Commerce before the publication of final results. 19 C.F.R. § 351.309(c)(1)(ii). Within the case brief, the dissatisfied party "must present all arguments that continue in the submitter's view to be relevant" for Commerce's final results. 19 C.F.R. § 351.309(c)(2). In addition to Commerce's regulations that address the exhaustion requirement by requiring parties to submit a case brief containing all arguments, Congress has instructed that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). If a party fails to put forth a relevant argument before Commerce in its case brief, then that argument is typically considered waived and will not be considered by a court on appeal. *Corus Staal BV v. United States*, 502 F.3d 1370, 1378 n.4 (Fed. Cir. 2007) (citing *Cemex, S.A. v. United States*, 133 F.3d 897, 902 (Fed. Cir. 1998)). Commerce rejected DuPont's calculation of its indirect selling expense ratio in the *Preliminary Results*, and DuPont did not present any argument based on 19 C.F.R. § 351.401(g)(4) in its case brief following the publication of the *Preliminary Results*. *See* DuPont Case Br. 2–24. DuPont thus waived this particular argument.

The court rejects DuPont's reliance on the exception to the exhaustion doctrine for pure questions of law. *See* DuPont Reply Br. 21 n.10. Commerce's regulation precludes the agency from rejecting an "allocation method *solely* because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise or a foreign like product (whichever is applicable)." 19 C.F.R. § 351.401(g)(4) (emphasis added). Determining Commerce's reasoning for rejecting DuPont's calculation of its indirect selling expense ratio necessarily requires a court to "delve[] into factual issues implicating the evidence on the administrative record," and thus the exception for pure questions of law does not apply. *Asahi Seiko Co., Ltd. v. United States*, 755 F. Supp. 2d 1316, 1330 (CIT 2011).

The court also rejects DuPont's reliance on Commerce's past practice in challenging Commerce's decision here. DuPont claims that

Commerce has accepted similar methodologies in an attempt to show that Commerce erred in finding that DuPont's proposed ratio was distortive. *See* DuPont Br. 24–27. Although the cases cited by DuPont facially involved methodologies similar to the one proposed by DuPont, they stand only for the proposition that Commerce will exclude expenses related to non-subject merchandise from the numerator of the ratio if the party requesting that methodology can adequately show that its proposed methodology is not distortive, which the respondents in those cases were able to do on the facts of those cases. As explained above, Commerce's default methodology is to multiply each sale price by the ratio of total indirect selling expenses to total sales revenue. Although the default methodology included expenses that were not incurred in the sale of subject merchandise, DuPont has not shown that its proposed alternative methodology is clearly less distortive.

DuPont was not able to adequately show the breakdown of the expenses remaining in the numerator of the indirect selling expense ratio (i.e., whether they applied to non-subject merchandise, subject merchandise, or both proportionately). *I&D Memo* at 23. DuPont has not convinced the court that this finding by Commerce was unsupported by substantial evidence. The failure to show the breakdown of the remaining expenses in the numerator is especially problematic because DuPont's methodology further reduced the numerator by a ratio of subject merchandise sales over total sales in an attempt to leave only expenses incurred in the selling of subject merchandise in the numerator. *See* DuPont Reply 19. But it appears that this proportional reduction would make sense only if the expenses remaining in the numerator applied proportionally to subject and non-subject merchandise. Without knowing what the remaining expenses related to, Commerce could not tell if this additional adjustment was distortive, or how great the distortion might be.

Commerce has discretion in choosing methodologies for calculating indirect selling expenses, and DuPont has not shown that its proposed methodology was clearly better than the methodology chosen by Commerce. The court cannot say that Commerce's choice of methodology over DuPont's proposed methodology was unreasonable, and therefore the court sustains Commerce's calculation of DuPont's indirect selling expenses.

IV. Targeted Dumping

In comparing export prices to normal value in order to calculate a dumping margin, Commerce's default methodology is the average-to-average ("A-A") methodology. 19 C.F.R. § 351.414(b)–(c). In investiga-

tions, Commerce may apply the average-to-transaction ("A-T") methodology if, and only if, Commerce finds a "pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time" and Commerce explains why the A-A methodology (or the rarely used transaction-to-transaction ("T-T") methodology) does not take such differences into account. 19 U.S.C. § 1677f-1(d)(1)(B). That pattern of "export prices . . . that differ significantly among purchasers, regions, or periods of time" is commonly referred to as targeted dumping. Wanhua contends that because the targeted dumping inquiry is described only in the subsection entitled "Investigations" in § 1677f-1(d) and is absent in the subsection entitled "Reviews," Congress intended for the targeted dumping analysis to be limited to investigations only, and thus Commerce erred in applying it in this administrative review. Wanhua Br. 15–19. DuPont incorporated this challenge by reference in its brief. DuPont Br. 1–2 n.2. This claim lacks merit.

19 U.S.C. § 1677f-1(d)(2), the subsection entitled "Reviews," does nothing more than clarify that Commerce should use monthly averages when it uses the A-T methodology in administrative reviews.[8] "Section 1677f-1(d)(2) is otherwise completely silent as to how Commerce should conduct its determination of less than fair value in reviews, leaving Commerce substantial discretion as to the methodologies it wishes to employ." *Timken Co. v. United States*, 968 F. Supp. 2d 1279, 1286 n.7 (CIT 2014); *see also CP Kelco Oy v. United States*, 978 F. Supp. 2d 1315, 1322 (CIT 2014). And because the statute does not evidence any intent by Congress to withhold any authority to engage in the targeted dumping analysis from Commerce when conducting reviews, the cases cited by Wanhua in its brief regarding the *expressio unius* doctrine are distinguishable. *See CP Kelco Oy*, 978 F. Supp. 2d at 1322–24 (rejecting party's reliance on cases invoking *expressio unius* doctrine to challenge Commerce's use of targeted dumping analysis in review); *Timken Co.*, 968 F. Supp. 2d at 1286 n.7 (same). The court holds that Commerce did not abuse its discretion by relying on its practice in investigations, which includes the use of the targeted dumping analysis, in selecting a calculation methodology to use in this review. *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1347–49 (CIT 2014); *CP Kelco Oy*, 978 F. Supp. 2d at 1322; *Timken Co.*, 968 F. Supp. 2d at 1286 n.7. Commerce's use of the targeted dumping analysis in this review therefore is sustained.

[8] 19 U.S.C. § 1677f-1(d)(2) provides: "In a review under section 1675 of this title, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."

V. Mandatory Respondent Selection

Wanhua raises several challenges to Commerce's decision to select DuPont as a mandatory respondent to the exclusion of Wanhua. First, Wanhua argues that because there was a small number of potential respondents, Commerce's decision to limit the number of mandatory respondents, with Wanhua excluded, was unlawful. Wanhua Br. 7–9. Second, Wanhua argues that Commerce improperly relied on a combination of export data from Customs and Border Protection and voluntarily submitted quantity and value ("Q&V") data in selecting the mandatory respondents; according to Wanhua, Commerce should have relied on a single, consistent set of data. *Id.* at 9–10. Finally, Wanhua argues that it should have been selected as a mandatory respondent and given its own rate to avoid the unfairness caused by basing Wanhua's rate on DuPont's rate, which allegedly was subject to manipulation by a U.S. petitioner. *Id.* at 10–12.

In its brief, the government argues that Commerce properly limited the number of mandatory respondents, because the number of potential respondents was too large to individually review each of them. Gov. Br. 50–56. The government additionally argues that Commerce reasonably used the CBP and Q&V data to select DuPont and Green Packing as the mandatory respondents. *Id.* at 56–58. The government also contends that there is no evidence that a U.S. producer actually manipulated DuPont's dumping margins and thus there was no unfairness to Wanhua when it was assigned DuPont's rate. *Id.* at 59–62. The government further contends that to the extent Wanhua suggests that DuPont's further manufacturing activities in the United States render DuPont's rate unrepresentative, this argument was not preserved before the agency and, in any event, the rate given to Wanhua was not based on any DuPont sales that involved further manufacturing in the United States. *Id.* at 62–63.

After the issue was raised by the court at oral argument, the government encourages the court to reject the challenges to respondent selection on the ground that Wanhua failed to exhaust its administrative remedies by not seeking voluntary respondent status. Def.'s Supplemental Br. 9–11, ECF No. 81. The court agrees that Wanhua has failed to exhaust its administrative remedies in challenging Commerce's selection of mandatory respondents.

Congress has directed that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637. This statute reflects "a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative

agencies." *Corus Staal*, 502 F.3d at 1379. Requiring exhaustion of administrative remedies protects agency authority and promotes judicial efficiency. *Id.* "[T]he exhaustion doctrine 'acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.'" *Id.* at 1380 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

The court repeatedly has required that a party aggrieved by not being selected as a mandatory respondent must request to be reviewed as a voluntary respondent under 19 U.S.C. § 1677m(a) before it can challenge the mandatory respondent selection process in court. *See, e.g.*, *Union Steel Mfg. Co. v. United States*, 837 F. Supp. 2d 1307, 1331 (CIT 2012) ("[A] respondent, in order to exhaust administrative remedies, must pursue the statutory process for receiving an individually-determined margin before challenging before the court the Department's decision not to assign an individual margin to it."); *Amanda Foods (Vietnam) Ltd. v. United States*, 807 F. Supp. 2d 1332, 1348 (CIT 2011) ("[A] plaintiff . . . that goes forward with a review but does not request voluntary respondent status, has also failed to exhaust its administrative remedies."); *Schaeffler Italia S.r.l. v. United States*, 781 F. Supp. 2d 1358, 1364 (CIT 2011); *Asahi Seiko Co.*, 755 F. Supp. 2d at 1326–27. Congress has provided an administrative avenue for a party that is not selected but wishes to be reviewed in 19 U.S.C. § 1677m(a). That section provides in relevant part:

> In a . . . review under section 1675(a) of this title in which [Commerce] has, under section 1677f-1(c)(2) of this title . . ., limited the number of exporters or producers examined, . . . [Commerce] shall establish . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such section[] who submits to [Commerce] the information requested from exporters or producers selected for examination, if—
>
> (1) such information is so submitted by the date specified—(A) for exporters and producers that were initially selected for examination . . .; and
>
> (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

Id. The statute thus provides a potential administrative remedy to a respondent who was not chosen as a mandatory respondent but

desires a rate based on its own sales, and the court will not order Commerce to assign a respondent an individual margin unless it has attempted to avail itself of this administrative remedy.

Here, Wanhua did not request voluntary respondent status. First, Wanhua missed the deadline for submitting its Section A Questionnaire response if it wanted to be treated as a mandatory respondent. *I&D Memo* at 7–8 & n.30; Oral Arg. at 1:21:50, 1:23:30. Second, when Wanhua did submit information from which Commerce potentially could determine an individual margin for Wanhua, it specifically stated that it was not submitting this information as a request for voluntary respondent status. Wanhua Comments on the Section A Response of DuPont Group at 2 n.1, CD 46 (Apr. 6, 2012) ("Wanhua Sec. A. Cmts."); *see also I&D Memo* at 7–8. Wanhua noted in its submission to Commerce that it assumed such a request would have been futile in the light of Commerce's refusal to accept two voluntary respondent requests in the prior administrative review of PET film from the PRC and repeated that claim at oral argument. Wanhua Sec. A. Cmts. at 2 n.1; Oral Arg. at 1:22:15. This futility argument is unavailing.

"The bar for a futility exception [to the exhaustion requirement] is high, requiring more than unlikeliness." *Amanda Foods*, 807 F. Supp. 2d at 1348 (citing *Corus Staal*, 502 F.3d at 1379). The court consistently has rejected claims that the failure to request voluntary respondent status should be excused because such an act would have been futile. *See id.* at 1349; *Union Steel*, 837 F. Supp. 2d at 1332–33; *Schaeffler Italia*, 781 F. Supp. 2d at 1364–65; *Asahi Seiko*, 755 F. Supp. 2d at 1327–28. Although it does not appear to be common, the government cites in its supplemental brief a number of instances in which requests for voluntarily respondent status were granted. *See* Def.'s Supplemental Br. at 5–8 & accompanying notes. The court therefore concludes that a request for voluntary status was not "obviously useless" at the relevant time, *Corus Staal*, 502 F.3d at 1379, and the futility exception does not excuse Wanhua's failure to exhaust this administrative remedy.

Had Wanhua requested and been granted individual review as a voluntary respondent, its various challenges to the respondent selection process would be moot. Wanhua thus failed to avail itself of an opportunity for Commerce to correct its alleged mistakes in not choosing Wanhua as mandatory respondent. *See Corus Staal*, 502 F.3d at 1380; *Amanda Foods*, 807 F. Supp. 2d at 1348. Because the issues raised by Wanhua before the court pertaining to respondent selection might have been nullified had Wanhua requested voluntary respon-

dent status, the court will not entertain Wanhua's request for a remand to Commerce to assign it an individual rate based on these alleged errors.[9]

VI. Use of DuPont's Rate as Wanhua's Rate

More generally, Wanhua contends that it is unfair and unreasonable for Wanhua to be assigned DuPont's rate because that rate was subject to manipulation by a U.S. producer and DuPont's pricing and sale structure is unrepresentative of Wanhua's commercial reality. Wanhua Br. 12–15. Again, the government contends that there was no evidence of actual manipulation of DuPont's rate, that Wanhua failed to preserve its claim that DuPont's further manufacturing activities rendered its rate unrepresentative, and that Wanhua's rate was not based on any DuPont sales that involved further manufacturing in the United States. Gov. Br. 59–63.

The court rejects Wanhua's more general contention that it was unfair to assign DuPont's rate to Wanhua. First, as explained above, Wanhua did not request to be reviewed as a voluntary respondent. Had Wanhua requested and obtained individual review as a voluntary respondent, its concerns with being assigned DuPont's rate would have been alleviated by the agency and there would be no need for litigation on this issue before the court. Wanhua thus failed to exhaust its administrative remedies.

Even if this more general argument was not forfeited by the failure to request voluntary respondent status, this argument lacks merit. In response to Wanhua's allegations that DuPont's rate was subject to manipulation by a U.S. producer, Commerce found that there was "no factual information on the record to support the allegation of actual or

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[9] The court noted at oral argument that the number of respondents potentially subject to review in this case does not appear to be a "large number" for purposes of 19 U.S.C. § 1677f–1(c). That section requires individual examination of "each known exporter and producer of the subject merchandise. *Id.* § 1677f–1(c)(1). Only when "it is not practicable to make individual weighted average dumping margin determinations [of each such exporter or producer] because of the large number of exporters or producers involved in the investigation or review" may Commerce limit the number of mandatory respondents. *Id.* § 1677f–1(c)(2). Although the court has strong doubts that the record would support Commerce's determination that the number of potential respondents in this case (between five and seven) is a "large number," the court need not decide this issue because Wanhua failed to exhaust its administrative remedies.

The court also notes that Commerce appears to be changing its respondent selection methodology as a result of judicial decisions or otherwise. *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 Fed. Reg. 65,963 (Dep't Commerce Nov. 4, 2013). The court expresses no opinion as to whether in the future making a request to be examined as a voluntary respondent will be futile.

potential U.S. price manipulation." *I&D Memo* at 17. Commerce's determination was reasonable, as Wanhua still has not put forth specific evidence showing any improper manipulation of DuPont's rate. Despite this, Wanhua states that "the mere suggestion of the likelihood of manipulation of the dumping margin by [Dupont U.S.] makes it inequitable for [Commerce] to apply DuPont China's rate to Wanhua." Wanhua Br. 14. This simply amounts to speculation, which is insufficient to establish that Commerce's determination was unreasonable and/or arbitrary. *Cf. Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009) ("It is well established that speculation does not constitute substantial evidence.") (internal quotation marks omitted). As Wanhua acknowledged in its Response to the Section A Questionnaire of DuPont-China, DuPont-U.S. also could have been motivated to reduce, rather than increase, DuPont's dumping margins. Wanhua Sec. A. Cmts. at 6–7; *see also* Reply of Consol. Pl. Tianjin Wanhua Co., Ltd. at 9, ECF No. 67 (acknowledging same). And Wanhua has not cited any authority that would otherwise bar the use of a mandatory respondent's rate when setting the all others rate if the mandatory respondent is affiliated with a U.S. producer. *See* I&D Memo at 17. Due to the lack of any evidence of actual manipulation, Commerce's reliance on Dupont's rate in assigning margins to the non-examined respondents, including Wanhua, was reasonable, supported by substantial evidence and otherwise in accordance with law.

The court also rejects Wanhua's claim that DuPont's further manufacturing in the United States rendered DuPont's rate unrepresentative because Wanhua did not raise this issue in its case brief to Commerce and, in any event, it appears that the further manufactured U.S. sales did not factor into DuPont's dumping margin. *See* Case Brief of Tianjin Wanhua Co., Ltd. et al. at 7–8, PD 261 (Jan. 28, 2013); Preliminary Results Memo at 13–15.

CONCLUSION

For the foregoing reasons, Commerce's *Final Results* are remanded in part for Commerce to reconsider the valuation of DuPont's recycled PET chips and to recalculate DuPont's brokerage and handless expenses. In all other respects, Commerce's *Final Results* are sustained. Because Wanhua was assigned DuPont's rate in the *Final Results*, any change to DuPont's margin following remand shall be applied to Wanhua's rate as well.[10] Commerce shall file its remand results by

[10] The government agrees with Wanhua's argument that if DuPont's margin is revised pursuant to this litigation, then Wanhua's rate also should be revised. Gov. Br. 63 n.10.

November 10, 2014. The parties shall have until December 8, 2014, to file objections, and the government shall have until December 23, 2014, to file a response.

Dated: September 11, 2014
New York, New York

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

Slip Op. 14–107

MEX Y CAN TRADING USA LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12–00329

[On cross-motions for summary judgment, judgment for the defendant.]

Dated: September 12, 2014

Mitchell S. Fuerst, and *Stephen H. Wagner*, Fuerst Ittleman David & Joseph, of Miami, FL, for the plaintiffs.

Aimee Lee, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Amy M. Rubin*, Acting Assistant Director, International Trade Field Office. Of Counsel on the brief was *Chi S. Choy*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington DC.

OPINION

Musgrave, Senior Judge:

Mex Y Can Trading USA Ltd., a U.S. importer, initiated suit to contest the denial of a protest by U.S. Customs and Border Protection concerning duty-free treatment of 156 entries of fresh cut flowers from Colombia. At the time of the entries, February 13, 2011 through July 17, 2011, duty-free benefits pursuant to the Andean Trade Preference Act ("ATPA"), 19 U.S.C. §§ 3201–3206, *et seq*., had been terminated for Colombia, but on October 21, 2011, with the enactment of the U.S.-Colombia Trade Promotion Agreement Implementation Act ("USCTA"), ATPA benefits were, by that amendment, renewed for Colombia until the new date of expiration, *i.e.*, July 31, 2013. Pub. L. 112–42, 125 Stat. 462 (Oct. 21, 2011). The USCTA also provided importers with a 180-day window within which to request retroactive application for entries made during the lapsed period. *Id*. at §501(c)(2). Moving for summary judgment here pursuant to USCIT

Rule 56, the plaintiff claims a letter sent to the defendant by its custom broker, which the defendant denied as untimely, was in fact a timely request for ATPA duty-free treatment in accordance with the USCTA. *See* Pl's Mot. for Sum. Judgment (Mar. 10, 2014), ECF No. 20 ("Pl's Mot.") at 5; *see also* Exhibit A to Def's Mot. (Apr. 30, 2012). The defendant cross-moves for summary judgment pursuant to USCIT Rule 56, arguing that it both properly rejected the plaintiff's duty refund submission as untimely and denied the plaintiff's subsequent protest regarding the submission. Def's Mot. for Sum. Judgment (Mar. 10, 2014), ECF No. 21 ("Def's Mot."). The court must grant the defendant's cross-motion and deny the plaintiff's motion.

I. *Background*

The ATPA provided for entry free from duties, fees, and taxes for certain eligible imports that were the growth, product, or manufacture of Ecuador, Colombia, Peru, and Bolivia.[1] ATPA benefits for Colombia expired on February 12, 2011. On October 21, 2011 the USCTA was signed into law and extended ATPA trade preference benefits for Colombia until July 31, 2013. USCTA at §501(a). The USCTA, through a retroactive application of ATPA benefits, also allowed importers to request reliquidation for otherwise eligible imports that entered the U.S. during the lapsed time period, but only if refund requests were filed with the defendant "not later than 180 days after the date of the enactment of [the USCTA]". *Id*. at §501(c)(2)(B). On October 26, 2011, the defendant issued CSMS Message No. 11–000267 through its Cargo Systems Messaging Service instructing members of the trade community as to the USCTA's enactment and provisions.[2]

The 156 fresh cut flower entries ("subject imports") occurred during the period ATPA program benefits for Colombia had lapsed. *See* Pl's Mot. at 2, referencing Compl. at ¶5 and Summons; *see also* ATPA at §3206(a)(1)(A)(2010). The defendant received the plaintiff's refund request for ATPA benefits on May 1, 2012. The request sought refund of the duties, fees, and taxes that the plaintiff had paid for the subject imports. *See* Exhibit A to Def's Mot. The defendant rejected the

[1] *See* ATPA at §§ 3201–3206; *see also* Assignment of Function Under Section 203(e)(2)(A) of the Andean Trade Preference Act, as amended, 73 Fed. Reg. 56701 (Sep. 25, 2008) (removing Bolivia from the list of beneficiary countries).

[2] CSMS Message No. 11–000267 originated from the Cargo Systems Messaging Service, a "searchable database of messages" to which e-mail subscribers may also be provided "timely notification of new messages". *See* Cargo Systems Messaging Service, "ATPA/ATPDEA Extended with Retroactivity, Instructions for the Trade Community", CSMS No. 11–00267 (Oct. 26, 2011) available at http://apps.cbp.gov/csms/viewmssg.asp?Recid=18512 (last visited this date) ("CSMS Message"); *see also* Automated Commercial System and ABI CATAIR, available at http://apps.cbp.gov/csms/csms.asp?display_page=1 (last visited this date).

plaintiff's request noting that the "[p]rogram has ended". *See* Exhibit B to Def's Mot. (May 7, 2012). The defendant subsequently denied the plaintiff's protest of the duty refund request rejection, on the ground that the plaintiff's "May 1, 2012 request is untimely". *See* Complaint at ¶¶ 8–9; *see also* Answer at ¶¶ 8–9; Exhibit A to Pl's Mot., HQ H223716 (Aug. 14, 2012).

II. *Discussion*

The court has jurisdiction pursuant to 28 U.S.C. §1581(a), and shall grant summary judgment if the movant has shown "that there is no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." USCIT Rule 56(a). The plain language of section 501(c)(2)(B) of the USCTA requires duty refund requests to be filed with the defendant "not later than 180 days after the date of the *enactment* of [the USCTA]" to be considered timely. USCTA at §501(c)(2)(B) (italics added). Enactment of a bill is "the action or process of making into law", and a bill becomes a law when the President signs the bill. *See* U.S. Const. art. I, §7, cl. 2; *see also Gardner v. Collector of Customs*, 73 U.S. 499, 504–06 (1867); *Black's Law Dictionary* 643 (10th ed. 2014) (defining enactment). The President signed the USCTA, enacting it into law, on October 21, 2011, making April 18, 2012 the unambiguous deadline for submitting duty refund requests under section 501(c)(2)(B), a deadline that neither party contests.[3]

The plaintiff's refund request filed with the defendant on May 1, 2012 was untimely. The plaintiff avers, however, that it filed the request late as a result of reasonably relying on the CSMS Message, in which it claims the defendant promulgated an incorrect deadline for duty refund requests and "created ambiguity where none previously existed." Pl's Mot. at 19. The CSMS Message states:

> On October 21, 2011, *the President signed [the USCTA]*, *which extends [] the [ATPA][] program[]* through July 31, 2013. *The ATPA[] program[]*, having lapsed February 12, 2011, *[has] been retroactively renewed* for [] Colombia, allowing for a refund of all duties paid on ATPA[]-eligible merchandise . . . . Benefits under

[3] *See* USCTA; *see also* Pl's Resp. in Opp. To Def's Mot. for Sum. Judgment (May 5, 2014), ECF No. 26 ("Pl's Resp.") at 6 ("[p]laintiff concedes that the plain English of the [USCTA] is unambiguous with respect to the deadline established for duty refund requests"); Pl's Mot. at 6 ("the [USCTA] may state that requests for reliquidation --such as [plaintiff's] Duty Refund Request -must be received by [the defendant] 'not later than 180 days after the *date of the enactment* of [the USCTA]'") (plaintiff's italics); Pl's Mot. at 9 ("[plaintiff], concedes that the *enactment date* of the [USCTA] was the date that the President signed the [USCTA] into law, October 21, 2011.") (plaintiff's italics); Def's Resp. in Opp. to Pl's Mot. For Sum. Judgment (May 5, 2014), ECF No. 27 ("Def's Resp.") at 2–3.

> the ATPA[] will commence on November 5, 2011, 15 days after the October 21, 2011, Presidential signing date.
>
> * * *
>
> ATPA[] refunds for all entries entered or withdrawn from warehouse for consumption during the lapse period will be processed upon receipt of a valid refund request. Claims may be made [] . . ., as long as they meet all the applicable time requirements. . . .
>
> * * *
>
> A valid liquidation or re-liquidation request must be filed with [the defendant] *within 180 days of the ATPA[] renewal date*.

See CSMS Message (italics added). Pointing out that the term "renewal" is not defined in the USCTA or in its legislative history, the plaintiff argues that the renewal date of the USCTA is synonymous with its effective date, which it avers is on November 5, 2011, 15 days after the enactment date. *See* Pl's Mot. at 9–14; *see also Johnson v. United States*, 529 U.S. 694, 694–95 (2000), referencing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (stating that a law takes effect on the date of its enactment absent a clear direction by Congress).

The court must construe the language of the CSMS Message in accordance with law to the extent possible, and it finds Customs use of "ATPA[] renewal date" was reasonable and not ambiguous as to the deadline for duty refund requests. The term "ATPA[] renewal date" in the CSMS Message does not refer to the date upon which benefits under the ATPA will commence, but instead the date on which the ATPA program was renewed -- the enactment date. The term "renewal" is defined as "[t]he act of restoring or reestablishing" and "[t]he re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." *Black's Law Dictionary* 1488 (10th ed. 2014).[4] On October 21, 2011 the President signed and enacted the USCTA into law, effectively renewing, restoring, and reestablishing the ATPA program. The CSMS Message reflects this ATPA program renewal by first stating that the President's signing of the USCTA "extends" and "retroactively renewed" the lapsed ATPA program, and

[4] The plaintiff argues that, "[i]n the world of insurance" the term "renewal date" commonly denotes a date triggered by an "effective date" or the anniversary thereof, however the insurance case the plaintiff cites to is not factually analogous to the customs issue before the court. Pl's Mot. at 13–14, referencing *Boseman v. Conneticut Gen. Life Ins. Co.*, 301 U.S. 196, 200 (1937).

later stating that refund requests must be filed with the defendant "within 180 days of the ATPA[] renewal date." Although the defendant did not use the exact term "enactment date" or "Presidential signing date" when discussing the deadline for duty refund requests in the CSMS Message, its use of "within 180 days of the ATPA[] renewal date" in reference to the renewal date of the ATPA program is not inconsistent with the deadline set unambiguously under section 501(c)(2)(B) of the USCTA.

The plaintiff argues that the defendant relinquished its right to summary judgment by not addressing the CSMS Message or the plaintiff's reliance on the message in its motion for summary judgment, facts the plaintiff claims are genuine and material. Pl's Resp. at 3–8. The fact that the defendant has not discussed the CSMS message is not an admission that it is ambiguous, since the only valid interpretation of it is one that would support the unambiguous language of the USCTA. *See e.g., Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1024, 116 F. Supp. 2d 1350, 1360 (2000) ("[i]f that statute is clear on its face, the court must follow Congressional intent, regardless of the existence of an interpretation by Customs to the contrary"). The CSMS Message does not "establish a completely different deadline" for refund requests or create an ambiguity that would preclude summary judgment for the defendant, as argued by the plaintiff. The message accordingly would not affect the outcome of the suit under the governing law. *See Lindahl v. Air France*, 930 F.2d 1434, 1436–37 (9th Cir. 1991), referencing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986) (a fact is material if it could affect the outcome of the suit, and factual disputes which are "irrelevant or unnecessary will not be counted").

The foregoing obviates detailed discussion of the plaintiff's equitable tolling argument. Even assuming, *arguendo*, such argument to be relevant, the plaintiff's main contention in this regard relies upon, *Bull S.A. v. Comer*, 55 F.3d 678 (D.C. Cir. 1995), in which the court granted an equitable tolling request as a result of that litigant's justifiable reliance on a government official who advised the litigant as to a certain unambiguous date that turned out to be erroneous advice. The plaintiff here has not persuaded that the "ambiguity" relevant to its circumstances is analogous to *Bull*, as the CSMS Message cannot reasonably be construed in the manner advocated by the plaintiff, nor does the plaintiff offer proof of activity that could reasonably be construed as detrimental reliance upon official advice. That is, this is not an instance where a government official has issued erroneous advice contrary to law upon which the recipient could reasonably rely, nor has the plaintiff provided other "equitable rea-

sons" that excuse its failure to meet the statutory deadline. *See id.* at 681–83. The court has considered the plaintiff's other arguments and finds them unpersuasive.

III. *Conclusion*

The defendant's filings and the undisputed facts demonstrate that the plaintiff's duty refund request was untimely as a matter of law. There being no genuine issues of material fact requiring trial, judgment will enter accordingly.

So ordered.

Dated: September 12, 2014
New York, New York

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