U.S. Customs and Border Protection

Slip Op. 13–155

WHIRLPOOL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and SAMSUNG ELECTRONICS CO., LTD., AND SAMSUNG ELECTRONICS AMERICA, INC., Defendant-Intervenors, and LG ELECTRONICS, INC., and LG ELECTRONICS USA, INC., Defendant-Intervenors.

PUBLIC VERSION

Before: Mark A. Barnett, Judge
Court No. 12–00164

[The court grants in part and denies in part Plaintiff's motion for judgment on the agency record and remands to the International Trade Commission to further explain its analysis.]

Dated: December 26, 2013

James R. Cannon, Jr., and *John D. Greenwald*, Cassidy Levy Kent (USA), LLP, of Washington, DC, argued for plaintiff. With them on the brief were *Jack A. Levy*, *Myles S. Getlan*, *Jennifer A. Hillman*, and *Thomas M. Beline.*

Karl S. von Schriltz, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, argued for defendant. With him on the brief were *Paul R. Bardos*, Acting General Counsel, and *Neal J. Reynolds*, Assistant General Counsel.

Christopher A. Dunn, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for Defendant-Intervenors LG Electronics, Inc. and LG Electronics USA, Inc. With him on the brief were *Neil R. Ellis*, *Lawrence R. Walders*, *Brenda A. Jacobs*, and *Dave M. Wharwood*, Sidley Austin LLP, of Washington, DC.

Warren E. Connelly, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for Defendant-Intervenors Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. With him on the brief was *Jarrod M. Goldfeder*.

OPINION

Barnett, Judge:

Plaintiff Whirlpool Corporation ("Whirlpool") moves pursuant to USCIT Rule 56.2 for judgment on the agency record, challenging the United States International Trade Commission's ("ITC" or "Commission") negative final injury determination in antidumping and countervailing duty investigations concerning bottom mount combination refrigerator-freezers ("BMRs") from the Republic of Korea, published in *Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico*, 77 Fed. Reg. 28,623 (ITC May 15, 2012 ("*Final Determination*

"), and the accompanying memorandum *Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico*, USITC Pub. 4318, Inv. Nos. 701-TA-477 and 731-TA-1180–1181 (Final) (May 2012) ("*Views of the Commission*" or "*Views*").[1] For the reasons stated below, the court grants, in part, and denies, in part, Whirlpool's motion and remands the case to the ITC.

BACKGROUND AND PROCEDURAL HISTORY

On March 30, 2011, Whirlpool filed a petition with the ITC, alleging material injury to domestic producers of BMRs due to dumped imports from Mexico and dumped and subsidized imports from Korea ("subject imports"). *Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico*, 76 Fed. Reg. 19,125 (ITC Apr. 6, 2011). Following its preliminary investigation, the ITC published a unanimous affirmative preliminary injury determination, finding a reasonable indication of material injury to the domestic industry. *Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico*, USITC Pub. 4232, Inv. Nos. 701 TA-477 and 731-TA-1180–1181 (Preliminary) (May 2011). In May 2012, the Commission published its final determination. In the decision, it described BMRs as follows:

> All bottom mount refrigerators are characterized by a lower freezer compartment and an upper refrigerator compartment . . . , although they otherwise come in a variety of configurations and capacities with different combinations of features. In terms of configuration, bottom mount refrigerators may be two-door, three-door French door, or four-door French door with an additional drawer between the freezer and refrigerator compartments. . . . Bottom mount refrigerators may be characterized as "large" or "jumbo" capacity, with an interior measuring 27.5 cubic feet or more, or regular capacity, with an interior measuring 27.4 cubic feet or less.

Views at 6–7 (footnotes omitted). Relying on this definition, the Commission unanimously found that, during the period of investigation ("POI") between 2009 and 2011, cumulated imports of dumped and subsidized BMRs from Korea and dumped BMRs from Mexico had neither caused nor threatened to cause material injury to the domestic industry.[2] *Final Determination*, 77 Fed. Reg. at 28,623.

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[1] All citations to the *Views of the Commission* are to the confidential version of the document.

[2] Between the publication of the ITC's preliminary and final determinations, the Commerce Department published final affirmative determinations of dumping and subsidization. *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from*

Specifically, the Commission concluded that, despite a significant increase in subject import volume, subject imports did not displace a significant volume of domestic industry shipments from the U.S. market. *Views* at 41. In its examination of the price effects of subject imports, the Commission found a "moderate degree of substitutability" in demand between subject imports and the domestic like product, with "several factors that attenuated subject imports competition." *Id.* at 44. It also determined that "both price and non-price factors are important considerations [for consumers] in [BMR] purchasing decisions." *Id.* The ITC additionally observed that subject import price underselling "was not significant" and that subject imports did not significantly depress or suppress domestic like product prices. *Id.* at 52–54. Taking these findings in the aggregate, the ITC concluded that subject imports did not have a significant adverse impact on the domestic industry and, therefore, did not materially injure the domestic industry. *Id.* at 63–65. It similarly determined that subject imports do not threaten the domestic industry with material injury. *Id.* at 70.

Whirlpool now challenges the *Final Determination* on several grounds. (*See generally* Plaintiff's Memorandum in Support of Its Rule 56.2 Motion ("Pl.'s Mot.").) It contests as unsupported by substantial evidence or not in accordance with law the ITC's findings that (1) the volume of subject imports did not displace a significant volume of the domestic like product, (2) subject imports did not significantly undersell domestic producer prices, (3) competition from subject imports did not depress or suppress domestic producers' prices, and (4) price played a significant role in the domestic industry's loss of an [[ ]]. (Pl.'s Mot. 1–5.)
The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c).

STANDARD OF REVIEW

An ITC determination is "presumed to be correct," and the burden of proving otherwise rests upon the challenging party. 28 U.S.C. § 2639(a)(1). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

Mexico, 77 Fed. Reg. 17,422 (Dep't of Commerce Mar. 26, 2012); *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 Fed. Reg. 17,413 (Dep't of Commerce Mar. 26, 2012); *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 17,410 (Dep't of Commerce Mar. 26, 2012).

Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It requires "'more than a mere scintilla," but "'less than the weight of the evidence.'" *Nucor Corp. v. United States*, 34 CIT __, __, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports the ITC's determination, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The ITC need not address every piece of evidence presented by the parties; absent a showing to the contrary, the court presumes that the ITC has considered all of the record evidence. *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT __, __, 2012 WL 5201218, at *2 (2012) (citing *USEC Inc. v. United States*, 34 F. App'x 725, 731 (Fed. Cir. 2002)). That a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966); *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168, 170 n.3 (C.C.P.A. 1980)). The court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted).

The two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of the Commission's interpretation of the antidumping and countervailing duty statutes. *Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005). First, the court must determine "'whether Congress has directly spoken to the precise question at issue.'" *Heino v. Shinseki*, 683 F.3d 1372, 1377 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "'that is the end of the matter . . . .'" *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "'if the statute is silent or ambiguous,'" the court must determine "'whether the agency's action "'is based on a permissible construction of the statute.'" *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842–43).

DISCUSSION

Two separate, but parallel, provisions of the Tariff Act of 1930, as amended, provide for the ITC to determine whether a domestic industry is materially injured, or threatened with material injury, by reason of unfairly subsidized or dumped imports. *See* 19 U.S.C. §§ 1671d(b), 1673d(b). The Commission will issue an affirmative determination if it finds "present material injury or a threat thereof" and makes a "finding of causation." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006) (quotation marks omitted). In making a material injury determination, the Commission evaluates "(1) the volume of subject imports; (2) the price effects of subject imports on domestic like products; and (3) the impact of subject imports on the domestic producers of domestic like products." *Id.* (citing 19 U.S.C. § 1677(7)(B)(i)(I)-(III)); *accord GEO Specialty Chems., Inc. v. United States*, Slip Op. 09–13, 2009 WL 424468, at *2 (CIT Feb. 19, 2009). The Commission may also consider "'such other economic factors as are relevant in the determination.'" *Hynix Semiconductor*, 30 CIT at 1210, 431 F. Supp. 2d at 1306 (quoting 19 U.S.C § 1677(7)(B)(ii)).

I. Volume

In performing its volume analysis, the ITC must consider "'whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.'" *Shandong TTCA Biochemistry Co. v. United States*, 45 CIT __, __, 774 F. Supp. 2d 1317, 1322 (2011) (quoting 19 U.S.C. § 1677(7)(C)(i)).

In the *Views of the Commission*, the ITC found that the volume of cumulated subject imports grew significantly during the POI, both in absolute terms and relative to apparent domestic consumption and production. *Views* at 40–41. Specifically, cumulated subject imports grew [[ ]] percent, from [[ ]] to [[ ]] units, and U.S. shipments of subject imports increased [[ ]] percent, from [[ ]] to [[ ]] units. *Id.* at 41. The share of apparent domestic consumption accounted for by subject imports rose from [[ ]] to [[ ]] percent, an increase of [[ ]] percent. *Id.* Despite this increase in volume, the Commission concluded that subject imports did not displace a significant volume of domestic industry shipments from the U.S. market. *Id.* It reasoned that, although subject imports increased their market share, the domestic industry increased its domestic shipments by [[ ]] percent, from [[ ]] to [[ ]] units. *Id.* at 41–42. In other words, subject imports increased their market share by capturing most of the [[ ]] percent in-

crease in apparent domestic consumption during the POI. *Id.* at 42.

Whirlpool was the largest producer of the domestic like product, representing [[ ]] domestic production of BMRs. *Id.* at 16–17. The ITC found that Whirlpool's lack of a jumbo capacity BMR and its introduction of a four-door BMR model only in the third quarter of 2010 – two years after the introduction of subject import four-door models – played an important role in the domestic industry's market share decline. *Id.* at 42. Jumbo capacity BMRs accounted for [[ ]] percent of the growth in apparent domestic consumption, and four-door BMRs accounted for [[ ]] percent of the increase, during the POI. *Id.* Together, jumbo capacity BMRs and four-door BMRs comprised [[ ]] percent of the growth in apparent domestic consumption and accounted for [[ ]] percent of the increase in subject imports. *Id.* The Commission therefore determined that, "[b]ecause most of the increase in subject import volume and market share resulted from increased sales of models that the domestic industry either did not produce or produced only toward the end of the period examined," the increase did not occur at the expense of the domestic industry. *Id.* at 42–43. The Commission also noted that "[a]nother significant portion" of subject import volume and market share increase resulted from [[ ]] and that price was not a significant factor in that decisions. *Id.* at 43.

A. Double Counting

a. Whirlpool's Contentions

Whirlpool asserts that the ITC's volume analysis is not supported by substantial evidence because it is based on an erroneous finding that jumbo capacity BMRs and four-door BMRs accounted for [[ ]] percent of the increase in apparent domestic consumption and [[ ]] percent of the increase in subject imports during the POI. (Pl.'s Mot. 16.) According to Whirlpool, the Commission double counted jumbo capacity BMRs that have four doors when calculating these figures (counting them first as jumbo capacity BMRs, then as four-door BMRs) and, therefore, understated the degree of competition between subject imports and the domestic like product. (Pl.'s Mot. 16–18.) Whirlpool notes that the Commission reached the [[ ]] percent figure by adding (1) third-party internet survey data breaking down the BMR market by capacity, showing that jumbo capacity BMRs accounted for [[ ]] percent of the increase in domestic consumption, and (2) price and quantity data from ITC questionnaire re-

sponses for four-door BMR Product Categories[3] 2A and 3A,[4] which indicate that four-door BMRs accounted for [[ ]] percent of the increase in domestic consumption. (Pl.'s Mot. 17 (citing *Views* at 35 & n.171).) According to Whirlpool, because Product Category 3A units qualify as both four-door and jumbo capacity BMRs, the Commission double counted four-door, jumbo capacity BMRs in its analysis of the increase in apparent domestic consumption and the increase in subject imports. (Pl.'s Mot. 17–18 (citing *Views* at 35 & n.171; R. Doc. 169 ("*Staff Report*") at V-9–10).)[5] According to Whirlpool, when the data are corrected for this double counting, jumbo capacity BMRs and four-door BMRs accounted for only [[ ]] percent of the increase in apparent domestic consumption and [[ ]] [6] percent of the rise in subject imports. (Pl.'s Mot. 18, Confidential Ex. 1.) Because these figures are significantly lower than the allegedly erroneous figures relied upon by the ITC, Whirlpool asks the court to remand the case for the ITC to reconsider its determination.

b. Analysis

Neither the *Views* nor the record evidence clearly shows the methodology by which the Commission determined that jumbo capacity BMRs and four-door BMRs accounted for [[ ]] percent of the increase in apparent domestic consumption and [[ ]] percent of the rise in subject imports during the POI. *See Views* at 34–35 & nn.171 (citing R. Doc. 133 (Hr'g Tr., Mar. 13, 2012) Whirlpool Ex. 7 (Def.-Intervenors Samsung Electronics, Inc. and Samsung Electronics America, Inc. Opp'n ("Samsung Opp'n") Public App. 53); R. Doc. 178 (Mem. INV-KK-046) at Table IV-8 (Def.'s Opp'n Confidential App. 55); *Staff Report* at V-60, 62), 173 (citing *Staff Report* at V-60, 62; R. Doc. 178 at Table IV-7 (Def.'s Opp'n Confidential App. 54)). However, in its brief, Whirlpool attempted to reverse engineer these calculations and arrived at the following conclusions, which the Commission does not dispute:

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[3] In the investigation, the ITC collected sales price data delineated by product specifications set out in the *Staff Report*. *See* R. Doc. 169 ("*Staff Report*") at V-18–19. Each enumerated product category has two subcategories, labeled 'A' and 'B.' The former contain data for the entire market for products meeting the category's specifications; the latter represent data for the top selling stock keeping unit within each category.

[4] BMRs in Product Category 2A are defined, in relevant part, as having four-doors and a total capacity of 24.5–25.4 cubic feet. *Staff Report* at V-18. Product Category 3A models have four doors and a total capacity of over 27.5 cubic feet. *Id.*

[5] All citations to the *Staff Report* are to the confidential version.

[6] Whirlpool transposed the digits in this figure in its moving brief. (*Compare* Pl.'s Mot. 18, *with* Pl.'s Hr'g Ex. 7.)

> With respect to the increase in apparent domestic consumption, the ITC found that jumbo capacity BMRs accounted for [[ ]] percent of that increase, and four-door BMRs accounted for another [[ ]] percent of the increase. These two figures add to the [[ ]] percent figure cited by the Commission. The ITC obtained the jumbo capacity BMR figure ([[ ]] percent) from internet survey data, compiled by a third-party named Traqline, which sought to determine BMR sales by capacity. The ITC arrived at the four-door BMR figure ([[ ]] percent) by adding the volumes reported for price and quantity data for four-door BMR Product Categories 2A and 3A. (Pl.'s Mot. 17 (citing *Views* at 35 & n.171), Confidential Ex. 1.) BMRs in Product Category 2A were defined, in relevant part, as having four-doors and a total capacity of 24.5–25.4 cubic feet. *Staff Report* at V-18. Product Category 3A models had four doors and a total capacity of over 27.5 cubic feet, i.e. jumbo capacity. *Id.* Whirlpool contends that, because BMRs that fall into Product Category 3A are four-door BMRs with jumbo capacity, *see id.*, and the Traqline data presumably incorporate all jumbo BMRs, (*see* R. Doc. 135 at 4 (Defendant ITC's Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Def.'s Opp'n") Confidential App. 21)), the Commission counted jumbo capacity, four-door BMRs twice. Whirlpool's reverse engineering similarly suggests the same double counting in the ITC's analysis of the rise in subject imports. (*See* Pl.'s Mot. Confidential Ex. 1.)

In response to this analysis suggesting that double counting occurred, the ITC argues that the Traqline data organized by capacity do not include four-door BMRs, because another table based on Traqline data, breaking down the refrigerator market (not limited to bottom mounted refrigerators) by door configuration, does not mention four-door BMRs. (Def.'s Opp'n 17 (citing R. Doc. 135 at 2 (Def.'s Opp'n Confidential App. 20)).) This evaluation of the Traqline data, however, is not reflected in the ITC's determination and is, instead, a post hoc rationale offered by counsel. Moreover, it is undisputed that four-door BMRs, including four-door jumbo capacity BMRs, existed during the period covered by the Traqline survey(s). *Views* at 42. Although the survey data on market share by door configuration do not refer to four-door BMRs, it does not necessarily follow that a separate table, purporting to examine the entire BMR market by capacity, would necessarily exclude such four-door BMRs. In fact, because the Commission relied on reproductions of the Traqline data, without examining the supporting data, except for the overlapping time periods, the record does not indicate that the two tables are

based on the same survey, as the ITC apparently assumed. In the absence of more information about the Traqline data and/or further exposition of the ITC's reasoning, the court is unable to find that the ITC's calculations that jumbo capacity BMRs and four-door BMRs accounted for [[ ]] percent of the increase in apparent domestic consumption and [[ ]] percent of the increase in subject imports during the POI is supported by substantial evidence. *See AWP Indus., Inc. v. United States*, 35 CIT __, __, 783 F. Supp. 2d 1266, 1285 (2011) (holding that "Commission must . . . disclose its reasoning, explaining how it has used its discretion in making its determination and 'articulate a [] rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962)) (brackets in original).

The ITC contends that even if double counting occurred, the court nevertheless should affirm its volume findings because the mistake amounts to harmless error. (Def.'s Opp'n 18); *see Ranchers-Cattleman Action Legal Found. v. United States*, 23 CIT 861, 883, 74 F. Supp. 2d 1353, 1373 (1999) (holding that court need not remand if it finds "there is not substantial doubt as to whether the ITC would have reached the same conclusion" despite error); *U.S. Steel Grp. v. United States*, 18 CIT 1190, 1215, 873 F. Supp. 673, 696 (1994) (same). In its analysis, the Commission found that the increase in subject import volume and market share did not occur at the expense of the domestic industry because "*most* of the increase" occurred in jumbo capacity BMRs and four-door BMRs. *Views* at 42–43 (emphasis added). Consequently, it reasons that, even employing Whirlpool's corrected figures, jumbo capacity BMRs and four-door BMRs would still account for more than half of the increase in subject import volume and total market share. Therefore, absent the error, the Commission argues that it would have reached the same conclusion. (Def.'s Opp'n 18–19.)

In this case, the court has sufficient doubt that the ITC would have reached the same conclusion that it must remand the determination so that the Commission, and not the Court, may fill in the gaps as to the data the Commission relied on, how it evaluated that data, and the conclusions it drew from that evaluation. The Commission's argument to the court that it should rely on the use of the word "most" in the Commission's determination simply places too much emphasis on that word choice in light of the potentially significant difference in the percentages relied on by the Commission and those presented by Whirlpool. On remand, the Commission must further evaluate its reliance on the Traqline data, re-evaluate the percentage of increase in apparent domestic consumption and subject imports accounted for by jumbo capacity BMRs and four-door BMRs, and may further con-

sider any other information relevant to its volume analysis. The Commission is also directed to reconsider any determinations made as a consequence of or in reliance on its volume analysis, to the extent necessary and appropriate.

B. Jumbo BMR Models as a Distinct Market Segment

a. Whirlpool's Contentions

Whirlpool contends that the ITC did not support, with substantial evidence, its conclusion that jumbo capacity BMRs, those with a capacity at or exceeding 27.5 cubic feet, did not compete with smaller models. (Pl.'s Mot. 21–24.) According to Whirlpool, nothing in the record indicates that 27.5 cubic feet serves as a meaningful dividing line in the BMR market. (Pl.'s Mot. 21–22.) In addition, Whirlpool points to record evidence allegedly demonstrating that jumbo models compete with smaller BMRs. (*See* Pl.'s Mot. 22–23.) For example, Whirlpool stresses that jumbo and non-jumbo capacity BMRs "were both sold to the same set of retailers, displayed on the same set of retailers' floors and were designed to fit into the same kitchen spaces." (Pl.'s Mot. 23 (citing *Views* at 11–12, 22–23; *Staff Report* at I-16–17; R. Doc. 176 at 10 (Pl.'s Mot. Public App. 91)).) Whirlpool also avers that the Commission cannot reconcile the establishment of a distinct jumbo market segment with its use of wide ranges of BMR size in its competitive pricing analyses. (Pl.'s Mot. 23 (citing *Staff Report* at V-9).) Whirlpool further asserts that the ITC's finding of a market trend toward larger refrigerators evidences competition between larger and smaller models; "[b]ecause the refrigerator market is largely a replacement market, a rise in sales of one type of refrigerator model is necessarily at the expense of other types." (Pl.'s Mot. 23 (footnote omitted).)

b. Analysis

The ITC's decision to treat jumbo BMRs as a distinct segment of the BMR market is supported by substantial evidence. First, record evidence indicates that consumers "consistently" paid a substantial premium for jumbo capacity BMRs over "the most comparable domestically produced models." *Views* at 34 n.170 (citing R. Doc. 174 (LG Final Comments) at 5 (Def.'s Supp. Br. 6)).[7] For example, jumbo capacity BMRs in Product Category 3A commanded a $[[ ]] to $[[ ]] premium per unit over the comparable non-jumbo domestic like product in Product Category 2A for all but one quarter in the POI. *Id.*

[7] The ITC mistakenly referred to this document as Samsung's Final Comments in the *Views*. (Def.'s Supp. Br. 1.)

(citing *Staff Report* at V-60, 62). Similarly, jumbo capacity BMRs in Product Category 5A earned a $[[ ]] to $[[ ]] premium per unit over thecomparable non-jumbo domestic like product in Product Category 6A. *Id.* (citing *Staff Report* at V-66, 68).

Second, the cleavage between the jumbo and non-jumbo capacity BMR markets played a significant role in Whirlpool's loss of a [[

]]." *Id.* (citing *Staff Report* at V-92). Finally, the ITC found that the evolving structure of the BMR market toward jumbo models reinforced the distinct position that jumbo BMRs hold in the broader market. *Id.* ("'[T]here has been a movement to larger bottom-mount refrigerators, over 27 cubic foot [sic], which has been led by Samsung and LG.' . . . There would have been no such movement if consumers viewed smaller, cheaper domestically produced bottom mount refrigerators as an acceptable substitute for subject imported jumbo bottom mount refrigerators.") (quoting R. Doc. 185 at 28:20–22 (Def.'s Opp'n Public App. 11)) (internal citations omitted); *see* R. Doc. 133 Whirlpool Ex. 7 (Samsung Opp'n Public App. 53).

These findings provide substantial evidence to support the conclusion that jumbo capacity BMRs, i.e. BMRs with a capacity greater than 27.5 cubic feet,[8] constitute a sufficiently distinct segment of the BMR market from smaller BMRs to evaluate the extent of competition between BMRs of these various sizes and to find that there is limited competition between jumbo and non-jumbo capacity BMRs. That Whirlpool can point to record evidence that supports a contrary finding is of no moment. *Matsushita Elec. Indus. Co.*, 750 F.2d at 936.

C. The Treatment of Whirlpool's Four-Door Model

a. Whirlpool's Contentions

Whirlpool asserts that the ITC's determination that competition between subject imports with four doors and the domestic like product was attenuated is not supported by substantial evidence. (Pl.'s Mot. 18–19.) Specifically, it contends that the ITC essentially ignored Whirlpool's introduction of a four-door BMR model in the third quarter of 2010 by "impl[ying] that most of the growth of subject imports of four door models occurred before" that time. (Pl.'s Mot. 19 (emphasis removed).) According to Whirlpool, correcting for this omission reveals that [[ ]] percent of four-door subject import sales during the POI occurred after Whirlpool introduced its four-door model. This

[8] To the extent that Whirlpool questions the ITC's use of 27.5 cubic feet as the dividing line between non-jumbo capacity and jumbo capacity BMRs, the record contains adequate support for the ITC's decision under the substantial evidence standard. In addition to the points made above, during the POI, Whirlpool did not manufacture any BMRs larger than 27.4 cubic feet. *Views* at 34 n.170 (citing *Staff Report* at V-92).

statistic, in turn, allegedly necessitates a finding that competition between subject imports with four doors and the domestic like product was not attenuated. (Pl.'s Mot. 19 (citing *Staff Report* at V-60, 61; (Pl.'s Mot. Confidential Ex. 3)).)

b. Analysis

Whirlpool mischaracterizes the Commission's findings in its *Final Determination*. The court does not read the *Views of the Commission* as implying that most of the market growth for four-door subject imports occurred prior to the release of Whirlpool's four-door BMR; rather, the ITC acknowledged Whirlpool's belated launch of a four-door BMR and noted that this late entry was one of several factors that lead it to conclude that "competition between subject imports and the domestic like product was attenuated to some extent" during the period of investigation. *Views* at 35. Whirlpool does not dispute that the ITC accurately determined that Whirlpool introduced its four-door BMR later than Samsung and LG. The sales data contained in Table V22 of the *Staff Report* (showing that Whirlpool's sales of four-door BMRs [[ ]] to the growth of subject import four-door BMRs over an earlier period of time) provides reasonable support for the Commission's conclusion that this timing difference was a relevant factor in analyzing the competition between subject imports and the domestic like product.

D. The Treatment of Four-Door and Jumbo BMR Models

a. Whirlpool's Contentions

Whirlpool proposes an alternative methodology for the ITC's competition analysis which would exclude the data for subject imports of jumbo capacity and four-door BMRs sold prior to the third quarter of 2010, the date when Whirlpool released a four-door model into the market. Whirlpool asserts that this alternative method would focus the analysis on what it terms the "competitive segment of the refrigerator market." (Pl.'s Mot. 19–20.) With this modification, subject imports increased from [[ ]] units in 2009 to [[ ]] units in 2011, their market share increasing [[ ]] percent during the POI, from [[ ]] to [[ ]] percent. (Pl.'s Mot. 19–20 (citing Pl.'s Mot. Confidential Ex. 2).) According to Whirlpool, these figures demonstrate the "substantial overlap" in the volume of subject imports in direct competition with the domestic like product, and thereby preclude the Commission's finding of attenuated competition between subject imports and the domestic like product. (Pl.'s Mot. 20

(quotation marks omitted). This heightened level of competition, in turn, reveals "a [[ ]]." (Pl.'s Mot. 20.)

b. Analysis

The ITC has "'broad discretion'" in choosing a methodology for measuring volume. *Aluminum Extrusions Fair Trade Comm.*, 36 CIT at __, 2012 WL 5201218, at *11 (quoting *Int'l Imaging Materials, Inc. v. ITC*, 30 CIT 1181, 1189 (2006)). "As long as the agency's methodology and procedures are a reasonable means of effectuating the statutory purpose . . . the court will not . . . question the agency's methodology." *Int'l Imaging Materials*, 30 CIT at 1189 (quoting *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986)) (first ellipses in original). When presented with a challenge to the Commission's methodology, the court's examines "not what methodology [Plaintiff] would prefer," but "whether the methodology actually used by the Commission was reasonable." *Shandong TTCA Biochemistry*, 45 CIT at __, 774 F. Supp. 2d at 1329 (quotation marks omitted).

The ITC's inclusion of jumbo capacity and four-door subject imports sold prior to the third quarter of 2010 in its competition analysis was reasonable. Section 1677(7)(B)(i)(I) provides that the ITC "shall consider . . . the volume of *imports of the subject merchandise* " in its analysis. 19 U.S.C. § 1677(7)(B)(i) (emphasis added). As noted previously, subject merchandise in this case encompasses all BMRs in the scope of the petition, including jumbo capacity and four-door BMRs sold prior to the third quarter of 2010. *See Views* at 5–7. Retaining those sales in the calculations is consistent with this statutory provision.

Similarly, the ITC's inclusion of jumbo capacity and four-door BMRs sold prior to the third quarter of 2010 in its analysis comported with the requirements of 19 U.S.C. § 1677(7)(C). Subsection (7)(C)(i) directs the Commission to "consider whether the volume of imports of [subject] merchandise, or any increase in that volume . . . is significant." 19 U.S.C. § 1677(7)(C)(i). Subsection (7)(C)(iii) explicitly requires the Commission to "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to – (I) actual and potential . . . sales [and] market share" and to "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). During the POI, jumbo capacity and four-door BMRs accounted for the greatest increase in subject import volume and

consumption, *see Views* at 34–35, 42, and it was the domestic industry's limited ability to compete in this segment of the market which led the Commission to conclude that the increase in subject imports did not come at the domestic industry's expense, *id.* at 42–43. Given the importance of jumbo capacity and four-door BMRs in the market, the ITC reasonably included jumbo capacity and four-door BMRs sold prior to the third quarter of 2010 in its analysis. *See* 19 U.S.C. § 1677(7)(C); *see also Views* at 20–35 & n.170 (describing conditions of competition within BMR market, including importance of capacity and four-door configuration to consumers), 42–43 (explaining significance of jumbo capacity and four-door BMRs in domestic market).

II. Price Effects

To determine the effects of subject imports on U.S. prices of the domestic like products, the Commission inquires: (1) whether there has been "significant price underselling by the imported merchandise as compared with the price of domestic like products" and (2) whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(I)-(II); *accord Shandong TCA Biochemistry*, 45 CIT at __, 774 F. Supp. 2d at 1326.

In the *Views of the Commission*, the ITC found that several factors complicated its pricing analysis. First, it found BMRs to be "highly differentiated products that continued to evolve during the period examined, with the introduction of new or improved features and greater capacity." *Views* at 44. This phenomenon led consumers to attach value to competing models "based on each consumer's subjective judgment regarding the value of unique combinations of features, capacity, brand, reliability, physical dimensions, and styling, among other things." *Id.* Second, the Commission concluded that the market's pricing practices "are characterized by manufacturer efforts to guide retail prices via MAPs [minimum advertised prices], independent retailer decisions to offer bottom mount refrigerators at prices below MAPs, and pervasive, periodic discounting that intensified during the period examined." *Id.* Finally, it found that, although price is "an important factor" in the BMR market, "myriad" non-price factors, "including features, capacity, brand, reliability, physical dimensions, and fit, feel, and finish," are also important. *Id.*

Despite these complications, the ITC determined that record sales price data showed that subject import price underselling was "not significant" during the POI, because subject imports oversold the domestic like product in a majority of quarterly comparisons by "sig-

nificant margins." *Id.* at 51–52. Pricing data for all sales of BMRs meeting the ITC's six product category definitions, *see Staff Report* at V-18–19, showed that subject imports oversold the domestic like product in [[ ]] of [[ ]] quarterly comparisons, or [[ ]] percent of the time, at margins of [[ ]] to [[ ]] percent, *Views* at 52. Pricing data for sales of the top-selling stock keeping units ("SKUs") for each product category, *see Staff Report* at V-18–19, indicated that subject imports oversold the domestic like product in [[ ]] of [[ ]] quarterly comparisons, or [[ ]] percent of the time, at margins ranging from [[ ]] to [[ ]] percent, *Views* at 52.

The Commission also found that subject imports did not depress domestic like product prices "to a significant degree," due to the absence of any clear correlation between subject import underselling and declining domestic prices. *Id.* at 53. It observed that reported prices, net of direct and indirect discounts, on domestically produced products declined between the first and last quarters with available data by [[ ]] to [[ ]] percent. *Id.* However, while domestic prices declined for Product Categories 1A, 1B, 2A, and 2B when subject imports generally undersold the domestic like product, domestic prices for Product Categories 4A, 4B, 6A, and 6B declined when subject imports generally oversold the domestic like product. *Id.* In fact, domestic prices for products which were generally oversold by subject imports declined by a greater percentage than those which were generally undersold. *Id.*

The ITC further determined that subject imports did not suppress domestic like product prices to a significant degree. *Id.* at 54. It noted that the domestic industry experienced a cost-price squeeze during the POI, with the ratio of domestic industry cost of goods sold ("COGS") to net sales rising from [[ ]] to [[ ]] percent. *Id.* at 54–55. However, the ITC reasoned that subject import price competition did not significantly contribute to the domestic industry's inability to raise prices for two reasons. First, the cost-price squeeze did not correspond to increases in subject import market share or substantial underselling, and the pricing data did not indicate that subject import pricing operated as a ceiling on domestic prices. *Id.* at 55. For example, the greatest increase in the domestic industry's COGS to net sales ratio occurred between 2010 and 2011, a period during which subject import market share declined [[ ]] percent, along with the incidence of subject import underselling. *Id.* Second, the Commission found that the previously mentioned complexity of the BMR market inhibited the domestic industry from passing on cost increases through higher prices. *Id.* at 55–56.

In further support of its price effects determination, the Commission highlighted the absence of confirmed domestic industry allegations of lost sales and revenues. *Id.* at 56. During the POI, Whirlpool lost two sales to [[ ]], in 2009 and 2011. *Id.* As discussed later, the ITC found that price did not play a significant role in [[ ]] or its decision to [[ ]]. *Id.* at 587–59.

A. The Standard of Review for ITC Methodology Challenges

Whirlpool's challenges to the ITC's underselling analysis primarily question the methodologies employed by the ITC. The ITC has "broad discretion" in selecting the appropriate methodology to review subject import price effects, *Hynix Semiconductor*, 30 CIT at 1215, 431 F. Supp. 2d at 1310–11, and may use the methodology of its choice as long as it is reasonable, *Shandong TTCA Biochemistry*, 45 CIT at __, 774 F. Supp. 2d at 1327, 1329. When presented with a challenge to the Commission's methodology, the court examines "not what methodology [Plaintiff] would prefer, but . . . whether the methodology actually used by the Commission was reasonable." *Id.* As discussed below, with regard to these claims, even if Whirlpool presents what may have been considered a reasonable methodology if it had been adopted by the Commission, in each case, Whirlpool has failed to demonstrate that the Commission's methodology was not reasonable, and the court, therefore, affirms the agency's determination.

B. Data Aggregation

i. Whirlpool's Contentions

Whirlpool claims that the ITC's underselling analysis is not supported by substantial evidence or in accordance with law because it "distorts" the record evidence by employing "perfunctory aggregate calculations of quarters of overselling and underselling." [9] (Pl.'s Mot. 24.) According to Whirlpool, instead of examining the number of quarters with under- and overselling for all product categories together, the ITC should have examined each category's number of over- and underselling quarters independently. (Pl.'s Mot. 24.) This calculation would have revealed that, for Product Categories 1A, 2A, and 4A, subject import underselling occurred in most quarters; [[ ]]. (Pl.'s Mot. 25.) Whirlpool concedes that its calculation method would have shown that [[ ]] the domestic like product for Product Category 6A. However, it asserts that the ITC should have ignored this finding,

[9] Whirlpool repeats this claim in the price depression and suppression portion of its brief. (*See* Pl.'s Mot. 33–35.)

because "the feature parameters for Product 6A were considerably looser" than for the other product categories and, therefore, skew the data. (Pl.'s Mot. 25 & n.17.) Whirlpool's proposed methodology omits data for Product Categories 1B, 2B, 4B, and 6B without explanation.[10] *Compare Views* at 52–53, *with* (Pl.'s Mot. 24–26).

ii. Analysis

Whirlpool has failed to demonstrate that the Commission acted unreasonably in its underselling analysis by (1) using the price data for all available product categories or (2) considering that data in the aggregate. Section 1677(7)(C)(ii) states in relevant part that, "[i]n evaluating *the effect of imports of such merchandise [subject merchandise]* on prices, the Commission shall consider whether-- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products." 19 U.S.C. § 1677(7)(C)(ii) (emphasis added). Similarly, 19 U.S.C. §§ 1671d(b)(1) and 1673d(b)(1) require the ITC to examine the domestic industry as a whole in making its injury determinations. *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). Together, these statutes provide that the ITC is to examine all subject imports and the entire domestic like product; it may not selectively omit market segments without reason. *See Nippon Steel Corp. v. United States*, 25 CIT 1415, 1425, 182 F. Supp. 2d 1330, 1341 (2001).

In light of these statutory provisions, the Commission performed its underselling analysis in a reasonable manner. Product Category 6A, which Whirlpool seeks to remove from consideration, accounted for [[ ]] percent of domestic BMR sales and [[ ]] percent of the sum of subject imported products 1A, 2A, 4A, and 6A (i.e., those product categories for which there were also sales of domestic like product) during the POI. *See Staff Report* at V-58, 60, 64, 68. Likewise, Product Category 6B comprised [[ ]] percent of the Product Category "B" sales and [[ ]] percent of the total of subject imports of products 1B, 2B, 4B, and 6B. *See Staff Report* at V-59, 61, 65, 69. The large size of the BMR market occupied by Product Category 6 made the ITC's inclusion of its data in the calculations reasonable. Moreover, Whirlpool's only argument for excluding Product Category 6A, due to its allegedly broad feature parameters, did not warrant the product category's removal from the Commission's analysis. In its determination, the Commission noted that "[t]he definition

[10] Product Categories 3, 5, and 7 (both A and B categories) are not discussed because there were no sales by the domestic industry reported for those product categories. *See Staff Report* at V-32, 33, 36, 37, 40, 41.

of product 6 [was] no less specific with respect to features than the definitions of products 1–5," with the exception of the inclusion of models with single and double evaporators. *Views* at 51 n.247. The Commission further concluded that models with single and dual evaporators had similar production costs and prices, which negated the significance of having models with differing numbers of evaporators in Product Category 6. *See id.* at 48 n.229, 51 n.247 (citing *Staff Report* at V-18–19; R. Doc. 185 at 221 (Defendant-Intervenors LG Electronics, Inc. and LG Electronics USA, Inc. ("LG Opp'n") Public App. 79)). It further noted that there is evidence that domestically produced Product Category 6 BMRs "generally possessed larger capacities" than their subject import counterparts, which would tend to favor Whirlpool. *Id.* at 51 n.247 (citing R. Doc. 151 (Samsung's Post-Hr'g Br.) at A-21–22, Ex. 6 (LG Opp'n Confidential App. 77–80)). By examining pricing data across all BMR product categories for which it possessed data, including Product Category 6, and by examining that data in the aggregate, the ITC's calculation reasonably reflected the state of the domestic BMR market as a whole. *See Nippon Steel*, 25 CIT at 1425–26, 182 F. Supp. 2d at 1340–41.

C. Feature Dumping

i. Whirlpool's Contentions

Whirlpool argues that the ITC's underselling analysis methodology also unlawfully failed to account for feature differences between subject imports and domestic like product BMRs, in contravention of the Court's holding in *Maine Potato Council v. United States*, 9 CIT 460, 617 F. Supp. 1088 (1985). (Pl.'s Mot. 26–28.) Whirlpool contends that if subject imports exceeded the domestic like product in quality and design, as the ITC concluded, *Views* at 47 n.225, "one would expect a price premium relative to the comparable domestic products." (Pl.'s Mot. 27.) However, according to Whirlpool, subject imports did not command a consistent price premium, demonstrating that they exerted downward pressure on the prices of the domestic like product. (Pl.'s Mot. 27.) The ITC's alleged failure to account for feature differences in subject import prices masked this downward pressure. Moreover, Whirlpool avers that if the Commission determined that it could not adjust the pricing data for specific feature differences between subject import BMRs and domestic like product, the Commission should have "deemphasized" the aggregate underselling data and "focused instead on price depression and price suppression in the product pricing comparisons where the most significant feature differences did not exist." (Pl.'s Mot. 27–28.)

ii. Analysis

Whirlpool has not shown that the ITC was unreasonable in the manner in which it accounted for feature differences between subject imports and domestic like product BMRs. Case law indicates that the Commission should account for significant quality differences between products, though not necessarily by assigning the differences monetary value. *See Maine Potato Council*, 9 CIT at 460–61, 617 F. Supp. at 1089–90. For example, in *Maine Potato*, the court affirmed the ITC's decision not to quantify quality differences in subject imports due to "wide fluctuations" in overselling margins and inconsistent respondent views about which subject import characteristics demarked higher quality. 9 CIT at 461, 617 F. Supp. at 1090. During its investigation, the ITC collected BMR pricing data "on the basis of pricing products defined to include specific features," which enabled it to conduct "probative price comparisons" between subject imports and the domestic like product sales with similar features. *Views* at 47 (citing *Staff Report* at V-18–19, 58–71). In other words, contrary to Whirlpool's assertion, the ITC designed its questionnaire and the product categories defined therein to control for relevant feature differences between BMR models.

In its analysis of the pricing data, the ITC determined that it could not place a monetary value on any remaining feature differences within these product categories for several reasons. First, in circumstances similar to those in *Maine Potato*, *see* 9 CIT at 461, 617 F. Supp. at 1090, it found that subject imports' superior design and quality, when compared to the domestic like product, commanded "no consistent premium . . . with wide fluctuations in margins of overselling and some underselling as well." *Views* at 47 n.225 (citing *Staff Report* at V-58–61, 64–65, 68–69). Moreover, assigning values to various feature differences would require the ITC to make "subjective judgments," particularly because "consumers (and by extension retailers) value a manufacturer's bottom mount refrigerator not by tallying up the value of individual features but rather based on the total value of its product offering at the price at which it is offered for sale." *Id.* at 48 (citing R. Doc. 150 (Whirlpool Post-Hr'g Br.) at II-1 (Samsung Opp'n Confidential App. 47); R. Doc. 185 at 33, 220–21 (LG Opp'n Public App. 75, 78–79)) (quotation marks omitted); *see id.* at 47 n.225, 48 & n.229 (elaborating on futility of incorporating feature differences into price). Consequently, the Commission concluded that any value that it might assign to different BMR features would not reliably reflect the value of these features in the marketplace. *Id.* at 47. In addition, the Commission determined that it could not incor-

porate feature differences into BMR pricing due to evidence that "the values manufacturers assign to different features for MAP purposes are unrelated to their costs or their values in the marketplace." *Id.* at 48 (citing R. Doc. 132 (Whirlpool Hr'g) Ex. 14 (Def.'s Supp. Br. 10); R. Doc. 58 (Staff Conference Tr., Apr. 20, 2011) at 78–79 (Def.'s Supp. Br. 13–14); R. Doc. 185 at 221 (LG Opp'n Public App. 79)). Given these obstacles, the court concludes that the Commission accounted for the feature differences between BMR models to the extent that it was able to and that its determination not to further quantify any feature differences was reasonable.

D. LG's Pricing Data

i. Whirlpool's Contentions

Whirlpool asserts that the ITC's underselling analysis is unsupported by substantial evidence and not in accordance with law because the agency examined Samsung and LG's pricing data in the aggregate. Whirlpool contends that the ITC should have examined the data for each producer separately because: (1) LG and Whirlpool's product lines were more similar to each other's than Samsung's,[11] (2) evidence showed that "[[

]]," and (3) the ITC found that many of LG's net prices inaccurately accounted for discounts and rebates. (Pl.'s Mot. 28–29.) Whirlpool argues that the ITC should have used the data from whichever of the two companies had the lowest product-specific quarterly price relative to Whirlpool, a method which Whirlpool labels "price leadership." (Pl.'s Mot. 28.)

ii. Analysis

Whirlpool has not shown that the Commission acted unreasonably by examining Samsung and LG's pricing data together. During its investigation, the Commission recognized that LG's pricing and discount data were "potentially problematic" due to inaccurate accounting for discounts and rebates. *Views* at 51. However, the Commission reasonably decided to use the data because it was the only pricing data available for one of the two major importers of subject merchandise.[12] *Id.* ; *see* 19 U.S.C. §§ 1671d(b)(1) (instructing ITC to examine price effects of subject imports as a whole), 1673d(b)(1) (same), 1677(7)(C)(ii) (same). Excluding LG's data from the Commission's analysis would have removed nearly [[ ]] of subject imports

[11] [[ ]] *See Staff Report* at I-16–17.

[12] In 2011, LG was [[ ]] importer of subject merchandise, accounting for [[ ]] percent of imports. *Staff Report* at IV-2.

from the analysis. To compensate for the data's potential deficiencies, the Commission instead "attach[ed] less weight to it" in its calculations[13] and also repeated the same analysis without LG's data, reaching the same conclusion. *Views* at 51–53. Because the Commission performed its analysis in two ways in order to mitigate any potential distortion in LG's data, the court finds that the Commission's use of LG's data was reasonable.

E. Price Depression and Suppression

Whirlpool makes numerous challenges to the Commission's determinations that subject import price competition did not significantly depress or suppress prices of the domestic like product. (Pl.'s Mot. 31–41.) The court addresses each in turn.

i. Predominant Underselling

Whirlpool argues that the ITC did not act in accordance with law when it found no significant price depression or suppression by subject imports in the presence of falling domestic prices for selected BMRs, net of direct and indirect discounts. According to Whirlpool, the ITC unlawfully assumed that price depression and suppression cannot occur without "predominant" underselling by subject imports. (Pl.'s Mot. 31–35, 40.) Whirlpool directs the court to 19 U.S.C. § 1677(7)(C)(ii), which instructs that factors other than underselling may lead to a price depression or suppression finding, and case law in which the Commission has found price suppression in a mixed under- and overselling context. (Pl.'s Mot. 32 (citing *Shandong TTCA Biochemistry*, 45 CIT at __, 774 F. Supp. 2d at 1332; *Companhia Paulista de Ferro-Ligas v. United States*, 21 CIT 473, 478 (1996)).)

Whirlpool mischaracterizes the basis of the Commission's findings. The Commission found that prices of domestic like product fell in the presence of both underselling and overselling of subject imports, with prices declining more rapidly during periods of overselling. *Views* at 53 (citing *Staff Report* at V-58–61, 64–65, 68–69). In this situation, the Commission could not discern a clear correlation between subject import underselling and declining domestic prices. *Id.* It was for this reason that the ITC found no significant price depression by subject imports. Similarly, the ITC concluded that subject import price competition did not significantly contribute to price suppression because (1) the domestic industry's cost-price squeeze did not correspond to increases in subject import market share or substantial underselling;

[13] The court cannot determine from the record how the ITC attached less weight to LG's data, and, during oral argument, counsel for the government conceded that he also could not provide an explanation. (Hr'g Tr. 1:40–42, Nov. 7, 2013.)

(2) pricing data did not indicate that subject import pricing placed a ceiling on domestic prices; and (3) the complexity of the BMR market, *see supra*, prevented the domestic industry from passing on costs increases to the consumer. *Views* at 54–56 (citing *Staff Report* at V-58–61, 64–65, 68–69, VI-1 & n.2; R. Doc. 178 at Table IV-4 (Pl.'s Mot. Confidential App. 41)). Stated differently, the *Views of the Commission* do not indicate that the Commission assumed that price depression and suppression cannot occur absent predominant underselling and, therefore, Whirlpool's contentions are without foundation.

ii. Price Depression

Whirlpool maintains that the ITC lacked substantial evidence for three of its explanations as to why subject import competition did not cause domestic producer prices to fall: (1) much of the subject import market share increase occurred in the jumbo market, which Whirlpool did not serve; (2) Whirlpool would not have cut prices to meet subject import prices because subject import prices were generally higher in 2010 and 2011; and (3) BMR prices decline as a model's life cycle progresses over the course of two to six years. (Pl.'s Mot. 36 (citing *Views* at 53–54).)

Whirlpool avers that correcting for the ITC's alleged double counting of four-door, jumbo models, discussed *supra*, reveals that "the rise of 'jumbo' imports . . . was not as significant as the Commission thought." (Pl.'s Mot. 36.) Because this argument hinges on the effects of the Commission's alleged double counting, and the court has remanded the double counting issue to the Commission for further explanation and analysis, the court remands this finding as well.

In the *Views of the Commission*, the ITC concluded that Whirlpool would not have cut prices to match subject import prices because subject import prices were higher than Whirlpool's prices in 2010 and 2011. *Views* at 54. Whirlpool characterizes this argument as a legally incorrect statement that price depression by reason of subject imports occurs only in the presence of underselling. (Pl.'s Mot. 36.) Whirlpool previously raised this argument, (*see* Pl.'s Mot. 3235, 40), and the court already found that Whirlpool's contention lacks foundation, *see supra* § II(E)(i). The *Views of the Commission* does not indicate that the Commission assumed that price depression and suppression cannot occur absent predominant underselling.

As to the product life cycle argument, Whirlpool asserts that the ITC did not support with substantial evidence its finding that product life cycles, rather than competition from subject imports, caused domestic producer prices to fall. Specifically, Whirlpool stresses that

it launched a Product Category 2A four-door model in the third quarter of 2010 for [[ ]]. By the third quarter of 2011, its price had fallen [[ ]] percent to [[ ]]. (Pl.'s Mot. 37–38 (citing *Staff Report* at V-60).) During this period, subject imports [[ ]] the model [[ ]], from [[ ]] to [[ ]] percent. (Pl.'s Mot. 38 (citing *Staff Report* at V-60).) Likewise, Whirlpool introduced a Product Category 4A model in the second quarter of 2009 for [[ ]], and by the first quarter of 2010, its price had fallen [[ ]] percent, during a period in which subject imports [[ ]] domestic models every quarter. (Pl.'s Mot. 38 (citing *Staff Report* at V-64).) According to Whirlpool, these figures demonstrate a causal nexus between subject import competition and declines in domestic producer prices.

Be that as it may, the ITC supported its conclusion with substantial evidence. In its analysis, the ITC underscored that Whirlpool had made "[[ ]]" in 2011. *Views* at 54 (citing *Staff Report* at VI-5 n.4) (quotation marks omitted). It also noted that Whirlpool had described a "typical[]" BMR life cycle as two to three years, with a maximum of six years. *Id.* at 23 (citing *Staff Report* at V-13), 54. In light of these market conditions, and previous ITC findings that the BMR market's emphasis on style and design led model prices to decline as "new, more innovative or stylish models are introduced," *id.* at 23 (citing *Staff Report* at V-13), the ITC concluded that the life cycle of Whirlpool's models, which would soon be replaced by newer, more advanced models, played a significant role in their price declines, *id.* at 54 (citing *Staff Report* at VI-5 n.4). Moreover, Whirlpool failed to show that the Commission's aggregate analysis was unreasonable and the fact that selective pieces of record evidence may support Whirlpool's conclusion does not detract from the soundness of the Commission's findings.[14] *Matsushita Elec. Indus.*, 750 F.2d at 933.

iii. Price Suppression

Finally, Whirlpool asserts that the ITC did not support with substantial evidence its conclusion that the domestic industry's inability to raise prices between 2010 and 2011 did not stem significantly from subject imports. According to Whirlpool, the Commission's recognition that the perceived value of a BMR is based on its features and price; that consumers make their purchasing decisions on differing

[14] Moreover, the Commission found that other factors in addition to product life cycles contributed to domestic producer price declines. *See Views* at 53–54.

and subjective evaluations; and that producers engaged in fierce price discounting rationally lead only to the conclusion that subject imports inhibited Whirlpool's ability to raise prices. (Pl.'s Mot. 39–40 (citing *Views* at 50).) Whirlpool also claims that the Commission ignored testimony that Whirlpool could not raise prices in 2011 due to the market share it lost from 2009 and 2010, (Pl.'s Mot. 40 (citing *Views* at 54–56)), and contends that the stabilization of its market share after cutting prices in 2011 shows that subject imports suppressed domestic prices, (Pl.'s Mot. 40).[15]

Substantial evidence supports the ITC's finding that subject imports did not cause, to a significant degree, the domestic industry's inability to raise prices between 2010 and 2011. When examining the domestic industry's cost-price squeeze during the POI, the Commission found that the squeeze did not correspond to increases in subject import market share or substantial underselling. *Views* at 55. Specifically, it noted that the majority of the increase in the domestic industry's COGS to net sales ratio occurred between 2010 and 2011, when the incidence of underselling and subject import market share fell by [[ ]] percent. *Id.* (citing *Staff Report* at V-58–59, 64–65, 68–69, VI-3; R. Doc. 178 at Table IV-4 (Pl.'s Mot. Confidential App. 41)). In addition, the Commission found that the complexity of the BMR market – with its evolving array of models, features, and aggressive price discounting, as well as consumers' making purchase decisions based upon differing, subjective evaluations – was "too complex" and had "too many factors" to permit it to conclude that subject imports inhibited the domestic industry from passing on cost increases through higher prices. *Id.* at 55–56. The court will not disturb the Commission's findings.

III. Impact

A. Lost Sales Analysis

i. Whirlpool's Contentions

Whirlpool argues that the ITC's conclusion that a [[ ]] decided to purchase from [[ ]] rather than Whirlpool for non-price reasons in 2011 is unsupported by substantial evidence and not in accordance with law. (Pl.'s Mot. 41–43.) Whirlpool asserts that the Commission did not sufficiently credit [[ ]] attempt to get

[15] Whirlpool additionally claims that the Commission ignored coincident declines in the prices of subject imports and the domestic like product prices for several product categories, as well as testimony provided by one of Samsung's witnesses. (Pl.'s Mot. 40–41.) The ITC is not required to address every individual speck of evidence in the record, and the court presumes the agency examined all relevant evidence absent a showing to the contrary. *Aluminum Extrusions Fair Trade Comm.*, 36 CIT at __, 2012 WL 5201218, at *2. Whirlpool makes no such showing.

Whirlpool to lower its bid price and [[ ]] strategy "'[[ ]].'" (Pl.'s Mot. 42–43 (quoting *Views* at 57).) Whirlpool avers that these facts demonstrate that price played a key role in [[ ]] award of the sale to [[ ]]. According to Whirlpool, the ITC also failed to abide by 19 U.S.C. § 1677(7)(C)(iii)(V) and take [[ ]] dumping margin of [[ ]] percent into account in its lost sales analysis. If the ITC had done so, it would have found that [[ ]] was able to present a competitive bid only by offering a dumped price, again demonstrating the key role that price played in [[ ]] decision. (Pl.'s Mot. 42.)

ii. Analysis

The Commission supported its conclusion that price did not play a significant role in [[ ]] with substantial evidence, and did not unlawfully ignore [[ ]] dumping margin to reach this conclusion. The ITC found persuasive the contention that [[ ]] would not consider [[ ]] for the portion of the [[ ]] pertaining to jumbo BMRs with slim in-door ice dispensers, representing [[ ]], because Whirlpool did not manufacture jumbo models or slim in-door ice dispensers. *Views* at 59. For the portion of the contract that [[ ]], the Commission found it "significant" that "[[[16]]]." *Id.* (citing *Staff Report* at V-93). Further, although [[ ]] lower per year than Whirlpool's, that figure amounted to a mere [[ ]] percent of the [[ ]], a difference which the ITC characterized as "not significant relative to the other, non-price factors that prompted [[ ]]." *Id.* at 59–60 (citing *Staff Report* at V-92).

Whirlpool's insistence that 19 U.S.C. § 1677(7)(C)(iii) required the Commission to incorporate [[ ]] dumping margin into its lost sales analysis is incorrect. Section 1677(7)(C)(iii) states, in relevant part, that "the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to . . . (V) the magnitude of the margin of dumping" when performing an impact analysis. 19 U.S.C. § 1677(7)(C)(iii). This court has held that "the statutory language does not dictate that . . . [the] ITC demonstrate that dumped imports, through the effects of particular margins of dumping, are causing injury." *Iwatsu Elec. Co. v. United States*, 15 CIT 44, 48, 758 F. Supp.

[16] "[[ ]]" refers to [[ ]]." *Staff Report* at V-91.

1506, 1510 (1991); *accord Consol. Fibers, Inc. v. United States*, 32 CIT 855, __, 574 F. Supp. 2d 1371, 1380 (2008) ((citing § 1677(7)(C)(iii)(V)). The Commission was not required to analyze whether the [[ ]] percent dumping margin of subject imports from [[ ]] injured the domestic industry. By extension, the Commission certainly was not required to determine whether the dumping margin alone, when weighed against all other evidence, caused [[ ]] to prevail against Whirlpool and [[ ]], as Whirlpool asserts. Accordingly, the court finds the ITC's lost sales analysis supported by substantial evidence and in accordance with law.

CONCLUSION

For the reasons provided above, the court grants in part and denies in part Whirlpool's motion for judgment on the agency record and remands the *Final Determination* to the ITC for further explanation of the potential double counting in its volume analysis and, to the extent necessary, in the price depression analysis. Specifically, the court affirms all findings in the *Final Determination*, except for those dependent on the possible double counting of jumbo, four-door BMRs. The court orders the Commission to file its remand results no later than March 26, 2014. The parties shall file any comments on the remand results no later than April 25, 2014, and any response to the comments no later than May 12, 2014.

Dated: December 26, 2013
New York, New York

Mark A. Barnett
MARK A. BARNETT
JUDGE

Slip Op. 13–156

UNITED STATES STEEL CORPORATION, Plaintiff, and NUCOR CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and HYUNDAI HYSCO, POHANG IRON & STEEL CO., LTD., and POHANG COATED STEEL CO., LTD., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 12–00071
Public Version

[Sustaining Commerce's antidumping duty administrative review]

Dated: 12/27/2013

Ellen J. Schneider, Skadden Arps Slate Meagher & Flom, LLP of Washington, DC

argued for Plaintiff. With her on the brief were *Robert E. Lighthizer* and *Jeffrey D. Gerrish*.

Timothy C. Brightbill, Wiley Rein, LLP of Washington, DC argued for Plaintiff-Intervenor. With him on the brief was *Alan H. Price*.

Tara K. Hogan, Senior Trial Counsel, 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*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Nathaniel J. Halvorson*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, DC.

Jarrod M. Goldfeder, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, argued for Defendant-Intervenors. With him on the briefs were *J. David Park*, and *Sally S. Laing*.

OPINION

Kelly, Judge:

This matter is before the court on motions for judgment on the agency record by Plaintiff, United States Steel Corporation ("U.S. Steel"), and by Plaintiff-Intervenor, Nucor Corporation ("Nucor"), (collectively "Plaintiffs"), both members of the domestic industry, pursuant to USCIT Rule 56.2. Plaintiffs' action, brought pursuant to section 516A of the Tariff Act of 1930 ("Tariff Act" or the "Act"), as amended, 19 U.S.C. § 1516a (2006),[1] challenges the United States Department of Commerce's ("Commerce") final determination in the administrative review issued in *Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea*, 77 Fed. Reg. 14,501 (Dep't Commerce Mar. 12, 2012) ("*Final Results*") which found *de minimis* margins for two respondents, Defendant-Intervenors herein. Defendant, United States, and Defendant-Intervenors, Pohang Iron & Steel Co., Ltd. and Pohang Coated Steel Co., Ltd. (collectively "POSCO"), and Hyundai HYSCO ("HYSCO") oppose this action. The administrative review arises from the antidumping duty order covering certain corrosion-resistant carbon steel flat products ("CORE") from Korea. *See, e.g.*, Pl.'s Compl. at ¶ 1, Mar. 23, 2012, ECF No. 6; *see also Certain Cold-Rolled Carbon Steel Flat Products and Certain Corrosion-Resistant Carbon Steel Flat Products From Korea*, 58 Fed. Reg. 44,159 (Dep't Commerce Aug. 19, 1993) (antidumping duty order). Commerce initiated the 17th administrative review on September 29, 2010, for, among others, POSCO and HYSCO. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 75 Fed. Reg. 60,076, 60,077 (Dep't Commerce Sept. 29, 2010).

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

BACKGROUND

Both POSCO and HYSCO produce and sell several different product types of CORE subject to the dumping order in question. Commerce based its review of the subject merchandise on twelve different model-match criteria, one of which is temper rolling.[2] HYSCO produces and sells temper rolled ("TR") and non-tempered rolled ("NTR") merchandise in both the United States and its home market. In its review, Commerce chose the date of shipment as the date of sale for POSCO's U.S. sales in order to determine the dumping margin. Further, it considered HYSCO's NTR home market sales to be made within the ordinary course of trade. Finally, after it found a *de minimis* margin for POSCO for the third consecutive review, Commerce revoked the order with respect to POSCO. *Final Results* at 14,501; Issues and Decision Memorandum for the Final Results of the 17th Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2009–2010) cmts 3, 5, 6, A-580–816, (Mar. 5, 2012) ("Issues and Decision Memorandum"), *available at* http://enforcement.trade.gov/frn/summary/Koreasouth/2012–5937–1.pdf (last visited Dec. 4, 2013).

Plaintiffs challenge Commerce's selection of the shipment date as the date of sale for POSCO, *see, e.g.*, Pl.'s Compl. at ¶ 10–11, and Commerce's determination that certain sales of NTR merchandise by HYSCO were within the ordinary course of trade. *Id.* at ¶ 16–17. Further, Plaintiffs challenge Commerce's revocation of the dumping order with respect to POSCO. *Id.* at ¶ 12–13.

For the reasons set forth below, the court sustains Commerce's selection of the shipment date as the date of sale for POSCO's U.S. sales, its findings that HYSCO's sales of NTR merchandise were within the ordinary course of trade, and its decision to revoke the antidumping duty order with respect to POSCO.

JURISDICTION

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006),[3] and 19 U.S.C. § 1516a(a).

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[2] Temper rolling "refers to a finishing operation that smoothes [sic] the surface of the steel." Mem. Def.-Interv. HYSCO Opp'n to Pl.'s Rule 56.2 Mot. J. at 4, Feb. 25, 2013, ECF No. 68.

[3] Further citations to Title 28 of the U.S. Code are made to the 2006 edition, and all applicable supplements.

DISCUSSION

Standard of Review

"The court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). To be in accordance with law, a decision must not be arbitrary and capricious, contrary to regulations, statutes or the Constitution, and must be supported by substantial evidence and reasoned explanations. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41–43, 103 S.Ct. 2856, 2866–67 (1983); *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373–74 (Fed. Cir. 2011). Substantial evidence exists on the record when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126, 140 (1938)). However, the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456, 467 (1951). Nevertheless, "the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence on the record." *Zhaoqing New Zhongya Aluminum Co. v. United States*, 36 CIT __, __, 887 F. Supp. 2d 1301, 1305 (2012) (*citing Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 465, 95 L.Ed. at 467–68).

Date of Sale

Commerce's determination that POSCO's date of sale should be based on the date of shipment is supported by substantial evidence and in accordance with law. Commerce calculated dumping margins in this case on a constructed export price ("CEP") basis, so the date of sale for purposes of determining the U.S. price of the subject merchandise was the date the merchandise was first sold to a party not affiliated with POSCO. *See* 19 U.S.C. § 1677a(b). The regulation instructs Commerce how to identify the date of sale generally. It provides:

> Date of sale. In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the

> Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i)(2013). Thus, the regulation sets forth a presumption that "the Secretary normally will use the date of invoice" for the date of sale but "may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms." 19 C.F.R. § 351.401(i)(2013). *See Sahaviriya Steel Indus. Pub. Co. v. United States*, 34 CIT __, __, 714 F. Supp. 2d 1263, 1279 (2010) ("Thus, Commerce's date of sale regulation provides for a 'rebuttable presumption' that invoice date will normally be identified as the date of sale." (citation omitted)), *aff'd*, 649 F.3d 1371 (Fed. Cir. 2011). Although Commerce's regulation provides that the date of sale will normally be the invoice date, Congress has "expressed its intent that, for antidumping purposes, the date of sale be flexible so as to accurately reflect the true date on which the material elements of sale were established." *Allied Tube and Conduit Corp. v. United States*, 24 CIT 1357, 1370, 127 F. Supp. 2d 207, 219 (2000).

Implicated in this case is what discretion the Secretary has to be "satisfied" that a date other than the invoice date is more appropriate as the date of sale. In other words, the question is whether record evidence supports a conclusion by the Secretary that the shipment date better reflects the date on which the exporter or producer established the material terms of sale. Material terms include price and quantity among others. *See Sahaviriya Steel*, 34 CIT at __, 714 F. Supp. 2d at 1280.

Commerce found that "the material terms of sale were set at the time of shipment." Issues and Decisions Memorandum at cmt 6. Commerce relied on POSCO's questionnaire response regarding the date of sale, record documentation regarding when the material terms of sale were set, a long-standing business practice in the Korean steel industry, and the U.S. sales process for all four respondents. Issues and Decision Memorandum at cmt 6 nn.95–99. Further, it noted "HYSCO has reported ship date as date of sale consistently in previous reviews which the Department has accepted." *Id.* at nn.99.

POSCO's questionnaire responses and supporting documentation in the record establish POSCO's sales process. POSCO's U.S. affiliate, POSCO America Corporation ("POSAM"), negotiates and executes purchase orders with United States customers.[4] Def.'s Opp'n. Pl.'s

[4] Although POSAM is the importer of record for the goods shipped by POSCO, POSAM does not take possession of the goods.

Mot.'s J. at 19, Feb. 27, 2013, ECF No. 72; *see also* Mem. POSCO POHANG Coated Steel Co., Ltd., Opp'n Pl.'s and Pl.-Interv.'s 56.2 Mots.' J. at 25–27, Feb. 25, 2013, ECF No. 70; POSCO's Dec. 20, 2010 Sect. A Resp. at A-18, A-24, PD I 52, CD I 8 (Dec. 20, 2010), ECF No. 32 (May 7, 2012). Then, on a monthly basis the U.S. customer sends an email to POSAM outlining the quantities and types of products it would like to order. Def.'s Opp'n. Pl.'s Mot.'s J. at 19. Next, POSAM enters the order into POSCO's computer system, "which is the basis for generating an order sheet." *Id.* POSCO then manufactures the products and, after shipping arrangements are made, ships the products directly to the U.S. customer. *Id.*

Based upon the foregoing description of the sales process as supported by POSCO's questionnaire responses, a reasonable mind could conclude the parties intend the quantity and delivery terms to be fixed when POSCO ships the merchandise to the U.S. customer. In Commerce's Section A questionnaire dated October 29, 2010, Commerce requested POSCO to report its date of sale for home market sales and U.S. sales. *See* POSCO's Dec. 20, 2010 Sect. A Resp. at A-22.[5] POSCO responded on December 20, 2010 and stated that "[f]or U.S. sales, POSCO has reported the date of shipment from the mill in Korea as the date of sale. The invoice issued to the customer by POSAM is issued long after the date of shipment." *Id.* at A-23. POSCO's response supports its intention as to the date of sale. However, Commerce did not accept this assertion at face value but followed up with a supplemental questionnaire on April 6, 2011. In that questionnaire it asked POSCO for more information regarding its date of sale. Commerce stated,

> Please provide a copy of all sales documents which set the material terms of sale, including quantity and price, agreed upon between POSCO America Corporation (POSAM) and your unaffiliated U.S. customer for the top five largest U.S. sales by quantity: SEQUs [[ ]].

[5] In particular Commerce's question asks:

> Sales Process: The date of sale for your sales to the United States and the foreign market is important to the Department's analysis. It will determine which sales are reported in response to sections B and C of this questionnaire and the exchange rate used to convert normal value into US dollars. Note, however, that the Department's criteria for determining date of sale may differ from those that you apply in the normal course of business. A description of the Department's criteria is included in the Glossary of Terms at Appendix I; please use these criteria in preparing your response to this questionnaire. If you have difficulty deciding which date to use as the date of sale, please contact the official in charge by no later than fourteen calendar days after the issuance of this questionnaire (the issuance date of this questionnaire appears on the first page of the cover letter). Describe the sales process for each method or channel of distribution described in response to question 3 above. Include a description of each step in the sales process.

POSCO's Dec. 20, 2010 Sect. A Resp. at A-22.

> Furthermore, please state if there were any changes to the material terms of sale following shipment for any of your U.S. sales during the period of review.

POSCO's May 4, 2011 Supp. Sect. A-C QNR at 1, PD I 124, CD I 39 (May 4, 2011), ECF No. 32 (May 7, 2012). POSCO responded that "POSAM and its unaffiliated customers generally set price and quantity terms through e-mail correspondence." *Id.* POSCO further cites documents attached at Exhibit S-1. Each sequence at Exhibit S-1 contains several documents including a purchase order, an order sheet, an invoice issued between POSCO and POSAM, a packing list, a bill of lading, an entry summary, and finally a commercial invoice between POSAM and the U.S. customer. *See id.* at Ex. 1.

POSCO also discusses possible changes to material terms including quantity and delivery destination that can occur after the purchase order but before shipment. *Id.* at 1. Finally, POSCO states that shipment date is the best date of sale:

> because it reflects the date on which the material terms of sale become firmly established. Indeed, the two changes noted above occur on or before the date of shipment, which is subsequent to the date of the initial order. Using shipment date as the date of sale is also consistent with the Department's longstanding practice, including in this proceeding, that the date of sale cannot be later than the date of shipment of the subject merchandise to the unaffiliated U.S. customer.

Id. at 1–2.

In this supplemental questionnaire, Commerce also noted [[ ]] and asked for "calculation worksheets and source documentation [[ ]]." *Id.* POSCO responded to this query by stating "[t]he difference between POSCO's price to POSAM and POSAM's price to the unaffiliated customer is attributable to [[ ]]." *Id.* POSCO provided a worksheet showing calculations at Exhibit S-3. The worksheet provided by POSCO shows the values it placed on each of these expenses. After adding them all together the total equals the price invoiced from POSAM to the U.S. customer.

Commerce probed further and on July 20, 2011 Commerce issued another supplemental questionnaire. *See* Dept.'s July 20, 2011 Supp. Sect. A-C QN, PD I 167, CD I 58 (Jul. 20, 2011), ECF No. 32 (May 7, 2012). It asked for more date of sale information. *Id.* at 2.

1. You state that "there were no changes to the material terms of sale following shipment for any of {your} U.S. sales during the POR" on page 1 of your May 2, 2011, supplemental questionnaire response (May QNR Response). Please provide the documents that finalizes [sic] the material terms of sale (i.e., price, quantity, delivery terms, and payment terms) at the date of shipment and that shows that such terms did not change after the shipment date for (*i.e.*, SEQUs [[ ]] your U.S. sales during the POR.
2. You stated in your May QNR Response that "POSAM and its unaffiliated customers generally set price and quantity terms through email correspondence." However, [[ ]]. All of the other sales documents which you submitted [[ ]]. Please provide sales documents which set the material terms of sale between POSAM and the unaffiliated U.S. customer for your top five largest U.S. sales by quantity (*i.e.*, SEQUs [[ ]]).
3. You stated that [[ ]] For SEQUs [[ ]], provide invoices or other source documentation clearly showing the actual amounts paid for the following expenses: [[ ]] In addition, you only provided a calculation worksheet for SEQU [[ ]]. Please provide calculation worksheets for the other four sales, specifically SEQUs [[ ]].

Id. POSCO responded to the July 20, 2011 questionnaire on August 3, 2011 providing Commerce with documents and worksheets regarding international freight, U.S. brokerage and handling, marine insurance, and U.S. duty. POSCO's Aug. 3, 2011 Supp. Sect. A-C QNR, PD I 171, CD I 62 (Aug. 3, 2011), ECF No. 32 (May 7, 2012).

The record taken as a whole contains substantial evidence for a finding by Commerce that the shipment date reflected the date on which the parties established the material terms. POSCO asserted that the shipment date was the date of sale in its questionnaire. As discussed above, Commerce did not merely accept this assertion at face value but probed further and elicited information and documentation concerning the circumstances surrounding POSCO's sales. Commerce reasonably made its date of sale determination based

upon the responses it received, Commerce's knowledge of the industry, and the lack of any evidence, that would undermine or contradict its findings.

The Plaintiffs claim that the lack of any one single document memorializing the material terms being fixed at the time of shipment precludes shipment date as a viable date of sale. *See* Mem. Supp. Pl. U.S. Steel Mot. J. at 15, Sept. 24, 2012, ECF No. 46; Br. Supp. Nucor 56.2 Mot. at 18–19, Sept. 24, 2012, ECF No. 45; Oral Arg. at 1:08:28–54, Oct. 28, 2013, ECF No. 100. Nothing in the regulation requires Commerce to base its decision upon such a single document. This argument ignores the language of the regulation. Commerce may choose a date other than the date of invoice as the date of sale if it satisfies itself that another date better represents when the parties established the material terms. Here, it relied upon the questionnaire response, its knowledge of the industry, and its understanding of how the transactions took place as supported by record evidence.

Moreover, despite protestations to the contrary, no documents or evidence relied upon by the Plaintiffs undercuts Commerce's findings. Plaintiffs point to the offer sheet, the purchase order, and the commercial invoice, note that the prices on each are different, and argue that therefore the commercial invoice is the only possible evidence establishing when the material terms are set. However, no one argues that the offer sheet or the purchase order represented or showed the final price. Commerce determined according to record evidence that the terms were fixed upon shipment. The existence of these other documents, or the fact that they show different amounts, does not detract from that finding. While it is conceivable that Commerce might have drawn another conclusion from these documents, "the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence on the record." *Zhaoqing New Zhongya Aluminum*, 36 CIT at __, 887 F. Supp. 2d at 1305 (*citing Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 465, 95 L.Ed. at 467–68).

Plaintiffs argue strongly that Commerce's practice of using the shipment date as the date of sale when shipment date precedes invoice date is not in accordance with law because it "contradicts Commerce's own regulations." Mem. Supp. Pl. U.S. Steel Mot. J. at 20. This argument holds some weight. The regulation states that the Secretary "normally will use the date of invoice" for the date of sale. 19 C.F.R. § 351.401(i)(2013). A determination that relied solely on a practice to use shipment date when it precedes invoice date would

appear to contradict this language. *See Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 638, 647, 491 F. Supp. 2d 1222, 1231 (2007) (stating that Commerce's practice "is in contradiction to Commerce's statement in the [regulation's] preamble" but noting other courts have "implicitly approved" the practice), *aff'd*, 548 F.3d 1375 (Fed. Cir. 2008).

While the second sentence of the regulation allows Commerce to choose a date other than the invoice date, it requires that Commerce be "satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." 19 C.F.R. § 351.401(i)(2013). The second sentence therefore clarifies that while normally the invoice date will be the date of sale, another date can be chosen if Commerce makes a determination in a particular case so as to "satisfy" itself. This second sentence requires Commerce to make a fact-specific determination in a particular case that another date better reflects the date on which the material terms were established.[6] It would seem that, by definition, a general practice cannot satisfy such a fact-specific command. While Commerce's knowledge of the industry, including how business is done, is not irrelevant, any purported practice alone would seem not to be enough to satisfy the standard that the regulation, written by Commerce, provides.[7]

However, here Commerce did not rely solely upon the practice. Commerce made a specific finding that the shipment date better reflected the date on which the material terms were set by the parties. It did so based upon evidence in the record and the Plaintiffs have failed to point to any evidence which detracts from this finding. The court sustains Commerce's date of sale determination.

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[6] One could argue that the second sentence does not exhaust the range of circumstances in which Commerce could deviate from its "normal" practice. However, to the extent that there could be any ambiguity in the regulation, Commerce foreclosed the possibility that it could develop a practice in which shipment date would be the preferred date. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,348–49 (Dep't Commerce May 19, 1997) (final rule) (rejecting shipment date as the uniform date of sale).

[7] In its Issues and Decision Memorandum Commerce said "[i]t is the Department's normal practice not to consider dates subsequent to the date of shipment from the factory to the customer as appropriate for the date of sale because once merchandise is shipped, the material terms of sale are established." Issues and Decision Memorandum at 28. At oral argument POSCO argued that while this practice appeared to contradict Commerce's regulation, "in the last 16 years they have modified their practice." Oral Arg. at 12:21:30, Oct. 28, 2013, ECF No. 100. Modifying a regulation in this manner would not be permissible. If Commerce has determined through subsequent implementation of the regulation that a date other than the invoice date normally will better reflect the date of sale there are adequate procedures for changing the regulation. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 553 (2006).

Ordinary Course of Trade

Antidumping duties should be "an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. Thus, Commerce must calculate both a CEP and a normal value. The statute defines normal value as the price of the subject merchandise "at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price," 19 U.S.C. § 1677b(a)(1)(A), where the price is "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade . . . ." 19 U.S.C. § 1677b(a)(1)(B). Thus, for Commerce to include a particular sale in its calculation of a respondent's normal value, the sale must have been made in the ordinary course of trade. Congress defines ordinary course of trade as:

> the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:
>
> (A) Sales disregarded under section 1677b(b)(1) of this title.
>
> (B) Transactions disregarded under section 1677b(f)(2) of this title.

19 U.S.C. § 1677(15).[8]

Other than for the two statutory exclusions mentioned above, the Tariff Act provides "little assistance in determining what is outside the scope of that definition." *NSK Ltd. v. United States*, 25 CIT 583, 599, 170 F. Supp. 2d 1280, 1296 (2001). The court has held that Commerce has discretion to determine what sales are outside the ordinary course of trade. *See, e.g.*, *Bergerac, N.C. v. United States*, 24 CIT 525, 536–37, 102 F. Supp. 2d 497, 507 (2000); *Torrington Co. v. United States* , 25 CIT 395, 402–03, 146 F. Supp. 2d 845, 861 (2001), *aff'd*, 62 Fed. Appx. 950 (Fed. Cir. 2003); *U.S. Steel Group v. United States*, 25 CIT 1293, 1300, 177 F. Supp. 2d 1325, 1333 (2001). Commerce's regulations in 19 C.F.R. § 351.102(b)(35)(2013) establish Commerce's methodology for evaluating when sales are made outside the ordinary course of trade:

[8] Although not relevant here, sales disregarded under § 1677b(b)(1) are sales made at prices less than the cost of production, 19 U.S.C. § 1677b(b)(1), and transactions disregarded under § 1677b(f)(2) are transactions between affiliated parties. 19 U.S.C. § 1677b(f)(2).

> [t]he Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that the Secretary might consider as being outside the ordinary course of trade are sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price.

19 C.F.R. § 351.102(b)(35)(2013). Therefore, Commerce may find that sales are outside the ordinary course of trade if it determines that sales "have characteristics that are extraordinary," based on a totality of the circumstances. *Id. See also NSK Ltd.*, 25 CIT at 599, 170 F. Supp. 2d at 1296 ("Commerce's methodology allows it, on a case-by-case basis, to examine all conditions and practices which may be considered ordinary in the trade under consideration and to determine which sales or transactions are, therefore, outside the ordinary course of trade.").

In applying its totality of the circumstances test, Commerce does not give particular weight to any single factor. Instead, Commerce determines which factor may be more or less significant based on the case at hand. *See, e.g.*, *Murata*, 17 CIT at 263, 820 F. Supp. at 606. In making its determination, Commerce looks "at market conditions, practices, and other sales" in the home market, *U.S. Steel Group*, 25 CIT at 1300, 177 F. Supp. 2d at 1333, and "it then compares the transactions in question to see if they exhibit characteristics that are extraordinary for the market." *Id. See also Mantex, Inc. v. United States*, 17 CIT 1385, 1403, 841 F. Supp. 1290, 1306 (1993). Commerce has discretion to determine when an unusual circumstance will render sales outside the ordinary course of trade. *See* 19 C.F.R. § 351.102(b)(35)(2013); *see also Koenig & Bauer-Albert AG v. United States*, 22 CIT 574, 589, 15 F. Supp. 2d 834, 850 (1998) (finding that "Commerce has the discretion to decide under what circumstances highly profitable sales would be considered to be outside of the ordinary course of trade."), *vacated on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001); *NTN Bearing Corp. of Am. v. United States*, 27 CIT 129, 16971, 248 F. Supp. 2d 1256, 1289–91 (2003) (finding that Commerce's inclusion of respondent's sample sales and sales with high profits in the normal value calculation was properly within Com-

merce's discretion because the mere existence of an extraordinary factor does not negate the totality of the circumstances test for determining whether sales are representative of the home market).

In addition to the regulations, the court has commonly looked to the Statement of Administrative Action ("SAA") to discern Congress' intent regarding ordinary course of trade. *See, e.g.*, *Monsanto Co. v. United States*, 12 CIT 937, 940, 698 F.Supp. 275, 278 (1988) (stating that the "commonly understood purpose of the ordinary course of trade provision is to prevent dumping margins from being based on sales which are not representative, for example, sales of obsolete merchandise."). The SAA states that

> Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include merchandise produced according to unusual product specifications, merchandise sold at aberrational prices, or merchandise sold pursuant to unusual terms of sale. As under existing law, amended section 771(15) does not establish an exhaustive list, but the Administration intends that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103316, vol. 1, at 834 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4171 ("SAA"). Thus, although Commerce's regulations reflect some of the language of the SAA, the SAA demonstrates a particular concern with extraordinary sales that would lead to "irrational or unrepresentative results." *Id.*

Finally, without "adequate evidence of extraordinary characteristics," *U.S. Steel Group*, 25 CIT at 1300, 177 F. Supp. 2d at 1333, Commerce presumes the contested sales were made in the ordinary course and includes them in its margin calculations. *See, e.g.*, *U.S. Steel Group*, 25 CIT at 1300, 177 F. Supp. 2d at 1333; *Bergerac*, 24 CIT at 538, 102 F. Supp. 2d at 509; *NTN Bearing Corp. of Am. v. United States*, 19 CIT 1165, 1172, 903 F.Supp. 62, 68–69 (1995). The court has characterized the burden imposed on the party challenging this presumption as requiring "a complete explanation of the facts which establish the extraordinary circumstances rendering particu-

lar sales outside the ordinary course of trade . . . ." *NTN Bearing Corp. of Am v. United States*, 19 CIT 1221, 1229, 905 F.Supp. 1083, 1091 (1995). *See also Bergerac*, 24 CIT at 538, 102 F. Supp. 2d at 509; *Koyo Seiko Co. v. United States*, 20 CIT 772, 783, 932 F.Supp. 1488, 1497–98 (1996).

The court sustains Commerce's determination that HYSCO's NTR sales were made within the ordinary course of trade as made in accordance with law and as supported by substantial evidence. Commerce properly considered the totality of the circumstances, including the number and types of customers that purchased NTR merchandise, the circumstances surrounding those sales, the average quantities purchased, the channels of distribution, and terms of sale. Issues and Decision Memorandum at cmt 3. It found that the number of customers was significant. *Id.* (*citing to* HYSCO's Rebuttal Brief at 17, CD II EXT_051205 (Jan. 17, 2012), ECF No. 32 (May 7, 2012)). It found "none of those customers were otherwise unique in their purchases," Issues and Decision Memorandum at cmt 3 (*citing to* HYSCO's Rebuttal Brief at 17), and found no evidence that the categories of customers for NTR sales were different from TR sales. Issues and Decision Memorandum at cmt 3. Neither did Commerce find anything unusual about the average purchase quantities. *Id.* It found no evidence that the terms of sale or channels of distribution were different for NTR sales than for TR sales. *Id.* U.S. Steel points to no evidence in the record that refutes any of these findings. *See* Mem. Supp. Pl. U.S. Steel Mot. J. at 24–30. Commerce's decision, based upon the totality of the circumstances, that HYSCO's NTR sales were not outside the ordinary course of trade is therefore reasonable and made in accordance with law.

Instead of directly challenging Commerce's factual findings on appeal, U.S. Steel contends that Commerce's inclusion of HYSCO's NTR sales in the normal value calculations was not in accordance with law. *Id.* at 25. U.S. Steel claims the SAA standard is controlling, and that it requires Commerce to exclude extraordinary sales when those sales produce irrational or unrepresentative results on the dumping margin.[9] *See id.* at 25–26. *See also* SAA at 834. U.S. Steel asserts that Commerce acted contrary to law by "ignor[ing] the straightforward directive of the SAA," Mem. Supp. Pl. U.S. Steel Mot. J. at 25, because HYSCO's home market NTR sales were "plainly extraordinary for the

[9] U.S. Steel argues the SAA "establishes that Commerce must not base its margin calculations on sales that are 'extraordinary for the market in question' and cannot use non-ordinary sales that lead to 'irrational or unrepresentative results.'" Mem. Supp. Pl. U.S. Steel Mot. J. at 26. As such, plaintiff argues "Commerce does not have any discretion in the matter," because when there exists "a class of extraordinary sales that by themselves produce an irrational result," the SAA requires those sales to be excluded from NV calculations. *Id.* at 26.

market in question." *Id.* at 26. In support of its argument that Commerce was required to exclude HYSCO's NTR sales, U.S. Steel makes two arguments. First, U.S. Steel argues that [[ ]] between HYSCO's home market TR and NTR sales renders the NTR sales extraordinary. *Id.* at 26. Second, U.S. Steel argues that HYSCO's NTR "sales are extraordinary because they took place without leaving any paper (or email) trail." *Id.* at 27. Further, U.S. Steel asserts that HYSCO's NTR sales have an irrational effect on the dumping margin and, therefore, the SAA requires Commerce to exclude them.[10] *Id.* at 28.

U.S. Steel's argument relies partly on the fact that [[ ]] of the time HYSCO's home market sales are TR. However, neither Commerce's regulations nor the SAA requires sales to be excluded because they are comparatively [[ ]] in volume, but only if, for some reason, those sales are not representative of the market in question. *See NTN Bearing Corp. of Am.*, 27 CIT at 171, 248 F. Supp. 2d at 1291 (upholding Commerce's determination that respondent's sample sales and high profit sales were in the ordinary course of trade because there was no evidence that "the transactions at issue possessed some unique and unusual characteristic that make them unrepresentative of the home market. . . "), *appeal dismissed on motion to withdraw*, 81 Fed. Appx. 318 (Fed. Cir. 2003).[11] Indeed, the court has explicitly held that a [[ ]] on its own, is not enough to warrant a finding that the

[10] U.S. Steel contends

> if the [[ ]] of sales that were designated as non-temper rolled were classified as temper rolled, the dumping margin would have been over [[ ]]. And if the [[ ]] of non-temper rolled sales had been excluded from the margin calculation as outside the ordinary course of trade (*i.e.*, so that HYSCO's dumping margin would be based on [[ ]] of its home market sales that were not unusual), HYSCO's dumping margin would have been [[ ]].

Mem. Supp. Pl. U.S. Steel Mot. J. at 28. HYSCO questions U.S. Steel's conclusion regarding the impact these sales have on the margin. *See* Mem. Def.-Interv. HYSCO Opp'n to Pl.'s Rule 56.2 Mot. J. at 28. HYSCO argues that "U.S. Steel's claimed result is unsubstantiated in the record by a single computer program or calculation. Correctly implementing the change that U.S. Steel suggests would require multiple changes throughout the Department's programs, given the complexity of the Department's calculations, and thus is highly prone to clerical error." *Id.* at 29 n.5.

[11] In *NTN Corp. v. United States*, plaintiff and respondent, NTN, argued Commerce incorrectly treated its sample sales as made in the ordinary course of trade. 28 CIT 108, 136, 306 F. Supp. 2d 1319, 1344 (2004) *aff'd*, 125 Fed. Appx. 1011 (Fed. Cir. 2005). NTN claimed "Commerce acknowledged that these sales were relatively few in number, but then found that NTN's sample sales were not rare or uncommon." *NTN Corp.*, 28 CIT at 136, 306 F. Supp. 2d at 1344. In rebutting Commerce's rationale, NTN argued the same thing as plaintiff herein. Specifically, NTN argued that a determination of whether a particular sales' factor is unusual should be based on a comparison of the contested sales with overall sales. *See NTN Corp.*, 28 CIT at 136, 306 F. Supp. 2d at 1344. The court found that "Commerce reasonably exercised its discretion in requiring NTN to provide evidence that its sample . . . sales were outside the ordinary course of trade." *NTN Corp.*, 28 CIT at 139, 306 F. Supp. 2d at 1347.

contested sales were made outside the ordinary course of trade. *See Murata*, 17 CIT at 263–64, 820 F.Supp. at 606–07. *See also Koyo Seiko Co.*, 20 CIT at 783, 932 F.Supp. at 1498.

Some potentially extraordinary sales characteristics that Commerce might consider in administering this test include sales where the merchandise is "off-quality," made with "unusual product specifications," or "sold pursuant to unusual terms of sale." 19 C.F.R. § 351.102(b)(2013). *See also* SAA at 834. All of these examples may involve a relatively [[ ]] comparative volume of sales in the home market, but merely declaring that there is a [[ ]] volume is not sufficient to show that the sales were extraordinary. Commerce must consider the totality of circumstances in each case to determine whether the sales or transactions at issue would not be representative of the market. *See U.S. Steel Group*, 25 CIT at 1299, 177 F. Supp. 2d at 1332.

U.S. Steel argues that the NTR sales do have unusual physical and production characteristics because they represent [[ ]] of HYSCO's subject home market sales and therefore they are, by definition, different from [[ ]] of HYSCO's subject home market sales both in terms of their physical characteristics and how they are produced. Mem. Supp. Pl. U.S. Steel Mot. J. at 26. This argument, if accepted, would inappropriately convert an inquiry concerning physical characteristics or production process into a question of numbers. U.S. Steel makes no argument that the sales themselves have unusual attributes, such as sales of off-quality merchandise, or of merchandise made pursuant to unusual specifications. *See id.* at 26–29.

Second, U.S. Steel points to the lack of paper documentation for HYSCO's NTR sales to argue that they are "inherently unverifiable" and, as such, extraordinary. *Id.* at 27–28. This contention fairs no better. Commerce found that the way in which the NTR sales were made was not unusual. Issues and Decision Memorandum at cmt 3. In the Issues and Decision Memorandum, Commerce found that "the number of customers that purchase non-temper rolled merchandise is significant, and that none of those customers were otherwise unique in their purchases of home market sales of subject merchandise from HYSCO." Issues and Decision Memorandum at cmt 3. U.S. Steel says nothing about whether the lack of a paper trail is unusual either for HYSCO or sales of NTR merchandise in the home market generally. Mem. Supp. Pl. U.S. Steel Mot. J. at 27–28.

U.S. Steel then argues that, per the SAA standard, these sales should be excluded because of their unrepresentative impact on the dumping margin. *Id.* at 28. U.S. Steel contends that it would be irrational to allow [[ ]] of sales "to control the outcome of a

case . . . .” *Id.* at 28. U.S. Steel relies upon the language of the SAA which provides that Commerce is to “avoid basing normal value on sales which are extraordinary . . . particularly when the use of such sales would lead to irrational or unrepresentative results.” SAA at 834. For Commerce to consider the impact of the sales on the dumping margin, the language of the SAA first requires that the sales exhibit extraordinary characteristics. However, if based on the totality of the circumstances, Commerce, as it did here, appropriately finds that the contested sales were not extraordinary then the impact of those sales on the margin is irrelevant.

Based on the foregoing, Commerce's decision to reject U.S. Steel's argument that HYSCO's NTR home market sales were outside the ordinary course of trade was made in accordance with law and supported by substantial evidence.

Revocation

Congress provided for the revocation of an antidumping order in 19 U.S.C. § 1675(d). The statute provides in relevant part:

> (d) Revocation of order or finding; termination of suspended investigation
>
> (1) In general
>
> The administering authority may revoke, in whole or in part, a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, after review under subsection (a) or (b) of this section. . . .

19 U.S.C. § 1675(d). Commerce's regulations set forth the requirements for a request for revocation.

> (e) Request for revocation or termination—
>
> (1) Antidumping proceeding. During the third and subsequent annual anniversary months of the publication of an antidumping order or suspension of an antidumping investigation, an exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section with regard to that person if the person submits with the request:
>
> (i) The person's certification that the person sold the subject merchandise at not less than normal value during the period of review described in §351.213(e)(i), and that in the future the person will not sell the merchandise at less than normal value;
>
> (ii) The person's certification that, during each of the consecutive years referred to in paragraph (b) of this section, the

> person sold the subject merchandise to the United States in commercial quantities; and
> (iii) If applicable, the agreement regarding reinstatement in the order or suspended investigation described in paragraph (b)(2)(iii) of this section.

19 C.F.R. § 351.222(e)(1)(2013). Commerce's regulations discuss Commerce's determination when to revoke in part:

> (2)(i) In determining whether to revoke, an antidumping duty order in part, the Secretary will consider:
> (A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;
> (B) Whether, for any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value; and (C) Whether the continued application of the antidumping order is otherwise necessary to offset dumping.
> (ii) If the Secretary determines, based upon the criteria in paragraphs (b)(2)(i)(A) through (C) of this section, that the antidumping duty order as to those producers or exporters is no longer warranted, the Secretary will revoke the order as to those producers or exporters.

19 C.F.R. § 351.222(b)(2)(i)-(ii) (language effective until June 20, 2012).

The statute "provides minimal guidance" to Commerce and is "silent as to the conditions that might warrant the revocation of an antidumping duty order or the particular circumstances that would trigger such an action." *Sahaviriya Steel Indus. Pub. Co. v. United States*, 649 F.3d 1371, 1376 (Fed. Cir. 2011). Thus, Commerce has discretion in making a revocation determination including whether the requesting party satisfied the criteria for revocation. *See, e.g.*, *Feili Group (Fujian) Co., v. United States*, 34 CIT __, __, 724 F. Supp. 2d 1358, 1369 (2010).

Commerce's determination is supported by substantial evidence and in accordance with law. Commerce explained that it was satisfied POSCO fulfilled the 19 C.F.R. § 351.222(e) certification requirements.

Issues and Decision Memo at cmt 5, n.78 (*citing* POSCO Letter to the Dept., PD I 4 (Aug. 31, 2010), ECF No. 32 (May 7, 2010)). Next, Commerce applied the criteria in 19 C.F.R. § 351.222(b)(2)(i) (language effective until June 20, 2012). It was undisputed that POSCO had *de minimis* margins for three consecutive years. Commerce found that POSCO had sold "at not less than normal value" for those years. 19 C.F.R. § 351.222(b)(2)(i)(A) (language effective until June 20, 2012); Issues and Decision Memorandum at cmt 5, nn.79–80. Commerce presumes continued application of the order is unnecessary after three consecutive findings of an absence of dumping unless the petitioner comes forward with information to rebut. *Id.* at n.82 (*citing Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 FR 51236 (Sept. 22, 1999)). Commerce's application of its standard is reasonable.

Plaintiffs' arguments that revocation was unsupported by substantial evidence or otherwise not in accordance with law are unavailing. First, as discussed above, Plaintiffs' claim that the revocation was based in part on Commerce's erroneous date of sale determination lacks merit.

Second, Plaintiffs argue that Commerce failed to address record evidence of specific market and economic factors which showed a likelihood of future dumping and thus that the continued application of the dumping order was necessary. Without nuance, U.S. Steel argues that POSCO's increasing production capacity and other business practices along with lost market share by domestic producers show a likelihood of future dumping. Mem. Supp. Pl. U.S. Steel Mot. J. at 23–24. In greater detail, Nucor argues that future dumping is likely because: (i) the economic downturn made the last three reviews unrepresentative, (ii) POSCO's shipment volumes and market share in Korea have declined while its production has increased, and (iii) it has established a "strategic partnership" with Union Steel Manufacturing Co. Ltd. (another respondent). Br. Supp. Nucor 56.2 Mot. at 12–16. However, assertions of market conditions are not evidence that the order is "otherwise necessary to offset dumping." 19 C.F.R. § 351.222(b)(2)(i) (language effective until June 20, 2012). Plaintiffs would have Commerce speculate that these facts support the conclusion that POSCO is likely to sell at less than normal value in the future. While Commerce must "address significant arguments and evidence which seriously undermine its reasoning and conclusion" it does not need to address every assertion made by the petitioners. *Altx, Inc. v. United States*, 25 CIT 1100, 1117–1118, 167 F.Supp.2d 1353, 1374 (2001), *aff'd*, 370 F.3d 1108 (Fed. Cir. 2004); *see also* 19 U.S.C. § 1677f(i)(3)(A). Here, where the assertions do no more than

ask Commerce to speculate, it is reasonable to conclude that Commerce considered the assertions and did not credit them.

Finally, Nucor argues that Commerce was unable to complete verification with regard to POSCO and thus, its determination was unsupported by substantial evidence and otherwise not in accordance with law. Commerce has discretion in how it conducts its verification process. *See Floral Trade Council v. United States*, 17 CIT 392, 398–99, 822 F. Supp. 766, 771–72 (1993). In its Issues and Decision Memorandum, Commerce correctly notes that it is "afforded [] a degree of latitude in implementing its verification procedures, and that the Department is not required to verify each item submitted in respondents' questionnaire." *Id.* at cmt 5, n.88; *see also Floral Trade Council*, 17 CIT at 399, 822 F. Supp. 2d at 772 (internal citations omitted). Contrary to Nucor's assertion that Commerce must conduct a "completeness test," Br. Supp. Nucor 56.2 Mot. at 11–12, "verification is an audit process that selectively tests accuracy and completeness of a respondent's submissions." Issues and Decision Memorandum at cmt 5, n.89 (*citing Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F.Supp 1507, 1508 (1990)); *see also Floral Trade Council*, 17 CIT at 398, 822 F. Supp. at 771. Although verification was not completed, it did not need to be complete for this court to sustain Commerce's finding. *See Floral Trade Council*, 17 CIT at 399–400, 822 F. Supp. at 772; *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F.Supp. 454, 469–70 (1987)).

Therefore, Commerce's decision to revoke the order with respect to POSCO is supported by substantial evidence and in accordance with law.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: December 27, 2013
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 13–158

APEX EXPORTS and FALCON MARINE EXPORTS LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE and AMERICAN SHRIMP PROCESSORS ASSOCIATION, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Consol. Court No. 11–00291
PUBLIC VERSION

[Plaintiffs' Motion for Judgment on the Agency Record under USCIT Rule 56.2 is denied. Defendant-Intervenors' Motion for Judgment on the Agency Record under USCIT Rule 56.2 is denied.]

Dated: December 31, 2013

Lizbeth R. Levinson, Kutak Rock LLP, of Washington, DC, argued for plaintiffs. With her on the brief was *Ronald M. Wisla*.

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

David A. Yocis, Picard Kentz & Rowe LLP, of Washington DC, argued for defendant-intervenor Ad Hoc Shrimp Trade Action Committee. With him on the brief were *Andrew W. Kentz*, *Nathaniel Maandig Rickard*, and *Jordan C. Kahn*.

Geert M. De Prest, Stewart and Stewart, of Washington, DC, argued for defendant-intervenor American Shrimp Processors Association. On the brief were *Edward T. Hayes*, Leake & Andersson, LLP, of New Orleans, LA, and *Terence P. Stewart*, *Elizabeth J. Drake*, and *Stephanie R. Manaker*, Stewart and Stewart, of Washington, DC.

OPINION

Goldberg, Senior Judge:

This consolidated action challenges three determinations made by the U.S. Department of Commerce ("Commerce" or the "agency") in the final results of an administrative review of an antidumping duty order on frozen warmwater shrimp from India. *Certain Frozen Warmwater Shrimp from India*, 76 Fed. Reg. 41,203 (Dep't Commerce July 13, 2011) ("*Final Results*").

Plaintiffs Apex Exports and Falcon Marine Exports Limited (collectively, "Apex" or "Plaintiffs") challenge the dumping margin Commerce assigned them during the review. Specifically, Plaintiffs allege Commerce inflated the normal value of their exports. Commerce did so by refusing (wrongly, in Plaintiffs' view) to subtract from Plaintiffs' costs of production the interest Plaintiffs earned on certain antidumping duty refunds. Defendant-Intervenors Ad Hoc Shrimp Trade Action Committee and American Shrimp Processors Association (col-

lectively, "Ad Hoc" or "Defendant-Intervenors") also challenge the dumping margin. They argue Commerce underestimated the margin by refusing to deduct antidumping duties from Plaintiffs' export prices. Finally, Plaintiffs allege Commerce wrongfully applied zeroing to calculate their margins.

The court finds that each of these contested decisions was grounded in substantial evidence and in accordance with law. Consequently, both Plaintiffs' and Defendant-Intervenors' motions are denied. The court sustains Commerce's decisions with respect to all issues.

BACKGROUND

In February 2005, Commerce published an antidumping duty order on certain frozen warmwater shrimp from India. *See Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5147 (Dep't Commerce Feb. 1, 2005) (final determination and antidumping duty order). Commerce initiated the order's fifth administrative review on April 7, 2010. *See Certain Frozen Warmwater Shrimp from Brazil, India, and Thailand*, 75 Fed. Reg. 17,693 (Dep't Commerce Apr. 7, 2010) (initiation of admin. reviews). Plaintiffs, both exporters of the subject merchandise, were selected as respondents. On March 4, 2011, Commerce published the preliminary results of the review. *See Certain Frozen Warmwater Shrimp from India*, 76 Fed. Reg. 12,025 (Dep't Commerce Mar. 4, 2011) ("*Preliminary Results*").

Plaintiffs then filed a case brief challenging two of Commerce's determinations in the Preliminary Results: the agency's refusal to grant an interest offset against Plaintiffs' financial expenses and its use of zeroing during the review. *See* Apex 56.2 Mot. for J. on Agency R. 4–5, ECF No. 36 ("Apex Br."). Some factual explanation is needed to frame Plaintiffs' first claim. During the second administrative review of the antidumping duty order now at issue, Plaintiffs were charged estimated antidumping duties of 10.17%. *See id.* at 3–4. Plaintiffs deposited these estimated duties with U.S. Customs and Border Protection ("Customs") during the period from February 2006 to January 2007. *See* Issues & Decisions Mem. at cmt. 4, PD 184 (July 5, 2011), ECF No. 49 (Apr. 26, 2012) ("*I&D Mem.*"). Later, when the second review's final results were issued, the final dumping rate was lower than the 10.17% deposit rate. *See Certain Frozen Warmwater Shrimp from India*, 73 Fed. Reg. 40,492, 40,495 (Dep't Commerce July 15, 2008) (final admin. review) (assigning both Plaintiffs a 1.69% rate). Customs refunded the difference between the deposit rate and the final rate, plus interest, during the review period for the fifth administrative review. Apex Br. 3–4.

When reporting their financial expenses for the fifth administrative review, Plaintiffs asked Commerce to use interest earned on the refunds to offset certain cost-of-production calculations relevant to Plaintiffs' normal value. Commerce barred the offset, however, reasoning that Plaintiffs' interest income was not attributable to short-term investments. *See Preliminary Results*, 76 Fed. Reg. at 12,030. Plaintiffs challenged this decision, arguing (1) the interest earned on refunds was short-term in nature because it was received less than one year after Commerce ordered the liquidation of the entries, and (2) the refunds were related to Plaintiffs' current operations and were thus not an "investment." *See* Apex Br. 4–5.

Defendant-Intervenors also contested Commerce's dumping margin in their case brief, but to the opposite effect. Ad Hoc 56.2 Mot. for J. on Agency R. 5, ECF No. 35 ("Ad Hoc Br."). Although the law permits Commerce to deduct from the export price any "costs, charges, . . . expenses, and United States import duties" associated with importing foreign merchandise, Tariff Act of 1930 § 772, *as amended*, 19 U.S.C. § 1677a(c)(2)(A) (2006),[1] Commerce refused to deduct antidumping duties from Plaintiffs' export price, *I&D Mem.* at cmt. 3. Ad Hoc said Commerce erred by declining to deduct these duties and underestimated Plaintiffs' true dumping margin.

Commerce rejected all of these arguments and issued the Final Results on July 13, 2011. *See Final Results*, 76 Fed. Reg. at 41,203; *I&D Mem.* at cmts. 1, 3–4. Shortly thereafter, Apex lodged a complaint to challenge Commerce's determinations regarding the interest offsets and zeroing. *See* Compl., Consol. Court No. 11–00291, ECF No. 8. Ad Hoc also filed a complaint to challenge Commerce's refusal to deduct antidumping duties from Apex's export price. *See* Compl., Court No. 11–00286, ECF No. 2. Apex's and Ad Hoc's cases were consolidated into the present action in October 2011. Order, Consol. Court No. 11–00291, ECF No. 29.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over the parties' claims pursuant to section 201 of the Customs Court Act of 1980, *as amended*, 28 U.S.C. § 1581(c) (2006).[2] The Court must "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. §

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

[2] Further citations to the Customs Courts Act of 1980 are to the relevant portions of Title 28 of the U.S. Code, 2006 edition.

1516a(b)(1)(B)(i) (1994)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). When reviewing agency determinations, findings, or conclusions for substantial evidence, the Court determines whether the agency action is reasonable in light of the entire record. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

Furthermore, when deciding whether an agency determination is in accordance with law, the Court deploys the two-step framework announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the Court first assesses whether the statute expresses Congress's unambiguous intent on a given issue. *Id.* at 842–43. If the statute is ambiguous, the Court next decides "whether the agency's [interpretation of the statute] is based on a permissible construction of [that] statute." *Id.* at 843. The Court must uphold the agency's reasonable reading of the statute, even if the Court would not have adopted that reading on its own. *Id.* at 843 n.11.

DISCUSSION

Plaintiffs raise the same two issues on appeal as were raised in their case brief: (1) whether Commerce unlawfully refused to deduct interest earned on antidumping duty refunds from Plaintiffs' financial expenses, and (2) whether Commerce unlawfully deployed its "zeroing" methodology in the review. Defendant-Intervenors raise one issue on appeal, namely, whether Commerce unlawfully refused to deduct antidumping duties from Plaintiffs' export price. The court first addresses Plaintiffs' argument regarding interest deductions from financial expenses, then turns to Defendant-Intervenors' argument regarding antidumping duty deductions from Plaintiffs' export price. Plaintiffs' zeroing argument is analyzed last.

The court concludes that each of the decisions contested in this case was supported in substantial evidence and in accordance with law.

I. Commerce's Refusal to Offset Interest Earned on Antidumping Duty Refunds Is Supported by Substantial Evidence and in Accordance with Law

Plaintiffs' first claim arises from Commerce's calculation of the normal value of Plaintiffs' goods. In general, a good's normal value equals the good's sale price in the exporter's home country or another

foreign country. *See* 19 U.S.C. § 1677b(a)(1)(B).[3] Commerce may find, however, that the exporter sold its goods at less-than-cost in those foreign markets. If the sales were substantial, not at prices sufficient to recover costs in a reasonable time, and made over an extended period, Commerce may disregard them in calculating normal value. *Id.* § 1677b(b)(1).

To pinpoint below-cost sales, Commerce first calculates the exporter's costs of production, which include costs of materials, container costs, and administrative and financial expenses. *See id.* § 1677b(b)(3). Commerce subtracts from the exporter's financial expenses any interest the exporter earned on short-term investments associated with the export. *Pakfood Pub. Co. v. United States*, 34 CIT __, __, 724 F. Supp. 2d 1327, 1354 n.50 (2010). Commerce allows this offset in recognition of producers' need to maintain working capital reserves for daily cash requirements. *Id.* at __, 724 F. Supp. 2d at 1356–57 n.54. Commerce does not, by contrast, allow offsets for income from long-term investments. *See, e.g.*, *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea*, 65 Fed. Reg. 68,976 (Dep't Commerce Nov. 15, 2000) (final admin. review) and accompanying Issues & Decisions Mem. at cmt. 7, A-580–812 (Nov. 15, 2000). If the exporter's costs of production exceed sales prices in the foreign market, then Commerce deems those sales below-cost and excludes them from normal value. *See* 19 U.S.C. § 1677b(b)(1).

Here, when computing the normal value of Plaintiffs' exports, Commerce investigated whether Plaintiffs had made below-cost sales in foreign markets. When adding up Plaintiffs' costs of production, Commerce refused to grant an offset for interest Plaintiffs earned on antidumping duties refunded during the fifth administrative review. Commerce subsequently found that both Plaintiffs made below-cost sales and declined to include these sales in its calculations of Plaintiffs' normal value. *Preliminary Results*, 76 Fed. Reg. at 12,030.

On appeal, Plaintiffs claim Commerce should have furnished an offset for their interest income. Plaintiffs argue the interest was short-term in nature, and even if not, that the interest was related to their current operations. *See Hyundai Elecs. Indus. Co. v. United States*, 28 CIT 517, 539, 342 F. Supp. 2d 1141, 1161 (2004) (permitting interest offset for long-term interest relating to current operations). Neither of these arguments shows, however, that Commerce should have deducted interest earned on antidumping duty refunds from

[3] In this case, Commerce generated export prices for Plaintiffs' products using sales data not from India, but from Japan and the United Kingdom. *Preliminary Results*, 76 Fed. Reg. at 12,026.

Plaintiffs' financial expenses. *See Pakfood*, 34 CIT at __, 724 F. Supp. 2d at 1357 (holding party requesting the offset bears burden to show the offset is warranted).

1. *The Interest Plaintiffs Earned on the Refunds Was Not Short-Term in Nature*

As mentioned above, Commerce may deny interest offsets if the respondent making the claim "cannot demonstrate that the interest income . . . is short-term in nature." *Pakfood*, 34 CIT at __, 724 F. Supp. 2d at 1357. Accordingly, Plaintiffs argue that the interest they earned on antidumping duty refunds was short-term in nature. They claim they did not know, in the period immediately following the second review's preliminary results, that they would receive a refund at all. Only upon liquidation does the importer learn whether it will receive a refund and associated interest. Thus Plaintiffs argue the date of deposit should be irrelevant to determining whether interest earned on those deposits is long- or short-term. Apex Br. 11. Furthermore, Plaintiffs allege that because any refunds must occur within six months of the liquidation date, *see* 19 U.S.C. § 1504(d), "any interest that flows from the deposits [was] short-term in nature." Apex Br. 11.

The court disagrees with this logic. The hallmark of a short-term deposit is whether it constitutes "liquid working capital reserves which would be readily available for the companies to meet their daily cash requirements." Def.'s Mem. in Opp'n to Pls.' 56.2 Mots. For J. on Agency R. 14, ECF No. 44 ("Gov't Br.") (quoting *Certain Frozen Warmwater Shrimp from Thailand*, 74 Fed. Reg. 47,551 (Dep't Commerce Sept. 16, 2009) (final admin. review) and accompanying Issues & Decisions Mem. at cmt. 7, A-549–822 (Sept. 16, 2009) ("*Thailand Shrimp Mem.*")). Antidumping duty payments to Customs do not satisfy this criterion. Duty payments are in fact compelled and in no way act as "reserves." Furthermore, even upon liquidation—when refund payments to the importer are assured—antidumping duty refunds may not be "readily available" for daily cash requirements. Plaintiffs thus fail to show that the duty refunds were short-term investments.[4]

[4] Plaintiffs also argue the deposit was not undertaken "with the intent of realizing a profit over time," and thus is not an "investment" in the traditional sense. Apex Reply Br. 3–4, ECF No. 56. But this argument, in itself, does not demonstrate that Commerce's refusal to treat the interest as short-term was unsupported by substantial evidence or otherwise unlawful.

2. *The Interest Earned Does Not Relate to Plaintiffs' Current Operations*

Plaintiffs also argue that their antidumping deposits were not investments, but rather part of their general business costs, thus warranting an offset. Apex Br. 10. To support their argument, Plaintiffs note that the court previously allowed Commerce to use long-term interest income to offset costs of production. *See Hyundai Elecs.*, 28 CIT at 539, 342 F. Supp. 2d at 1161 ("[I]nterest income may be treated as an offset where there is sufficient evidence that the interest income from long-term investment is related to the current operations of a company."). But Commerce subsequently abandoned this practice. *See, e.g.*, *Polyethylene Retail Carrier Bags from Thailand,* 74 Fed. Reg. 65,751 (Dep't Commerce Dec. 11, 2009) (final admin. review) and accompanying Issues & Decisions Mem. at cmt. 5, A-549–821 (Dec. 7, 2009) (repudiating methodology upheld in *Hyundai Electronics*).

Plaintiffs cite *Gulf States Tube v. United States*, 21 CIT 1013, 981 F. Supp. 630 (1997), for the same proposition, but their reliance on this case is misplaced. In *Gulf States*, *id.* at 1038, 981 F. Supp. at 651, the court found plaintiff failed to establish a nexus between its long-term investments and its current operations expenditures. *Gulf States* did not declare, however, that Commerce must provide an offset for long-term investments that fund current operations. In fact, as later noted in *Pakfood*, 34 CIT at __, 724 F. Supp. 2d at 1355–56 n.51, *Gulf States* "explicitly rejected the plaintiff's argument that 'long-term interest income must . . . be taken into account in calculating a respondent's net interest expense.'" (quoting *Gulf States*, 21 CIT at 1038, 981 F. Supp. at 651).

The facts and reasoning of *Pakfood* apply here. In *Pakfood*, the plaintiff's affiliates were required to maintain funds in lending institutions to have access to loans and credit lines. *See id.* at __, 724 F. Supp. 2d at 1354. The court found Commerce reasonably refused to offset interest earned on those deposits. *Id.* at __, 724 F. Supp. 2d at 1357. Similarly here, Plaintiffs were required to pay cash deposits to import goods. In neither case did the companies have immediate, daily access to the disputed funds. In both cases, the deposits held by lending institutions and Customs were long-term costs of doing business. Commerce was thus not required to grant an offset for the interest Plaintiffs earned on antidumping duty refunds.

Plaintiffs also argue that Commerce previously allowed offsets for interest earned on deposits with government agencies because those deposits were necessary to run a company's Consol. Court No. 11–00291 Page 11 current operations. *See Glycine from India*, 73 Fed. Reg. 16,640 (Dep't Commerce Mar. 28, 2008) (final determination)

and accompanying Issues & Decisions Mem. at cmt. 4, A-533–845 (Mar. 28, 2008). One agency decision, however, does not a precedent make. Shortly after the *Glycine* decision, Commerce stated that it did not yet have a policy concerning whether "certain interest earned (or owed) on antidumping cash deposits . . . should be taken into account in the calculation of financial expenses." *Thailand Shrimp Mem.* at cmt. 5. Rather, the practice Commerce has consistently followed is to allow "income expense offsets solely for short-term income from current assets and working capital accounts." *Pakfood*, 34 CIT at __, 724 F. Supp. 2d at 1356. Commerce's decision not to offset interest earned on antidumping duties is thus supported by substantial evidence and in accordance with law. Furthermore, because the refund interest was neither short-term nor related to Plaintiffs' current operations, the court declines to address whether the interest should be excluded as a direct inevitable consequence of the order.

The court sustains Commerce's decision not to deduct interest earned on refunded antidumping duties from Plaintiffs' financial expenses.

II. Commerce's Refusal to Deduct Antidumping Duties from Plaintiffs' Export Price is Supported by Substantial Evidence and in Accordance with Law

Defendant-Intervenors, in turn, claim Commerce wrongly refused to deduct assessed antidumping duties from Plaintiffs' export price, yielding erroneously low dumping margins. They note that 19 U.S.C. § 1677a(c)(2)(A) requires Commerce to subtract from the export price any amount "included in such price . . . attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise" into the country. In Defendant-Intervenors' view, antidumping duties are none other than "United States import duties" or "additional costs" to be deducted under the statute. The court disagrees with this interpretation, however, and finds Commerce's approach was grounded in substantial evidence and in accordance with law.

1. *The Statute Does Not Unambiguously Require Commerce to Offset Antidumping Duties*

Defendant-Intervenors first argue the law unambiguously required Commerce to deduct assessed antidumping duties from Plaintiffs' export price. The relevant statutory language, however, is open to interpretation. *See id.* As the Federal Circuit observed, the statute does not define the terms "United States import duties" or "costs, charges or expenses." *Wheatland Tube Co. v. United States*, 495 F.3d

1355, 1359–60 (Fed. Cir. 2007) (discussing U.S. import duties); *see also Hoogovens Staal BV v. United States*, 22 CIT 139, 146, 4 F. Supp. 2d 1213, 1220 (1998) (discussing both U.S. import duties and costs, charges, and expenses). Because the statute does not define these terms, "the question for the court is whether the agency's [action] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

The court finds Commerce's construction was indeed permissible. As explained in the I&D Memo, Commerce deducted neither antidumping duty deposits nor assessed antidumping duties from Plaintiffs' export price. *See I&D Mem.* at cmt. 3. This approach, which was adeptly illustrated and upheld in *Ad Hoc Shrimp Trade Action Committee v. United States*, 37 CIT __, __, 925 F. Supp. 2d 1367, 1372–77 (2013), acted to restore to normal value the price that unaffiliated U.S. buyers paid for Plaintiffs' goods. Contrary to Defendant-Intervenors' claims, Commerce's method works regardless of whether the unaffiliated U.S. buyer or the exporter acting as importer of record pays antidumping duties. *Id.* at __, 925 F. Supp. 2d at 1375 n.21 (upholding Commerce's method even when exporter acts as importer of record). *But see* Ad Hoc Br. 14 (alleging Commerce must deduct antidumping duties from export price when exporter sells under delivered-duty-paid contract).

By contrast, if Commerce deducted assessed antidumping duties from the export price, then Plaintiffs would pay more in duties than the antidumping statute intends. *See Ad Hoc Shrimp*, 37 CIT at __, 925 F. Supp. 2d at 1373–75.[5] Under Defendant-Intervenors' proposed

[5] Technically, *Ad Hoc Shrimp*, 37 CIT at __, 925 F. Supp. 2d at 1374, found that deducting antidumping duty deposits (not assessed duties) would produce inflated margins. But deducting assessed duties would also result in excessive margins. To illustrate, suppose a good has a normal value ("NV") (after all relevant adjustments) of $150 before Commerce issues an antidumping duty order. During the investigation, Commerce finds the export price ("EP") (after all relevant adjustments) is $100. Commerce would consequently set a 50% deposit rate ((NV – EP)/EP = (150 – 100)/100 = 50/100 = 50%). *See* 19 U.S.C. § 1677(35)(B) (outlining formula for weighted average dumping margins).

Now suppose the exporter (acting as importer of record) makes just one entry of merchandise following the investigation. The exporter sells its good to an unaffiliated U.S. buyer for $120 plus a $60 antidumping duty deposit (120*50% = 60), for a total U.S. price of $180. On these facts, if Commerce chose not to deduct antidumping deposits and duties from EP during the administrative review, then Commerce would find no dumping occurred. EP ($180) would exceed NV (assuming a consistent $150 NV) by $30, negating any need for final assessed duties. Customs would refund the $60 deposit to the exporter following an administrative review, and the antidumping statute would have achieved its purpose, i.e., to increase EP to NV or above. *See id.* § 1673 (mandating antidumping duties "in an amount equal to the amount by which the normal value exceeds the export price").

But suppose Commerce instead deducted "assessed antidumping duties" from EP. *See* Ad Hoc Br. 14. Using Defendant-Intervenors' method, Commerce would subtract the U.S. sales price (less antidumping duty deposits) from NV, yielding a 25% dumping rate ((150 –

method, Commerce would have to (1) calculate antidumping duty margins for both Plaintiffs; (2) assess duties pursuant to those margins that, in the normal course, would be paid by Plaintiffs acting as importers; (3) increase the dumping margin for each Plaintiff by deducting those duties from Plaintiffs' export prices (creating a revised export price); and (4) assess new, higher duties to account for the deduction. And logically, if duties were considered a "cost, charge, or expense," then those new, higher duties would also be subject to the same deduction process. *See* 19 U.S.C. § 1677a(c)(2)(A). This would result in circular calculations and impermissible double-counting of the dumping margins. It was reasonable for Commerce to interpret the statute to avoid this absurd result.

Defendant-Intervenors offer an illustration to support its suggested approach, but it is unconvincing. *See* Ad Hoc Br. 12–14. The illustration assumes the following baseline facts: "[A]n exporter sells a product to an unrelated customer at $100 on a C&F [cost-and-freight] basis in both the U.S. and [a third-country] comparison market." *Id.* at 12. [6] "[F]reight and other similar costs" are $8 in the U.S. market and $5 in the comparison market. *Id.* Under these conditions, the normal value of the exporter's product would be $95 and the export price would be $92, yielding a $3 antidumping duty. Consequently, the unaffiliated U.S. customer would pay a total of $103 for the exporter's product. *Id.* at 12–13.

In its first variation on these facts, Defendant-Intervenors suppose freight costs to U.S. markets increase to $13, but the exporter continues to charge the U.S. customer $100 for its product. *Id.* at 13. The export price thus decreases to $87, normal value remains at $95, and the dumping margin increases to $8. Under the C&F contract, the U.S. customer would be liable for antidumping duties and pay a total

120)/120 = 30/120 = 25%). Commerce would then reassess the margin, this time subtracting $30 in "assessed duties" (120*25%) from EP, yielding a 50% dumping rate ((150 – (120 – 30))/120 = (150 – 90)/120 = 60/120 = 50%). Under the 50% dumping rate, the exporter (acting as importer of record) would be liable for $60 in duties (120*50%), and Customs would return none of the exporter's $60 deposit. In sum, the government would receive a $60 windfall, even though the exporter raised its U.S. price to $180, a price well above the good's $150 NV. This is not what the antidumping regime was designed to do. *See* 19 U.S.C. § 1673.

[6] C&F, also known as CFR, is an Incoterm delineating certain terms in an international business transaction. An Incoterm is "[a] standardized shipping term, defined by the International Chamber of Commerce, that apportions the costs and liabilities of international shipping between buyers and sellers." *Black's Law Dictionary* 782 (8th ed. 2004). According to the Incoterms, CFR "means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination." Int'l Chamber of Commerce, *Incoterms 2010*, at 95 (2010) ("*Incoterms 2010*").

of $108 for the exporter's product ($100 U.S. price + $8 antidumping duties). The exporter would earn $87 on the transaction ($100 U.S. price – $13 freight). *See id.*

In the second variation on the baseline facts, Defendant-Intervenors assume freight costs remain the same, but the terms of the transaction change from C&F to delivered-duty-paid ("DDP"). *Id.*[7] Under the DDP contract, the exporter would be responsible for paying $1 in brokerage and customs fees upon importation. Normal value would thus remain $95, the export price would drop to $91 to reflect the $1 import fee, and antidumping duties would total $4. Ad Hoc argues that the exporter would pay these antidumping duties under the DDP contract, and consequently, that the U.S. customer would pay $100 for the exporter's product. As in the first variation, the exporter would earn only $87 on the transaction ($100 U.S. price – $8 freight – $1 customs fees – $4 antidumping duties). *See id.*

Defendant-Intervenors observe that antidumping duties are $8 in the first hypothetical and $4 in the second, even though the exporter earns $87 in both scenarios. *Id.* at 13–14. To cure this apparent error, Defendant-Intervenors would require Commerce to deduct the $4 antidumping duty in the second hypothetical from the export price ($91 export price – $4 antidumping duty = $87). This would yield an $8 antidumping duty, on par with the $8 duty in the first hypothetical. *See id.*

Though creative, these illustrations do not prove that Commerce must deduct antidumping duties from Plaintiffs' export price. *See* 19 U.S.C. § 1677a(c)(2)(A). First, the focus of antidumping law is not the exporter's profits, as suggested by Ad Hoc's hypotheticals. Rather, antidumping duties act to equalize the price of U.S.-imported goods and the price of like goods in the exporter's home market. It is thus irrelevant that the exporter in the second hypothetical earned the same profits as the first. *See* Gov't Br. 37. Second, and in a similar vein, Ad Hoc's illustrations assume the exporter would not raise its U.S. price to offset duties the exporter paid under the DDP contract. But whether the exporter passes the cost of antidumping duties to the buyer is a matter of private contract. *Id.* Finally, unlike the parties in the first variation of Ad Hoc's illustration, Plaintiffs' unaffiliated U.S. customers did not pay antidumping duties upon importation. Instead,

[7] DDP "means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities." *Incoterms 2010*, at 69.

Plaintiffs acted as their own importers of record and paid the duties themselves, rendering at least part of Ad Hoc's illustration inapplicable.

Commerce also successfully opposes Defendant-Intervenors' claim that the disputed duties cannot be distinguished from other import fees paid to Customs or customs brokers. Ad Hoc Br. 11. In calculating dumping margins, Commerce compares the normal value of the merchandise to the export price (or constructed export price) of a company's U.S. sales. *See* 19 U.S.C. § 1677(35)(A). As a first step, Commerce must calculate export and normal prices; in the second step, it finds the difference between the two. Unlike freight, broker fees, and customs duties, which are expenses deducted at the first step, antidumping duties are not determined until the second step. Accordingly, they cannot be "costs" inherent in the underlying business transaction, and are thus not subject to deduction from the export price. *See id.* § 1677a(c)(2); *see also* Gov't Br. 38.

2. *Commerce's Objections Are Supported by a Legal and Evidentiary Basis*

Defendant-Intervenors next argue that Commerce's refusal to deduct antidumping duties lacks an evidentiary and legal basis. The court disagrees. As explained in the I&D Memo, Commerce has a longstanding practice "not to deduct antidumping duties as costs, expenses or import duties because antidumping duties are neither selling expenses nor normal customs duties." *I&D Mem.* at cmt. 3; *see also Certain Cold-Rolled Carbon Steel Flat Products from Korea*, 63 Fed. Reg. 781, 786–87 (Dep't Commerce Jan. 7, 1998) (final admin. review). Such practices have been sustained not only by this court but also by the Federal Circuit. *See Wheatland*, 495 F.3d at 1361; *Hoogovens*, 22 CIT at 146, 4 F. Supp. 2d at 1220; *Ad Hoc Shrimp*, 37 CIT at __, 925 F. Supp. 2d at 1372–77; *AK Steel Corp. v. United States*, 21 CIT 1265, 1280 n.12, 988 F. Supp. 594, 608 n.12 (1997). Furthermore, as previously discussed, deducting antidumping duties could result in double-counting and circular calculations. There is thus a sound basis for Commerce's refusal to deduct antidumping duties from Plaintiffs' export price.

Even so, Defendant-Intervenors argue that Commerce may subtract antidumping duties from export prices under 19 C.F.R. § 351.402(f)(l)(i), which directs Commerce to deduct any antidumping duties the exporter pays on behalf of, or reimburses to, the importer. This provision is inapplicable here, however, because Plaintiffs neither reimbursed an importer nor paid duties on an importer's behalf. Rather, they acted as their own importers of record and could not

reimburse themselves. *See Agro Dutch Indus. Ltd. v. United States,* 508 F.3d 1024, 1031 (Fed. Cir. 2007) (holding single importer could not be "affiliated" with itself under duty absorption statute); *see also Brass Sheet and Strip from Germany*, 75 Fed. Reg. 66,347 (Dep't Commerce Oct. 28, 2010) and accompanying Issues & Decisions Mem. at cmt. 9, A-428–602 (Oct. 28, 2010) (holding two separate entities must exist to invoke reimbursement regulation). Just because Commerce may deduct reimbursed antidumping duties under 19 C.F.R. § 351.402(f)(l)(i) does not mean it must also deduct those duties where no reimbursement is made. *See Ad Hoc Shrimp*, 37 CIT at __, 925 F. Supp. 2d at 1375–77 (explaining purpose and effect of reimbursement regulation).

Given this evidence, the court need not address Ad Hoc's other arguments in detail. They claim, for example, that Commerce unreasonably interpreted the export price law using the legislative history of the "duty absorption provision." Ad Hoc Br. 16–17. But this provision is relevant here. In the Statement of Administrative Action relating to the duty absorption provision, Congress stated the provision was "not intended to provide for the treatment of antidumping duties as a cost." Gov't Br. 36 (quoting Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1, at 885 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4210) (internal quotation marks omitted). Finally, even if the duty absorption provision is irrelevant to calculating dumping margins, Commerce's other interpretive arguments suffice to receive *Chevron* deference.

The court therefore sustains Commerce's refusal to deduct antidumping duties from Plaintiffs' export prices.

III. Commerce's Practice of "Zeroing" in Administrative Reviews Is in Accordance with Law

Finally, Plaintiffs challenge whether Commerce acted lawfully in using "zeroing" to determine Plaintiffs' "weighted average dumping margin." *See* 19 U.S.C. § 1677(35)(B). When Commerce "zeroes" in a constructed value calculation, it disregards all U.S. sales for which the constructed export price exceeds the normal value, setting these sales at zero in determining the numerator of the dumping margin calculation. Thus, Commerce effectively calculates a dumping margin only for dumped sales, and does not consider any non-dumped sales in its estimate. While this practice has long been upheld, some have questioned whether Commerce could reasonably "zero" dumping margins in administrative reviews but not investigations. *See Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1372–73 (Fed. Cir. 2011); *JTEKT Corp. v. United States*, 642 F.3d 1378, 1379 (Fed. Cir. 2011);

Sucocitrico Cutrale Ltda. v. United States, Slip Op. 12–71, 2012 WL 2317764, at *3–4 (CIT June 1, 2012).

Despite recent controversy on the matter, it is now settled law—and binding precedent on this Court—that it is reasonable for Commerce to interpret the statute to allow zeroing in administrative reviews but not in investigations. *See generally Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013) (holding that Commerce's explanation of its zeroing practice is a reasonable interpretation of statute). The court therefore sustains Commerce's decision to use zeroing during the fifth administrative review.

CONCLUSION AND ORDER

Plaintiffs' Motion for Judgment on the Agency Record is denied. The court sustains Commerce's decisions regarding offsets for interest earned on antidumping duty refunds and zeroing. Defendant-Intervenors' Motion for Judgment on the Agency Record is also denied. The court sustains Commerce's refusal to deduct antidumping duties from Plaintiffs' export price. Judgment will enter accordingly.

Dated: December 31, 2013
New York, New York

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

APEX EXPORTS and FALCON MARINE EXPORTS LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE and AMERICAN SHRIMP PROCESSORS ASSOCIATION, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Consol. Court No. 11–00291

JUDGMENT

This case having been submitted for decision, and the court, after due deliberation, having rendered an opinion; now in conformity with that decision, it is hereby

ORDERED that the final determination of the United States Department of Commerce, published as *Certain Warmwater Shrimp from India*, 76 Fed. Reg. 41,203 (Dep't of Commerce July 13, 2011) (final admin. review), be, and hereby is, SUSTAINED; it is further

ORDERED that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, DENIED; it is further

ORDERED that Defendant-Intervenors' Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, DENIED.

Dated: December 31, 2013
New York, New York

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

ERRATA

Apex Exports v. United States, Consol. Court No. 11–00291, Slip Op. 13–158, dated Dec. 31, 2013:

Page 6, footnote 3, line 1: replace "export prices" with "normal values".

Slip Op. 14–3

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

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

[Plaintiff's renewed motion for default judgment in customs penalty action granted.]

Dated: January 10, 2014

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

OPINION

Restani, Judge:

Before the court is plaintiff United States' renewed motion for entry of default judgment seeking $324,687.00 in civil penalties plus post-judgment interest against defendant Lafidale, Inc. ("Lafidale") for alleged grossly negligent violations of section 592(a) of the Tariff Act of 1930, 19 U.S.C. § 1592(a) (2006). The court continues to have jurisdiction pursuant to 28 U.S.C. § 1582(1).

On October 30, 2013, the court ruled that plaintiff had established the liability of Lafidale for gross negligence in the misclassification of 46 entries of wallets and handbags between June 20, 2006, and April 22, 2009. United States v. Lafidale, Inc., 942 F. Supp. 2d 1362, 1364–65 (CIT 2013). Certain discrepancies between the allegations in the complaint and the allegations in the affidavit supporting the amount of lost duties and penalties claimed caused the court to deny the motion for default judgment without prejudice to renewal. Id. at 1366–67.

The December 20, 2013, affidavit of Robert P. Thierry, Director of the Office of Fines, Penalties and Forfeitures of U.S. Customs and Border Protection, satisfactorily establishes an actual and potential duty loss of at least $81,171.63.[1] See Thierry 2d Decl. & Attachs., ECF Nos. 15–1, 15–2, 15–3. Where there is duty loss because of gross negligence, penalties may be assessed at "the lesser of—(i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19

[1] Thierry actually calculates the duty loss to be $82,936.24. Thierry 2d Decl. ¶ 9. Because this is a slight increase over the amount originally claimed, plaintiff continues to use the amount alleged in its earlier filings ($81,171.63) as the basis for its penalty calculation. Pl.'s Renewed Mot. for Entry of Default J. 4, ECF No. 15. The unpaid duties ultimately were paid by sureties. Thierry 2d Decl. ¶ 11.

U.S.C. § 1592(c)(2)(A). Mr. Thierry's affidavit asserts that the domestic value of the 46 entries of misclassified merchandise was $1,264,224.97. Thierry 2d Decl. ¶ 5. Thus, plaintiff continues to claim penalties of $324,687 (four times the duty loss), as set forth in its previous filings. Pl.'s Renewed Mot. for Entry of Default J. 1, 4, ECF No. 15.

As Lafidale has failed to respond in any way in this action, including disputing that this amount is an appropriate penalty, the court sees no reason for further delay, and judgment for penalties in the amount of $324,687.00 plus post-judgment interest will enter accordingly.

Dated: January 10, 2014
New York, New York

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