Slip Op. 11–16

LIFESTYLE ENTERPRISE, INC., TRADE MASTERS OF TEXAS, INC., EMERALD HOME FURNISHINGS, LLC, RON'S WAREHOUSE FURNITURE D/B/A VINEYARD FURNITURE INTERNATIONAL LLC, Plaintiffs, and DREAM ROOMS FURNITURE (SHANGHAI) CO., LTD., GUANGDONG YIHUA TIMBER INDUSTRY, CO., LTD., Consolidated Plaintiffs, ORIENT INTERNATIONAL HOLDING SHANGHAI FOREIGN TRADE CO., LTD., INTERVENOR PLAINTIFF, v. UNITED STATES, UNITED STATES DEPARTMENT OF COMMERCE Defendants, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, VAUGHAN-BASSETT FURNITURE COMPANY, INC. Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 09–00378
Public Version

[In antidumping duty matter plaintiffs' motions for judgment on agency record granted in part and denied in part. The intervenor defendants' motion for judgment on agency record granted in part and denied in part. Commerce's requests for voluntary remand granted.]

Dated: February 11, 2011

Mowry & Grimson, PLLC (*Kristin H. Mowry*, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Susan E. Lehman*) for the plaintiffs.[1]

Wilmer, Cutler, Pickering, Hale & Dorr, LLP (*Patrick J. McLain* and *John D. Greenwald*) for consolidated plaintiff, Guangdong Yihua Timber Industry Co., Ltd.

Garvey Schubert Barer (*William E. Perry*) for consolidated plaintiff, Dream Rooms Furniture (Shanghai) Co., Ltd.

Arent Fox LLP (*Nancy A. Noonan* and *Matthew L. Kanna*) for the intervenor plaintiff, Orient International Holding Shanghai Foreign Trade Co., Ltd.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*), for the defendants.

King & Spalding LLP (*J. Michael Taylor*, *Joseph W. Dorn*, *Daniel L. Schneiderman*, *Steven R. Keener*, and *Prentiss L. Smith*) for the intervenor defendants.

OPINION AND ORDER

Restani, Judge:

[1] Mowrey & Grimson, PLLC withdrew as counsel for Ron's Warehouse Furniture on January 6, 2011. Ron's Warehouse Furniture has not retained substitute counsel as of the date of this opinion.

INTRODUCTION

This action challenges the Department of Commerce's ("Commerce") final results rendered in the third antidumping ("AD") duty review of certain wooden bedroom furniture ("WBF") from the People's Republic of China ("PRC"). *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 41,374, 41,374 (Dep't Commerce Aug. 17, 2009) ("*Final Results*"); *Wooden Bedroom Furniture From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 55,810, 55,810 (Dep't Commerce Oct. 29, 2009) ("*Amended Final Results*"). The plaintiffs, Lifestyle Enterprise, Inc. ("Lifestyle"), Orient International Holding Shanghai Foreign Trade Co., Ltd. ("Orient"), Guangdong Yihua Timber Industry Co., Ltd. ("Yihua Timber"), Dream Rooms Furniture (Shanghai) Co., Ltd. ("Dream Rooms"), Ron's Warehouse Furniture, Emerald Home Furnishings, LLC, and Trade Masters of Texas, Inc., submitted motions for judgment on the agency record. The intervenor defendants, American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (collectively "AFMC") submitted a motion for summary judgment on the agency record.[2] For the reasons stated below, the court holds that the plaintiffs' and intervenor defendants' motions are granted in part and denied in part. Commerce's motion for voluntary remand is granted.

BACKGROUND

In January 2005, Commerce published the AD duty order on WBF from the PRC. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329, 329 (Dep't Commerce Jan. 4, 2005). On January 31, 2008, AFMC requested an administrative review of 213 exporters and producers of merchandise entered into the United States between January 1, 2007 and December 31, 2007, thereby triggering the third administrative review of WBF. Def.'s App. to Resp. to Mot. for J. Upon the Admin. R. ("Def.'s App.") Doc. 18. On February 27, 2008, Commerce published a notice that it would initiate an administrative review and would publish a separate initiation notice for WBF containing additional detail. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 73 Fed. Reg. 10,422, 10,422 (Dep't Commerce Feb. 27,

[2] Lifestyle is the U.S. importer of WBF from Orient, Yihua Timber, and Dream Rooms. Orient, Yihua Timber, and Dream Rooms are PRC-based producers of WBF. AFMC is an organization representing U.S. manufacturers of WBF.

2008) ("*February Notice*"). On March 7, 2008, Commerce published a notice initiating the WBF administrative review and identifying the 228 exporters and producers under review. *Notice of Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture From the People's Republic of China*, 73 Fed. Reg. 12,387, 12,387 (Dep't Commerce Mar. 7, 2008) ("*March Notice*").

On March 11, 2008, Commerce informed the parties of its intent to limit the number of individually reviewed respondents and identified the *March Notice* as the initiation notice. Def.'s App. Doc. 48, 347. Commerce accepted withdrawal from review within 90 days of publication, i.e., from March 7 until June 5, 2008. Def.'s App. Doc. 347, at 2; *see* 19 C.F.R. § 351.213(d)(1). Commerce selected for review the two largest exporters by volume as of June 6, 2008: Yihua Timber and Orient. Def.'s App. Doc. 347, at 7. Commerce informed Orient that its questionnaire response was deficient. Def.'s App. Doc. 366, 368. Orient requested to withdraw the confidential version of its questionnaire response but not its separate rate certification[3] and informed Commerce it would significantly limit its participation in the review. Def.'s App. Doc. 374, at 1 2.

In February 2009, Commerce published its preliminary results. *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of Review*, 74 Fed. Reg. 6,372, 6,372 (Dep't Commerce Feb. 9, 2009) ("*Preliminary Results*"). Commerce preliminarily determined that, 1) Orient's refusal to fully participate precluded verification of Orient's separate rate status and therefore Orient would be treated as part of the PRC-wide entity, 2) Orient had failed to cooperate to the best of its abilities, and 3) a dumping margin of 216.01% would be assigned to the PRC-wide entity, including Orient. *Id.* at 6,380. Commerce calculated a dumping margin for Yihua Timber of 124.31%. *Id.* at 6,384.

Dream Rooms also filed a separate rate certification. App. to Br. of Lifestyle Enterprise, Inc., Trade Masters of Texas, Inc., Emerald Home Furnishings, LCC, and Ron's Warehouse Furnishings ("Pl.'s App.") Tab 10, at 4, 16. Commerce issued a supplemental questionnaire and confirmed through Federal Express that the package had

[3] Commerce requires companies operating in a non-market economy ("NME") such as China to submit documentation demonstrating their independence from government control. If a company does so, it receives a separate rate certification and its own rate. *Transcom, Inc. v. United States*, 294 F.3d 1371, 1371 (Fed. Cir. 2002). If a company fails to do so, it is assigned the rate applicable to all entities controlled by the government, i.e., a country-wide rate. *Id.* Commerce's test for whether a company is eligible for a separate rate focuses on control over investment, pricing, and the output decision-making process at the individual firm. *Fuyao Glass Indus. Grp. v. United States*, 27 CIT 1892, 1896 n.8 (2003).

been delivered to Dream Rooms. Def.'s App. Doc. 446, 475. Dream Rooms did not respond to the supplemental questionnaire and claimed to have never received it. Def.'s App. Doc. 549. Commerce found that Dream Rooms had failed to demonstrate eligibility for a separate rate and assigned it the PRC-wide rate. *Preliminary Results*, 74 Fed. Reg. at 6,378; *Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Wooden Bedroom Furniture from the People's Republic of China*, A-570–890, POR 1/1/07 12/31/07, at 83 85 (Aug. 10, 2009) (*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/prc/E9–19666–1.pdf (last visited Feb. 10, 2011).

In August 2009, Commerce published its *Final Results*. *Final Results*, 74 Fed. Reg. at 41,374. Commerce determined Orient had demonstrated both de jure and de facto independence from government control, recognizing that Commerce had failed to inform Orient that its failure to fully participate in the review would result in denial of separate rate status. *Issues and Decision Memorandum* at 75 88. Based upon Orient's failure to respond fully to the AD questionnaire, however, Commerce assigned the PRC-wide rate of 216.01% to Orient based on adverse facts available ("AFA"). *Id.* at 87; *see* 19 U.S.C. § 1677e. Commerce assigned Yihua Timber a rate of 29.89%. *Amended Final Results*, 74 Fed. Reg. at 55,810. Commerce adhered to its determination as to Dream Rooms in the *Final Results*. *Final Results*, 74 Fed. Reg. at 41,378.

In determining surrogate values,[4] Commerce preliminarily relied upon financial statements from five Filipino companies: Maitland-Smith Cebu, Inc. ("Maitland-Smith"), Casa Cebuana, Inc. ("Casa Cebuana"), Las Palmas Furniture, Inc. ("Las Palmas"), Global Classic Designs, Inc. ("Global Classic"), and Diretso Design Furnitures, Inc. ("Diretso Design"). Def.'s App. Doc. 480, at 5 8. Commerce preliminarily determined not to rely on those of Arkane International Corp. ("Arkane") because the company's financial statements indicated involvement in mining. *Id.* at 6. Commerce also preliminarily determined not to rely on the financial statements of Insular Rattan and Native Products Corp. ("Insular Rattan"). *Id.* In the *Final Results*, Commerce relied on financial statements of four additional companies: Giardini Del Sole Manufacturing and Trading Corporation ("Giardini"), SCT Furniture Corp. ("SCT"), Las Palmas, and Arkane.

[4] Under its NME AD methodology, Commerce calculates normal value ("NV") "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c). Surrogate values from market economy ("ME") countries are used as a measure of these costs. *See id.* ; *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1347 (CIT 2010) ("*GPX III*").

Issues and Decision Memorandum at 33 55. Commerce made additional determinations as to surrogate producers' indirect materials and subcontracting expenses, surrogate producers' changes to work-in-process inventory, reliance on World Trade Atlas ("WTA") import data for wood inputs and tariff headings for medium density fiberboard to determine value, valuation of brokerage and handling, sources for data on electricity, use of regression-based wage rates, and the rejection of constructed export price offset. *See generally*, *Issues and Decision Memorandum*

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determinations in AD duty reviews unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Initiation and Selection of Respondents

Orient and Lifestyle allege that Commerce violated its own regulation when it failed to issue sufficient notice of initiation of review, resulting in the erroneous selection of Orient as a mandatory respondent. Pl.'s Mem. of P. & A. in Supp. of Rule 56.2 Mot. or J. on the Agency R.("Pl.'s Br.") at 20; Intervenor Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 ("Intervenor Pl.'s Br.") at 8. Plaintiffs request the court void the review ab initio or remand to Commerce to reconsider its selection of Orient. Pl.'s Br. at 28; Intervenor Pl.'s Br. at 17 18. This claim lacks merit.

Commerce "[w]ill publish the notice of initiation of the review *no later than* the last day of the month following the anniversary

month," or, in this case, February 29, 2008.[5] [6] *See* 19 C.F.R. § 351.221(c)(1)(i) (emphasis added). To obtain relief on their claim, Plaintiffs must show that a violation took place, that the violation resulting in substantial prejudice to them, and that the remedy is rescission or a rate adjustment. *See P.A.M. S.p.A. v. United States*, 463 F.3d 1345, 1349 (Fed. Cir. 2006).

Although Commerce appears to have violated its own regulation by failing to individually name the companies under review by the applicable deadline,[7] the failure to meet a procedural requirement does not automatically void the agency's subsequent action.[8] *See Brock v. Pierce Cnty.*, 476 U.S. 253, 260 (1986) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action."); *Kemira Fibres OY v. United States*, 61 F.3d 866, 868, 871 (Fed. Cir. 1995) (Commerce's failure to abide by its own regulatory deadline does not void subsequent agency action). Here, Plaintiffs have failed to demonstrate substantial prejudice resulting from failure to follow the regulation

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[5] The statute is silent as to Commerce's obligation to publish notice within a certain period of time: "[T]he administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall . . . review and determine . . . , the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1).

[6] Commerce has previously declined to follow its own regulation and instead used a two-step procedure. *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 Fed. Reg. 16,837, 16,837 (Dep't Commerce Mar. 31, 2008); *Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 73 Fed. Reg. 18,739, 18,739 (Dep't Commerce Apr. 7, 2008); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 72 Fed. Reg. 14,516, 14,516 (Dep't Commerce Mar. 28, 2007); *Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam and the People's Republic of China*, 72 Fed. Reg. 17,095, 17,095 (Dep't Commerce Apr. 6, 2007). Commerce also has declined to provide the earlier notice, publishing notification after its regulatory deadline in the two prior reviews of WBF. *Notice of Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture From the People's Republic of China*, 72 Fed. Reg. 10,159, 10,159 (Dep't Commerce Mar. 7, 2007); *Notice of Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, 71 Fed. Reg. 11,394, 11,394 (Dep't Commerce Mar. 7, 2006).

[7] Because the *February Notice* failed to "serve[ ] to notify any interested party that the antidumping rate on goods obtained from exporters named in the notice of initiation for an administrative review may be affected by the outcome of that review," it was not "notice of initiation of [the] review" under the regulation. *See Transcom*, 182 F.3d at 880.

[8] Lifestyle cites *Elkem* for the principle that Commerce may not violate its timing deadlines. Pl.'s Br. at 20 21; *Elkem Metals, Inc. v. United States*, 26 CIT 234, 243 (2002). In *Elkem*, however, the International Trade Commission promised a hearing as a matter of regulation and then revoked that right. *Elkem*, 26 CIT at 243. Here, in contrast, Commerce merely delayed its full notification rather than failing to give notice entirely.

because the regulation is intended to effect notice and all interested parties received notice of the initiation date and resulting deadlines. *See Transcom*, 182 F.3d at 880 (finding that the purpose of the regulation is to provide parties with notice); Pl.'s App. Tab 15 (notifying Lifestyle that March 7 was the initiation date); *March Notice*, 73 Fed. Reg. at 12,387 91 (notifying all parties of initiation and identifying March 7 as the date from which two deadlines would be measured).

What Orient seeks here is to be free of the review based on its fourth highest sales volume at the earlier notice date. Oral Arg. Tr., 17, Nov. 16, 2010. Commerce's decision to select just two respondents, however, is not mandated. Orient could have been and probably should have been selected as an additional respondent even using sales volume at the earlier initiation date.[9] Whatever "prejudice" Orient has suffered in not avoiding a legally permissible review, it is not one which the regulation was intended to guard against.

II. Separate Rate & AFA Determinations

A) Orient's Separate Rate Status

AFMC alleges Commerce properly concluded Orient did not have separate rate status in the *Preliminary Results*, but erred in granting Orient a separate rate status in the *Final Results*. Intervenor Def.'s Rule 56.2 Br. in Supp. of Mot. for J. on the Agency R. ("Intervenor Def.'s Br.") at 35. This claim lacks merit.

Commerce granted Orient its separate rate status on the basis that Commerce "did not clearly inform Orient . . . of [its] obligation" to otherwise respond to the AD questionnaire. *Issues and Decision Memorandum* at 83. Orient had affirmatively demonstrated an absence of de jure or de facto government control.[10] Def.'s App. Doc. 151. Commerce concluded in the *Final Results* Orient had effectively demonstrated de jure and de facto independence from the government. *Issues and Decision Memorandum* at 84. Whatever the merits of Commerce's reasoning, Orient did not fail to provide information in regard to its separate status. Orient's failure in other respects does not undermine this showing. *See Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270, 1287 88 (CIT 2005); *Shandong Huarong Gen. Grp. Corp. v. United States*, 27 CIT 1568, 1594 95 (2003).

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[9] *See infra* note 15.

[10] Commerce presumes state control unless the contrary is demonstrated. Based on the parties' arguments the court need not resolve here whether the presumption of state control is supported. *See Qingdao Taifa Grp. Co. v. United States*, Slip Op. 10–126, 2010 WL 4704464, at *3 (CIT Nov. 12 2010) ("*Taifa III*").

B) Orient's AFA Rate

As indicated, Orient initially participated in the review, but withdrew the confidential version of its questionnaire response relating to its cost and prices and informed Commerce it would significantly limit its participation in the review after Commerce informed Orient its questionnaire response was deficient. Def.'s App. Doc. 366, 368, 374. In the *Final Results*, Commerce assigned Orient a rate of 216.01% based on adverse facts available ("AFA") due to Orient's failure to respond to Commerce's questionnaire. *Issues and Decision Memorandum* at 85 87. Commerce calculated this rate by choosing the highest company-specific calculated rate from any segment of the proceeding: 216.01% assigned to Shenyang Kunyu Wood Industry Co., Ltd. ("Kunyu") in a prior administrative review. *Issues and Decision Memorandum* at 87 88; *Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004–2005 Semi-Annual New Shipper Reviews*, 71 Fed. Reg. 70,739, 70,739 (Dep't Commerce Dec. 6, 2006). Commerce attempted to corroborate Kunyu's rate as to Orient with the finding "that the margin of 216.01 percent was within the range of margins calculated on the record of the instant administrative review." *Issues and Decision Memorandum* at 88. Commerce found that "[b]ecause the record of this administrative review contains margins within the range of 216.01 percent, . . . the rate from the 2004 2005 review continues to be relevant for use in this administrative review."[11] *Id.*

Lifestyle and Orient allege that Commerce erred when it assigned Orient the PRC-wide rate of 216.01% as an AFA rate, despite Orient's separate rate status.[12] Pl.'s Br. at 38 39; Intervenor Pl.'s Br. at 16.

[11] At oral argument, the Government clarified that "[[ ]] transaction specific margins from Yihua Timber during this period of review" were used to corroborate Orient's rate. Oral Arg. Tr., 42, Nov. 16, 2010. During the period of review, Yihua Timber exported [[ ]] to the United States. Mem. in Supp. of Consol. Pl.'s Mot. for J. on the Agency R. Under Rule 56.2 Filed by Guangdong Yihua Timber Indus. Co., Ltd. ("Consol. Pl.'s App.") Tab 1, at 2. The Government has not stated what percentage of Yihua Timber's sales were used to corroborate Orient's rate and what the significance of such a percentage would be. *See Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1325 (Fed. Cir. 2010) (holding an AFA rate uncorroborated when Commerce failed to "show that a small percentage of the mandatory respondents' transactions represented a reasonably accurate estimate of [non-participating respondent's] actual dumping margin").

[12] Lifestyle claims that Commerce de facto revoked Orient's separate rate status by assigning Orient the PRC-wide rate. Pl.'s Br. at 40. Once a separate rate status determination is made, Commerce may not apply the PRC-wide rate, as such, to an entity. *Qingdao Taifa Grp. Co. v. United States*, 637 F. Supp. 2d 1231, 1241 (CIT 2009) ("*Taifa II*"). Here, Commerce did not assign Orient the PRC-wide rate, but rather the rate from a cooperating company corroborated with data from the current period of review. *Issues and Decision Memorandum* at 87 88. This claim lacks merit as Commerce did not assign the PRC-wide rate per se, but rather selected the same rate based on separate considerations. Orient shares the same rate as the PRC-wide entity because Commerce applied AFA to both the

Orient and Lifestyle ask the court to assign Orient the rate granted to non-mandatory respondents or, in the alternative, remand this matter to Commerce so that Commerce may redetermine the AFA rate for Orient. Intervenor Pl.'s Br. at 18 19; Pl.'s Br. at 41.

In calculating an AFA rate, Commerce may rely on secondary information, which includes information derived from the petition, a final determination, or any previous review or determination. 19 U.S.C. § 1677e(b); 19 C.F.R. § 351.308(c)(1). Where Commerce uses "secondary information rather than information obtained in the course of an investigation or review," it must corroborate that information by demonstrating that it has probative value. 19 U.S.C. § 1677e(c); *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010). Here, Commerce chose secondary information a rate from a prior administrative review and therefore needed to corroborate that rate. *See Gallant*, 602 F.3d at 1325 (recognizing the statutory requirement that secondary information, such as a petition rate, be corroborated).

Corroboration demands that Commerce use reliable facts with "some grounding in commercial reality."[13] *Gallant*, 602 F.3d at 1323 24; *see F.lli. De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (AFA rates must be reasonably accurate estimates of respondents' rates with some built-in increase as a deterrent for non-compliance). Indications that a rate may not reflect commercial reality include significantly lower rates for cooperating respondents and the presence of more recent, conflicting data.[14] *See Gallant*, 602 F.3d at 1324. As the rate becomes larger and greatly exceeds the rates of cooperating respondents, Commerce must provide a clearer explanation for its choice and ample

PRC-wide entity and Orient because neither Orient nor the PRC provided any of the requested production information. Commerce has in the past calculated the same AFA rate for separate rate respondents and the PRC-wide entity. *See* AFMC's Resp. in Opp. to Resp'ts' Rule 56.2 Mot. for J. on the Agency R. ("Intervenor Def.'s Resp. Br.") at 55. Nonetheless, the leap to use of the PRC-wide rate as a separate AFA rate presents a problem, as explained in the text.

[13] Although clearly distinct standards under Federal Circuit precedent, corroboration and reliability seem to collapse together in that they require demonstration of the same facts and legal conclusions. *See*, *e.g.*, *KYD*, 607 F.3d at 766. Here, Commerce stated it corroborated the rate by using "high-volume transaction-specific margins for cooperative companies which are . . . higher than the . . . [assigned adverse facts available] rate." *Id.* ; *see NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (CIT 2004).

[14] The Government and AFMC assert that *Ta Chen* stands for the proposition that a small percentage of sales can be used to corroborate an AFA rate. *See* Def.'s Br. at 37 38; Intervenor Def.'s Resp. Br. at 54, 60 61; *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330 (Fed. Cir. 2002). "*Ta Chen* was not a corroboration case as Commerce relied on primary information," *Gallant*, 602 F.3d at 1324.

record support for its determination. *See Taifa III*, 2010 WL 4704464, at *5 n.7.

Here, the highest separate rate assigned in the current review to a company other than Orient was 29.89%, which was the rate assigned to eighteen parties. *Final Results*, 74 Fed. Reg. at 41,380. Commerce also assigned a 0% rate to two companies. *Id.* at 41,381. Furthermore, Orient had been assessed a significantly lower rate of 7.28% from 2006 until 2008, however it was not individually examined during that period. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order/Pursuant to Court Decision: Wooden Bedroom Furniture From the People's Republic of China*, 71 Fed. Reg. 67,099, 67,099 (Dep't Commerce Nov. 20, 2006). Although Commerce did compare Kunyu's 216.01% rate with a large number (in absolute terms) of Yihua Timber's sales, Commerce's total failure to address the dramatic increase in Orient's rate from 7.28% to 216.01%, where the non-PRC-wide rates range from 0% to 30%, raises the concern that "[t]here is little likelihood that in any real world this could be an approximation of an actual rate." *Taifa III*, 2010 WL 4704464, at *3. Orient is at least entitled to an explanation and supporting evidence regarding their 3000% increase in margin, which is also 700% greater than the highest separate rate assigned in the review.[15] *See id.* at *5. The dramatic increase in Orient's rate requires Commerce to present substantial evidence that the new rate reflects commercial reality. *See Gallant*, 602 F.3d at 1324 25. By not stating what percentage of Yihua Timber's sales were used to corroborate Orient's rate and the significance thereof nor elaborating on how the new rate was grounded in commercial reality, Commerce has provided neither substantial evidence nor reasoned explanation. Although Orient did not distinguish itself when it withdrew its own data, this is not a proceeding which is devoid of all data. Commerce has information on the record which it can use to come to a reasoned and supported conclusion. Accordingly, the court remands this matter to Commerce with instructions to either explain its determination or replace Orient's rate with a corroborated rate, reflective of commercial reality.

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[15] [[

]] This radical growth suggests that the business model that yielded Orient a 7.28% rate had given way to a more aggressive business model. Finally, Orient was on notice that Commerce had, in the prior administrative review, assigned Kunyu's 216.01% rate to a non-participating mandatory respondent. *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 Fed. Reg. 49,162, 49,166 (Dep't Commerce Aug. 20, 2008). None of this was discussed by Commerce.

C) Dream Rooms's Separate Rate Status

Lifestyle alleges that Commerce erred when it assigned the PRC-wide rate to Dream Rooms. Pl.'s Br. at 41. Commerce assigned Dream Rooms the PRC-wide rate on the basis that Dream Rooms had failed to reply to the supplemental separate rate questionnaire. *Issues and Decision Memorandum* at 76; Def.'s App. Doc. 130, 446, 475. Lifestyle asserts Dream Rooms never received the supplemental questionnaire. Lifestyle Enter., Inc., Trade Masters of Texas, Inc., Emerald Home Furnishings, LLC and Ron's Warehouse Furniture D/B/A Vineyard Furniture Int'l, LLC Resp. to Mot. for J. on the Agency R. Pursuant to Rule 56.2(c) Filed by the Am. Furniture Manufacturers Comm. for Legal Trade and Vaughan-Bassett Furniture Co., Inc. and Br. in Support Thereof ("Pl.'s Resp. Br.") at 16 17; Def.'s App. Doc. 549. Unlike prior Commerce cases where lack of receipt was supported, here there was no demonstrated error by Commerce, external explanations, or other proof.[16] *See, e.g.*, *Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India*, A-533–840, POR 8/4/04 1/31/06, at 33 35 (Sept. 5, 2007), *available at* http://ia.ita.doc.gov/frn/summary/india/E7–18006–1.pdf (last visited Feb. 10, 2011) (evidence showing delivery to an unknown address); *Issues and Decision Memorandum for the Final Results of the 2006 2007 Antidumping Duty Administrative Review on Silicon Metal from the People's Republic of China*, A-570–806, POR 6/01/06 5/31/07, at 4 (Aug. 4, 2008), *available at* http://ia.ita.doc.gov/frn/summary/prc/E8–18477–1.pdf (last visited Feb. 10, 2011) (evidence showed delivery to offices which had been closed by the respondent). Respondent cannot rely on an allegation of mailing error without additional proof. *See Uniroyal Marine Exps. Ltd. v. United States*, 626 F. Supp. 2d 1312, 1316 (CIT 2009) (Commerce rejected respondent's claim that the questionnaire was lost in the mail). Dream Rooms' sole evidence that it did not receive the supplemental questionnaire is an affidavit signed by Dream Rooms' general manager stating that Dream Rooms never received the supplemental questionnaire. *See* Def.'s App. Doc. 549. In contrast, Commerce presented uncontested evidence that it sent the supplemental questionnaire to Dream Rooms' mailing address and facsimile number as provided in Dream Rooms' separate rate application. *Issues and Decision Memorandum* at 76; Pl.'s App. Tab 13. In the face of such evidence, Dream Rooms needed to present evidence demon-

[16] Lifestyle alleges that Commerce's evidence of receipt is circumstantial. Pl.'s Resp. Br. at 16 17. Circumstantial evidence is sufficient to support a factual finding. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 99 (2003) (finding circumstantial evidence valid absent a direct statute holding the opposite).

strating that it in fact never received the supplemental questionnaire, such as a changed address or facsimile number, that the individual who signed for the package was never employed by the company, or that the package was improperly delivered. Commerce may decline to rely on conclusory affidavits alone as not sufficient. Here, Commerce weighed the affidavit by Dream Rooms' general manager against documents demonstrating delivery to an uncontested address and facsimile number. Commerce's determination is therefore supported by substantial evidence.

III. Normal Value

A) Wood Inputs

AFMC alleges that Commerce erred because, 1) Commerce failed to adequately explain why the limited gross weight data from the World Trade Atlas ("WTA") was more reliable in valuing wood inputs than volume data, including some estimated data, from the Philippines National Statistics Office ("NSO") data, and 2) Commerce improperly accepted and relied upon data submitted in Yihua Timber's rebuttal brief denying AFMC the opportunity to respond. Intervenor Def.'s Br. at 16 22. AFMC asks the court to remand the issue to Commerce for further deliberation on the surrogate value for wood inputs. *Id.* at 22. This claim has merit.[17]

In the *Preliminary Results*, Commerce determined the surrogate value for wood inputs using volume-based NSO data. Def.'s App. Doc. 480, at 4. The NSO also reports data in gross weight in kilograms and freight on board value. App. to AFMC's Rule 56.2 Br. in Supp. of Mot. for J. on the Agency R. ("Intervenor Def.'s App.") Tab 14, at Ex. 2. Yihua Timber appended to its rebuttal brief before Commerce new

[17] The Government contends that AFMC "failed to squarely challenge the reliability of the WTA data during the administrative briefing, even though Yihua Timber specifically contended that Commerce should rely on the WTA data instead of the NSO data [therefore AFMC] failed to avail themselves of the administrative remedy that Commerce provided in its regulation." Def.'s Br. at 70 71 (internal citations omitted). First, Commerce seemed to waive its exhaustion claim at oral argument, stating that it was "arguing on the merits." *See* Oral Arg. Tr., 76, Nov. 16, 2010. Second, to exhaust administrative remedies, normally a party usually must submit a case brief "present[ing] all arguments that continue in [its] view to be relevant to [Commerce's] final determination or final results." 19 C.F.R. § 351.309(c)(2); 28 U.S.C. § 2637(d). A party, however, may seek judicial review of an issue that it did not brief at the administrative level if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level. *LTV Steel Co. v. United States*, 985 F. Supp. 95, 120 (CIT 1997); *Taifa II*, 637 F. Supp. 2d at 1237 (respondent are "not required to predict that Commerce would accept other parties' arguments and change its decision"). Because Commerce changed its position from the *Preliminary Results* to the *Final Results*, AFMC may seek judicial review of its surrogate value claim relating to wood inputs.

data supporting its contention that NSO data was anomalous. *Id.* at Tab 29, at Attach. 1. In the *Final Results*, Commerce relied upon data in Yihua Timber's rebuttal brief in rejecting NSO data. *Issues and Decision Memorandum* at 6, 8. Instead of using the volume NSO data, Commerce used gross weight WTA data, as reported by gross weight in kilograms, in the *Final Results* on the basis that "no interested party [had] claimed that the WTA import data for the Philippines is unreliable." *Id.*

First, Commerce failed to explain why it chose gross weight data (from the WTA) over volume data (from the NSO). Commerce must explain why volume data are not the superior approach given the patent complications with using gross weight data with wood inputs, such as differences in gross weight between high-moisture green wood imported into the Philippines and kiln-dried wood consumed by Yihua Timber and that different types of packaging of the same wood may result in distortions in the gross-weight data. Intervenor Def.'s Br. at 15, 20 21. Commerce did more than choose between data from the WTA and NSO: It changed the measurement of wood inputs from volume to gross weight without explanation. Differences between the NSO data's net and gross weights fail to explain why the NSO data's volume data is anomalous.[18] [19] Given the essential nature of wood to wooden bedroom furniture valuation and Commerce's continued use

[18] Commerce may not rely on the assumption that because it has determined NSO data to be anomalous therefore it may use WTA data. First, the anomalies were discovered in separate sections of the tariff code, pertaining to nails and adhesives. *Issues and Decision Memorandum* at 6. Second, Commerce admits that its findings are contingent on highly similar products being packaged using similar containers and materials, an assumption that seems tenuous given the nature of the product. *Id.* Third, Commerce acknowledges that it has not reached the critical issue of whether the Philippine NSO consistently applies a standard conversion factor to complete missing data fields. *Id.* Fourth, even if the NSO data is anomalous Commerce has failed to explain why those anomalies would not be present in the WTA data as well. *Id.* In what is in essence a volume versus gross weight issue, Commerce cannot rely on debunking the NSO data as a rationale for changing the unit of measurement.

[19] The Government counters that, 1) it incorporated Yihua Timber's arguments by reference, and 2) Petitioners offer only unsupported hypotheticals. Def.'s Br. at 68 71. First, Commerce did not incorporate Yihua Timber's arguments by reference. Commerce merely stated that it agreed "with Yihua Timber that numeric anomalies bring into question the reliability of the [NSO] data," that "net weights and corresponding gross weights vary significantly throughout the NSO data," and that "using a net quantity and gross value to calculate surrogate values would be distortive." *Issues and Decision Memorandum* at 6. Furthermore, Commerce addresses neither the shift from volume-based to weight-based measurements nor the domino effect using supposedly anomalous NSO data would have on WTA data. Commerce's sole comment, that "[Commerce has] already determined that the NSO volume-based data is flawed" and therefore not "less distortive than WTA weight-based data," is a circular argument requiring further evidence or explanation. *See Issues and Decision Memorandum* at 9. Second, AFMC's hypotheticals are not the basis of a claim but rather an elucidation of Commerce's failure to identify the source of the anomaly.

of NSO volume data in the subsequent administrative review, Commerce must provide substantial support for its shift in both the source of the data itself and the unit of measurement used. *See Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part*, 75 Fed. Reg. 5,952, 5,962 (Dep't Commerce Feb. 5, 2010). Commerce did not support its finding that numeric anomalies present in the NSO data are not present in the WTA data or why measuring the input in gross weight is superior to measuring the input by volume.[20]

Second, Commerce, contrary to its normal practice, permitted Yihua Timber to submit data in Yihua Timber's response brief and Commerce relied upon the data in the *Final Results*. *See Issues and Decision Memorandum* at 6; 10 C.F.R. § 351.301(b)(2) (setting the deadline for submission of factual information to 140 days after initiation of the administrative review). In such a case, parties must receive a full and fair opportunity to respond, which AFMC will have on remand. *See Old Republic Ins. Co. v. United States*, 645 F. Supp. 943, 956 (CIT 1986) (granting "full opportunity to respond" where a "substantive challenge to plaintiff's affidavit was not made until defendant's final brief").

B) Medium Density Fiberboard

AFMC alleges that Commerce erred because Commerce failed to, 1) use official Philippine Standard Commodity Classification ("PSCC") descriptions of tariff subheadings in lieu of those published by the WTA, and 2) distinguish between 4411.21 and 4411.29, both of which could have been used given Commerce's reasoning. Intervenor Def.'s Br. at 23 25. This claim has merit.

In the *Preliminary Results*, Commerce assigned a surrogate value for medium density fiberboard ("MDF") using WTA tariff heading 4411, generally. In the *Final Results*, Commerce assigned the surrogate value for MDF using only WTA tariff heading 4411.29 because the tariff subheading covered densities from 0.5 g/cc to 0.8 g/cc, providing a more precise value for Yihua Timber's MDF which ranged from 0.45 g/cc to 0.88 g/cc. *Issues and Decision Memorandum* at 11. Commerce determined that only one other subheading, 4411.39, covered part of the density range reported by Yihua Timber and, therefore, using subheadings which did not have specific densities "would detract from the accuracy of the calculation." *Issues and Decision Memorandum* at 11 12.

First, Commerce stated as a basis for its decision to use a single subheading rather than an aggregate of subheadings or the broader tariff heading "would detract from the accuracy of the calculation," *Issues and Decision Memorandum* at 12. But this does not explain why the WTA tariff headings rather than the PSCC tariff headings were the best available information. The parties do not contest that the WTA draws its information from the PSCC and, therefore, Commerce must state why it chose not to look at the more detailed subheadings available in the PSCC. Additionally, Commerce's reasoning relies on the assumption that the other tariff subheadings do not reference specific densities. *See Issues and Decision Memorandum* at 11 12. Although this is true with the WTA subheadings, it proves false with the PSCC subheadings. The PSCC subheadings provide densities for tariff subheadings: 4411.11 for MDF of more than 0.8 g/cc, 4411.21 for MDF from 0.5 to 0.8 g/cc, and 4411.31 for MDF from 0.35 to 0.5 g/cc. Intervenor Def.'s App. Tab 24, at Attach. 2. Because Commerce's reasoning does not hold in light of this fact, it must reconsider and redetermine as necessary.

Second, AFMC argues that when Commerce chose to use a subheading rather than a heading, Commerce failed to explain why it selected "Other" MDF under 4411.29 rather than "Not mechanically worked or surface covered" MDF under 4411.21.[21] Intervenor Def.'s Br. at 24 25. Commerce's failure to offer any factual basis for its selection of "Other" over "Not mechanically worked or surface covered" also necessitates that this issue be remanded.

C) Brokerage and Handling Charges

In the *Preliminary Results*, Commerce valued brokerage and handling (B&H) charges at 7.86% of the value of exported merchandise based on the Philippine Tariff Commission's ("PTC") Customs Administrative Order No. 01–2001, using the average of eight shipment value brackets from zero to 200,000 pesos.[22] App. to Lifestyle Enter.,

[21] Neither AFMC nor Commerce explain if Yihua Timber's MDF is mechanically worked or surface covered. Intervenor Def.'s Br. at 24 25; App. to AFMC's Reply in Supp. of Mot. for J. on the Agency R. ("Intervenor Def.'s Reply App.") Tab 8, at 22 23.

[22] In the *Preliminary Results*, the rates were as follows:

Up to 10,000 pesos	13.00%
Over 10,000 pesos to 20,000 pesos	10.00%
Over 20,000 pesos to 30,000 pesos	9.00%
Over 30,000 pesos to 40,000 pesos	8.25%
Over 40,000 pesos to 50,000 pesos	7.20%
Over 50,000 pesos to 60,000 pesos	6.67%
Over 60,000 pesos to 100,000 pesos	4.70%
Over 100,000 pesos to 200,000 pesos	2.65%
Average Percentage	7.68%

Pl.'s Resp. App. Tab 15, at Attach. 3.

Inc., Trade Masters of Texas, Inc., Emerald Home Furnishings, LCC, and Ron's Warehouse Furniture, D/B/A Vineyard Furniture Int'l, LLC Resp. to the Mot. for J. on the Agency R. Pursuant to Rule 56.2(c) Filed by the Am. Furniture Manufacturers Comm. for Legal Trade and Vaughan-Bassett Furniture Co., Inc. and Br. in Supp. Thereof ("Pl.'s Resp. App.") Tab 15, at 8, Attach. 3. In the *Final Results*, Commerce found that it had erred in the *Preliminary Results* in not applying the rate for shipments over 200,000 pesos in the PTC's order. *Issues and Decision Memorandum* at 28. Commerce relied on Yihua Timber's high average entry value and used the PTC B&H rate for shipments valued at over 200,000 pesos, significantly lowering B&H value.[23] *Id.*

AFMC alleges that Commerce failed to calculate a value for handling charges at all because the source of the B&H calculations, the PTC's order, reported only brokerage fees, thus accounting for the significant drop in B&H to entry value ratio.[24] Intervenor Def.'s Br. at 25 27. AFMC asks the court to require Commerce to consider an alternate data source, *Trading Across Borders in Philippines*, which separately reports B&H charges.[25] Intervenor Def.'s Br. at 26 27. The Government and Lifestyle counter that AFMC failed to exhaust its administrative remedies. Def.'s Br. at 75 76; Lifestyle Enter., Inc., Trade Masters of Texas, Inc., Emerald Home Furnishings, LLC and Ron's Warehouse Furniture D/B/A Vineyard Furniture Int'l, LLC Reply Br. in Supp. of Mot. for J. on the Agency R. Under Rule 56.2 ("Pl.'s Reply Br.") at 34 35. Commerce did not select a new source for calculating B&H charges, but rather used additional data from the same source. Even if AFMC was surprised by the drop in the B&H value, or was just banking on Commerce failing to discover its clear error, it is asking for consideration of an entirely new document, which it did not place before the agency. As a factual matter, this

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[23] In the *Final Results*, Commerce took the PTC's B&H rate for shipments of over 200,000 pesos (at a conversion rate of 0.02151 peso per USD or $114.06), a flat rate of 5300 (at the same conversion rate or $4,304.20) plus 0.00125 of the shipment value, and applied it to Yihua Timber's average entry value of [[

]] Intervenor Def.'s App. Tab 33, at Attach. 5.

[24] AFMC offers the World Bank survey, *Trading Across Borders in Phillippines*, as the only report covering both brokerage and handling charges. Intervenor Def.'s Br. at 26. Additionally, AFMC submits that Commerce itself acknowledged this in the 2008 administrative review. *Id.* ; *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part*, 75 Fed. Reg. 5,952, 5,962 (Dep't Commerce Feb. 5, 2010).

[25] The PTC's order does not say "handling" and does mention "brokerage fees" several times. Intervenor Def.'s App. Tab 33, at Attach. 5. Commerce refers to the numbers resulting from the PTC's order as "B&H." *Issues and Decision Memorandum* at 27 28.

record does not demonstrate that Commerce excluded handling costs or failed to use the best information it had on the record regarding B&H charges. Because AFMC does not challenge Commerce's selection of rates but rather the source itself, AFMC's failure to challenge the use of PTC's order at the administrative level as unreliable and proffer the new data at the administrative level, precludes that option now.

Yihua Timber alleges that Commerce double-counted when it calculated a surrogate value for PRC B&H where such charges were included in the ME ocean freight B&H.[26] Consol. Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Consol. Pl.'s Br.") at 58. This claim lacks merit. Commerce determined that Yihua Timber did not "adequately demonstrate[] that its B&H was actually provided by an ME supplier." *Issues and Decision Memorandum* at 28. Commerce based this finding on Yihua Timber officials' comments that "foreign shipping companies can only handle ocean transportation, where other services . . . have to be handled by a local agent." *Id.* at 28. Furthermore, Commerce found that Yihua Timber failed to partition the PRC B&H charges from the ME ocean freight charges. *Id.* at 28. Thus, Yihua Timber could not demonstrate what double-counting might have been occurring. Further, given the very low rate of B&H charges in the *Final Results* it is unlikely that significant double-counting occurred. Also, Commerce used data provided by the NME producer itself.[27] *Id.* Thus, Commerce's choice of a source to value for B&H charges is adequately supported and has not been demonstrated to be erroneous. Commerce's decision is therefore sustained in this regard.

D) Electricity

Commerce selected a surrogate value for electricity from *The Cost of Doing Business in Camarines Sur*, rejecting Yihua Timber's argument that Commerce should instead use *Doing Business in the Philippines*. *Issues and Decision Memorandum* at 22 23. According to Commerce, *The Cost of Doing Business in Camarines Sur* provides

[26] Commerce may use ME values for some factors of production instead of surrogate values if they are separately determinable.

[27] Yihua Timber compares the instant case to *Shandong Huarong Mach. Co. v. United States*, 31 CIT 1815, 1827 (2007) where the court "sustain[ed] as reasonable . . . Commerce's inference that the surrogate value for brokerage and handling includes the expenses incurred in loading and containerizing the merchandise." *Id.* Commerce's discretion to extrapolate from incomplete data in one case does not require the court to mandate that Commerce do so in subsequent cases. *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999) (permitting Commerce "broad discretion in valuing the factors of production on which factory overhead is based").

provincial data specific to industrial users of electricity while *Doing Business in the Philippines* covers a broader geographical area but aggregates residential and commercial customers. *Id.* at 22.

Yihua Timber alleges that Commerce failed to combine the data sets and use at least some of the data from *Doing Business in the Philippines*, which provides disaggregated data on industrial electricity usage for one region and business electricity usage for another.[28] Intervenor Pl.'s Br. at 56 57. AFMC asserts that this claim was not exhausted at the administrative level because Yihua Timber failed to raise the claim that Commerce should combine the two data sets rather than merely apply the data from *Doing Business in the Philippines*. Intervenor Def.'s Resp. Br. at 37. Yihua Timber counters that it did not have the opportunity to raise the issue because Commerce's reasoning that the use of industrial data took preference over broader geographical coverage was not articulated until the Final Results. Intervenor Pl.'s Response Br. at 28. Commerce is not required to consider every possible data set combination. *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1190 (2004) ("Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was reasonable"). Thus, this choice is likely within Commerce's discretion. In any case, given that both data sets were on the record and Commerce did not change its methodology from the *Preliminary Results* to the *Final Results*, *Issues and Decision Memorandum* at 22, Yihua Timber could have but did not argue for combination of data at the administrative level. Thus, Yihua Timber also failed to exhaust its claim.

IV. Surrogate Financial Ratios

A) Admission of Financial Statements

Yihua Timber and AFMC allege that the reliance on financial statements of certain surrogate companies was not supported by substantial evidence. Consol. Pl.'s Br. at 15; Intervenor Def.'s Br. at 27. In general, these claims assert that, 1) *Dorbest IV* did not foreclose arguments based on economies of scale, *see Dorbest Ltd. v. United*

[28] Yihua Timber argues Commerce took this approach in the second administrative review, but offers no evidence on record to substantiate this claim. Consol. Pl.'s Br. at 56; *Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China*, 72 Fed. Reg. 46,957, 49,957 (Dep't Commerce Aug. 22, 2007). Even if this were the case, Commerce is not bound by previous administrative reviews, so long as it does not act arbitrarily. *Cinsa, S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1238 (CIT 1997).

States, 604 F.3d 1363, 1374 (Fed. Cir. 2010) ("*Dorbest IV*"), 2) a narrative statement of unclear significance related to a non-subject mining operation can be the basis for the rejection of entire financial statements, and 3) the requirement that Commerce must identify producers of comparable merchandise ought to be strictly construed. Consol. Pl.'s Br. at 15.

i. Economies of Scale

Yihua Timber alleges that Commerce distorted the financial ratio data based on economies of scale because the companies selected, unlike the respondents, were both small in operation and customer base, had a different production process than Yihua Timber, or had Consol. Ct. No. 09–00378 Page 28 financial ratio data which was aberrational or double-counted significant costs.[29] Consol. Pl.'s Reply Br. in Supp. of Its Rule 56.2 Mot. for J. on the Agency R. at 2 ("Consol. Pl.'s Reply Br."); *see* Consol. Pl.'s Br. at 15 16.[30]

In *Dorbest IV*, the respondent challenged Commerce's use of seven companies where the larger companies had SG&A ratios of 24.38%, 13.53%, and 10.44% and the smaller companies had SG&A ratios of 31.51%, 34.39%, 47.30%, and 15.66%. *Dorbest IV*, 604 F.3d at 1374. Like Yihua Timber, respondent's argument was based on the concept that the size of the companies distorted the SG&A ratio. *Id.* The Federal Circuit found that excluding smaller companies based on distortions in economies of scale would also necessitate excluding the larger companies based on economies of scale, thereby impermissibly excluding all data from all surrogate companies. *Dorbest IV* therefore held that Commerce can rely on certain financial surrogate companies' financial statements even where distortions based on economies of scale exist without explaining what factor or factors beyond company size determine a company's SG&A ratio. *See id.* Yihua Timber unconvincingly attempts to distinguish the instant case from *Dorbest IV* on the basis that factual proof exists that "[t]here is an unambiguous divide between the aggregate SG&A and overhead ratios of the

[29] In order by size: 1) Maitland Smith: Overhead ("OH") Ratio 28.29%; Selling, General, and Administrative Expenses ("SG&A") Ratio 5.23%, 2) Casa Cebuana: OH Ratio 19.33%; SG&A Ratio 10.72%, 3) Giardini: OH Ratio 35.52%; SG&A Ratio 12.35% , 4) Arkane: OH Ratio 7.24%; SG&A Ratio 6.55%, 5) Las Palmas: OH Ratio 31.96; SG&A Ratio 23.60%, 6) SCT: OH Ratio 31.36%; SG&A Ratio 20.27, 7) Global Classic: OH Ratio 74.77%; SG&A Ratio 7.72%, 8) Diretso Design: OH Ratio 16.12%; SG&A Ratio 70.37%. *Issues and Decision Memorandum* at 40 41.

[30] Yihua Timber concedes that in light of *Dorbest IV*, evidence that smaller companies have higher SG&A ratios than larger companies does not by itself require the exclusion of smaller companies. Consol. Pl.'s Reply Br. at 2; *see Dorbest IV*, 604 F.3d at 1374. Yihua Timber contends that *Dorbest IV* allows for company size as a relevant but not dispositive factor. Consol. Pl.'s Reply Br. at 3.

four smaller and four larger surrogate companies." Consol. Pl.'s Reply Br. at 5. Yihua Timber's attempt to demonstrate a distortion based on economies of scale is misplaced because an unambiguous divide between SG&A and OH ratios does not exist. For example, Global Classics, the seventh of eight companies in terms of size has the third smallest SG&A ratio. *Issues and Decision Memorandum* at 41. Even if this case were distinguishable from *Dorbest IV*, Commerce provided a reasonable explanation that economies of scale did not distort the financial ratios because Commerce found no "sufficient relationship between company size and financial ratios to warrant the exclusion of companies Yihua Timber has designated as smaller producers." *Issues and Decision Memorandum* at 40 41 (comparing sales value, OH ratio, and SG&A ratio in determining that no reason to exclude exists). Commerce, therefore, did not err when it rejected Yihua Timber's contention that the use of smaller companies distorted the financial ratio data.

ii. Mining Operations (Arkane)

Commerce concluded that Arkane was a producer of comparable merchandise because it did not have a significant mining operation. *Issues and Decision Memorandum* at 42 43; App. to Guangdong Yihua Timber Industry Co., Ltd.'s Reply Br. in Supp. of Its Rule 56.2 Mot. for J. on the Agency R. ("Consol. Pl.'s Reply App.") Tab 10, at Ex. 18. Commerce identified two conflicting statements in Arkane's financial statements, which referred to Arkane as, "a family owned corporation principally engaged in the manufacturing of Rattan and wood furniture for export," and as, "engaged in small scale mining." *Issues and Decision Memorandum* at 42. Commerce found the latter statement insignificant because other "record evidence provides a reasonable basis to conclude that Arkane is, in fact, engaged primarily in the production of furniture and not mining," relying on the Articles of Incorporation, secondary purposes of the corporation, and the absence of other references to mining in the financial statements. *Id.* at 42 43.

AFMC alleges Commerce erred when it admitted Arkane's financial statements to calculate surrogate financial ratios because Commerce incorrectly found that Arkane did not have a major mining operation. Intervenor Def.'s Br. at 27 30. In creating surrogate values, Commerce uses data from producers of "comparable merchandise," considering end uses, physical characteristics, and production processes. *See Issues and Decision Memorandum for the Final Results of Administrative Review of Certain Cased Pencils from the People's Republic of China*, A-570–827, ARP 12/01/1999 11/30/2000, at 14 18

(July 25, 2002), *available at* http://ia.ita.doc.gov/frn/summary/prc/02–18856–1.pdf (last visited Feb. 10, 2011). Commerce, therefore, was merely obligated to show substantial evidence that Arkane was a *significant* producer of wooden furniture production. 19 U.S.C. § 1677b(c)(1). In determining Arkane did not engage in significant mining operations, Commerce permissibly chose between two acceptable inconsistent conclusions. *See Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Issues and Decision Memorandum* at 42.

AFMC further alleges that if Arkane did not have a mining operation, Arkane's financial statements were unreliable because of the narrative error. Intervenor Def.'s Br. at 27 30. Where Commerce does not rely upon fundamentally flawed or incomplete financial statements, minor narrative inconsistencies do not tend to render entire financial statements invalid. *Compare Issues and Decision Memorandum for the Administrative Review of Chlorinated Isocyanurates from the People's Republic of China*, A-570–898 ARP 06/01/2007 05/31/2008, at 11–13 (Dec. 14, 2009), *available at* http://ia.ita.doc.gov/frn/summary/prc/E9–29731–1.pdf (last visited Feb. 10, 2011) (accounting irregularities sufficient to invalidate surrogate companies), *with Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, A-552–801, at 76 78 (June 16, 2003), *available at* http://ia.ita.doc.gov/frn/summary/vietnam/03–15794–1.pdf (last visited Feb. 10, 2011) (articles questioning the clarity of price data from financial statements do not render the surrogate companies' statements invalid). Commerce proffered evidence that the error was narrative, isolated, and without ramification for the financial data, thereby demonstrating substantial support for its conclusion. *See Issues and Decision Memorandum* at 42.

iii. Comparable Merchandise (Diretso/Palmas/SCT)

Commerce determined that Diretso Design produced comparable wooden furniture to Yihua Timber and, therefore, Diretso Design's financial statements were sufficiently specific. *Issues and Decision Memorandum* at 43. In doing so, it relied on website printouts of www.diretso.com to determine that the products were comparable. *Id.* Yihua Timber alleges that Commerce confused two distinct companies, Diretso Design and Diretso Trading, and thereby subjected Yihua Timber to an aberrationally high SG&A rate of 70.37%. Consol. Pl.'s Br. at 22. Yihua Timber bases its claim on website printouts that describe "Diretso Trading" then show images of www.diretso.com, a website which does not identify itself as belonging to either Diretso

Trading or Diretso Design. *Id.* at 23; Def.'s App. Doc. 431, at Attach. 6. Yihua Timber's contention before Commerce was that the evidence, "*is not a description of Diretso Design, but rather, of Diretso Trading (perhaps a Sister Company)*." *See* Def.'s App. Doc. 559, at 34. Commerce did not respond to this comment in the *Final Results* and therefore does not provide substantial evidence to support its use of Diretso Design. *See Issues and Decision Memorandum* at 43.[31]

In the alternative, Yihua Timber alleges that the evidence on the record does not support the conclusion that the Diretso identified by Commerce produces comparable wooden furniture. Consol. Pl.'s Br. at 24. Commerce relied on the website printouts as evidence that Diretso Design produces comparable merchandise, demonstrating that Diretso Design produced sofas, chairs, tables, and accessories.[32] *Issues and Decision Memorandum* at 43. Yihua Timber produces substantially comparable merchandise: wooden chairs, tables, bookcases, and bedroom furniture. The websites used by Commerce constitute substantial evidence that the company described therein produces comparable merchandise to respondent. The matter is remanded so that Commerce may determine if the financial statements match the correct company.

Yihua Timber alleges Commerce improperly selected Las Palmas because Commerce failed to provide substantial evidence explaining Las Palmas's extensive sales operation as well as its retail aspect. Consol. Pl.'s Br. at 25 26. Commerce concurs that Las Palmas sells furniture at both retail and wholesale and has a large sales operation, but contends that the sales operations and retail presence need not be explained because surrogate data on companies need only reflect the general merchandise and production experience of the respondent companies. *Issues and Decision Memorandum* at 43 44. Commerce cannot base its analysis on mere speculation, but may draw reasonable inferences from the record. *Hebei Metals*, 28 CIT at 1203. Commerce examined the financial statements, concluding sufficient data existed for Commerce to calculate surrogate overhead, SG&A and profit ratios, especially in light of the fact that Yihua Timber itself

[31] On brief, the Government argues that Commerce did not rely on website documents alone, but rather on auditor's notes accompanying Diretso Design's financial statement that the company's core "activity is manufacturing furniture and furniture accessories," and that these descriptions accord with the website printouts. *See* Def.'s Br. at 49; *Issues and Decision Memorandum* at 43; Def.'s App. Doc. 431, at Attach. 6; Consol. Pl.'s Reply App. Tab 9. Nevertheless, this rationale was not articulated at the administrative level.

[32] Yihua Timber further contends that the website images are not necessarily Diretso Design, but possibly belonging to Diretso Trading. Consol. Pl.'s Br. at 50. Yihua Timber, however, submitted the same website images into evidence as representations of Diretso Design's catalogue. Consol. Pl.'s Reply App. Tab 12.

produces more than WBF. *Issues and Decision Memorandum* at 44. Commerce cites to printouts of Las Palmas's website showing wooden furniture and stating that Las Palmas produces wooden furniture as well as quotes notes to Las Palmas's financial statements, stating that Las Palmas's "primary purpose is to engage in the business of manufacturing goods such as furniture." *Id.* at 44; App. to AFMC's Response in Opp. to Resp'ts. Rule 56.2 Mots. for J. on the Agency R. ("Intervenor Def.'s Resp. App.") Tab 13, at Ex. 6. Commerce, therefore, provided sufficient evidence that Las Palmas produced comparable merchandise.

Yihua Timber alleges that SCT, like Diretso Design and Las Palmas, is not operationally similar to Yihua Timber and does not produce comparable merchandise because SCT, 1) does not produce a significant amount of wooden furniture, 2) sells to retail businesses as opposed to contract orders at the wholesale level therefore having a different marketing and advertising operation, and 3) produces dining room and living room furnishings. Consol. Pl.'s Br. at 28. First, Commerce correctly relied on evidence in the record that SCT produces wooden furniture.[33] *Issues and Decision Memorandum* at 45; Consol. Pl.'s Reply App. Tab 9, at Attach. 6. Second, with regard to Yihua Timber's claim that SCT supplies retail businesses, it is unclear what Yihua Timber seeks to achieve by distinguishing between a company that sells to retail and one which sells to wholesale. Indeed, here this appears to be a distinction without difference. Even if the distinction is meaningful, Commerce cross-references its earlier arguments, stating that it disagrees with Yihua Timber's arguments, "for the same reasons as discussed above with respect to Diretso Design and Las Palmas." *Issues and Decision Memorandum* at 45. In the discussion of Las Palmas, Commerce asserted that Yihua Timber had failed to provide evidence that Yihua Timber itself sells or does not sell to retail businesses and that expenses derived from selling retail also apply to sales at the wholesale level. *Id.* at 43; Consol. Pl.'s Reply App. Tab 9, at Attach. 6. Absent evidence distinguishing either SCT or Las Palmas from Yihua Timber, Commerce reasonably relied on the evidence in the record to conclude that the companies sold

[33] Yihua Timber does not dispute that SCT produces wooden furniture. *See* Consol. Pl.'s Br. at 29 30. The record shows that SCT produces wood, iron, and rattan furniture. *See* Consol. Pl.'s Reply App. Tab 9, at Attach. 6. Instead, Yihua Timber contests that Commerce has not demonstrated that a sufficient percentage of SCT's production of wooden furniture to provide substantial evidence that SCT produces comparable merchandise. Consol. Pl.'s Br. at 30. Based on the catalogues, financial records, and descriptions of SCT, Commerce reasonably concluded that SCT's production experience was similar to Yihua Timber's. *See Issues and Decision* Memorandum at 45.

comparable merchandise with similar marketing expenses. *See* Consol. Pl.'s Reply App. Tab 9, at Attach. 6. Third, Yihua Timber's argument that SCT produces non-WBF is irrelevant as Yihua Timber also produces non-WBF. Furthermore, the comparable merchandise in question is not WBF, but wooden furniture generally. *See* Oral Arg. Tr., 27, Nov. 16, 2010. Therefore Commerce's determination that SCT's financial statements were reliable as SCT produced comparable merchandise through similar operations was supported.

Yihua Timber alleges that Commerce's reliance on Global Classic's financial statements was impermissible because Global Classic does not have a comparable production process. Consol. Pl.'s Br. at 30 31. Yihua Timber asks the court to reject Commerce's use of Global Classic's financial statements. Commerce included Global Classic's contracting expenses as factory overhead cost, leading to a 74.77% overhead ratio, more than twice the other surrogate companies. *See Issues and Decision Memorandum* at 40 41. Global Classic's contracting expenses are 53% of its materials, labor, and energy ("MLE"). Consol. Pl.'s Br. at 31. Global Classic's data does not indicate if labor is contracted out. In contrast, Yihua Timber does not use contractors at all in its production process. Consol. Pl.'s App. Tab 3, at 10. Although, as the Government claims, Commerce need not "duplicate the exact production experience," in determining the production experience of the NME respondent, *Nation Ford Chem. Co. v. United States*, 166 F.3d 1377, (Fed. Cir. 1999), Commerce must select surrogate companies that engage in a comparable production process. *See Shanghai Foreign Trade Enters. Co. v. United States*, 318 F. Supp. 2d 1339, 1348 (CIT 2004). As indicated, the record does not indicate whether Global Classic's contracts are for materials and energy or for labor if the contracts were for the latter Global Classic would have a fundamentally different production process. Commerce need not exclude every company with an outlying factory overhead ratio or SG&A ratio, however, significant statistical outliers require that Commerce provide an explanation as to how the company maintains a comparable production process. In this case the contrasting experiences cast considerable doubt on the comparability of the production processes. The inflated SG&A ratio requires an explanation that Commerce failed to provide. Commerce must explain or exclude Global Classic from the calculation.

B) Rejection of Financial Statements

In the *Final Results*, Commerce rejected data from Insular Rattan on the basis that such data were incomplete according to the Philip-

pines' Statement of Financial Accounting Standards ("SFAS") because the record contained a tax return but not the notes or accounting policies. *Issues and Decision Memorandum* at 35.

Yihua Timber alleges that data on the record were complete and reliable because Commerce misread the record to include a requirement that the record contain not only tax returns but also notes and accounting policies. *See* Consol. Pl.'s Br. at 33. Yihua Timber's argues that Commerce had the same evidence before it in the second administrative review and decided to rely on Insular Rattan's financial statements. *See id.* at 32 33. In this case, as opposed to the second administrative review, new facts were placed on the record regarding the Philippine requirement for notes to financial statements. *Issues and Decision Memorandum* at 35. The SFAS policies placed on the record in this review support Commerce's assertion that the SFAS considers notes and accounting policies an integral part of complete financial records. Intervenor Def.'s Resp. App. Tab 12. Commerce was apparently unaware of this policy during the second administrative review and therefore relied upon Insular Rattan's documents. The new requirements placed on the record in this review constitute new factual information, thus invalidating Yihua Timber's reliance on the second administrative review. *See* Consol. Pl.'s Br. at 33; *Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 418 19 (CIT 1993) (Commerce may diverge from its methodology or prior determinations so long as it provides reasoned explanations demonstrating it is not acting arbitrarily). Commerce may reject financial statements where they are not complete, for example, lacking in auditors' notes. *Shanghai Eswell Enter. Co. v. United States*, Slip Op. 07–138, 2007 WL 2932873, at *4 (CIT 2007). Commerce's decision to reject the data from Insular Ratan is supported.

C) Ratio Calculations

i. Factory Overhead

Yihua Timber alleges that Commerce double-counted by including surrogate companies' indirect materials and indirect labor in factory overhead while requiring Yihua Timber to report indirect materials and indirect labor as MLE. Consol. Pl.'s Br. at 34 35. Yihua Timber asks the court to remand so that Commerce can disqualify higher ratio companies as dissimilar producers of comparable merchandise or realign the factory overhead and MLE of surrogate companies with Yihua Timber's. Consol. Pl.'s Br. at 41. This claim lacks merit.

Commerce found that Yihua Timber had failed to provide a line-item analysis of its indirect materials. *Issues and Decision Memorandum* at 53. Additionally, Commerce determined that, "each of the

surrogate companies has a distinct line-item for labor, as well as energy and materials," and therefore found "no evidence that direct material, labor, or energy costs are included in the subcontracting expenses line-items." *Id.* at 56. Once Commerce selects surrogate companies, Commerce has some discretion in valuing NME overhead, "[a]s factory overhead is composed of many different elements, the cost for individual items may depend largely on the accounting method used by the particular factory." *Magnesium Corp. of Am.*, 166 F.3d at 1372; *see GPX III*, 715 F. Supp. 2d at 1353. The court has previously affirmed the methodology used in the instant case. *See Shanghai Foreign Trade*, 318 F. Supp. 2d at 1341; *Hebei Metals & Minerals Imp. & Exp.*, 366 F. Supp. 2d 1264, 1277 n.7 (CIT 2005). Commerce has no requirement "to do an item-by-item analysis in calculating factory overhead." *Magnesium Corp. of Am.*, 166 F.3d at 1372.[34] Where the record contains an itemized financial statements for both the surrogate and the respondent, Commerce will likely be required to make a more detailed analysis. Yihua Timber has failed to prove the availability of such evidence.

ii. Work-in-Process

Yihua Timber alleges Commerce erred when it treated "period changes in the value of work-in-process and/or finished goods inventory in addition to, or subtracted from, the surrogate producer's cost of materials," because accounting in the Philippines, "assigns the costs of both MLE and factory overhead costs to work-in-process and finished inventory." Consol. Pl.'s Br. at 46 47. Yihua Timber proposes that "factory overhead ratios should have been calculated by reference to the ratio of the value and factory overhead component of total manufacturing costs (adjusted for any excluded items) as a percentage of MLE component of total manufacturing costs (also adjusted for any excluded items)." *Id.* at 47. The court has upheld Commerce's practice of treating work-in-process changes as direct materials costs unless the financial statements indicate that other expenses are included in the work-in-process changes. *See GPX III*, 715 F. Supp. 2d at 1352; *Issues and Decision Memorandum* at 48; *Antidumping Duty Administrative for the Final Results of Antidumping Duty Adminis-*

[34] Yihua Timber argues that it submitted itemized data on Maitland-Smith's production supplies. Consol. Pl.'s Br. at 39; Consol. Pl.'s Reply App. Tab 18. Commerce disregarded the data as unverified. *Issues and Decision Memorandum* at 54. Additionally, statements by a Filipino professor on classification were disregarded as not related to specific financial statements. *Id.* Yihua Timber's contention that double-counting occurred confuses the process by which a surrogate financial ratio is created with the act of calculating Yihua Timber's expenses twice.

trative and New Shipper Reviews of Wooden Bedroom Furniture from the People's Republic of China, A-570–896, POR 04/1/06 3/31/07, at 47 48 (Aug. 10, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–19303–1.pdf (last visited Feb. 10, 2011). Such a determination is reasonable because it reflects actual materials used in production. *See*, *e.g.*, *Final Results and Partial Termination of Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China*, 62 Fed. Reg. 6,173, 6,182 (Dep't Commerce Feb. 11, 1997).[35]

Yihua Timber further alleges that Commerce erred in not deducting Maitland-Smith's exchange rate gain from SG&A expenses, thus overstating Maitland-Smith's financial ratios. Consol. Pl.'s Br. at 47 48. Yihua Timber provides no citation indeed because no citation exists in this record that this is common practice, as it alleges. Furthermore, Yihua Timber raised this issue for the first time on rebuttal, thus likely failing to exhaust administrative remedies. *See Dorbest IV*, 604 F.3d at 1375 76.

D) Constructed Export Price Offset

Yihua Timber alleges that Commerce failed to reduce normal value whenever normal value "constitutes a more advanced stage of distribution than the level of trade of the constructed export price," 19 U.S.C. § 1677b(7)(B), because Yihua Timber's constructed export price, i.e. the U.S. price, is at a level of trade involving no significant selling expenses whereas several of the surrogate companies used for determining normal value are smaller design shops selling at retail. Consol. Pl.'s Br. at 48; *see also* 19 U.S.C. § 1677b(a)(7)(B). Commerce has discretion not to apply a constructed export price offset where it cannot accurately determine the specific indirect selling expenses incurred on sales reflected in the surrogate financial statements because "the plain language of the statute" permits Commerce "the discretion to determine what other expenses will be included in its calculation of NV in an NME." *GPX III*, 715 F. Supp. 2d at 1348 49; *see GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1246 n.14 (CIT 2009) (Because of the lack of detailed surrogate information, Commerce need not make "fine-tuned adjustments" to NV such as constructed export price offsets). Here, Commerce found that Yihua Timber failed to submit adequate evidence concerning its selling

[35] Although normal practice may give way when evidence compels appropriate adjustments, nothing on the record suggests that Commerce was compelled to adjust its findings as Yihua Timber offers no citations to the record demonstrating that its own financial statements are itemized to allow for this type of analysis. *See Rhodia Inc. v. United States*, 240 F. Supp. 2d 1247, 1250 51 (CIT 2002).

functions and the selling functions of the surrogate companies. *Issues and Decision Memorandum* at 58 59. To date, Yihua Timber has failed to submit data concerning its own selling functions. Def.'s Br. at 80. Commerce, therefore, did not err in determining that it need not apply a constructed export price offset in calculating normal value.[36]

V. Surrogate Labor Value

Commerce requests a voluntary remand to redetermine the surrogate value for Yihua Timber's labor costs in light of *Dorbest IV*.[37] Def.'s Br. at 77. The Federal Circuit has concluded that Commerce's wage rate regression methodology is inconsistent with 19 U.S.C. § 1677b(c)(4); *Dorbest IV*, 604 F.3d at 1372 73. In the *Final Results*, Commerce relied on the now invalidated methodology. *Issues and Decision Memorandum* at 17 21. Thus, Commerce erred in its use of the methodology and the issue will be remanded to Commerce. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (permitting the reviewing court to grant a voluntary remand in its discretion so long as it is not frivolous or in bad faith).

VI. Negative Net U.S. Price

AFMC alleges that in the *Final Results* Commerce erroneously compared normal value to U.S. sales price without properly accounting for statutory deductions where the deductions resulted in a negative value for U.S. price.[38] Intervenor Def.'s Br. at 31 32; Intervenor Def.'s App. Tab 33, at 8. Commerce does not admit error but asks for a remand because the parties did not have an opportunity to comment. As this matter is remanded for many other matters and the parties and Commerce were not in a position to address this issue it is appropriate to grant Commerce's request for a voluntary remand so that it may correct its error if there is one or explain its methodology.[39]

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[36] Yihua Timber claims that the court's holdings in *Dorbest* apply. Consol. Pl.'s Br. at 48 (citing *Dorbest Ltd. v. United States*, 547 F. Supp. 2d 1321, 1338 44 (CIT 2008) ("*Dorbest II*"); *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1306 (CIT 2006) ("*Dorbest I*")). The court has already rejected the particular interpretation of *Dorbest* on which Yihua Timber relies. *See supra* at 28.

[37] AFMC contends that the court should not remand because a petition for en banc review will be filed with the Federal Circuit. Intervenor Def.'s Resp. Br. at 75 76. No such petition was ever filed.

[38] In actuality, Commerce said where the deductions resulted in a negative number for net U.S. price it substituted absolute value, i.e. a positive number. If Commerce actually did this, it is totally arbitrary.

[39] Lifestyle alleges that AFMC failed to exhausted administrative remedies and therefore this issue should not be remanded to Commerce. Pl.'s Resp. Br. at 44 45. This assertion lacks merit because, 1) the action was intentional and could not be corrected as a ministerial error after the *Final Results*, and 2) AFMC did not have a chance to object earlier

VII. Combination Rates[40]

AFMC alleges Commerce erred when it declined to impose combination rates on exporters and their producers and suppliers. Intervenor Def.'s Br. at 44. AFMC bases its allegation on an article from Furniture Today which it placed in the record.[41] Intervenor Def.'s Br. at 53. Commerce declined to investigate or impose combination rates on the basis that, unlike prior determinations where Commerce had imposed combination rates, "there is no record evidence concerning specific producers who are shifting their exports from high-margin to low-margin exporters, or that specific producers are otherwise manipulating or evading the AD rates. *Issues and Decision Memorandum* at 71; *see Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain In-Shell Raw Pistachios from Iran*, A-507–502, POR 07/01/02 06/30/03, at 17 (Feb. 7, 2005), *available at* http://ia.ita.doc.gov/frn/summary/iran/E5–596–1.pdf (last visited Feb. 10, 2011). Commerce disregarded the article, the only evidence on record, as "too vague to compel the Department to query the entire group of separate rate respondents," because the article cited unnamed officials and that the article itself was insufficient evidence. *Issues and Decision Memorandum* at 71. AFMC's claim lacks merit.

Commerce has a duty to prevent circumvention of AD law and may do so by imposing combination rates.[42] *See Shandong Huarong Gen. Grp.*, 27 CIT at 1580; 19 C.F.R. § 351.107(b)(1); *Tung Mung v. United States*, 354 F.3d 1371, 1381 (Fed. Cir. 2004) (Commerce has the

because the error was made in the *Final Results*. As AFMC did not have a chance to respond to the error, its claim is not barred for failing to exhaust administrative remedies. *Taifa II*, 637 F. Supp. 2d at 1236.

[40] Commerce "may establish" a combination cash deposit rate for the combination of the exporter and its supplier when a company exports a product to the United States that it did not produce itself. 19 C.F.R. § 351.107. In 2005, Commerce stated that for all future investigations Commerce would apply a single cash deposit rate to the exporter firm and all producers who supplied the same merchandise during the period of investigation. *See Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries* (Apr. 5, 2005), ("*Policy Bulletin 05.1*") *available at* http://ia.ita.doc.gov/policy/bull05–1.pdf (last visited Feb. 10, 2011). The policy does not reference administrative reviews as opposed to investigations.

[41] [[

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[42] AFMC cites *Policy Bulletin 05.1* for the proposition that Commerce requires the imposition of combination rates. Intervenor Def.'s Br. at 49. The policy bulletin discusses how the rates are imposed, but does not necessarily state that they must be imposed in every NME investigation. *See Policy Bulletin 05.1* ; *see also Policy Bulletin 03.2: Combination Rates in New Shipper Reviews* (Mar. 3, 2004), *available at* http://ia.ita.doc.gov/policy/bull03–2.html (last visited Feb. 10, 2011) (outlining the policies for implementation of combination rates where the system is being circumvented).

discretion to apply combination rates); *Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1340 41 (CIT 2010) (Commerce generally refrains from issuing combination rates and combination rates "remain[] solely in the discretion of Commerce"); *U.S. Magnesium LLC v. United States*, Slip Op. 07–99, 2007 WL 1875662, *4 (CIT 2007) ("Commerce has broad discretion . . . [and is not required to] use combination cash deposit rates in administrative reviews"). Here, the record does not show that Commerce was presented with such a clear case of circumvention or some other circumstance that would mandate the use of combination rates. Commerce evaluated AFMC's claims and found that the evidence on the record as a whole did not substantiate the claims. *Issues and Decision Memorandum* at 71. Commerce, therefore, did not abuse its discretion in failing to utilize combination rates.

CONCLUSION

For all the foregoing reasons, the court remands the matter for Commerce to explain or otherwise resolve Orient's separate rate, the data set for wood inputs, the tariff heading for medium density fiberboard, whether Diretso and Global Classic produce comparable merchandise through a comparable production process, surrogate labor value, and negative export pricing. The plaintiffs', consolidated plaintiffs', intervenor plaintiff's, and intervenor defendant's motions for judgment on the agency record are otherwise denied.

Commerce shall file its remand determination with the court within 90 days of this date. The parties have 30 days thereafter to file objections, and the Government will have 15 days thereafter to file its response.

Dated: This 11th day of February, 2011.
New York, New York.

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

Slip Op. 11–17

TIANJIN MAGNESIUM: INTERNATIONAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and US MAGNESIUM LLC, Intervenor Defendant.

Before: Jane A. Restani, Judge
Court No. 09–00535
Public Version

[Commerce's *Final Results* in antidumping matter is remanded for Commerce to make a finding as to whether plaintiff cooperated to the best of its ability in antidumping review. Plaintiff's motion for judgment on the agency record is denied as to its due process claims.]

Dated: February 11, 2011

Riggle and Craven (*David A. Riggle* and *Lei Wang*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); *Thomas M. Beline*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

King & Spalding LLP (*Stephen A. Jones*, *Jeffery B. Denning*, and *Steven R. Kenner*) for the intervenor defendant.

OPINION AND ORDER

Restani, Judge:

INTRODUCTION

This court action challenges the Department of Commerce's ("Commerce") final results rendered in an antidumping duty ("AD") review of pure magnesium from the People's Republic of China ("PRC"). *See Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 66,089 (Dep't Commerce Dec. 14, 2009) ("*Final Results*"). The plaintiff, Tianjin Magnesium International Co., Ltd. ("TMI") submitted a motion for judgment on the agency record pursuant to USCIT R. 56. For the reasons stated below, the court remands this matter to Commerce with instructions to either find that TMI did not fulfill its statutory duties and assign it an AFA rate, or calculate a neutral facts available rate for TMI.

BACKGROUND

In July 2008, Commerce initiated an administrative review of the antidumping duty order on pure magnesium from the PRC for the period May 1, 2007, through April 30, 2008 ("2007 2008 review") and named TMI as a respondent. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 37,409, 37,409 (Dep't Commerce July 1, 2008). In June 2008, Commerce published its preliminary results and assigned

TMI a preliminary weighted-average AD margin of 9.1%.[1] *Pure Magnesium from the People's Republic of China: Preliminary Results of 2007–2008 Antidumping Duty Administrative Review*, 74 Fed. Reg. 27,090, 27,096 (Dep't Commerce June 8, 2009) ("*Preliminary Results*"). In NME cases, Commerce uses a factors of production ("FOP")[2] methodology for determining NV. *See* 19 U.S.C. § 1677b(c)(1). For its FOP inputs, TMI advocated certain valuations of raw materials and by-products produced by its unaffiliated supplier.[3] *See* US Magnesium's App. Tab 5, D-13. Commerce preliminarily accepted this information for the purposes of calculating TMI's NV, but stated that it intended to verify all information it relied upon. *Preliminary Results*, 74 Fed. Reg. at 27,094, 27,096.

During verification, Commerce visited TMI's producer in an effort to verify its FOP methodology. *See Issues and Decision Memorandum for the Final Results of the 20072008 Administrative Review of Pure Magnesium from the People's Republic of China*, A-570832, POR: 5/1/2007 4/30/2008, at 6 (Dep't Commerce Dec. 7, 2009) ("*Issues and Decision Memorandum*"), *avaliable at* http://ia.ita.doc.gov/frn/summary/PRC/E9–29727–1.pdf (last visited Feb. 10, 2011). The producer, however, conducted itself in a manner that frustrated Commerce's efforts. *Id.* In addition, Commerce encountered evidence strongly suggesting that the producer had doctored records. *Id.* Based on this behavior, Commerce concluded in its *Final Results* that TMI's information was unreliable and assigned it an adverse facts available ("AFA") rate of 111.73%, *id.* at 10; *Final Results*, 74 Fed. Reg. at 66,090, which was the highest weighted-average margin calculated for a cooperating respondent in the previous review, *Issues and Decision Memorandum* at 12 13.

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[1] An AD margin is the difference between the normal value ("NV") of merchandise and the price for sale in the United States. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). Unless nonmarket economy ("NME") methodology is used, an NV is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). An export price or constructed export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a) (b).

[2] FOP includes "hours of labor required," "quantities of raw materials employed," "amounts of energy and other utilities consumed," and "representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

[3] During the period of review, [[ ]] of the pure magnesium sold by TMI to the United States was supplied to it by two producers, [[ ]]. *See* App. of Documents Cited in US Magnesium's Resp. in Opp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("US Magnesium's App.") Tab 16, at 5 6, Tab 24, at 2. Although these two producers are denominated as separate companies, they share common financial, accounting, and sales departments, all located at [[ ]] headquarters. *Id.* at Tab 24, 2. There is also evidence on the record suggesting that TMI is [[ ]] exporting agent for pure magnesium. *Id.* at Tab 6, Ex. 5.

In December 2009, TMI commenced this action contesting the AFA rate of 111.73%. In June 2010, the TMI filed a motion for judgment on the agency record pursuant to USCIT Rule 56.2.

STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final results in AD reviews unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. AFA

During an AD review, when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . the administering authority . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). The AD duty rate under such circumstances is known as an AFA rate and may be based on information obtained from: "(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under [19 U.S.C. § 1675] or determination under [19 U.S.C. § 1675b], or (4) any other information placed on the record." *Id.* For this reason, the United States Court of Appeals for the Federal Circuit has repeatedly acknowledged that "Commerce's discretion in applying an AFA margin is particularly great." *PAM S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009).

TMI claims that Commerce erred by applying an adverse inference against it in the *Final Results*. Mot. for J. on the Agency R. Submitted by Pl. Tianjin Magnesium International Co., Ltd. Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("Pl.'s Br.") 2. TMI argues that Commerce's application of AFA was not in accordance with the law because Commerce based its decision solely on an unaffiliated producer's failure to cooperate. *Id.* at 3. This claim has merit.

"Before making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce, however, lacks "authority under *19 U.S.C. § 1677e(b)* to use an inference that is adverse to a party to the proceeding absent a factual finding that such party failed to cooperate by not acting to the best of its ability to comply with a request for

information."[4] *SKF USA Inc. v. United States*, 675 F. Supp. 2d. 1264, 1275 (CIT 2009) (internal quotation marks omitted).

In the *Final Results*, Commerce stated that TMI's margin is based on total AFA because its "producers have failed to cooperate to the best of their ability."[5] *Final Results*, 74 Fed. Reg. at 66,090; *Issues and Decision Memorandum* at 6. Commerce's decision to apply AFA to TMI, therefore, was in violation of 19 U.S.C. § 1677e(b) because it did not make a "fail[ure] to cooperate" finding as to the actual respondent, TMI.[6] *See SKF*, 675 F. Supp. 2d. at 1275, 1277 ("The court

[4] The Government claims that *SKF* is inconsistent with the statute. Def.'s Resp. to Pl.'s Mot. for J. Upon the Administrative R. ("Def.'s Br.") 15. Pursuant to 19 U.S.C. § 1677(9), the term "interested party" includes both exporters and producers. *See* 19 U.S.C. § 1677(9). Commerce argues its interpretation of "interested party" under 19 U.S.C. § 1677e(b) to include "both the exporter and its unaffiliated suppliers of subject merchandise," regardless of whether they are a respondent to the review, is reasonable. *Issues and Decision Memorandum* at 10; *see* Def.'s Br. 17. In support of this position, the Government cites *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010), for the proposition that uncooperative unaffiliated parties can effect the dumping margins of others. Def.'s Br. 17 18. Importers, like KYD, however, take the margins of their exporters/producers. The data of the exporters and producers are the basis for the AD margin calculation. Whether any exporter is responsible for the conduct of its supplier is a separate matter. *See SKF*, 675 F. Supp. 2d. at 1276. Further, the definition of "interested party" in 19 U.S.C. § 1677(9) is irrelevant. Essentially that defines which parties may participate before the agency and thus file action here pursuant to 28 U.S.C. § 2631(c). Thus, "interested parties," participating or not, may indeed get AFA rates, but that does not convert one interested party into another interested party under 19 USC § 1677e(b). *See SKF*, 675 F. Supp. 2d. at 1277.

[5] The *Final Results* incorporate by reference an additional memorandum written by Commerce further explaining its application of AFA to TMI. *See Final Results*, 74 Fed. Reg. at 66,090 n.8; *Application of Adverse Facts Available for Tianjin Magnesium International, Ltd. in the 2007–2008 Administrative Review of Pure Magnesium from the People's Republic of China* (Dep't Commerce Dec. 7, 2009) ("*AFA Memorandum*"), *available at* US Magnesium's App. Tab 30. Although this document further explains the events that occurred during verification, all findings of failure to cooperate apply solely to TMI's producer. *See AFA Memorandum* at 12 13.

[6] US Magnesium claims that Commerce's application of AFA is supported by substantial evidence because there are facts on the record which indicate that TMI did not cooperate to the best of its ability. *See* US Magnesium's Resp. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("US Magnesium's Br.") 17 26. Although case law "does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping." *NSK Ltd. v. United States*, 481 F.3d 1355, 1361 (Fed. Cir. 2007) (internal quotation marks omitted). Moreover, under 19 C.F.R. § 351.303(g), "Commerce's regulations require a representative of the company participating in an administrative review or investigation to certify that he has read the attached submission, and that to the best of his knowledge, the information contained in the submission is complete and accurate." *PAM, S.p.A. v. United States*, 495 F. Supp. 2d 1360, 1369 (CIT 2007). Thus, TMI was responsible for providing complete and correct information, *id.*, and, for this reason, an inadequate inquiry into the accuracy of facts submitted may trigger AFA, *see Nippon*, 337 F.3d at 1383; *see also PAM, S.p.A.*, 582 F.3d at 1339 (providing that the inquiry must be "reasonable under the circumstances"). The inquiry extends to an examination of the accuracy of suppliers' data to the extent that

cannot accept a construction of *19 U.S.C. § 1677e(b)* under which the party who suffers the effect of the adverse inference is not the party who failed to cooperate."). If TMI is to receive an AFA rate, Commerce must link TMI to its supplier's failures, as a matter of fact. Assuming *arguendo* there is any textual ambiguity in 19 U.S.C. § 1677e(b), Commerce's statutory arguments do not satisfy its obligation to administer the statute fairly. Accordingly, the court remands this matter to Commerce with instructions to either find that TMI failed to cooperate to the best of its ability and assign it an AFA rate, or calculate a neutral facts available rate for TMI.[7]

II. Due Process

TMI claims that Commerce violated its due process rights on three separate occasions during this review. *See* Pl.'s Br. 3. Generally, "[w]here a right to be heard exists, due process requires that right be accommodated at a meaningful time and in a meaningful manner." *Barnhart v. United States Treasury Dep't*, 588 F. Supp. 1432, 1438 (CIT 1984). It remains unclear to what extent constitutional due process claims are "viable in an antidumping context." *Borden, Inc. v. United States*, 23 CIT 372, 375 n.3 (1999), *rev'd on other grounds*, 7 F. App'x 938, 938 39 (Fed. Cir. 2001); *see Am. Ass'n of Exp. & Imp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) (providing that "[n]o one has a protectable interest to engage in international trade"). The court need not decide this issue because the contours of such rights in this context are grounded in the statutory scheme and reasonable administration thereof, and TMI's claims are unavailing thereunder. *See Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1375 (CIT 2010). The court will address the three claims separately.

A. Commerce's Application of AFA in the *Final Results*

TMI first claims that Commerce's "failure to release information to TMI deprived TMI of the right to due process." Pl.'s Br. 26. TMI

it is readily available and not burdensome to obtain. *See Pacific Giant, Inc. v. United States*, 26 CIT 1331, 1332 33 (2002). Moreover, when verification is pending, a respondent must alert Commerce, prior to verification, to problems it discovered with data while preparing for verification. *See id.*; *see also Wuhan Bee Healthy Co. v. United States*, 31 CIT 1182, 1193 (2007). Commerce, however, has failed to make any determination as to whether TMI satisfied these obligations. *See Final Results*, 74 Fed. Reg. at 66,089; *Issues and Decision Memorandum* at 6; *AFA Memorandum* at 12 14.

[7] It is premature for the court to decide if the AFA rate of 111.73% assigned to TMI in the *Final Results* is corroborated. Of course, even AFA rates must be grounded in commercial reality. *See F.Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1034 (Fed. Cir. 2000).

explains that it "was unaware of Commerce's decision to apply an adverse inference against TMI until the Final Results were issued" because Commerce failed to issue an amended preliminary results that applied AFA to TMI. *Id.* at 27. This claim lacks merit.

"The court applies a rule of reason in evaluating administrative due process claims." *Borden*, 23 CIT at 375 n.3. In this case, although Commerce did not apply AFA to TMI until the *Final Results*, *see Final Results*, 74 Fed. Reg. at 66,090, this issue was raised and extensively briefed by the parties during the review, *see* US Magnesium's App. Tab 25, 20 32, Tab 26, at 4 31, Tab 27, at 3 16. Commerce considered these arguments before making its final decision regarding the application of AFA to TMI. *See Issues and Decision Memorandum* at 2 5, 10, 13 14. Furthermore, the Court of International Trade provides TMI a forum in which to challenge its AFA rate, regardless of exhaustion, in the event that Commerce unexpectedly changes its mind between the preliminary and final results. *See Qingdao Taifa Grp. Co. v. United States*, 637 F. Supp. 2d 1231, 1237 (CIT 2009) (explaining that a respondent "is not required to predict that Commerce would accept other parties' arguments and change its decision"). Commerce's failure to issue amended preliminary results, therefore, did not substantially deprive TMI of an opportunity to be heard. *See Mid Continent Nail*, 712 F. Supp. 2d at 1375 ("If, however, a plaintiff makes thoughtful comments that Commerce addresses in its determination, then, as a practical matter, [the plaintiff] was not substantially deprived of an opportunity to be heard before the agency." (Internal quotation marks omitted)).

B. Draft Liquidation Instructions

Next, TMI claims that Commerce's failure to issue draft liquidation instructions violated its due process rights. Pl.'s Br. 29. TMI argues that "[e]specially where the decision of the Preliminary Results changed, Commerce must provide a copy of the draft liquidation instructions as part of the Final Results calculations [sic] materials for review and comment." *Id.* at 30. This claim lacks merit.

In making a due process determination, courts often look for "evidence that given more time [a plaintiff] would have, in fact, provided more meaningful comments." *Sichuan Changhong Elec. Co. v. United States*, 466 F. Supp. 2d 1323, 1328 (CIT 2006). TMI, however, does not allege any errors in Commerce's liquidation instructions from this review[8] and does not describe any arguments it would have made if

[8] Rather, in support of its argument, TMI points to the previous review, in which Commerce allegedly made a "significant error" in its liquidation instructions. Pl.'s Br. 30. TMI argues that "[t]his required TMI to make an emergency application for a temporary restraining

Commerce had provided it with draft instructions.[9] *See* Pl.'s Br. 29 31. Commerce's failure to provide draft liquidation instructions in the *Final Results*, therefore, did not violate TMI's due process rights. *See Mid Continent Nail*, 712 F. Supp. 2d at 1376 (holding that respondent's due process rights were not violated when "[t]here is no evidence before the court . . . to suggest that the plaintiffs would have provided more meaningful comments if they were afforded" additional time to comment).

C. Consideration of Facts Not on the Record

Finally, TMI claims that it was deprived due process when Commerce considered facts not on the administrative record. Pl.'s Br. 31. Specifically, TMI argues that it "requested Commerce remove Petitioner's rebuttal brief dated November 17, 2009 from the record because it contains argument based on facts not of record in this review," but Commerce failed to do so. *Id.* For the following reasons, TMI has failed to support such a claim.

Although TMI's argument is unclear and imprecise, it appears to be challenging the introduction of new factual evidence after the established time limitation. *See* Pl.'s Br. 31 32. Indeed, pursuant to the regulations, "a submission of factual information is due no later than . . . 140 days after the last day of the anniversary month." 19 C.F.R. § 351.301(b)(2). TMI, however, has repeatedly failed to identify what new facts it is referring to, despite ample opportunity to do so. *See* Pl.'s Br. 31 32; App. of Non-Confidential Docs. in Supp. of Def.'s Mem. in Opp'n to Mot. for J. Upon the Agency R. Tab 14, at 2 (stating that "[i]t is not the place of TMI to repeat spurious facts not of record when objecting since US Magnesium must know, or can very easily identify, these facts"). Despite both the Government and US Magnesium having raised this obvious problem with TMI's claim, [10] *see* Def.'s Br. 30; US Magnesium's Br. 37 38, TMI yet again declined to identify any

order" and that "such a waste of judicial resources could have been easily avoided." *Id.* Such considerations, however, are irrelevant for the purposes of this due process claim.

[9] Commerce's policy is to issue liquidation instructions after the publication of the final results of a review in the Federal Register. *See SKF*, 675 F. Supp. 2d at 1280. "[T]he issuance of the liquidation instructions is an agency action that is separate from the Final Results," *SKF USA Inc. v. United States*, 31 CIT 405, 409 (2007), and thus, under the statutory regime, Commerce need not provide respondents with an opportunity to comment, *see* 19 U.S.C. § 1677m(g). Rather, a plaintiff may challenge errors in Commerce's instructions to Customs where the error was not reflected in the final results. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1309 (Fed. Cir. 2004).

[10] The Government and US Magnesium both speculate that the facts to which TMI refers are references to information from a previous review. *See* Def.'s Br. 30; US Magnesium's Br. 38. Both parties argue that Commerce is permitted to take notice of such information. *See* Def.'s Br. 30; US Magnesium's Br. 38. The court, however, need not decide this issue because TMI has failed to identify this information.

specific facts in its reply brief, *see* Reply Br. in Supp. of the Mot. for J. on the Agency R. Submitted by Pl. Tianjin Magnesium International Co., Ltd., Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade 10 11.

For the aforementioned reasons, TMI has not demonstrated that any due process rights it had were violated. Accordingly, TMI's motion for judgment on the agency record is denied as to these claims.

CONCLUSION

For the aforementioned reasons, the court remands the matter for Commerce to make a finding as to whether plaintiff cooperated to the best of its ability in antidumping review. TMI's motion for judgment on the agency record is denied as to its due process claims.

Commerce shall file its remand determination with the court within sixty days of this date. TMI and US Magnesium have eleven days thereafter to file responses.

Dated: This 11th day of February, 2011.
New York, New York.

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

Slip Op. 11–18

UNION STEEL, Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION and NUCOR CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 09–00130

[Affirming in part, and remanding in part, final determination of the U.S. Department of Commerce issued in an administrative review of an antidumping duty order]

Dated: February 15, 2011

Troutman Sanders LLP (*Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*) for plaintiff.

Drinker Biddle & Reath, LLP (*William R. Rucker*) for plaintiff-intervenor.

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Skadden, Arps, Slate, Meagher & Flom LLP (*Jeffrey D. Gerrish*, *Ellen J. Schneider*,

Soo-Mi Rhee, and *Robert E. Lighthizer*) for defendant-intervenor United States Steel Corporation.

Wiley Rein LLP (*Timothy C. Brightbill*, *Robert E. DeFrancesco, III*, and *Alan H. Price*) for defendant-intervenor Nucor Corporation.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

Plaintiff Union Steel Manufacturing Co., Ltd. ("Union") contests a final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), that concluded the Department's fourteenth periodic administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products ("CORE") from the Republic of Korea ("Korea"). *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review & Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) ("*Final Results*"). Union, a Korean company that produced and exported CORE subject to the order and was a respondent in the review, moves for judgment on the agency record, bringing three claims. Union's first claim "contests Commerce's change of practice regarding the calculation of the general and administrative ('G&A') and interest expense ratios and Commerce's use of Plaintiff's 2007 financial statements to calculate these ratios." Compl. ¶ 7. In its second claim, Union challenges Commerce's "model match" methodology as applied in the review, by which Commerce compared Union's U.S. sales of painted CORE products to Union's home market sales, which included not only painted CORE products but also "laminated" CORE products, *i.e.*, CORE products that are coated with a plastic film. *Id*. ¶ 6. Union argues that Commerce erred in treating its laminated CORE as identical to its painted CORE for model match purposes. *Id.* ¶¶ 16–17. Third, plaintiff challenges Commerce's construction of section 771(35) of the Tariff Act of 1930 ("Tariff Act" or the "Act"), 19 U.S.C. § 1677(35) (2006), according to which Commerce applied its practice of "zeroing," *i.e.*, the deeming of the sales a respondent makes in the United States at prices above normal value to have individual dumping margins of zero rather than negative margins. Compl. ¶ 5. Union claims that as a result of these errors, the weighted-average dumping margin of 7.56% that Commerce assigned to Union in the Final Results was significantly overstated. *Id.* ¶¶ 5–7; *Final Results*, 74 Fed. Reg. at 11,083.

On plaintiff's first claim, the court determines that Commerce acted lawfully in basing its general and administrative ("G&A") and interest expense ratio calculations on financial statements that pertained to seven of the twelve months of the one-year period of review ("POR") covered by the Final Results. On plaintiff's second claim, the court grants, in part, defendant's request for a voluntary remand allowing Commerce to reconsider its denial, made during the review, of Union's request for a revised model match methodology that includes an individual model match type category for laminated CORE products. On plaintiff's third claim, the court affirms the Department's use of zeroing in the Final Results based on binding precedent.

II. BACKGROUND

Commerce initiated the fourteenth administrative review of certain corrosion-resistant carbon steel flat products from Korea in 2007. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 72 Fed. Reg. 54,428 (Sept. 25, 2007). On September 9, 2008, Commerce published preliminary results ("Preliminary Results"), in which Commerce calculated a preliminary dumping margin of 1.9% for Union. *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Prelim. Results of the Antidumping Duty Admin. Review*, 73 Fed. Reg. 52,267, 52,272 (Sept. 9, 2008) ("*Prelim. Results*"). On March 16, 2009, Commerce published the Final Results, which determined Union's margin of 7.56%. *Final Results*, 74 Fed. Reg. at 11,083.

Union commenced this action on March 24, 2009 and filed a motion for a preliminary injunction against liquidation of certain entries, which the court granted on March 25, 2009. Summons; Compl.; Mot. for Prelim. Inj.; Order, Mar. 25, 2009. On May 13, 2009, the court granted the motions of Whirlpool Corporation ("Whirlpool"), a U.S. importer of subject merchandise, to intervene as of right and to obtain a preliminary injunction against liquidation of Whirlpool's entries. Order, May 13, 2009; *see Union Steel v. United States*, 33 CIT __, Slip Op. 09–47 (May 19, 2009). On July 2, 2009, Union filed its motion for judgment on the agency record. Pl. Union Steel's Mot. for J. upon the Agency R. On October 21, 2009, defendant and defendant-intervenors, Nucor Corporation and United States Steel Corporation, filed their responses to plaintiff's motion. Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R.; Nucor Corp.'s Mem. in Resp. to the Mot. for J. on the Agency R. by Pl. Union Steel ("Nucor's Resp."); Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. Filed By Def.-Intervenor United

States Steel Corp ("U.S. Steel's Opp'n"). On November 20, 2009, plaintiff filed its reply brief in support of its motion. Reply Br. of Pl. Union Steel ("Union's Reply").

On April 8, 2010, in response to Union's request, the court held oral argument on the issue of whether Commerce's determination to calculate Union's G&A and interest expense ratios based on 2007 financial statements is supported by substantial evidence and otherwise in accordance with law. Oral Tr. (Apr. 8, 2010). On May 24, 2010, pursuant to discussion at oral argument, defendant filed a proposed remand order pertaining to its request for a voluntary remand in response to plaintiff's claim challenging the Department's model match methodology, to which defendant-intervenors consent. Def.'s Proposed Order (May 24, 2010). Plaintiff and plaintiff-intervenor did not consent to defendant's proposed remand order. Def.'s Comments Regarding Def.'s Proposed Remand Order.

III. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court will uphold the Department's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

A. Commerce Did Not Err in Calculating General & Administrative and Interest Expenses Using 2007 Financial Statements

Union argues that Commerce was required to calculate G&A and interest expenses using the financial statements for Union and its parent company, Dongkuk Steel Mill ("DSM"), for fiscal year 2006 rather than the statements for fiscal year 2007. Br. in Supp. of the Mot. of Pl. Union Steel for J. upon the Agency R. 14–28 ("Pl.'s Br."). The court concludes that this claim is without merit.

In a review, Commerce ordinarily calculates the normal value of the subject merchandise as an average of prices in comparison-market sales of the foreign like product during each calendar month in which a respondent made U.S. sales. 19 C.F.R. § 351.414(b)(3) (2007) (describing the "average-to-transaction method" of comparing home market and U.S. sales) & § (c)(2) (stating that Commerce normally will use the average-to-transaction method in a review). Normal value excludes, in certain circumstances, sales made at prices below

the cost of production ("COP") of the foreign like product. Tariff Act, § 773(b)(1), 19 U.S.C. § 1677b(b)(1).[1] COP includes, among others things, an amount for G&A expenses. *Id.* § 1677b(b)(3).[2] As is its practice, Commerce decided to include in COP interest expenses, *i.e.*, financing costs, a decision not challenged here.

To calculate G&A and interest expenses for a particular product, Commerce first calculates ratios for G&A and interest. The numerator of the G&A ratio is the respondent's full-year G&A expenses, and the numerator for the interest ratio is the respondent's full-year interest expenses. *See Letter from Program Manager Office of AD/CVD Operations 3 to Dongbu* 10138, at 13–14 (Dec. 6, 2007) (Admin. R. Doc. No. 4454) ("*Section D Questionnaire*"). The denominator for both ratios is the respondent's full-year cost of goods sold. *Id.* Commerce uses as numerator and denominator the relevant data from the respondent's financial statements. *Id.* Commerce then uses these ratios to calculate per-unit G&A and interest by multiplying each ratio by the total cost to manufacture the particular foreign like product for which Commerce is calculating COP. *Id*. At issue in this case is whether Commerce acted lawfully in choosing to calculate the G&A and interest ratios using data from Union's and DSM's 2007 financial statements.

To acquire the information needed to calculate G&A and interest expense ratios, Commerce requested on December 6, 2007 that Union provide data from financial statements. *See id.* at 13; *Letter from Program Manager Office of AD/CVD Operations 3 to Union* (Dec. 6,

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[1] Specifically, section 773(b)(1) of the Tariff Act of 1930 (the "Act") provides, in pertinent part, that:

> Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production–
>
> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value.

19 U.S.C. § 1677b(b)(1) (2006).

[2] Section 773(b)(3) of the Act, provides that the "cost of production" of the foreign like product is the sum of:

> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C. § 1677b(b)(3).

2007) (Admin. R. Doc. No. 4457). Commerce instructed Union to "use the full-year G&A expense and COGS [cost of goods sold] reported in your company's audited fiscal year financial statements that most closely correspond to the POI." *Section D Questionnaire* 13. Commerce provided similar instructions for interest expenses. *Id*. at 14–15. Although the period to which the financial statements were to "most closely correspond" was August 1, 2006 through July 31, 2007, *Final Results*, 74 Fed. Reg. at 11,082, Union responded by providing financial statements for fiscal year 2006, for the apparent reason that the financial statements for 2007 were not available at the time of submitting the questionnaire response.[3] *Letter from Union to the Sec'y of Commerce* 356–681, exhibit D-16 & 17 (Feb. 4, 2008) (Admin. R. Doc. No. 4530) ("*Union's Section D Resp.*"). Later, on June 9, 2008, Commerce requested fiscal year 2007 financial statements, which Union provided. *Letter from Union to the Sec'y of Commerce* 1, exhibits D-39 & D-40 (July 16, 2008) (Admin. R. Doc. No. 4675) ("*Union's Supplemental Resp.*").

In the Preliminary Results, Commerce determined Union's G&A and interest expense ratios using the 2006 financial statements. *Prelim. Results*, 73 Fed. Reg. at 52,271–72. In the Final Results, Commerce used, instead, the 2007 financial statements. *Final Results*, 74 Fed. Reg. at 11,083. Commerce explained its change in position in an Issues and Decisions Memorandum ("Decision Memorandum"), which Commerce incorporated by reference in the Final Results. Issues & Decision Mem., A-580–816, ARP 3–09, at 14–15 (Mar. 9, 2009) (Admin. R. Doc. No. 4868) ("*Decision Mem.*"); *Final Results*, 74 Fed. Reg. at 11,083. The Decision Memorandum explained that the "2007 fiscal year financial statements overlap seven months of the POR whereas the 2006 financial statements overlap only five months of the POR" and that "[t]herefore, the 2007 financial statements are the more appropriate basis for the G&A expense and interest expense ratios since the portion of the POR in 2007 is longer than the portion of the POR in 2006." *Decision Mem.* 15. As additional reasons for its decision to use the 2007 financial statements, the Department stated that its questionnaire "requires the respondent to use the audited fiscal year financial statements for the period that most closely corresponds to the POR," and that "[b]asing the G&A and interest expense rates on the fiscal year which most closely corre-

[3] Specifically, Union Manufacturing Co., Ltd. ("Union") used its own 2006 unconsolidated financial statements to calculate its general & administrative ("G&A") expense ratio and used the 2006 consolidated financial statements for Union's parent company, Dongkuk Steel Mill, to calculate its interest expense ratio. *Letter from Union to the Sec'y of Commerce* 356–681, exhibits D-16 & D-17 (Feb. 4, 2008) (Admin. R. Doc. No. 4530) ("*Union's Section D Resp.*").

sponds to the POR is also our practice." *Id.* at 14.

The Department also stated that "[w]e acknowledge that, for at least the three previous reviews of this particular case, the Department has accepted . . . Union's reporting based on the earlier set of the financial statements for its calculations of G&A expense and interest expense ratios." *Id*. at 15. The Department concluded that "it is not compelled to continue with a methodology at variance with its standard practice for the sake of consistency with prior segments." *Id.* The Department's description of which financial statements it used in the three prior reviews is apparently incorrect. Plaintiff has conceded that Commerce accepted Union's financial statements pertaining to five months of the POR in only one prior instance, which was the previous administrative review. Union's Reply 3 n.2.

The statute does not speak to the issue presented by the choice of financial statements in this case, and accordingly the court accords the Department considerable deference when reviewing Commerce's decision. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). The court concludes that Commerce acted reasonably in choosing the 2007 financial statements over the 2006 statements based on the relatively greater correspondence with the POR.

Union's arguments to the contrary are not persuasive. According to Union, Commerce should have used 2006 financial statements because "the more relevant period is the home market sales reporting period, which . . . includes sales made between March 2006 and September 2007" and "the majority of this period–ten months out of nineteen–falls *in 2006* . . . ." Pl.'s Br. 19. In referring to the nineteen-month "home market sales reporting period," Union refers to reporting of home market sales occurring three months prior to the earliest sale of subject merchandise and two months subsequent to the latest sale of subject merchandise. *Id.* at 19; *see* 19 C.F.R. § 351.414(e). The record indicates that Union reported home market sales that took place as early as March 2006 and as late as September 2007. *Letter from Union to the Sec'y of Commerce* exhibit B-2 (Feb. 4, 2008) (Admin. R. Doc. No. 4530); Pl.'s Br. 19 (referring to the sales as "window period sales").

Even if ten of the nineteen months of the home market sales reporting period were in 2006, Commerce would not be acting unreasonably in placing more weight on the correspondence of the financial statement reporting period to the POR, as opposed to correspondence to the entire home market sales reporting period. It is reasonable for Commerce to consider the home market sales reporting period to be less significant than the POR because the earliest three months, and

latest two months, of reported home market sales are used in the margin calculation only if a respondent had no sales of the foreign like product during the same month of the POR in which it sold subject merchandise.[4] *See* 19 C.F.R. § 351.414(e)(2) (defining the "contemporaneous month" during which a weighed average based on home market sales will be compared to a U.S. sale of subject merchandise as, in the first instance, the month during which the U.S. sale was made).

Union argues, further, that it was unreasonable for Commerce to calculate Union's G&A and interest expense ratios "using data that is impacted by events occurring *after* the POR and which Union could not possibly factor into its decision-making when setting its home market prices." Pl.'s Br. 21. This argument is also unpersuasive. The "event" to which Union refers is a "2007 year-end adjustment for foreign currency translation gains and losses," *id.*, which necessarily took place after the POR ended on July 31, 2007. Although Union may have a legitimate interest in being able to predict how Commerce will apply the Tariff Act to its sales and set prices accordingly, that interest, in the entire circumstances of this case, is not sufficient to compel Commerce to use the 2006 financial statements. Commerce conducts administrative reviews according to a "'retrospective' assessment system." 19 C.F.R. § 351.213(a). Some uncertainty is inherent in such a system.

Union also argues that Commerce has a "practice" of accepting Union's financial statements pertaining to five months of the period of review and that Union has relied upon this practice. Pl.'s Br. 25–26 ("This consistency in the past reviews has become an 'agency practice' that Union has come to rely upon for predictability . . . ."). Commerce, however, did not establish such a practice as to Union. Union concedes as much in its reply brief by informing the court that only once, *i.e.*, in the most recent review, has Commerce calculated Union's G&A and interest expenses using financial statements pertaining to five months of the POR.[5] Union's Reply 3 n.2.

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[4] Moreover, the court has reason to question whether the data Union presents in its brief support Union's argument. Although those data show that Union reported ten months of home market sales for 2006, the data also appear to indicate that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") was required to compare U.S. sales to a weighted average price determined from only nine of those months. *See* Br. in Supp. of the Mot. of Pl. Union Steel for J. upon the Agency R. appendix 1 ("Pl.'s Br."). Thus, it appears possible to conclude from the data submitted with plaintiff's brief that nine months of the relevant home market sales reporting period fell within each of the two calendar years.

[5] Plaintiff also states, as a related "practice" argument, that in some cases in which "the POR is divided between two fiscal years 'it has been the Department's practice to use the financial statements from the most recently completed fiscal year at the time the

Union takes issue with the Department's relying in part on a claimed practice of using financial statements that most closely correspond to the POR, when the Department, according to Union, has failed to follow such a "practice" on so many occasions that the practice cannot be said to exist. Pl.'s Br. 25 (citing *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999)). In the Decision Memorandum, Commerce cited two previous decisions in which it referred to the claimed practice. *Decision Mem.* 14 (citing *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Admin. Review*, 72 Fed. Reg. 51,791 (Sept. 11, 2007) (incorporating Issues & Decision Mem., A-821–819, ARP 9–07, cmt. 1 (Sept. 2007), *available at* http://ia.ita.doc.gov/frn/index.html) & *Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results & Final Rescission in Part of Antidumping Duty Admin. Review*, 67 Fed. Reg. 78,417 (Dec. 24, 2002) (incorporating Issues & Decision Mem., A-583–816, ARP 12–02, cmt. 8 (Dec. 17, 2002), *available at* http://ia.ita.doc.gov/frn/index.html)). Upon reviewing these decisions and others cited by the parties, the court agrees with Union that the so-called "practice" is subject to exceptions. What Commerce describes as its practice is at most a preference for using the financial statement most closely corresponding to the POR, a preference that Commerce does not observe when it finds sufficient reason to use a different financial statement or statements. Nevertheless, Union's objection is to no avail. On the undisputed facts of this case, the logic of using the 2007 financial statements based on correspondence with the POR is sufficient by itself to demonstrate the reasonableness of Commerce's choice to use the 2007 statements, even if the preference, due to inconsistency in application, would not qualify as an agency practice.

Union argues in the alternative that Commerce should have calculated G&A and interest expense ratios by combining the 2006 and 2007 financial statements to "be closer to satisfying Commerce's legal obligation of allocating costs on a basis that 'reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review.'" Pl.'s Br. 27–28 (citing *Uruguay Round Agreements Act, Statement of Administrative*

questionnaire response was submitted.'" Pl.'s Br. 25 (citing *Final Determination in the Antidumping Investigation of Light-Walled Rectangular Pipe & Tube from Mexico*, 74 Fed. Reg. 53,677 (Sept. 2, 2004); Issues & Decisions Mem., A-201–832, ARP 9–04, at 64–65 (Sept. 2, 2004), *available at* http://ia.ita.doc.gov/frn/index.html). The court finds this argument unconvincing: it relies on how Commerce calculated G&A and interest expenses in an investigation in which the period of review was divided evenly between two fiscal years, with six months covered by each. *Id.*

Action, H.R. Doc. No. 103–316, vol. 1, at 835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4172). Under this alternative approach, the G&A and interest expense ratios would be based on twelve months of data corresponding to the POR and twelve months of data that pertain to time periods outside the POR. On the record facts, the alternative approach does not offer clear advantages over Commerce's approach of using financial statements for the single year that most closely corresponds to the POR, such that Commerce's approach must be found unreasonable. The court rejects, also, Union's argument that Commerce impermissibly failed to give adequate consideration to this suggested alternative. *Id*. The Decision Memorandum indicated that using the financial statements for two years was "not warranted in this case." *Decision Mem.* 15. Although this conclusory statement leaves much to be desired, it is sufficient when read in the context of the Decision Memorandum as a whole and in view of the obvious point that, outside of a financial statement with perfect correspondence to the POR, some compromise in the choice of data always will be necessary. *See id.* at 14–15.

B. On Remand, Commerce is Required to Review and Reconsider the Model Match Methodology it Applied to Union's Sales

An appendix to Commerce's questionnaire specified twelve model match criteria for CORE, the first of which, termed "type," is at issue in this case. *Letter from Program Manager Office of AD/CVD Operations 3 to Dongbu* appendix IV (Dec. 6, 2007) (Admin. R. Doc. No. 4454). The questionnaire directed respondents to classify each of their CORE products within one of four type categories: (1) "Clad (metals bonded by the hot-rolling process), less than 3/16″ in thickness"; (2) Coated/plated with metal: Painted, or coated with organic silicate, Polyvinylidene Fluoride ("PVDF"); (3) Coated/plated with metal: Painted, or coated with organic silicate, All Other (*i.e.*, other than PVDF); and (4) "Not painted, and not coated with organic silicate." *Id*. Union made sales, both in the United States and in its home market, Korea, of unpainted CORE products, CORE products painted with PVDF, and CORE coated with other paints. Pl.'s Br. 6. Union's home market sales, but not its U.S. sales, also included sales of CORE that was coated with plastic film. *Id*. In responding to Commerce's questionnaire, Union reported its sales according to the Department's type categories but proposed an additional type category: "Coated/plated with metal: Laminated with film." *Letter from Union to the Sec'y of Commerce* 6–126, at 6 (Feb. 4, 2008) (Admin. R. Doc. No. 4530) ("*Union's Section B Resp.*"). Union argued to the Department that its laminated CORE products were distinguished from its

painted CORE because, *inter alia*, they underwent a different production process, were physically different because they were coated with plastic film, and were costlier. *Id.* at 6; *Union's Supplemental Resp.* 23–24. Rejecting Union's proposed additional type category, Commerce placed Union's home market sales of laminated CORE within the type category for "All Other" painted CORE. *Decision Mem.* 7–8.

Before the court, Union argues that Commerce erred in placing laminated CORE in the third type category, for "other painted" products, despite differences in cost, price, commercial identity, and use. Pl.'s Br. 28–36. Union points to record evidence that its laminated products have physical properties that cannot be achieved by painting, such as the unrestricted expression of various patterns, superior durability, and the use of environmentally-friendly material. *Id.* at 30. According to Union, Commerce improperly relied on its analysis from previous administrative reviews to justify grouping within the same type category two distinctly different classes of products. *Id.* at 34.

Defendant proposes a voluntary remand under which Commerce would "review and reconsider its model match methodology including . . . [r]econsidering the product classification of laminates and other painted products and addressing all of the parties' arguments regarding that product classification." Def.'s Proposed Order (May 24, 2010). Defendant's proposed remand also would direct Commerce to consider "the effect of any Court determination regarding Commerce's remand determination in *Union Steel v. United States*, Ct. Int'l Trade No. 08–00101." *Id*. In that remand determination, which the court recently held to be contrary to law, Commerce decided not to change its model match methodology and thereby rejected Union's proposal in the thirteenth review to establish a separate model match type-category for laminated CORE. *Union Steel v. United States*, 35 CIT __, __, Slip Op. 11–3, at 28–29 (Jan. 11, 2011). The court concluded that Commerce erred when it determined on the record in the thirteenth review that laminated CORE and painted, non-laminated CORE could be compared as merchandise "identical in physical characteristics" according to section 771(16)(A) of the Act, 19 U.S.C. § 1677(16)(A). *Id.* at __, Slip Op. 11–3, at 28–29. The court concluded that the record in that review lacked substantial evidence to support a finding that the physical differences between laminated and non-laminated, painted CORE were "minor and not commercially significant." *Id.* at __, Slip Op. 11–3, at 25. The court ordered a second remand, under which Commerce either must reopen the record to re-investigate the issue of whether the physical differences are minor

and not commercially significant or must modify its model match methodology so that laminated CORE and painted CORE are not compared as identical merchandise according to 19 U.S.C. § 1677(16)(A). *Id.* at __, Slip Op. 11–3, at 29.

In its brief supporting its motion for judgment on the agency record, Union sought a remand under which the court would order Commerce to place laminated CORE within a separate type category. Pl.'s Br. 40. In its reply brief, Union does not state that it opposes the government's request for a voluntary remand and takes the position that a remand is appropriate to allow Commerce to address Union's argument that classifying laminated CORE as painted CORE is not supported by substantial evidence on the record. Union's Reply 13–14. Defendant-intervenors argue that the Department's model match methodology is supported by substantial evidence and otherwise consistent with law. U.S. Steel's Opp'n 26–37; Nucor's Resp. 16–24.

An agency may request a voluntary remand without confessing error. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1027–30 (Fed. Cir. 2001). The court concludes that it is appropriate to grant defendant's request for a remand and will issue remand instructions in essentially the form proposed in defendant's draft order, but updated to reflect the significant development that has occurred since defendant filed its draft remand order, *i.e.*, the court's decision in *Union Steel*, 35 CIT at __, Slip Op. 11–3, at 28–29, addressing Union's challenge to the model match issue presented in the thirteenth review.

The Decision Memorandum confirms that Commerce, in the fourteenth review, did not change the model match methodology it applied in the thirteenth review. *Decision Mem.* 7–8. Therefore, the court concludes that Commerce again compared laminated CORE with painted, non-laminated CORE as identical merchandise according to 19 U.S.C. § 1677(16)(A). As the court held in *Union Steel*, the Department's doing so is unlawful absent a finding of fact, supported by record evidence, that laminated CORE and painted, non-laminated CORE are "identical in physical characteristics" within the meaning of that statutory provision. *Union Steel*, 35 CIT at __, Slip Op. 11–3, at 28–29. The court will issue a remand order consistent with this holding and defendant's proposal.[6]

[6] The court's order sets forth a schedule for the remand proceeding parallel to that ordered in *United States Steel Corporation v. United States*, Consol. Court No. 09–156 (Feb. 15, 2011) ("*US Steel*"), so that the remand redetermination filed pursuant to this Opinion and Order will take into account any other adjustments to redetermined dumping margins resulting from the court's remand order in *US Steel*, which pertains to the same administrative review that is the subject of this litigation.

C. Commerce's Use of Zeroing in the Final Results Was Lawful

Plaintiff's third claim challenges the method Commerce used to calculate Union's weighted-average dumping margin. Compl. ¶¶ 8–15. To calculate a weighted-average dumping margin in an administrative review, Commerce first must determine, for each entry of subject merchandise falling within the period of review, the normal value and the export price (or constructed export price). 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines a margin for each entry according to the amount by which the normal value exceeds the export price or constructed export price. 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677(35)(A); *Decision Mem.* 9–10. If the export price or constructed export price on a particular entry is higher than normal value, Commerce, in calculating a weighted-average margin, assigns a margin of zero to the entry instead of a negative margin. *See Decision Mem.* 9–10. Finally, Commerce aggregates these individual margins in determining a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

Plaintiff argues that Commerce's construction of 19 U.S.C. § 1677(35), pursuant to which Commerce engaged in zeroing in this administrative review, is unreasonable and therefore not in accordance with law. Pl.'s Br. 36–40. Union acknowledges that the United States Court of Appeals for the Federal Circuit ("Court of Appeals") and the Court of International Trade consistently have upheld Commerce's practice of zeroing in administrative reviews. *Id.* at 36–37. Union argues, however, that a determination Commerce issued under section 123 of the Uruguay Round Agreements Act, 19 U.S.C. § 3533(g) (2006), to implement recommendations of the World Trade Organization ("WTO") Dispute Settlement Body ("Section 123 Determination") adopted a new interpretation of § 1677(35) that justifies a fresh review of the zeroing issue by this court. Compl. ¶¶ 11–15 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006) ("*Section 123 Determination*")). According to Union, in issuing the Section 123 Determination that discontinued zeroing in average-toaverage comparisons in antidumping investigations, "Commerce did not explain why it was appropriate to interpret the statutory provision at issue . . . as having one meaning in the case of antidumping investigations and a different meaning in administrative reviews." Compl. ¶12. Union argues that on January 9, 2007, the WTO Appellate Body rejected the use of zeroing in antidumping administrative reviews on an "as such"

basis (citing Appellate Body Report, *United States– Measures Relating to Zeroing in Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007)), and that "[t]o date, however, Commerce has not modified its position, as expressed in the Final Section 123 Determination[,] that it will continue to interpret the statute as providing for zeroing in administrative reviews." Compl. ¶ 12, n.2. Union concludes that Commerce's continued use of zeroing in administrative reviews must be rejected by the court because it "is unsupported by substantial evidence and is otherwise not in accordance with law." Compl. ¶ 15.

The Court of International Trade rejected Union's previous challenge to the zeroing methodology in *Union Steel v. United States*, 33 CIT __, __, 645 F. Supp. 2d 1298, 1305–10 (2009), and must do so again in this case. Union's claim is contrary to precedent of the Court of Appeals, which consistently has upheld the Department's use of zeroing in administrative reviews. *SKF USA Inc. v. United States*, No. 2010–1128, 2011 WL 73179, at *8 (Fed. Cir. Jan. 7, 2011); *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290–91 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007). The Court of Appeals specifically has affirmed the Department's construing 19 U.S.C. § 1677(35) to allow zeroing in reviews even though the Department discontinued zeroing in average-to-average comparisons in investigations. *See SKF USA*, 2011 WL 73179, at *8 ("Even after Commerce changed its policy with respect to original investigations, we have held that Commerce's application of zeroing to administrative reviews is not inconsistent with the statute.") (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007)). The Court of Appeals also has rejected Union's argument that the zeroing practice conflicts with U.S. obligations under the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 (1994), concluding that "WTO decisions do not change United States law unless implemented pursuant to an express statutory scheme." *SKF USA*, 2011 WL 73179, at *8 (citing *NSK Ltd.*, 510 F.3d at 1379–80; *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005)). Union admits in its complaint that the United States has not implemented WTO decisions disallowing the zeroing practice in administrative reviews. Compl. ¶ 12 n.2.

For these various reasons, the court upholds the Department's use of zeroing in the administrative review.

IV. CONCLUSION AND ORDER

The court concludes that Commerce's calculation of Union's G&A and interest expense ratios was lawful. Further, the court concludes that remand is appropriate with respect to the model match issue and that it would be appropriate to grant defendant's request for voluntary remand in the circumstances of this case. Finally, the court concludes that the Final Results must be affirmed with respect to the Department's use of zeroing based on binding Court of Appeals precedent. Therefore, upon consideration of all proceedings and submissions herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's Motion for Judgment upon the Agency Record, be, and hereby is, GRANTED only to the extent that a remand is hereby ordered under which Commerce is directed to review and reconsider its model match methodology and DENIED to the extent that such motion requested the court to set aside the manner by which Commerce calculated general, administrative, and interest expenses and Commerce's decision to determine dumping margins using the zeroing methodology in *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review & Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) ("Final Results"); it is further

ORDERED that Commerce, upon remand, shall review and reconsider its "model match" methodology, including its decision in the Final Results to deny the request of Union Steel Manufacturing Co., Ltd. ("Union") for a revision of that model match methodology, by which Commerce compared the types of subject merchandise in plaintiff's U.S. sales with the types of foreign like products in plaintiff's sales in its home market; it is further

ORDERED that the Department may reopen the record to investigate whether only minor and commercially insignificant physical differences distinguish Union's laminated products from the non-laminated products to which the Department compared Union's laminated products; it is further

ORDERED that if substantial record evidence does not support a finding that only minor and commercially insignificant physical differences distinguish Union's laminated products from the non-laminated products to which the Department compared Union's laminated products, then the Department must alter the model match methodology that was applied in the Final Results so that laminated and non-laminated CORE products are not compared according to 19 U.S.C. § 1677(16)(A) and recalculate any affected dumping margins; it is further

ORDERED that the Department's remand results must comply with this Opinion and Order, be supported by substantial record evidence, be supported by adequate reasoning, and be in all respects in accordance with law; and it is further

ORDERED that the Department shall have ninety (90) days from the date of this Opinion and Order to file its remand results, that plaintiff, plaintiff-intervenor, and defendant-intervenors shall have thirty (30) days from the filing of those results to file comments thereon with the court, and that defendant shall have fifteen (15) days thereafter to file any reply to such comments.

Dated: February 15, 2011
New York, New York

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

Slip Op. 11–19

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

Before: Timothy C. Stanceu, Judge
Consol. Court No. 09–00156

[Remanding for reconsideration and redetermination the final results of an administrative review of the antidumping order on certain corrosion-resistant carbon steel flat products from the Republic of Korea]

Dated: February 15, 2011

Skadden, Arps, Slate, Meagher & Flom, LLP (*Jeffrey D. Gerrish* and *Stephen J. Narkin*) for plaintiff United States Steel Corporation.

Wiley Rein, LLP (*Timothy C. Brightbill*, *Lori E. Scheetz*, and *Alan H. Price*) for plaintiff-intervenor Nucor Corporation.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant United States.

Troutman Sanders LLP (*Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*) for defendant-intervenor Union Steel.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Jaehong D. Park*, *Bryce V. Bittner*, *Jarrod M. Goldfeder*, *Lisa-Marie W. Ross*, and *Natalya D. Dobrowolsky*) for defendant-intervenors POSCO and Pohang Coated Steel Co., Ltd.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Jaehong D. Park*, *Bryce V. Bittner*, *Jarrod M. Goldfeder*, *Lisa-Marie W. Ross*, and *Natalya D. Dobrowolsky*) for defendant-intervenor Hyundai Hysco.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

Plaintiff United States Steel Corporation ("U.S. Steel"), a domestic manufacturer of corrosion-resistant carbon steel flat products ("CORE"), brought this action under section 516A of the Tariff Act of 1930 ("Tariff Act" or the "Act"), 19 U.S.C. § 1516a (2006), to contest a determination (the "Final Results") that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") issued in the fourteenth periodic administrative review of an antidumping duty order on imports of certain CORE from the Republic of Korea ("subject merchandise"). U.S. Steel Compl. ¶¶ 1, 3; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review & Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) ("*Final Results*"). In an action (Court No. 09–00152) consolidated with that brought by U.S. Steel, Nucor Corporation ("Nucor"), a domestic manufacturer of CORE, also contested the Final Results.

Before the court are U.S. Steel's and Nucor's Rule 56.2 motions for judgment upon the agency record. U.S. Steel claims that Commerce, when determining the cost of production of subject merchandise produced by respondent Union Steel Manufacturing Co., Ltd. ("Union"), acted in disregard of its own regulation in declining to adjust data pertaining to the costs Union incurred in obtaining from suppliers affiliated with Union a production input, "steel substrate" (carbon steel coil used to make the subject merchandise), based on a finding that any such adjustment would be negligible. Mem. in Supp. of Pl.'s Mot. for J. on the Agency R. under Rule 56.2, at 2 ("U.S. Steel Mem."). Nucor objects to other decisions Commerce made affecting the valuation of Union's purchases of steel substrate from suppliers affiliated with Union. Br. in Supp. of Nucor Corp.'s Rule 56.2 Mot. 1 ("Nucor Br.") . Nucor also claims that Commerce erred in determining that Pohang Iron & Steel Co., Ltd. ("POSCO") and Pohang Coated Steel Co., Ltd. (collectively, the "POSCO Group"), producers of subject merchandise affiliated with Union, should not be "collapsed" with Union, *i.e.* treated as a single entity, for purposes of the administrative review. *Id.* at 2.

Defendant voluntarily requests a remand order under which the Department would reconsider its determination that potential adjustments to Union's reported costs for acquiring steel substrate should be disregarded as negligible. Def.'s Resp. to Pls.' Mot. for J.

upon the Agency R. 1–2 ("Def. Resp.") . U.S. Steel supports the government's remand request, which the court will grant. Reply Br. in Supp. of Pl.'s Mot. for J. on the Agency R. under Rule 56.2, at 2. With one exception, the court finds merit in Nucor's claims and includes in the remand order instructions under which Commerce must address these claims.

II. BACKGROUND

Commerce published the antidumping duty order on corrosion-resistant carbon steel flat products in 1993. *Antidumping Duty Orders on Certain Cold-Rolled Carbon Steel Flat Products & Certain Corrosion-Resistant Carbon Steel Flat Products From Korea*, 58 Fed. Reg. 44,159 (Aug. 19, 1993). On September 25, 2007, Commerce initiated the fourteenth review of the order, which pertains to imports of subject merchandise made during the period of August 1, 2006 through July 31, 2007 (the "period of review"). *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 72 Fed. Reg. 54,428, 54,428 (Sept. 25, 2007). On September 9, 2008, Commerce issued the preliminary results of the review ("Preliminary Results"). *Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Prelim. Results of the Antidumping Duty Admin. Review*, 73 Fed. Reg. 52,267 (Sept. 9, 2008) ("*Prelim. Results*"). Following publication on March 16, 2009 of the Final Results, 74 Fed. Reg. at 11,082, U.S. Steel and Nucor instituted the current actions. U.S. Steel Compl.; Nucor Compl.

III. DISCUSSION

The court exercises jurisdiction pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants the Court of International Trade exclusive jurisdiction over any civil action commenced under 19 U.S.C. § 1516a. The court reviews the Final Results based on the agency record. *See* Customs Courts Act of 1980, § 301, 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b)(1)(B)(i). 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). "Substantial evidence is more than a mere scintilla. It means 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).

A. Remand Is Appropriate to Allow the Department to Reconsider Its Finding that Potential Adjustments to Union's Steel Substrate Costs Should Be Disregarded as Negligible

Commerce may "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise." Tariff Act, § 777A(a)(2), 19 U.S.C. § 1677f-l(a)(2). The Department's regulations, in 19 C.F.R. § 351.413 (2007), set forth a standard of less than 0.33% *ad valorem* that Commerce ordinarily applies to determine whether an adjustment is insignificant.[1]

U.S. Steel challenges the Department's valuation of steel substrate that Union purchased from affiliated suppliers. U.S. Steel Mem. 2. U.S. Steel argues that under both the "transactions disregarded rule" of section 773(f)(2) of the Tariff Act, 19 U.S.C. § 1677b(f)(2), and the "major input rule" of section 773(f)(3) of the Tariff Act, 19 U.S.C. § 1677b(f)(3), Commerce erred in valuing an input obtained from affiliated suppliers using the transfer prices, which U.S. Steel alleges to have been lower than the market prices. U.S. Steel Mem. 12.[2] U.S. Steel claims that Commerce should have made an upward adjustment to those prices and unlawfully disregarded the standard of 19 C.F.R. § 351.413 in deciding to disregard any adjustment as insignificant. *Id*. at 12, 19.

Defendant responds by stating that "because Commerce's finding that certain potential adjustments under the major input rule and transactions disregarded rule were negligible may have been based

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[1] The regulation provides that,

> Ordinarily, under section 777A(a)(2) of the Act [(*i.e.*, 19 U.S.C. § 1677f-1)], an "insignificant adjustment" is any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price, or normal value, as the case may be. Groups of adjustments are adjustments for differences in circumstances of sale under § 351.410, adjustments for differences in the physical characteristics of the merchandise under § 351.411, and adjustments for differences in the levels of trade under § 351.412."

19 C.F.R. § 351.413 (2007).

[2] In the "transactions disregarded" rule, the antidumping law provides that,

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.

19 U.S.C. § 1677b(f)(2) (2006). The "major input" rule provides that,

> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2) [19 U.S.C. § 1677b(f)(2)].

19 U.S.C. § 1677b(f)(3).

on erroneous calculations, we respectfully request a remand to reexamine the accuracy of those calculations, to make any necessary corrections to those calculations, and to reconsider, if appropriate, the treatment of those adjustments." Def. Resp. 6. The court concludes that Commerce should be granted the opportunity on remand to reconsider the decision to disregard the adjustments as negligible and to make all changes that may be required to resolve this issue in accordance with the antidumping statute and regulations.

B. Upon Remand, Commerce Must Reconsider its Decision Not to Apply the Major Input Rule to Union's Purchases of Steel Substrate from the POSCO Group

In the Final Results, Commerce applied the major input rule to only one of Union's related suppliers of steel substrate. Issues & Decisions Mem., A-580–816, ARP 3–09, at 20 (Mar. 9, 2009) (Admin. R. Doc. No. 4868) ("*Decision Mem.*"); *Final Results*, 74 Fed. Reg. at 11,083. Nucor claims that Commerce erred in declining to apply the major input rule to Union's steel substrate purchases from all other suppliers related to Union, including the POSCO Group. Nucor Br. 10. In the issues and decisions memorandum that Commerce incorporated by reference in the Final Results ("Decision Memorandum"), *Final Results*, 74 Fed. Reg. at 11,083, Commerce based its decision not to apply the major input rule to the POSCO Group on a finding of fact that "the record shows that the POSCO Group, and certain other affiliated suppliers, accounted for insignificant percentages of Union's total purchases of substrate during the POR." *Decision Mem.* 20. With respect to the POSCO Group, Nucor cites to record evidence demonstrating that Union's purchases of steel substrate from the POSCO Group were not insignificant as a percentage of Union's total substrate purchases. Nucor Br. 10 ("This determination was mathematically incorrect and therefore unsupported by substantial evidence."). Defendant now concedes that the Department erred in stating in the Decision Memorandum that Union's purchases from the POSCO Group were an insignificant percentage of Union's total substrate purchases, describing that finding as an "inadvertent error." Def. Resp. 13. According to defendant's argument, the real reason that Commerce declined to apply the major input rule to these purchases was that "there was insufficient information on the record to conduct a major input analysis." *Id.* Defendant adds that "[i]n its proprietary calculation memorandum, Commerce fully explains the reasons why it declined to apply the major input rule to the POSCO Group purchases." *Id.*

The court is required to review a determination of an agency on the basis of the reasoning the agency puts forth. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."). The Decision Memorandum, unlike the "proprietary calculation memorandum" to which defendant refers therein, is incorporated by reference into the Final Results and, therefore, presents the reasoning on which the court must consider the Department's decision not to apply the major input rule to the POSCO Group. Because that reasoning is based on a finding of fact that is, as defendant concedes, unsupported by substantial record evidence, the decision not to apply the major input rule to the valuation of Union's purchases of substrate from the POSCO Group must be reviewed and reconsidered on remand.

C. On Remand, Commerce Must Reconsider, and Explain Satisfactorily, its Method of Applying the Major Input Rule to Value the Steel Substrate that Union Obtained from JFE Steel through Purchases from a Trading Company Affiliated with Union

The one supplier of steel substrate affiliated with Union to which Commerce applied the major input rule, JFE Steel, sold to Union through a trading company also affiliated with Union. Br. in Opp'n to the Mot. of Pls. U.S. Steel Corp. & Nucor Corp. for J. upon the Agency R. 12 ("Union Br.") (disclosing that Commerce applied the major input rule to JFE Steel). *Decision Mem.* 21. ("We note that Union purchased various forms of steel substrate manufactured by [a] certain affiliated supplier and sold to Union through a certain affiliated supplier during the POR."). In applying the major input rule, under which Commerce is to value the input on the basis of the information available regarding the cost of production, *see* 19 U.S.C. § 1677b(f)(3), Commerce obtained and examined data from the trading company, even though the trading company was not the producer, *Decision Mem.* 21. As it had for Union's purchases from the other affiliated suppliers of steel substrate, Commerce ultimately decided not to make any adjustment to the data on Union's cost of acquisition. *Id.*

Nucor claims that Commerce misapplied the major input rule in requesting and examining only data from the trading company and not cost of production data from the actual producer. Nucor Br. 10–11. Although Nucor acknowledges that application of the major input rule is discretionary, it argues that once Commerce decided to apply the major input rule, it was required to value the input according to

information on the actual cost of production. *Id.* at 11 ("In this case, the Tariff Act explicitly states that '[i]f, in the case of a transaction between affiliated persons involving the *production* by one of such persons of a major input to the merchandise . . . then the administering authority may determine the value of the major input on the basis of the information available regarding such *cost of production*.'" (alterations in original) (citing 19 U.S.C. § 1677b(f)(3))).

Defendant argues that Commerce complied with the major input rule by comparing the trading company's average selling price to Union with the "cost of production," which it based on the cost the trading company incurred in purchasing substrate from the producer and the trading company's selling, general, and administrative expenses. Def. Resp. 10. Defendant bases its argument on the language of 19 U.S.C. § 1677b(f)(3), emphasizing that the statute allows valuation "*on the basis of the information available* regarding such cost of production." *Id.* at 9 (quoting 19 U.S.C. § 1677b(f)(3)). According to defendant, Commerce could base its application of the major input rule on data from the trading company because those data were the best information available, in that the record contained no cost of production information from the producer. *Id.* at 10.

The court must consider Commerce's decision based on the reasoning the Department put forth. *Chenery Corp.*, 332 U.S. at 196. The Decision Memorandum, however, contains only the briefest explanation of the reasoning underlying the Department's decision to request and use the information from the trading company. The Decision Memorandum explains that "[b]ecause this certain affiliated supplier is a trading company, and therefore does not manufacture, we requested and obtained its weighted average *purchase costs* for certain steel substrates during the POR." *Decision Mem*. 21 (emphasis added). There is no explanation in the Decision Memorandum of why Commerce did not seek to obtain production cost information from the producer rather than purchase cost information from the trading company or why it concluded that purchase cost information from the trading company would suffice for application of the major input rule. Defendant, in its response to Nucor's motion, argues that there was no guarantee that the trading company would have responded to an information request, noting that the trading company was not a party to the proceeding, could not have been compelled to provide information, and, in a previous segment of the proceeding, had refused to provide its cost of production data. Def. Resp. 10–11. This explanation appears nowhere in the Decision Memorandum and, therefore, does not constitute a statement of the Department's reasoning for purposes of judicial review.

The Decision Memorandum also states, confusingly, that "[t]he Department determines that Union's purchases of steel substrate from a certain supplier constitute a major input and, therefore, we examined these purchases as directed by section 773(f)(3) of the Act [19 U.S.C. § 1677b(f)(3)] and 19 CFR 351.407(b)(2)." *Decision Mem.* 20–21. The statutory provision it cites, section 773(f)(3) of the Tariff Act, refers to valuing a major input based on the cost of production, but the regulatory provision it cites refers to valuing a major input based on market value. *See* 19 C.F.R. § 351.407(b) ("For purposes of section 773(f)(3) of the Act, the Secretary normally will determine the value of a major input purchased from an affiliated person based on the higher of . . . (2) the amount usually reflected in sales of the major input in the market under consideration . . . ."). Because the Department gives no indication elsewhere that it intended to value the input based on market value as opposed to cost of production, it is arguable that the court should read the Decision Memorandum as intending to refer to 19 C.F.R. § 351.407(b)(3) ("The cost to the affiliated person of producing the major input.").[3] However, in view of Commerce's own finding that the record did not contain data on the producer's costs, the Department's statement of its reasoning is unsatisfactorily opaque even when read in this way. Due to the deficiencies in the explanation put forth in the Decision Memorandum, the court will remand for reconsideration and explanation the Department's valuation of the steel substrate produced by JFE Steel.

D. Commerce Did Not Err in Declining to Apply the Major Input Rule to Union's Other Steel Substrate Suppliers

The court next considers Nucor's claim that the Department acted unlawfully in applying the transaction disregarded rule, rather than the major input rule, to Union's affiliated suppliers of steel substrate other than the trading company and the POSCO Group. Nucor Br. 14–18. In the Decision Memorandum, Commerce explained that "[i]n determining whether an input is considered 'major,' among other factors, the Department looks at both the percentage of the input obtained from affiliated suppliers (as opposed to unaffiliated suppliers) and the percentage the individual element represents in the

[3] The regulation provides that:

> For purposes of section 773(f)(3) of the Act [19 U.S.C. § 1677b(f)(3)], the Secretary normally will determine the value of a major input purchased from an affiliated person based on the higher of:
>
> (1) The price paid by the exporter or producer to the affiliated person for the major input;
>
> (2) The amount usually reflected in sales of the major input in the market under consideration; or
>
> (3) The cost to the affiliated person of producing the major input.

19 C.F.R. § 351.407(b).

product's cost of manufacture (COM)." *Decision Mem.* 20. Commerce found that only purchases of steel substrate from a certain affiliated supplier (*i.e.* the trading company, as discussed previously) qualified as major inputs under 19 U.S.C. § 1677b(f)(3) and 19 C.F.R. § 351.407(b) and therefore applied the major input rule to those purchases of steel substrate. *Decision Mem.* 20. For Union's purchases of steel substrate from all other affiliated suppliers, including in particular the POSCO Group, Commerce applied the transactions disregarded rule. *Id.* Commerce found, pursuant to 19 U.S.C. § 1677b(f)(3), that the purchases from the other affiliated suppliers and the POSCO Group "accounted for insignificant percentages of Union's total purchases of substrate during the POR." *Id.*

As discussed previously, Nucor concedes that the application of the major input rule is discretionary. Nucor Br. 11; *see* 19 U.S.C. § 1677b(f)(3) (providing that the Department, in the circumstance contemplated by the major input provision, "may determine the value of the major input on the basis of the information available regarding such cost of production . . . ."). Nucor's argument is that, despite the discretion afforded by § 1677b(f)(3), Commerce, without adequate explanation, departed in this case from its past practice of aggregating all purchases of the same input from various affiliates when determining whether an input is considered major for purposes of deciding whether to apply the major input rule. Nucor Br. 15. Nucor invokes the established principle that an agency must either conform itself to prior decisions or explain the reasons for its departure. *Id.* Nucor characterizes the decision to depart from this alleged practice as "unsupported by substantial evidence," arguing that the record demonstrates that a large percentage of Union's steel substrates were purchased from affiliated suppliers and that "steel substrates are by far the most significant input to the production of CORE . . . ." *Id.* at 17.

Defendant takes issue with Nucor's contention that the Department's decision not to apply the major input rule to the suppliers in question was a departure from practice. Def. Resp. 15. Defendant cites a recent administrative review in which "Commerce found that an input purchased by one affiliated supplier was not significant in relation to the total costs incurred to produce the merchandise" and "excluded that company's input from the major input rule while subjecting the same input from another affiliated supplier to the major input rule." *Id.* at 15–16 (citing *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Admin. Review & Partial Rescission of Antidumping Duty Admin. Review*, 72 Fed. Reg. 27,802 (May 17, 2007); Issues & Decision

Mem., A-549–817, ARP 5–07, cmt. 3 (May 7, 2007), *available at* http://ia.ita.doc.gov/frn/index.html). Defendant also cites the preamble accompanying the promulgation of the Department's regulations in support of the Department's decision to apply the major input rule to fewer than all affiliated suppliers of steel substrate. *Id.* at 15 (citing *Antidumping Duties; Countervailing Duties; Final rule*, 62 Fed. Reg. 27,295, 27,336 (May 19, 1997) ("The determination of which inputs are 'major' must be made on a case-by-case basis taking into consideration the nature of the product, its inputs, and the company-specific information on the record.")).

As defendant's citation to a recent review demonstrates, what Nucor considers to be a Departmental "practice" has not been uniformly followed. The court, therefore, will not reject the Department's explanation of its reasons for declining to apply the major input rule to affiliates other than the POSCO Group and the trading company for failure to explain a departure from an alleged agency practice. The court also concludes that substantial evidence supports the Department's finding that the affiliated suppliers in question "accounted for insignificant percentages of Union's total purchases of substrate during the POR." *See Decision Mem.* 20.

In conclusion, the court rejects Nucor's claim that Commerce acted contrary to law in declining to apply the major input rule to the affiliated suppliers other than the POSCO Group and the trading company.

E. Commerce Based its Decision Not to Collapse Union and the POSCO Group Partly on a Finding of Fact that Is Unsupported by Substantial Evidence on the Record

Acting under its regulation, 19 C.F.R. § 351.401(f)(1), Commerce decided not to treat Union and the POSCO Group as a single entity, *i.e.*, not to "collapse" the two affiliated parties, for purposes of the review. *Decision Mem.* 22–23. The regulation provides that Commerce will collapse two affiliated producers if it makes the following two findings of fact: (1) the producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (2) there is a significant potential for the manipulation of price or production. 19 C.F.R. § 351.401(f)(1). According to the regulation, the factors Commerce considers when identifying a "significant potential for the manipulation of price or production" include, but are not limited to: "[t]he level of common ownership;" "[t]he extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm;" and "[w]hether operations are intertwined, such as through the sharing of sales information,

involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers." *Id.* § 351.401(f)(2).

Nucor challenges the decision not to collapse Union and the POSCO Group. Nucor objects, first, that Commerce found in the Preliminary Results that the two companies have production facilities for manufacturing subject merchandise that would not require substantial retooling to restructure manufacturing priorities but then, contrary to the record evidence, reversed that finding in the Final Results. Nucor Br. 20. Nucor contends, second, that Commerce erroneously found that there was no potential for manipulation of price or production. *Id.* at 21. In making this second argument, Nucor takes issue with a finding by Commerce that there were no significant transactions between Union and the POSCO Group during the period of review. *Id.* at 19–20. Nucor's second argument relies on a memorandum of understanding between the POSCO Group and Union's parent company, which Nucor construes to signify "a real and significant potential for manipulation" that meets "the Department's forward-looking test for collapsing two companies." *Id.* at 22; Reply Br. of Nucor Corp. 13; Def. Resp. 20 (discussing the "memorandum of understanding").

Nucor cites a pre-decisional memorandum ("Collapsing Memorandum" or "predecisional memorandum") in contending that Commerce, in the Preliminary Results, found that production facilities of Union and the POSCO Group would not require substantial retooling to restructure manufacturing priorities. Nucor Br. 20 (citing *Mem. to Dir., AD / CVD Operations Office 3*, at 4 (Sept. 2, 2008) (Admin R. Doc. No. 4733)). Based on its review of the Collapsing Memorandum, the court concludes that Nucor is correct in its characterization of the finding stated therein. As published, the Preliminary Results make no mention of such a finding. *See Prelim. Results*, 73 Fed. Reg. at 52,267–72. But referring to the Preliminary Results, the Decision Memorandum states that "[t]he Department also found that the POSCO Group and Union did *not* fit the criteria of 19 CFR 351.401(f), where two or more producers have production facilities for similar or identical products that would not require substantial retooling of either facility to restructure manufacturing priorities." *Decision Mem.* 22 (emphasis added).

The discussions in the Decision Memorandum and the predecisional memorandum appear to be inconsistent on what the Department decided in the Preliminary Results as to possible retooling of manufacturing facilities. The Decision Memorandum makes no separate finding on this point; it appears that Commerce considered

discussion of this issue unnecessary due to its finding that "there is no significant potential for the POSCO Group and Union to manipulate the price or cost of CORE exported to the U.S." *Id.* at 23. As support for the latter finding, the Decision Memorandum states that "the POSCO Group['s] and Union's operations are not intertwined, such as through common ownership, sharing of board members, sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between affiliated producers." *Id.* at 22. Invoking the criteria of 19 C.F.R. § 351.401(f)(2), the Decision Memorandum concludes that "there is no evidence that the POSCO Group and Union share sales information, production and pricing decisions, facilities, or employees" and that "[t]here is no evidence on the record of this proceeding which indicates that the POSCO Group and Union are engaged in any significant transactions during the POR." *Id.*

Regarding "the level of common ownership" criterion of 19 C.F.R. § 351.401(f)(2), the record evidence is that common ownership existed between the two entities but also that it was, as defendant argues, a small percentage of ownership. Def. Resp. 21. While the Department's application of the "common ownership" criterion is supported by substantial record evidence, the same cannot be said of the analysis the Department conducted under the criterion of "significant transactions between the affiliated producers," *see* 19 C.F.R. § 351.401(f). Without elaborating, Commerce found, in the Decision Memorandum, a lack of "any significant transactions" between Union and the POSCO Group during the period of review. *Decision Mem.* 22. Defendant attempts to characterize this finding as one supported by substantial evidence, arguing that "record evidence demonstrated that the POSCO Group made no purchases from Union during the period of review, while Union purchased only a limited amount of input materials from the POSCO Group–accounting for only a small portion of Union's overall purchases." Def. Resp. 19. As discussed previously, defendant concedes that the Department erred in stating in the Decision Memorandum that Union's purchases of steel substrate from the POSCO Group were an insignificant percentage of Union's total steel substrate purchases and describes that finding, as stated in the Decision Memorandum, as an "inadvertent error." *Id.* at 13.

The court holds that the Department erred in stating in the Decision Memorandum its finding that "[t]here is no evidence on the record of this proceeding which indicates that the POSCO Group and Union are engaged in any significant transactions during the POR." *See Decision Mem.* 22. Because that erroneous finding was one of the stated reasons why Commerce decided not to collapse Union and the

POSCO Group, the court must remand for reconsideration the decision not to collapse Union and the POSCO Group. On remand, the Department also must revisit the question of whether the two companies have production facilities for manufacturing subject merchandise that would not require substantial retooling to restructure manufacturing priorities. As discussed previously, the Department answered that question in the affirmative in the pre-decisional memorandum prior to issuance of the Preliminary Results and then, in the Decision Memorandum, mischaracterized its earlier decision.

IV. CONCLUSION AND ORDER

The court will grant defendant's request for a voluntary remand so that Commerce may review and reconsider its finding that adjustments to the valuation of steel substrate that Union obtained from its affiliated suppliers should be disregarded as negligible. On remand, the Department also must review and reconsider its decision not to apply the major input rule to Union's purchases of steel substrate from the POSCO Group, its method of applying the major input rule to value the steel substrate that Union obtained from JFE Steel through purchases from the trading company, and its decision not to collapse Union and the POSCO Group.[4]

ORDER

Based on the court's consideration of *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review & Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) (the "Final Results"), the motions of plaintiffs under USCIT Rule 56.2 for judgment on the agency record, the submissions of all parties, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Rule 56.2 motion of plaintiff United States Steel Corporation be, and hereby is, GRANTED; it is further

ORDERED that the Rule 56.2 motion of plaintiff Nucor Corporation be, and hereby is, GRANTED in part and DENIED in part; it is further

ORDERED that the Final Results be, and hereby are, remanded to the Department for reconsideration and redetermination in accordance with this Opinion and Order; it is further

[4] The court's order sets forth a schedule for the remand proceeding parallel to that ordered in *Union Steel v. United States*, Court No. 09–130 (Feb. 15, 2011) ("*Union*"), so that the remand redetermination filed pursuant to this Opinion and Order will take into account any other adjustments to redetermined dumping margins resulting from the court's remand order in *Union*, which pertains to the same administrative review that is the subject of this litigation.

ORDERED that Commerce, on remand, shall review and reconsider its determinations that potential adjustments to the costs of Union Steel Manufacturing Co., Ltd. ("Union") to purchase steel substrate from affiliated suppliers should be disregarded as negligible; it is further

ORDERED that Commerce, on remand, shall review and reconsider its decision not to apply the major input rule to Union's purchases of steel substrate from Pohang Iron & Steel Co., Ltd. and Pohang Coated Steel Co., Ltd. (collectively, the "POSCO Group"); it is further

ORDERED that Commerce, on remand, shall reconsider its method of applying the major input rule to value the steel substrate that Union obtained from JFE Steel through purchases from a trading company and include a satisfactory explanation for its decisions; it is further

ORDERED that Commerce, on remand, shall review and reconsider its decision not to treat Union and the POSCO Group as a single entity for purposes of the administrative review; it is further

ORDERED that the Department shall file remand results in compliance with this Opinion and Order that are supported by substantial evidence and otherwise in accordance with law; and it is further

ORDERED that the Department shall have ninety (90) days from the date of this Opinion and Order to file its remand results, that plaintiff, plaintiff-intervenor and defendant-intervenors shall have thirty (30) days from the filing of those results to file comments thereon with the court, and that defendant shall have fifteen (15) days thereafter to file any reply to such comments.

Dated: February 15, 2011
New York, New York

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

Slip Op. 11–20

MARSAN GIDA SANAYI VE TICARET A.S., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Court No. 09–00483

[Plaintiff's Motion for Judgment on the Agency Record is denied and the final results of the countervailing duty changed circumstances review are sustained.]

Dated: February 16, 2011

Law Offices of David L. Simon (*David L. Simon*), for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Joshua E. Kurland*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Deborah R. King*), Of Counsel, for the Defendant.

OPINION

Goldberg, Senior Judge:

Introduction

Marsan Gida Sanayi ve Ticaret A.S. ("Marsan" or "Plaintiff"), a Turkish producer and exporter of pasta brought this appeal to contest the final results of the changed circumstances review of the countervailing duty order on pasta from Turkey, published as *Certain Pasta from Turkey: Final Results of Countervailing Duty Changed Circumstances Review*, 74 Fed. Reg. 54,022 (Dep't Commerce Oct. 21, 2009) ("*Final Results*"). The changed circumstances review examined whether Marsan was the successor-in-interest to Gidasa for countervailing duty cash deposit purposes. Commerce determined that Marsan was not the successor to Gidasa. *Id.* at 54,023.[1] Consequently, Commerce determined that Marsan's merchandise was not entitled to Gidasa's countervailing duty cash deposit rate, and instead, should enter under the "all others" cash deposit rate of 9.38 percent. *Id.* Marsan challenges the methodology Commerce employed and its final determination as unsupported by substantial evidence and contrary to law.

Background

A. Commerce's Position on CVD CCRs

In December 2006, several years prior to Marsan's petitions for an antidumping ("AD") and countervailing duty ("CVD") changed circumstances review ("CCR"), Commerce stated it might change the successor-in-interest analysis for CVD CCRs. *See Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Changed Circumstances Review*, 71 Fed. Reg. 75,937 (Dep't Commerce Dec. 19, 2006) ("*Stainless Steel*").

Thus, in January 2007, Commerce published a Federal Register notice indicating its intention to change the successorship analysis in CVD CCRs. *Countervailing Duty Changed Circumstances Reviews: Request for Comment on Agency Practice*, 72 Fed. Reg. 3,107 (Dep't

[1] Commerce determined that Marsan was the successor to Gidasa for antidumping duty cash deposit purposes. *Certain Pasta from Turkey: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 74 Fed. Reg. 26,373 (Dep't Commerce June 2, 2009).

Commerce Jan. 24, 2007) ("*Request for Comment*"). At that time, Commerce applied the same criteria for both AD and CVD successor-in-interest CCRs to examine whether an alleged successor and predecessor company were the same business entity. Commerce's criteria compared the companies' (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base before and after the changed circumstances. *Id.* at 3,108. Commerce stated it may not be appropriate to use the same analysis, given that AD and CVD determinations focus on different issues. *Id.* Commerce noted the analysis focused on pricing behavior, which is less relevant in the CVD context where subsidization, not price discrimination, is the analytical focus. *Id.*

According to Commerce, "an examination that focuses largely or solely on changes in the legal or managerial structure or the productive capacity of a company may overlook other important considerations that also may be relevant in the context of subsidies and countervailing duties." *Id.* In response to the *Request for Comment*, Commerce received comments from two parties, which were summarized in the *Preliminary Results* of Marsan's CVD CCR, published as *Certain Pasta from Turkey: Preliminary Results of Countervailing Duty Changed Circumstances Review*, 74 Fed. Reg. 47,225 (Dep't Commerce Sept. 15, 2009) ("*Preliminary Results*").

B. Marsan's CVD CCR

In August 2007, the Sabanci Group, a Turkish conglomerate and then-owner of Gidasa, agreed to sell Gidasa to MGS Marmara Gida for cash. In March 2008, the parties finalized the agreement. In June 2008, Gidasa's new shareholders changed the name of the company to Marsan. In December 2008, Marsan filed petitions requesting that Commerce conduct CCRs for both the AD and CVD orders on pasta from Turkey.[2] Marsan asserted it was the successor-in-interest to Gidasa for purposes of those orders. Thus, Marsan claimed it was entitled to Gidasa's AD and CVD cash deposit rates.

On January 28, 2009, Commerce published its *Notice of Initiation* regarding Marsan's CVD CCR.[3] *Notice of Initiation of Countervailing Duty Changed Circumstances Review: Certain Pasta from Turkey*, 74

[2] Notice of Countervailing Duty Order: Certain Pasta from Turkey, 61 Fed. Reg. 38,546 (Dep't Commerce July 24, 1996); *Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey*, 61 Fed. Reg. 38,545 (Dep't Commerce July 24, 1996).

[3] Commerce also published a *Notice of Initiation* for the AD CCR in January 2009. *Notice of Initiation of Antidumpting Duty Changed Circumstances Review: Certain Pasta from Turkey*, 74 Fed. Reg. 681 (Dep't Commerce Jan. 7, 2009).

Fed. Reg. 4,938 (Dep't Commerce Jan. 28, 2009) ("*Notice of Initiation*"). Commerce reiterated that the successor-in-interest test used in AD and CVD CCRs might not "fully address whether it is appropriate to apply the CVD cash deposit rate of a previously examined company" to a different company claiming to be its successor. *Id.* at 4,939. Referencing its language from *Stainless Steel* and its *Request for Comment*, Commerce specifically stated that it did not intend to apply the AD CCR successor-in-interest methodology in Marsan's CVD CCR to determine whether Marsan was the successor to Gidasa for CVD cash deposit purposes. *Id.*

In September 2009, Commerce published the *Preliminary Results* of Marsan's CVD CCR. Commerce announced that, in consideration of the comments it received, and drawing on the Department's experience, it would be utilizing a new successor-in-interest methodology for CVD CCRs, including Marsan's CVD CCR. *Preliminary Results*, 74 Fed. Reg. at 47,227. Under the new CVD CCR successor-in-interest methodology, Commerce makes "an affirmative CVD successorship finding (*i.e.*, that the successor company is the same subsidized entity for CVD cash deposit purposes as the predecessor company) where there is no evidence of significant changes in the respondent's operations, ownership, corporate or legal structure" that could have affected the nature and extent of the company's subsidy levels. *Id.* Commerce provided a non-exhaustive list of the changes it considered "significant and would affect the nature and extent of the requesting party's subsidization: (1) changes in ownership, other than regular buying and selling of publicly owned shares held by a broad array of investors; (2) corporate mergers and acquisitions involving the respondent's consolidated or cross-owned corporate family and outside companies; and (3) purchases or sales of significant productive facilities." *Id.* at 47,227–28.

In addition, under the new methodology, where a change occurs in a company's operations, ownership, corporate, or legal structure that is not reflected in the abovementioned non-exhaustive list, Commerce will assess whether the "change could affect the nature and extent of the respondent's subsidization." *Id.* at 47,228. Commerce outlined additional non-exhaustive, objective criteria for this assessment: "(1) [c]ontinuity in the cross-owned or consolidated respondent company's financial assets and liabilities; (2) continuity in its production and commercial activities; and (3) continuity in the level of the government's involvement in the respondent's operations or financial structure (*e.g.*, government ownership or control, the provision of inputs, loans, equity)." *Id.* According to Commerce, the particular criteria "better reflect [the] aspects of a company that are most impacted by,

the target of, or the vehicle for subsidy benefits." *Id.* Commerce also highlighted that the successor-in-interest analysis focuses on whether a significant change occurred and not whether those changes, in fact, affected a company's subsidization. *Id.*

Using the new criteria, Commerce preliminarily determined that Marsan was not the successor to Gidasa for CVD cash deposit purposes because there was a significant change in the company's operations, ownership, corporate, or legal structure. Commerce reasoned that the change in ownership was a significant change because new investors and a new corporate entity owned and controlled all of Gidasa's assets, including its facilities and brand names. *Id.* According to Commerce, these changes "could impact the nature and extent of the respondent's subsidization." *Id.* However, Commerce did not analyze whether the change of ownership actually affected Marsan's subsidy levels because that analysis is only appropriate in a full administrative review. *Id.*

Ultimately, Commerce determined that Marsan's merchandise was not entitled to enter under the CVD cash deposit rate previously established for Gidasa. *Id.* at 47,229. Instead, Marsan's merchandise should enter under the "all others" cash deposit rate of 9.38 percent. *Id.* Commerce published the *Final Results* of Marsan's CVD CCR on October 21, 2009, adopting its new successor-in-interest methodology for CVD CCRs, as well as the findings set forth in the *Preliminary Results*.

Marsan challenges Commerce's new CVD CCR successor-in-interest test as unlawful. Marsan also challenges Commerce's final determination that Marsan was not the successor to Gidasa for purposes of the CVD cash deposit rate, claiming it is not supported by substantial evidence and is unlawful.

Jurisdiction and Standard of Review

This case deals with countervailing duty proceedings. Plaintiff brought this action pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006). This Court has jurisdiction pursuant to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006).

This Court must "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Technology, Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)). "Substantial evidence" means "more than a mere scintilla" and has been characterized as "such relevant evidence as a reason-

able mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). When reviewing agency determinations, findings, or conclusions for substantial evidence, this 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). The Court must find evidence that reasonably led to the agency's conclusion, ensuring it was a rational decision. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

Commerce's interpretation of a statute is reviewed pursuant to the two-prong analysis adopted by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The first prong of the *Chevron* analysis requires the Court to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. However, if the statute is silent or ambiguous, prong two of *Chevron* requires the Court to assess whether the agency's interpretation of the statute is reasonable. *Id.* at 843.

"As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

Discussion

A. Commerce's Interpretation of Changed Circumstances Review Is Reasonable and the Successor-in-Interest Methodology Employed Therein Is in Accordance with Law

Marsan asserts that "Commerce created a *per se* rule that, whenever there had been a change in ownership since the most recently completed administrative review, the resulting company would not qualify as successor to the old company." Pl.'s Br. 11. Marsan argues that Commerce is, in effect, applying an irrebuttable presumption that a corporate acquirer brings subsidies into the acquired company.

Marsan challenges Commerce's analysis because "decision-making based on an irrebuttable presumption is irreconcilable with the requirement that decisions be supported by substantial evidence . . . . " Pl.'s Br. 13.

In the reply brief, Marsan characterizes differently Commerce's alleged "irrebuttable presumption." Marsan posits that "Commerce has adopted a criterion that a change in ownership is *per se* a *significant* change. In other words, there is an irrebuttable presumption that a change in ownership is a significant change." Pl.'s Reply Br. 2. Marsan asserts that "*Chevron* deference does not allow Commerce to sidestep the substantial evidence requirement . . . . " Pl.'s Reply Br. 6.; *see* Tariff Act of 1930, § 516A(b)(1)(B)(i), 19 U.S.C. § 1516a(b)(1)(B)(i). Therefore, Marsan contends that Commerce must formulate criteria that provide an evidentiary basis for making its determination as to whether there is an essential continuity between the pre-sale and post-sale company.[4]

As Commerce noted, the statute authorizing Commerce to conduct a changed circumstances review, 19 U.S.C. § 1675(b)(1), does not explicitly define what a CCR is or what a CCR entails.[5] In fact, a CCR may address a broad range of matters and the only limitation in the statute is the requirement that there be "changed circumstances **sufficient** to warrant a review." *See Mittal Canada, Inc. v. United States*, 30 CIT 1565, 1572, 461 F. Supp. 2d 1325, 1332 n.7 (2006) (emphasis added). Thus, as Commerce pointed out, it has discretion to construe the breadth of CCRs because statutory silence provides "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *See Chevron*, 467 U.S. at 843–44.

In matters of statutory construction, the Court will accord "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Koyo Seiko Co., Ltd. v. United States*, 31 CIT 1512, 1514, 516 F. Supp. 2d 1323, 1329 (2007) (quoting *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L. Ed. 2d

[4] The Court notes the agency action also may have been challenged as arbitrary and capricious. *See SKF USA Inc. v. United States*, No. 07-CV-0393, 2011 U.S. App. LEXIS 324, at *17–18 (Fed. Cir. Jan. 7, 2011) (noting that a change in agency practice requires adequate explanation and laying out the factors to consider when determining whether agency action is arbitrary and capricious). However, the Plaintiff did not raise that issue. Therefore, the Court will not address it.

[5] Section 751(b)(1) of the Tariff Act of 1930, 19 U.S.C. § 1675(b)(1) provides that Commerce shall conduct a review of a determination whenever the administering authority receives information concerning, or a request from an interested party for a review of a final affirmative determination that resulted in a countervailing duty order which shows changed circumstances sufficient to warrant a review of such determination.

616 (1965)), *aff'd*, 551 F.3d 1286 (Fed. Cir. 2008). Specifically, the Court must defer to Commerce's reasonable interpretation of the antidumping and countervailing duty statute. *See Hangzhou Spring Washer Co., Ltd. v. United States*, 29 CIT 657, 659, 387 F. Supp. 2d 1236, 1240 (2005). In order to survive judicial scrutiny, Commerce's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 57 L. Ed. 2d 337, 98 S. Ct. 2441 (1978).

Commerce argues that its CVD CCR successor-in-interest methodology is a reasonable interpretation of 19 U.S.C. § 1675(b)(1) because Commerce articulated well-grounded reasons for implementing a new successor-in-interest methodology in CVD CCRs, it identified concrete factors for its methodology, and it related those factors to the purposes and limitations of CCRs. Commerce notes that the statute does not require the standards and analysis used in an AD CCR to parallel those used in a CVD CCR. *See* 19 U.S.C. § 1675(b)(1). Moreover, Commerce highlights that the AD successorship analysis focuses on pricing, which is not relevant in the CVD context because subsidization is the focus.

1. Commerce's Interpretation of Changed Circumstances Review Is Reasonable

Commerce interpreted a CCR addressing successorship as a review in which it only analyzes whether an alleged successor company is essentially the same entity as *(i.e.*, virtually unchanged from) an alleged predecessor company such that it succeeds to it for purposes of an existing AD or CVD order. Commerce's interpretation that a CVD CCR need only examine the **changes** to the company that could impact subsidy levels is reasonable because only certain types of changes to a company may render it different from a former company such that it is inappropriate to apply the CVD cash deposit rate of the former company to the new company.

Commerce underscores that it would be "infeasible and inappropriate for it to conduct a fact-intensive analysis of the extent to which significant changes affect a company's subsidization level, and that such an analysis is the province of a full administrative review." Def.'s Br. 17. Thus, when Commerce conducts a CCR to determine whether a company is entitled to a previously calculated CVD cash deposit rate, it is reasonable for Commerce to refrain from delving into an analysis of subsidization because that requires deeper analysis, appropriate for a full administrative review. Therefore, Commerce's interpretation of "changed circumstances review," including its construction that it is a review limited in scope and purpose, is reasonable.

2. Commerce's CVD CCR Successor-in-Interest Methodology Is in Accordance with Law

Pursuant to Commerce's reasonable interpretation of a CCR, it devised a methodology for CVD CCRs focusing on successorship. It has been recognized that the antidumping statute "reveals tremendous deference to the expertise of the Secretary of Commerce in administering the anti-dumping law." *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citations omitted). In fact,

> [t]his deference is both greater than and distinct from that accorded the agency in interpreting the statutes it administers, because it is based on Commerce's technical expertise in identifying, selecting and applying methodologies to implement the dictates set forth in the governing statute, as opposed to interpreting the meaning of the statute itself where ambiguous.

Id. Therefore, this Court will not question Commerce's methodology "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose." *Hangzhou*, 387 F. Supp. 2d at 1240. In addition, if Commerce has discretion to create a methodology, Commerce may revise it, and this Court will uphold the revised methodology if it is reasonable. *See Koyo Seiko Co., Ltd.*, 516 F. Supp. 2d at 1331.

As this Court previously noted, the "successor-in-interest analysis was not explicitly created by statute or by regulation, but is an agency practice designed to facilitate the proper implementation of the [trade] laws." *East Sea Seafoods, LLC v. United States*, 34 CIT ___ , ___, 703 F. Supp. 2d 1336, 1352 (2010). Thus, the successor-in-interest analysis is precisely the type of methodology Commerce is tasked with identifying and applying, and the Court must not direct Commerce on how to create that methodology. Rather, the Court must defer to Commerce's methodology if it is reasonable. *See JTEKT Corp. v. United States*, 33 CIT ___, ___, 675 F. Supp. 2d 1206, 1219 (2009).

As early as 2006, Commerce stated that it was considering changing the successor-in interest analsysis for CVD CCRs.[6] Commerce noted it was not appropriate to use the same analysis for AD and CVD CCRs, given that AD and CVD determinations focus on different issues. In 2007, Commerce published a notice requesting comments on its plan to change the CVD successor-in-interest methodology. Then, in the *Notice of Initiation* for this case, Commerce clearly stated it would not be utilizing the former successor-in-interest criteria in

[6] *Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Changed Circumstances Review*, 71 Fed. Reg. 75,937 (Dep't Commerce Dec. 19, 2006).

Marsan's CVD CCR. Finally, in the *Preliminary Results* of the present case, Commerce summarized the comments it received, articulated its reasons for implementing a new methodology, and provided the specific criteria applicable. Commerce asserts that its revised criteria better address the focus (*i.e.*, subsidization) of a successor-in-interest analysis in the CVD context than the factors examined in the AD context because the new criteria better reflect those aspects of a company that generally are the most impacted by, the target of, or the vehicle for subsidy benefits. In light of the foregoing, and for the following reasons, Commerce's CVD successor-in-interest methodology is reasonable.

Marsan challenges Commerce's CVD CCR successor-in-interest methodology as unlawful, claiming it constitutes decision-making by irrebuttable presumption. Marsan asserts that *Delverde SRL v. United States* held decision-making by irrebuttable presumption unlawful, by stating:

> [the Court] ha[s] come to the conclusion that the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically "passed through" to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government.

202 F.3d 1360, 1364 (Fed. Cir. 2000). However, the Court in *Delverde* also stated that "before Commerce imposes a countervailing duty on merchandise imported into the United States, it must determine that a government is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of that merchandise." *Id.* at 1365. More specifically, the Court read the portion of the statute at issue in that case as "plainly requiring Commerce to make a determination that a purchaser of corporate assets received both a financial contribution and benefit from a government, albeit indirectly through the seller, before concluding that the purchaser was subsidized." *Id.* at 1367.

Thus, *Delverde* addressed Commerce's methodology for analyzing subsidization and levying countervailing duties in the course of a CVD investigation.[7] In this case, on the other hand, the methodology

[7] In *Delverde*, the plaintiff challenged Commerce's methodology, which assumed that a pro rata portion of the former owner's nonrecurring subsidies "passed through" to Delverde as a consequence of the sale, as erroneous and inconsistent with the Tariff Act as amended by

at issue is applied in the context of a CCR; Commerce did not assess subsidization or make a countervailing duty determination. Therefore, Commerce did not presume that subsidies granted to a seller passed through to the purchaser or conclude that Marsan was subsidized. Ultimately, "[t]he question in a successor-in-interest determination is whether an alleged successor should qualify for the cash deposit rate last calculated for the alleged predecessor." *East Sea Seafoods*, 703 F. Supp. 2d at 1352. Here, Commerce utilized its methodology to answer that question.

Commerce's methodology simply evaluates the **changes** to a company to determine whether those changes would make it inappropriate to treat the former and subsequent company as if they were the same entity and entitled to the same cash deposit rate. As Commerce explained, subsidization often seeks to stabilize a company's financial position or facilitate investment. Thus, changes in a company's name, ownership, or structure because of corporate reorganization, merger, or acquisition by another company are relevant to subsidy benefits. Accordingly, a methodology that examines whether a company underwent these types of changes to determine whether the company is entitled to the CVD cash deposit rate Commerce assigned to the former company is reasonable. If, as here, the changes indicated the companies are not the same entity, the "all others" rate would be assigned until the respondent requested a full administrative review to determine its specific rate.

Thus, contrary to Marsan's assertions, the successor-in-interest methodology does not entail an irrebuttable presumption that the corporate acquirer has subsidies because the analysis is not focused on the company's subsidization. Moreover, the governing principle of *Delverde*, that Commerce could not conclusively presume subsidization, is inapplicable because Commerce's methodology does not determine, analyze, or presume subsidization. Instead, the methodology examines the changes that warranted the CCR. The methodology also does not entail an irrebuttable presumption that any change constitutes a significant change. The analysis simply focuses on certain changes to a company that would make it inappropriate to treat the old and new company similarly for purposes of the CVD order.

Therefore, the successor-in-interest methodology in a CVD CCR, which concentrates on whether there were significant changes to a company's operations, ownership, corporate, or legal structure to determine whether the changed company may receive a previously calculated CVD cash deposit rate, is reasonable and in accordance with law.

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the Uruguay Round Agreements Act. *Id.* at 1363.

B. Commerce's Determination that Marsan Is Not the Successor to Gidasa for CVD Cash Deposit Purposes Is Supported by Substantial Evidence and Otherwise in Accordance with Law

Marsan argues that "Commerce simply leapt from the fact of the acquisition to the conclusion that the post-acquisition company probably had subsidies even though it had none prior to the acquisition, with no evidentiary basis whatsoever and only its new irrebuttable presumption as rationale." Pl.'s Br. 15. Marsan contends that Commerce did not make any effort to determine whether the purchaser brought any subsidies. According to Marsan, Commerce's only factual analysis was to find that Marsan had acquired Gidasa.[8] Thus, Marsan claims that "in the absence of any evidence or reason to believe that the transfer of ownership brought any subsidies into the company, Commerce could not lawfully determine that Marsan was not the successor to Gidasa for purposes of the CVD CCR." Pl.'s Br. 22.

In support of Marsan's claim that it was the successor-in-interest to Gidasa, Marsan stresses that it had the same productive facilities as Gidasa, it was in the same line of business as Gidasa, and the sale was a private-to-private transaction with a holding company whose sole asset was the shares of Marsan. Marsan asserts that these facts demonstrate a continuity of structure, function, and operations between Gidasa and Marsan.

Marsan's arguments that Commerce did not find that Marsan had subsidies and that Marsan had similar productive facilities, customers, and suppliers are misplaced. Pursuant to Commerce's reasonable interpretation of a CCR, the review was limited to an analysis of successorship, not subsidization, which is analyzed in a full administrative review. In addition, pursuant to Commerce's expertise, it reasonably determined that an analysis of productive facilities, customers, and suppliers is relevant to an AD determination, whereas the company's ownership and assets are relevant to a CVD determination. Thus, the Court only determines whether Commerce's final determination is supported by substantial evidence on the record. *See* Tariff Act of 1930, § 516A(b)(1)(B)(i), 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). Substantial evidence review essentially inquires into the reasonableness of the determination. *See Nippon Steel Corp.*, 458 F.3d at 1351.

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[8] Specifically, Marsan asserts that Commerce never considered that Gidasa did not have subsidies according to its most recent review, that there was no possibility of any infusion of domestic subsidies, that the holding company that acquired Gidasa did not have subsidies, or that a review of recent Turkish CVD cases establishes that there is little or no likelihood of subsidies applicable.

As Commerce explained, it examined information Marsan submitted which shows evidence of a significant change in ownership and corporate structure. Marsan contends that the "evidence in the present case establishes that Marsan is substantially identical to its predecessor, Gidasa, and Commerce's refusal to consider that evidence resulted in a decision based on speculation rather than substantial evidence." Pl.'s Reply Br. 12. However, Commerce argues that regardless of the factors Marsan claims demonstrate it is the successor, the record supports Commerce's decision to the contrary. According to Commerce, even if the Court considered the information Marsan offers to support its claim of successorship, substantial evidence still supports Commerce's conclusion because the record demonstrates that Marsan underwent significant changes, and therefore, was not the successor to Gidasa for CVD cash deposit purposes. Indeed, if there is evidence that reasonably led to Commerce's conclusion, such that it was a rational decision, the conclusion is supported by substantial evidence. *See Matsushita Elec. Indus. Co.*, 750 F.2d at 933.

By requesting a CCR, Marsan acknowledged it could not automatically succeed to Gidasa's CVD cash deposit rate without a declaration by Commerce that it is essentially the same entity as Gidasa and thus entitled to similar treatment. In fact, without such a determination, Marsan's merchandise would automatically enter under the "all others" rate, the rate applicable to companies that have not been reviewed, until there was an administrative review to determine the new or changed company's specific rate. Thus, the CCR was necessary to examine the changes that occurred in order for Commerce to determine whether it could treat Marsan as it had treated Gidasa. There is not a guarantee that a CCR will result in an affirmative finding of successorship.

In this case, Commerce made a negative determination as to Marsan's successorship status because there is substantial evidence to support the conclusion that the two companies, Gidasa and Marsan, are not the same entity. The record shows that the ownership of Gidasa changed, as well as its name. A change in ownership is a significant change because it entails different assets and a different corporate identity, which are relevant to subsidization. Thus, the change in ownership is "such relevant evidence as a reasonable mind might accept as adequate to support" the conclusion that Marsan is not the successor to Gidasa for CVD cash deposit purposes. *See Consol. Edison Co.*, 305 U.S. at 229.

Conclusion

Commerce's interpretation of "changed circumstances review" is reasonable, the methodology it employed therein is in accordance with law, and its final determination is supported by substantial evidence.

For the foregoing reasons, Marsan's motion for judgment upon the agency record is denied and judgment is entered in favor of the United States.

Dated: February 16, 2011
New York, New York

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

Slip Op. 11–21

CALGON CARBON CORPORATION, AND NORIT AMERICAS INC., Plaintiffs, and HEBEI FOREIGN TRADE AND ADVERTISING CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and JACOBI CARBONS AB, JACOBI CARBONS, INC., CHERISHMET INC., BEIJING PACIFIC ACTIVATED CARBON PRODUCTS COMPANY, LTD., NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON COMPANY, LTD., DATONG YUNGUANG CHEMICALS PLANT, AND DATONG MUNICIPAL YUNGUANG ACTIVATED CARBON CO., Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 09–00518

[In antidumping duty matter plaintiffs' motion for judgment on the agency record denied. Consolidated plaintiff's motion for judgment on the agency record granted. Intervenor defendants' motion for judgment on the agency record granted in part and denied in part. Commerce's request for voluntary remand granted.]

Dated: February 17, 2011

Kelley Drye & Warren LLP (*R. Alan Luberda*, *David A. Hartquist*, and *John M. Herrmann, II*) for the plaintiffs, Calgon Carbon Corporation and Norit Americas, Inc.

Mowry & Grimson, PLLC (*Kristin H. Mowry*, *Jill A. Cramer*, *Jeffrey S. Grimson*, *Sarah M. Wyss*, and *Susan E. Lehman*) for the consolidated plaintiff, Hebei Foreign Trade and Advertising Company.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez* and *Antonia R. Soares*); *Thomas M. Beline*, Office of Chief Counsel for Import Administrative, U.S. Department of Commerce, of counsel, for the defendant.

Winston & Strawn, LLP (*Daniel L. Porter*, *Ross E. Bidlingmaier*, and *William H. Barringer*) for intervenor defendants, Jacobi Carbons AB and Jacobi Carbons, Inc.

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (*Francis J. Sailer*, *Mark E. Pardo*, *Nikolas E. Takacs*, and *Andrew T. Schutz*) for intervenor defendants, Cherishmet Inc., Beijing Pacific Activated Carbon Products Company, Ltd., Ningxia Guanghua Cherishmet Activated Carbon Company, Ltd., Datong Yunguang Chemicals Plant, and Datong Municipal Yunguang Activated Carbon Co.

OPINION AND ORDER

Restani, Judge:

INTRODUCTION

This action challenges the Department of Commerce's ("Commerce") final determination rendered in an antidumping ("AD") duty review of certain activated carbon from the People's Republic of China ("PRC"). *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 57,995 (Dep't Commerce Nov. 10, 2009) ("*Final Results*"); *Certain Activated Carbon from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 66,952 (Dep't Commerce Dec. 17, 2009) ("*Amended Final Results*"). Plaintiffs Calgon Carbon Corporation and Norit Americas Inc. (collectively "Calgon"), consolidated plaintiff Hebei Foreign Trade and Advertising Corporation ("Hebei Foreign"), and intervenor defendants Cherishmet Inc., Beijing Pacific Activated Carbon Products, Co., Ltd., Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Datong Yunguang Chemicals Plant, and Datong Municipal Yunguang Activated Carbon Co. ("Cherishmet") sought judgment on the agency record pursuant to USCIT R. 56.2. For the reasons stated below, the court sustains Commerce's final determination in part and denies it in part and, accordingly, Hebei Foreign's motion for judgment on the agency record is granted, Cherishmet's motion for judgment on the agency record is granted in part and denied in part, and Calgon's motion for judgment on the agency record is denied. Commerce's request for voluntary remand is granted.

BACKGROUND

In April 2007, Commerce published an AD duty order on certain

activated carbon[1] from the PRC. *Notice of Antidumping Duty Order: Certain Activated Carbon From the People's Republic of China*, 72 Fed. Reg. 20,988 (Dep't Commerce Apr. 27, 2007). In April 2008, Calgon requested an administrative review of ninety Chinese exporters and producers of activated carbon. App. to Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. Filed on Behalf of Calgon Carbon Corp. and Norit Am.'s Inc. ("Pl.'s App.") Tab 12. In June 2008, Commerce initiated the first administrative review, for the period from October 11, 2006 through March 31, 2008. *Initiation of Antidumping and Countervailing Duty Admin. Rev. and Requests for Revocation in Part*, 73 Fed. Reg. 31,813 (Dep't Commerce June 4, 2008) ("*Initiation*").

Commerce selected Jacobi Carbons AB ("Jacobi"), Calgon Carbon (Tianjin) Co. Ltd.[2] ("CCT"), and Jilin Bright Future Chemicals Co., Ltd. ("Jilin") as mandatory respondents. App. to Def.'s Resp. in Opp. to Pl.'s Mot. for J. upon the Agency R. ("Def.'s App.") Tab 1. Commerce selected Cherishmet as a mandatory respondent because Jilin refused to participate and Cherishmet had requested treatment as a voluntary respondent. Def.'s App. Tab 3. In November 2009, Commerce published the *Final Results* and *Amended Final Results*, assigning AD duty margins of 14.51% to CCT, 18.19% to Jacobi, and 16.84% for Cherishmet. *Amended Final Results*, 74 Fed. Reg. at 66,953. Commerce also revoked Hebei Foreign's separate rate and assigned Hebei Foreign the PRC-wide rate of 228.11%. *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Admin. Rev. of Certain Activated Carbon from the People's Republic of China*, A-570–904, POR 10/1106 3/31/08, at 78 81 (Nov. 3 2009) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/prc/E9–27083–1.pdf (last visited Feb. 17, 2011). In the *Final Results*, Commerce made determinations relating to separate rate certification, assignment of an adverse facts available rate, combination rates and zeroing as well as with regard to valuation of steam/energy coal, hydrochloric acid, carbonized material, bituminous coal, coal tar, ink, and labor. In May 2010, Calgon, Hebei For-

[1] Activated carbon is a powdered, granular, or pelletized carbon product obtained by activating with heat, chemicals, or steam various materials containing carbon, such as wood, coal, or petroleum pitch. Activated carbon is produced through either physical or chemical activation. With physical activation, the material with carbon content is exposed to high temperatures then activated through steam, oxygen, or carbon monoxide. With chemical activation, the raw material with carbon is imbued with chemicals (typically phosphoric acid, potassium hydroxide) then carbonized at lower temperatures.

[2] CCT, a subsidiary of Calgon, is a respondent which is not contesting the rate assigned to it by Commerce. Calgon, the U.S. parent company of CCT, is one of the Petitioners. *Issues and Decision Memorandum* at 3 n.2, 3 n.3.

eign, and Cherishmet filed motions for judgment on the agency record under USCIT R. 56.2 as to these determinations.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determinations in AD duty reviews unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Hebei Foreign's Separate Rate Certification and Adverse Facts Available Rate

Hebei Foreign alleges that Commerce erred in revoking Hebei Foreign's separate rate status when Commerce determined Hebei Foreign's documents were improperly certified by an individual who was later determined not to be an employee of Hebei Foreign. Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. on the Agency R. by Pl. Hebei Foreign Trade and Advertising Corp. ("Consol. Pl.'s Br.") 27.

In the *Preliminary Results*, Commerce granted Hebei Foreign's separate rate status based on documents certified by Mr. Wang Kezheng. *Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 Fed. Reg. 21,317, 21,323 24 (Dep't Commerce May 7, 2009) ("*Preliminary Results*"); App. to Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. on the Agency R. by Pl. Hebei Foreign Trade and Advertising Corp. ("Consol. Pl.'s App.") Tab 10. Commerce then placed a series of documents on the record from Hebei Foreign's request for Changed Circumstances Review ("CCR"), a separate administrative proceeding. Consol. Pl.'s App. Tab 11. In rescinding the CCR, Commerce noted that:

> Hebei Foreign's submissions and questionnaire response were certified by Wang Kezheng as the manager of the No. 1 Business Department of Hebei Foreign. However, Hebei Foreign's supplemental response clearly states that Wang Kezheng is not employed by Hebei Foreign. The Department is mindful of the concerns raised by Petitioners with regard to Hebei Foreign's certification. Accordingly, the Department reminds parties of their obligation pursuant to 19 CFR 351.303(g) to certify factual information submitted to the Department.

Id. at Tab 11, at Attachment 2 at 5 (footnotes omitted). The relevant portions of Hebei Foreign's response to the questionnaire state that "Mr. Wang Kezheng . . . is the manager of No. 1 Business Department of Hebei Foreign," "Mr. Wang Kezheng and Jiang Hua are not working at Hebei Foreign," "At the time of the submission of the CCR request, Mr. Wang Kezheng was employed by Hebei Foreign," "Mr. Wang Kezheng joined Hebei Foreign as a sales manager in 2002 . . . [and now] he serves as the manager of No. 1 Business Department," and "Mr. Wang Kezheng does not hold any positions at other companies while he is employed at Hebei Foreign."[3] *Id.* at Tab 11, at Attachment 6 at 6 7. In the *Final Results*, Commerce found that:

> [The] Department placed information on the record which shows evidence that Hebei Foreign's separate rate status was based on incorrect information, resulting in the revocation of Hebei Foreign's separate rate. Hebei Foreign has not submitted any information to contradict the evidence on the record. Thus, we have assigned Hebei Foreign the PRC-wide entity rate of 228.11 percent.

Final Results, 74 Fed. Reg. at 57,998. Hebei Foreign, however, did not have the opportunity to place contradictory information on the record because the denial of separate rate status occurred for the first time

[3] Hebei Foreign's responses were prompted by two questions. The first prompt reads: "On page 5 of your CCR request you stated that Hebei Foreign only had one U.S. customer who will continue to be supplied by Hebei Shenglun upon receipt of separate rate status. In Exhibit 16 you submitted emails that you stated were from Hebei Foreign to the U.S. customer explaining the transition in companies and the need for the changed circumstances review. However, it is unclear from the email print-outs who they are written by and to whom they are sent. Please provide an explanation of the following names and email addresses, including the company represented by each individual and their position in the company: WKZ <activatedcarbon@active-carbon.com>." Commerce then listed the e-mail addresses of two additional individuals unrelated to Mr. Wang's status." Consol. Pl.'s App. Tab 11, at Attachment 6 at 6.

The second prompt reads, "On the certification page of your CCR request the submission is certified by Wang Kezheng, sales manager. The certification states that he is "currently employed" by Hebei Foreign. A. Please provided an explanation for the term "currently employed" and state whether Wang Kezheng is still employed by Hebei Foreign. Please provide a list of all position that have been held by Wang Kezheng at Hebei Foreign. B. Please provide a list of position held by Weng Kenzhang [sic] at any company other than Hebei Foreign while he was employed at Hebei Foreign. Specifically, please state whether Wang Kenzheng [sic] is or has been employed by Baoding Activated Carbon Factoy [sic] and what position he held if applicable." Consol. Pl.'s App. Tab 11, at Attachment 6 at 6 7

in the *Final Results*.[4] In response to the *Final Results*, Hebei Foreign requested a correction of ministerial errors on the basis that the relevant portion of their response to the supplemental questionnaire:

> . . . was not written by Hebei Foreign as part of its response and was not intended for submission to the Department. The note was written by counsel's Chinese consultant noting his particular concern that certain emails written by Wang Kezheng to the U.S. customer could be interpreted as implying that Wang Kezheng was a commission agent of Hebei Foreign, rather than as an actual employee of Hebei Foreign. The truth is, however, Mr. Wang has been authorized to make sales on behalf of Hebei Foreign since 2002 and he has signed many contracts on behalf of the company, several of which are on record. He has therefore always been considered an "employee" of the company.

Consol. Pl.'s App.'s Br. Tab 14 at 4 5 (also citing contracts, organizational charts, and presentations on the record showing Mr. Wang as an employee). Commerce refused to make any changes to Hebei Foreign's status. *Id.* at Tab 15 at 8.[5]

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[4] The Government alleges that Hebei Foreign waived its claim because it failed to exhaust its administrative remedies. Def.'s Resp. in Opp. to Pl.'s Mot. for J. upon the Agency R. at 42 ("Def.'s Br."). The court may permit a party to raise an issue that it did not brief at the administrative level if Commerce did not address the issue until its final determination. *LTV Steel Co. v. United States*, 985 F. Supp. 95, 120 (CIT 1997); *Qingdao Taifa Group Co. v. United States*, 637 F. Supp. 2d 1231, 1237 (CIT 2009) ("*Taifa II*") (respondent is "not required to predict that Commerce would accept other parties' arguments and change its decision"); *Saha Thai Steel Pipe Co. v. United States*, 828 F. Supp. 57, 59–60 (CIT 1993) (respondent not required to file a brief to exhaust its administrative remedies where it had "received all the remedy it sought from the preliminary determination"). Because Commerce did not raise the issue prior to the *Final Results* and Hebei Foreign did not have a full and fair opportunity to raise the issue at the administrative level, Hebei Foreign may bring its claim before the court.

[5] Commerce also failed to properly notify Hebei Foreign regarding the deficiency of its separate rate certification. At oral argument, the Government contended that because the separate rate certification is a voluntary process, Commerce did not need to inform Hebei Foreign that it was rejecting its separate rate certification prior to the *Final Results*. If the submission was mandatory, Commerce was required to "promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d). If the submission was voluntary, Commerce was required "to the extent practicable, provide to the person submitting the information a written explanation of the reasons for not accepting the information." 19 U.S.C. § 1677m(f). The latter provision implies notice beyond the *Final Results*. Because of the presumption of state control employed by Commerce, fair process requires that Commerce make substantial efforts to keep respondents fully informed on this crucial step. In either case, Commerce did not fulfill its obligation under the statute, which required Commerce to provide Hebei Foreign with some explanation and an opportunity to respond.

Here, the record indicates that Mr. Wang performed significant operations for the company and was likely in a position to supply the information Commerce requested. In the regulation governing certifications, Commerce requires factual submissions to be certified and requires the certifier to specify the party by whom the certified is currently employed. 19 C.F.R. § 351.303(g). Commerce appears to have construed its regulation to require, also, that the certifier be a current employee of the entity on whose behalf the certification is made, even though the regulation does not expressly state such a requirement. *Id.* If Commerce chooses to require formal employee status, Commerce must first make clear to respondents such a strict interpretation of its regulation.

Furthermore, Commerce did not articulate how the statements on record as a whole support its finding that Mr. Wang was not a formal employee: Reliance on a single unclear statement by a party outside the respondent corporation to the exclusion of half a dozen others to the contrary does not rise to the level of substantial support. The statements relied on by Commerce are linguistically and contextually incoherent, demanding further explanation. Thus, Commerce failed to provide substantial support and this issue is remanded to Commerce so that Commerce may explain its regulation in the context of Chinese corporations and determine whether or not Mr. Wang was in a position to certify the facts at issue. If Mr. Wang was in a position to know the facts but was not an employee in the sense required by Commerce, then Commerce must re-open the record to allow Hebei Foreign to attempt to find someone who fulfills the regulatory requirement.[6]

II. Normal Value[7]

Calgon alleges deficiencies in Commerce's surrogate value calculations with respect to A) energy/steam coal, and B) hydrochloric acid. Cherishmet alleges errors by Commerce with respect to hydrochloric acid as well as, C) carbonized material, D) bituminous coal, E) coal tar, F) ink, and F) labor. The court remands to Commerce for rede-

[6] Having found that Commerce improperly rescinded Hebei Foreign's separate rate status, the court need not consider the issues concerning the application of the PRC-wide rate. *See* Consol. Pl.'s Br. at 22.

[7] AD duty margins are determined by comparing normal value ("NV") with the price for sales to the United States. To approximate the NV of the subject merchandise in non-market economy ("NME") countries, "Commerce solicits information from respondents concerning the quantities of various inputs consumed in producing the subject merchandise, and then uses surrogate values from a similar, market economy country to value those inputs." *Tianjin Magnesium Int'l Co. v. United States*, 533 F. Supp. 2d 1327, 1334 (CIT 2008).

termination on the surrogate value of hydrochloric acid, carbonized material, bituminous coal, and as requested, its labor regression methodology.

A. Energy/Steam Coal

Calgon alleges Commerce did not provide substantial support for the reliability of the Coal India, Ltd. ("CIL") data in light of evidence that the Indian government maintains control over the coal industry and that Indian coal is of an inferior quality than imported coal. Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. Filed on Behalf of Calgon Carbon Corp. and Norit Am's Inc. ("Pl.'s Br.") 3, 21. Calgon requests that the court remand the issue to Commerce for further explanation of its choice of CIL data or for reversion to the World Trade Atlas ("WTA") import data used in the *Preliminary Results*. *Id.* at 24.

In the *Preliminary Results*, Commerce relied on WTA data to value steam coal consumed by the respondents. *Preliminary Results*, 74 Fed. Reg. at 21,318 19; Def.'s App. Tab 5 at 3 5; Pl.'s App. Tab 15. In response to Cherishmet's suggestion that Commerce use CIL data, Calgon placed evidence on the record to demonstrate that domestic coal prices in India were distorted as a result of intervention by the Indian government.[8] Pl.'s App. Tab 15. In the *Final Results*, Commerce decided to value steam coal using CIL data, which is grade-specific, for those respondents who provided precise descriptions of the types of steam coal they consumed. *Issues and Decision Memorandum* at 35. Commerce concluded that the evidence placed on the record by Calgon was insufficient to determine whether or not government intervention in the Indian coal industry may have affected prices. *Id.* Calgon's claim regarding government intervention in Indian coal industry amounts to a statement that India with respect to the coal industry is a de facto NME. Here, the domestic rate is on the

[8] The relevant evidence comes from the TERI Energy Data Directory and Yearbook 2007 as follows:

> The [coal] sector became captive to the solitary coal company, CIL . . . , a government PSU (public sector undertaking) with a very large strongly unionized labour force; resulting in a very strong coal lobby negating all proposed reforms in the sector and consequently maintaining a status quo. The reforms have hardly touched the sector, competition and private participation remain minuscule, and best practices have not been adopted
>
> . . . . .
>
> Since coal was always a controlled commodity and became the monopoly of a couple of government PSUs after nationalization, it has been in short supply. . . . As the possibility of the opening up of the sector was resisted by the strong unions, the entry of the private sector remained low and resulted in larger shortages as the national coal companies could not create enough capacities.

Pl.'s App. Tab 15, at 36 38.

record and Commerce did not find government subsidization. *Issues and Decision Memorandum* at 35. Even though Commerce did not articulate precisely why the record did not support Calgon's concerns, it is clear that Commerce was referring to documents on the administrative record refuting government subsidization and control. *See id.* at 35; App. to Cherishmet Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. upon the Agency R. ("Intervenor Def.'s App.") Tab 8. Commerce also addressed Calgon's concern regarding the quality of Indian steam coal in determining that the type of coal used by respondents was the same type of coal produced by CIL, based on Useful Heat Value ranges, grade, and type of coal. *Id.* Because WTA data do not provide this specificity, Commerce chose CIL data as more accurate, reliable, contemporaneous, and specific. *Id.* Thus, despite evidence on the record that Indian coal was inferior, Commerce determined that CIL data matched respondent's input. Further, despite evidence placed on the record regarding the distorting effects of government control (which Commerce permissibly found to be inconclusive), the record as a whole, including the evidence that the CIL price data pertained to a type of coal more specific to the input, supported Commerce's ultimate determination that the CIL data were the "best information available" for the purposes of 19 U.S.C. § 1677b(c)(1).

B. Hydrochloric Acid[9]

i. Calgon

Calgon alleges that Commerce's rejection of WTA data in favor of Chemical Weekly data to value hydrochloric acid ("HCL") failed to give appropriate weight to InfoDrive data, which Calgon claims provides a more precise product description. Pl.'s Br. at 26. Calgon asks that Commerce use WTA data in conjunction with the InfoDrive data[10] or average the WTA data with the Chemical Weekly data. Pl.'s Br. at 26 29.

In the *Preliminary Results*, Commerce relied on Indian import data from the WTA to value HCL, because WTA data were specific and represented values from the whole of India whereas Chemical Weekly data were derived from selected markets. Def.'s App. Tab 9 at 7 8. In the *Final Results*, Commerce relied on Chemical Weekly data for Jacobi, a company that provided specific purity levels of HCL, because Chemical Weekly data were based on 30 33% purity levels

[9] Hydrochloric acid is a raw material used in the acid washing stage of production of the subject merchandise. Intevenor Def.'s App. Tab 10 at 13.

[10] The Government failed to brief this first claim. *See* Def.'s Resp. in Opp. to Pl.'s Mot. for J. Upon the Agency R. ("Def.'s Br.") 22 26.

whereas WTA data contained no information on HCL purity, but Commerce continued to rely on WTA data for Cherishmet and CCL, because they had not provided specific purity levels. *Issues and Decision Memorandum* at 23 24. Commerce rejected the use of InfoDrive data to test its chosen data or otherwise, determining that the InfoDrive data on record do not constitute "an adequately high percentage of the corresponding WTA HTS number for HCL for [Commerce] to conclude that the import data are not reflective of comparable HCL" and WTA data report in different quantity units from InfoDrive data. *Id.* at 24, 24 n.84.

Although Commerce may not simply discard InfoDrive data on the basis that it did not cover an adequate percentage of imports of the input at issue without first stating at least an approximative of the proportion the data actually cover, *see Dorbest Ltd. v. United States*, 602 F. Supp. 2d 1287, 1290 91 (CIT 2009), *rev'd on other grounds* 604 F.3d 1363 (Fed. Cir. 2010), Commerce determined here that Chemical Weekly data were a more precise measure than other data sets for respondents who provided specific HCL purity levels. *Issues and Decision Memorandum* at 23 24. Thus, the court rejects Calgon's request to remand so that Commerce can average Chemical Weekly and WTA data or InfoDrive and WTA data because Commerce's determination that the Chemical Weekly data are superior to other data sets is substantially supported. *C.f. Zhejiang Native Produce Animal By-Products Imp. & Exp. Group Corp., et al. v. United States*, Slip Op. 09–61, 2009 WL 1726360, at *5 (CIT 2009) (finding that Commerce has the discretion to average equally reliable data sets).

ii. Cherishmet

Cherishmet alleges that Commerce erred by using different data sets for the two respondents' HCL inputs thereby valuing Cherishment's HCL input fourteen times higher than Jacobi's HCL input. Br. in Supp. of Cherishmet Pl.'s Rule 56.2 Mot. for J. on the Agency R. at 32 ("Intervenor Def.'s Br."). Cherishmet requests on remand that Commerce apply Chemical Weekly data in valuing Cherishmet's HCL inputs. Intervenor Def.'s Br. at 36.

In the *Preliminary Results*, Commerce determined that WTA data provided the best available information for all respondents. Def.'s App. Tab 9 at 8. At verification, Jacobi voluntarily, and not in response to a particular request from Commerce, provided supplemental information on HCL purity. Def.'s App. Tab 6. Commerce never

requested HCL purity data Consol. Case No. 09–00518 Page 14 from Cherishmet nor did Cherishmet provide Commerce with such data.[11] Def.'s Br. at 24 26. In the *Final Results*, Commerce chose to use Chemical Weekly data for Jacobi as it was more specific based on the HCL purity data Jacobi provided at verification. Def.'s Br. at 24; Def.'s App. Tab 5, at Ex. 6. Commerce used WTA data for Cherishmet because Cherishmet did not provide purity data. *Issues and Decision Memorandum* at 24. Because Commerce relied upon Chemical Weekly data for the first time in the *Final Results*, Cherishmet appended to its brief before the court a document asserting that its HCL purity levels do not deviate significantly from those of Jacobi. Intervenor Def.'s Br. at Attachment 1. Cherishmet also contends that in a worst case scenario where Cherishmet theoretically might use HCL of a 100% purity, assuming relatively similar increases in value as purity increases, such a concentration level would be valued only three times greater than the concentration level represented by the Chemical Weekly data, as opposed to the 1400% increase resulting from the use of WTA data. Intervenor Def.'s Br. at 36.

The Government argues that its selection of WTA data is not a de facto adverse factual inference, but rather an attempt to select the best available information on "a case-by-case basis." Def.'s Br. at 25 (citing *Lasko Metal Prods, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (permitting Commerce to determine NME surrogate values based on various methodologies, but not authorizing Commerce to impose different values on respondents for the same inputs)). Commerce determined that Chemical Weekly data were superior so long as respondents supplied HCL purity data. *Issues and Decision Memorandum* at 24. Commerce had no obligation to accept additional evidence at verification. Once Commerce did accept such evidence, however, Commerce had an obligation to treat Cherishmet fairly by giving it a similar opportunity. Commerce's use of Jacobi's but not Cherishmet's purity data led to arbitrary and unfair treatment of competitors responding to Commerce's inquiries to the best of their abilities. In essence, Commerce has imposed a de facto adverse facts available rate through the application of two different surrogate values, triggering a fourteen fold increase in the surrogate value for Cherishmet. Thus, the court remands this issue to Commerce to give Cherishmet the opportunity to place HCL purity data on the record, or reach some other fair result.

[11] In its questionnaire, Commerce did ask for type and grade of material used in the production process.

C. Carbonized Material

Cherishmet alleges Commerce erred in using HTS 2704.00.90: "Other Cokes of Coal" as Cherishmet's evidence demonstrates that the majority of imports under this tariff heading are not specific to the inputs used by respondents. Intervenor Def.'s Br. at 8; Cherishmet Reply Br. at 4 ("Intervenor Def.'s Reply Br."); *Globe Metallurgical, Inc. v. United States*, Slip Op. 08–105, 2008 WL 4417187, at *7 (CIT 2008) (the best available information is that which better relates to the specific product at issue). Instead, Cherishmet asks that Commerce use HTS 4402.00.10: "Coconut Shell Charcoal"[12] because "record evidence conclusively established that coconut-shell charcoal is a carbonized material that can be and is used by the parties to this case to produce activated carbon." Intervenor Def.'s Br. at 16.

In the *Final Results*, Commerce maintained its view from the *Preliminary Results* that use of the HTS 2704.00.90: "Other Cokes of Coal" was appropriate, despite two pieces of evidence on the record:[13] 1) InfoDrive data covering approximately 50% of "Other Cokes of Coal" imports showing that Indian imports under "Other Cokes of Coal" consisted of low ash metallurgic coal ("LAMC") not carbonized material like that used in producing the subject merchandise and, 2) an expert's report finding that LAMC is commercially unviable and

[12] HTS 4402.00.10: "Coconut Shell Charcoal" was used by Commerce in the less than fair value investigation where it commented that coconut shell charcoal is comparable but "not identical to the coal-based carbonized material used by respondents." *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China*, A-570–904, Investigation at 59 (Feb. 23, 2007), *available at* http://ia.ita.doc.gov/frn/summary/prc/E7–3693–1.pdf (last visited Feb. 17, 2011); Pl.'s Br. in Resp. to Cherishmet's Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Resp. to Cherishmet") 9.

[13] In the investigation, Commerce found that carbonized material included both coal and coconut shells, heated and carbonized. *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China*, A-570–904, Investigation, at 58 60 (Feb. 23, 2007), *available at* http://ia.ita.doc.gov/frn/summary/prc/E7–3693–1.pdf (last visited Feb. 17, 2011). In the *Preliminary Results*, Commerce valued carbonized material under HTS 2704.00.90: "Other Cokes of Coal," explaining the change from the investigation on the basis that "the reported carbonized material was made of various forms of heated bituminous coal, and to a much less extent anthracite coal" and that "this value [was] closer to the reported input than coconut shell charcoal." Intervenor Def.'s App. Tab 5, at 7. Cherishmet submitted a contradictory expert's report and InfoDrive data. Def.'s App. Tab 13, at Ex. 2–1, 3–5. Jacobi's expert concurred that this tariff heading was "an entirely inappropriate surrogate for the carbon source used in the manufacture of activated carbon." Intervenor Def.'s App. Tab 7, at Ex. 1; Intervenor Def.'s Br. at 7. Calgon countered that the tariff heading suggested by Cherishmet, HTS 4402.00.10: "Coconut Shell Charcoal," was "of low value imports and imports which did not accurately reflect the type of charcoal used by respondents in the production of activated carbon." Def.'s App. Tab 19, at 16.

unsuitable for the production of activated carbon. *Issues and Decision Memorandum* at 28; Intervenor Def.'s Br. at 6, 13 14. Commerce relied on three counter assertions: 1) InfoDrive data must cover a significant portion of overall imports in the relevant category, 2) in view of the limited InfoDrive data, 50% of the imports in the selected tariff heading still might be carbonized material, and 3) respondents' expert opinions do not connect the LAMC he tested with LAMC imported under "Other Cokes of Coal." *Issues and Decision Memorandum* at 28.

First, Commerce must consider InfoDrive if it covers a definite and substantial percentage of overall imports. *Globe Metallurgical, Inc. v. United States*, Slip Op. 09–37, 2009 WL 1272102, at *3 (CIT 2009); *Dorbest Ltd. v. United States*, 602 F. Supp. 2d 1287, 1290 91 (CIT 2009) ("*Dorbest III*") (upholding Commerce's rejection of InfoDrive data where it covered 60% of imports and presented data in different, incommensurable units of measurements); *see Longkou Haimeng Mach. Co. v. United States*, 581 F. Supp. 2d 1344, 1362 (CIT 2008) (Commerce must address InfoDrive data where it covers 70% of the imports). Where InfoDrive data is placed on the record to impeach as opposed to corroborate Commerce's determination, a lower threshold may exist.[14] *Zhengzhou Harmoni Spice Co. v. United States*, 617 F. Supp. 2d 1281, 1325 (CIT 2009) (where respondent is using InfoDrive data to impeach the credibility of Commerce's surrogate value determination, Commerce must cite some evidence supporting its decision). Here, InfoDrive data cover 50% of the imports and Commerce does not contest that the units of measurement are commensurate. Thus, Commerce must reassess the InfoDrive data before considering which tariff subheading is appropriate.[15]

Second, assuming the InfoDrive data cover 50% of the imports, Commerce may not rely on general statements of assurances that the other half of the data represents the input being measured. *Taian Ziyang Food Co. v. United States*, 637 F. Supp. 2d 1093, 1149 50 (CIT

[14] Commerce found that "the InfoDrive India data . . . [did] not represent 100% of the WTA Indian import data, [and therefore] the Department [could not] determine whether the material tested is similar to the HTS category used to value carbonized material." *Issues and Decision Memorandum* at 28. Cherishmet counters that it need not demonstrate that 100% of the import data under the tariff heading does not correspond to the actual material used. Intervenor Def.'s Br. at 14 15. Commerce cannot summarily ignore InfoDrive data on the record merely because those data do not represent 100% of the WTA data..

[15] Commerce also found that "it is not the Department's normal practice to analyze WTA's underlying data within InfoDrive for completeness, given that the InfoDrive data do not account for all of the Indian imports which fall under a particular HTS subheading." *Issues and Decision Memorandum* at 28. Commerce's normal practices and presumptions alone are not substantial evidence. *See FMC Corp. v. United States*, 27 CIT 240, 250 51 (2003).

2009) (where the "vast majority of entries" are products other than the input, Commerce's statement that, "that fact alone does not undermine the use of the value," falls short of substantial evidence); *Longkou*, 581 F. Supp. 2d 1361 63 (finding that where 70% of the imports under a tariff heading were not related to the subject merchandise Commerce did not provide substantial support); *Zeijiang Dunan Hetian Metal Co. v. United States*, 707 F. Supp. 2d 1355, 1364 65 (CIT 2010) (upholding Commerce's findings where it did "not merely dismiss the InfoDrive India data out of hand, nor . . . make a general finding that InfoDrive data were unreliable," but assumed the data were reliable and discussed its relevance to WTA data). Even though Cherishmet has not clearly shown comparability between the 50% of imports covered by the InfoDrive data and the remaining 50%,[16] Commerce must show that its selection of this tariff heading is substantially supported. Commerce's reliance on Cherishmet's inability to prove that the remaining 50% "are definitively not a carbonize [sic] material that could be used by respondents in the production of subject merchandise" does not support its choice. *Issues and Decision Memorandum* at 28.

Third, Commerce found that Cherishmet failed to demonstrate that the material tested by its expert was the same material that would be classified under HTS 2704.00.90: "Other Cokes of Coal." *Issues and Decision Memorandum* at 28. Cherishmet countered that the expert report references a sample that was "typical quality, character and grade" of the LAMC Cherishmet argues represents virtually all imports under this heading. Intervenor Def.'s Br. at 15 16. Commerce cited no evidence contesting Cherishmet's expert's determination that the LAMC tested was the same as the LAMC imported under the chosen tariff heading.[17]

Commerce must do more than erect roadblocks to respondents' fair arguments. It must select the best available information and substantially support its decisions. Commerce's determination that imports under the tariff heading constituted the best available informa-

[16] Cherishmet's brief makes this leap of logic: "[I]t is logical to assume that those entries under this [tariff heading] not identified by InfoDrive India data also consist primarily of LAMC or at least consist of a broad group of products of which LAMC is a significant part." Intervenor Def.'s Br. at 12 13.

[17] Calgon counters that because the expert did not test the incoming imports, Cherishmet cannot prove that the LAMC was the same LAMC referenced in the InfoDrive data. Pl.'s Br. in Resp. to Cherishmet's Rule 56.2 Mot. for J. on the Agency R. at 14 ("Pl.'s Response Br. to Cherishmet"). Given that Calgon has not submitted its own expert report to the contrary, it seems logical to assume that LAMC tested is the same as the LAMC as imported. Failing to allow for this assumption would mandate the onerous requirement that all expert opinions be based upon actual imports under the tariff heading during the appropriate year. This would essentially bar any attempt by a respondent to use expert studies to contest surrogate values based on tariff headings.

tion is not substantially supported because approximately 50% of the imports under this heading are not product-specific and Commerce's reasons for rejecting data contrary to its selection are flawed. Thus, the issue is remanded to Commerce to specifically address plaintiffs' argument that imports under HTS 2704.00.90: "Other Cokes of Coal" are not product-specific and to select the best method for valuation of the input as possible under the circumstances. If all the choices are equally bad, Commerce should explain this and its final choice.

D. Bituminous Coal[18]

Cherishmet alleges that Commerce erred when it valued Cherishmet's bituminous coal consumption using WTA import data instead of domestic CIL data. Intervenor Def.'s Br. at 28. Cherishmet requests Commerce apply CIL data to value its bituminous coal inputs.[19]

First, Cherishmet argues that coking coal is used in metallurgical and steel industries and cannot be used to value bituminous coal. Intervenor Def.'s Br. at 29 30; Intervenor Def.'s App. Tab 3. Commerce must show a rational relationship between the surrogate value and the input to which it is applied. *Dorbest I*, 462 F. Supp. 2d at 1307 08. Furthermore, Commerce must establish the category of the input used by the respondent or the categories normally used to produce the subject merchandise. *Hebei Metals & Minerals Imp. & Exp. v. United States*, 366 F. Supp. 2d 1264, 1273 (CIT 2005) ("*Hebei II*"). Neither in the *Final Results* nor in the briefs does Commerce make any argument as to why coking coal is a valid surrogate for bituminous coal in light of Cherishmet's claims.

Second, Cherishmet argues that Commerce fails to explain why cheaper domestic products are not the best available record source. Intervenor Def.'s Br. at 30; *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 617 (2002) (rejecting Commerce's determination that more expensive imported coal was a better surrogate than domestic coal because Commerce must explain the existence of the relationship between surrogate and input). Commerce failed to respond to this contention at the administrative level.

Thus, because of Commerce's failure to explain the relationship between coking coal and bituminous coal or articulate why a less expensive domestic product would be rejected for a more expensive imported product, the issue is remanded to Commerce for further consideration or explanation.

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[18] Bituminous coal is a raw material used to make carbonized material, an intermediate input in the production of the subject merchandise. Intervenor Def.'s App., Tab 10 at 12.

[19] The court need not address Cherishmet's procedural argument that Commerce failed to advise it of deficiencies as to this input.

E. Coal Tar

Cherishmet alleges that Commerce erred in adopting as its surrogate value for imports under HTS 2706.00.10: "Coal Tar" because Commerce failed to examine statistical discrepancies between Singaporean export data and Indian import data or investigate the presence of high value U.S. exports.[20] Intervenor Def.'s Br. at 21 25. Cherishmet asks that Commerce average Singaporean and Romanian export data or use financial statements from Indian companies to value coal tar as opposed to using Indian HTS 2706.00.10: "Coal Tar" value. *Id.* at 19. In both the *Preliminary Results* and the *Final Results*, Commerce relied on HTS 2706.00.10: "Coal Tar." *Issues and Decision Memorandum* at 32; Intervenor Def.'s App. Tab 5, at 4.

Cherishmet alleges that Indian import data contain a large percentage of high-value, non-coal tar imports because WTA Indian import data under HTS 2706.00.10 show 40% more imports by kilogram and 400% greater average unit value than WTA Singaporean export data under HTS 2706.00.00 for a similar period.[21] Intervenor Def.'s Br. at 18, 22; Def.'s App. Tab 17 at 14. Cherishmet supports this contention with the fact that Indian imports from Romania are valued at 8.55 Rs/kg under HTS 2706.00.10. In contrast, Singaporean exports are valued at 6.314 Rs/kg while Indian imports for the same period are 23.68 Rs/kg. Intervenor Def.'s Br. at 22. In the *Final Results*, Commerce disregarded Cherishmet's claim on the basis that, "[b]y simply arguing that the export quantities versus import quantities predictably differ, Cherishmet has not established that . . . Singapore[an] export data are more reliable than the Indian import data." *Issues and Decision Memorandum* at 32. Commerce determined that the discrepancy did not call into question WTA import data because Commerce did not expect export and import data to match up at a one-to-one ratio. *Id.* Furthermore, despite Cherishmet's attempt to explain how data from the tariff heading should be construed to reflect negatively on data from a tariff subheading, Cherishmet has not placed evidence on the record that directly calls into question Commerce's choice of surrogate value. Commerce's value

[20] According to WTA data, only three market economies exported coal tar to India from October 2006 to March 2008. By weight, Romania exported 12.52% (106,345 kgs), Singaporeexported 14.12% (120,000 kgs), and the United States exported 73.36% (623,239 kgs) of total imports from market economies to India.

[21] Calgon counters that Cherishmet's argument is invalid because it relies on the assumption that the data sets are comparable even though they are "nearly" the same time period and "the majority" of Singaporean exports entered India. Pl.'s Response Br. to Cherishmet at 19. Calgon's argument proves too much. Although it undoubtably tempers the strength of Cherishmet's argument, the fact that there is not a perfect statistical overlay does not completely invalidate the argument.

used in the *Final Results*, 21.79 Rs/kg, is corroborated by the total Indian imports of coal tar under HTS 2706.00.10, 83% of which had an average unit value of 24–25 Rs/kg. Pl.'s Response Br. to Cherishmet at 20. The sum of the evidence on record does not require the court to upend Commerce's determination that HTS 2700.00.10 is the best available information.

Cherishmet also alleges that U.S. export statistics show that no mineral tars (which encompass coal tar) had been exported to India during the period of review and that InfoDrive data indicate that the products identified were highly specialized products not used in production of the subject merchandise. Intervenor Def.'s Br. at 23. The InfoDrive data which Cherishmet proposes show that India imported 15,709 kg of coal tar from the United States whereas WTA data shows India importing 396,894 kg of coal tar from the United States (4.00% of the WTA data and 1.85% of total imports). *Issues and Decision Memorandum* at 32. Although InfoDrive data may prove helpful in certain cases, here, Commerce permissibly declined to use the InfoDrive data on the basis that the InfoDrive data relied upon by Cherishmet constituted an insignificant percentage of overall imports. *Issues and Decision Memorandum* at 32; *Dorbest III*, 602 F. Supp. 2d at 1290 91 (rejecting InfoDrive data where it composed an insignificant percentage of overall import data).

Finally, Cherishmet urges the court to remand to Commerce so that Commerce may consider using financial statements in lieu of import data. Intervenor Def.'s Br. at 23 25. Given the inherent inconsistencies among financial statements, Commerce permissibly chose for its surrogate value calculation the data set representing the best available, if flawed, information. Respondent's evidence to the contrary as embodied in tangential tariff headings and insignificant data sets represents mere conjecture to the contrary. Commerce's determination is therefore sustained in this regard.

F. Ink

Cherishmet alleges Commerce erred in valuing ink used to mark packing bags under HTS 3215.00: "Ink, Printing, Writing, Drawing etc., Concen. or Not," rather than HTS 3215.90.90: "Other ink not elsewhere specified," because Commerce failed to provide substantial evidence supporting its decision. Intervenor Def.'s Br. at 37; Intervenor Def.'s App. Tab 9, at 36.

In its supplemental questionnaire, Cherishmet stated that, "the ink [it] used to mark packing bags is not printing ink, fountain pen ink, ball pen ink or other drawing ink. Rather it is ink classifiable under HTS 32159090." Def.'s App. Tab 11 at 24. Cherishmet offers no fur-

ther evidence. In the *Final Results*, Commerce continued to use HTS 3215.00, finding that "Cherishmet [had] not provided additional evidence on the record to compel a change from the *Preliminary Results*." *Issues and Decision Memorandum* at 38. Cherishmet offered no evidence during the review to support its assertion that its ink is not printing ink. *NSK Ltd. v. United States*, 919 F. Supp. 442, 449 (CIT 1996) ([R]espondents have the burden of creating an adequate record to assist Commerce's determinations." (internal quotation marks omitted)). Additionally, to "mark" is defined as "to label (an article) with a sign or symbol," "brand," or "stamp," and to "print" is defined as to "mark with a print" or "to cause (as a mark) to be stamped." *Webster's Third New International Dictionary* 1383, 1803 (Philip Babcock Gove et al. eds., 1981). Thus, Cherishmet neither fulfilled its burden nor successfully argued that "print" was distinguishable from "mark." Commerce's determination on this issue is affirmed.

G. Surrogate Labor Value

Cherishmet alleges that Commerce's use of its wage rate regression methodology does not comport with the statutory requirement to use surrogate values from a country that is both economically comparable and a significant producer of comparable merchandise. Intervenor Def.'s Br. at 38 39. Commerce requests a voluntary remand to redetermine the surrogate value for Cherishmet's labor costs.[22] Def.'s Br. at 37.

The Federal Circuit has concluded that Commerce's wage rate regression methodology is inconsistent with 19 U.S.C. § 1677b(c)(4). *Dorbest, Ltd. v. United States*, 604 F.3d 1363, 1372 73 (Fed. Cir. 2010) ("*Dorbest IV*"). In the *Final Results*, Commerce relied on the now invalidated methodology. *Issues and Decision Memorandum* at 16. Thus, Commerce erred in its use of the methodology and the issue will be remanded to Commerce.[23] *See SKF USA, Inc. v. United States*, 254

[22] No party contests the voluntary remand. Pl.'s Response Br. to Cherishmet at 39; Reply Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R. by Pl. Hebei Foreign Trade and Advertising Corp. ("Consol. Pl.'s Reply Br.") ii; Def.'s Br. at 37.

[23] Cherishmet requests a remand to Commerce ordering that the labor wage rate be recalculated using India's labor rate of $0.21 per hour. Intervenor Def.'s Br. at 40. Calgon argues that although the Federal Circuit invalidated Commerce's labor wage rate, it did not mandate that the surrogate labor wage rate should be based on a single country. Pl.'s Response Br. to Cherishmet at 39; *see Dorbest IV*, 604 F.3d at 1372 (holding Commerce's labor wage rate invalid because it "improperly uses data from both countries that produce comparable merchandise and countries that do not"). Cherishmet asks that the record not be reopened because earlier cases should have warned that Commerce's labor wage rate would be overturned. Intervenor Def.'s Reply Br. at 12; *see, e.g.*, *Allied Pac. Food (Dalian) Co. v. United States*, 587 F. Supp. 2d 1330, 1362 (CIT 2008) (holding Commerce's "surrogate labor rates in [NME] investigations and reviews . . . invalid"); *Taian Ziyang*, 637 F. Supp. 2d at 1136 (finding the regression-based "methodology . . . inconsistent with the statutory

F.3d 1022, 1029 (Fed. Cir. 2001) (permitting the reviewing court to grant a voluntary remand in its discretion so long as it is not frivolous or in bad faith).

III. Combination Rates[24]

Calgon alleges Commerce erred when it failed to apply combination rates because it impermissibly required combination rates in the investigation but not in this administrative review.[25] Pl.'s Br. at 8, 10 13.[26]

Commerce has a duty to prevent circumvention of AD law and may do so by imposing combination rates. *See Shandong Huarang Gen. Grp. Corp. v. United States*, 27 CIT 1568, 1580 (2003); 19 C.F.R. § 351.107(b)(1); *Tung Mung v. United States*, 354 F.3d 1371, 1381 (Fed. Cir. 2004) (Commerce has the discretion to apply combination rates);

mandate"). Given that Commerce did not have a full and fair opportunity to consider this issue at the administrative level, the minor gains to judicial efficiency do not outweigh the court's interest in allowing Commerce to make the initial finding.

[24] To prevent circumvention of high cash deposit rates by firms in NME countries diverting exports through intermediaries with lower rates, Commerce occasionally imposes combination rates, which involve "specific pairs of exporters and producers in situations where a specific producer supplied the merchandise which was then exported by the firm in question during the [period of review]." *Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1340 (CIT 2010); *see* 19 C.F.R. § 351.107(c). In 2005, Commerce stated that for future investigations Commerce would apply a single cash deposit rate to the exporter firm and all producers who supplied the same merchandise during the period of investigation. *See Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries* (Apr. 5, 2005), *available at* http://ia.ita.doc.gov/policy/bull05–1.pdf (last visited Feb. 16, 2011) ("*Policy Bulletin 05.1*").

[25] In its *Final Results*, Commerce makes no mention of combination rates, principally because no party raised the issue at the administrative level. Commerce likely need not respond to unsupported claims that its policies are being circumvented. *Cf. Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1334 (CIT 2009) (according a voluntary remand to Commerce on the basis that Commerce did not fully explain its reasoning on combination rates); *Tianjin Magnesium*, 722 F. Supp. 2d at 1341 42 (deferring to Commerce on the implementation of combination rates in administrative reviews).

[26] The Government alleges that Calgon failed to exhausted its administrative remedies because Calgon did not raise the issue of combination rates before the *Final Results*. Def.'s Br. at 9 10. Calgon submitted their combination rate arguments nine days after the *Final Results*, in response to Commerce's draft instructions which did not "continue to apply the combination rates established in the [investigation]." Reply Br. of Pls. Calgon Carbon Corp. and Norit Am.'s Inc. at 8 ("Pls.' Reply Br."); App. to Reply Br. of Pls. Calgon Carbon Corp. and Norit Am.'s Inc., Tab 2 ("Pl.'s Reply App."). Combination rates and other anti-circumvention issues do not become concerns until Commerce issues the final results and therefore the doctrine of exhaustion likely does not apply in this instance. *U.S. Magnesium LLC v. United States*, Slip Op. 07–99, 2007 WL 1875662, at *3 4 (CIT 2007); *see, e.g.*, *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1195 97 (2004) (declining to require exhaustion where benchmark not revealed until final determination). Here, although Calgon could have anticipated and raised the combination rate argument earlier in the proceedings, it did not impermissibly fail to exhaust administrative remedies.

Tianjin Magnesium Int'l, 722 F. Supp. 2d at 1340 41 (Commerce generally refrains from issuing combination rates and combination rates "remain[] solely in the discretion of Commerce"); *U.S. Magnesium*, 2007 WL 1875662, at *4 ("Commerce has 'broad' discretion . . . and is not required to use combination cash deposit rates in administrative reviews"). Here, nothing on the record shows that Commerce was presented with a case of circumvention, or otherwise demonstrates combination rates are mandated.[27] *See Lifestyle Enter., Inc. v. United States*, Slip Op. 11–16, at 43 (CIT Feb. 11, 2011). The court cannot find that Commerce abused its discretion in not using combination rates.

IV. Zeroing[28]

Cherishmet alleges that Commerce's interpretation of 19 U.S.C. § 1677(35)[29] is unreasonable because it permits calculation of dumping margins without zeroing in investigations but allows zeroing in administrative reviews.[30] Intervenor Def.'s Br. at 40. Commerce explained that it interprets 19 U.S.C. § 1677(35) "to mean that a dumping margin exists only when [normal value] is greater than export or constructed export price." *Issues and Decision Memorandum* at 5. This interpretation is reasonable. *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (finding zeroing permis-

[27] Calgon also alleges that Commerce has an analytical framework in applying combination rates in administrative reviews. Pl.'s Br. at 14. According to this framework, Commerce considers, 1) the similarity of export's U.S. sale subject to administrative review and in the previous new shipper review where the combination rate was applied, 2) the exporter's normal business practice in the U.S. market, 3) the exporter's ability to source the subject merchandise it sells from a large pool of suppliers, and 4) the existence of high cash deposit rates for other producers subject to the order and a high "other" rate. *Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain In-Shell Raw Pistachios from Iran*, A-507–502, POR 07/01/-2--06/30/03, at 16 (Feb. 7, 2005), *available at* http://ia.ita.doc.gov/frn/summary/iran/e5–596–1.pdf (last visited Feb. 16, 2011). Calgon fails to cite to any case indeed because none exist using this framework in a case where no record evidence exists of specific producers shifting their exports. *See* Def.'s Br. at 15 16.

[28] "Zeroing is a practice in which Commerce gives the sales margins of merchandise sold at or above fair value prices an assumed value of zero. . . . Commerce only takes into account those sales margins of merchandise sold at less than fair value prices to calculate the final weighted-average dumping margin." *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1353 n.15 (CIT 2010) (citations omitted).

[29] Cherishmet cites to 19 U.S.C. § 1677(5) in their brief. The court assumes this to be a typographical error. The relevant statutory provision is 19 U.S.C. § 1677(35), the provision cited by Cherishmet at the administrative level.

[30] Cherishmet's argument in their opening brief is strikingly limited, incorrectly citing the relevant statute and raising no case law to support their view. *See* Intervenor Def.'s Br. at 40. Cherishmet does not raise the issue again in either response brief. It is unclear whether Cherishmet continues to support this argument and, if so, on what grounds. If parties are dropping untenable arguments, they should make this clear.

sible); *Timken Co. v. United States*, 354 F.3d 1334, 1341 42 (Fed. Cir. 2004) (finding Commerce's decision not to zero also permissible). Commerce did not address the shift from not zeroing under the investigation to zeroing in the administrative review. *See Issues and Decision Memorandum* at 5 6. At the time of this review, the policy of not zeroing applies only to prospective investigations and administrative reviews, including administrative reviews commencing after Commerce announced its elimination of zeroing so long as the investigation pre-dates the change in policy. *Union Steel v. United States*, 645 F. Supp. 2d 1298, 1309 (CIT 2009) (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1374 75 (Fed. Cir. 2007). Furthermore, the change from zeroing in the investigation but not zeroing in the administrative review has been found to be permissible. *Dongbu Steel Co. v. United States*, 677 F. Supp. 2d 1353, 1366 (CIT 2010) (citing *Corus Staal BV v. United States*, 593 F. Supp. 2d 1373, 1383 84 (CIT 2008) (finding that Commerce's interpretation of 19 U.S.C. § 1677(35)(A) (B), prohibiting zeroing in investigations but not in administrative reviews, not inconsistent or unreasonable). Thus, Commerce did not err in its decision to use zeroing in the instant case.

CONCLUSION

For all the foregoing reasons, the court remands the matter for Commerce to reexamine Hebei Foreign's separate rate certification, the labor regression methodology, and the surrogate values for hydrochloric acid, carbonized material, and bituminous coal. The parties' motions for judgment on the agency record are otherwise denied.

Commerce shall file its remand determination with the court within forty-five days of this date. Respondent and Petitioner have eleven days thereafter to file objections, and the Government will have seven days thereafter to file its response.

Dated: This 17th day of February, 2011.
New York, New York.

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