U.S. Court of International Trade

Slip Op. 18–53

SOLARWORLD AMERICAS, INC. et al., Plaintiff and Consolidated Plaintiffs, and CANADIAN SOLAR INC. et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 16–00134

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand determination in the second administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: May 18, 2018

Timothy C. Brightbill, Laura El-Sabaawi, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, DC, for SolarWorld Americas, Inc.

Robert George Gosselink and *Jonathan Michael Freed*, Trade Pacific, PLLC, of Washington, DC, for Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Trina Solar (U.S.) Inc.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd.

Neil R. Ellis, Richard L.A. Weiner, Shawn Michael Higgins, and *Justin Ross Becker*, Sidley Austin, LLP, of Washington, DC, for Yingli Green Energy Holding Co., Ltd.; Yingli Green Energy Americas, Inc.; Yingli Energy (China) Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; and Shenzhen Yingli New Energy Resources Co., Ltd.

Neil R. Ellis, Richard L.A. Weiner, Shawn Michael Higgins, and *Justin Ross Becker*, Sidley Austin, LLP, of Washington, DC, for Canadian Solar Inc.; Canadian Solar (USA) Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; and Canadian Solar International Limited.

Craig Anderson Lewis, Hogan Lovells US LLP, of Washington, DC, for BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd.

Tara Kathleen Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of Counsel on the brief was *Mercedes C. Morno*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") remand determination in the second adminis-

trative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("China" or "the PRC"), pursuant to the court's order in *SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1254, 1278–79 (2017) ("*SolarWorld Americas I*"). *See Final Results of Remand Redetermination*, Jan. 18, 2018, ECF No. 123–1 ("*Remand Results*"); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 81 Fed. Reg. 39,905 (Dep't Commerce June 20, 2016) (final results of ADD administrative review and final determination of no shipments; 2013–2014) and accompanying Decision Mem. for the Final Results of the 2013–2014 [ADD] Admin. Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the [PRC], A-570–979, (June 13, 2016), ECF No. 21–5 ("Final Decision Memo").

For the reasons that follow, the court sustains Commerce's determination to include import data with reported quantities of zero in the surrogate value calculations and remands for further explanation or reconsideration consistent with this opinion Commerce's surrogate value selections for respondent Yingli Green Energy Holding Co., Ltd.'s tempered glass input and respondent Changzhou Trina Solar Energy Co., Ltd.'s scrapped solar cell and module byproduct offset.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous opinion, *see SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1259–60, and here recounts the facts relevant to the court's review of the *Remand Results*. In this second administrative review of the ADD order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from China, Commerce selected Yingli Green Energy Holding Co., Ltd. ("Yingli") and Changzhou Trina Solar Energy Co., Ltd. ("Trina") as mandatory respondents. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 80 Fed. Reg. 80,746, 80,746 (Dep't Commerce Dec. 28, 2015) (preliminary results of ADD administrative review and preliminary determination of no shipments; 2013–2014) and accompanying Decision Mem. for Prelim. Results of the 2013–2014 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC], A-570–979, at 2, PD 520, bar code 3427351–01 (Dec. 18, 2015) (citing 2013–2014 [ADD] Admin. Review of Crystalline Silicon

Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]: Respondent Selection, A-570–979, at 4–5, PD 67, bar code 3264380–01 (Mar. 13, 2015)).[1] In the final determination, Commerce valued Yingli's tempered glass input using Thai import data under Harmonized Tariff Schedule ("HTS") subheading 7007.19.9000, *see* Final Decision Memo at 29–34, and Trina's scrapped solar cell and module byproduct using Thai import data under HTS subheading 8548.10.[2] *See id.* at 46–48. Commerce included in the average unit surrogate value calculations for all factors of production import data with reported quantities of zero, finding no basis in the record to support a determination that the zero-quantity values are unreliable or incorrect, simply because quantity listed is zero. *See id.* at 63–64.

Plaintiff, SolarWorld Americas, Inc. ("SolarWorld"), moved for judgment on the agency record, challenging certain aspects of the final determination. *See* SolarWorld's Mot. J. Agency R., Jan. 26, 2017, ECF No. 44; SolarWorld Americas, Inc.'s Mem. Supp. Rule 56.2 Mot. J. Agency R. Conf. Version, Jan. 26, 2017, ECF No. 44; Summons, July 20, 2016, ECF No. 1 (commencing this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)).[3] Relevant on remand, SolarWorld challenged Commerce's determination to value Trina's scrapped solar cell and module byproduct using Thai data for imports classified under HTS subheading 8548.10 ("Waste and scrap of primary cells, primary batteries and electric accumulators; spent primary cells, spent primary batteries and spent electric accumulators; electrical parts of machinery or apparatus, not specified or included elsewhere in this Chapter: Other").

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[1] On September 14, 2016, Defendant submitted indices to the public and confidential administrative records for this review. These indices are located on the docket at ECF Nos. 212 and 21–3. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices.

[2] In the final determination, Commerce valued Yingli's, but not Trina's, scrapped solar cells using Thai import values for HTS 2804.69, explaining:

> Yingli reported that it removes the polysilicon from its scrap solar cells and reintroduces it into production. Thus, the value of these scrap solar cells is in the silicon content. Hence, consistent with *Solar ARI*, we valued Yingli's scrap cells based on HTS 2804.69, which is the HTS category applicable to silicon.

Final Decision Memo at 47. Commerce noted that, "[i]n contrast," because Trina reported that its scrap is composed of broken cells and modules that could not be reintroduced into production, the agency "determined that Trina's cell scrap consisted of every component of the cell, not simply polysilicon, and its modules scrap consisted of every component of the module." *Id.*

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

Mandatory respondents Yingli et al.[4] and Trina et al.[5] each also commenced litigation challenging certain aspects of the final determination; both actions have been consolidated with the present action. *See* Mem. Points and Authorities Supp. Mot. J. Agency R., Jan. 26, 2017, ECF No. 42 ("Yingli Br."); Mem. Supp. Mot. [Trina et al.] J. Agency R., Jan. 26, 2017, ECF No. 43 ("Trina Br."); Order, Oct. 25, 2016, ECF No. 31 (order consolidating all three actions related to this administrative review). Relevant here, Yingli challenged Commerce's use of Thai import data to value Yingli's tempered glass input, contending that the Thai data is aberrational, *see* Yingli Br. at 9–26, and Trina challenged Commerce's inclusion, in the calculation of surrogate values, values for Thai import categories with reported quantities of zero, contending that doing so resulted in surrogate values that are not supported by substantial evidence. *See* Trina Br. at 16–19.

In the prior decision, the court sustained in part and remanded in part Commerce's final determination in this review.[6] *SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1278–79. Specifically, the court remanded three issues. The court remanded Commerce's selection of a surrogate value for Yingli's tempered glass input to explain why the selection is reasonable in light of evidence of the disproportionate impact of Hong Kong input data and the allegation of aberrational benchmarks. *See id.*, 41 CIT at __, 273 F. Supp. 3d at 1261–65, 1278–79. The court remanded Commerce's determination to value Trina's scrapped solar cells and modules byproduct offset using import data for Thai HTS category 8548.10, determining that Commerce had not sufficiently explained why the selection is reasonable given that the category is not specific to the solar cells and modules

[4] The following parties are plaintiffs in the action Yingli Green Energy Holding Co., Ltd. v. United States, Ct. No. 16–00135, which has been consolidated with the present action: Yingli Green Energy Holding Company Limited; Yingli Green Energy Americas, Inc.; Yingli Energy (China) Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; and Shenzhen Yingli New Energy Resources Co., Ltd.

[5] The following parties are plaintiffs in the action Changzhou Trina Solar Energy Co., Ltd. v. United States, Ct. No. 16–00132, which has been consolidated with the present action: Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science and Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd.

[6] Specifically, the court sustained: Commerce's surrogate value selections for valuing respondents' aluminum frames, semi-finished polysilicon ingots and blocks, solar backsheet, and nitrogen inputs; Commerce's selection of financial statements for calculating financial ratios for the respondents' overhead, selling, general, and administrative expenses, and profit; and Commerce's application of adverse facts available to Trina's unreported, purchased solar cells. *See SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1278.

and in light of SolarWorld's evidence that the selection results in a surrogate value for the byproduct that is higher than the value of the input itself. *See id.*, 41 CIT at __, 273 F. Supp. 3d at 1267–68, 1278–79. Finally, the court remanded Commerce's use of surrogate values for factors of production with reported quantities of zero for Commerce to explain why the inputs are reliable in light of the evidence on the record that the values are not within range of the values for other low-quantity imports on the record. *See id.*, 41 CIT at __, 273 F. Supp. 3d at 1273–75, 1278–79.

Commerce filed the *Remand Results* on January 18, 2018. Plaintiff SolarWorld continues to challenge Commerce's selection of Thai data for imports classified under HTS subheading 8548.10 as a surrogate to value Trina's scrapped solar cell and module byproduct. *See* Pl. [SolarWorld]'s Comments on Final Results of Redetermination Pursuant to Remand at 5–8, Mar. 7, 2018, ECF No. 133 ("SolarWorld Remand Comments"). SolarWorld contends that Commerce on remand continues to insufficiently explain its selection of an HTS category specific to scrapped battery cells, a product with which the scrapped solar cells and modules share no components, making it an unreasonable surrogate value. *Id.* Consolidated Plaintiff Yingli continues to challenge Commerce's selection of Thai import data for valuing Yingli's tempered glass input, contending that Commerce has insufficiently explained its selection and failed to address the court's request to explain why the selection of the Thai data is reasonable in light of the disproportionate impact that the import data from Hong Kong has on the overall Thai data value. *See* Comments of Pls., [Yingli] et al., on [Commerce]'s Final Results of Remand Redetermination, Mar. 6, 2018, ECF No. 129 ("Yingli Remand Comments"). Consolidated Plaintiff Trina continues to challenge Commerce's inclusion of import data with reported quantities of zero in its surrogate value calculations, contending on remand that Commerce has relied upon erroneous calculations to support its analysis of the data sets. *See* [Trina]'s Comments on [Commerce]'s Final Results of Redetermination Pursuant to Remand, Mar. 5, 2018, ECF No. 127 ("Trina Remand Comments").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or other-

wise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. The Use of Import Data with Reported Quantities of Zero

In the final determination, Commerce included values for import data with reported quantities of zero in the surrogate value calculations. *See* Final Decision Memo at 63–64. Trina argued that the values with zero quantities were not reliable, such that their inclusion results in distorted surrogate values. Trina Br. at 16–19. The court remanded on this issue, determining that Commerce's conclusory explanation that the values are reliable because there was no reason to conclude the zero-quantity values were errors was insufficient given Commerce's acknowledgment that the majority of the zero-quantity values are not within range of other low-quantity import values on the record. *SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1273–75, 1278–79. The court requested that, on remand, Commerce explain how the inclusion of these values is reasonable. *Id.*, 41 CIT at __, 273 F. Supp. 3d at 1275. On remand, Commerce provided additional analysis of the zero-quantity values and further explanation of its determination that the values were reliable and not in error. *See Remand Results* at 33–52. For the reasons that follow, the court sustains Commerce's determination on this issue.

In the final determination, Commerce stated that, in this review, "in most instances, the values for zero quantity import data points are not within the range of other lower quantity and value import data points . . . ." Final Decision Memo at 64. The court requested that Commerce explain, on remand, how its explanation that there is no indication that the values are unreliable is reasonable in light of this acknowledgment that the values are out of range of other low-quantity values on the record. *See SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1275.

On remand, Commerce "acknowledge[s] that [the agency] did not directly address the data Trina placed on the record" regarding the zero-quantity values in the final determination. *Remand Results* at 34. In its remand determination, Commerce analyzes the import data to determine whether the zero-quantity values were in fact reliable.

See id. at 33–52. Commerce determined, after examining the data on the record, "that the values of the zero-quantity imports are, in fact, relatively low, especially when the overall trend of the import data reflects that low quantity imports have a higher [average unit value ("AUV")] than high quantity imports." *Id.* at 34–35. Based on this determination, Commerce "continue[s] to find that the zero-quantity data are attributable to rounding small quantities down to zero, rather than random errors that might result in unreliable data." *Id.* at 35.

Commerce summarized and explained the results of the analyses and comparisons it ran on remand to determine whether the zero-quantity values are within range of other low-quantity import values on the record. *See Remand Results* at 34–38. Commerce concluded that the "comparisons and analysis do indicate a strong correlation between low value and zero quantities," which it determined demonstrates that the data is reliable, reasoning that, if the zero values were the results of random errors, the zero-quantity imports would not be "consistently in the low value range of all imports" as the comparisons demonstrate that they are. *Id.* at 38. Specifically, one analysis demonstrated that, "of any imported quantity with more than one import (*i.e.*, data point), the average value of zero-quantity imports is lower than the AUV of any other quantity of imports." *Id.* at 35. In another analysis, Commerce "divide[d] the value of each zero-quantity import by the AUV of the HTS category under which the zero-quantity import was classified" and averaged those quantities, which resulted in a quantity for the values that was "nearly 50,000 times less than the average of the quantities of all data points." *Id.* at 36. Commerce uses this figure to demonstrate that the value of zero-quantity imports is lower than the AUV for other quantities for each import category. Commerce further discovered that more than one-third of the zero-quantity import values "have a value that is less than the AUV of the HTS category under which the zero-quantity import was classified," which Commerce suggests implies a quantity of less than one for those values because "the AUV is the average value of one unit imported under that HTS category[.]" *Id.* at 36–37. In an additional comparison methodology, Commerce replaced the zero with 0.49, the highest quantity that would be rounded down to zero, and discovered that, "overall, the AUVs for zero-quantity imports are consistent with the AUVs of other low quantity imports." *Id.* at 37. Based on all of these methods of comparison, Commerce concluded that the zero-quantity import values "exhibit characteristics consistent with other low-quantity imports."

Id. at 37. Accordingly, Commerce "continue[s] to find that the zero-quantity data are attributable to rounding small quantities down to zero, rather than random errors that might result in unreliable data." *Id.* at 35.

Commerce has responded to the court's order. Commerce explained that it had not previously addressed the data thoroughly, and accordingly ran a thorough analysis of the data on remand. The results of that analysis demonstrate that the zero-quantity values are in fact consistent with other low-quantity values on the record. Having confirmed that the values are consistent with other low-quantity values, it is reasonable for Commerce to conclude that the zero-quantity values are not the result of error but are the result of rounding quantities between 0.01 and 0.49 down to zero, and to determine that the data is reliable.

Trina contends that, on remand "Commerce has ignored substantial information that demonstrates that the values of zero quantity Thai entries vary tremendously even within the same HTS classification and therefore cannot reasonably be considered to reflect only small quantity imports," such that these values are unreliable and should not be included. Trina Remand Comments at 5. Commerce's analysis of the data emphasizes that the overall trend of the zero-quantity values suggests that the zero-quantity values are consistent with other low-quantity values on the record. This explanation does not require that the value within each HTS category be unvaried. The determination that the values are generally consistent with other low-quantity values for each HTS category is reasonable despite some variation within each HTS category.

Trina also argues that Commerce's analysis is misleading and inaccurate because the agency has presented an analysis of the figures which relies upon grouping "together completely different imported products with widely divergent import average unit values." Trina Remand Comments at 5. However, in explaining its analysis, Commerce stated that its methodology specifically accounted for the fact that there are differences in the AUVs of individual HTS categories. *See Remand Results* at 35–36, 46. To account for these differences, Commerce "divid[ed] the total value of each import by the AUV of the HTS category under which the import was classified to normalize for differences in the AUVs of different HTS categories," and then compared the averages that resulted for each distinct import quantity to assess each individual HTS category. *Id.* at 46. This methodology reasonably assesses the reliability of each individual HTS category,

and Trina's argument that the agency erroneously assessed all values together without taking those differences into account is therefore unpersuasive.

II. Tempered Glass

The court remanded Commerce's valuation of Yingli's tempered glass input using Thai import data, requesting that Commerce explain how the selection is reasonable in light of its past practice, record evidence of the disproportionate impact of the Hong Kong input values, and the claim of aberrational benchmarks. *See Solar-World Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1261–65, 1278–79.

Yingli reported tempered glass as a factor of production in this review. In proceedings involving imports from a nonmarket economy country,[7] such as the PRC, Commerce obtains a normal value by adding the value of the factors of production used to produce the subject merchandise with other costs, expenses, and profits. *See* 19 U.S.C. § 1677b(c)(1). Pursuant to the statute, Commerce selects "the best available information regarding the values of such factors in a market economy country or countries" as a surrogate with which to value each factor of production.[8] *Id.* Commerce has broad discretion in deciding what constitutes the best available information. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (noting the absence of a definition for "best available information" in the ADD statute). The agency has developed a methodology to determine which data source is the best available information, which is to select a source that is (1) specific to the input; (2) tax and import duty exclusive; (3) contemporaneous with the period of review; (4) representative of a broad market average; and (5) publically available. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited

[7] The term "nonmarket economy country" means any foreign country that Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). In such cases, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses]." *Id.*§ 1677b(c)(1).

[8] To the extent possible, Commerce uses "the prices or costs of factors of production in one or more market economy countries that are--(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. §§ 1677b(c)(4)(A)–(B). Commerce also has a regulatory preference for valuing all factors of production using surrogate value data from a single surrogate country where practicable. 19 C.F.R. § 351.408(c)(2) (2015).

May 15, 2018) ("*Policy Bulletin 04.1*"). Despite its discretion, Commerce's determination of what constitutes the best available information must be based in the objective of the ADD statute, to calculate accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007).

As explained in *SolarWorld Americas I*, it is Commerce's practice not to use aberrational values as surrogate values. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19, 1997); *SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1262. It is the agency's practice, "[w]hen presented with sufficient evidence to demonstrate that a particular surrogate value is aberrational, and therefore unreliable," to "examine relevant price information on the record, including any appropriate benchmark data, in order to accurately value the input in question." *Remand Results* at 6 (citations to past practice omitted). Commerce explains that its practice is to assess aberrationality by examining HTS data both across potential surrogate countries and within the surrogate country over multiple years. *Id.* Commerce considers import data to be aberrationally high if that data is "many times higher than the import values from other countries." *Id.* (quoting Final Decision Memo at 33).

On remand, Commerce continues to value the tempered glass input using Thai import data, again determining that the import data is not aberrational based on a revised explanation of its practice for determining aberration. *See Remand Results* at 4–9, 12–33. Commerce clarifies that, in the final determination, the agency erred by citing two cases as current practice which no longer reflect its current practice. *Id.* at 13 (citing Final Results of Redetermination Pursuant to Catfish Farmers of America v. United States, Consol. Court No. 08–00111 (Sept. 14, 2009), ECF No. 100–1 ("*Catfish Farmers Remand Results*"); Issues and Decision Mem. for the Investigation of Steel Wire Rope from the [PRC], A-570–859 (Feb. 28, 2001), *available at* http://ia.ita.doc.gov/frn/summary/prc/014895–1.txt (last visited May 15, 2018) ("*Steel Wire Rope from the PRC*"))). In those cases, Commerce had explained its practice as evaluating individual inputs within the overall import data for a certain HTS category and, if found to be aberrational, removing those component inputs from the import data before calculating the surrogate value. *See id.*; *Catfish Farmers Remand Results* at 4–7; *Steel Wire Rope from the PRC* at Comment 1. The court expressed concern that Commerce's practice in fact runs counter to the methodology that the agency employed in the present case and requested that, on remand, the agency reconcile its

methods in this case with that practice. *SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1264–65.

On remand Commerce explains that its current practice is in fact to require interested parties to demonstrate that the import data is aberrational in the aggregate, rather than to evaluate each individual input that forms the overall value for aberrationality. *Remand Results* at 14–15. Commerce states:

> The underlying rationale is that "[w]hen determining whether data are aberrational, [Commerce] has found that evidence of a high or low AUV does not necessarily establish that GTA data for the suspect countries are unreliable, distorted or misrepresentative. Rather, interested parties must provide specific evidence showing whether the value is aberrational." Commerce's current practice considers whether the AUV, in the *aggregate*, is aberrational for the economically comparable surrogate countries or as compared to historical AUVs of the surrogate country at issue.

Id. at 25–26 (emphasis in original) (citing and quoting *Issues and Decision Mem. for the Final Results of the 2012–2013 [ADD] Admin. Review of Multilayered Wood Flooring from the PRC* at Comment 11.D, A-570–970 (July 8, 2015) ("*Wood Flooring Decision Memo*")). Commerce emphasizes that this current practice does not require the agency to evaluate whether certain imports with a high or low value have a disproportionate impact on the overall import value, but instead to assess whether the overall AUV "is consistent with surrogate values for the input from other economically comparable countries identified as potential surrogate countries."[9] *Id.* at 15. Commerce states that this practice is reasonable because it would be administratively burdensome to require the agency to assess the potential

[9] The court notes that Commerce, after dismissing the practice demonstrated in *Catfish Farmers Remand Results* and *Steel Wire Rope from the PRC* (in which the agency disaggregated import data and excluded component data that it found aberrational) as contrary to its current practice, *Remand Results* at 13, later cites those cases as support of its methodology for determining aberration. *Id.* at 32. Commerce invokes *Catfish Farmers Remand Results* and *Steel Wire Rope from China* to support its finding in this case that the Thai AUV is not aberrational:

> [W]hile the POR Thai AUV for tempered glass is approximately four and a half times the average of Thai AUVs for tempered glass from the first administrative review and the investigation in this proceeding, in *Steel Wire Rope*, Commerce stated that it would determine whether unit values are aberrational if they are many times higher than the import values from other countries. Similarly, in *Fish from Vietnam*, the Department found the surrogate values for labels to be aberrational where the AUVs varied between 30 and 79 times greater than the average of the rest of the import data. Hence, our comparison to historical data does not demonstrate that the POR Thai AUV for tempered glass is aberrational, particularly because it is within the POR AUVs of tempered glass from the other potential surrogate countries. This failure to refute the POR Thai AUV for tempered glass, in the aggregate, with credible benchmarks supports the reasonableness of this value.

aberration of each data point on the record, *id.* at 16, and would invite interested parties to request "distortive cherry picking of data" to suit their objectives. *Id.* at 15 (quoting Polyethylene Terephthalate Film, Sheet, and Strip from the [PRC]: Issues and Decision Mem. for the Final Results of the 2010–2011 Admin. Review at 12, A-570–924, (June 5, 2013), *available at* http://ia.ita.doc.gov/frn/summary/prc/2013–13985–1.pdf (last visited May 15, 2018) ("*PET Film Decision Memo*")).[10] Commerce emphasizes that this practice is grounded in its "judicially-affirmed preference to base surrogate values on broad data that reflect the surrogate country's market as a whole." *Id.* Commerce contends that, because its practice is to determine whether the overall AUV of the HTS category is aberrational in the aggregate, it is unnecessary to analyze individual data points for aberration. *Id.* at 28. Commerce explains that its actions in the present case were consistent with this practice, as the agency compared the Thai AUV for tempered glass with AUVs for tempered glass from other potential surrogate countries, which resulted in the determination that the Thai AUV is not aberrational. *See id.* at 15.

On remand Commerce emphasizes that it followed its current practice here as reflected in the *Wood Flooring* proceeding. *See Remand Results* at 13–15, 25–27. In *Wood Flooring*, although Commerce asserted that it is only concerned with aberrationality in the aggregate, it nevertheless explained why the allegedly aberrational inputs were in fact representative of market-driven prices by assessing the share each input represented of the aggregate data. *Wood Flooring Decision Memo* at 43 (finding "imports from Taiwan and the United States represent the vast majority of imports into Thailand (77.1%) and, therefore, are a true representation of market-driven prices."). Thus, it is not clear from *Wood Flooring* whether Commerce's practice is to assess what percentage of the market the allegedly aberrational input data constitutes, to determine whether that data is represen-

Id. at 32. Although Commerce invoked these cases for its practice of only finding values aberrational when they are many times higher than other benchmarks, in the sections cited in both cases the agency was in fact discussing excluding certain aberrational components within the overall data, *see Steel Wire Rope from the PRC* at Comment 1; *Catfish Farmers Remand Results* at 4–7, which is exactly the approach the plaintiffs are seeking here. Commerce cites *Catfish Farmers Remand Results* and *Steel Wire Rope from the PRC* for the proposition that a value has to be many times higher to be considered aberrational while ignoring the fact that at issue in those cases were allegedly aberrational component input data. Commerce also cites a section in *Steel Wire Rope from the PRC* in which the agency excluded an aggregate surrogate value, rather than one component data input, that it determined was aberrational overall. *See Remand Results* at 32 (citing *Steel Wire Rope from the PRC* at Comment 6).

[10] Although Commerce cites to the *PET Film Decision Memo* as well as the *Wood Flooring Decision Memo* as evidence of its current practice, *see Remand Results* at 13–14, there is no discussion in the *PET Film Decision Memo* regarding the share of the market represented by the data that was allegedly aberrational for which exclusion was sought. *See PET Film Decision* Memo at 17–18.

tative of the market. If that is the case, Commerce must clarify how its practice is relevant here, where the allegedly aberrational Hong Kong data comprises just 1.6% of the overall import data into Thailand and yet constitutes more than 75% of the overall value of the Thai import data.[11] *See* Yingli Remand Comments at 9; Reply of Pls. [Yingli et al.] Supp. Mot. J. Agency R. at 4–5, June 2, 2017, ECF No. 67 ("Yingli Reply Br."). If Commerce does not have a practice of considering what percentage of market share is made up by the input data in question, Commerce should explain why it focused on market representation in the *Wood Flooring Decision Memo*. Because Commerce has invoked *Wood Flooring* here to explain its practice, the agency must clarify what exactly that practice is and why, in light of that practice, its selection of the Thai import data constitutes a reasonable surrogate value for the tempered glass input.[12]

Additionally, in the *Remand Results*, Commerce did not respond to the court's request that the agency explain why its selection of the surrogate value for tempered glass is reasonable given the evidence of the Hong Kong data's disproportionate impact on the overall value of the Thai import data. *See SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1263–65. The inclusion of the Hong Kong data, which has such a disproportionate effect on the overall Thai import value, appears to contradict Commerce's stated "preference to base surrogate values on broad data that reflect the surrogate country's market as a whole." *Remand Results* at 15. Commerce's only response to the court's request is its contention that the Hong Kong data does not distort the Thai value for tempered glass because there is no evidence to support "Yingli's claim that the Thai AUV for tempered glass does not reflect a range of prices that is representative of the Thai import market." *Id.* at 17. The Hong Kong data represents 1.6% of the import volume but increases the value of the imports by more

[11] Yingli presented calculations to Commerce and this court which demonstrate the extreme impact of the Hong Kong input data on the overall Thai AUV: if the Hong Kong data was excluded, the overall Thai value would drop from $4.14 USD per kilogram to $1.00 USD per kilogram, which constitutes a 76% decrease in value. *See* Yingli Br. at 22–23; Reply of Pls. [Yingli et al.] Supp. Mot. J. Agency R. at 4–5, June 2, 2017, ECF No. 67 ("Yingli Reply Br."); Yingli's Case Br. at 22–27, PD 563, bar code 3438258–01 (Feb. 2, 2016). Yingli's data demonstrates that the value of the imports for this HTS category into Thailand from Hong Kong was $7,351,945 USD, which is 76.16% of the total value, $9,652,802 USD, of imports into Thailand for this HTS category, while the quantity of the same Hong Kong imports was 38,398 kilograms, which is 1.6% of the total quantity, 2,331,015 kilograms, of imports into Thailand for this HTS category. *See* Yingli Reply Br. at 4–5.

[12] Commerce's explanation on remand on the issue of aberrational benchmark data from Ecuador and Ukraine is sufficient. Regarding the contention that the Ecuador and Ukraine import values are aberrational benchmarks, Commerce emphasizes that the fact that an AUV is of a lower import quantity does not in and of itself render the AUV aberrational; additional indication that the import data is aberrational is needed, and no such indication was presented by interested parties in this case. *Id.* at 17–18.

than 75%, *see* Yingli Reply Br. at 4–5; it is not clear how the Thai AUV as reflected in this record represents the Thai market as a whole. Commerce's response is inadequate and does not speak to the underlying issue: that the Hong Kong data skews the Thai AUV in a way that renders the Thai AUV unrepresentative of the Thai market. On remand Commerce must reconsider or explain the issue of the disproportionate impact of the Hong Kong data.

The court acknowledges Commerce's concern regarding the potential administrative burden involved with assessing individual inputs for aberration. Commerce notes that

> [i]dentifying and defining what is and what is not aberrational among these thousands of data points spread along a vast spectrum of relatively high and low values is an impossible task. An argument that an import value that is ten times the average value is clearly aberrational may on its face appear plausible, and yet the record in this case contains thousands of such values. Our current practice of only examining whether an entire country's AUV is aberrational prevents what could be a never-ending process of removing allegedly relatively high and low individual data points from our calculations. The second concern with using the proposed analysis is that it undermines the use of broad-market average prices for a particular input. Both concerns relate to Commerce's statutory obligation to rely on the "best information available" to value [factors of production], which the parties recognize.

Remand Results at 26–27 (citations omitted). Commerce claims that "the proposed analysis . . . undermines the use of broad-market average prices," *id.* at 27, but it is unclear how retaining the Hong Kong input, which so disproportionately effects the overall value, serves the objective of using broad market average prices. Further, Commerce asserts that disaggregating inputs that are ten times higher (or lower) than the average value would create an insurmountable administrative burden, as there could be "thousands of such values." *Id.* at 26. However, here, there is a claim that the Hong Kong input is close to two-hundred times higher than the average unit values from the rest of the import data. *See* Yingli Remand Comments at 9. Although the administrative burden concern is significant, it does not outweigh the accuracy concerns raised in a case such as this where the Thai data includes unit values from Hong Kong which make up only 1.6% of the import volume yet, at 191 times higher than the average unit values from other countries, quadruple the Thai AUV. *See id.*; Yingli Br. at 17–18.

Commerce of course may change its practice; however, its practice must still be reasonable. Here, Commerce has supported its claimed change in practice, stating it will no longer disaggregate data and exclude aberrational values, *see Remand Results* at 13–15, but Commerce has not explained how its practice supports its stated preference to "base surrogate values on broad data that reflect the surrogate country's market as a whole," *id.* at 15, where unit values representing 1.6% of the import volume account for more than 75% of the total value of Thai imports of tempered glass. A practice that considers values in the aggregate to avoid administrative burdens may be reasonable in other cases but, without further explanation, does not appear reasonable on this record.

III. Scrapped Solar Cells and Modules

The court remanded Commerce's selection of Thai HTS category 8548.10 to value Trina's scrapped solar cell and module byproduct. *See SolarWorld Americas, Inc.*, 41 CIT at __, 273 F. Supp. 3d at 1267–68, 1278–79. The court concluded that Commerce had not explained its decision to value the solar cell and module byproduct using an HTS category which is specific to scrapped electric battery cells. *Id.* The court requested that Commerce explain on remand why its selection is reasonable given the fact that Thai HTS category 8548.10 is not specific to solar cells or modules and results in a value for the scrapped cell and module byproduct that is higher than the value of the input itself. *Id.* On remand, Commerce has continued to value the byproduct using Thai HTS category 8548.10. *See Remand Results* at 53–64. SolarWorld continues to challenge the selection and argues that Commerce has still not explained why the selection is reasonable given that the category is not specific to the input. SolarWorld Remand Comments at 5–8. For the reasons that follow, the issue is remanded for further explanation or reconsideration.

To calculate normal value for a nonmarket economy country, Commerce removes the value of reported byproducts from the values calculated for the factors of production, expenses, and profits. *See* 19 U.S.C. § 1677b(c)(1). As with factors of production, Commerce selects a surrogate with which to value each byproduct using "the best available information regarding the values of such factors in a market economy country or countries." *Id.* Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See Policy Bulletin 04.1*. Although Commerce has discretion to determine

what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011), the agency must ground its selection of the best available information in the overall purpose of the statute, which is to calculate accurate dumping margins. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191; *see also Parkdale Int'l.*, 475 F.3d at 1380.

There were two potential surrogate values placed on the record of this review with which Commerce could value Trina's scrapped solar cell and module byproduct: the Thai import value for HTS category 8548.10, covering "waste and scrap of primary cells, primary batteries and accumulators; spent primary cells, spent primary batteries, and spent electrical accumulators," and the Thai import value for HTS category 2804.69, covering silicon of less than 99.99 percent purity. *Remand Results* at 53. On remand, Commerce continues to value the scrapped solar cell and module byproduct using Thai HTS category 8548.10 for scrapped battery cells. *See id.* at 53–64. Commerce explains that this category constitutes an appropriate surrogate value because "the manufacturing processes and the raw materials used to produce primary cells and batteries are more similar to the processes and inputs used in producing solar cells than those used to extract or produce silicon." *Id.* at 54. Commerce elaborates upon this similarity by noting that scrapped solar cells and modules, like scrapped battery cells, "are scrap products that were initially assembled together from many different inputs to create negative and positive electronic charges capable of conveying electricity." *Id.* Commerce asserts that, in contrast, the silicon covered under HTS category 2804.69, SolarWorld's preferred category, is minimally processed and "is not a product that is now scrap or one that was originally manufactured/assembled together from many different inputs for the purpose of producing or conveying electricity." *Id.* Commerce also emphasizes that it found HTS category 2804.69 not specific to Trina's scrapped solar cells and modules because the polysilicon in a solar cell is of a higher purity than the silicon covered by HTS category 2804.69.[13] *Id.*

[13] It is not clear to the court that this difference in purity on which Commerce relies to reject HTS category 2804.69 is a rational reason to reject that category, given that Commerce values Yingli's scrapped solar cells using HTS category 2804.69, which Commerce describes as "the HTS category applicable to silicon," because Yingli reported extracting the polysilicon from its solar cell byproduct. *See* Final Decision Memo at 47. Even though Commerce believes that SolarWorld's position "calls for speculation that parties are purchasing scrapped solar cells and modules only for their polysilicon," *Remand Results* at 61, Commerce's determination with respect to Yingli makes clear that, if purchasers were doing so, HTS 2804.69 would be the appropriate category for valuation of the byproduct, despite the difference in purity levels between the silicon covered by the category and the respondent's

This explanation does not sufficiently explain why, on this record, the category is a reasonable choice for the best available information. Products that are assembled from multiple inputs, convey electricity, undergo certain unspecified manufacturing processes, and are ultimately scrapped do not inherently share a similar value. In emphasizing these similarities, Commerce misses the point of a surrogate value for a byproduct. The surrogate value should be a product that is similarly valued in order to achieve an accurate valuation for the respondent's byproduct and, ultimately, for the respondent's normal value. *See Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1375–76, 985 F. Supp. 133, 137 (1997), *aff'd*, 166 F.3d 1373 (Fed. Cir. 1999).[14] Commerce has not provided an explanation as to why the selection of a category covering scrapped electrical batteries accurately values the respondent's scrapped solar cells and modules byproduct.[15] Without an explanation which demonstrates that the se-

polysilicon. *See* Final Decision Memo at 47 (finding "the nature of the process, and the additional chemicals and additives used during cell production, introduce impurities . . . suggest[ing] that the recycled polysilicon is not at the purity level required for solar grade polysilicon (99.9999 percent silicon).").

[14] In the final determination, Commerce explained that it "has a long-standing practice of rejecting or capping byproduct surrogate values in instances where the byproduct surrogate value exceeds the surrogate value of the input from which it was derived," but that this practice did not apply in this case because the argument was presented by SolarWorld in relation to an alternate HTS category that was ultimately not selected. Final Decision Memo at 48. The court requested that, on remand, Commerce explain why its selection of import data for HTS category 8548.10 is reasonable, in light of the concerns raised by SolarWorld regarding selecting a surrogate value for a byproduct that is higher than the value for the input itself. *SolarWorld Americas I*, 41 CIT at __, 273 F. Supp. 3d at 1268.

In the *Remand Results*, Commerce states that the value of the HTS category should be compared to the cost of finished solar cells rather than to the cost of polysilicon. *Remand Results* at 55 ("SolarWorld improperly compared the scrap surrogate value to the value of polysilicon when the proper comparison is to the cost of solar cells, which is approximately $200 per kilogram (over four times greater than the scrap surrogate value)."). Commerce's position that the value of the scrap stems from all of the components is at odds with SolarWorld's position that it is the polysilicon, the primary input into the cells and modules, that gives value to the scrap as it is "the raw material that is reclaimed when cells and modules are scrapped." SolarWorld Remand Comments at 6. Record information supports SolarWorld's position. Commerce determined that Yingli's scrap solar cells and modules derive their value from the reclaimed polysilicon. Final Decision Memo at 47. Commerce noted that Yingli reported that it extracts the polysilicon from the scrapped solar cells and that Trina reported that it does not. *Id.* Commerce notes that SolarWorld speculates that Trina sells the scrap for others to extract the polysilicon. *Remand Results* at 61. However, Commerce speculates that the scrap is sold not for the polysilicon but for all the components. *Id.* (". . . [I]t is not appropriate to assume that purchasers valued these defective products, particularly scrapped modules that continued to function, solely for polysilicon.") Although there is record evidence to support SolarWorld's speculation, Commerce does not point to anything in the record which supports its own speculation that Trina's scrapped solar modules are resold for components other than their polysilicon. In light of the record evidence that scrapped solar cells and modules are valuable to some for the polysilicon, Defendant has not explained why it is reasonable for Commerce to assume that scrapped solar cells and modules are valuable to others for more than the polysilicon.

[15] Commerce attempts to explain why its position makes sense by comparing it to an example:

lected import data, for HTS category 8548.10, provides a representative value for the scrapped solar cells and modules in a market-economy PRC, the court cannot say that the selection of this category is reasonable.[16] *See id.* The issue is remanded to Commerce to reconsider or further explain its selection of HTS category 8548.10 in light of this opinion.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination to include import data with reported quantities of zero in the surrogate value calculations. This matter is remanded to Commerce for reconsideration or further explanation consistent with this opinion Commerce's surrogate value selection for Yingli's tempered glass input and Trina's scrapped solar cells and modules byproduct offset. In accordance with the foregoing, it is

ORDERED that Commerce's surrogate value selections for the respondents' tempered glass input and scrapped solar cells and modules byproduct offset are remanded for further explanation or reconsideration consistent with this opinion. Commerce shall file its remand determination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

> Commerce's practice is to select surrogate values as specific to the input (or byproduct/scrap) being valued as possible. There are no surrogate values specific to scrapped solar cells or modules on the record. Therefore, we looked for surrogates covering products of the same nature as completed solar cells and modules. We would not use the price of an automobile to value a suitcase. Rather, we would rely on suitcase prices to value suitcases and if there were no such prices on the record, then we would rely on the value of a broader category of products consisting of containers used to convey or transport items to value a suitcase. Because solar cells and modules are electrical products manufactured using a multiple array of inputs, including chemicals and metals, we find that the potential surrogate covering scrapped manufactured electrical products comprising various inputs is the better surrogate compared to a potential surrogate covering silicon rocks.

Remand Results at 62. It is unclear how this comparison demonstrates that the selection of a category specific to scrapped electrical batteries provides a reasonable surrogate value for scrapped solar cell and module byproduct. This analogy demonstrates that a certain different inapposite valuation would be unreasonable and it implies that the scrapped batteries are broader category of solar modules. Commerce does not explain why its implication is reasonable other than to say that solar modules and batteries contain metals and chemicals and produce electricity. This explanation does not support Commerce's implication.

[16] Commerce and Plaintiff-Intervenor each allude to the fact that HTS category 8548.10 for scrapped battery cells contains an "other" subcategory, suggesting that scrapped modules could possibly be represented within this other category. *See Remand Results* at 59; Pl.-Intervenors BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd. Comments on Remand Results at 5, Mar. 21, 2018, ECF No. 136. It is not clear that it is reasonable to suggest that this "Other" category would cover scrapped solar modules. However, this suggestion, even if reasonable, would not address the lack of a rationale that focuses on the representativeness of the selected value, as would be necessary to make the selection of this HTS reasonable on this record.

ORDERED that the parties shall have 30 days thereafter to file a reply to comments on the remand determination.
Dated: May 18, 2018
New York, New York

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

Slip Op. 18–54

UNITED STATES STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 17–00190

[Granting Defendant's motion to dismiss and dismissing Plaintiff's complaint.]

Dated: May 18, 2018

Luke Anthony Meisner, Schagrin Associates, of Washington DC, argued for plaintiff United States Steel Corporation.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Reza Karamloo*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION

Kelly, Judge:

Before the court is Defendant's motion to dismiss United States Steel Corporation's ("Plaintiff") complaint challenging the Department of Commerce's ("Commerce") amended antidumping duty order issued in connection with the final determination in the antidumping duty ("ADD") investigation into oil country tubular goods ("OCTG") from India. *See* Def.'s Mot. Dismiss, Nov. 29, 2017, ECF No. 15 ("Mot. Dismiss"). Defendant moves to dismiss, contending that the Court lacks subject-matter jurisdiction because Plaintiff's claim is untimely, and contending in the alternative that, even if the Court has jurisdiction, Plaintiff failed to state a claim upon which relief can be granted. *See id.* 7–16; *see also* USCIT R. 12(b)(1); USCIT R. 12(b)(6). For the reasons that follow, Defendant's motion to dismiss is granted.

BACKGROUND

Commerce initiated the underlying ADD investigation of certain oil country tubular goods from India on July 29, 2013. *See Certain [OCTG] from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey,*

Ukraine, and the Socialist Republic of Vietnam, 78 Fed. Reg. 45,505, 45,506–12 (Dep't Commerce July 29, 2013) (initiation of [ADD] investigations). Commerce published a final affirmative determination in the investigation on July 18, 2014, *see Certain [OCTG] From India*, 79 Fed. Reg. 41,981 (Dep't Commerce July 18, 2014) (final determination of sales at less than fair value and final negative determination of critical circumstances) ("*Final Results*"), and issued the initial ADD order on September 10, 2014. *See Certain [OCTG] from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 53,691 (Dep't Commerce Sept. 10, 2014) (antidumping duty orders) ("*ADD Order*").

The rates set for respondents Jindal SAW Ltd. ("Jindal SAW") and GVN Fuels Limited ("GVN") were challenged before this court in *United States Steel Corp. v. United States*, Consol. Court No. 14–00263 ("Consol. Court No. 14–00263"). No party challenged the all-others rate. The court remanded for further consideration or explanation several issues, *see United States Steel Corp. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1114, 1156 (2016) ("*U.S. Steel I*"), and Commerce issued the results of its remand redetermination pursuant to the remand order in *U.S. Steel I* on August 31, 2016. *See* Final Results of Redetermination Pursuant to Remand, (Aug. 31, 2016) ("*Remand Results*"), *available at* https://enforcement.trade.gov/remands/16–44.pdf (last visited May 15, 2018). On remand, this court sustained Commerce's *Remand Results*. *See United States Steel Corporation v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1300, 1325 (2017) ("*U.S. Steel II*").

To conform the *Final Results* with the court's decisions in *U.S. Steel I* and *U.S. Steel II*, Commerce published in the Federal Register a notice announcing that there was a court decision not in harmony with a prior determination and amended the *Final Results*. *See Certain [OCTG] From India*, 82 Fed. Reg. 17,631 (Dep't Commerce Apr. 12, 2017) (notice of court decision not in harmony with final determination of sales at less than fair value and final negative determination of critical circumstances and notice of amended final determination) ("*Amended Final Results*"). Although the *Amended Final Results* listed new rates for the mandatory respondents, it made no reference to the all-others rate. Subsequently, on June 20, 2017, Commerce published an amendment to the *ADD Order*, listing the estimated weighted-average dumping margins for Jindal SAW at 11.24% and for all others at 5.79%.[1] *See Certain [OCTG] From India*, 82 Fed. Reg.

[1] In the *Final Results*, the all-others rate was 5.79%, an average of the calculated weighted-average dumping margins for Jindal SAW (9.91%) and GVN (2.05%). *See Final Results*, 79 Fed. Reg. at 41,982. However, as a result of *U.S. Steel I* and *U.S Steel II*, Commerce revised Jindal SAW's weighted-average dumping margin to 11.24% and GVN's weighted-average

28,045, 28,046 (Dep't Commerce June 20, 2017) (amendment of [ADD] order) ("*Amended ADD Order*").

Following the publication of the *Amended ADD Order*, counsel for Plaintiff contacted Commerce and "requested that the all-others rate be corrected based on the revised dumping margins calculated for GVN and Jindal SAW in the [*Amended Final Results*]." Resp. Br. of Pl. United States Steel Corp. Opp'n Def. United States' Mot. Dismiss at 3 n.1, Jan. 10, 2018, ECF No. 18 ("Pl.'s Resp.") (citation omitted). Commerce responded that the *Amended ADD Order* "fully effectuate[s] the court's affirmed remand." *Id.* at Appendix at Tab A1 (reproducing a copy of Commerce's response to Plaintiff's attorney's request for recalculation of the all-others rate, dated June 27, 2017).[2]

On July 20, 2017, Plaintiff commenced the present action challenging the all-others rate published in the *Amended ADD Order*. Compl. at ¶¶ 1, 18, July 20, 2017, ECF No. 4. Plaintiff claims that the correct all-others rate imposed by Commerce should have been 11.24%, the rate assigned to Jindal SAW. *Id.* at ¶ 18. Further, Plaintiff claims that the Court has jurisdiction pursuant to either 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2), or, in the alternative, 28 U.S.C. § 1581(i). *Id.* at ¶ 2. Jurisdiction exists, Plaintiff argues, because it timely filed its challenge to a reviewable determination embodied in the *Amended ADD Order* within the statutorily prescribed time periods of 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and 19 U.S.C. § 1516a(a)(2)(B)(i). *See* Pl.'s Resp. at 9–11. Plaintiff argues that it was only upon publication of the *Amended ADD Order* that Commerce's decision to calculate the all-others rate using dumping margins of Jindal SAW and GVN, invalidated by *U.S. Steel I* and *U.S. Steel II*, became known. *See id.* at 10–11. Plaintiff argues that Commerce should have followed its statutory directive in 19 U.S.C. § 1673d(c)(5)(A), as well as its past practice, and should have recalculated the all-others rate based on the rates calculated for Jindal SAW and GVN after the court sustained Commerce's remand redetermination. *See id.* at 5–8.

Defendant argues that the Court lacks jurisdiction over this action because Plaintiff's challenge to the calculation of the all-others rate is untimely. *See* Mot. Dismiss at 7–9. The time to challenge the calculation of the all-others rate, according to the Defendant, was after the

dumping margin to 1.07% (de minimis) in the *Amended Final Results*. *See Amended Final Results*, 82 Fed. Reg. at 17,631. Consequently, had Commerce recalculated the all-others rate following the decision in *U.S. Steel II*, the all-others rate would have increased to 11.24%, as GVN's de minimis rate would have been excluded.

[2] Following the communication from Commerce to Plaintiff's counsel, Commerce published in the Federal Register a correction to the *Amended Final Results* and the *Amended ADD Order*. *See Certain [OCTG] From India*, 82 Fed. Reg. 35,182 (Dep't Commerce July 28, 2017) (notice of correction to amended final determination and amendment of [ADD] order). The correction made was not in regards to the all-others rate.

issuance of the *Final Results*, not the *Amended ADD Order*. *See id.* Defendant also makes two arguments in the alternative, should the court determine that jurisdiction exists. *See id.* at 9–16. First, Defendant argues that Plaintiff's claim is precluded because Plaintiff failed to raise it in its challenge to the *Final Results*, i.e., in the proceedings leading to the court's decision in *U.S. Steel I*. *See id.* at 9–13. Second, Defendant argues that Plaintiff failed to exhaust its administrative remedies during the litigation in Consol. Court No. 14–00263 and, as a result, has waived its challenge to the all-others rate. *See id.* at 13–16.

The court held oral argument on April 10, 2018, *see* Oral Arg., Apr. 10, 2018, ECF No. 29, and subsequently, at the court's request, the parties submitted supplemental briefing in further support of their positions.[3] *See* Def.'s Suppl. Br., Apr. 23, 2018, ECF No. 31; Pl. United States Steel Corp.'s Br. Resp. Ct.'s Apr. 11, 2018 Letter, Apr. 23, 2018, ECF No. 32.

STANDARD OF REVIEW

The party seeking the Court's jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When deciding a motion to dismiss for lack of subject-matter jurisdiction, the Court must first determine whether the motion seeking dismissal "challenges the sufficiency of the pleadings or controverts the factual allegations made in the pleadings." *See H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006) (citation omitted). If the motion controverts the basis for jurisdiction

[3] At oral argument, Defendant also argued that Plaintiff's claim arose, if it all, at the time when the Timken Notice was published in the Federal Register following this court's decision in *U.S. Steel II* and did not list an all-others rate. *See* Oral Arg. at 00:58:54–00:59:07, 00:59:25–00:59:49. In its supplemental brief, Defendant argues that if Commerce decides to recalculate the all-others and the all-others rate was not challenged in the complaint nor mentioned in the remand redetermination, it will do so, if at all, "in an amended final determination accompanying a *Timken Notice*." Def.'s Suppl. Br. at 5, Apr. 23, 2018, No. 31 (citing *e.g.*, *Oil Country Tubular Goods from Turkey*, 81 Fed. Reg. 12,691, 12,691 (Dep't Commerce Mar. 10, 2016) (notice of court decision not in harmony with the final determination of the countervailing duty investigation) ("*OCTG from Turkey*"); *Stainless Steel Sheet and Strip in Coils from Germany*, 67 Fed. Reg. 15,178, 15,179 (Dep't Commerce Mar. 29, 2002) (amended final determination of [ADD] investigation) ("*SSSS from Germany*"); *Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands*, 61 Fed. Reg. 47,871, 47,871 (Dep't Commerce Sept. 11, 1996) (amended final determination pursuant to CIT decision) ("*Cold-Rolled Carbon from the Netherlands*")). Further, Defendant argues that even if Plaintiff's argument had merit and Commerce was obligated to recalculate the all-others rate, Plaintiff's recourse would not be to file a separate action, but seek enforcement of the court's order following the court's decisions in *U.S. Steel I* and *U.S. Steel II*. *See id.* at 2–3.

pled by the non-moving party, then "the allegations in the complaint are not controlling," and the court assumes that all undisputed facts alleged in the complaint are true. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993). The court may decide to dismiss an action for failure to state a claim if the claim is barred by the doctrine of claim preclusion. *See Bowers, Inv. Co. v. United States*, 695 F.3d 1380, 1384 (Fed. Cir. 2012).

DISCUSSION

I. Jurisdiction

Defendant claims that the Court lacks subject-matter jurisdiction over Plaintiff's action. *See* Mot. Dismiss at 7–9; Def.'s Reply Supp. Mot. Dismiss at 1–7, Jan. 30, 2018, ECF No. 22 ("Def.'s Reply"). Defendant argues that the triggering event to challenge the calculation of the all-others rate was the publication of the *Final Results* and, therefore, the all-others rate should have been challenged in Consol. Court No. 14–00263. *See* Mot. Dismiss at 8. Plaintiff argues that its claim is timely and jurisdiction exists because it was the publication of the *Amended ADD Order* in the Federal Register on June 20, 2017 that triggered its complaint and that the *Amended ADD Order* may be challenged pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). *See* Pl.'s Resp. at 9–11. For the reasons that follow, the Court has jurisdiction over the present action pursuant to 28 U.S.C. § 1581(c).

A party may challenge an order embodying a final affirmative determination made by Commerce. *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i); *see also* 28 U.S.C. § 1581(c). Although 19 U.S.C. § 1516a(a)(2)(B)(i) does not specify the types of final affirmative determinations that are reviewable, or the means by which Commerce communicates those determinations, 19 U.S.C. § 1516a(a)(2)(A) further explicates what may be challenged by providing time periods for challenging different determinations. A party may challenge an antidumping duty order based upon a final affirmative determination by filing a summons in this Court within 30 days of the order's publication in the Federal Register and, within 30 days thereafter, filing a complaint in this Court. *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i).

Here, Commerce announced that the previously issued Final Results were not in conformity with this court's decisions in *U.S. Steel I* and *U.S. Steel II*, and amended the results accordingly. *See Amended Final Results*, 80 Fed. Reg. at 17,631. The *Amended Final Results* constitute a final affirmative determination that may be contested under 19 U.S.C. § 1516a(a)(2)(B)(i). Subsequently, based on the final

affirmative determination announced in the *Amended Final Results*, Commerce published the *Amended ADD Order* in the Federal Register on June 20, 2017. *See Amended ADD Order*, 82 Fed. Reg. at 28,046. The publication of the *Amended ADD Order* provides a jurisdictional basis for Plaintiff's action. *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(II). Plaintiff filed its summons and complaint on July 20, 2017, 30 days after publication of the *Amended ADD Order*. *See* Summons, July 20, 2017, ECF No. 1; Compl. Accordingly, Plaintiff complied with the timing requirements of 19 U.S.C. § 1516a(a)(2)(A). Plaintiff's complaint in the present action challenges Commerce's purported failure to recalculate the all-others rate in the *Amended ADD Order*, following this court's decision in *U.S. Steel II*. *See* Compl. at ¶ 18. Although Defendant claims that no new rate was published in the *Amended ADD Order, see* Def.'s Reply 2–3, the issue of whether a new rate was published is a separate issue from whether the Court can hear a challenge to an alleged error in the *Amended ADD Order*.

II. Claim Preclusion and Exhaustion of Administrative Remedies

Defendant argues that Plaintiff's claim is precluded and that Plaintiff failed to exhaust its administrative remedies. *See* Mot. Dismiss at 9–16; Def.'s Reply at 7–9. Plaintiff argues that its claim is not barred by the doctrine of claim preclusion because at issue here is the failure to recalculate the all-others rate, which was not, and could not have been, at issue in Consol. Court No. 14–00263. *See* Pl.'s Resp. at 11–14. Plaintiff also argues that its claim is not barred by the doctrine of exhaustion because it could not have challenged Commerce's calculation of the all-others rate until the publication of the *Amended ADD Order* and, further, because its claim in this action is a pure question of law. *See id.* at 14–17. Plaintiff's claim is precluded and the court need not reach Defendant's argument that Plaintiff has not exhausted its administrative remedies.

The doctrine of claim preclusion not only prohibits the litigation of matters that were previously litigated, but also those that could have been litigated. *See Bowers*, 695 F.3d at 1384. A claim will be precluded when there is

> (1) an identity of parties or their privies, (2) a final judgment on the merits of the first suit, and (3) the later claim [is] to be based on the same set of transactional facts as the first claim such that the later claim should have been litigated in the prior case[]

Id. (citing *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003)).

Plaintiff could have challenged the all-others rate at the time that it challenged the individual respondents' rate in *U.S. Steel I*. When Commerce issues a final antidumping determination, the relevant statute directs Commerce to also calculate an estimated all-others rate. *See* 19 U.S.C. § 1673d(c)(5)(A). The statute provides that, generally, the estimated all-others rate will be based on the weighted average of the estimated dumping margins calculated for the individually investigated exporters and producers, excluding rates that are zero, de minimis, or based entirely on facts otherwise available. *See id.* Although Plaintiff argues that the present action is not based on the "same set of transactional facts" because the all-others rate was not an issue underlying the challenge in *U.S. Steel I* and *U.S. Steel II*, *see* Pl.'s Resp. at 11–12, the plaintiff in Consol. Court No. 14–00263 had all the facts that it needed to seek a change to the all-others rate in that action. The plaintiff in Consol. Court No. 14–00263 sought to challenge the rate of the mandatory respondents, *see* Compl., Nov. 10, 2014, ECF No. 9, Consol. Court No. 14–00263, and could have sought a corresponding change in the all-others rate at the same time.

Plaintiff's claims that Commerce was required to recalculate the all-others rate as a matter of law or based upon its past practice are necessarily merged into the judgment in *U.S. Steel II*. Plaintiff claims that it had no reason to believe that Commerce would not follow the statutory directive to recalculate the all-others rate based on methodology provided in 19 U.S.C. 1673d(c)(5)(A), or that Commerce would contravene what Plaintiff claims is Commerce's established practice of recalculating the all-others rate.[4] *See* Pl.'s Resp. at 5–8. Plaintiff contends that it was only after the *Amended ADD Order* was published that a challenge arose. *See id.* at 11–12, 14. Plaintiff argues that 19 U.S.C. 1673d(c)(5)(A) "unequivocally requires" the calculation of the all-others weight in a specific manner. *Id.* at 5.[5] Plaintiff, in essence, contends that the judgment in *U.S. Steel II* required Commerce to recalculate the all-others rate. Therefore, Plaintiff's claim is precluded and its complaint is dismissed. The court does not need to reach, and so does not reach, the question of whether Plaintiff failed to exhaust its administrative remedies.

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[4] Plaintiff also cited several cases for the proposition that Commerce cannot use a dumping margin that has been invalidated by the courts to calculate the all-others rate. *See* Pl.'s Resp. at 6.

[5] Plaintiff argues that it is Commerce's practice to revise the all-others rate, regardless of whether it is challenged in the underlying complaint. *See* Pl.'s Resp. at 6–8 (citing *e.g.*, *OCTG from Turkey*; *SSSS from Germany*; *Cold-Rolled Carbon from the Netherlands*).

Plaintiff may seek to enforce the judgment in *U.S. Steel II*, if the Plaintiff believes that the judgment in *U.S. Steel II* requires Commerce to recalculate the all-others rate.[6] The Court has inherent authority to enforce its own judgments. *See B.F. Goodrich Co. v. United States*, 18 CIT 35, 36, 843 F. Supp. 713, 714 (1994).

CONCLUSION

For the reasons set forth, Defendant's motion to dismiss is granted and Plaintiff's complaint is dismissed. Judgment will enter accordingly.

Dated: May 18, 2018
New York, New York

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

Slip Op. 18–55

GGB BEARING TECHNOLOGY (SUZHOU) CO., LTD. and STEMCO LP, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 12–00386

[Sustaining a decision responding to court order in litigation contesting a final determination in a new shipper review conducted under an antidumping duty order]

Dated: May 22, 2018

Bruce M. Mitchell, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y., for plaintiffs GGB Bearing Technology (Suzhou) Co., Ltd. and Stemco LP. With him on the brief were *Ned H. Marshak* and *Dharmendra N. Choudhary*.

Tara K. Hogan, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *James H. Ahrens II*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

William A. Fennell, Stewart and Stewart, of Washington, D.C., for defendant-intervenor The Timken Company. With him on the brief were *Terence P. Stewart* and *Lane S. Hurewitz*.

[6] A motion to enforce judgment will be granted by this Court "'when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment.'" *GPX Int'l Tire Corp. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1266, 1272 (2015) (quoting *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004)).

OPINION

Stanceu, Chief Judge:

Before the court is the decision (the "Remand Redetermination") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in response to the court's opinion and order of December 12, 2017. *See Final Results of Redetermination Pursuant to Court Remand* (Int'l Trade Admin. Mar. 19, 2018), ECF No. 103–1 ("*Remand Redetermination*"); *GGB Bearing Tech. (Suzhou) Co. v. United States*, 41 CIT __, 279 F. Supp. 3d 1233 (2017) ("*GGB I*"). The court will enter judgment sustaining the Remand Redetermination.

I. BACKGROUND

The background of this action is set forth in the court's prior opinion, which is summarized and supplemented, as necessary, herein. *See GGB I*, 41 CIT at __, 279 F. Supp. 3d at 1235–36.

A. Decision Contested in this Litigation

The administrative decision contested in this litigation was published as *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 77 Fed. Reg. 65,668 (Int'l Trade Admin. Oct. 30, 2012) ("*Final Results*").

B. The Parties to this Litigation

Plaintiff GGB Bearing Technology (Suzhou) Co., Ltd. ("GGB") is a Chinese producer and exporter of tapered roller bearings and parts thereof, finished and unfinished (the "subject merchandise" or "TRBs"). Compl. ¶ 3 (Nov. 29, 2012), ECF No. 6. Plaintiff Stemco LP is GGB's U.S. affiliate and an importer of subject merchandise. *Id*. Defendant-intervenor The Timken Company ("Timken"), the petitioner in the investigation that gave rise to the underlying antidumping duty order, participated in this new shipper review as an interested party. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review*, 77 Fed. Reg. 32,522 (Int'l Trade Admin. June 1, 2012).

C. Procedural History

Commerce issued the antidumping duty order on TRBs from the People's Republic of China in 1987. *Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished,*

From the People's Republic of China, 52 Fed. Reg. 22,667 (Int'l Trade Admin. June 15, 1987). In response to a request from GGB, Commerce initiated a new shipper review covering shipments of TRBs from China produced and exported by GGB for the period of June 1, 2010 through May 31, 2011.[1] *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 76 Fed. Reg. 45,777 (Int'l Trade Admin. Aug. 1, 2011). On October 30, 2012, Commerce published the final results of its new shipper review, assigning GGB a weighted-average dumping margin of 12.64%. *Final Results*, 77 Fed. Reg. at 65,669.

GGB commenced this action to contest certain aspects of the Department's determination. *See* Summons (Nov. 29, 2012), ECF No. 1; Compl. ¶ 1. In its motion for judgment on the agency record, GGB challenged the choice of record information used to value two components of the normal value calculation: (1) GGB's manufacturing overhead, selling, general, and administrative ("SG&A") expenses, and profit; and (2) labor hours. *See* Br. in Supp. of Pls.' Rule 56.2 Mot. for J. upon the Agency R. (May 22, 2013), ECF No. 26 ("Pls.' Br."). GGB claimed that Commerce erred by relying upon manufacturing wage data from Thailand in valuing the labor factor of production, as opposed to using record data from the Philippines or Ukraine (or, alternatively, an average obtained from the data for those two countries). *Id*. at 41. Plaintiffs characterized the Department's decision to use the Thai data as "not supported by substantial record evidence" and "contrary to law," contending that their preferred labor cost data was more specific to the type of labor used, and therefore represented the "best available evidence." *Id*. at 29.

In *GGB I*, the court granted in part and denied in part GGB's motion for judgment on the agency record. *GGB I*, 41 CIT at __, 279 F. Supp. 3d at 1253. While sustaining the Department's choice of information for valuing GGB's manufacturing overhead, SG&A expenses, and profit, *id.*, 41 CIT at __, 279 F. Supp. 3d at 1237–44, the court ordered Commerce to reconsider its selection of information for valuing GGB's labor input, *id*., 41 CIT at __, 279 F. Supp. 3d at 1244–51.

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[1] Under section 751(a)(2)(B) of the Tariff Act of 1930, an exporter or producer subject to an antidumping duty order may request a "new shipper" review to obtain an individually-determined weighted average dumping margin, i.e., a margin based on its own U.S. sales of merchandise subject to the order, provided certain conditions are met. 19 U.S.C. §1675(a)(2)(B). In this case, Commerce determined that GGB qualified as a new shipper and calculated GGB's margin based on sales during the period of June 1, 2010 through May 31, 2011.

Commerce filed the Remand Redetermination with the court on March 19, 2018. *See* Remand Redetermination. Timken's comments in support of the Remand Redetermination were deemed filed on April 23, 2018. *See* Timken's Comments on Final Results of Redetermination Pursuant to Ct. Remand (Apr. 23, 2018), ECF No. 107 ("Timken's Comments"). On the same day, GGB notified the court that it would not be filing comments on the Department's Remand Redetermination. *Letter from GDLSK to Ct.* (Apr. 23, 2018), ECF No. 108 ("Pls.' Letter"). Defendant filed, on May 3, 2018, a response requesting that the Remand Redetermination be sustained in full. Def.'s Resp. to Comments on Final Results of Redetermination Pursuant to Court Remand (May 3, 2018), ECF No. 109 ("Def.'s Resp.").

II. DISCUSSION

A. Standard of Review

The court exercises jurisdiction pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), under which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended*, 19 U.S.C. § 1516a. In reviewing a final determination (including a redetermination made pursuant to court order), 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).

B. Determining the Normal Value of Merchandise Subject to an Antidumping Duty Order that is Produced in a Non-Market Economy Country

Because GGB produces subject merchandise in China, a country considered by Commerce to be a non-market economy ("NME") country, the Department determined GGB's margin by comparing the U.S. prices of merchandise produced and exported by GGB with what it determined to be the "normal value" of that merchandise, which it calculated according to the special procedures of section 773(c) of the Tariff Act, 19 U.S.C. § 1677b(c). Under these NME country procedures, which as a general matter avoid reliance on prices or costs within the non-market exporting country, Commerce ordinarily determines normal value "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."[2] 19 U.S.C. § 1677b(c)(1)(B).

The statute further directs Commerce to value the factors of production using "the best available information regarding the values of such factors in a market economy country or countries" that Commerce considers appropriate. *Id.* In valuing the factors of production Commerce must "utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are — (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4).

C. On Remand, Commerce Determined that the Philippines and Ukraine Were Significant Producers of Merchandise Comparable to TRBs

In the final results, Commerce rejected GGB's argument that the Department should value the labor input using labor cost data from the Philippines or Ukraine, or both, in part because "[w]hile the Philippines and Ukraine are noted on the record to be at a comparable level of economic development to the PRC, we have not selected either of these countries as the primary surrogate country, nor have we determined that they are significant producers of comparable merchandise." *Issues and Decision Mem. for the Final Results of the New Shipper Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China* at 9 (Oct. 19, 2012) (P.R. Doc. 115) ("*I&D Mem.*"). In *GGB I*, the court concluded that Commerce erred in failing to make a finding as to whether the Philippines or Ukraine, or both, were significant producers of comparable merchandise. *GGB I*, 41 CIT at __, 279 F. Supp. 3d at 1249–51. The court reasoned that it was not permissible for Commerce to determine that the information it relied on to value labor constituted "best available information" without first determining whether the record information from the Philippines and Ukraine met the two criteria of 19 U.S.C. § 1677b(c)(4), and if so, then comparing those data with the potential Thai data sources. *Id.* The court ruled that this constituted error despite plaintiffs' having failed to exhaust their administrative remedies as to the argument because Commerce was required by statute to consider

[2] The factors of production include, inter alia, labor hours, quantities of raw materials, and amounts of energy and other utilities used in producing the merchandise as well as representative capital cost, including depreciation. 19 U.S.C. § 1677b(c)(3).

whether the Philippines and Ukraine were significant producers in response to GGB's advocating during the review that Commerce value labor using data from these countries. *Id*., 41 CIT at __, 279 F. Supp. 3d at 1247–49, 1251.

In the Remand Redetermination, Commerce considered whether the Philippines and Ukraine were significant producers of comparable merchandise. *Remand Redetermination* at 5–8. In doing so, Commerce noted that "[n]either the statute [i.e., 19 U.S.C. § 1677b(c)(4)] nor Commerce's regulations provide further guidance on what may be considered a 'significant producer' or 'comparable merchandise.'" *Id*. at 5. Commerce relied on its own policy bulletin and legislative history to determine the meaning of these terms. *Id*. at 5–6. Commerce further noted that the record contains export data from the Philippines and Ukraine for three different four-digit tariff headings for merchandise included within the scope of the antidumping duty order. *Id*. at 6. Commerce decided that heading 84.82 ("Ball or roller bearings, and part thereof") was superior to two other headings to determine whether the Philippines and Ukraine were significant producers of comparable merchandise because heading 84.82 included "products with a similar physical form that would involve the same extent of processing as the subject merchandise" and included no other items. *Id*. at 6–7; *see also GGB I*, 41 CIT at __, 279 F. Supp. 3d at 1252–53 (stating that other headings are arguably less probative on the issue of whether the Philippines and Ukraine were significant producers of comparable merchandise).

Record evidence relied upon by Commerce demonstrated that the Philippines and Ukraine had exports of merchandise under heading 84.82 valued at $16,850,286 and $97,047,957, respectively, in calendar year 2010. *See Remand Redetermination* at 7–8. For comparison, Thai exports under heading 84.82 were $340,803,597 for the same calendar year. Attach. 1 to *The Timken Company's Surrogate Country Comments* (Nov. 28, 2011) (P.R. Doc. 46–47). No party objects to the Department's conclusion that the Philippines and Ukraine were both significant producers of comparable merchandise during the period of review. The court sustains this aspect of the Department's Remand Redetermination.

D. Commerce Permissibly Relied upon Thai ILO Chapter 6A "Total Manufacturing" Labor Cost Data to Value GGB's Labor Cost Factor of Production

In the Final Results, Commerce valued GGB's labor factor of production using record data from the International Labour Organiza-

tion's ("ILO") Yearbook of Labour Statistics (the "Yearbook"). Specifically, the Department relied on Thai data for "total manufacturing" labor rates, as reported in the ILO Yearbook. *I&D Mem*. at 8–9. Commerce stated that it relied on "total manufacturing" labor data, as opposed to more industry-specific labor data, because industry-specific labor cost data for Thailand had not been reported since 2000. *Id*. at 9. In their motion for judgment on the agency record, plaintiffs claimed that Commerce erred by relying on the less industry-specific Thai data as opposed to more industry-specific data from the Philippines or Ukraine (or, alternatively, an average of the data from the two countries). Pls.' Br. 28–36; *see also GGB I*, 41 CIT at __, 279 F. Supp. 3d at 1246–47. This decision, according to plaintiffs, resulted in a determination that did not rely on the best available information. Pls.' Br. 40.

In *GGB I*, the court ordered Commerce to "make a new determination of what constitutes the 'best available information' to value the labor input after making a 'significant producer' determination as to the Philippines and Ukraine." *GGB I*, 41 CIT at __, 279 F. Supp. 3d at 1251. "Only after making a finding as to the status of the Philippines and Ukraine under the 'significant producer' criterion" would Commerce be in a position to determine best available information to value GGB's labor input. *Id*.

In the Remand Redetermination, Commerce, after determining that both the Philippines and Ukraine qualified under the statute as significant producers of comparable merchandise, determined anew the selection of best available information to value GGB's labor input. *Remand Redetermination* at 8–10. In making this determination, Commerce considered labor cost data for the Philippines, Thailand, and Ukraine. *Id*. In evaluating these sources of record data, the Department explained that "Commerce's regulations provide that it will normally value all FOPs [i.e., factors of production] in a single country." *Id*. at 9 (citing 19 C.F.R. §351.408(c)(2)). It also explained the Department's methodology for valuing the labor input in NME proceedings. *Id*. This methodology, announced in 2011, states that in NME country proceedings the Department "will base labor cost on ILO Chapter 6A data applicable to the primary surrogate country." *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093 (Int'l Trade Admin. June 21, 2011). The Remand Redetermination then rejects plaintiffs' preferred data for valuing the labor input, stating:

> GGB has argued that Commerce should use the Philippine and/or Ukrainian labor data to value its labor FOP as those data

> are more specific than the Thai labor data, and thus, the "best available information on the record." However, as stated above, Commerce has found that using industry-specific wages from the primary surrogate country or, where industry-specific wages from the primary surrogate country are unavailable, national wages from the primary surrogate country, is the best approach for valuing the labor input in NME antidumping duty proceedings.

Remand Redetermination at 9. Because Commerce continued to rely on the same information to value GGB's labor input in the Remand Redetermination as it had in the Final Results, it made no change to GGB's dumping margin. *Id*. at 11.

No party challenges the Department's determination to continue valuing GGB's labor input using Thai ILO wage data from 2005. Timken's Comments 1–2; Def.'s Resp. 2; *see also* Pls.' Letter (stating plaintiffs would not be filing comments on Remand Redetermination). The court sustains this aspect of the Remand Redetermination.

III. CONCLUSION

For the reasons discussed in the foregoing, the court sustains the Department's Remand Redetermination with respect to GGB's claims and will enter judgment accordingly.

Dated: May 22, 2018
New York, New York

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

Slip Op. 18–56

MID CONTINENT STEEL & WIRE, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 16–00244

[Denying motion for judgment on 2014–2015 administrative review of antidumping duty order on certain steel nails from the United Arab Emirates.]

Dated: May 22, 2018

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for the plaintiff.

Eric J. Singley, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Direc-

tor, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Mercedes C. Morno*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Musgrave, Senior Judge:

The plaintiff Mid Continent Steel & Wire, Inc. ("Mid Continent") invokes jurisdiction under 28 U.S.C. §1581(c) to challenge *Certain Steel Nails From the United Arab Emirates* ("UAE"), 81 Fed. Reg. 71482 (Oct. 17, 2016), Public Record ("PDoc"[1]) 132. The publication covers the final results of the 2014–2015 administrative review of the antidumping duty ("AD") order on that subject merchandise, as further elucidated by the U.S. Department of Commerce, International Trade Administration ("Commerce:), in its accompanying issues and decision memorandum dated October 11, 2016 ("*IDM*"), PDoc 126. The period of review ("POR") is May 1, 2014, through April 30, 2015.

During the review, Commerce found that the sole mandatory respondent Overseas Distribution Services, Inc. ("ODS") lacked a viable home or third-country market during the POR. In order to calculate constructed value ("CV") profit and selling expenses, Commerce therefore resorted to the "any other reasonable method" option of 19 U.S.C. §1677b(e)(2)(B)(iii) to find a surrogate for the profit and selling expenses for ODS. Prelim. Dec. Mem. at 11, PDoc 107.

Mid Continent agrees such resort was proper in theory. Pl's 56.2 Br. at 9. To Commerce, it thus argued in favor of using the financial statements of Overseas International Steel Industry LLC ("OISI"), an affiliate of ODS located in Oman. Commerce, however, concluded that OISI's financial statements' lack of information on inventory accounts and raw material costs were more indicative of a company providing a "service," not a "good," and therefore it concluded OISI's financials did not provide a reasonable surrogate for CV profit and selling expenses. From among the remaining seven alternative sources for CV profit and selling expenses, for the final results Commerce favored using the profit and expense data from the financial statements of L.S. Industry ("LSI"), a producer of steel nails in Thailand, after finding LSI "the only company we can conclude, based on record evidence, is a producer of nails during the POR." *IDM* at 9.

Mid Continent challenges that decision. The overall question here is whether Commerce's determination is supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. §1516a(b)(1)(B)(i). The court concludes that it is.

[1] The parties have not provided any confidential record documents for examination; parallel citation to the confidential record ("CDocs") is therefore omitted herein.

I

Based on Commerce's statements in the *IDM*, the defendant argues "the record showed that OISI did not actually produce steel nails during the period of review". Def. Br. at 5. Mid Continent correctly points out, however, that the record is in contrast to that position in the form of ODS's certified questionnaire responses:

> Please note that although [OISI] . . . (an affiliate listed in Exhibit A-3) produces nails on a job-work basis for ODS (and whose sales are accounted for by ODS, based on invoicing done by OISI), it is a separate and distinct company that operates in Oman and their nails, whose production process is entirely conducted in Oman, would be considered of Omani origin, and hence (1) not subject merchandise for this review, and (2) not reported in Exhibit A-I. OISI serves as importer of record for imports manufactured in and exported from Oman. At the time of import, OISI posts cash deposits for antidumping duties relating to the antidumping duty order on nails from Oman.

PDoc 25 at A-4 n.3.

> ODS and OISI both produce wire nails, as well as, other non-subject merchandise using wire rods and other raw materials.

PDoc 49 at 5.

> Similarly, the production process for nails exported from OISI (using the balance wire rods after transfer of ODS) is entirely carried out at their facility in Al Buraimi, making those nails Omani origin.

Id.

> Please note that all nails produced by OISI in Oman are completely produced in, packed at, and shipped from Oman itself. They are never physically transferred to ODS in Dubai before shipment. Since the entire manufacturing process took place in Oman, they are of Omani origin and hence considered non-subject merchandise in this administrative review of UAE nails.

Id. at 7.

> Since the goods physically produced by OISI in Oman are OISI sales and are of Omani origin, the commercial invoice issued to the customer is also issued by OISI.

Id. at 13.

But, for the final results Commerce also acknowledged ODS's argument that "OISI operates as a 'job worker,' or toller for ODS." *IDM* at 4:

> ODS explains that OISI issues a debit note to ODS for the cost of labor, electricity and consumables incurred by OISI in Oman;

> ODS reimburses OISI for these costs; and ODS owns the materials OISI consumes to produce the nails. ODS argues that OISI's financial statements do not show cost of materials consumed, which is the main element of cost in the profit and loss account, and there is no opening and closing stock because OISI does not own stock in any form, as ODS maintains ownership of all materials processed by OISI. ODS argues that, because the income and expenses in the financial statements of OISI relate to job work (*i.e.*, tolling), they should not be considered as being in the same general category with respect to subject merchandise, as they bear no similarity to ODS'[s] business operations, and using them to calculate CV would inflate the profit and selling expenses ratios in a manner that does not reflect home market sales of the subject merchandise. Moreover, citing to the Department's 2015 Antidumping Manual, Chapter 7 page at 31, ODS argues that the Department itself recognizes that a toller is not a manufacturer for antidumping purposes where the toller or subcontractor does not acquire ownership of the subject merchandise and does not control the relevant sale of the subject merchandise or foreign like product.

Id.

The foregoing is indeed consistent with toll processing, which is simply an arrangement whereby where one company will process raw materials or partly completed goods for another. *See, e.g., Atar, S.r.L. v. United States*, 35 CIT ___, Slip Op. 11–87 at 2 (July 22, 2011) ("[i]n a tolling arrangement, a producer employs a subcontractor that provides processing services for, or material for incorporation into, the merchandise that is sold by the producer"), referencing *United States v. Eurodif S.A.*, 129 S.Ct. 878, 885 (2009); *see also Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT ___, ___, 219 F. Supp. 3d 1326, 1349 (2017) ("transactions for low carbon wire drawing and steel nail making services performed by Pro-Team's tollers" disregarded). On the other hand, the last of ODS's points above overstates the import of the reference relied upon, wherein Commerce stated that the purpose of "not consider[ing] a toller or subcontractor to be a manufacturer or producer [under certain conditions] . . . is to enable the Department to identify the appropriate seller *of subject merchandise and foreign like product* for purposes of calculating export price, constructed export price, and normal value." Antidumping Manual, Ch. 7, p. 31 (italics added). It does not follow, from distinguishing production of subject merchandise, that a toller or subcontractor can not be considered a "producer" of merchandise in its own right.

A "producer" is defined, tautologically, as "one who produces, brings forth, or generates". *Black's Law Dictionary* at 1209 (6th ed.). In other words, all the material output of an entity is "production." But for purposes of the AD statute, it would appear that whether "tolling" can be concluded as providing a mere "service" in the production of merchandise, subject or non-subject, or can be regarded as "production" in its own right, is necessarily dependant upon the circumstance of each case. *See, e.g., An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 442 CIT ___, ___, 287 F. Supp. 3d 1361, 1373 (2018) ("cooperating tollers provided over 80 percent of the product"); *Atar, S.r.l. v. United States*, 33 CIT 658, 665 (2009) (dispute over "date on which Atar instructed its toll processor to produce pasta"); *Goldlink Indus. Co. v. United States*, 30 CIT 616, 637, 431 F. Supp. 2d 1323, 1341 (2006) (plaintiff "requests that Commerce recalculate the cost of toll production by applying the financial ratios to the cost of materials, energy and labor in the toll production process"). Regardless, however, tolling operations are necessarily part of "production," regardless of whether they may be interpreted as mere "service" thereto.

The foregoing leads to the more germane argument, over whether substantial evidence supports Commerce's interpretation of OISI's financials, which underpins Commerce's decision that OISI's toll manufacturing is a "service" and not "production" in its own right.

II

ODS's argument, above, that "using [OISI's financials] to calculate CV would inflate the profit and selling expenses ratios in a manner that does not reflect home market sales of the subject merchandise" appears to be a *non-sequitor* in view of the fact that ODS did not make home market sales of the subject merchandise in any event, which was the whole point of Commerce having to resort to option (iii) for ODS's profit and selling expenses. As mentioned, Commerce rejected OISI's financial statements upon the following reasons:

> OISI's financial statements do not include any inventory accounts, and the cost of sales figure does not include any raw material costs. The absence of any inventory and material costs indicates that OISI's financial results and profit are more reflective of a company providing a service, not a good, and as such, are not a good surrogate for CV profit, when compared with ODS.

IDM at 8 (footnote omitted).

Mid Continent raises three points in this regard. First, it draws attention to Commerce's acknowledgment that "the financial state-

ments of OISI and [LSI] sufficiently identify income statement line items for direct selling expenses and indirect selling expenses, and non-selling related expenses necessary to calculate selling expense ratios", and it argues that inventory accounts have no bearing on profit and selling expenses. Pl's 56.2 Br. at 10, quoting *IDM* at 10. Second, it contends that if inventory accounts are relevant to profit and selling expenses, Commerce erred in stating that OISI does not include inventory accounts because OISI's financial statements in fact show "Opening stock" and "Closing stock", *see* ODS's SQR (Jan. 12, 2016) at Ex. S1–1(E), page 11 (Note 11), PDoc 49, which it claims are just different names for inventory accounts, and which Mid Continent compares with LSI's financial statements as likewise not referring to "inventory accounts" but instead referring to "Raw materials remained" and "Deduct remained raw materials." *See* ODS's CV Profit Comments (Apr. 28, 2016) at Exhibit CV-2(c), page 7 (titled "Sale capital details"), PDocs 87–89. Third, Mid Continent contends Commerce failed to recognize that while OISI's cost of sales figure does not specifically break out "raw materials", it does include a line item for "production expenses", the largest single value included in cost of sales. PDoc 49 at Ex. S1–1(E), page 11 (Note 11). It then compares this with LSI's cost of sales figure, called "Total expense of sales" in LSI's financial statements, which similarly does not include any cost item labeled "raw materials."[2] *See* PDocs 87–89 at Ex. CV-2(c), page 8 (titled "Expenses details of sale and administration").

On the correctness of Commerce's decision here, defendant argues that "because record evidence indicated that OISI operates on a job work or toll basis on behalf of ODS, [Commerce determined that] OISI lacks the requisite profit and selling experience in the production of merchandise comparable to subject merchandise." Def's Resp. at 14. "Mid Continent does not explicitly deny . . . that a company without inventory costs is more reflective of a company providing a service than one producing a good, such as steel nails." *Id*. at 15. The defendant also emphasizes that although Note 11 to OISI's financial statements does include line items for "Opening stock" and "Closing stock," they do not reflect any values. *Id*. "OISI's financial statements do not reflect any cost of materials consumed, which would have been expected if OISI had produced steel nails during the period of review."

[2] Pl's 56.2 Br. at 10–11. Mid Continent also argues that Commerce is itself currently treating OISI as a producer, given that it is a mandatory respondent in the first annual administrative review in the *Certain Steel Nails from Oman* proceeding. *See Certain Steel Nails From the Sultanate of Oman: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2014–2016*, 82 Fed. Reg. 36738 (Aug. 7, 2017). Each segment of a proceeding is accorded *tabla rosa* treatment, however. *See, e.g., Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1134, 724 F. Supp. 2d 1327, 1342 (2010), *aff'd* 453 Fed. Appx. 986 (2011).

Id. And, on Mid Continent's argument that raw materials are jointly ordered and commonly stored and that ODS's and OISI's financial records reflect "little more than an accounting fiction", Pl's 56.2 Br. at 15, the defendant contends that because the cost of raw materials are not reflected in OISI's financial statements, Commerce determined that OISI's records do not reflect "amounts incurred and realized" by ODS in the production of subject merchandise, consistent with alternative (iii) for CV profit and selling expenses. *Id.* at 16. "A calculation based on OISI's profit and expense data would be tantamount to a removal of raw material purchases from the financial statements of ODS, and would not be representative of the profit and selling expense incurred by a producer of merchandise comparable to subject merchandise." *Id.*

Mid Continent's reply argues that both ODS and OISI obviously produce nails and that ODS reported "all sales of the subject merchandise are made-to-order", *see* PDoc 25 at A-16, and that the kind of modern-day made-to-order manufacturing in which OISI engages would obviously incur no inventory costs because they would not maintain inventory.[3] "It is thus no surprise that the company would not report inventory costs." Pl's Reply at 3. From this, Mid Continent notes that the defendant separately faults its observation that the line item in OISI's financial statement for "production expenses" could include raw materials, *see* Def's Br. at 17, but does not deny that the line item "production expenses" could include raw materials. "Defendant simply speculates, with no support, that it does not", while also speculating that the category is "consistent with OISI's role as a job worker or toller on behalf of ODS". *Id*. Mid Continent thus argues that OISI's financial statements must include expenses incurred to produce those nails, *i.e.*, "production expenses", because "[o]nly by relying on its . . . assertion that OISI does not produce nails can Commerce claim that an account for "production expenses" does not include . . . 'production expenses.' " *Id*. at 4.

The papers submitted, however, are insufficient from which to infer that ODS's production did not involve any inventory costs or that OISI's "production expenses" correspondingly included such costs,

[3] Along these lines, ODS specifically reported: "The sales process for nails produced by OISI for ODS is the same as nails produced by ODS, as explained on page A-15 of ODS' Section A response. The sales process begins with the negotiation of prices, quantity and other sales terms between ODS and its U.S. customers. Once prices and quantities are agreed upon, and before issuance of the purchase order by the customer, management informs the customer the name of the company (*i.e.*, ODS or OISI) that will produce and ship the nails, so that the customer can issue the purchase order accordingly. Therefore, after the purchase order is received (for nails to be produced by OISI), OISI starts producing nails and ships them directly to U.S customers from the Sohar Port in Oman. Omani-produced nails are not shipped to ODS in Dubai prior to sale to the United States." PDoc 49 at 7.

and the court cannot conclude those facets irrelevant. Mid Continent argues OISI's "financial statement contains line items that would include raw materials", but the defendant argues the relevant line items contained no values. Mid Continent's argument does not sufficiently address either that or the defendant's further point, *supra*, that relying upon OISI's profit and expense data would in effect remove the cost of raw material purchases from the ODS's financial statements and would be unrepresentative of the profit and selling expense incurred by a producer of merchandise comparable to the subject merchandise.

The court has not been provided ODS's financial statements for examination, and thus it would be speculative for the court to opine on ODS's inventory costs. Relying on the papers before it in rendering its decision, the court concludes that the arguments presented do not overcome the presumption of administrative regularity that attaches to the making of Commerce's decision, nor can the court conclude Commerce's interpretation of OISI's financial statements to have been clear error. *See, e.g., NEC Corp. v. U.S. Dep't of Commerce*, 21 CIT 933, 949, 978 F. Supp. 314, 330 (1997) (clear and convincing test is necessary to rebut presumption of administrative regularity), *aff'd sub nom. NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998). Commerce concluded OISI a "mere" toll processor and not a producer of comparable merchandise, it eliminated OISI's financial statements from contention among those on the record for use as possible surrogates for ODS's profit and expense data, and it selected LSI's financials based on the quality of their data. Substantial evidence of record supports that determination.

However, Mid Continent also contends that the defendant's argument that the LSI financial statement is qualitatively superior when examined in the context of the factors developed in *Pure Magnesium from Israel* and *CTVs from Malaysia*[4] actually has the situation reversed, and that those "factors unequivocally demonstrate that OISI, and not LSI, is the qualitatively superior source and should be used alone." Pl's Reply at 4–5. It contends: that OISI and ODS have

[4] Def. Br. at 11, citing *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 Fed. Reg. 49349 (Sep. 27, 2001), accompanying I&D Memo cmt. 8 ("To determine the most appropriate profit rate under alternative (iii), the Department has weighed several factors. Among them are: (1) the similarity of the potential surrogate company's business operations and products to the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data to the POI; and (4) the similarity of the customer base (i.e., retail versus OEM). The greater the similarity in business operations, products, and customer base, the more likely that there is a greater correlation in the profit experience of the two companies"), and *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia*, 69 Fed. Reg. 20592 (Apr. 16, 2004), accompanying I&D Memo cmt. 26 (same).

literally identical production processes, business operations and products, use the same equipment and raw materials to produce the same steel nails for the same customers, have the same owner, share sales and marketing staff, have production decisions jointly made for them, and produce the exact same nails; that the OISI financial statements are contemporaneous with the POR; and that the customer bases of OISI and ODS "have to be *identical* given the way the companies are commonly managed." *Id*. at 5 (italics in original).

All of which may be true. Nonetheless, the argument is insufficient to demonstrate error in Commere's choice of LSI's financial statements in light of those aspects of the administrative record that the parties have filed with the court. *See, e.g., FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513–14 (2009) ("a court is not to substitute its judgment for that of the agency" and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (citations omitted).

Conclusion

Having considered that arguments presented, the court concludes Commerce's resort to reliance upon the profit and selling expense data from the financial statements of the Thai company L.S. Industry to be supported by substantial evidence and in accordance with law. The plaintiff's motion for judgment must therefore be, and hereby is, denied.

So ordered.

Dated: May 22, 2018
New York, New York

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

Slip Op. 18–57

HEZE HUAYI CHEMICAL CO., LTD. and JUANCHENG KANGTAI CHEMICAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and BIO-LAB, INC., CLEARON CORP., and OCCIDENTAL CHEMICAL CORP., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 17–00032

[Denying motion for judgment on 2014–2015 administrative review of chlorinated isocyanurates from the People's Republic of China.]

Dated: May 22, 2018

Gregory S. Menegaz, J. Kevin Horgan, Judith L. Holdsworth, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for the plaintiffs.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel was *Catherine Miller*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

James R. Cannon, Jr. and *Nina R. Tandon*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for the defendant-intervenors.

OPINION

Musgrave, Senior Judge:

The plaintiffs Heze Huayi Chemical Co., Ltd. ("Heze") and Juancheng Kangtai Chemical Co., Ltd. ("Kangtai"), producers and/or exporters of subject merchandise, initiated this challenge to the 2014–2015 administrative review ("POR") of the antidumping duty ("AD") order on chlorinated isocyanurates ("chlor-isos") from the People's Republic of China ("PRC"). *See Chlorinated Isocyanurates from the PRC*, 82 Fed. Reg. 4852 (Jan. 17, 2017) (final results of 2014–2015 antidumping duty admin. review) ("*Final Results*"), PDoc 177, and accompanying Issues and Decision Memorandum ("*IDM*"), PDoc 171; *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 45947 (Aug. 3, 2015). On the record compiled by the International Trade Administration, U.S. Department of Commerce ("Commerce" or "Department"), the plaintiffs invoke the court's jurisdiction under 19 U.S.C. §1516a(a)(2)(A)(i)(I) and (B)(iii), *see* 28 U.S.C. §1581(c), and move for judgment pursuant to USCIT Rule 56.2. Their claim is that the agency erred in choosing Mexico as the surrogate country upon which to value the factors of production ("FOPs") for subject merchandise and in choosing surrogate financial statements to base financial ratios. The defendant and defendant-intervenors[1] argue for dismissal. The court agrees with the defendants, in view of the following.

Background

Commerce typically calculates the normal value ("NV") of subject merchandise from non-market economy "(NME") producers/exporters using surrogate values ("SVs") offered "in a market economy country or countries considered to be appropriate by" Commerce. 19 U.S.C. §1677b(c)(1). Under that scenario, Commerce must utilize, to the extent possible, the prices or costs of factors of production ("FOPs") in one or more market economies countries that are (a) "at a level of

[1] *I.e.*, domestic industry representatives Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corp. (together, "petitioners").

economic development comparable to that of the [NME] country" and (b) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4).

The statute does not signal what constitutes a "comparable" level of economic development, "comparable" merchandise, or the meaning of "significant". *See* 19 U.S.C. §1677b(c)(4)(B). Pursuant to its reading of the statute, Commerce has avoided developing regulatory definitions thereof, *cf*. 19 C.F.R. §§351.102 & 351.408, but for the first of the statutory requirements its Office of Policy ("OP") produces a short list of market economy countries at a level of economic development "comparable" to the NME country (the PRC in this instance) in terms of *per capita* gross national income ("GNI") based on World Development Report data compiled by the World Bank[2] that is then disseminated to the parties for comment. *E.g.*, Memorandum to Interested Parties re: Request for Economic Development, Surrogate Country and SV Comments and Information (Aug. 14, 2015), PDoc 8 ("OP List").

Commerce's practice entails selecting the appropriate surrogate country based on the availability and reliability of surrogate values ("SVs") data for that country. In accordance with 19 U.S.C. § 1677(c)(1) and the "best available information" for valuing FOPs, Commerce's practice is to select, to the extent practicable, SVs that are product-specific, representative of a broad market average, publicly available, tax exclusive, and contemporaneous with the period of review. There is no hierarchy for applying the SV selection criteria; rather, Commerce must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what is the "best" SV for each input. *See, e.g., Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States*, 38 CIT ___, ___, 28 F. Supp. 3d 1317, 1336 (2014) (upholding Commerce's practice to "carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on a case-by-case basis"). For that process, the statute affords administrative discretion to examine various data sources for determining the best available information. *See* 19 U.S.C. § 1677(c); *see also Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

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[2] *See, e.g., Pure Magnesium from the PRC*, 75 Fed. Reg. 80791 (Dec. 23, 2010) (final results 2008–09 antidumping duty admin. review) and accompanying I&D Memo at cmt. 4. Using *per capita* GNI has been held a "consistent, transparent, and objective metric to identify and compare a country's level of economic development" and "a reasonable interpretation of the statute." *Jiaxing Brother Fastener Co. v. United States*, 38 CIT ___, ___, 961 F. Supp. 2d 1323, 1329 (2014).

Commerce considers all countries on the OP List to be at the same level of economic development as the PRC and does not use GNI alone as the basis for its selection. It purports to evaluate which of these countries is a significant producer of comparable merchandise in addition to considering which countries have reliable data. *E.g.*, Defendant's Response to Plaintiffs' Motion for Judgment Upon the Agency Record ("Def's Resp.") at 10. For guidance on defining comparable merchandise, Commerce will look to other sources such as its Policy Bulletin 04.1, NME Surrogate Country Selection Process (Mar. 1, 2004) ("Policy Bulletin").

For this AD review segment, OP listed Bulgaria, Ecuador, Mexico, Romania, South Africa, and Thailand as countries at the same level of economic development as the PRC based on 2014 *per capita* GNI. Commenting thereon, the respondents (plaintiffs hereat) provided Thai surrogate values but argued that Thailand did not have a usable import value for chlorine and that Commerce should follow its practice from the previous review of using the largest importer of chlorine among the listed economically comparable countries, which in this review was Mexico. Letter from Heze and Kangtai re: SVs for the Preliminary Results (Dec. 17, 2015) ("Resps' SV Submission"), PDocs 60–70. *See* PDoc 60 at 2. The petitioners (intervenor-defendants hereat) argued Mexico or Romania were appropriate as primary surrogates because those countries have actual production of comparable merchandise as well as import values for the most major inputs used in chlor-isos production, and also because the financial statements of Mexican and Romanian companies have not previously encountered the documented difficulty in their usage as those of Thai companies. Letter from Petitioners re: SV Data (Dec. 17, 2015) ("Pets' SV Submission"), PDocs 71–82. *See* PDoc 71 at 2 n.2.

The respondents then submitted rebuttal to the petitioners' comments and also filed final SVs and comments for the preliminary results. Letter from Heze and Kangtai re: Certain Chlor-Isos from the PRC Rebuttal SVs for the Preliminary Results (Jan. 11, 2016) ("Resps' SV Rebuttal Submission"), CDoc73, PDocs 87–89, 95; Letter from Kangtai and Heze re: Certain Chlor-Isos from the PRC, Final SV Submission and Pre-Preliminary Comments (June 6, 2016) ("Resps' Final SV Submission"), CDoc 155, PDocs 124–28. In those submissions the respondents argued Mexico is neither a significant producer nor a net exporter of comparable merchandise and therefore Commerce should select as the primary surrogate country either Thailand, because it has the highest quality of data including two contemporaneous financial statements, or Romania, because it has data

to value all inputs and a reliable financial statement from a major chemical producer that produces comparable merchandise. Resps' Final SV Submission at 3–6.

For their part, the petitioners' comments narrowed their argument to Mexico as the primary surrogate country because it is economically comparable to the PRC, it is the only country on the OP List that produces "substantial" quantities of chlor-isos, and Port Import/Export Reporting Service ("PIERS") data reflected that the Mexican company Aqua-Clor S.A. de C.V. ("Aqua-Clor") produced chlor-isos during the POR. *See* Letter from Petitioners re: Comments Concerning the Preliminary Determination and Submission of Factual Information Regarding SVs (June 6, 2016) ("Pets' Prelim. & SV Cmts"), PDocs 129–138, at 3, Exs. 1–3; Letter from Petitioners re: Rebuttal to Preliminary Determination Comments (June 11, 2016) ("Pets' Rebuttal Comments"), CDocs156–57, PDocs 140–41; Letter from Petitioners re: Additional Rebuttal to Preliminary Determination Comments (June 16, 2016) ("Pets' Add'l Rebuttal Cmts"), CDoc 158, PDoc 143.

The respondents' final comments argued that the statute and Commerce's policy do not establish a hierarchal preference for being a producer of identical merchandise over a producer of comparable merchandise, thus urging Commerce to determine "at a minimum" that Thailand, Romania, and Mexico are all significant producers of comparable merchandise and to rely on data quality as the basis of its surrogate country selection. Letter from Kangtai and Heze re: Rebuttal Final SVs and Rebuttal Pre-Preliminary Comments, dated June 16, 2016 ("Resps' Rebuttal Final SV Submission"), PDoc 142, at 2, 5.

In due course, Commerce published its preliminary results. *Chlor-Isos from the PRC*, 81 Fed. Reg. 45128 (July 12, 2016) (prelim. results of antidumping duty admin. review 2014–2015) ("Preliminary Results"), PDoc 146, and accompanying Preliminary Decision Memorandum ("*PDM*") at 5, PDoc 147. In prior reviews of the AD order, Commerce had found calcium hypochlorite and sodium hypochlorite comparable to subject merchandise because those compounds all share similar physical characteristics, end uses, and production processes. *See Chlor-Isos from the PRC*, 80 Fed. Reg. 4539 (Jan. 28, 2015) (final results of AD admin. review) and accompanying I&D Memo at cmt. 2. Adhering to that course, and pursuant to its policy of determining economic comparability and suitable surrogate countries for analyzing comparable merchandise, Commerce found from the OP List that Bulgaria, Ecuador, Romania, South Africa, and Thailand are significant producers of calcium hypochlorite and sodium hypochlorite. *PDM* at 11; *IDM* at 4. Commerce noted that the sixth country, Mexico, is a producer of both identical and comparable merchandise.

Id. After eliminating other countries from the list due to data quality considerations, Commerce narrowed the possible choices to Mexico and Romania as the only two countries that provided usable surrogate financial statements and surrogate values for chlorine and hydrogen, an important input and by-product, respectively. *Id*.

Because both Mexico and Romania were producers of comparable merchandise and each had one usable financial statement, Commerce then looked to the Policy Bulletin for guidance in selecting the primary surrogate country. *See IDM* at 20; Policy Bulletin. Such guidance led to preliminarily determining Mexico as the best choice for the primary surrogate country, a decision based in part on finding the data for the Mexican company CYDSA, S.A.B. de C.V. ("CYDSA") superior to those for the Romanian company Chimcomplex S.A. ("Chimcomplex"), with one exception concerning less-contemporaneous labor data. *PDM* at 13; *see also* Memorandum to File, re: Preliminary Results SV Memorandum, dated July 12, 2016 ("Prelim. SV Memo"), PDoc 148; *IDM* at 7–10. The determination remained unchanged in the *Final Results*. *IDM* at 3–5, 7–10.

Discussion

Commerce's final determinations in proceedings such as this are to be sustained 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).

I

The plaintiffs dispute that Mexico is a significant producer of comparable merchandise. They argue Commerce failed to consider the statutory directive of determining a producer of "comparable" merchandise by overweighting the fact that Mexico produces "identical" merchandise, the volume of which they contend was insignificant in contrast to the far more significant production of "comparable" merchandise in Romania. They claim Commerce's decision "narrowed the meaning of comparable merchandise to mean identical merchandise and completely failed to actualize the significance of that production." Pls.' Rule 56.2 Mem. in Supp. of Mot. for J. Upon the Agency Record ("Pls. Br.") at 2.

The statute does not speak directly to the meaning of "comparable"; therefore, Commerce's interpretation will govern if it is reasonable. *See, e.g., United States v. Eurodif*, 555 U.S. 305, 316 (2009). Commerce found Mexico to produce both "identical" and "comparable" merchandise, and the Policy Bulletin, upon which Commerce relied, states that "[i]n all cases, if identical merchandise is produced, the country qualifies as a producer of comparable merchandise". The

defendant posits from this that "if the record contains a producer of identical merchandise, the statutory requirement of comparable merchandise is satisfied." Def's Resp. at 10, citing 19 U.S.C. §1677b(c)(4).

Although the plaintiff apparently attempts to drive a wedge between "identical" and "comparable" merchandise in Commerce's decision, it is obvious that production of identical merchandise is production of "comparable" merchandise. *Mid Continent Nail Corp. v. United States*, 34 CIT 512, 519, 712 F. Supp. 2d 1370, 1377 (2010). *See also Dorbest Ltd. v. United States*, 30 CIT 1671, 1682, 462 F. Supp. 2d 1262, 1273 (2006) ("*Dorbest*") ("[c]omparable merchandise is a broader category than the 'such or similar' merchandise comparison which is usually used in antidumping investigations"), quoting S. Rep. No. 100–71 at 106 (1987). The crux of the plaintiffs' argument, rather, is with respect to the statutory requirement that a "producer" (*i.e.*, market economy country) of such merchandise be "significant". *See* 19 U.S.C. §1677b(c)(4)(B).

In that regard, the plaintiffs contend that because Mexico is not a net exporter with production of identical merchandise sufficient to influence or affect world trade, it is therefore an insignificant producer of comparable merchandise. The defendant is correct, however, that the ability to influence world trade is not a standard required by the statute, "it is only one of many criteria the Department may use to determine whether a country is a significant producer." *IDM* at 5. *See also, e.g.*, H.R. Conf. Rep. 100–576 at 590, 1988 U.S.C.C.A.N. 1547, 1623 ("[t]he term 'significant producer' *includes* any country that is a significant net exporter and, if appropriate, Commerce may use a significant net exporting country in valuing factors) (italics added).

On the other hand, the plaintiffs' contention indicates that they interpret Commerce's position to mean Commerce may consider the mere fact of production of identical merchandise as "significant" in relation to production of comparable merchandise.[3] And it is clear that Congress intended "significant" to be interpreted with respect to

[3] *See, e.g.*, Def's Resp. at 12 ("Commerce determined that Mexico was the appropriate primary surrogate country because Mexico produced identical merchandise and the selection of Mexico would not lead to factor valuation difficulties" and thus "Commerce stated that it was 'not required to consider parties' arguments for comparable merchandise'"), quoting *IDM* at 20; *see also* Policy Bulletin at 2 ("[i]n cases where identical merchandise is *not* produced, the team must determine if other merchandise that is comparable is produced") (italics added) & *id*. at 5 n.6 ("[i]f considering a producer of identical merchandise leads to data difficulties, the operations team may consider countries that produce a broader category of reasonably comparable merchandise"). In other words, Commerce's preference for identical merchandise over a broader category of similar merchandise must "take second-seat if the use of identical goods leads to data selection problems." *Dorbest*, 30 CIT at 1682, 462 F. Supp. 2d at 1274.

quantitative measures of production, not merely in terms of the degree of similarity of the surrogate product to the subject merchandise. *See, e.g.*, H.R. Conf. Rep. 100–576 at 591, 1988 U.S.C.C.A.N. at 1624 ("Commerce should seek to use, if possible, data based on production of the same general class or kind of merchandise using similar levels of technology and at similar levels of volume as the producers subject to investigation"). The plaintiffs thus argue that the quantity of Mexican production of chlor-isos is uncertain, *i.e.*, that even assuming the 2,159 to 2,534 (*cf.* Pls' Br. at 4 *with id.* at 5) tons of the product exported from Mexico under Harmonized Tariff Schedule ("HTS") item 2933.69.03 during the POR are all chlor-isos,[4] Commerce still needs to articulate why "this small amount is a significant quantity" given that Mexico is a net importer of that product. Pls' Br. at 4–5.

The court disagrees, as exportation is not the only indicium of the significance of production on this record. *See, e.g., PDM* at 11 (citing: Petitioners' SC Comments at 3–4 and Exh. 3, CDoc 64, PDoc 43; Pets' Prelim & SV Cmts at 3 and Exs. 1–3, PDoc 129–138; Pets' Rebuttal Cmts at 2 & Exh. 1, CDoc 156–57, PDoc 140–41; Resps' SC Cmts at 2–3, PDoc 50). Commerce agreed that the petitioners' submission of a certain affidavit and joint venture agreement demonstrated significant Mexican production of chlor-isos by Aqua-Clor and corroborated "extensive PIERS cross-border trade data" on shipments of subject merchandise on the record. *IDM* at 4 (citing: Pets' Rebuttal Cmts at 2 & Exh. 1; Pets' Add'l Rebuttal Cmts at 3). The record also included a publication from the International Trade Commission, which had found Mexico to be a source of United States imports of chlor-isos in 2014, *i.e.*, covering this POR. *Id.* at 5. Record data also showed Mexican exports by truck and rail during the POR of about 3,019,331 kilograms of identical merchandise. Pets' Prelim & SV Cmts at 4, Ex. 1, PDoc 129. Commerce also explained that the volume of Mexico's exports "does not negate the fact that Mexico is a significant producer" because its export volumes are driven by the fact that "Mexico is a larger consumer of comparable merchandise than Romania." *IDM* at 5. The foregoing substantiates Mexican production of "comparable" merchandise as "significant."

The plaintiffs, however, emphasize that Romania's 18,542 tons of "comparable" merchandise exports of calcium or sodium hypochlorite

[4] HTS 2933.69.03 is a basket category that would include chlor-isos and other compounds including an unfused triazine ring. *See IDM* at 2. The plaintiffs contend Commerce has not historically relied upon this HTS item to determine significance of comparable merchandise but they also acknowledge that the PIERS Mexican export data of record describe exports under the more precise HTS item of 2933.69.03 as "trichloroisocyanuric acid." Pls' Br. at 4, referencing Pets' Final SVs (June 6, 2016) at Exs 3, PDocs 129–138.

under HTS 2828.90 and 2828.10 ranked it as the 17th largest exporter and a net exporter at that, while Mexico's exports of 750 tons ranked it as 48th but still a net importer. In other words, Romanian exports represent "almost 2% of world trade while Mexican exports represent only 0.07%". *Id*. at 5 (chart omitted).[5] This analysis, apart from the question of its accuracy (*see* note 5), is insufficient to undermine Commerce's determination on the "significance" of Mexico's production in its own right. *See supra*.

In the final analysis, Commerce has been delegated the task of finding relevant facts from a given record, and it has the discretion to determine whether a given volume, value or quantity is "significant" under the statute after "taking into account the entire record, including whatever fairly detracts from the substantiality of th[at] evidence." *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (bracketing added). *Accord Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1340 (Fed. Cir. 2011); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003). Commerce determined that both Mexico and Romania "are at a comparable level of economic development" pursuant to 19 U.S.C. §1677(c)(4); both are significant producers of comparable . . . merchandise; and both have publicly available and reliable data for all the identified inputs submitted by interested parties." *PDM* at 12. Commerce's "evidentiary decisions are reviewed for abuse of discretion" while its "findings of fact are reviewed for clear error", *NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007), and this court perceives neither in Commerce's determination on the significance of Mexican production, which is therefore supported by substantial evidence on the record and in accordance with law.

II

As mentioned, Commerce selected CYDSA's financial statements ("FS") for calculating financial ratios. CYDSA is a producer of comparable merchandise, not identical merchandise, but Commerce "has

[5] The defendant here contends the plaintiff's tabular analysis and its conclusion that Mexico represents 0.07 percent net world exports on page 6 of their brief, is problematic in multiple respects: (1) the chart includes only two of the relevant commodity codes, HTS 2828.90 and 2828.10, but not include 2933.69, the basket HTS code that includes identical merchandise, and therefore is not a reasonable reflection of exports of identical merchandise; (2) the plaintiffs did not rely upon the analysis reflected in that chart during the administrative process (*see* Respondents SC Comments, Ex. 2 (including commodity code 2933.69, which is later omitted from their analysis), PDoc 50) and thus argument relying upon this compilation of data to derive percentages for net world exports is waived; and (3) even if the chart can establish that Mexico was not a significant net exporter, it would also establish that Romania was not a significant net exporter. The plaintiff complains that Romania exported 25 times as much as Mexico, is a net exporter, and had influence on world trade unlike Mexico, but all of this is beside the point. *See infra*.

wide discretion in choosing among various surrogate sources," *FMC Corp. v. United States*, 27 CIT 240, 251 (2003), *aff'd*, 87 Fed. Appx. 753 (Fed. Cir. 2004). "The data on which Commerce relies to value inputs must be the 'best available information,' but there is no requirement that the data be perfect." *Home Meridian Int'l, Inc. v. United States*, 772 F. 3d 1289, 1296 (Fed. Cir. 2014); *see also Jiaxing Brother Fastener Co., Ltd. v. United States*, 822 F. 3d 1289, 1301 (Fed. Cir. 2016) ("[t]hough the data may be imperfect, the administrative record supports [Commerce's] conclusion"); *QVD Food Co., Ltd. v. United States*, 658 F. 3d 1318, 1322 (Fed. Cir. 2011) (acknowledging that Commerce had made a reasonable choice given "imperfect alternatives"). Commerce found Mexico to have better surrogate value data than Romania, noting record evidence indicated that Mexico had surrogate values for all inputs with the exception of steam coal while Romania had surrogate values for all inputs with the exception of steam, and that Mexico's labor data was not contemporaneous but Romania's electricity and water were also not contemporaneous. *IDM* at 11–13.

Emphasizing here that Romania nonetheless fulfills all the surrogate country criteria, the plaintiffs contend that the data of record for Romania do not suffer from the "grave" deficiencies of the data for Mexican production. They first contend that the cost of developing "massive energy plants" shown in CYDSA's 2014 and 2015 financial statements is

> reflected in part in CYDSA's astronomical SG&A expense 45.81% in 2015 and 31.77% in 2014, while the more comparable Romanian and Thai chemical companies' ratios on the record ranged from 6.37% to 17.75% in 2014 and 2013 and 2012, consistent with the range for this ratio assigned by the Department in recent segments (notably the Department relied on the 2013 ratios of Aditya Birla in POR9 and the 2012 ratios of Aditya Birla in POR8). There is no reasonable explanation or expectation that the SG&A of the respondents would have doubled or tripled from one segment to the next.

Pls' Reply at 6–7 (citation omitted).[6] The plaintiffs complain that Commerce did not address this. *See also* Pls' Br. at 9–12.

[6] The plaintiffs further explain that CYDSA's first electricity and steam cogeneration plant began operating in early 2014 and during 2015 produced 380 million of kilowatts-hour of electricity and 470,000 tons of steam. *See* CYDSA 2015 FS at 37, PDocs129–138; CYDSA 2014 FS at 41, PDocs 124–128. During 2014 and 2015, CYDSA built a second cogeneration plant with the same capacity. In 2015, the company also began construction on underground storage of hydrocarbons. *See* CYDSA 2015 FS at 38–39, PDocs 129–138.

The defendant argues Commerce did address the development of CYDSA's energy division at both the preliminary and the final stages of the review. *See PDM* at 12–13; *IDM* at 9. Commerce first found that the plaintiffs' "argument[ ] stating that CYDSA production processes and products dissimilar to those of respondents is not accurate and does not reflect the information on the record." *IDM* at 9. The plaintiffs allege CYDSA has three operating divisions, Pls' Br. at 11–12, but Commerce only found two operating segments in CYDSA's financial statement: the Chemical Products and Specialties segment that accounts for 96.5 percent of its total sales, and the Yarns segment that accounts for the remaining sales. *Id*.

Commerce also found CYDSA's financial statement sufficient to value surrogate ratios because its chlorine and caustic soda accounted for 45 percent of sales within CYDSA's Chemical Products and Specialties segment, representing 43.4 percent of CYDSA's total sales. *Id*. Consistent with prior determinations, Commerce explained that 45 percent is nearly double what Commerce determined to be sufficient to use the same financial statements to value a different product in *Hydrofluorocarbon Blends and Components Thereof from the PRC*, 81 Fed. Reg. 42,314 (June 29, 2016) (final determ. of sales at less than fair value and final affirm. determ. of crit. circum.), and accompanying I&D Memo at cmt. 30 (selecting CYDSA's financial statement even though refrigerants represented only 23.5 percent of CYDSA's total sales in 2014). The court cannot find fault in Commerce's conclusion that, "given the absence of information regarding the income generated by Chimcomplex for each product group, the Department has no way to evaluate whether its sodium hypochlorite business represents a significant or primary product of the company." *IDM* at 10.

The plaintiffs acknowledge that CYDSA did not have energy sales in 2014 but they argue nonetheless that the chlorine and caustic soda data are distorted by CYDSA's allegedly "massive" energy division. Pls' Br. at 12 ("[t]he fact that most of the sales were from the chemical division simply does not mean that most of the costs of the company are connected to the chemical division."). Commerce, however, found the plaintiffs' characterization of the energy division not supported by the evidence. Specifically, Commerce explained that CYDSA's 2015 statement reflects "only one electricity co-generation plant operating at the end of 2015 and this plant was not handling all of CYDSA's electrical needs." *IDM* at 9, citing CYDSA 2015 FS at 36. In addition, Commerce found that CYDSA uses gas and electricity as key inputs in the production of chlorine and caustic soda, further supporting the conclusion that CYDSA relies on outside purchases of electricity to

support its production processes. Specifically, Commerce found that these inputs were subject to "price risk" because the Mexican public provider of electricity uses natural gas, which is "vulnerable to the volatility of the natural gas market." *Id*., citing CYDSA Financial Statement at 81. Furthermore, the defendant-intervenors point out that they argued in their administrative case brief, of which Commerce was presumptively aware, that the increase in administrative expenses from 2013 to 2014 due to the start-up of the cogeneration plant had a minimal impact on the ratio of administrative expenses to cost of sales (12.3% in 2014 versus 11.6% in 2013). Def-Int's Resp. at 16–17, referencing Pets' SV Cmts (Dec. 17, 2015), PDoc 75, Ex. 16 at 72. They contend that "the small change in the ratio from 2013 to 2014 does not establish that CYDSA's 2014 (much less its 2015) financial results were distorted by the start-up of cogeneration." *Id*. at 17. The court agrees.

The plaintiffs assert nonetheless that the Romanian company Chimcomplex better represents its own infrastructure and level of integration because Chimcomplex only produces chemicals rather than two types of products like CYDSA. Pls' Br. at 11, 14. Whether that is true, the court may not "reweigh the evidence or . . . reconsider questions of fact anew", *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015), which is another way of expressing that "as to matters . . . requiring expertise a court may [not] displace the [agency]'s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Commerce reasoned that "[t]he information contained in Chimcomplex's financial statement does not indicate that it is any less integrated" because "information on the record from Chimcomplex's website shows that it has two major segments for inorganic and organic products," which is the same number of segments as CYDSA. *IDM* at 9.

Further, Commerce stated that within its seven product groups, Chimcomplex has 24 separate products, some of which were even more dissimilar than those products produced by plaintiffs. *Id*. Taking into account these numerous products, Commerce found the number of Chimcomplex's product lines to be as varied as those of CYDSA. *Id*. at 10. Thus, Commerce found both CYDSA and Chimcomplex to have two main operating segments that produce a number of products that are dissimilar to their comparable product, sodium hypochlorite. *Id*. Given these similarities between CYDSA's and Chimcomplex's statements and the lack of information as to whether sodium

hypochlorite was a significant product of Chimcomplex, *id*., after concluding that levels of integration were not a meaningful factor because the respondents themselves "are vastly different in their own levels of integration", *see id*., pursuant to 19 U.S.C. § 1677(c)(1) Commerce decided CYDSA's financial statement was the best available information on the record because the major chlor-iso product (sodium hypochlorite) is a significant product of CYDSA. The evidence of record and logic support that conclusion notwithstanding the plaintiffs' argument with respect to "cogeneration" that it contends is supported by Commerce's discussion of its intermediate input methodology in *Xanthan Gum from the PRC*, 80 Fed. Reg. 29615 (May 22, 2015) (2013 new shipper rev. results) and accompanying I&D Memo at 10–11. *See* Pls' Reply at 8–9.

The plaintiffs also contend the Mexican record is not superior with respect to other inputs. Pls' Br. at 18. Specifically, plaintiffs take issue with Commerce's assessment of the input values for steam, steam coal, labor, electricity, and water. Pls' Br. at 18–21. *See PDM* at 11–13; *IDM* at 11–13. Their primary concern here derives from the fact that both the Mexican and Romanian records each have usable surrogate values for all but one input — steam for Romania, steam coal for Mexico — and that the latter is the important input for the plaintiffs' chlor-isos production because they use steam coal, not steam; and that the only respondent that uses steam, Hebei Jiheng Chemical Co., Ltd. ("Jiheng"), did not challenge the determination to value its steam based on Mexican data. Pls' Br. at 18. They thus assert the Romanian record is superior because its missing value, steam, is insignificant when compared to Mexico's missing value, steam coal. *Id*.

As an initial matter, it appears Commerce does not have a "practice of weighing the quality of a particular surrogate value based solely on the number of shared inputs used by each respondent." *IDM* at 11. Commerce explained that "such a practice would penalize a more integrated company" because they "consume more material and energy inputs." *Id*. Moreover, the reasonableness of Commerce's analysis is not contingent on whether or not a particular party challenges its decision, and the fact that the only respondent that used steam did not challenge the determination is inapposite to the propriety of Commerce's analysis for SVs: Commerce simply did not find the fact that only one respondent uses steam sufficient to elevate the importance of steam coal over steam. *IDM* at 11. When considering steam as an energy input, Commerce analyzed its significance within Jiheng's consumption of all its energy inputs. *Id*. at 12. Weighing these inputs, Commerce found that electricity accounted for the largest portion of Jiheng's energy costs, followed by steam, and then slightly

smaller amounts of steam coal. *Id*. Commerce concluded from this that steam was at least as meaningful as steam coal to use as an SV in this case. *Id*. The court cannot find fault in that conclusion.

The plaintiffs also contend that the Romanian record is superior in terms of the contemporaneity of its data because the electricity SV is one year old and its water SV is three years old, while Mexico's labor SV is six years old. Pls' Br. at 19. The plaintiffs agree with the defendant that contemporaneity is only one of the factors that Commerce considers when choosing the best available information to use as surrogate values, *see IDM* at 12, but they disagree that contemporaneity is the only factor that differs among the surrogate values in question for labor, electricity, and water. Specifically, the plaintiffs argue that the labor rate comes from a time when the PRC was not considered economically comparable to Mexico, that adjusting for inflation would not address any significant changes in the labor market that would change the price of labor independent of normal inflation, and that it is "common" for water and electricity rates to remain stable for stretches of time. Pls' Br. at 19–20, referencing Pets' SVs (Dec. 17, 2015), PDocs 71–82, at Ex. 5 (Thai water rates in effect since 2012 at the time of this submission) & Ex. 12 (year 2008 versus year 2000 Mexican labor rate variations for several industries)

Despite the plaintiffs' preference to give more weight to the number of years out of date, Commerce found that Mexico was superior to Romania in terms of contemporaneity because "it had two more contemporaneous values for electricity and water, and only one less contemporaneous value for labor." *Id*. Commerce was able to adjust the labor value for Mexico through its normal method of inflating the value for labor by "using the Consumer Price Index rate for Mexico, as published by the International Monetary Fund . . . to account properly for inflation or changes in the labor rate over this time period." *Id*. at 12–13. *See Changzhou Trina Solar Energy Co., Ltd. v. United States*, 41 CIT ___, ___, 255 F. Supp. 3d 1312, 1323 (2017) (noting that Commerce adjusts data to contemporaneity where there are no contemporaneous data on the record). Although the plaintiffs allege that Commerce's adjustment is inadequate because of changes in Mexican labor rates between 2000 and 2008, Commerce determined that there was no record evidence of any significant changes or events in Mexico to affect its labor rate during the time period at issue. *Id*. Commerce therefore concluded that plaintiffs' argument that the older Mexican labor rate was to be less reliable was not supported by the record. *Id*.

In view of the foregoing, the plaintiffs' critiques of the Mexican record and CYDSA's financial statement do not persuade that Commerce's choices were unreasonable and without substantial support

on the record. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("as to matters . . . requiring expertise a court may [not] displace the [agency]'s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

Conclusion

Having considered the arguments presented, the court finds Commerce's choice of Mexico as the primary surrogate country and its conclusion that CYDSA's financial statement was suitable for calculating financial ratios both supported by substantial evidence on the record and in accordance with law. The plaintiffs' motion for judgment must therefore be, and hereby is, denied.

So ordered.

Dated: May 22, 2018
New York, New York

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

Slip Op. 18–58

UNITED STATES, Plaintiff, v. ACTIVE FRONTIER INTERNATIONAL, INC., Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 11–00167

[Granting plaintiff's application for judgment by default in penalty action]

Dated: May 24, 2018

Joshua A. Mandelbaum, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for plaintiff. With him on the application were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the application was *Mary McGarvey-Depuy*, Senior Attorney, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION

Stanceu, Chief Judge:

Plaintiff United States brought this action to recover a civil penalty under section 592 of the Tariff Act of 1930 (the "Tariff Act"), *as amended*, 19 U.S.C. § 1592 (2006)[1] , from Active Frontier International, Inc. ("Active Frontier"), for alleged false declarations of coun-

[1] All citations to the United States Code herein are to the 2006 edition.

try of origin on seven entries of wearing apparel made during 2006 and 2007. Before the court is plaintiff's application for a judgment by default seeking a civil penalty of $80,596.40, an amount calculated at the statutory maximum of 20% of the aggregate dutiable value of the merchandise on the seven entries. Mot. for Default J. (Oct. 4, 2017), ECF No. 36 ("Pl.'s Mot."); *see also* 19 U.S.C. § 1592(c)(3)(B). The court imposes a civil penalty in the amount plaintiff seeks and will enter judgment accordingly.

I. BACKGROUND

The background of this action is presented in the court's three previous opinions and is supplemented, as necessary, herein. *See United States v. Active Frontier Int'l, Inc.*, 36 CIT __, 867 F. Supp. 2d 1312 (2012) (denying without prejudice plaintiff's first application for default judgment); *United States v. Active Frontier Int'l, Inc.*, 36 CIT __, Slip Op. 12–127 (Oct. 3, 2012) (denying without prejudice plaintiff's motion to amend complaint); *United States v. Active Frontier Int'l, Inc.*, 37 CIT __, Slip Op. 13–8 (Jan. 16, 2013) (granting plaintiff's motion to amend complaint).

Before the court are plaintiff's complaint, Second Amended Compl. (July 21, 2016), ECF No. 33 ("Compl."), and its application for default judgment, Pl.'s Mot.

II. DISCUSSION

A. Subject Matter Jurisdiction and Standard of Review

Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582(1), grants the court jurisdiction over an action to recover a civil penalty under section 592 of the Tariff Act. Under section 592, the court determines all issues, including the amount of any penalty, *de novo*. 19 U.S.C. § 1592(e)(1).

B. Plaintiff is Entitled to a Default Judgment Imposing a Penalty in the Amount It Seeks

In evaluating an application for judgment by default, the court accepts as true all well-pled facts in the complaint but must reach its own legal conclusions. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2688.1 (4th ed. 2016). For the reasons discussed below, the court rules that plaintiff's Second Amended Complaint sets forth well-pled facts which, if accepted as true, support the imposition of a civil penalty against defendant in the maximum statutory amount.

Section 592(a)(1) provides, in pertinent part, that "no person, by fraud, gross negligence, or negligence . . . may enter, introduce, or

attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1)(A).

The allegations in the Second Amended Complaint describe the merchandise imported by Active Frontier as consisting of women's capri pants (on Entry No. EH3–07587053) or ladies' jackets and pants (on the remaining six entries, Entry Nos. EH3–06550979, EH3–06556166, EH3–06550730, DQ7–70089166, DQ7–70088549, and DQ7–70088556).[2] Compl. ¶¶ 11, 17, 21, 29, 36, 43, 49. The complaint alleges that "Active Frontier entered and/or introduced, or caused to be entered and/or introduced, articles of wearing apparel manufactured in the People's Republic of China into the commerce of the United States, by means of entry documents filed with the U.S. Customs and Border Protection (CBP)." *Id*. ¶ 6. The government further alleges that this merchandise was "entered and/or introduced . . . by means of materially false documents, written statements, acts, and/or omissions." *Id*. ¶ 7. For each of the seven entries, the complaint alleges that Active Frontier declared falsely on entry documentation that the country of origin of the goods was a country other than China, *id.*¶ 8, and, specifically, that "Active Frontier submitted to CBP bills of lading, entry summaries, and/or other entry documents incorrectly stating that such articles of wearing apparel were . . . manufactured in Indonesia, Korea, and/or the Philippines," *id.* ¶ 8(a).[3] It also alleges that Active Frontier submitted "Manufacturer's Identification Codes" that incorrectly indicated that the goods were manufactured in either Korea or the Philippines.[4] Id. ¶ 8(b).

With respect to the statutory requirement that the false statements be "material," plaintiff alleges that all of the merchandise on Entry No. EH3–07587053 and some of the merchandise on each of the other six entries were subject to a quota (i.e., a quantitative limitation) that applied to certain apparel products of China. Compl. ¶¶ 61–63. Spe-

[2] The seven entries were made between June 5, 2006 and March 2, 2007. Second Amended Complaint ¶ 6 (July 21, 2016), ECF No. 33.

[3] An exhibit to the Second Amended Complaint specifies that the country of origin on Entry Nos. EH3–06550979, DQ7–70089166, DQ7–70088549, and DQ7–70088556 was falsely declared to be Korea, that the country of origin on Entry Nos. EH3–07587053 and EH3–06550730 was falsely declared to be the Philippines, and that the country of origin on Entry No. EH3–06556166 was falsely declared to be Indonesia and/or Korea. Compl. Ex. 16.

[4] According to an affidavit and attached exhibits, the Manufacturer's Identification Codes for Entries EH3–07587053 and EH3–06550730 indicated the Philippines as the country of origin and those for the remaining five entries indicated the country of origin as Korea. Decl. of Raymond Irizarry ¶¶ 7–13 (Nov. 28, 2011) ("First Irizarry Decl."); *see also* Compl. Ex. 16. For all seven entries, according to the affidavit, the true bills of lading stated that China was the origin of the merchandise. First Irizarry Decl. ¶¶ 7–13; *see also* Compl. Ex. 16.

cifically, this merchandise consisted of the pants in each entry, which as entered under subheading 6204.63.3090, HTSUS were within quota category 648 at the time of entry. *Id.* ¶¶ 56–59. Because the allegedly false declarations of origin on this quota-subject merchandise interfered with the administration of the quantitative limitation (whether or not the quota had been filled at the time of entry), it was material for purposes of section 592. In the case of a filled quota, the merchandise would have been inadmissible; in the case of an open quota, the merchandise, by not being counted against the quota, defeated the purpose of the quota.

Plaintiff acknowledges that the jackets, which were entered on five of the six entries (all except for Entry No. EH3–07587053, which contained only pants), were not subject to a quantitative limitation at the time of entry but argues that the false origin declarations on the jackets were also material because they "helped mask the false statements about the pants." Pl.'s Mot. 13. Plaintiff points out that the complaint alleges that the entries contained jackets and pants that featured matching designs and were intended to be advertised and sold as single units. *Id.* at 13–14; *see also* Compl. ¶ 64. The complaint ties this alleged fact to an allegation that the false origin declarations for the jackets made the quota violation as to the pants more difficult to detect: "Had Active Frontier provided different country-of-origin statements for two parts of a single outfit shipped together, the error would have been easier to detect because an official who inspected the entry documents and the goods would expect the two parts of the outfits—matching jackets and pants—to originate from the same country." Compl. ¶ 64. The court considers the allegations that jackets and pants were in matching styles, and that both were falsely declared as to origin, to be sufficient to allow the court to conclude that the allegedly false declarations of origin as to the jackets were material. Had a Customs official been alerted to the different origins and subjected the merchandise to further inspection and inquiry, it is reasonably possible that the quota merchandise, i.e., the pants, which were on the same entries as the jackets, would not have entered the commerce of the United States and therefore would not have defeated the purpose of the quota. Instead, as the Second Amended Complaint indicates, the merchandise was released by the time the violation was discovered, with no samples collected.

Regarding the amount of a penalty, the original complaint filed in this action states that the violations alleged therein did not affect the assessment of duties. Compl. ¶ 13 (May 31, 2011), ECF No. 2. For a negligent violation that did not result in a loss of revenue to the United States, the statute prescribes a maximum penalty of 20% of

the dutiable value, not to exceed the domestic value of the merchandise. 19 U.S.C. § 1592(c)(3)(B). Plaintiff alleges that the aggregate entered value of the merchandise on the six entries was $402,982. Compl. ¶ 73. Twenty percent of that amount is $80,596.40, the penalty amount plaintiff seeks. *Id*. ¶ 77.

Because the amount of penalty is to be determined *de novo* by the court, 19 U.S.C. § 1592(e)(1), the court is not required to impose a penalty in the maximum amount authorized by section 592(c). Plaintiff argues that a penalty in the maximum amount is appropriate because Active Frontier, having failed to respond to CBP's pre-penalty notice and penalty claim, did not put forth any information from which it could be concluded that Active Frontier qualifies for mitigation. Pl.'s Mot. 15. The court agrees that it has no information as to mitigating factors, but the court does not consider this fact alone to be sufficient for imposition of a maximum penalty in the amount of 20% of the dutiable value of the merchandise. The court notes that the Customs penalty guidelines for section 592 violations (which are not binding on the court but may serve as guidance), provide that a penalty for a negligent, non-duty-loss violation normally will be disposed of with a penalty in the range of 5% to 20% of the dutiable value, depending on mitigating and aggravating factors. 19 C.F.R part 171, App. B(F)(2)(c)(ii). Nevertheless, the court, in exercising its discretion, has determined that a penalty in the maximum amount is appropriate for another reason.

Where, as here, the United States seeks a penalty under section 592 based on a culpability level of negligence, "the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4). Because defendant has defaulted, plaintiff need not plead facts from which the court could conclude that the origin statements alleged to be material and false occurred as a result of the importer's negligence; here, the allegation of negligence will suffice for purposes of seeking a default judgment.

In this instance, plaintiff's factual allegations, if presumed true, clearly would support a conclusion that Active Frontier was negligent. An importer is required to use reasonable care in importing merchandise. *See* 19 U.S.C. § 1484(a)(1). Meeting that standard requires review of information on the characteristics and source of the merchandise and information on the underlying transaction, including review of available documentation, to ensure that origin will be correctly declared upon entry. As noted in an affidavit submitted by

plaintiff, the true bills of lading for each of the six entries "clearly stated" that the origin of the merchandise was China. Decl. of Raymond Irizarry ¶¶ 7–13 (Nov. 28, 2011); *see also* Exs. 2, 4, 6, 8, 10, 12, 14 to Compl. If that fact is true, even a minimum effort on the part of defendant likely would have uncovered the origin-related discrepancy in the entry documentation. Therefore, a penalty in the highest amount allowed by statute for a negligent violation is appropriate.

III. CONCLUSION

Plaintiff has established that it is entitled to a judgment by default in which a civil penalty is imposed on defendant based on a non-revenue-loss violation of section 592, a culpability level of negligence, and merchandise with a dutiable value of $402,982. In exercising its authority to determine the amount of penalty *de novo*, the court will enter judgment for a civil penalty in the amount of $80,596.40, the maximum amount allowed by section 592(c)(3)(B), with post-judgment interest as provided by law, and costs according to 28 U.S.C. § 1920 and USCIT Rule 54(d).

Dated: May 24, 2018
New York, New York

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

Slip Op. 18–59

VINH HOAN CORPORATION et al., Plaintiff and Consolidated Plaintiffs, and BINH AN SEAFOOD JOINT STOCK COMPANY, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CATFISH FARMERS of AMERICA et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 13–00156

[Sustaining the U.S. Department of Commerce's third remand determination in the eighth antidumping duty administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: May 24, 2018

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, argued for Plaintiff and Defendant-Intervenor Vinh Hoan Corporation.

Jordan Charles Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, argued for Consolidated Plaintiff Anvifish Joint Stock Company and Consolidated Plaintiff and Defendant-Intervenor Vietnam Association of Seafood Exporters and Producers.

Robert George Gosselink and *Jonathan Michael Freed*, Trade Pacific, PLLC, of Washington, DC, for Consolidated Plaintiff Vinh Quang Fisheries Corporation.

John Joseph Kenkel, deKieffer & Horgan PLLC, of Washington, DC, for Consolidated Plaintiff and Plaintiff-Intervenor Binh An Seafood Joint Stock Company.

Jonathan Mario Zielinski and *Heather Kay Pinnock*, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Consolidated Plaintiff and Defendant-Intervenor Catfish Farmers of America; Alabama Catfish Inc. d/b/a Harvest Select Catfish, Inc.; America's Catch; Heartland Catfish Company; Magnolia Processing, Inc. d/b/a Pride of the Pond; and Simmons Farm Raised Catfish, Inc. On the brief was *Nazakhtar Nikakhtar*.

Kara Marie Westercamp, Trial Attorney, U.S. Department of Justice, Commercial Litigation Branch – Civil Division, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Kristen McCannon*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC. Also appearing as Of Counsel was *David W. Richardson*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") third remand determination in the eighth antidumping duty ("ADD") administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam"), filed pursuant to the court's order in *Vinh Hoan Corporation v. United States*, 41 CIT __, 234 F. Supp. 3d 1332 (2017). *See* Final Results of Redetermination Pursuant to *Vinh Hoan Corporation et al. v. United States*, Consol. Court No. 13–00156, Slip Op. 17–00081 (July 10, 2017), Sept. 22, 2017, ECF No. 223 ("*Third Remand Results*"); *see also Vinh Hoan Corporation v. United States*, 41 CIT __, __, 234 F. Supp. 3d 1332, 1344 (2017) ("*Vinh Hoan III*").

The court remanded Commerce's final determination and first and second remand determinations on the issue of calculating a surrogate value for respondent Vinh Hoan Corporation's ("Vinh Hoan") fish oil byproduct in this review. *See Vinh Hoan III*, 41 CIT at __, 234 F. Supp. 3d at 1341–45; *Vinh Hoan Corporation v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1208, 1222–24 (2016) ("*Vinh Hoan II*"); *Vinh Hoan Corporation v. United States*, 39 CIT __, __, 49 F. Supp. 3d 1285, 1321–22 (2015) ("*Vinh Hoan I*"); *Certain Frozen Fish Fillets From [Vietnam]*, 78 Fed. Reg. 17,350 (Dep't Commerce Mar. 21, 2013) (final results of ADD administrative review and new shipper review; 2010–2011), *as amended* 78 Fed. Reg. 29,323 (Dep't Commerce May 20, 2013) and accompanying Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Mem. for the Final Results of the Eighth Admin. Review and Aligned New Shipper Reviews, (Mar. 13, 2013), ECF No. 27–3 ("Final Decision Memo"). The court ordered that, on third remand, Commerce must further explain or reconsider its decision to

construct a value for respondent Vinh Hoan's fish oil byproduct rather than to select the best surrogate value for fish oil from the values placed on the record. *Vinh Hoan III*, 41 CIT at __, 234 F. Supp. 3d at 1342–45.

On third remand, Commerce further explains its determination to construct a surrogate value price for Vinh Hoan's fish oil, and provides further explanation as to why that method is reasonable based on the record and why the resulting value constitutes the best available information for valuing the fish oil byproduct. Commerce has complied with the court's remand order in *Vinh Hoan III*, Commerce's explanation is reasonable, and its findings are supported by substantial evidence. Accordingly, the *Third Remand* Results are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the three prior opinions, *see Vinh Hoan III*, 41 CIT at __, 234 F. Supp. 3d at 1334–37; *Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1213–15; *Vinh Hoan I*, 39 CIT at __, 49 F. Supp. 3d at 1290–91, and here recounts the facts relevant to the court's review of the *Third Remand Results*.

In the final determination, Commerce selected Indonesian import data under HTS 1504.20.9000 as the best available information to value Vinh Hoan's fish oil byproduct in this review. *See* Final Decision Memo at 36–39. Commerce explained that it "harbor[ed] concerns" that the HTS category may be "overly broad" because it included values for both refined and unrefined fish oil, and Vinh Hoan's byproduct is solely unrefined fish oil. *Id.* at 38. To address its concern about overbreadth, Commerce "capped" the HTS value at a value for unrefined fish oil, calculated using Vinh Hoan's factor of production ("FOP") data. *Id.* In *Vinh Hoan I*, Defendant requested remand for Commerce to reconsider the valuation of Vinh Hoan's fish oil byproduct, on the grounds that Commerce had used its capping methodology for the first time in the final determination and accordingly had not had the opportunity to address, at the agency level, the parties' arguments related to this methodology. *See* Def.'s Resp. Pls.' Mots. J. Agency R. at 79–80, May 22, 2014, ECF No. 78. The court granted the request for remand. *Vinh Hoan I*, 39 CIT at 1321, 49 F. Supp. 3d at 1321–22.

On first remand, Commerce continued to "cap" Indonesian import data for HTS 1504.20.9000 at a value representative of Vinh Hoan's fish oil, derived from a build-up of FOPs used to produce unrefined fish oil. *See* Final Results of Redetermination Pursuant to *Vinh Hoan Corporation et al. v. United States*, Consol. Court No. 13–00156, Slip

Op. 15–16 (Feb. 19, 2015) at 78–82, Aug. 12, 2015, ECF No. 136–1. Commerce explained that such a cap was warranted because the import value was greater than the value for whole fish, the main input, and "[i]t would be illogical to value an unrefined by-product like fish oil at a value greater than that of the main input, a value that also approaches that of the finished product, frozen fish fillets." *Id.* at 80.

In *Vinh Hoan II*, the court determined that what Commerce referred to as a "cap" of the Indonesian data was actually "a rejection of the import data in favor of a constructed value." *Vinh Hoan II*, 40 CIT at __, 179 F. 3d at 1222. The court stated that, until Commerce acknowledged that it was actually constructing a value rather than capping an surrogate value from an existing data source, the court could not review whether Commerce's selection of the Indonesian import data was reasonable because it was not clear whether and how Commerce actually valued Vinh Hoan's fish oil byproduct using the Indonesian import data. *Id.*, 40 CIT at __, 179 F. 3d at 1224. The court noted that,

> [a]lthough the court cannot say Commerce unreasonably determined that Vinh Hoan's fish oil is a low value-added product, Commerce has not explained why it is reasonable to depart from its normal methodology of choosing the best [surrogate value] data source to value respondents' fish oil byproduct. Commerce may have good reason to go beyond its stated methodology and construct a value, but Commerce needs to state what it is doing and explain why it is reasonable so that the court may review Commerce's methodology and determination. The court cannot review whether Commerce's choice of Indonesian import data is reasonable when it is unclear how, to what extent, or even if Commerce used Indonesian import data for fish oil in calculating a [surrogate value] for Vinh Hoan's fish oil.

Id. (internal citation omitted). The court remanded Commerce's determination on this issue for the agency to clarify its methodology. *See id.*, 40 CIT at __, __, 179 F. Supp. 3d at 1224, 1237–38.

On second remand, Commerce continued to refer to its methodology as a "cap." *See generally* Final Results of Redetermination Pursuant to Vinh Hoan Corporation et al. v. United States, Consol. Court No. 13–00156, Slip Op. 16–53 (May 26, 2016) at 23–25, 34–37, Jan. 27, 2017, ECF No. 203–1. Commerce again explained that it had "capped" the HTS 1504.20.9000 data at a value for unrefined fish oil based on Vinh Hoan's own FOP data. *See id.* at 23. Commerce again concluded that the HTS data was not representative of Vinh Hoan's unrefined

fish oil byproduct because the HTS value was significantly higher than the main input and includes data values for both refined and unrefined fish oil. *See id.* at 24. Commerce explained that, pursuant to its practice, such a cap was appropriate because the HTS data value was higher than the value of the main input, whole live fish, and a surrogate value priced above the value of the main input would be unreasonable. *Id.* at 23–24. Commerce explained that "the use of the contemporaneous, verified FOP data to produce unrefined fish oil provided by Vinh Hoan, provides a more accurate cap than the [surrogate value] for live whole fish, improves the accuracy of the Department's dumping calculation, and represents the best available information." *Id.* at 25.

In *Vinh Hoan III*, the court again determined that Commerce had still not explained, or even "squarely acknowledged," *Vinh Hoan III*, 41 CIT at __, 234 F. Supp. 3d at 1342, that it was using a constructed value rather than selecting a surrogate value for fish oil from the values available on the record. *Id.*, 41 CIT at __, 234 F. Supp. 3d at 1342–44. The court explained that, although the agency had determined that Indonesian import data for HTS 1504.20.9000 constitutes the best available information, "Commerce does not actually use the import data for HTS 1504.20.9000 as a [surrogate value]," but instead "builds a constructed value for the fish oil using fish oil FOPs and calls this value a 'cap.'" *Id.*, 41 CIT at __, 234 F. Supp. 3d at 1342. The court determined that Commerce had, without explanation, deviated from its standard practice of choosing "the best existing surrogate value data source for fish oil from the existing alternative sources" on the record. *Id.* The court remanded again for the agency to explain why constructing a value from fish oil FOPs, rather than using alternative available surrogate value data, constitutes the best available information, or reconsider its determination. *Id.*, 41 CIT at __, 234 F. Supp. 3d at 1344.

Commerce issued the *Third Remand Results* on September 22, 2017. On third remand, Commerce acknowledged that it constructed a value for the fish oil surrogate value rather than capping a surrogate value already on the record. *Third Remand Results* at 8 n.30 ("Based on the Court's ruling, we will no longer refer to the [surrogate value] used to value fish oil as a cap, but instead as a value the Department calculated to yield a more reasonable result."). Commerce explained that constructing a value based on Vinh Hoan's FOPs provided a more accurate value than any of the other potential [surrogate values] on record in this review because it was based on "verified information submitted from Vinh Hoan's own books and

records," which is specific, reliable, and meets the Department's other selection criteria, while the alternative surrogate values that had been placed on the record did not. *See id.* at 9–10. The agency emphasized that, in this case, building up a value complies with its statutory mandate to calculate the most accurate dumping margins possible based on the record. *Id.* at 7–8. For these reasons, Commerce explained, it found that the calculated fish oil surrogate value constitutes the best available information on the record of this review. *See id.* at 3–14. Vinh Hoan's margin calculation did not change on third remand. *Id.* at 2.

JURISDICTION AND STANDARD OF REVIEW

The court continues to have jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "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). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306).

DISCUSSION

On third remand, Commerce acknowledges that it constructed a value for Vinh Hoan's unrefined fish oil byproduct to be offset in this review. *See Third Remand Results* at 7–9. Plaintiff continues to challenge Commerce's use of that constructed value, and argues that it was unreasonable to set aside the Indonesian import data for HTS 1504.20.9000 because that data is not overbroad and its value is not unreasonably high. *See* Pl.'s Comments on the Final Results of Redetermination Pursuant to 3rd Remand at 6–26, Dec. 14, 2017, ECF No. 233 ("Pl.'s Third Remand Comments"). Defendant responds that constructing a value in this case using FOP data reported by Vinh Hoan and verified by Commerce resulted in the most accurate surrogate value available on this record, so it was reasonable for Com-

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

merce not to use the Indonesian HTS 1504.20.9000 data. *See* Def.'s Resp. Pl.'s Comments on Remand Redetermination at 7–18, Feb. 23, 2018, ECF No. 242 ("Def.'s Third Remand Comments"). Defendant emphasizes that Commerce determined that the import data for the Indonesian HTS 1504.20.9000 category would not be a reasonable surrogate value because the import data is not specific to, and thus not representative of the value of, Vinh Hoan's unrefined fish oil. *See id.* at 5–6, 9–13, 19–20.

In non-market economy cases, Commerce obtains the normal value of the subject merchandise by adding the value of the FOPs used to produce the subject merchandise together with "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Commerce offsets that figure with the production costs of any byproducts generated during the production process that the respondent sold. *See* Final Decision Memo at 34. Commerce values the byproduct offset and other FOPs using "the best available information regarding the values of such factors in a market economy country or countries. . . ." 19 U.S.C. § 1677b(c)(1). Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. Final Decision Memo at 11; *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited May 21, 2018). Commerce's practice for selecting the best available information to value individual FOPs favors selecting a data source that satisfies the breadth of its selection criteria where possible. *See* Final Decision Memo at 11. Although Commerce has discretion to decide what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011), Commerce must ground its selection of the best available information in the overall purpose of the ADD statute, calculating accurate dumping margins. *See Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (2001); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) ("[T]here is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so."); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Here, Commerce deviates from its standard methodology of selecting an already-established value from sources placed on the record. Commerce explains that this decision is, however, not a deviation from its overall practice "to follow [its] statutory mandate to select [surrogate values] from the best available information," which Commerce emphasizes it has done here by constructing a value using the FOPs placed on the record by Vinh Hoan. *Third Remand Results* at 7–8. Commerce explains that, because there were no reasonable established surrogate values available, constructing a value using the respondent's own FOP data is preferable in this case as it will result in a more accurate value for the fish oil byproduct. *See id.* at 7–10. Commerce states:

> The record of this review contained additional information beyond the sources proffered by the interested parties concerning fish oil, specifically, all FOPs consumed by Vinh Hoan to produce fish oil. Because this additional information was on the record, we could evaluate whether this information could credibly be used to value fish oil. We reiterate that we have calculated surrogate values using record information in other cases where the record contains the requisite information to do so and the record information represents the best available information.

Id. at 8. On this record, Commerce's decision is reasonable.

Commerce explains that a constructed value would achieve a more accurate surrogate value than the existing values from sources placed on the record. *Third Remand Results* at 9–10. There were two potential surrogate values placed on the record in this administrative review: a price quote for fish oil from an Indonesian company and GTA import data for Indonesian HTS category 1504.20.9000. *Id.* at 4–7. On third remand, Commerce reexamined both values to determine whether either would satisfy the standard selection criteria and accordingly be a reasonable surrogate value. *See id.* Regarding the price quote, Commerce determined that it would not be a reasonable surrogate value because it met only one of the five criteria – public availability – and that it was also unreliable. *Id.* at 4–6.

Regarding the HTS data, Commerce determined that, while satisfying the other four criteria, the data was not specific to Vinh Hoan's unrefined fish oil because HTS category 1504.20.9000 covers both refined and unrefined fish oil, such that the value of the import data is not representative of Vinh Hoan's fish oil. *Third Remand Results* at 6. Commerce determined that the data within HTS 1504.20.9000 is not "sufficiently representative of Vinh Hoan's fish oil," because that HTS category covers "unrefined fish oil that is packaged and contain-

erized for international shipment, as well as high value refined fish oil containing Omega-3 fatty acids," in addition to unrefined, unpackaged fish oil such as Vinh Hoan's. *Id.* Commerce explained that this lack of specificity of the HTS import data is concerning and significant on these facts, where the import data value is high relative to the main input, whole, live fish. *Id.* at 7. Given the price disparity between the HTS data and the main input, Commerce determined that the HTS data is more representative of refined than unrefined fish oil.[2] *See id.* Thus, Commerce concluded that the import data for HTS 1504.20.9000 is "overly broad and not specific to the low value, unrefined fish oil produced by Vinh Hoan[.]" *Id.* at 10.

The record supports Commerce's determination. Commerce explained that "Vinh Hoan's unrefined and low value fish oil is dissimilar to much of the fish oil covered" by the heading. *Id.* Record evidence indicates that Vinh Hoan's byproduct is unrefined fish oil. *See id.* at 6 (citing Commerce Mem. re: Verification of the Sales and [FOP] Response of Vinh Hoan Corporation, PD 393, bar code 3110870–01 (Dec. 14, 2010)).[3] Commerce concluded that, because Vinh Hoan's fish oil is unrefined and of lower value, the Indonesian HTS 1504.20.9000 data would constitute an unrepresentative surrogate value. *Id.* at 7, 9–10. It is reasonable for Commerce to determine that, on this record, the surrogate value that results from the use of data from HTS category 1504.20.9000 is not representative of the value of Vinh Hoan's by-

[2] Commerce also emphasized that the surrogate value derived from the Indonesian HTS 1504.20.9000 data would exceed the value of the main input and of the subject merchandise, which would be an unreasonable result for this byproduct. *Third Remand Results* at 7. In response, Plaintiff argues that, in this case, it is not unreasonable for the HTS value to exceed the value of the main input (whole, live fish) because more fish are required to make one kilogram of fish oil than one kilogram of fish. *See* Pl.'s Third Remand Comments at 17–18. As an initial matter, Defendant contends that this argument was not exhausted before the agency. Def.'s Third Remand Comments at 17. Plaintiff responds that it has consistently argued in these proceedings that there is not a rational connection between the value of a live fish and the byproduct it is producing. *See* Oral Arg. at 00:13:51–00:18:25, Apr. 11, 2018, ECF No. 262. Nevertheless, Plaintiff's argument is unpersuasive. Plaintiff argues that "the fish oil value that will actually be used for purposes of deducting the byproduct offset is not higher than the value of the main input," because the correct inquiry is not the value of the byproduct but "the value applicable to the amount of fish oil obtained from the FOPs used to obtain 1 kg of the subject merchandise, which will only be a fraction of $3.10/kg." Pl.'s Third Remand Comments at 18. Even accepting Plaintiff's argument as correct, the argument by itself does not undermine Commerce's justification for rejecting the HTS import data as unrepresentative and overbroad in light of the fact that Vinh Hoan's byproduct is low value, minimally processed, unpackaged, unrefined fish oil. Commerce did not determine that the value was inappropriate simply because its value was greater than the main input; instead, Commerce found the data inappropriate because of the high value in combination with the fact that the heading contained refined fish oil where Vinh Hoan's fish oil is unrefined. On these facts, Plaintiff has not demonstrated that Commerce's determination to use the constructed FOP value is unreasonable.

[3] On June 19, 2013, Defendant filed on the docket the indices to the public and confidential administrative records; these indices are located on the docket at ECF No. 27. *See* Admin. Index, June 19, 2018, ECF No. 27.

product because many of the products covered by that category are not sufficiently similar to Vinh Hoan's unrefined fish oil. The agency therefore constructed a value using Vinh Hoan's own reported FOP data, which it considered would result in a more accurate value. *Id.* at 9–10. On this record Commerce's determination is reasonable.

Commerce has explained why it deviated from its usual practice and constructed a value using Vinh Hoan's FOP data in this review, and the method used by the agency to construct a value in this case is reasonable. Commerce used the respondent's own reported FOP data to build up a price that reflects the value of that respondent's fish oil byproduct. *Third Remand Results* at 7–10. These FOPs were provided by the respondent and verified by the Department. *Id.* at 9.

Plaintiff contends that Vinh Hoan's unrefined fish oil is a "value-added product," such that a surrogate value (here, the HTS import data) that exceeds the value of the main input is not an unreasonable category with which to value the byproduct. Pl.'s Third Remand Comments at 18–23. Defendant contends that, despite this minimal further processing, it would be unreasonable for the value of the fish oil to exceed that of the main input. Def.'s Third Remand Comments at 16–17. Whether the product is value-added does not undermine Commerce's reasonable determination that the HTS value covering "unrefined fish oil that is packaged and containerized for international shipment, as well as high value refined fish oil containing Omega-3 fatty acids," in addition to unrefined, unpackaged fish oil such as Vinh Hoan's, is not specific to Vinh Hoan's fish oil. *Third Remand Results* at 6.

Finally, Plaintiff argues that Commerce's determination on third remand that Indonesian import data for HTS category 1504.20.9000 is not specific to Vinh Hoan's fish oil byproduct is not supported by the agency record because it is inconsistent with the agency's prior determinations in these proceedings that the HTS import data was specific. *See* Pl.'s Third Remand Comments at 5–6, 15–17. Commerce explained in the third remand that it in fact had expressed concern early on in the proceedings regarding the specificity of the HTS import data: "[a]s stated in the [final determination], while the Indonesian HTS 1504.20.9000 is sufficiently specific, the HTS may contain refined fish oil which is not sufficiently similar to the fish oil byproduct." *Third Remand Results* at 13. Although the third remand may have been the first time that the agency explicitly stated that the HTS import data was not specific to Vinh Hoan's unrefined fish oil, throughout these proceedings Commerce consistently expressed concern that the HTS data was "overly broad," which was the reason that the agency decided to "cap" the import value at a value more repre-

sentative of unrefined fish oil. *See* Final Decision Memo at 38. Indeed, in the final determination, Commerce stated that, because Vinh Hoan's fish oil is unrefined and unpackaged,

> we harbor concerns that the HTS 1504.20.9000 used in the Preliminary Results may be an overly broad HTS category in which to value the respondents' fish oil, given that by its terms it may include refined fish oil. Nevertheless, we will continue to value fish oil using the Indonesian HTS 1504.20.9000 because by its terms it similarly encompasses unrefined fish oil. However, we will cap the price of HTS 1504.20.9000 at the calculated value of the FOPs and ratios used by Vinh Hoan to make fish oil, i.e., fish waste, labor and energy, plus surrogate ratios, to ensure that it is a fully-loaded fish oil value.

Id. This passage clearly reflects a concern about the specificity of the data, which formed the basis for Commerce's decision to calculate a value more representative of the value of the respondent's fish oil byproduct. Accordingly, Plaintiff's argument that Commerce's determination on third remand that the HTS import data is not specific is inconsistent with prior findings on the record is unpersuasive.

CONCLUSION

For the foregoing reasons, the *Third Remand Results* in Commerce's eighth antidumping duty administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam comply with the court's order in *Vinh Hoan III*, 41 CIT at __, 234 F. Supp. 3d at 1344, are supported by substantial evidence, and are in accordance with law. Therefore, the *Third Remand Results* are sustained. Judgment will enter accordingly.

Dated: May 24, 2018
New York, New York

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

Slip Op. 18–60

AN GIANG FISHERIES IMPORT AND EXPORT JOINT STOCK COMPANY et al., Plaintiffs and Consolidated Plaintiffs, and VIETNAM ASSOCIATION of SEAFOOD EXPORTERS AND PRODUCERS et al., Plaintiff-Intervenor and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CATFISH FARMERS of AMERICA et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 14–00109

[Sustaining the U.S. Department of Commerce's second remand determination in the ninth antidumping duty administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: May 24, 2018

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, argued for Plaintiffs, Consolidated Plaintiff-Intervenors, and Consolidated Defendant-Intervenors An Giang Fisheries Import and Export Joint Stock Company; Cuu Long Fish Joint Stock Company; Hiep Thanh Seafood Joint Stock Company; NTSF Seafoods Joint Stock Company; QVD Food Company Ltd.; Southern Fishery Industries Company, Ltd.; Vinh Hoan Corporation; Asia Commerce Fisheries Joint Stock Company; and International Development and Investment Corporation.

Jonathan Mario Zielinski and *Heather Kay Pinnock*, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Consolidated Plaintiffs, Defendant-Intervenors, and Consolidated Defendant-Intervenors Catfish Farmers of America; America's Catch; Alabama Catfish Inc. d/b/a Harvest Select Catfish, Inc.; Heartland Catfish Company; Magnolia Processing, Inc. d/b/a Pride of the Pond; and Simmons Farm Raised Catfish, Inc. On the brief was *Nazakhtar Nikakhtar*.

John Joseph Kenkel, deKieffer & Horgan PLLC, of Washington, DC, for Consolidated Plaintiff Binh An Seafood Joint Stock Company.

Jordan Charles Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, argued for Consolidated Plaintiff, Plaintiff-Intervenor, Consolidated Plaintiff-Intervenor, and Consolidated Defendant-Intervenor Vietnam Association of Seafood Exporters and Producers.

Kara Marie Westercamp, Trial Attorney, U.S. Department of Justice, Commercial Litigation Branch, Civil Division, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *David W. Richardson*, Senior Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC. Also appearing as Of Counsel was *Kristen McCannon*, U.S. Department of Commerce, of Washington, DC.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") second remand determination in the ninth antidumping duty ("ADD") administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam"), filed pursuant to the court's order in *An Giang Fisheries Import and Export Joint Stock Company v. United States*, 41 CIT __, 236 F. Supp. 3d 1352 (2017). *See* Final Results of Redetermination Pursuant to *An Giang Fisheries Import and Export Joint Stock Company et al.*, Consol. Court No. 14–00109, Slip Op. 17–00082 (July 10, 2017), Sept. 22, 2017, ECF No. 167 ("*Second Remand Results*"); *see also An Giang Fisheries Import and Export Joint Stock Company v. United States*, 41 CIT __, __, 236 F. Supp. 3d 1352, 1361 (2017) ("*An Giang II*").

The court remanded Commerce's final determination and first remand determination on the issue of calculating a surrogate value for respondent Vinh Hoan Corporation's ("Vinh Hoan") fish oil byproduct in this review. *See An Giang II*, 41 CIT at __, 236 F. Supp. 3d at 1358–61; *An Giang Fisheries Import and Export Joint Stock Company v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1256, 1285 (2016) ("*An Giang I*"); *Certain Frozen Fish Fillets From [Vietnam]*, 79 Fed. Reg. 19,053 (Dep't Commerce Apr. 7, 2014) (final results of ADD administrative review and new shipper review; 2011–2012), *as amended* 79 Fed. Reg. 37,714 (Dep't Commerce July 2, 2014) and accompanying Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Mem. for the Final Results of the Ninth Admin. Review and Aligned New Shipper Review, (Mar. 28, 2014), ECF No. 29–3 ("Final Decision Memo"). The court ordered that, on second remand, Commerce must further explain or reconsider its decision to construct a value for respondent Vinh Hoan's fish oil byproduct rather than to select the best surrogate value for fish oil from the values placed on the record. *An Giang II*, 41 CIT at __, 236 F. Supp. 3d at 1358–61.

On second remand, Commerce further explains its determination to construct a surrogate value price for Vinh Hoan's fish oil, and provides further explanation as to why that method is reasonable based on the record and why the resulting value constitutes the best available information for valuing the fish oil byproduct. Commerce has complied with the court's remand order in *An Giang II*, Commerce's explanation is reasonable, and its findings are supported by substantial evidence. Accordingly, the *Second Remand Results* are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the two prior opinions, *see An Giang II*, 41 CIT at __, 236 F. Supp. 3d at 1354–56; *An Giang I*, 40 CIT at __, 179 F. Supp. 3d at 1261–62, and here recounts the facts relevant to the court's review of the *Second Remand Results*.

In the final determination, Commerce selected Indonesian import data under HTS 1504.20.9000 as the best available information to value Vinh Hoan's fish oil byproduct in this review. *See* Final Decision Memo at 78–86. Commerce explained that it had concerns that the HTS category was too broad because it included values for both refined and unrefined fish oil, and Vinh Hoan's byproduct is solely unrefined fish oil. *Id.* at 82. Commerce explained that it "finds that the value derived from the Indonesian GTA import data under HTS 1504.20.9000 is unrepresentative of Vinh Hoan's 'unrefined' fish oil

because this value likely reflects 'refined' fish oil prices." *Id.* at 83. To address its concern about overbreadth, Commerce "capped" the HTS value at a value for unrefined fish oil, calculated using Vinh Hoan's factor of production ("FOP") data, as it had in the eighth review. *See id.* at 81–83. Commerce explained that it was "capping" the Indonesian import data value for HTS 1504.20.9000 at a value representative of Vinh Hoan's fish oil, derived from a build-up of FOPs used to produce unrefined fish oil. *See id.* at 82–82. Commerce explained that such a cap was warranted because the import value was greater than the value for whole fish, the main input, and it would be "unreasonable that the [surrogate value] for Vinh Hoan's fish oil by-product derived from whole fish would be higher than its main input (*i.e.*, whole fish)." *Id.* at 82.

In *An Giang I*, the court determined that what Commerce referred to as a "cap" of the Indonesian data was "in fact a rejection of the import data in favor of a [constructed value]." *An Giang I*, 40 CIT at __, 179 F. Supp. 3d at 1281–82. The court stated that, until Commerce acknowledged that it was actually constructing a value rather than capping a surrogate value from an existing data source, the court could not review whether Commerce's selection of the Indonesian import data was reasonable because it was not clear whether and how Commerce actually valued Vinh Hoan's fish oil byproduct using the Indonesian import data. *Id.*, 41 CIT at __, 179 F. 3d at 1282–83. The court noted that,

> [a]lthough the court cannot say Commerce unreasonably concluded that Vinh Hoan's fish oil is unrefined fish oil (a low value-added product), Commerce has not explained why it is reasonable to depart from its normal methodology of choosing the best [surrogate value] data source to value respondents' fish oil byproduct. . . . Commerce may have good reason to go beyond its stated methodology and construct a value instead of choosing the best available [surrogate value] data source on the record to value fish oil. If so, Commerce needs to state what it is doing and explain why this alternative methodology is reasonable so that the court may review Commerce's methodology and determination.

Id. (internal citation omitted). The court remanded Commerce's determination on this issue for the agency to clarify its methodology. *See id.*, 40 CIT at __, __, 179 F. Supp. 3d at 1283, 1285.

On first remand, Commerce continued to refer to its methodology as a "cap." *See generally* Final Results of Redetermination Pursuant to *An Giang Fisheries Import and Export Joint Stock Company et al., v. United States*, Consol. Court No. 14–00109, Slip Op. 16–55 (June 7,

2016) at 13–17, 22–26, Feb. 10, 2017, ECF No. 151–1. Commerce again explained that it had "capped" the HTS 1504.20.9000 data at a value for unrefined fish oil based on Vinh Hoan's own FOP data. *See id.* at 14–15. Commerce again concluded that the HTS data was not representative of Vinh Hoan's unrefined fish oil byproduct because the HTS value was significantly higher than the main input and includes data values for both refined and unrefined fish oil. *See id.* Commerce explained that, pursuant to its practice, such a cap was appropriate because the HTS data value was higher than the value of the main input, whole live fish, and a surrogate value priced above the value of the main input would be unreasonable. *Id.* at 14. Commerce explained that "the use of the contemporaneous, recently verified FOP data to produce unrefined fish oil provided by Vinh Hoan, provides a more accurate cap than the [surrogate value] for live whole fish, improves the accuracy of the Department's dumping calculation, and represents the best available information." *Id.* at 17.

In *An Giang II*, the court again determined that Commerce had still not explained, or even "squarely acknowledged," *An Giang II*, 41 CIT at __, 236 F. Supp. 3d at 1359, that it was using a constructed value rather than selecting a surrogate value for fish oil from the values available on the record. *Id.*, 41 CIT at __, 236 F. Supp. 3d at 1359–61. The court explained that, although the agency had determined that Indonesian import data for HTS 1504.20.9000 constitutes the best available information, "Commerce does not actually use the import data for fish oil [under HTS 1504.20.9000 as a surrogate value]," but instead "builds a constructed value for the fish oil using fish oil FOPs and calls this value a 'cap.'" *Id.*, 41 CIT at __, 236 F. Supp. 3d at 1359. The court determined that Commerce had, without explanation, deviated from its standard practice of choosing "the best existing surrogate value data source for fish oil from the alternative sources" on the record. *See id.*, 41 CIT at __, 236 F. Supp. 3d at 1358. The court remanded again for the agency to explain why constructing a value from fish oil FOPs, rather than using alternative available surrogate value data, constitutes the best available information, or reconsider its determination. *Id.*, 41 CIT at __, 236 F. Supp. 3d at 1360–61.

Commerce issued the *Second Remand Results* on September 22, 2017. On second remand, Commerce acknowledged that it constructed a value for the fish oil surrogate value rather than capping a surrogate value already on the record. *Second Remand Results* at 11 n.59 ("Based on the Court's ruling, we will no longer refer to the [surrogate value] used to value fish oil as a cap, but instead as a value the Department calculated to yield a more reasonable result."). Commerce explained that constructing a value based on Vinh Hoan's

FOPs provided a more accurate value than any of the other potential surrogate values on record in this review because it was based on "verified information submitted from Vinh Hoan's own books and records," which is specific, reliable, and meets the Department's other selection criteria, while the alternative surrogate values that had been placed on the record did not. *See id.* at 13–14. The agency emphasized that, in this case, building up a value complies with its statutory mandate to calculate the most accurate dumping margins possible based on the record. *Id.* at 11. For these reasons, Commerce explained, it found that the calculated fish oil surrogate value constitutes the best available information on the record of this review. *See id.* at 2–14. Vinh Hoan's margin calculation did not change on second remand. *Id.* at 2.

JURISDICTION AND STANDARD OF REVIEW

The court continues to have jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "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). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306).

DISCUSSION

On second remand, Commerce acknowledges that it constructed a value for Vinh Hoan's unrefined fish oil byproduct to be offset in this review. *See Second Remand Results* at 11–13. Plaintiff continues to challenge Commerce's use of that constructed value, and argues that it was unreasonable to set aside the Indonesian import data for HTS 1504.20.9000 because that data is not overbroad and its value is not unreasonably high. *See* Pl.'s Comments on the Final Results of Redetermination Pursuant to 2nd Remand at 5–27, Dec. 14, 2017, ECF No. 172 ("Pl.'s Second Remand Comments"). Defendant responds that constructing a value in this case using FOP data reported by Vinh

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

Hoan and verified by Commerce resulted in the most accurate surrogate value available on this record, so it was reasonable for Commerce not to use the Indonesian HTS 1504.20.9000 data. *See* Def.'s Resp. Pl.'s Comments on Second Remand Redetermination at 6–18, Feb. 23, 2018, ECF No. 185 ("Def.'s Second Remand Comments"). Defendant emphasizes that Commerce determined that the import data for the Indonesian HTS 1504.20.9000 category would not be a reasonable surrogate value because the import data is not specific to, and thus not representative of the value of, Vinh Hoan's unrefined fish oil. *See id.* at 5, 9–12, 19.

In non-market economy cases, Commerce obtains the normal value of the subject merchandise by adding the value of the FOPs used to produce the subject merchandise together with "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Commerce offsets that figure with the production costs of any byproducts generated during the production process that the respondent sold. Commerce values the byproduct offset and other FOPs using "the best available information regarding the values of such factors in a market economy country or countries. . . ." 19 U.S.C. § 1677b(c)(1). Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Final Decision Memo at 13; Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited May 21, 2018). Commerce's practice for selecting the best available information to value individual FOPs favors selecting a data source that satisfies the breadth of its selection criteria where possible. *See* Final Decision Memo at 13. Although Commerce has discretion to decide what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011), Commerce must ground its selection of the best available information in the overall purpose of the ADD statute, calculating accurate dumping margins. *See Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (2001); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) ("[T]here is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so."); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Here, Commerce deviates from its standard methodology of selecting an already-established value from sources placed on the record. Commerce explains that this decision is, however, not a deviation from its overall practice "to follow [its] statutory mandate to select [surrogate values] from the best available information," which Commerce emphasizes it has done here by constructing a value using the FOPs placed on the record by Vinh Hoan. *Second Remand Results* at 11. Commerce explains that, because there were no reasonable established surrogate values available, constructing a value using the respondent's own FOP data is preferable in this case as it will result in a more accurate value for the fish oil byproduct. *See id.* at 11–14. Commerce states:

> The record of this review contained additional information beyond the sources proffered by the interested parties concerning fish oil, specifically, all of the FOPs consumed by Vinh Hoan to produce fish oil. Because this additional information was on the record, we were able to evaluate whether this information could credibly be used to value fish oil. We reiterate that we have calculated [surrogate values] using record information in other cases where the record contains the requisite information to do so, and the record calculated [surrogate value] information represented the best available information.

Id. at 11. On this record, Commerce's decision is reasonable.

Commerce explains that a constructed value would achieve a more accurate surrogate value than the existing values from sources placed on the record. *Second Remand Results* at 13–14. There were six potential surrogate values placed on the record in this administrative review: five price quotes for fish oil from five different companies and the GTA import data for Indonesian HTS category 1504.20.9000. *Id.* at 3. Among the five price quotes, two were from Indonesian companies, two were from Indian companies, and one was from a Bangladeshi company. *Id.* On second remand, Commerce reexamined each of the values to determine whether any would satisfy the standard selection criteria and accordingly be a reasonable surrogate value. *See id.* at 4–11. Commerce concluded that none of the five price quotes satisfied more than two of the selection criteria, and that none were reliable values. *See id.* at 4–9.

Regarding the HTS data, Commerce determined that, while satisfying the other four criteria, the data was not specific to Vinh Hoan's unrefined fish oil because HTS category 1504.20.9000 covers both refined and unrefined fish oil, such that the value of the import data

is not representative of Vinh Hoan's fish oil. *Second Remand Results* at 9–10. Commerce determined that the data within HTS 1504.20.9000 is not "sufficiently similar to the fish oil by-product produced by Vinh Hoan," *id.* at 9, because that HTS category covers "unrefined fish oil that is packaged and containerized for international shipment, as well as high value refined fish oil containing Omega-3 fatty acids," in addition to unrefined, unpackaged fish oil such as Vinh Hoan's. *Id.* at 9–10. Commerce explained that this lack of specificity of the HTS import data is concerning and significant on these facts, where the import data value is high relative to the main input, whole, live fish. *Id.* at 10. Given the price disparity between the HTS data and the main input, Commerce determined that the HTS data is more representative of refined than unrefined fish oil.[2] *See id.* at 10–11, 16–17. Thus, Commerce concluded that the import data for HTS 1504.20.9000 is "overly broad and not specific to the low value, unrefined fish oil produced by Vinh Hoan[.]" *Id.* at 10.

The record supports Commerce's determination. Commerce explained that Vinh Hoan's "low value, unrefined fish oil" is "physically dissimilar to many of the products covered" by the heading, and that the value derived from the heading would exceed the value of the main input and of the subject merchandise. *Second Remand Results* at 9–10. Record evidence indicates that Vinh Hoan's byproduct is unrefined fish oil. *See id.* at 9 (citing Commerce Mem. re: Verification of the Sales and [FOP] Response of Vinh Hoan Corporation, PD 393,

[2] Commerce also emphasized that the surrogate value derived from the Indonesian HTS 1504.20.9000 data would exceed the value of the main input and of the subject merchandise, which would be an unreasonable result for this byproduct. *Second Remand Results* at 10–11. In response, Plaintiff argues that, in this case, it is not unreasonable for the HTS value to exceed the value of the main input (whole, live fish) because more fish are required to make one kilogram of fish oil than one kilogram of fish. *See* Pl.'s Second Remand Comments at 17–18. As an initial matter, Defendant contends that this argument was not exhausted before the agency. Def.'s Second Remand Comments at 17. Plaintiff responds that it has consistently argued in these proceedings that there is not a rational connection between the value of a live fish and the byproduct it is producing. *See* Oral Arg. at 00:13:51–00:18:25, Apr. 11, 2018, ECF No. 198. Nevertheless, Plaintiff's argument is unpersuasive. Plaintiff argues that "the fish oil value that will actually be used for purposes of deducting the by-product offset is not higher than the value of the main input," because the correct inquiry is not the value of the byproduct but "the value applicable to the amount of fish oil obtained from the FOPs used to obtain 1 kg of the subject merchandise, which will only be a fraction of $3.10/kg." Pl.'s Second Remand Comments at 18. Even accepting Plaintiff's argument as correct, the argument by itself does not undermine Commerce's justification for rejecting the HTS import data as unrepresentative and overbroad in light of the fact that Vinh Hoan's byproduct is low value, minimally processed, unpackaged, unrefined fish oil. Commerce did not determine that the value was inappropriate simply because its value was greater than the main input; instead, Commerce found the data inappropriate because of the high value in combination with the fact that the heading contained refined fish oil where Vinh Hoan's fish oil is unrefined. On these facts, Plaintiff has not demonstrated that Commerce's determination to use the constructed FOP value is unreasonable.

bar code 3110870–01 (Dec. 14, 2010), Consol. Court No. 13–00156).[3] Commerce concluded that, because Vinh Hoan's fish oil is unrefined and of lower value, the Indonesian HTS 1504.20.9000 data would constitute an unrepresentative surrogate value. *Id.* at 10–11, 13–14. It is reasonable for Commerce to determine that, on this record, the surrogate value that results from the use of data from HTS category 1504.20.9000 is not representative of the value of Vinh Hoan's by-product because many of the products covered by that category are not sufficiently similar to Vinh Hoan's unrefined fish oil. The agency therefore constructed a value using Vinh Hoan's own reported FOP data, which it considered would result in a more accurate value. *Id.* at 13–14. On this record, Commerce's determination is reasonable.

Commerce has explained why it deviated from its usual practice and constructed a value using Vinh Hoan's FOP data in this review, and the method used by the agency to construct a value in this case is reasonable. Commerce used the respondent's own reported FOP data to build up a price that reflects the value of that respondent's fish oil byproduct. *Second Remand Results* at 11–14. These FOPs were provided by the respondent and verified by the Department. *Id.* at 13.

Plaintiff contends that Vinh Hoan's unrefined fish oil is a "value-added product," such that a surrogate value (here, the HTS import data) that exceeds the value of the main input is not an unreasonable category with which to value the byproduct. Pl.'s Second Remand Comments at 18–23. Defendant contends that, despite this minimal further processing, it would be unreasonable for the value of the fish oil to exceed that of the main input. Def.'s Second Remand Comments at 16–17. Whether the product is value-added does not undermine Commerce's reasonable determination that the HTS value covering "unrefined fish oil that is packaged and containerized for international shipment, as well as high value refined fish oil containing Omega-3 fatty acids," in addition to unrefined, unpackaged fish oil such as Vinh Hoan's, is not specific to Vinh Hoan's fish oil. *Second Remand Results* at 9–10.

Finally, Plaintiff argues that Commerce's determination on second remand that Indonesian import data for HTS category 1504.20.9000 is not specific to Vinh Hoan's fish oil byproduct is not supported by the agency record because it is inconsistent with the agency's prior determinations in these proceedings that the HTS import data was specific. *See* Pl.'s Second Remand Comments at 4–5, 14–16. Commerce explained in the second remand that it in fact had expressed

[3] This document is filed on the administrative record of Vinh Hoan Corporation v. United States, Consol. Court No. 15–00156. *See* Admin. Record, June 19, 2013, ECF No. 27, Consol. Court No. 13–00156.

concern early on in the proceedings regarding the specificity of the HTS import data: "In the [final determination], while we found the Indonesia HTS to be contemporaneous, we also found it to be not sufficiently similar to the fish oil by-product produced by Vinh Hoan." *Second Remand Results* at 9; *see id.* at 16–17 (noting that, in the final determination, "the Department found that HTS 1504.20.90.00 is reflective of refined fish oil prices." (citing Final Decision Memo at 76–86)). While the second remand may have been the first time that the agency explicitly stated that the HTS import data was not specific to Vinh Hoan's unrefined fish oil, throughout these proceedings Commerce consistently expressed concern that the HTS data was overly broad, which was the reason that the agency decided to "cap" the import value at a value more representative of unrefined fish oil. *See* Final Decision Memo at 82–84. Indeed, in the final determination, Commerce stated that

> the Department finds that the value derived from the Indonesian GTA import data under HTS 1504.20.90.00 is unrepresentative of Vinh Hoan's "unrefined" fish oil because this value likely reflects "refined" fish oil prices.
>
> Nevertheless, the Department will continue to value fish oil using the Indonesian GTA import data under HTS 1504.20.9000 because it is the most specific of the available Indonesian HTS categories on the record and, by its terms, encompasses "unrefined" fish oil. Moreover, the GTA data is contemporaneous with the POR. And, as stated above, the Department previously found GTA data to be publicly available, free of taxes and duties, and representative of broad market averages. However, because of the concerns articulated [by Commerce with respect to representative value], the Department will "cap" the price of HTS 1504.20.9000 at the calculated CV of the FOPs and ratios used by Vinh Hoan to make fish oil, *i.e.*, fish waste, labor and energy, plus surrogate ratios, to ensure that it is a fully-loaded fish oil value.

Id. at 83 (citations omitted). This passage clearly reflects a concern about the specificity of the data, which formed the basis for Commerce's decision to calculate a value more representative of the value of the respondent's fish oil byproduct. Accordingly, Plaintiff's argument that Commerce's determination on second remand that the HTS import data is not specific is inconsistent with prior findings on the record is unpersuasive.

CONCLUSION

For the foregoing reasons, the *Second Remand Results* in Commerce's ninth antidumping duty administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam comply with the court's order in *An Giang II*, 41 CIT at __, 236 F. Supp. 3d at 1361, are supported by substantial evidence, and are in accordance with law. Therefore, the *Second Remand Results* are sustained. Judgment will enter accordingly.

Dated: May 24, 2018
New York, New York

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