U.S. Customs and Border Protection

Slip Op. 14–33

CS WIND VIETNAM CO., LTD. and CS WIND CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, WIND TOWER TRADE COALITION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 13–00102

[Motion for judgment on the agency record in antidumping investigation granted in part.]

Dated: March 27, 2014

Ned H. Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, argued for the plaintiffs. With him on the brief were *Bruce M. Mitchell*, *Andrew B. Schroth*, *Kavit Mohan*, and *Dharmendra N. Choudhary*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Attorney, Office of the Chief Counsel for Trade Compliance and Enforcement, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, Wiley Rein, LLP, of Washington, DC, argued for the defendant-intervenor. With him on the brief were *Alan H. Price*, *Daniel B. Pickard*, and *Usha* Neelakantan.

OPINION

Restani, Judge:

This action challenges the U.S. Department of Commerce's ("Commerce") final results rendered in the antidumping ("AD")[1] investigation of certain windtowers from Vietnam. *See Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Determination of Sales at Less than Fair Value*, 77 Fed. Reg. 75,984 (Dep't Commerce Dec. 26, 2012) ("*Final Determination*"); Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Utility Scale Wind Towers from the Socialist Republic of Vietnam, A-552–814, (Dec. 17, 2012), *available at* http://enforcement.trade.gov/frn/summary/vietnam/2012–30944–1.pdf (last

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

visited Mar. 20, 2014) ("*I&D Memo*"). Plaintiffs CS Wind Vietnam Co., Ltd. and CS Wind Corp. (collectively "CS Wind") seek remand of the *Final Determination*, contending Commerce erred in calculating its dumping margin based on the application of certain surrogate values and adjustments. Mem. of Law in Supp. of Pls.' Rule 56.2 Mot. for J. upon the Agency R., ECF No. 26 ("Pl. Br."). Defendant United States ("the government") and defendant-intervenor Wind Tower Trade Coalition ("WTTC") argue that the *Final Determination* is based on substantial evidence and in accordance with law. Def.'s Mem. in Opp'n to Pls.' Mot. for J. upon the Agency R., ECF No. 32 ("Def. Br."); Def.-Intvnr.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 34 ("WTTC Br."). For the reasons stated below, the court remands in part and sustains in part the *Final Determination*.

BACKGROUND

Following a petition by WTTC, Commerce initiated an AD investigation into certain wind towers from Vietnam. *See Utility Scale Wind Towers from the People's Republic of China and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 77 Fed. Reg. 3440 (Dep't Commerce Jan. 24, 2012). Because Vietnam is considered by Commerce to be a non-market economy ("NME"), much of the investigation focused on selecting surrogate values for valuing the various factors of production ("FOPs") used by CS Wind in manufacturing wind towers. *See* 19 U.S.C. § 1677b(c)(1). These surrogate values were then used to compute the normal value, representing the cost of production for CS Wind if it had operated in a hypothetical market economy. *See id.* Before the agency, the parties primarily disputed the proper surrogate value to use for steel plate, as it is the main input in the production process for wind towers. *See I&D Memo* at 2–15. Disputes also arose over carbon dioxide costs, weight discrepancies for the reported FOPs, market economy input purchases, and brokerage and handling ("B&H") expenses. *See id.* at 28–33, 37–42, 45–46, 48–51.

After verification at CS Wind's offices in Korea and production facility in Vietnam, Commerce calculated an average weighted dumping margin of 51.50 percent in its *Final Determination*. 77 Fed. Reg. at 75,988. As part of that determination, Commerce selected a different financial statement to calculate surrogate financial ratios and, in doing so, modified certain offsets to those ratios in a manner different from that advanced by the parties. *See I&D Memo* at 15–16, 26–27. Commerce also adjusted both normal value and the U.S. sales price to account for a discrepancy between CS Wind's reported material FOP weights and the "Packed Weight" of the wind towers, as reported on

packing lists. *Id.* at 28–33. CS Wind filed ministerial error allegations based on both of these changes, but Commerce rejected them, asserting that the adjustments were made based on intentional methodological choices. *CS Wind Request to Correct Clerical Errors*, bar code 3112173–01 (Dec. 26, 2012), ECF No. 27–12 (Aug. 8, 2013); *Ministerial Error Memo* at 2–3, bar code 3115888–01 (Jan. 18, 2013), ECF No. 28–9 (Aug. 9, 2013). CS Wind subsequently filed suit and moved for judgment on the agency record, asserting that Commerce acted contrary to law and without substantial evidence in determining CS Wind's dumping margins. *See* Pl. Br. 10–57.

CS Wind presents six arguments challenging Commerce's *Final Determination*: 1) Commerce lacked substantial evidence and acted contrary to law when it used Global Trade Atlas ("GTA") import data rather than Steel India data to value steel plate; 2) Commerce impermissibly valued carbon dioxide based on GTA import data; 3) Commerce improperly calculated surrogate financial ratios by failing to offset certain expenses with related income line items; 4) Commerce acted contrary to law and without substantial evidence in rejecting the market economy input prices paid for flanges, welding wire, and wire flux; 5) Commerce impermissibly adjusted normal value based on a weight discrepancy and then incorrectly adjusted the U.S. sales price; and 6) Commerce used an inflated document preparation fee in calculating B&H expenses. *See id.*

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. Valuation of Steel Plate

In NME AD cases, Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1)(B). Among other costs, the factors of production include "quantities of raw materials employed." *Id.* § 1677b(c)(3). In calculating normal value, "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *Id.* § 1677b(c)(1)(B). Furthermore, Commerce "shall 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).

"Nowhere does the statute speak directly to any methodology Commerce must employ to value the factors of production, indeed the very structure of the statute suggests Congress intended to vest discretion in Commerce by providing only a framework within which to work." *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 (1999); *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (recognizing that Commerce is entitled to deference in interpreting the undefined term "best available information"). Nonetheless, selection of the best available information must be in line with the overall purpose of the antidumping statute, which the Court of Appeals for the Federal Circuit has explained to be "determining current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) ("[T]here is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so."). In calculating normal value in the NME context, the particular aim of the statute is to determine the non-distorted cost of producing such goods. *See Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1081, 810 F. Supp. 314, 316–17 (1992).

In past investigations and reviews, Commerce has articulated the standard it uses in selecting from among competing surrogate values. *See I&D Memo* at 9 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the First Administrative Review*, 71 Fed. Reg. 14,170 (Dep't Commerce Mar. 21, 2006)). These criteria include "a strong preference for valuing all FOPs in the primary surrogate country, as well as a preference for prices which are period-wide, representative of a broad market average, specific to the input in question, net of taxes and import duties, contemporaneous with the period under consideration, and publicly available." *Id.* (footnotes omitted).

Because steel plate is the primary input in wind towers, the valuation of the plates is an important factor in determining normal value

and the resulting dumping margin. Before the agency, CS Wind proposed six different data sets[2] for valuing the steel plate, and pointed to at least ten other data sets[3] that purportedly corroborated these prices. Pl. Br. Ex. 1 (summarizing data sets). Commerce instead relied upon Indian import statistics obtained through GTA, utilizing India Harmonized Tariff Schedule ("HTS") line 7208.51.10, the tariff category for "flat rolled products of iron or non-alloy steel, of a width of 600 mm or more, hot-rolled, not clad, plated or coated, other, not in coils, not further worked than hot rolled: of a thickness exceeding 10 mm: plates."[4] *I&D Memo* at 7. Commerce based its decision to use the GTA data on the fact that the data were contemporaneous, from the primary surrogate country (India), from an HTS category that includes the relevant grades of steel plates (S355K2, S355J2, and S355NL), net of taxes and duties, and publicly available. *Id.* at 9. Commerce, however, recognized that the HTS category it chose also covered grades of steel plate other than S355, but it found the data proffered by CS Wind to be more problematic for a variety of reasons, including lack of specificity, lack of complete data, lack of broad market averages, and lack of economic comparability. *See id.* at 9–15.

In its motion for judgment on the agency record, CS Wind argues that at least some of these data points should have been considered as alternate bases for calculating a surrogate value, while others should have served as evidence that Commerce's chosen surrogate value is aberrational. Pl. Br. 10–27. After considering the record concerning each proposed data point, the court concludes that Commerce acted

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[2] CS Wind put on the record steel price data from Steel India, Steel Chamber, Steel Mint, JPC, MEPS (India), and Metal Expert India (domestic). *See CS Wind First SV Submission*, Exs. 3B, 3C, 3D, 3F, PD 3 at bar code 3075091–03–07 (May 10, 2012), ECF No. 28–2 (Aug. 9, 2013); *CS Wind Pre-Preliminary Comments*, Ex. 3, CD 4 at bar code 3084019–05 (June 29, 2012), ECF No. 27–3 (Aug. 8, 2013); *CS Wind Post-Preliminary SV Submission*, Ex. 1D, PD 6 at bar code 3096954–01 (Sept. 14, 2012), ECF No. 28–4 (August 8, 2013). These data valued the relevant steel plate between $0.68/kg and $0.89/kg during the period of investigation ("POI"). *See* Pl. Br. Ex. 1; *I&D Memo* at 10. Commerce's surrogate value based on the GTA data was $1.20/kg. *See I&D* Memo at 10.

[3] These data sets included Metal Expert India (import), Infodrive India, MEPS (non-India), SBB, Metal Expert Ukraine/Russia, GTA Ukraine (import), Steel Orbis Ukraine (export), GTA India (export), and Steel Prices Europe. *See CS Wind First SV Submission*, Exs. 3A, 3B, 3E, 3F; *CS Wind Post-Preliminary SV Submission*, Exs. 1E, 1F, 1H, 1I, 1J, 1K; *WTTC Resubmission of Post-Preliminary Rebuttal SV Information*, Ex 5 at bar code 3099084–04 (Sept. 28, 2012), ECF No. 28–9 (Aug. 9, 2013).

[4] WTTC also disputed Commerce's decision to utilize HTS 7208.51.10, but not the use of GTA data generally. *See I&D Memo* at 2–4. Commerce rejected WTTC's arguments that this was the improper tariff heading, *id.* at 7, and WTTC did not file suit challenging that determination by Commerce. Accordingly, the court will not examine the reasonableness of that aspect of the surrogate value determination. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

unreasonably in dismissing many of the proposed data points, at least for the reasons asserted by Commerce. Each of these data sources is discussed below based on the reasons for their rejection before turning to the question of whether Commerce's selection of the GTA data as the best available information was supported by substantial evidence. In analyzing the various sources, the court takes into account Commerce's reasoning for accepting and selecting the GTA data as the best available information, including ensuring consistency of the agency's position from case to case.

A. *Proposed Data Sources*

1. Steel India

Commerce rejected the Steel India data because they did not include the identical grades of steel actually used by CS Wind, dismissing arguments that Commerce should consider data for equivalent or comparable grades of steel plate. *I&D Memo* at 10–11. CS Wind claims that the domestic prices from Steel India encompass exclusively grade IS 2062 steel, which is an equivalent grade of steel also used to produce wind towers.[5] Pl. Br. 21; *CS Wind Pre Preliminary Comments*, Ex. 3; *CS Wind Post-Preliminary SV Submission*, Ex. 3E at 2; *CS Wind Case Brief* at 12 n.6, bar code 3099703–01 (Oct. 3, 2012), ECF No. 27–11 (Aug. 8, 2013). As discussed further below in comparing the GTA and Steel India data, the prices of equivalent products are at least relevant to calculating a surrogate value for an input, especially when no data source provides prices exclusively, or even largely, for the precise input used to manufacture the subject goods. Based on the record before the court, Commerce acted unreasonably in declining to consider the Steel India prices. Therefore, the court remands to Commerce for reconsideration of the Steel India data in calculating a surrogate value for steel plate.

[5] Outside of WTTC's rejected claim that S355 steel is high-strength low-alloy steel, no party appears to have challenged before the agency the record evidence submitted by CS Wind purportedly showing that S355 steel is equivalent to other steel used in wind towers, such as IS 2062 steel. *See I&D Memo* at 8–9; *see, e.g.*, *CS Wind Post-Preliminary SV Submission*, Ex. 3E at 2 (identifying A36 and IS 2062 as wind tower steel). One chart placed on the record by WTTC shows IS 2062 steel labeled as structural steel plate while S355 is labeled as high tensile plate. *See WTTC Pre-Preliminary Comments on Steel Plate*, Ex 1, PR 252–54 (July 9, 2012), ECF No. 36–1 (Nov. 27, 2013). In another document submitted by WTTC, however, S355 is described as structural steel, as IS 2062 is. *See WTTC Response to CS Wind's SV Comments*, Ex. 1, PR 148 (May 23, 2012), ECF No. 36–1 (Nov. 27, 2013).

2. JPC

Commerce rejected the JPC data because they were not representative of the entire POI due to a missing month of data. *I&D Memo* at 11. CS Wind challenges Commerce's rejection of the JPC data, claiming that the five months of accurate data covered substantially all of the six-month POI. Pl. Br. 20–21. The court has held previously that data with minor defects cannot be summarily rejected by Commerce, particularly where the data is submitted for the purpose of showing that Commerce's selected data is aberrational. *See Xinjiamei Furniture (Zhangzhou) Co. v. United States*, Slip Op. 13–30, 2013 Ct. Int'l Trade LEXIS 34, at *23 (CIT Mar. 11, 2013) (remanding for Commerce to consider data set for corroboration purposes even though the data covered only ten of the twelve months of the period of review). Accordingly, although Commerce may have some legitimate basis for rejecting the JPC data as a primary source for surrogate values, it was unreasonable for Commerce to reject the data entirely in considering whether the GTA data is aberrational. Therefore, the court remands to Commerce for reconsideration of the JPC data at least for corroboration purposes, if not more.

3. Steel Mint

Steel Mint data were rejected because they were based on prices from a single day during the POI. *I&D Memo* at 11–12. CS Wind simply asserts that the Steel India, Steel Mint, MEPS, and Metal Expert India data all corroborate the JPC data and each other. Pl. Br. 21. CS Wind, however, fails to contest directly the deficiency that Commerce found with the Steel Mint data. Because Commerce must reconsider its chosen surrogate value, it may consider these data, or not, on remand.

4. MEPS India

Commerce refused to use the MEPS India data because the reported prices for several months were the same, despite other evidence that prices fluctuated during the POI, and because the data were not representative of a broad market average. *I&D Memo* at 12. As with the Steel Mint data, CS Wind makes no substantive arguments to the contrary. Because Commerce must reconsider its chosen surrogate value, it may consider these data, or not, on remand.

5. Steel Chamber

Commerce dismissed the Steel Chamber Weekly prices because they were not representative of a broad market average. *Id.* at 11. CS Wind challenges the rejection of the Steel Chamber data but does not dispute that the data were not representative of a broad market average. *See* Pl. Br. 21. Instead, CS Wind criticizes Commerce's reliance on this criteria because Commerce's finding that prices varied across markets was supported by data (JPC and Steel India) that Commerce already had rejected for other reasons. *See id.* Because the court has found the complete rejection of the Steel India and JPC data to be unreasonable, at least for the reasons given by Commerce, how these data will be treated on remand may affect the use of the Steel Chamber data, and therefore reconsideration of these data is warranted on remand.

6. MEPS Non-India

Commerce criticized the MEPS data for non-Indian markets because those countries were not identified as economically comparable to Vietnam and because the range of thicknesses did not encompass all of the steel plates used by CS Wind. *I&D Memo* at 12.

CS Wind's challenge to the exclusion of the MEPS non-India data as benchmarks has merit. The court recently held that "while the [proposed benchmark] prices might not satisfy the requirements for surrogate values, they are sufficient to call into question the reliability of the GTA data," even when from non-economically comparable countries. *Xinjiamei*, 2013 Ct. Int'l Trade LEXIS 34, at *21–22. The GTA import data used by Commerce are based largely on imports from European countries, including some of the countries covered by the MEPS data, *see Surrogate Values for the Preliminary Determination*, Ex. 2 at bar code 3089133–02 (July 26, 2012), ECF No. 28–3 (Aug. 9, 2013), and therefore, these benchmarks are relevant in determining whether the international market prices reflected in the MEPS data for the grade of steel plate at issue, or its equivalent, render the GTA import data price aberrational.

Similarly, Commerce's rejection of the MEPS data based on thickness appears inconsistent with its selection of the GTA data. The MEPS data cover the vast majority of the thicknesses of steel plate used by CS Wind, with the remainder falling outside the range by one millimeter. *See CS Wind Verification Exhibit 18I* at 2, bar code 3094071–01–07 (Sept. 21, 2012), ECF No. 27–13 (Aug. 8, 2013); *CS Wind First SV Submission*, Ex. 3F. In choosing to rely on the GTA data, which include a wide range of plates both significantly thicker

and thinner than the plate used by CS Wind, Commerce implicitly accepted WTTC's argument that thickness is not a determinative factor in calculating the price per kilogram of steel plate. *See* HTS 7208.51.10 (covering steel plate with a thickness greater than 10 mm); *WTTC Rebuttal Brief* at 22–26, bar code 3100546–01 (Oct. 9, 2012), ECF No. 27–11 (Aug. 8, 2013). After reaching such a conclusion for the GTA data, Commerce may not reasonably reject the MEPS data on this basis without further explanation. Accordingly, the MEPS non-India data is remanded to Commerce for reconsideration.

7. Metal Expert India

Metal Expert India data were not used because Commerce could not determine if the prices reflected broad market averages and because the import data included imports from an NME. *I&D Memo* at 12–13. CS Wind asserts that the Steel India, Steel Mint, MEPS, Metal Expert India, and JPC data all corroborate each other but fails to contest directly any of the deficiencies that Commerce found with the Metal Expert India data. *See* Pl. Br. 21. Given the overall deficiencies in Commerce's rejection of data sets, Commerce may reconsider this evidence, or not, on remand.

8. Metal Expert non-India

Metal Expert data for other countries were rejected because those countries were not economically comparable. *I&D Memo* at 13. The court remands this determination for the same reason given for the MEPS non-India data.

9. SBB

SBB pricing was rejected because it provided prices on a quarterly basis only and could include NME or subsidized prices. *Id.* Additionally, the SBB data regarding Turkey were not for an economically comparable country, not based on broad market averages, and did not show how prices were determined. *Id.* Although Commerce's rejection of the data for lack of economic comparability was erroneous, for the same reasons as the rejection of the MEPS non-India data, CS Wind has not challenged the other reasons for which the SBB data set was excluded, including the lack of frequent price reporting and the possible taint of NME/subsidized imports. Therefore, the determination with respect to the SBB data is remanded to Commerce to reconsider whether the data should continue to be rejected based on these unchallenged deficiencies, or whether it should be used for some purpose in this inquiry.

10. Steel Orbis Ukraine Export

The Steel Orbis Ukraine Export data were rejected because they were not from an economically comparable country, might have included value added tax, and may have used different tariff headings. *Id.* at 14. As with the MEPS non-India data, CS Wind's challenge based on economic comparability has merit. CS Wind, however, has not responded to Commerce's concerns regarding the latter two reasons for rejection. Commerce should reconsider on remand whether rejection of the data is still warranted based on these alternate grounds or whether the data should be used for some purpose in this inquiry.

11. GTA India Export

GTA India Export data were not used because of prior findings that Indian export prices were affected by export subsidies. *Id.* CS Wind has not argued that this determination was unsupported or contrary to law. Whether Commerce has some use on remand for these data is for Commerce to decide.

12. Steel Price Europe ("Steel Guru")

Steel Price Europe data were not used because the steel plate thickness range was not broad enough to cover all of the plate used by CS Wind and because some of the prices did not cover the exact grade of steel plate used by CS Wind. *Id.* at 15. Finally, Steel Price Europe data for Belgium were disregarded because it was unclear how the data were gathered. *Id.*

At least some of CS Wind's challenges to this determination have merit. As the court discussed in the context of the MEPS non-India data, in selecting the GTA data, Commerce made a decision that thickness was not a decisive factor in valuing steel plate, impliedly accepting WTTC's argument that steel of a particular grade is valued at the same per kilogram price across thicknesses. Similarly, as discussed in the context of the Steel India data, rejection based on a difference in grade is inappropriate if CS Wind's submissions demonstrate that the goods are equivalent.

CS Wind cites to Exhibit 1A of the *CS Wind Post-Preliminary SV Submission* to support its claim that Commerce also acted unreasonably in concluding that the record did not provide evidence that the Steel Guru Belgium data were based on broad market averages. Pl. Br. 25. This document, however, explains only that Steel Guru *India* prices are collected from ten different markets to ensure the prices reflect broad market averages. *See CS Wind Post-Preliminary SV Submission*, Ex. 1A. CS Wind, however, has not pointed to evidence

explaining whether this practice is carried over to price research in other markets or, more specifically, what Steel Guru's practices are with respect to Belgian steel prices. In reviewing the record as a whole, the court has been unable to locate such evidence. Instead, the relevant letter from Steel Guru simply explains that the publicly available prices are for S235 and S355 grade non-alloy steel plate during the POI, exclusive of duties and taxes. *Id.* at Ex. 1J. The attached chart references a single port, Antwerp. *See id.* That said, it is unclear to the court whether this would matter in the context of a fairly small country like Belgium with limited ports. Accordingly, for the various reasons described above, Commerce should reconsider this determination as well on remand.

13. Infodrive India

CS Wind also challenges Commerce's apparently inconsistent use of Infodrive India data in its *Final Determination*. Pl. Br. 18–19, 23–24. Commerce relied on this data set, submitted by WTTC, for several purposes, including to show the GTA data contained actual imports of S355 grade steel plate and to demonstrate that prices of steel varied over time during the POI. *See I&D Memo* at 10–11. Commerce, however, rejected the use of the same data when used by CS Wind to show that most imports of S355 grade plate in the GTA data cost the same as the plates covered by CS Wind's proffered data sets, that S355 makes up a very small portion of the total imports of steel plate falling within the chosen basket tariff classification, and that other imports in the basket included grades of steel plate not used in wind tower production. *See id.* at 6. The court has held previously that corroboration data, including Infodrive data in particular, need not meet the same standards as data offered to calculate surrogate values in order to be relevant for Commerce to consider. *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1698, 462 F. Supp. 2d 1262, 1286 (2006) ("Regardless of whether or not Commerce finds it appropriate to use the Infodrive India data to value mirrors, the Infodrive India data can prove to be illuminating as to the nature of the product actually being valued within a specific (and in this case basket) HTS subheading."); *see also Calgon Carbon Corp. v. United States*, Slip Op. 11–21, 2011 Ct. Int'l Trade LEXIS 21, at *27–28 (CIT Feb. 17, 2011) ("Commerce must consider InfoDrive if it covers a definite and substantial percentage of overall imports. . . . Where InfoDrive data is placed on the record to impeach as opposed to corroborate Commerce's determination, a lower threshold may exist."). *But see Dorbest Ltd. v. United States*, 32 CIT 185 198–99, 547 F. Supp. 2d 1321, 1333 (2008) (ac-

cepting Commerce's complete rejection of Infodrive data based on substantially incomplete reporting of imports and inconsistent units of measure).

Here, Commerce's exclusion of the Infodrive data raises more basic questions than those addressed in *Calgon Carbon* and *Dorbest* because Commerce chose to rely on the data for some purposes but not others, without providing any rationale for why the data was reliable for only the selected purposes. Thus far, Commerce's explanation for this inconsistency in its use of the Infodrive data is inadequate, and unless it has a heretofore unstated rational explanation, it must consider the data to the extent they both support and detract from Commerce's chosen surrogate value. As the court must in evaluating the record evidence, Commerce also "must consider the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence." *Nucor Corp. v. United States*, 32 CIT 1380, 594 F. Supp. 2d 1320, 1332 (2008) (internal quotation marks omitted), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010). Accordingly, Commerce may not rely on Infodrive data when they support Commerce's determination but then reject the data when they detract from that conclusion, at least without a substantial reason.

With respect to all of the alternative data sources, the court will not decide at this point which Commerce should accept or reject and for which purposes. Commerce's determination at a minimum gives the appearance that it has pre-determined that the GTA data must be used and any data contradicting it must be rejected, for good reason or bad. Of course, this is not acceptable. If Commerce has good reasons for rejecting a data set for some purpose, it must say so clearly on the record.

B. *Best Available Information*

Having found that Commerce impermissibly disregarded many of the data sets proffered by CS Wind for either valuation or corroboration purposes, at least based on the reasons provided in the *I&D Memo*, the court turns now specifically to how this error infected Commerce's selection of the best available information for valuing steel plate. CS Wind attacks the GTA import data as not sufficiently product specific because 96 percent of the import data under the basket tariff heading cover steel not of the relevant grade (S355). Pl. Br. 22. CS Wind claims that the domestic prices from Steel India, by comparison, encompass exclusively an equivalent grade of steel plate that is also used to produce wind towers. *Id.* at 21; *CS Wind Case*

Brief at 12 n.6; *WTTC Pre-Preliminary Comments on Steel Plate*, Ex. 1. By contrast, CS Wind contends that there is no evidence that the non-S355 steel included in the GTA import data is equivalent to S355, as the basket covers all grades of non-alloy hot-rolled steel greater than a certain thickness. *See* HTS 7208.51.10; Pl. Br. 22. Furthermore, CS Wind argues that the Steel India data are more specific than the GTA data because they separately report prices for a variety of plate thicknesses corresponding to the thicknesses actually used by CS Wind in producing the subject wind towers. Pl. Br. 22. Commerce summarily rejected the notion that it should even consider comparable or equivalent grades of steel in setting a surrogate value for the steel plate used by CS Wind. *See I&D Memo* at 10–11.

Although in the abstract Commerce's preference for prices of identical merchandise over comparable/equivalent merchandise would be reasonable, in this case its choice purportedly based on that preference is not. Here, Commerce has selected the GTA data as the best available information, despite at least some evidence that 96 percent of the steel falling within the selected basket tariff heading is not of the same grade as the steel used by CS Wind. *See WTTC Resubmission of Post-Preliminary Rebuttal SV Information*, Ex 5; *CS Wind Case Brief* at 22. It is unclear what portion of this 96 percent could be considered equivalent or comparable because Commerce never made such a finding on the record. Commerce also never addressed the question of how accurate the 96 percent figure even is, based on the completeness of the Infodrive data, assuming instead that the data accurately demonstrated some imports (approximately 4 percent) were S355 steel while discounting without explanation evidence demonstrating the converse proposition. As a result, the court is left to review Commerce's choice between 1) a set of prices 96 percent of which purportedly correspond to steel that is similar to but not necessarily comparable to the steel plate at issue and 2) a set of prices based on the specific thickness of steel and a purportedly equivalent grade of steel. This choice is also in the context of other data sets that Commerce must reconsider on remand, which, if accepted, closely corroborate the Steel India data but differ significantly from the GTA data. Commerce's choice here in selecting the GTA data is akin to valuing a red onion not based on the prices of yellow or white onions but based on the prices of a basket of all root vegetables, simply because one red onion is in the bushel. Assuming equivalence of steel grades for the Steel India data, which Commerce did not address, it is perplexing how any reasonable mind could consider the first data set the best available information on the record, even when giving priority to the grade of steel over the thickness of steel.

In view of the above analysis, the court must remand to Commerce to choose an appropriate surrogate steel value or explain its reliance on the GTA data as the "best available information" for valuing the steel plate used by CS Wind in producing wind towers. The explanation that there is a small amount of identical merchandise in the GTA category it chose is not substantial evidence to support Commerce's current choice.

II. Valuation of Carbon Dioxide

In addition to challenging the surrogate value assigned to steel plate, CS Wind argues that Commerce erred in its valuation of CS Wind's carbon dioxide ("CO2") gas input. Pl. Br. 53–56. Commerce again relied upon GTA Indian import data, using the tariff heading for "carbon dioxide: other," HTS 2811.21.90. *I&D Memo* at 45–46. Commerce rejected CS Wind's suggestion that it instead utilize the prices contained in the financial statements for SICGIL Indian Ltd. ("SICGIL"), an Indian producer of CO2 gas. *See id.* Commerce found that although the SICGIL data are "reflective of the primary surrogate country, specific to the input in question, and net of taxes and import duties, [Commerce was] not able to determine . . . whether or not the SICGIL price data is representative of a broad market average." *Id.* at 46. Commerce further faulted the data for not being contemporaneous with the POI, as they were based on the April 1, 2010–March 31, 2011 financial statement. *Id.* at 45–46. Although recognizing that the GTA data were less specific, as they included all forms of CO2 besides dry ice, Commerce found the GTA data met all of the other criteria it considers in evaluating potential surrogate values. *Id.* at 46.

In its motion, CS Wind claims that Commerce's decision is not supported by substantial evidence because SICGIL's data are representative of a broad market average and that Commerce's preference for contemporaneity and broadness over specificity was contrary to Commerce's practice and relevant law. Pl. Br. 53–56. The government responds that Commerce acted reasonably and in accordance with law because the GTA data satisfied all of Commerce's surrogate value criteria while the SICGIL data were deficient. Def. Br. 22–25. WTTC similarly claims that Commerce's selection of the less-specific GTA data was reasonable because of the noted deficiencies in the SICGIL data. WTTC Br. 51–53.

In reviewing the pages of SICGIL's financial statement cited by CS Wind, it is clear that SICGIL is a sizeable producer of CO2, producing 31,381 metric tons of CO2 during the reported year. *See CS Wind Post-Preliminary SV Submission*, Ex. 6E at 24. As noted by CS Wind

at oral argument, this quantity is more than twice[6] the annual quantity of all CO2 imports in the relevant tariff category, according to the GTA data relied upon by Commerce. *See Surrogate Values for the Preliminary Determination*, Ex. 4–2. Although volume alone may not be enough to demonstrate that the prices represented broad market averages, it does not appear that Commerce considered and addressed this argument in the *I&D Memo*. On the other hand, Commerce correctly found that the data is not contemporaneous with the POI. Because, however, Commerce based its rejection of the SICGIL data on both broadness and contemporaneity concerns, and because Commerce failed to address evidence significantly detracting from its finding with respect to one of these criteria, the court remands to Commerce for it to consider CS Wind's argument regarding the relative size of SICGIL within the Indian CO2 market and to reweigh the evidence underlying its choice.

III. Allocation of Civil/Erection Income and Expenses

CS Wind contends that Commerce erred in rejecting its ministerial error allegation regarding the allocation to overhead of certain income and expenses in Ganges Internationale's ("Ganges") financial statement. Pl. Br. 27–31. In its *Final Determination*, Commerce accepted CS Wind's proposal to use Ganges's financial statement in calculating surrogate financial ratios, including overhead expenses, selling and general expenses, and profit. *See I&D Memo* at 15–16; *see also* 19 U.S.C. § 1677b(c)(1), (3), (4). In doing so, Commerce also accepted WTTC's argument that it should treat the line item for jobwork charges in the financial statement as part of overhead because direct labor and energy expenses were reported as separate line items already. *I&D Memo* at 26. Without explanation, however, Commerce did not accept WTTC's concession that the erection income and civil income line items in the same financial statement also should be included as offsets to overhead. *See id.*; *Final SV Memo* at 4–5, bar code 3111181–01 (Dec. 17, 2012), ECF No. 28–9 (Aug. 9, 2013).

Commerce then rejected CS Wind's ministerial error allegation concerning this calculation, asserting that the allocation was an in-

[6] Because Commerce excluded imports from South Korea and other countries, the actual volume of imports upon which the GTA data is based was reduced from 6,752 metric tons to only 3,389 metric tons, a tenth of the SICGIL data. *See Surrogate Values for the Preliminary Determination*, Ex. 4–2.

tentional methodological choice[7] because Commerce "normally includes only miscellaneous income items as an offset to the surrogate financial ratios." *Ministerial Error Memo* at 2–3 (citing *Lightweight Thermal Paper from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 73 Fed. Reg. 57,329 (Dep't Commerce Oct. 2, 2008)). Commerce determined that the erection and civil income line items did not meet this criteria and excluded them from the financial ratios. *Id.* at 3. CS Wind asserts that this explanation is unreasonable in view of the description of jobwork charges in the financial statement as "including Erection and Civil Expenses." *CS Wind Request to Correct Clerical Errors*, Ex. 1 at 5. Once Commerce made the determination that jobwork (including erection and civil expenses) was a miscellaneous expense, CS Wind contends Commerce then was required to consider the related income lines as miscellaneous income to be used as an offset. Pl. Br. 27–31. The government argues that Commerce did not err in rejecting the ministerial error allegation because Commerce "cannot go behind financial statements in determining the appropriateness of including an item in the financial ratio calculations," and accordingly, Commerce could not determine here whether erection and civil income were related directly to "jobwork charges." Def. Br. 36 (citing Issues and Decision Memorandum for the 2008–2009 Administrative Review of Chlorinated Isocyanurates from the People's Republic of China, A-570–898, at cmt. 5 (Nov. 10, 2010), *available at* http://enforcement.trade.gov/frn/summary/prc/2010–29020–1.pdf (last visited Mar. 20, 2014)). WTTC argues that "CS Wind assumes incorrectly that similarly titled expenses and income are automatically related."[8] WTTC Br. 33 (contending that there is no record evidence directly linking the income and expense lines in question).

CS Wind does not challenge Commerce's practice of including only miscellaneous income lines in overhead, but it contends that Commerce failed to follow its acknowledged practice of offsetting expense line items associated with the general operations of the company with

[7] Although this issue was presented to Commerce in the form of a ministerial error allegation, *see* 19 C.F.R. § 351.224 (2012), none of the parties have briefed it in this manner before the court. Because Commerce applied this intentional methodological choice for the first time in the *Final Determination*, without notice, CS Wind is permitted to challenge Commerce's determination directly in the first instance here. *See Lifestyle Enter. v. United States*, 768 F. Supp. 2d 1286, 1313 n.39 (CIT 2011).

[8] Interestingly, this argument is contrary to the argument that WTTC made in its last brief before the *Final Determination* in which it advocated for both the jobwork expenses and the civil and erection income lines to be included in the overhead calculation, acknowledging that they were linked. *See WTTC Rebuttal Brief* at 61.

related income lines. Pl. Br. 28–29 & n.7 (citing *Chlorinated Isocyanurates from the People's Republic of China: Final Results of 2008–2009 Antidumping Duty Administrative Review*, 75 Fed. Reg. 70,212, cmt. 5 (Dep't Commerce Nov. 17, 2010); *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 73 Fed. Reg. 55,039, cmt. 3 (Dep't Commerce Sept. 24, 2008); *Notice of Final Determination of Sales at Less than Fair Value and Negative* Final Determination of Critical Circumstances: Certain Color Television *Receivers from the People's Republic of China*, 69 Fed. Reg. 20,594, cmt. 18 (Dep't Commerce Apr. 16, 2004)). The only question then is whether Commerce reasonably could determine that "Erection income" and "Civil income" were unrelated to the "Jobwork Charges (including Erection and Civil Expenses)" described in a single financial statement. *CS Wind Request to Correct Clerical Errors*, Ex. 1 at 1, 5. Because Commerce does not look beyond the face of the financial statement to interpret these line items, its decision that the identical terms were not related, despite the seemingly contrary text of the financial statement, is unsupported by substantial evidence.[9] As a result, the jobwork charges and the associated income lines must be treated similarly under Commerce's practice, either including both as overhead or excluding both from the calculation, unless Commerce explains why different treatment is warranted. Accordingly, this issue is remanded to Commerce for reconsideration and/or further explanation.

IV. Weight Discrepancy and Adjustment

CS Wind also asserts that Commerce's decision to account for the discrepancy between the Packed Weight of its merchandise and the weight it reported for the material FOPs was unsupported by substantial evidence and contrary to law. *See* Pl. Br. 40–46. Although the court finds that Commerce's adjustment to normal value based on the weight discrepancy was supported by substantial evidence, the resulting adjustment to the U.S. sales price was not.

[9] WTTC notes in its brief that the combined erection income and civil income line items are less than the total for jobwork charges, supporting its new argument that the items are unrelated. *See* WTTC Br. 33. Commerce did not mention this as a reason for its determination, and therefore, the court will not consider this alternate justification at this juncture, although the agency may wish to explore it on remand, along with CS Wind's explanation for the difference.

A. *Weight Discrepancy*

Early on in its investigation, Commerce noticed that the total net weight of all of the FOPs CS Wind had reported was significantly less than the total Packed Weight CS Wind had reported for its wind towers. *See Surrogate Values for the Preliminary Determination* at 6; *Preliminary Analysis Memo* at 8, CR 213 at bar code 3089102–01 (July 26, 2012), ECF No. 42–9 (Dec. 11, 2013). As a result, Commerce requested that CS Wind reconcile the difference in weights on multiple occasions. *See, e.g.*, *May Supplemental Questionnaire* at 15, PR 128 at bar code 3075213–01 (May 9, 2012), ECF No. 43–1 (Dec. 11, 2013).

CS Wind responded that the difference in the two weights occurred because the Packed Weight was based on theoretical weights of all the inputs plus the weights of packing/transportation equipment. *See CS Wind July 18, 2012 Submission* at 2–3, CR 206–08 at bar code 3087123–01 (July 18, 2012), ECF No. 42–9 (Dec. 11, 2013). CS Wind claimed that the FOP weights were drawn from the actual weights of the inputs with no additional packing/transportation equipment weight added. *Id.* at 3. The Packed Weight, CS Wind alleged, was calculated solely for purposes of determining the center of gravity of the tower portions in order to stack the towers on the ship in such a way that they would not roll in transit. *I&D Memo* at 28. Thus, these weights were much less accurate than the FOP weights. *CS Wind July 18, 2012 Submission* at 3.

During verification, Commerce was "not able to observe the actual receipt and withdrawal of raw materials, the entry of raw materials into the production processes, the packing process, or receipt and subsequent release of finished goods from inventory." *Verification Report* at 14, bar code 3097980–01 (Sept. 21, 2012), ECF No. 27–11 (Aug. 8, 2013). As a result, Commerce could not confirm whether the weights of the reported FOPs were accurate by weighing the individual inputs used in the towers or weighing the final product. Commerce also could not determine whether the reported consumption quantities of any FOPs matched the FOPs actually incorporated in the final product. Instead, Commerce continued to rely at that point on the weights and consumption quantities reported by CS Wind, which were either derived or theoretical values taken from documentation provided by suppliers or customers (test certificates, packing lists, bills of material, specifications, etc.). *See, e.g.*, *id.* at 17, 34, 38–40. At verification, Commerce also confirmed that the Packed Weight was based on center-of-gravity calculations created to ensure the wind towers did not roll over in transit. *See id*. at 47.

Commerce, thus, was faced with an unclear record as to what was the correct weight of a finished tower — one based on the FOP weight or one based on the Packed Weight. In its *Final Determination*, Commerce decided that it was "unreasonable to assume that the weight of the wind tower section recorded in the packing lists is so grossly overestimated as to chance the misplacement of the wind tower section on a shipping vessel and risk an imbalance of the vessel or rolling of the tower section in transit." *See I&D Memo* at 31. Commerce adopted the Packed Weight as the correct measure based on its link to real world choices. *See id.* at 32. The discrepancy in the weights, however, meant CS Wind had either underreported its consumption of FOPs or had not reported certain factors. In particular, as the weights for the flanges, door frames, and steel plates corresponded between the Packed Weight and FOP weights, Commerce determined that the consumption of the internal components was underreported. *See id.* at 33. To compensate for this, Commerce applied the weighted-average surrogate value of all internal components to the difference between the weights and included the resulting adjustment in its calculation of normal value. *Id.* at 33.

Generally, when "faced with a choice between two imperfect options, it is within Commerce's discretion to determine which choice represents the best available information." *Dorbest Ltd. v. United States*, 30 CIT 1671, 1687, 462 F. Supp. 2d 1262, 1277 (2006). In this case, Commerce reasonably could have accepted the FOP weight or the Packed Weight as the actual weight of the towers. Because there was a gap in the record, Commerce permissibly looked to "facts otherwise available" to account for the discrepancy by accepting the Packed Weight as the actual weight and then increasing the normal value based on the weighted-average surrogate value for internal components, as that was where the weight discrepancy arose. *See* 19 U.S.C. § 1677e(a); *I&D Memo* at 32–33. The "facts otherwise available" to Commerce demonstrated that although the Packed Weight might not be an exact measure of the actual weight, based on its actual use, the Packed Weight was likely at least as accurate as the FOP weight, which also was based on theoretical or derived weights drawn from information provided by CS Wind's customers or suppliers.[10] *See, e.g.*, *Verification Report* at 47–48.

[10] To some extent, CS Wind's arguments about whether the FOP weights associated with internal components were "actual" weights and whether such weights were verified by Commerce are red herrings. Commerce's determination was not based on a finding that the per unit weight of any of the FOPs was incorrect or falsified. Instead, Commerce based its adjustment to normal value on its finding that the consumption of internal components was underreported, resulting in a discrepancy in the reported weight of the finished product, which could not be tested during verification.

Additionally, Commerce requested that CS Wind explain the weight discrepancy on numerous occasions, requests which were met with responses that the Packed Weight was merely a theoretical value calculated by CS Wind's customer. *See CS Wind July 18, 2012 Submission* at 3. CS Wind responded in this manner despite the importance that CS Wind places on the Packed Weight's accuracy in the normal course of business along with the fact that the Packed Weight was traced back to a packing list prepared by CS Wind. *See Verification Report* at 47. Thus, in choosing the Packed Weight and deciding to adjust for differences between the data choices, Commerce acted reasonably in filling the gap in the record by using the facts available to it.

B. *Amount of Adjustment to U.S. Sales Price*

Although Commerce permissibly made an upward adjustment to normal value based on the weight discrepancy, its resulting upward adjustment to the U.S. sales price was erroneous.

CS Wind incorporated into its wind towers certain free-of-charge internal components provided by its customers. *See I&D Memo* at 53. Because these inputs were a factor in the production of the towers, Commerce valued the parts just as it did with any other material FOP. *Id.* As CS Wind did not actually pay for these parts, it of course did not charge the customers that supplied the components to CS Wind. Therefore, the value of the free-of-charge components was not reflected in the U.S. sales price. In order to offset the increase in the normal value caused by adding in the value of the free-of-charge components, Commerce adjusted the U.S. sales price upwards by the same amount it had added for these components to the normal value. *Id.*

As explained above, in its *Final Determination*, Commerce further adjusted normal value to account for the weight shortfall in reported FOP input weights. *Id.* at 29. As this adjustment assumed that consumption of both purchased internal components and free-of-charge internal components was underreported, the adjustment was based on the combined weighted-average surrogate value of all inputs, both purchased and free-of-charge. *Id.* at 29 & n.163. In an effort to continue to account for the value of the free-of-charge components included in the normal value calculation, Commerce attempted to make an additional upward adjustment to the U.S. sales price. *Id.* at 29. To accomplish this, Commerce determined the percentage by weight by which all internal components were underreported. *See Final Calculation Analysis* at 4–5, 7–8, bar code 3111172–01 (Dec. 17,

2012), ECF No. 27–12 (Aug. 8, 2013). Commerce then used this percentage to calculate the weight by which the free-of-charge components were underreported. *Id.* at 8. Commerce finally multiplied that weight by the combined weighted-average surrogate value of all internal components, both purchased and free-of-charge. *Id.* This amount was then added to the U.S. sales price. *Id.*

CS Wind filed a ministerial error allegation, claiming that Commerce mistakenly multiplied the weight shortfall for the free-of-charge components by the combined weighted-average surrogate value for all internal components, instead of by the weighted-average surrogate value for only the free-of-charge components. *CS Wind Request to Correct Clerical Errors* at 8–11. Commerce rejected the allegation, claiming that its adjustment was based on an intentional methodological choice. *Ministerial Error Memo* at 3. CS Wind continues its challenge before the court, claiming that the adjustment is unsupported by substantial evidence and not in accordance with law. Pl. Br. 46–49. The government contends that Commerce's adjustment was reasonable because it was a quantity rather than a value adjustment. Def. Br. 45–48. The government explains that Commerce was unable to determine the portion of the weight discrepancy attributable to purchased versus free-of-charge components. *Id.* at 47. This is why Commerce adjusted normal value based on the weighted-average value for all components and used the same value when adjusting the U.S. sales price. *Id.*

It is important to keep in mind that Commerce's sole purpose in adjusting the U.S. sales price essentially was to cancel out the impact of including the free-of-charge components on the normal value side of the AD comparison.[11] *See I&D Memo* at 53. Therefore, the weight-discrepancy adjustment made to the U.S. sales price was intended to cancel out the effect of the free-of-charge components being included in the normal value equation. The court does not understand the government's response that Commerce's adjustment was one based on weight and not value, as CS Wind's argument does not seem to hinge on this distinction. The formula used for FOP value (with the weight adjustment) could be written as follows, although this appears

[11] The court notes that Commerce's original adjustment did not completely accomplish this goal because the value associated with the components was incorporated into calculations for financial ratios. *See I&D Memo* at 53–54. Although CS Wind challenged this aspect of the adjustment below, *see id.*, it did not raise this argument in its brief before the court.

in a slightly different mathematical form[12] from that reported by Commerce:

FOP Material Value = (ExtW x ExtSV) + (IntW x IntSV) + (FreeW x FreeSV) + (WD% x IntW x IntSV) + (WD% x FreeW x FreeSV)[13]

Replacing the variables with fictitious, arbitrary figures, the formula could be written as:

FOP Material Value = (500 x 0.15) + (100 x 0.1) + (100 x 0.2) + (50% x 100 x 0.1) + (50% x 100 x 0.2)

In order to counter the effect of including the free-of-charge components in the weight adjustment to normal value, as Commerce explained it intended, the final term in the formula (WD% x FreeW x FreeSV), or applying the fictitious values, (50% x 100 x 0.2) = 10, simply needed to be included in the calculation for U.S. price. Instead Commerce used the following additions to the U.S. sales price: WD% x FreeW x (the combined weighted-average surrogate value for all internal components, both free-of-charge and purchased), which can be written using the above fictitious values as (50% x 100 x ((100 x 0.1) + (100 x 0.2))/(100 + 100) = 7.5. *See Final Calculation Analysis* at 7–8. As can be seen, this is not equivalent to the normal value adjustment corresponding to the free-of-charge inputs, as the average surrogate value for purchased internal components is lower than that of the free-of-charge components, bringing down the combined average and improperly lowering the U.S. price adjustment. *See CS Wind Request to Correct Clerical Errors*, Ex. 7. Unless Commerce is able to provide a mathematically sustainable explanation as to why its adjustment appropriately offsets the inclusion of the free-of-charge components in the normal value calculation, the court must hold that Commerce miscalculated the adjustment to U.S. price.

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[12] The only difference between the formula presented below and the one used by Commerce is that Commerce first calculated a combined weighted-average surrogate value for both the purchased and free-of-charge internal components. *See Final Calculation Analysis* at 4–5. It then multiplied this by the weight discrepancy. *Id.* at 5. The formula included herein simply distributes out this adjustment to assist the reader in understanding the effect of this adjustment.

[13] The formula employs the following variables: ExtW = weight of non-internal components; ExtSV = weighted-average value of non-internal components; IntW = weight of purchased internal components; IntSV = weighted-average value of purchased internal components; FreeW = weight of internal components provided free-of-charge by customers; FreeSV = weighted-average value of internal components provided free-of-charge by customers; WD% = percentage by which the Packed Weight for internal components exceeded the FOP weight for internal components.

V. Market Economy Input Purchases

CS Wind argues that Commerce's decision to reject CS Wind's market economy purchase prices for flanges, welding wire, and wire flux, based on a suspicion or belief that they were subsidized, is unsupported by substantial evidence and contrary to law. Pl. Br. 31–40. CS Wind contends that Commerce has failed to provide objective and specific evidence of the existence of subsidy programs within the Korean market from which its suppliers could have received benefits. *Id.* at 34–37. CS Wind further supports its assertions by claiming that neither CS Wind nor its manufacturers received or were even eligible to receive any export subsidies based on these "domestic" purchases. *Id.* at 37–40. In its *I&D Memo*, Commerce found there was "reason to believe or suspect" that CS Wind's purchase prices were distorted by "broadly available, non-industry specific export subsidies" in South Korea, thereby justifying a departure from its normal practice of using actual purchase prices for inputs from market economies. *I&D Memo* at 37–42. As a result, Commerce determined that Indian import data, and not CS Wind's actual purchase prices for flanges, welding wire, and wire flux sourced from South Korea, would be used to value these FOPs. *Id.* at 42.

When valuing an FOP purchased from a market economy supplier and paid for in a market economy currency, Commerce "normally" uses the price actually paid by the buyer. 19 C.F.R. § 351.408(c)(1). Nevertheless, when there is "reason to believe or suspect" that these inputs were subsidized, Commerce instead uses surrogate values from a market economy country. *See Peer Bearing Co.-Changshan v. United States*, 27 CIT 1763, 1769, 298 F. Supp. 2d 1328, 1334 (2003) (citing legislative history). Although the legislative history clarifies that Commerce need not conduct a full-fledged countervailing duty investigation before excluding market economy purchase prices, it does not alter the general standard by which this court evaluates all factual determinations by Commerce in trade remedy cases: substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Accordingly, "there must be some positive evidence on the record to permit the court to evaluate whether Commerce's decision is supported by substantial evidence." *Gold E. Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317, 1324 (CIT 2013). The burden of substantial evidence demands "more than a mere scintilla" of evidence; the burden is met when there exists "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In *Fuyao Glass*, the court held that Commerce must justify its belief or suspicion of price subsidization with specific and objective evi-

dence. *Fuyao Glass Indus. Grp. v. United States*, 29 CIT 109, 114 (2005). Under the standard applied in that case, Commerce was required to show: "(1) subsidies of the industry in question existed in the supplier countries during the [POI]; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier not to have taken advantage of such subsidies." *Id.* CS Wind alleges that under *Fuyao Glass* Commerce has not met its burden in justifying its "reason to believe or suspect" that CS Wind's purchase prices were tainted by subsidies. Pl. Br. 34–37. The government primarily responds by claiming that *Fuyao Glass* is not binding precedent and has been ignored consistently by Commerce. Def. Resp. 30–33.

The court agrees with CS Wind that the *Fuyao Glass* standard is one reasonable method for evaluating the sufficiency of the evidence upon which Commerce based its belief or suspicion that prices were subsidized.[14] In this case, Commerce has met its burden under *Fuyao Glass*, albeit reluctantly. Commerce satisfied the first prong of the test by presenting evidence that widely available, non-industry specific subsidies existed in Korea during 2010, just months before the POI under review. *I&D Memo* at 40 & n.247 (citing Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea, C-580–866, at 14–16 (Mar. 16, 2012) ("*Refrigerator-Freezers*"), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2012–7217–1.pdf (last visited Mar. 20, 2014) (discussing short-term export insurance program); Issues and Decision Memorandum for the Countervailing

[14] The court notes that the cases cited by Commerce in attempting to cast doubt on the reasoning of *Fuyao Glass* fail to address the issue presently before the court. For example, in *Jinan Yipin*, the plaintiff waived any argument contesting Commerce's finding with respect to generally available export subsidies. *See Jinan Yipin Corp. v. United States*, 774 F. Supp. 2d 1238, 1244, 1248 (CIT 2011). Likewise in *Zhejiang Machinery*, the plaintiff failed to argue before the agency the standard set out in *Fuyao Glass*, as the court's decision post-dated the close of the record. *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 31 CIT 159, 166 n.10 (2007). Similarly, the government's reliance on Commerce's finding in *Fuyao Glass* that the imports there "are subsidized" versus may have been subsidized is a red herring, as Commerce later abandoned its reliance on that distinction following remand, and the court retained the same standard for evaluating Commerce's determination. *See Fuyao Glass*, 29 CIT at 112–13.

Commerce explained in its *I&D Memo* that it has continued to reject the application of *Fuyao Glass* in other investigations and reviews. *See I&D Memo* at 41–42. Time marches on. In its investigations and reviews, Commerce must either abide by the standard set out in *Fuyao Glass* or propose another reasonable means of evaluating whether it has sufficient evidence to support a belief or suspicion that the market economy inputs in the particular case at hand were subsidized.

Duty Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, C-580–818, at 17, 19–20 (Jan. 7, 2009) ("*CORE*"), *available at* http://enforcement.trade.gov/frn/summary/korea-south/E9–633–1.pdf (last visited Mar. 20, 2014) (discussing countervailable short-term export financing system, document/acceptance loans, and trade rediscount program in 2006)). At least with respect to the *Refrigerator-Freezers* determination, Commerce did not merely rely on the "existence, at some point in time, of the subsidy programs" in Korea, *Sichuan Changhong Electric Co. v. United States*, 30 CIT 1481, 1496, 460 F. Supp. 2d 1338, 1352 (2006), but rather it identified almost contemporaneous findings of countervailable subsidies. Thus, Commerce demonstrated with specific and credible evidence that contemporaneous, widely available export subsidies existed in Korea, thereby meeting the first prong of the *Fuyao Glass* test.

Turning to the second prong of *Fuyao Glass*, Commerce has met this standard based on the same evidence discussed above for prong one because these prior countervailing duty determinations demonstrate that South Korea had broadly available, non-industry specific export subsidies for which exporters, including the suppliers of CS Wind, were eligible. *See Sichuan*, 30 CIT at 1495–96, 460 F. Supp. 2d at 1352–53 (finding that widely available, non-specific export subsidies met the second prong of *Fuyao Glass*). If Korea had suddenly discontinued this export support program, this would have been publicly available information CS Wind could have presented in rebuttal.

Under the third prong of *Fuyao Glass*, Commerce may meet its burden by demonstrating "the competitive nature of [the] market economy countr[y]" in which the supplier operates. *Fuyao Glass*, 29 CIT at 118 (internal quotation marks omitted). The burden is on Commerce, however, to prove that "it would have been unnatural for a supplier to not have taken advantage of such subsidies." *Id.* at 114. In the instant case, Commerce found that it would have been against any market economy supplier's interest in Korea to not take advantage of these subsidies. *See I&D Memo* at 41–42. Thus, Commerce has met the low threshold required under this prong.

CS Wind argues that even if the *Fuyao Glass* test has been met by Commerce, this simply creates a rebuttable presumption of subsidized prices that CS Wind has rebutted. Pl. Br. 37–39. CS Wind contends that the export subsidy programs found to exist in *Refrigerators-Freezers* and *CORE* were available only to entities that export goods under export contracts from Korea. Pls.' Reply to Def. & Def.-Intvnrs. Resp. to Pls.' Rule 56.2 Mot. for J. upon the Agency R., ECF No. 45, at 15–19. In the instant case, CS Wind alleges that these

input purchases were domestic transactions and that the companies CS Wind purchased these inputs from did not export goods and thus could not have received export subsidies under these programs. *Id.* Consequently, CS Wind alleges that CS Wind Corp., in South Korea, was the only entity in the chain of these transactions that could have benefitted from export subsidies, and it is undisputed that Commerce verified that CS Wind Corp. did not receive subsidies. *See id.* at 17–19.

CS Wind's evidence, while entitled to some weight, is insufficient to show that Commerce's determination was not supported by substantial evidence. Although these inputs were purchased in South Korea by CS Wind Corp., also located in South Korea, and then exported to CS Wind Vietnam by CS Wind Corp., the transactional documents support Commerce's determination that these documents could have been used by the suppliers to show that an export transaction occurred, making them eligible for the subsidy programs. The record shows that two manufacturers of these inputs identified themselves as the "Exporter" of their products on the certificates of origin. *See, e.g.*, *Verification Exhibits* at 14, 24, 28, 67, 76, CR 227–34 at bar code 3094071–06 (Aug. 30, 2012), ECF No. 42–11 (Dec. 11, 2013). These documents also support the findings that the manufacturers were aware that these products would be exported to Vietnam and that the sales could be classified as export transactions through an intermediary, CS Wind Corp. Thus, Commerce was justified in its determination that "all parties involved . . . had prior knowledge that these inputs were destined for exportation." *See I&D Memo* at 41. As a result, it was not unreasonable for Commerce to determine that the suppliers may have benefitted from the widely available export subsidies based on these "domestic" transactions that Commerce permissibly found were export transactions.

CS Wind also presented as rebuttal evidence correspondence from one of the manufacturer's sales managers, stating that the company did not benefit from any export subsidies. *See CS Wind Submission of Factual Data*, Ex. 2 at bar code 3090709–01 (Aug. 6, 2012), ECF No. 27–17 (Aug. 8, 2013). This individual, however, works in the sales division of a large manufacturer, not in finance. *See id.* ; *WTTC Aug. 15, 2012 Submission*, Exs. 1, 2, CR 225 at bar code 3092349–01 (Aug. 15, 2012), ECF No. 42–9 (Dec. 11, 2013). Thus, Commerce's conclusion that this person might not know about the receipt of subsidies is reasonable, especially when there is other record evidence showing past government awards for exports. *See WTTC Submission of Additional Factual Information*, Ex. 2, CR 216–21 at bar code 3091000–01 (Aug. 6, 2012), ECF No. 42–9 (Dec. 11, 2013).

As CS Wind's rebuttal arguments are insufficient to undermine Commerce's finding, the court sustains Commerce's determination that there was reason to believe or suspect that the inputs purchased in Korea were subsidized.

VI. Brokerage and Handling Costs

CS Wind argues that Commerce acted unreasonably in creating a surrogate value to be allocated per kilogram for export document preparation based on the weight of a full, twenty-foot container instead of the weight of CS Wind's actual shipments. Pl. Br. 49–52. In its *Final Determination*, Commerce relied upon the World Bank's 2012 Doing Business India report to calculate a surrogate value for B&H costs, including those for document preparation and customs clearance/technical control. *I&D Memo* at 48–49. The report was based on the costs associated with exporting a filled, twenty-foot container; CS Wind, however, did not containerize its wind tower segments, instead laying them in a pyramid fashion on the ship. *See id.* at 48–50. To account for the different form of shipment, Commerce converted the report's per shipment document preparation cost of $415 into a per kilogram value based on the weight of a filled twenty-foot container, 10,000 kg, instead of the weight of an average shipment of towers, 2,600,000 kg. *See id.* at 49–50; Pl. Br. 49–51. This resulted in a surrogate value of $0.0545/kg for all B&H costs. Pl. Br. 50. Although CS Wind objected during the agency proceedings that this overstated the document preparation charges, Commerce replied that it had no other way to convert between the unit of measure in the Doing Business report and CS Wind's actual shipments. *I&D Memo* at 49–50. Commerce further stated that it was following a consistent practice employed in several prior agency proceedings. *Id.* at 50 & n.283 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Preliminary Determination of Sales at Less than Fair Value, Postponement of Final Determination and Affirmative Preliminary Determination of Critical Circumstances*, 77 Fed. Reg. 31,309, 31,321 (Dep't Commerce May 25, 2012)).

At the outset, it is useful to recognize what the document preparation costs are intended to cover. The Doing Business report explains that several documents typically are required to export goods: bank documents, customs clearance documents, port terminal and handling documents, and transport documents. *See Trading Across Borders Methodology*, World Bank, *available at* http://www.doingbusiness.org/methodology/trading-across-borders (last vis-

ited Mar. 20, 2014) (cited in *Surrogate Values for the Preliminary Determination*, Ex. 6). Underlying Commerce's calculation here must be an assumption that the $415 for document preparation mentioned in the report was derived from a formula by which the exporter pays for documents based on the weight of the goods, which simply is not reflective of reality. Accordingly, implicit in Commerce's methodology is the incorrect assumption that a shipment weighing less will incur lower document processing costs while a shipment weighing more will incur higher processing costs.

Common sense indicates that a half-full, twenty-foot container would incur the same document preparation expenses as a full twenty-foot container of a single type of good. The court has recognized previously that increasing the surrogate value for B&H proportionally based on the weight of the shipment or the size of the container may not always be reasonable. *See Since Hardware (Guangzhou) Co. v. United States*, 911 F. Supp. 2d 1362, 1380–81 (CIT 2013). The government unsuccessfully attempts to distinguish that case from the present one, arguing that unlike in *Since Hardware*, Commerce did not make a presumption of a proportional increase in costs. Def. Br. 40.

The government's argument is nonsensical, and the same logic from *Since Hardware* applies equally here. By converting the document costs to a per kilogram value based on the weight of a hypothetical twenty-foot container, and then multiplying that value by the weight of CS Wind's actual shipments, Commerce has applied a proportional increase in the B&H fees. Commerce has failed to explain why document preparation costs, as opposed to other B&H fees, would change depending on the size or weight of the shipment. Taken to its logical extreme, under Commerce's methodology, a single shipment of wind towers by CS Wind, at an average weight of 2,600,000 kg, would incur a document preparation cost of over $100,000. Pl. Br. 51. Such a position flies in the face of common sense and commercial reality. Although the court understands that Commerce typically converts all surrogate values into a per kilogram amount for use in calculating dumping margins, its method of doing so here, based on the weight of a filled twenty-foot container and not based on the weight of a shipment of wind towers, for which the same documents would need to be prepared, is unreasonable and unsupported by substantial evidence. The reasonable conversion methodology here appears to be to calculate a per kilogram surrogate value allocating the $415 document cost over the weight of the entire wind tower shipment. Accordingly, the court remands this issue to Commerce for recalculation and/or further explanation.

CONCLUSION

As discussed above, Commerce has failed to support with substantial evidence its determinations with respect to the valuation of steel plate, carbon dioxide, overhead, and B&H fees. Although Commerce's decisions to disregard CS Wind's market economy input purchases and to adjust for the discrepancy between Packed Weight and FOP weight were reasonable, the adjustment to the U.S. sales price based on the weight discrepancy was not. Commerce shall file its remand determination by May 27, 2014. The parties shall have until June 24, 2014 to file objections, and the government shall have until July 11, 2014 to file its response.

Dated: March 27, 2014
New York, New York

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

Slip Op. 14–34

JINAN YIPIN CORPORATION, LTD., LINSHU DADING PRIVATE AGRICULTURAL PRODUCTS CO., LTD., and SUNNY IMPORT AND EXPORT CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Defendant-Intervenors.

Court No. 06–00189

[Sustaining U.S. Department of Commerce's second remand determination in tenth administrative review of antidumping duty order covering fresh garlic from the People's Republic of China]

Dated: March 28, 2014

Mark E. Pardo, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for Plaintiffs.

Richard P. Schroeder, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *George Kivork*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Michael J. Coursey, Kelley Drye & Warren, LLP, of Washington, D.C., argued for Defendant-Intervenors. With him on the brief was *John M. Herrmann*.

OPINION

RIDGWAY, Judge:

Seven plaintiff Chinese producers and exporters of fresh garlic commenced this action to challenge the final results of the U.S. Department of Commerce's tenth administrative review of the antidumping duty order covering fresh garlic from the People's Republic of China. *See generally* Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Review, 71 Fed. Reg. 26,329 (May 4, 2006) ("Final Results"); *see also* Issues and Decision Memorandum for the Administrative Review and New Shipper Reviews of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (April 26, 2006) (Pub. Doc. No. 462) ("Issues and Decision Memorandum"); *Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 617 F. Supp. 2d 1281 (2009) ("*Jinan Yipin I*"); *Jinan Yipin Corp. v. United States*, 35 CIT ____, 800 F. Supp. 2d 1226 (2011) ("*Jinan Yipin II*").

Jinan Yipin I analyzed the seven issues raised by the plaintiff Chinese producers/exporters, sustaining Commerce's determination as to two of the issues and remanding the remaining five to the agency. *See generally Jinan Yipin I*, 33 CIT at 458, 514–15, 617 F. Supp. 2d at 1289, 1334. *Jinan Yipin II* reviewed Commerce's First Remand Determination, filed pursuant to *Jinan Yipin I*. *See generally* Final Results of Redetermination Pursuant to Court Remand ("First Remand Determination"). As to one of the five issues addressed therein, there were no objections. *Jinan Yipin II* sustained the First Remand Determination as to that issue, and, upon analysis, remanded the other four to Commerce for further consideration. *See generally Jinan Yipin II*, 35 CIT at ____, ____, 800 F. Supp. 2d at 1235, 1315–16.

Now pending before the court is Commerce's Second Remand Determination, filed pursuant to *Jinan Yipin II*. *See generally* Final Remand Results of Redetermination Pursuant to Second Remand ("Second Remand Determination"). The Domestic Producers (*i.e.*, the Fresh Garlic Producers Association and its four constituent members),[1] Defendant-Intervenors in this action, challenge the Second Remand Determination as to one of the four issues addressed therein. *See generally* Defendant-Intervenors' Comments Regarding Second Remand Redetermination ("Def.-Ints.' Brief"); Defendant-

[1] The four constituent members of the Fresh Garlic Producers Association are Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

Intervenors' Reply Comments Regarding Second Remand Redetermination ("Def.-Ints.' Reply Brief"). For their part, the Government and the three Plaintiff Chinese producers/exporters – *i.e.*, Jinan Yipin Corporation, Ltd. ("Jinan Yipin"), Linshu Dading Private Agricultural Products Co., Ltd. ("Linshu Dading"), and Sunny Import and Export Co., Ltd. ("Sunny") (collectively, the "Chinese Producers") – urge that the Second Remand Determination be sustained in all respects. *See* Defendant's Response to Comments Regarding Redetermination Pursuant to Court Remand ("Def.'s Response Brief") at 1–2, 16; Plaintiffs' Response to Defendant-Intervenors' Comments Regarding Second Remand Redetermination ("Pls.' Response Brief") at 6.

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[2] For the reasons detailed below, Commerce's Second Remand Determination is sustained.

I. *Background*

Seven Chinese producers and exporters of fresh garlic brought this action to contest various aspects of the Final Results of Commerce's tenth administrative review of the antidumping duty order on fresh garlic from China, which covered the period from November 1, 2003 through October 31, 2004. *See generally Jinan Yipin I*, 33 CIT 453, 617 F. Supp. 2d 1281; Final Results, 71 Fed. Reg. 26,329.

Jinan Yipin I analyzed each of the seven issues that the plaintiff Chinese producers/exporters raised, sustaining Commerce's determination as to two issues and remanding the other five for further consideration. *See generally Jinan Yipin I*, 33 CIT at 458, 514–15, 617 F. Supp. 2d at 1289, 1334.[3] Specifically, *Jinan Yipin I* sustained Commerce's use of the agency's intermediate input methodology to value raw garlic bulbs. *See id*., 33 CIT at 458, 458–66, 514, 617 F. Supp. 2d at 1289, 1289–95, 1334. *Jinan Yipin I* similarly sustained Commerce's surrogate financial ratios against the Chinese producers' allegations of "double-counting" of certain labor-related expenses (*i.e.*,

[2] All citations to federal statutes are to the 2000 edition of the United States Code. Similarly, all citations to federal regulations are to the 2003 edition of the Code of Federal Regulations.

[3] Only four of the seven original Plaintiffs moved for judgment on the agency record, *i.e.*, Zhengzhou Harmoni Spice Co., Ltd., Jinan Yipin Corporation, Ltd., Linshu Dading Private Agricultural Products Co., Ltd., and Sunny Import and Export Co., Ltd. The other three – Jining Trans-High Trading Co., Ltd., Jinxiang Shanyang Freezing Storage Co., Ltd., and Shanghai LJ Trading Co., Ltd. – played no role in the briefing or oral argument, and were later voluntarily dismissed from this action, together with Zhengzhou Harmoni Spice Co., Ltd. *See Jinan Yipin I*, 33 CIT at 454 & n.2, 617 F. Supp. 2d at 1285 & n.2; n.4, *infra* (summarizing proceedings leading to voluntarily dismissal of four of original seven Plaintiffs).

"provident fund" and "gratuity" expenses). *See id*., 33 CIT at 458, 506–14, 514, 617 F. Supp. 2d at 1289, 1327–34, 1334. In contrast, *Jinan Yipin I* remanded for further consideration Commerce's valuation of certain "factors of production" necessary for the cultivation and export of fresh garlic – in particular, (1) raw garlic bulbs, (2) labor, (3) ocean freight, (4) cardboard packing cartons, and (5) plastic jars and lids. *See id*., 33 CIT at 458, 466–73, 473–80, 481–87, 487–98, 498506, 514–15, 617 F. Supp. 2d at 1289, 1295–1301, 1301–07, 1307–12, 1312–21, 1321–1327, 1334.[4]

In its First Remand Determination, Commerce revalued raw garlic bulbs, labor, and ocean freight. *See* First Remand Determination at 5–15, 15–38, 38–41. On the other hand, Commerce continued to value cardboard packing cartons and plastic jars and lids as it had in the Final Results. *See id*. at 41–46, 46–50, 68–71, 71–74. As a result of its reconsideration in the course of the first remand, Commerce recalculated the weighted-average antidumping duty margin for Jinan Yipin as 55.18% (up from 29.52%), for Linshu Dading as 39.51% (up from 22.47%), and for Sunny as 26.67% (up from 10.52%). *See id*. at 74–75; Final Results, 71 Fed. Reg. at 26,332.

Commerce's First Remand Determination was the subject of *Jinan Yipin II*. *See generally Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1226. In the absence of any objections to the First Remand Determination's treatment of the surrogate value for ocean freight, Commerce's determination on that issue was sustained. *See generally id*., 35 CIT at ____, ____, ____, 800 F. Supp. 2d at 1235–36, 1276–79, 1315 (sustaining First Remand Determination as to ocean freight expenses). However, the agency's treatment of the four remaining issues – *i.e.*, the surrogate values for raw garlic bulbs, labor expenses, cardboard packing cartons, and plastic jars and lids – remained in dispute. In light of the Chinese Producers' arguments and the Government's request for a voluntary remand, *Jinan Yipin II* once again remanded to Commerce the issue of labor expenses. *See generally id*., 35 CIT at ____, ____, ____, 800 F. Supp. 2d at 1236, 1274–76, 1315–16.

[4] Following *Jinan Yipin I* but before Commerce issued its First Remand Determination, four of the seven Chinese producers that filed the Complaint in this action moved for voluntary dismissal with prejudice, which was granted. *See generally Zhengzhou Harmoni Spice Co. v. United States*, 34 CIT ____, 675 F. Supp. 2d 1320 (2010) (dismissing action as to Zhengzhou Harmoni Spice Co., Ltd., Jining Trans-High Trading Co., Ltd., Jinxiang Shanyang Freezing Storage Co., Ltd., and Shanghai LJ International Trading Co., Ltd.). The antidumping duty margins for those four Chinese producers therefore remain unchanged from the Final Results. *See* First Remand Determination at 4; Final Results, 71 Fed. Reg. at 26,332 (0.27% for Zhengzhou Harmoni Spice Co., Ltd.; 0.00% for Jining Trans-High Trading Co., Ltd.; 14.79% for Jinxiang Shanyang Freezing Storage Co., Ltd.; 0.00% for Shanghai LJ International Trading Co., Ltd.).

Similarly, the issues of the valuation of raw garlic bulbs, cardboard packing cartons, and plastic jars and lids also were remanded to Commerce yet again. *See generally id*., 35 CIT at ____, ____, ____, ____, ____, 800 F. Supp. 2d at 1236, 1236–74, 1279–1307, 1307–15, 1315–16.

In its Second Remand Determination, Commerce has revalued raw garlic bulbs, using data from the Indian Agricultural Marketing Information Network ("Agmarknet") for garlic grown in the five "long-day zone" states of India. *See* Second Remand Determination at 1, 10, 12–17, 31, 36. Commerce also has now recalculated the surrogate labor rate in accordance with the agency's revised methodology. *See id*. at 1, 24–31, 38 (relying on Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 Fed. Reg. 36,092 (June 21, 2011); also reconsidering valuation of labor data reflected in surrogate financial ratios, and revising average surrogate financial ratios accordingly). In addition, to value cardboard packing cartons as well as plastic jars and lids for purposes of the Second Remand Determination, Commerce has implicitly adopted the fundamental reasoning of *Jinan Yipin II* and has therefore relied on the domestic Indian price quotes that the Chinese Producers had placed on the administrative record, in lieu of the Indian import statistics that the agency relied on in its prior determinations in this case. *See* Second Remand Determination at 1, 23–24, 38.[5] As a result of these changes, the Second Remand Determination calculates the margins for both Jinan Yipin and Linshu Dading to be 0.00%, and 0.04% for Sunny. *See id*. at 1–2.

Although they do not dispute Commerce's revised surrogate values for labor, cardboard packing cartons, and plastic jars and lids,[6] the Domestic Producers contest the Second Remand Determination as to the surrogate value for raw garlic bulbs. *See generally* Def.-Ints.' Brief; Def.-Ints.' Reply Brief. Specifically, the Domestic Producers

[5] The Second Remand Determination states that Commerce used the domestic price quotes "under protest." *See* Second Remand Determination at 1, 24. As explained below, however, *Jinan Yipin II* did not impose any outcome or result on Commerce. *See* nn.32, 47, *infra*.

[6] Notably, the Domestic Producers have not objected to Commerce's use of domestic Indian price quotes in valuing cardboard packing cartons and plastic jars and lids in this Second Remand Determination in the tenth administrative review, although they did object to such price quotes in *Taian Ziyang*, a companion case involving the ninth administrative review of the same antidumping duty order that is at issue in this action. *See* Second Remand Determination at 6 (noting that Domestic Producers' comments on draft Second Remand Determination addressed only valuation of raw garlic bulbs); Def.-Ints.' Brief, *passim* (objecting only to agency's valuation of raw garlic bulbs); Def.-Ints.' Reply Brief, *passim* (same); *cf*. *Taian Ziyang Food Co. v. United States*, 37 CIT ____, ____, ____, 918 F. Supp. 2d 1345, 1358–69, 1369–76 (2013) ("*Taian Ziyang III*") (analyzing and rejecting Domestic Producers' objections to agency's use of domestic Indian price quotes in valuing cardboard packing cartons and plastic jars and lids in ninth administrative review).

contend that this matter must be remanded to Commerce yet again "to select a surrogate value that is specific to the fresh garlic exported to the United States by the [Chinese Producers]." Def.-Ints.' Brief at 2; *see also id*. at 21–22; Def.-Ints.' Reply Brief at 2, 10–11. In contrast, the Government and the Chinese Producers urge that the Second Remand Determination be sustained in all respects. *See* Def.'s Response Brief at 1–2, 16; Pls.' Response Brief at 6.

II. *Standard of Review*

In an action reviewing an antidumping determination by Commerce, the agency's determination must be upheld except to the extent that it is 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); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same). Moreover, any evaluation of the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (*quoting Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Finally, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319–20. Nevertheless, "the path of Commerce's decision must be reasonably discernable," to support judicial review. *Id*. (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

III. *Analysis*

As *Jinan Yipin II* explained, dumping occurs when goods are imported into the United States and sold at a price lower than their "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1233 (*citing* 19 U.S.C. §§ 1673, 1677(34), 1677b(a)); *see generally Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1233–35. The difference between the normal value of the goods and the U.S. price is the "dumping margin." *See* 19 U.S.C. § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See* 19 U.S.C. § 1673.

Normal value is typically calculated using either the price in the exporting market (*i.e.*, the price in the "home market" where the goods are produced) or the cost of production of the goods, when the exporting country is a market economy country. *See generally* 19 U.S.C. § 1677b.[7] However, where – as here – the exporting country has a non-market economy ("NME"), there is often concern that the factors of production used to produce the goods at issue are under state control, and that home market sales may not be reliable indicators of normal value. *See* 19 U.S.C. § 1677(18)(A).

In cases such as this, where the subject merchandise is exported from an NME country and Commerce concludes that concerns about the sufficiency or reliability of the available data do not permit the normal value of the goods to be determined in the typical manner, Commerce "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production," including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See* 19 U.S.C. § 1677b(c)(1); *see generally Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1250–51 (Fed. Cir. 2009) (briefly summarizing "factors of production" methodology).[8] The antidumping statute requires Commerce to value

[7] In addition, in certain market economy cases, Commerce may calculate normal value using the price in a third country (*i.e.*, a country other than the exporting country or the United States). *See*, *e.g.*, *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1338 (Fed. Cir. 2002) (discussing 19 U.S.C. §§ 1677b(a)(1)(B)(ii), 1677b(a)(1)(C)); *see also Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1251 n.1 (Fed. Cir. 2009) (explaining exception).

[8] Factors of production "include, but are not limited to . . . hours of labor required, . . . quantities of raw materials employed, . . . amounts of energy and other utilities consumed, and . . . representative capital cost, including depreciation." *See* 19 U.S.C. § 1677b(c)(3); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010) (discussing factors of production).

factors of production "based on the *best available information* regarding the values of such factors" in an appropriate surrogate market economy country – in this case, India. *See* 19 U.S.C. § 1677b(c)(1) (emphasis added); *see also Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *Ningbo*, 580 F.3d at 1254 (emphasizing that statute mandates that Commerce "shall" use "best available information" in valuing factors of production).

In determining which data constitute the "best available information," Commerce generally looks to the criteria set forth in its "Policy Bulletin 04.1," also known as the "NME Surrogate Country Policy Bulletin." Policy Bulletin 04.1 explains:

> In assessing data and data sources, it is [Commerce's] stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.

See Import Administration Policy Bulletin 04.1, "Non-Market Economy Surrogate Country Selection Process," at "Data Considerations" (March 1, 2004) ("Policy Bulletin 04.1")[9]; *see also* First Remand Determination at 42 (quoting Policy Bulletin and stating that it reflects agency's "well-established practice for determining the reliability and appropriateness of surrogate values").

Within this general framework, the statute "accords Commerce wide discretion in the valuation of factors of production in the application of [the statute's] guidelines." *See Shakeproof*, 268 F.3d at 1381 (internal quotation marks and citation omitted); *see also Ad Hoc Shrimp Trade Action Committee v. United States*, 618 F.3d 1316, 1320 (Fed. Cir. 2010) (same); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (same). Commerce is recognized as the "master of antidumping law." *See Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999); *see also*

[9] As *Jinan Yipin II* explained, Policy Bulletin 04.1 clearly states that the five specified criteria – *i.e.*, "investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data" – were developed to serve as a "tie-breaker," if necessary, in Commerce's identification of a surrogate country. *See Jinan Yipin II*, 35 CIT at ____ n.7, 800 F. Supp. 2d at 1234 n.7. The criteria were not promulgated for the purpose of guiding Commerce's selection from among alternative data sources *after* a surrogate country has been identified. *Id*. Nevertheless, Commerce has used the criteria for that purpose here and in many other cases. *Id*.

Shakeproof, 268 F.3d at 1381 (acknowledging "Commerce's special expertise"). And "[t]he process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise." *Id*.

Nevertheless, Commerce's discretion is not boundless. In exercising its discretion, Commerce is constrained by the purpose of the antidumping statute, which is "to determine antidumping margins 'as accurately as possible.'" *See Shakeproof*, 268 F.3d at 1382 (*quoting Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)). And, Commerce's discretion notwithstanding, "a surrogate value must be as representative of the situation in the [nonmarket economy] country as is feasible." *See Nation Ford*, 166 F.3d at 1377 (internal quotation marks and citation omitted). Thus, "[i]n determining the valuation of . . . factors of production, the critical question is whether the methodology used by Commerce is based on *the best available information* and establishes antidumping margins *as accurately as possible*." *See Ningbo*, 580 F.3d at 1257 (emphases added) (*quoting Shakeproof*, 268 F.3d at 1382) (internal quotation marks omitted).

In the present case, pursuant to the instructions in *Jinan Yipin II*, Commerce's Second Remand Determination reconsidered and revised the surrogate value for raw garlic bulbs, as well as the surrogate values for labor, cardboard packing cartons, and plastic jars and lids. As discussed in greater detail below, that determination is sustained in all respects.

A. *Surrogate Value for Raw Garlic Bulbs*

In the administrative review at issue, rather than valuing the Chinese Producers' so-called "growing" and "harvesting" factors of production (*i.e.*, the garlic seed, water, pesticides, herbicides, fertilizer, plastic film, labor, and other "inputs" (commodities) consumed by Chinese producers in cultivating and harvesting whole raw garlic bulbs), Commerce broke with its past practice and employed the agency's "intermediate input methodology" to value the whole raw garlic bulb (the "intermediate input") itself. *See Jinan Yipin I*, 33 CIT at 456–57, 460–61, 617 F. Supp. 2d at 1288, 1291; *see also Jinan Yipin*

II, 35 CIT at ____, 800 F. Supp. 2d at 1236.[10] *Jinan Yipin I* rejected the Chinese Producers' objections to Commerce's use of its intermediate input methodology here. *See Jinan Yipin I*, 33 CIT at 458, 466, 514, 617 F. Supp. 2d at 1289, 1295, 1334; *see generally id*., 33 CIT at 458–66, 617 F. Supp. 2d at 1289–95 (reviewing the Chinese Producers' objections to intermediate input methodology). On the other hand, *Jinan Yipin I* sustained the Chinese Producers' challenge to the surrogate value for raw garlic bulbs that Commerce calculated for use in the Final Results, principally on the grounds that the record evidence did not establish that the data on which Commerce relied were sufficiently "product-specific." *See id*., 33 CIT at 458, 469–71, 473, 514–15, 617 F. Supp. 2d at 1289, 1298–99, 1301, 1334; *see generally id*., 33 CIT at 466–73, 617 F. Supp. 2d at 1295–1301 (analyzing Chinese Producers' challenge to surrogate valuation of raw garlic bulbs).

As *Jinan Yipin I* explained, the Chinese Producers' garlic "is a large, high yield, high-quality type of garlic that is distinct from the overwhelming majority of garlic grown in India." *See Jinan Yipin I*, 33 CIT at 467, 617 F. Supp. 2d at 1296; *see also* Issues and Decision Memorandum at 42 (same). In the Final Results, Commerce calculated a surrogate value for raw garlic bulbs using data from the Indian Agricultural Marketing Information Network ("Agmarknet") for a category of garlic referred to as "China" garlic. *See Jinan Yipin I*, 33 CIT at 467–68, 617 F. Supp. 2d at 1296–97; Issues and Decision Memorandum at 39–44, 47; *see also Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1236–37. As support for Commerce's finding that the "China" category of garlic is sufficiently product-specific to the

[10] For a summary overview of Commerce's intermediate input methodology, *see Jining Yongjia Trade Co. v. United States*, 34 CIT ____, ____ & n.6, 2010 WL 5121964 * 2 & n.6 (2010) (explaining, *inter alia*, that, when Commerce employs its intermediate input methodolgy, "the cost (or value) of the whole garlic bulb [is] used as a substitute for the costs of the growing and harvesting [factors of production] ('upstream FOPs') actually reported by [the foreign producer at issue]").

In prior administrative reviews, Commerce used the agency's standard upstream "factors of production" methodology, rather than the intermediate input methodology employed here. In those prior reviews, Commerce calculated separate surrogate values for garlic *seed* and other so-called "growing" and "harvesting" factors of production. *See Jinan Yipin I*, 33 CIT at 456–57, 460, 467 n.19, 617 F. Supp. 2d at 1287–88, 1290–91, 1296 n.19; *see also*, *e.g.*, *Taian Ziyang Food Co. v. United States*, 33 CIT 828, 860–64, 637 F. Supp. 2d 1093, 1124–27 (2009) ("*Taian Ziyang I*") (analyzing Commerce's valuation of garlic seed in ninth administrative review); *Jinan Yipin Corp. v. United States*, 31 CIT 1901, 1924–30, 526 F. Supp. 2d 1347, 1367–72 (2007) (same, in eighth review). In the instant (tenth) administrative review (and in subsequent reviews), Commerce has used the intermediate input methodology, due to problems with the data reported by the Chinese producers in past reviews for their "growing" and "harvesting" factors of production. *See Jinan Yipin I*, 33 CIT at 455–57, 460–61, 617 F. Supp. 2d at 1287–88, 1290–91.

Chinese Producers' large-bulb garlic, the Final Results relied on information drawn from "Market Research on Fresh Whole Garlic in India," a June 2003 report prepared by consultants to the Domestic Producers, which the Domestic Producers placed on the record of this administrative review. *See Jinan Yipin I*, 33 CIT at 469, 617 F. Supp. 2d at 1297–98; *see also* Issues and Decision Memorandum at 40–41; Domestic Producers' Surrogate Value Submission (Pub. Doc. No. 417), Exh. 33 ("Market Research Report").[11]

Relying on the Market Research Report and additional information on the record, the Final Results explained that Chinese garlic exported to the United States is characterized by its relatively large bulb size; that the bulb size of local, native garlic typically grown and sold in the Indian market is significantly smaller; and that, in India, cultivation of large-bulb garlic is generally confined to the country's "long-day zone," which enjoys longer periods of sunlight. *See Jinan Yipin I*, 33 CIT at 468–69, 617 F. Supp. 2d at 1297; Issues and Decision Memorandum at 41–44. Based on this and other information, the Final Results concluded that the Agmarknet data for "China" category garlic must represent sales of large-bulb garlic from India's long-day zone. *See Jinan Yipin I*, 33 CIT at 469, 617 F. Supp. 2d at 1298; *see also* Issues and Decision Memorandum at 40–42.

However, as *Jinan Yipin I* emphasized, the Agmarknet data provide no description of the physical characteristics of "China" garlic (or any other category of garlic reflected therein). *See Jinan Yipin I*, 33 CIT at 468–71, 617 F. Supp. 2d at 1297–99; *see also* Issues and Decision Memorandum at 42 (noting that Agmarknet data do not include descriptions of categories of garlic reflected in the data). Noting that the Final Results apparently relied on the Agmarknet data "based on nothing more than perhaps the name of the variety, and the fact that [the "China" category] had a higher weighted-average price," *Jinan Yipin I* held that the Final Results were therefore "largely speculative and conclusory" and "lack[ed] adequate support in the evidentiary record." *See Jinan Yipin I*, 33 CIT at 468–70, 617 F. Supp. 2d at 1297–98. *Jinan Yipin I* concluded that, absent some proof of the physical characteristics of "China" garlic, the Final Results' calcula-

[11] The Market Research Report was first placed on the record of the eighth administrative review of the antidumping order on fresh garlic from China. *See* Second Remand Determination at 8 n.30 (explaining that Market Research Report "was originally submitted on the record of the 2001 2002 administrative review"). The same Market Research Report was later placed on the record of the second remand in litigation involving the ninth administrative review, as well as the record of the review here at issue. *See Jinan Yipin I*, 33 CIT at 469, 617 F. Supp. 2d at 1297–98; *Taian Ziyang Food Co. v. United States*, 35 CIT ____, ____ & nn.11–12, 783 F. Supp. 2d 1292, 1303–04 & nn.1112 (2011) (*"Taian Ziyang II"*) (reviewing second remand determination in ninth administrative review).

tion of a surrogate value based on Agmarknet data for that category of garlic was not supported by substantial evidence and could not be sustained on the then-existing record. *See id*. The valuation of raw garlic bulbs was thus remanded to the agency for further consideration. *See id*., 33 CIT at 458, 473, 514–15, 617 F. Supp. 2d at 1289, 1301, 1334.

In addition to the Chinese Producers' concerns about product specificity (discussed above), *Jinan Yipin I* addressed a number of other issues. *See generally Jinan Yipin I*, 33 CIT at 471–73, 617 F. Supp. 2d at 1299–1301. Among other things, the Chinese Producers argued that the Agmarknet data actually reflect a final product and not an intermediate input at all. Specifically, the Chinese Producers asserted that, because the Agmarknet prices – by definition – represent garlic sold at market, the prices do not reflect an intermediate product and inherently include post-harvest factors of production. *See id*., 33 CIT at 472, 617 F. Supp. 2d at 1300. The Chinese Producers thus contended that the Final Results "impermissibly inflated the surrogate value of fresh garlic by adding additional post-harvest factors of production (*e.g.*, sales, packing, and transportation costs) to a figure that already reflected such costs." *See id*. *Jinan Yipin I* instructed Commerce, on remand, to consider "the potential for double counting that may result when using data from the Agmarknet database, which presumably contains information regarding Indian market transactions and is representative of the *final* garlic product rather than an *intermediate* garlic product (*i.e.*, garlic bulb)." *See id*. *Jinan Yipin I* specifically cautioned that, "when valuing an intermediate product in [a non-market economy] country case, [Commerce] must find a surrogate representative of that intermediate product." *See id*., 33 CIT at 472–73, 617 F. Supp. 2d at 1300.

Citing the concerns identified in *Jinan Yipin I* (particularly the lack of any physical description of "China" garlic and the various other categories of garlic reflected in the Agmarknet data), the First Remand Determination declined to rely on the Agmarknet data. *See* First Remand Determination at 5, 7–8, 15. Instead, the First Remand Determination relied on an additional set of data, which Commerce placed on the record in the course of the first remand proceeding – *i.e.*, information on garlic prices at the produce market near Delhi operated by the Azadpur Agricultural Produce Marketing Committee ("APMC"), as published in the Azadpur APMC's "Market Information Bulletin," for the two-and-one-half-month period from May 1, 2006

through July 14, 2006. *See id*. at 2, 6, 10, 13, 15; *see also Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1238.[12] The First Remand Determination concluded that the Azadpur APMC data constituted "the best information available with which to value [the Chinese Producers'] garlic bulb," even though – much like the Agmarknet data – the Azadpur APMC data do not describe the physical characteristics of the garlic to which they refer. *See* First Remand Determination at 14; Azadpur APMC data; *see also Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1239. Accordingly, to establish the "product specificity" of the Azadpur APMC data, Commerce had to rely on the Domestic Producers' Market Research Report. *See* First Remand Determination at 11; Market Research Report at 21.

Jinan Yipin II closely critiqued – and roundly rejected – the First Remand Determination's use of the Azadpur APMC data,[13] concluding that "[s]erious issues exist as to the contemporaneity, representativeness, and product specificity of those data." *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1273; *see generally id*., 35 CIT at ____, 800 F. Supp. 2d at 1236–74. *Jinan Yipin II* went so far as to note the existence of "record evidence suggest[ing] that [the First Remand Determination] may not have valued the intermediate input at all, and – instead – may have valued a final product." *Id*., 35 CIT at ____, 800 F. Supp. 2d at 1273. The issue of the calculation of a surrogate value for raw garlic bulbs therefore was remanded to Commerce yet again. *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1273–74.

In the course of the most recent remand proceeding, Commerce reopened the administrative record to allow the parties to submit additional information concerning the valuation of raw garlic bulbs, as well as garlic seed. *See* Second Remand Determination at 4–5, 7–9. In the resulting Second Remand Determination, Commerce reaffirmed its conclusion that the agency's intermediate input methodology "results in a more accurate dumping margin than the use of the traditional [factors of production] methodology." *Id*. at 9–10; *see also id.* at 10–12. Commerce further determined, based on a comprehensive review of the strengths and weaknesses of all data on the

[12] Specifically, the First Remand Determination calculated the surrogate value for raw garlic bulbs using the Azadpur APMC data, averaging the values for "A"- and "S.A."-grade garlic. *See generally* First Remand Determination at 9–15, 53–59; *see also Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1239.

[13] *Jinan Yipin II* found, for example, that "statements in the [First] Remand Determination reflect egregious factual errors, and demonstrate that Commerce does not understand either the meaning of the Azadpur APMC data or their limitations." *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1246.

record,[14] that the Agmarknet data (on which the Final Results were based) constitute the best available information for use in calculating a surrogate value for raw garlic bulbs. *See id*. at 1, 9–10, 12–23, 31–37. However, rather than relying on data for a single category of garlic (*i.e.*, the "China" category) as Commerce did in the Final Results, the Second Remand Determination instead uses the average for the six specific Agmarknet categories of garlic grown in the five "long-day zone" states in India (*i.e.*, Punjab, Haryana, Himachal Pradesh, Jammu and Kashmir, and Uttaranchal) – the regions where longer periods of sunlight result in large-bulb garlic similar to the Chinese garlic at issue here. *See id*. at 1, 10, 12, 13, 15, 31–32. In addition, Commerce also made certain adjustments, which are not at issue here, to address the Chinese Producers' concerns about "captur[ing] the farm gate prices." *See id*. at 10, 17–19.[15] Using these "filtered" Agmarknet data, Commerce calculated a final weighted-average price of 8.35 rupees per kilogram to value raw garlic bulbs for purposes of the Second Remand Determination. *See id*. at 36–37; *compare id*. at 12 (specifying 8.3471 rupees per kilogram).

Neither the Chinese Producers nor the Domestic Producers contest the Second Remand Determination's use of the Agmarknet database

[14] The Second Remand Determination explains that Commerce determined that the numerous concerns about the Azadpur APMC data which were identified in *Jinan Yipin II* could not "be adequately remedied" in the course of the second remand proceeding. *See* Second Remand Determination at 23; *see also id*. at 7. In addition, Commerce has a practice in remand proceedings of relying only on data that were available at the time of the underlying administrative review. Here, the agency determined during the second remand proceeding that the Azadpur APMC data were not available when the agency conducted the administrative review at issue. *See id*. at 7–8; *see also id.* at 23. For both of these reasons, Commerce decided not to consider use of the Azadpur APMC data in the Second Remand Determination. *See id*. at 7, 23. The Azadpur APMC data have been used in subsequent administrative reviews. Of course, those proceedings have involved different arguments and different administrative records.

[15] For example, "[b]ecause the record . . . support[s] the claim that transportation costs could be double counted," Commerce "remov[ed] freight costs from . . . Linshu Dading's input calculation in the SAS program in order to exclude transportation costs from the garlic bulb supplier to Linshu Dading's factory in the normal value calculation." *See* Second Remand Determination at 19. Because Jinan Yipin and Sunny grow their own garlic, they did not incur such freight costs. Accordingly, Commerce made no such adjustment for them. *Id*.

It is not clear whether (and, if so, how) the Second Remand Determination considered the Chinese Producers' previously-expressed concerns that the Agmarknet data reflect prices that include, for example, the expense of transporting garlic bulbs from "farm gate" to market. *See*, *e.g.*, *Jinan Yipin I*, 33 CIT at 472, 617 F. Supp. 2d at 1300 (discussing the Chinese Producers' concerns that the Agmarknet data "impermissibly inflated the surrogate value . . . by adding additional *post harvest* factors of production (*e.g.*, sales, packing, and transportation costs) to a figure that already reflected such costs") (emphasis added). In any event, the Chinese Producers do not challenge the Second Remand Determination's "farm gate" adjustments.

in calculating a surrogate value for raw garlic bulbs. Similarly, neither party contests Commerce's decision to "filter" the Agmarknet data set so as to use only data for garlic grown in India's five long-day zone states.[16] Indeed, like the Government, the Chinese Producers maintain that the surrogate value calculated in the Second Remand Determination based on that "filtered" data set should be sustained. *See* Def.'s Response Brief at 1–2, 7, 15, 16; Pls.' Response Brief at 1, 6. However, the Domestic Producers contend that the data should be further filtered, such that Commerce should use data for only three of the six Agmarknet categories of garlic that are reflected in the Second Remand Determination's calculations. *See generally* Def.-Ints.' Brief at 2–3, 11–16, 21–22; Def.-Ints.' Reply Brief at 2, 10.

Specifically, the Domestic Producers emphasize that the Chinese garlic at issue here has a bulb diameter of 50 millimeters ("mm") or greater, and that not all of the garlic that is grown in India's long-day zone states has a comparable bulb size. *See* Def.-Ints.' Brief at 8–16; Def.-Ints.' Reply Brief at 3, 4, 9–10. The Domestic Producers argue that the data set used in the Second Remand Determination thus is overly broad and not sufficiently "product-specific" to the Chinese Producers' garlic, and that the data set should be further limited to exclude data on categories of garlic that – according to the Domestic Producers – do not have a bulb diameter comparable to the Chinese Producers' garlic. *See* Def.-Ints.' Brief at 11–16, 21–22; Def.-Ints.' Reply Brief at 2, 10.

There is no dispute that the subject Chinese garlic bulbs have a diameter of 50 mm or greater. *See*, *e.g.*, Second Remand Determination at 13; Def.'s Response Brief at 5. Similarly, there is no dispute that not all garlic grown in India's long-day zone states has a bulb diameter of 50 mm or more. *See*, *e.g.*, Second Remand Determination at 32; Pls.' Response Brief at 2. Moreover, in principle, there is no question but that it would be optimal to exclude from Commerce's calculations all data on garlic bulbs with a diameter of less than 50 mm, to render the surrogate value data perfectly "product-specific" to the subject Chinese garlic bulbs. *See*, *e.g.*, Policy Bulletin 04.1 (expressing Commerce preference for data "specific to the input in question"); *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1304 (explaining that "'product specificity' logically must be the foremost consideration in determining 'best available information,'" because – if data is not sufficiently product-specific – it is irrelevant whether data satisfies other criteria set forth in Policy Bulletin 04.1).

[16] The Domestic Producers point out that, contrary to statements in *Jinan Yipin I*, the state of Haryana is considered to be part of India's "long-day zone." *See* Def.-Ints.' Brief at 6 n.9; *id*. at 17 n.35.

However, perfect data is virtually non-existent in the real world. *See generally* Second Remand Determination at 9 ("acknowledg[ing] that all of the surrogate value sources placed on the record to value garlic bulb are imperfect"); *id*. at 20 (same); Def.-Ints.' Brief at 11 (quoting and concurring in the Second Remand Determination's observation); Def.'s Response Brief at 13, 14. Here, after careful consideration, Commerce concluded in its Second Remand Determination that (notwithstanding the Domestic Producers' claims) the evidence simply does not establish that further filtering the Agmarknet data set would in fact render the data more product-specific, and that – based on the existing record – any attempt to further filter the data would be fraught with the potential for distortion. *See* Second Remand Determination at 32, 36.[17] Commerce therefore determined that "the subset of the Agmarknet data that reflects values for Indian domestic garlic grown in the [long-day zone states] is the best available information to value garlic bulb," "results in the most [product-] specific surrogate value," and "is far superior to the other data sources on the record" for use in calculating an appropriate surrogate value. *See id*. at 12, 17, 20.[18] As discussed below, under the circum-

[17] Specifically, Commerce concluded that – because "the record does not contain definitions for the six [categories] of garlic identified in the Agmarknet data" – "further filtering the [long-day zone] dataset to exclude certain [categories], in an attempt to be more accurate, . . . could potentially introduce unintended distortions in the surrogate value calculation." *See* Second Remand Determination at 32; *see also id*. at 36 (rejecting Domestic Producers' argument for further filtering the data set, explaining that "because the Agmarknet data do not provide definitions of the Agmarknet designated [categories of garlic], attempting to filter this dataset further by excluding three of the six [categories], based on unfounded assumptions[,] could lead to unintended distortions in the remaining data").

[18] *See also* Second Remand Determination at 32 (explaining that "of all the potential data sources on the record, the garlic grown in the [long-day zone] states as identified in the Agmarknet data[] . . . reflect[s] the large-bulb garlic most representative of the [Chinese Producers'] sales of garlic," and that "filtering for the [long-day zone] states in the Agmarknet dataset yields the most reliable surrogate value for garlic bulb"); *id*. at 23 (concluding that "the Agmarknet's [long-day zone] data constitute the best available information on the record to value . . . garlic bulb"); *id*. at 14–15 (stating that the Agmarknet data for the long-day zone states "reflect an average as broad as is available for the specific input in question because the values represent an average across the five Indian states that are known for cultivating the larger bulbs of garlic similar to the bulbs of the Chinese garlic producers"); *id*. at 15 (explaining that "[f]iltering the Agmarknet data for the [longday zone] states results in a surrogate value for large-bulbed . . . garlic grown in India, which is more specific to the Chinese garlic bulb"); *id*. at 21 (noting that "Agmarknet's [long-day zone] data are more specific to the [Chinese Producers'] garlic bulb because [the long-day zone] garlic prices are for the majority of India's large-bulbed . . . garlic, which is similar to the garlic produced by the [Chinese Producers]"); *id*. at 10 (stating that "the [Agmarknet] data for [long-day zone] states . . . represent the best available information on the record for valuing garlic bulb to establish dumping margins as accurately as possible"); *id*. at 13 (concluding that "the Agmarknet's [long-day zone] data are the best available information on the record based on contemporaneity, representativeness, and specificity"); *id*. at 19 (noting that "the

stances of this case, that determination was a reasonable one. *See generally* Def.'s Response Brief at 5, 14; Pls.' Response Brief at 1, 6.

The Domestic Producers maintain that, of the six Agmarknet categories of garlic included in the data set used in the Second Remand Determination's calculations, three of those categories – denominated "Desi," "Average," and "Other" – have bulb diameters that are not comparable to the Chinese Producers' garlic and should be excluded from Commerce's surrogate value calculation. *See* Def.-Ints.' Brief at 12–16, 21–22; Def.-Ints.' Reply Brief at 5–8, 10 (reiterating arguments concerning "Desi," "Average," and "Other" categories). In other words, the Domestic Producers contend that the Agmarknet data set for the five long-day zone states used in Commerce's surrogate value calculation should be limited to include only data for the three categories of garlic that Agmarknet denominates as "China," "New Medium," and "Garlic." *See generally* Def.-Ints.' Brief at 11–21 (captioned "The Department Should Rely on Values for 'China,' 'Garlic,' and 'New Medium' Varieties to Calculate a Surrogate Value").[19] Commerce rejected the Domestic Producers' argument, concluding that – contrary to their claims – "the record does not support filtering the data for the undefined Agmarknet designations 'Desi,' 'Average,' and 'Other.'" *See* Second Remand Determination at 32.

In an effort to support their claim that the "Desi," "Average," and "Other" categories of garlic are characterized by small bulb size, the

Agmarknet's [long-day zone] data represent a reliable surrogate value for garlic bulb"); *id*. at 20 (stating that "the Agmarknet data filtered for the [long-day zone] are more specific to the garlic input" at issue).

[19] Language in their Reply Brief suggests that – rather than seeking to limit the data set to the "China," "Garlic," and "New Medium" categories (the relief sought in their opening brief, as most clearly indicated by the caption on page 11 of that brief) – the Domestic Producers instead now favor limiting the data set to data from fewer than five states. *See*, *e.g.*, Def.-Ints.' Reply Brief at 4 (arguing that "[Commerce's] reliance on Agmarknet pricing data for all five of India's long-day states is overbroad," that "[Commerce's] reliance on Agmarknet pricing from all five of the long-day states does not result in the selection of a surrogate that is product-specific," and that "[Commerce's] reliance on Agmarknet pricing data from all five of India's long-day states to calculate a surrogate for input garlic bulbs is overbroad and is not supported by substantial evidence or in accordance with law").

But it is much too late for the Domestic Producers to change their tune (if, in fact, that is what they were trying to do). To the extent that the Domestic Producers now assert claims and seek relief that may differ from what they advocated to Commerce in the course of the remand proceeding, their efforts are quite likely barred by the doctrine of exhaustion of administrative remedies. *See*, *e.g.*, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1380–81 (Fed. Cir. 2013) (holding that doctrine of exhaustion barred party from raising in litigation an argument which was not raised before agency). And, in any event, the Domestic Producers waived any possible right to raise such arguments when they failed to make them in their opening brief in this forum. *See*, *e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319–20 (Fed. Cir. 2006) (explaining, *inter alia*, that it is "well established that arguments not raised in the opening brief are waived"); *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (same).

Domestic Producers argue that the Agmarknet data set used in the Second Remand Determination includes more data points for those three categories than for the other three categories (*i.e.*, "China," "New Medium," and "Garlic") and that the prices for the "Desi," "Average," and "Other" categories are lower than the prices for the "China," "New Medium," and "Garlic" categories. *See* Def.-Ints.' Brief at 14, 16; Def.-Ints.' Reply Brief at 7–8. The Domestic Producers further argue that this is consistent with the Market Research Report, which indicates generally that garlic production in India is dominated by local varieties with smaller bulb sizes and a lower value. *See* Def.-Ints.' Brief at 16; Def.-Ints.' Reply Brief at 6–8. The Domestic Producers maintain that it therefore follows inexorably that the lower-priced categories of garlic reflected in the Agmarknet data, by definition, have a bulb size smaller than the Chinese Producers' garlic at issue here. *See*, *e.g.*, Def.-Ints.' Brief at 16; Def.-Ints.' Reply Brief at 7, 8. However, as noted in *Jinan Yipin I* and quoted in the Second Remand Determination, the implication that "higher price" necessarily "equals[] bigger-bulb" is overly simplistic,[20] and is not alone sufficient to compel Commerce to reach the conclusion that the Domestic Producers urge. *See generally Jinan Yipin I*, 33 CIT at 468, 470–71, 617 F. Supp. 2d at 1297, 1299; *see also* Second Remand Determination at 16, 35; Def.'s Response Brief at 10–11; Pls.' Response Brief at 5–6.[21]

[20] It is axiomatic that correlation does not necessarily imply causation.

[21] The Domestic Producers offer no explanation as to why, for example, the "Average Price" for "Other" category garlic (which the Domestic Producers seek to exclude from Commerce's calculations) so closely approximates the "Average Price" for "Garlic" category garlic (which the Domestic Producers contend is large-bulb garlic and should be included in Commerce's calculations). *See* Def.-Ints.' Response Brief at 12 (table listing "Average Value[s]" of "Other" category garlic as "1,171.35" and "Garlic" category garlic as "1,462.06"); *cf.* Def.-Ints.' Brief at 8 (acknowledging that even the Market Research Report – which was prepared by consultants to the Domestic Producers – does not indicate that larger-sized garlic bulbs uniformly command a higher price than smaller bulbs); *id*. at 7 (same, acknowledging existence of "exception" reflected in "average prices for 16 months from Nov. 2001-Feb. 2003 for sales of each grade at the Azadpur APMC near Delhi").

As Commerce has elsewhere explained, bulb size is not the sole determining factor in valuing garlic. Indeed, the Azadpur APMC Market Information Bulletin indicated that garlic bulbs with a diameter of between 40 mm and 55 mm could be classified as either "grade A" or "grade super-A" (presumably with corresponding differences in price). *See* Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Issues and Decision Memorandum for the Eleventh Administrative Review and New Shipper Reviews (June 11, 2007) at 12 (comment 2); *see also*, *e.g.*, Issues and Decision Memorandum for the Final Results of the 15th Administrative Review of Fresh Garlic from the People's Republic of China (June 20, 2011) at 11 (comment 3) (explaining that, "[d]uring the course of past reviews, it has become clear that *size and quality* are important characteristics of the [fresh garlic] exported from the PRC to the United States") (emphasis added); Fresh Garlic from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 13th Antidumping Duty Administrative and New Shipper Reviews and Rescission, In

The Domestic Producers also cite certain evidence which they claim proves that the "Desi" category of garlic is limited to local varieties with a smaller bulb size and a lower value. The Domestic Producers note that the Issues and Decision Memorandum that accompanied the Final Results in this matter states that "[t]he term 'Desi' is a general term referring to the Indian subcontinent. Thus, 'Desi' garlic refers to a variety of garlic which, as the respondents have argued, may be more pungent than Chinese varieties, *but is also mostly smaller in size*." *See* Def.-Ints.' Brief at 14–15 (*quoting* Issues and Decision Memorandum at 44 (emphasis added by Domestic Producers))[22]; *see also* Def.-Ints.' Reply Brief at 5–6. *But see* Def.'s Response Brief at 9–10, 11. Similarly, in the course of the most recent remand, the Domestic Producers placed on the administrative record an entry from the Oxford Dictionary defining the term "desi" to mean "local" or "indigenous." *See* Def.-Ints.' Brief at 15 & n.28; Def.-Ints.' Reply Brief at 5, 8. *But see* Def.'s Response Brief at 9–10, 11; Second Remand Determination at 33.

But the evidence that the Domestic Producers cite is not nearly as potent as they suggest. The meaning of "desi" in common parlance is not at issue. The open question is the precise definition of the term as it is used by Agmarknet to categorize garlic.[23] As the Second Remand

Part, [of] the Antidumping Duty Administrative and New Shipper Reviews (June 8, 2009) at 15 (comment 2) (stating that, in addition to "the size of a garlic bulb," factors that "noticeably influence price" include the "number of cloves" as well as "possibly . . . a specialty garlic variety (single bulb garlic)"); *cf.* Issues and Decision Memorandum for the Final Results of the 12th Administrative Review: Fresh Garlic from the People's Republic of China ("PRC") (June 9, 2008) at 19 (comment 2) (stating that "size is not the only characteristic that should be considered in selecting the appropriate surrogate value" for garlic bulbs).

[22] In their brief, the Domestic Producers actually misquote the Issues and Decision Memorandum, critically omitting the qualifying term "mostly" (with no ellipses or other indication that the quotation had been altered). *Compare* Def.-Ints.' Brief at 14–15 (asserting that Issues and Decision Memorandum states that "'Desi' garlic refers to a variety of garlic which . . . may be more pungent than Chinese varieties, *but is also smaller in size*") (omitting the word "mostly") *and* Issues and Decision Memorandum at 44 (stating that "'Desi' garlic refers to a variety of garlic which . . . may be more pungent than Chinese varieties, but is also *mostly* smaller in size") (emphasis added)).

Properly quoted, the Issues and Decision Memorandum thus does not support the Domestic Producers' assertion that garlic categorized as "Desi" is – uniformly, and by definition – smaller than the Chinese Producers' garlic here.

[23] Contrary to the Domestic Producers' implications, the names of the Agmarknet categories do not appear to be particularly descriptive. It may be tempting, at first blush, to attribute significance to the category titles "China" (which the Domestic Producers agree should be included in Commerce's calculations) and "Desi" (which the Domestic Producers contend should be excluded). But what of the titles of the other four Agmarknet categories at issue – *i.e.*, the "Average" and "Other" categories (which the Domestic Producers maintain should be excluded) and the "New Medium" and – the least illuminating – "Garlic" categories (both of which the Domestic Producers agree should be included in Commerce's calculations). There is nothing inherent in the title "Average" to suggest that garlic so categorized is

Determination explains, there is simply no evidence that speaks to how the Agmarknet database itself defines "Desi" as the term is used to denominate one of the six categories of garlic at issue. The record is devoid of any evidence documenting the physical characteristics of the garlic that Agmarknet categorizes as "Desi." *See* Second Remand Determination at 16, 32, 33, 36.[24]

The Domestic Producers' claim concerning the definition of "Desi" (disposed of above) is the linchpin for the Domestic Producers' next argument, which seeks to exclude from Commerce's surrogate value calculations the data concerning the "Average" and "Other" categories of garlic. Beginning from the premise that garlic categorized by Agmarknet as "Desi" garlic is "local" and "indigenous" and thus has smaller-sized bulbs (*i.e.*, the proposition addressed immediately above), the Domestic Producers argue that – "because the volume and value for Desi variety transactions are similar to those reported for the 'Average' and 'Other' varieties, and because . . . smaller-sized garlic bulbs in India are sold at lower prices than larger-sized bulbs" – "the only reasonable conclusion" that Commerce could possibly have drawn is that "the transactions involving 'Average' and 'Other' varieties are comparable to the transactions involving the local, indigenous, small-sized Desi variety garlic bulbs." *See* Def.-Ints.' Brief at 15–16; Def.-Ints.' Reply Brief at 7. *But see* Second Remand Determination at 34–36; Def.'s Response Brief at 9–10.

The Domestic Producers significantly overstate their case. To the extent that this argument is predicated on, and analogizes from, the Domestic Producers' assertions concerning the characteristics of garlic categorized by Agmarknet as "Desi," this argument too must fail. Again, as the Second Remand Determination explains, there is no record evidence documenting the characteristics of any of the six Agmarknet categories of garlic at issue, including not only the "Desi" category, but also "Average" and "Other," as well as "China," New Medium," and "Garlic." *See* Second Remand Determination at 16, 32, 33, 34, 36.

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smaller than garlic categorized as "New Medium," which is what the Domestic Producers contend. And is garlic categorized simply as "Garlic" larger or smaller than "Other" garlic? (According to the Domestic Producers, garlic of the "Garlic" category is large-bulb garlic, and "Other" garlic is not.) In short, on the basis of the existing record, it would be folly to read much into the titles of the various Agmarknet categories of garlic. What is missing from the record – what the Domestic Producers lack – is evidence documenting the distinguishing physical characteristics of each of the six categories.

[24] Notably, the Domestic Producers make no attempt to hazard an explanation differentiating garlic categorized as "Desi" from the garlic classified in other categories, including "Average" and "Other." In other words, the Domestic Producers offer no explanation as to how, for example, garlic that is categorized by Agmarknet as "Average" or "Other" differs from that which is categorized as "Desi." In fact, the Domestic Producers do not even make any specific claim as to the defining physical characteristics of the "Desi" category.

The gravamen of the Domestic Producers' remaining arguments is that the Agmarknet data for garlic categorized as "China" garlic should be included in Commerce's calculation of a surrogate value for raw garlic bulbs. *See generally* Def.-Ints.' Brief at 16–21.[25] There is no need to discuss these arguments in any detail,[26] because the data set used in the Second Remand Determination includes the "China" data (in addition to the five other specific categories of garlic included in the Agmarknet data base for India's five long-day zone states). *See* Second Remand Determination at 31.[27]

Jinan Yipin II explicitly stated that nothing in *Jinan Yipin I* precluded Commerce from relying on the Agmarknet database, provided that Commerce adequately justified its selection of the specific data that it used. *See Jinan Yipin II*, 35 CIT at ____ n.57, 800 F. Supp. 2d at 1272 n.57. Accordingly, in its Second Remand Determination, Commerce has explained that – rather than confining its data set to the "China" category (as it did in the Final Results) – the agency has calculated surrogate value using the Agmarknet data on all six specific categories of garlic reported for India's five long-day zone states, including the "China" category. No party has objected to Commerce's inclusion of the data for "China" category garlic in the agency's calculations. The Domestic Producers therefore prevail on their claim that the "China" category data is properly included in the Second Remand Determination's surrogate value calculations.

In sum, Commerce's calculation of a surrogate value for raw garlic bulbs using Agmarknet data for the six categories of garlic reported for India's five long-day zone states must be sustained. To be sure, the Domestic Producers' challenges to the specificity of those data are not

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[25] The Domestic Producers note that, contrary to a statement in *Jinan Yipin I*, "China" category garlic is grown in more than one long-day zone state. *See* Def.-Ints.' Brief at 17 n.35.

[26] *See generally* Second Remand Determination at 9, 16–17 (addressing, *inter alia*, Domestic Producers' submission of documents concerning use of term "China" by Indian tea industry in attempt to prove meaning of term as used in garlic industry, and dismissing the claim as "speculative"); Def.'s Response Brief at 10, 12 (same); Pls.' Response Brief at 5 (characterizing as "speculative" the Domestic Producers' claims based on tea industry usage of the term "China," and arguing that Agmarknet's "China" category likely "reflects prices for garlic that was actually *imported from China* and is now being sold in an Indian wholesale market").

[27] Significantly, the Domestic Producers do not now contend that Commerce should base its surrogate value calculation on the "China" category data alone. *See*, *e.g.*, Def.-Ints.' Brief at 11–21 (captioned "The Department Should Rely on Values for 'China,' 'Garlic,' and 'New Medium' Varieties to Calculate a Surrogate Value"). To the extent that the Domestic Producers argued in the course of the most recent remand proceeding that the agency should use only the data for the Agmarknet "China" category garlic, that claim has since been abandoned. *See* Second Remand Determination at 9 (noting that Domestic Producers "advocate relying on the 'China' variety subset of Agmarknet data"); *id*. at 22 (same).

wholly lacking in substance. Had Commerce made the extrapolations that the Domestic Producers advocate and drawn the inferences that the Domestic Producers urge – and thus excluded from the agency's surrogate value calculations the Agmarknet data for garlic categorized as "Desi," "Average," and "Other" – it is possible that the agency's determination might have been sustained. But an agency determination cannot be overturned merely because the agency could have reached the opposite result based on the same record. *See generally* Def.'s Response Brief at 13 (noting that "a reasonable mind could decline to draw the inferences [that the Domestic Producers] urged Commerce to draw in this case").

The evidence that the Domestic Producers cite is neither so clear nor so strong as to *require* Commerce to reach a result other than that which the agency reached here. As discussed above, "[t]he process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise." *Shakeproof*, 268 F.3d at 1381. As the "master of antidumping law," Commerce is entitled to "wide discretion in the valuation of factors of production," in recognition of the agency's "special expertise." *See id*. (internal quotation marks and citation omitted); *Thai Pineapple*, 187 F.3d at 1365.

Moreover, as the Government underscores, it is the parties to a proceeding that bear the burden of building an adequate record. *See* Def.'s Response Brief at 13–14 (*citing QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). In the instant case, the parties had multiple opportunities to augment the record with relevant information, even as late as the most recent remand proceeding before the agency. The Domestic Producers have proffered no evidence to directly and definitively establish the specific characteristics of the "Desi," "Average," and "Other" categories of garlic as those terms are used in the Agmarknet database. Particularly in the absence of such evidence, and in light of all other circumstances, Commerce's concerns that – on this record – any further "filtering" of the data set could potentially distort the agency's surrogate value calculation cannot be said to be unreasonable. *See* Second Remand Determination at 32, 36. Nor is the Second Remand Determination's calculation of a surrogate value for raw garlic bulbs unsupported by substantial evidence. The Domestic Producers' arguments to the contrary therefore must fail.

B. *Surrogate Value for Labor*

The antidumping statute provides that, in non-market economy cases such as this, the surrogate data used to calculate the value of

factors of production must, to the extent possible, come from market economy countries that are at "a level of economic development comparable to that of the nonmarket economy country" at issue – in this case, China. *See* 19 U.S.C. § 1677b(c)(4)(A). The antidumping statute further provides that, in such cases, the surrogate data must, to the extent possible, come from market economy countries that are "significant producers of comparable merchandise." *See* 19 U.S.C. § 1677b(c)(4)(B).

For most factors of production, Commerce typically uses values from a single market economy country (known as the "surrogate country" – here, India) that Commerce has determined to be both (a) economically comparable to the non-market economy country in question and (b) a significant producer of the goods at issue. *See* 19 C.F.R. § 351.408(c)(2). However, as *Jinan Yipin I* and *Jinan Yipin II* explained, Commerce in the past treated the cost of labor quite differently than other factors of production. *See Jinan Yipin I*, 33 CIT at 474, 617 F. Supp. 2d at 1301–02; *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1274; *see generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010).

Concerned about "wide variances in wage rates between comparable economies," Commerce historically valued the cost of labor in a non-market economy ("NME") country case by using a regression-based wage rate "reflective of the observed relationship between wages and national income in a variety of market economy countries." *See Jinan Yipin I*, 33 CIT at 474–75, 617 F. Supp. 2d at 1302 (internal quotation marks and citations omitted). Thus, in the past, "unlike its valuation of other factors of production in an NME case, Commerce [has based] its surrogate wage rate on data from a broad 'basket' of countries, and [has] not limit[ed] itself to market economy countries at a level of economic development comparable to the NME country in question." *See id*., 33 CIT at 475, 617 F. Supp. 2d at 1302.

In the Final Results in this case, Commerce calculated the Chinese Producers' labor costs using the agency's standard regression-based wage rate calculation methodology, as set forth in the agency's regulations. *See Jinan Yipin I*, 33 CIT at 475–76, 617 F. Supp. 2d at 1302–03; 19 C.F.R. § 351.408(c)(3). Using that methodology, the agency calculated a surrogate wage rate of $0.97/hour in the Final Results. *See Jinan Yipin I*, 33 CIT at 476, 617 F. Supp. 2d at 1303.

Relying heavily on *Allied Pacific* (which held Commerce's regulation to be inconsistent with the statute), *Jinan Yipin I* remanded the issue of the surrogate value for labor to Commerce for further consideration. *See Jinan Yipin I*, 33 CIT at 458, 473–80, 514–15, 617 F.

Supp. 2d at 1289, 1301–07, 1334; *Allied Pacific Food (Dalian) Co. v. United States*, 32 CIT 1328, 1351–65, 587 F. Supp. 2d 1330, 1351–61 (2008). On remand, Commerce nevertheless continued to use a regression-based methodology, albeit one that was slightly revised. *See generally* First Remand Determination at 15–38, 59–68. The resulting calculation produced a surrogate wage rate of $0.80/hour for China. *See id*. at 68; *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1275.

In the meantime, however, the Court of Appeals handed down its decision in *Dorbest*, striking down Commerce's regulation as inconsistent with the plain language of the statute. *See generally Dorbest*, 604 F.3d at 1366, 1369–73. The Court of Appeals concluded that the agency's regulation "improperly require[d] using data from both economically comparable and economically dissimilar countries, and . . . improperly use[d] data from both countries that produce comparable merchandise and countries that do not." *See id*., 604 F.3d at 1372 (discussing 19 C.F.R. § 351.408(c)(3)). The Government therefore sought a voluntary remand in this action to allow Commerce to recalculate the surrogate value for labor expenses in a manner consistent with *Dorbest*, which *Jinan Yipin II* granted. *See generally Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1274–76.

In the course of the most recent remand, Commerce reconsidered its approach to the calculation of surrogate values for labor expenses, in light of the Court of Appeals' decision in *Dorbest*, as well as the decision in *Shandong Rongxin*. *See generally* Second Remand Determination at 24–31; *Dorbest*, 604 F.3d at 1369–73; *Shandong Rongxin Import & Export Co. v. United States*, 35 CIT ____, ____, 774 F. Supp. 2d 1307, 1315–16 (2011); Def.'s Response Brief at 15 (advising that "[c]onsistent with *Dorbest* . . . , Commerce no longer is relying upon its regression-based methodology for wage rates"). Concluding that "relying on multiple countries to calculate the wage rate is no longer the best approach," Commerce altered its methodology, to rely on industry-specific labor cost data from the primary surrogate country – in this case, India. *See* Second Remand Determination at 26; Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 Fed. Reg. 36,092 (June 21, 2011); *see also* Def.'s Response Brief at 15 (explaining that, in Second Remand Determination, "pursuant to [its new methodology], Commerce valued labor by using industry-specific data from India"). As the Second Remand Determination observes, such an approach "is fully consistent with how [Commerce] values all other

[factors of production], and results in the use of a uniform basis for [factor of production] valuation – a single surrogate country." Second Remand Determination at 26.

For purposes of the Second Remand Determination here, Commerce relied on 2004 data (as reported in a 2005 publication of the International Labour Organization ("ILO")), because those data were "the most contemporaneous data that were available" between November 1, 2003 and May 4, 2006 – *i.e.*, "during the conduct of the underlying administrative review." *See* Second Remand Determination at 26–27 (explaining, *inter alia*, that, on remand, agency used labor cost data for India "reported in the ILO Chapter 6A data").

Specifically, Commerce selected "the industry-specific Indian data provided under Sub-Classification 15 'Manufacture of food products and beverages' of the International Standard Industrial Classification – Revision 3-D standard." *See* Second Remand Determination at 27. Based on those data, the Second Remand Determination calculated a revised labor rate of 24.50 rupees per hour. *Id*.

As noted above, neither the Chinese Producers nor the Domestic Producers have objected to Commerce's revised wage rate calculation as set forth in the Second Remand Determination. *See* Def.'s Response Brief at 15 (noting that "[n]o party objects to the Second Remand Results with respect to Commerce's valuation of labor expenses," and urging that "the Court should sustain Commerce's Second Remand Results" on the issue); *id*. at 2 (same); *see also* Def.-Ints.' Brief (offering no comments on any issue other than valuation of raw garlic bulbs); Def.-Ints.' Reply Brief (same); Pls.' Response Brief (same). Commerce's determination on this issue is accordingly sustained.

C. *Surrogate Value for Cardboard Packing Cartons*

In the Final Results in this case, Commerce valued the cardboard cartons that are used to pack and ship garlic based on Indian import statistics taken from the World Trade Atlas [28] for the Indian tariff subheading 4819.1010, which covers, among other things, cartons, boxes, and cases made of corrugated paper and paperboard (which were formerly covered by subheading 4819.1001). *See Jinan Yipin I*, 33 CIT at 488, 617 F. Supp. 2d at 1312–13; *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1307. In so doing, the Final Results rejected the other alternative source of data on the record – specifically, four

[28] The World Trade Atlas is "a database of commodities using all levels of the Harmonized Tariff Schedule," which "enables users to determine the value of a specific product and identify countries to or from which the product is being exported or imported." *See Jinan Yipin I*, 33 CIT at 467 n.20, 617 F. Supp. 2d at 1296 n.20 (internal quotation marks and citation omitted).

domestic Indian price quotes submitted by the Chinese Producers, which predate the period of review by several months and were obtained from four different Indian box vendors in four different cities, for basic cardboard packing cartons virtually identical to those that the Chinese Producers actually used. *See Jinan Yipin I*, 33 CIT at 488, 498, 617 F. Supp. 2d at 1312, 1321; *Jinan Yipin II*, 35 CIT at ____, ____, ____ & n.102, 800 F. Supp. 2d at 1307, 1308, 1310–11 & n.102.[29] The Final Results rejected the domestic price quotes because they are not considered "publicly available information." *See Jinan Yipin I*, 33 CIT at 489, 617 F. Supp. 2d at 1313; *Jinan Yipin II*, 35 CIT at ____, ____, 800 F. Supp. 2d at 1307–08, 1309; Policy Bulletin 04.1.[30]

As *Jinan Yipin I* observed, however, the Final Results significantly "overstated any potential concerns as to the reliability of the domestic Indian box prices that the agency rejected, . . . [and] significantly understated the patent flaws and defects in the Indian import statistics on which the agency relied." *Jinan Yipin I*, 33 CIT at 498, 617 F. Supp. 2d at 1321 (emphases omitted). Detailing the numerous problems with Commerce's calculus, *Jinan Yipin I* remanded the issue to the agency for further consideration. *See generally id*., 33 CIT at 487–98, 617 F. Supp. 2d at 131221; *see also Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1307–09.

Commerce's First Remand Determination was "wholly unresponsive" to *Jinan Yipin I* on the issue of the use of Indian import statistics *versus* domestic price quotes for purposes of calculating the surrogate value for cardboard packing cartons. *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1309; *see generally id*., 35 CIT at ____, 800 F. Supp. 2d at 1307–15. As *Jinan Yipin II* summed up the situation, the First Remand Determination "add[ed] little or nothing to the record on the issue of Commerce's concerns about the 'public

[29] The price quotes for cardboard packing cartons on the record of this tenth administrative review are the same price quotes that are on the record of the ninth administrative review. *See Jinan Yipin II*, 35 CIT at ____ & n.102, 800 F. Supp. 2d at 1310–11 & n.102 (explaining that four price quotes for cardboard packing cartons on record of tenth administrative review "are dated either June 19, 2003 or June 20, 2003"); *Taian Ziyang III*, 37 CIT at ____, 918 F. Supp. 2d at 1358 (noting that record in ninth administrative review includes "four domestic Indian price quotes . . . which were obtained within the period of review (and within one week of one another) from four different Indian box vendors in four different cities"); *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1321 (noting that four price quotes for cardboard packing cartons on record of ninth administrative review are "dated within two days of one another").

[30] The sole concern that the Final Results raised as to the price quotes for cardboard packing cartons was the issue of "public availability." Only in the First Remand Determination did Commerce – for the first time – raise concerns about the "contemporaneity" and "representativeness" of the price quotes. As *Jinan Yipin II* noted, however, no party objected to Commerce's failure to raise those concerns earlier. *Jinan Yipin II*, 35 CIT at ____ & n.99, ____, 800 F. Supp. 2d at 1309 & n.99, 1310–11.

availability' of the domestic price quotes and the potential for 'manipulation' – the sole basis cited in the Final Results for Commerce's decision to reject the price quotes in favor of the Indian import statistics," and instead added "'contemporaneity' and 'representativeness' to Commerce's list of grounds for rejecting the price quotes." *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1309. Commerce yet again sought to exaggerate the alleged shortcomings of the domestic price quotes, while simultaneously ignoring the obvious (and admitted) problems inherent in the Indian import statistics on which the agency continued to rely. *See generally id*., 35 CIT at ____, 800 F. Supp. 2d at 1309–15.

Noting that Commerce had seemingly chosen "*admittedly distorted* Indian import statistics over *potentially 'perfect'* price quotes," *Jinan Yipin II* held that the First Remand Determination failed to adequately explain and justify by reference to substantial record evidence the agency's determination that the Indian import statistics constituted the "best available information" for use in calculating the surrogate value of basic cardboard packing cartons, in light of the acknowledged infirmities in the import statistics. *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1315; *see generally id*., 35 CIT at ____, 800 F. Supp. 2d at 1309–15. In particular, *Jinan Yipin II* stated that "[Commerce's] conclusions that the Indian import statistics [– as compared to the domestic price quotes –] are 'sufficiently specific' and constitute the 'best available information' for use in valuing cardboard cartons" were "unexplained," "not rational," and "lack[ed] any sound basis in the administrative record," and therefore could not be sustained. *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1315. The issue was therefore remanded once again, and the agency was cautioned not to simply recycle its earlier arguments, because "no further remands [were] likely." *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1315.[31]

Commerce's Second Remand Determination followed. In the Second Remand Determination, as a surrogate value for cardboard packing cartons, Commerce relied on the four domestic price quotes on the record, implicitly adopting the fundamental reasoning of *Jinan Yipin*

[31] Among other things, *Jinan Yipin II* instructed Commerce to reopen the administrative record on remand, to allow the submission of further "evidence concerning the domestic price quotes and the Indian import statistics (as well as alternative sets of data, if any, that may be appropriate)." *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1315; *see also id*., 35 CIT at ____, 800 F. Supp. 2d at 1307 (directing agency to reopen record on plastic jars and lids). It is, however, undisputed that Commerce did not reopen the record on either issue. *See* Second Remand Determination at 24 (stating that "rather than reopen the record, [Commerce] has determined, under protest, to use the price quote[s]").

II (and, in turn, *Jinan Yipin I*). The Second Remand Determination states:

> The Court found [in *Jinan Yipin II*] that Commerce had chosen "*admittedly distorted* Indian import statistics over *potentially* '*perfect* ' price quotes." While [Commerce] disagrees with this conclusion, [Commerce] is cognizant of the Court's admonition that the [agency] is not likely to "get another bite of the apple on this issue." . . . .
>
> . . . .
>
> Accordingly, . . . [Commerce] has determined, under protest, to use the price quote surrogate values provided on the record by the plaintiffs during the underlying proceeding for this final remand redetermination. Using these price quotes, the surrogate value for cardboard cartons is 32.3750 Rupees per box . . . .

Second Remand Determination at 23–24 (footnotes omitted); *see also id*. at 1 (stating that Commerce "has applied, under protest, the price quotes on the record of the underlying review as surrogates to value . . . cardboard cartons")[32]; *cf*. Defendant's Response to Comments Regarding Redetermination Pursuant to Court Remand at 9–11

[32] The quoted language from the Second Remand Determination – particularly the phrase "under protest" – can be read as suggesting that *Jinan Yipin II* imposed an outcome or result on Commerce, and ordered the agency to use the domestic price quotes in valuing cardboard packing cartons for purposes of the Second Remand Determination. Nothing could be further from the truth. *See*, *e.g.*, *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1310 (suggesting action on remand "to seek information to clarify the accuracy of the domestic price quotes, in order to address the agency's concerns about potential 'manipulation'" of price quotes); *see also id*., 35 CIT at ____, 800 F. Supp. 2d at 1311–12 (same); *id*., 35 CIT at ____, 800 F. Supp. 2d at 1311–12 (suggesting action on remand to seek information concerning the volatility of prices for cardboard packing cartons in India); *id*., 35 CIT at ____, 800 F. Supp. 2d at 1313 (suggesting action on remand to ascertain extent of distortion attributable to inclusion in import statistics of "specialty" and "gift" boxes unlike basic cardboard packing cartons); *id*., 35 CIT at ____, 800 F. Supp. 2d at 1313–14 (suggesting action on remand "to determine the volume of merchandise reflected in the Indian import statistics that was imported by air, or to otherwise demonstrate that the values reflected in the Indian import statistics are not significantly inflated by the inclusion of air freight costs"); *cf*. *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1331 (in context of companion case challenging agency determinations in administrative review immediately preceding review at issue here, suggesting that, on remand, Commerce address the "serious unanswered questions about the extent to which the import statistics are distorted by the inclusion of gift and speciality boxes . . . and about the extent to which the import statistics are distorted by the inclusion of charges for air freight"; suggesting that Commerce also consider obtaining evidence concerning the accuracy of the price quotes); *id*., 35 CIT at ____ n.43, 783 F. Supp. 2d at 1332 n.43 (in context of companion case challenging agency determinations in administrative review immediately preceding review at issue here, noting that "[i]f Commerce could establish on remand that the inclusion of the more

(April 20, 2012), *filed in Taian Ziyang Food Co. v. United States*, Court No. 05–00399 (in companion case contesting Commerce's determinations in administrative review immediately preceding review at issue in this action, which included parallel challenge to agency's reliance on import statistics *versus* price quotes in surrogate valuation of cardboard packing cartons, agency ultimately decided to rely on price quotes (as the agency has done here), explaining that "the Remand Results are consistent with the Court's holding" in *Taian Ziyang II*, and that "[i]n light of the Court's concerns about the import statistics, . . . Commerce reasonably adopted plaintiffs' approach and used the domestic price quotes").

As summarized below, and as set forth at length and in exhaustive detail in *Jinan Yipin I* and *Jinan Yipin II*, the record evidence – viewed through the lens of Commerce's criteria in Policy Bulletin 04.1 – weighs solidly in favor of the price quotes. *See Jinan Yipin I*, 33 CIT at 487–98, 617 F. Supp. 2d at 1312–21 (analyzing merits of domestic price quotes *versus* Indian import statistics for valuation of cardboard packing cartons); *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1307–15 (same); section III, *supra* (in the introductory text, discussing criteria established in Policy Bulletin 04.1, including "product specificity," "contemporaneity," "representativeness," and "public availability," in addition to whether prices are "net of taxes and import duties").

As *Jinan Yipin II* explained, of the five criteria set forth in Policy Bulletin 04.1, "product specificity" logically must be the most

expensive products and the air freight charges have no significant distortive effect on the Indian import statistics, it might be possible to sustain the agency's determination that the import statistics constitute the 'best available information'").

In short, in the course of the second remand, Commerce here was free to use either the import statistics or the price quotes (or even some other data), provided that the agency properly articulated its rationale and supported its determination with substantial evidence. *See*, *e.g.*, *Tung Mung Development Co. v. United States*, 354 F.3d 1371, 1379 (Fed. Cir. 2004) (noting that "the Court of International Trade's remand orders did not compel Commerce to adopt a new policy," where agency was free to "either explain its deviation from 'prior practice' or 'apply a combination rate, consistent with its prior practice'").

The quoted language from the Second Remand Determination also reflects a fundamental flaw in logic. In the excerpt, Commerce first acknowledges that *Jinan Yipin II* cautioned that a *third remand* was unlikely; but then – rather than putting the *second remand* to good use through further analysis and/or eliciting additional evidence for the record – Commerce elected to adopt the domestic price quotes (in lieu of the Indian import statistics). *See* Second Remand Determination at 23–24. This is classic *non sequitur*. As a matter of logic, there is nothing about the low probability of a *third remand* that counsels a litigant not to avail himself of a *second remand* ; indeed, one would reasonably expect the opposite. In other words, one would reasonably expect that a litigant who understands that he may have just "one *last* shot" to give it his "*best* shot."

important. *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1304.[33] And it is undisputed that, as discussed in *Jinan Yipin I* and *Jinan Yipin II*, the four domestic price quotes on the record of this proceeding are highly "specific to the input in question" – that is, the cardboard packing cartons actually used by the Chinese Producers. *See Jinan Yipin I*, 33 CIT at 488, 498, 617 F. Supp. 2d at 1312, 1321; *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1307–08.

Moreover, although the four domestic price quotes are not "contemporaneous" within the meaning of Policy Bulletin 04.1, the price quotes are just a few months outside the period of review. *See Jinan Yipin II*, 35 CIT at ____ & n.102, 800 F. Supp. 2d at 1310–11 & n.102.[34] And, as *Jinan Yipin II* explained (and as the First Remand Determination itself conceded), contemporaneity is not necessarily a critical factor. *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1311 (and authorities cited there). Thus, for example, as discussed immediately below, absent concrete evidence (or even some credible basis to suggest) that prices for basic cardboard packing cartons fluctuate to any significant degree over relatively brief periods of time, the contemporaneity (like the "representativeness") of the price quotes is of little moment.[35]

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[33] To underscore the necessary primacy of "product specificity," *Jinan Yipin II* took the point to its logical extreme vis-a-vis the surrogate valuation of plastic jar and lids:

> To illustrate . . . , Commerce here could not reasonably base its surrogate value for basic plastic jars on Indian import statistics for umbrellas (for instance), even if those import statistics – in the words of Policy Bulletin 04.1 – unquestionably reflected "review period-wide price averages" and were indisputably "publicly available data" that were fully "contemporaneous with the period of . . . review" and "net of taxes and import duties." Commerce could not do so because, even if the Indian import statistics for umbrellas were perfect in every other way, the import statistics would not be sufficiently "product specific."

Jinan Yipin II, 35 CIT at ____, 800 F. Supp. 2d at 1304 (footnote omitted); *see also Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1330 (in challenge to administrative review immediately preceding review at issue here, similarly observing that Commerce could not base surrogate value for cardboard packing cartons on import statistics for fishing rods, even if those import statistics were otherwise perfect, because import statistics would not be sufficiently "product specific"). If a set of data is not sufficiently "product specific," it is of no import whether or not the data satisfy the other criteria set forth in Policy Bulletin 04.1. *See*, *e.g.*, *Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264, 1273–74 (2005) (explaining that, where agency failed to demonstrate that import statistics were sufficiently "product specific," it was irrelevant whether statistics satisfied other criteria).

[34] Although there was some confusion concerning the contemporaneity of the domestic price quotes, the record establishes that all four quotes predate the period of review by roughly four and one-half months. *See Jinan Yipin II*, 35 CIT at ____ & nn.102–03, 800 F. Supp. 2d at 1310–11 & nn.102–03.

[35] *Jinan Yipin II* highlighted the fact that – although Commerce raised concerns about the contemporaneity and representativeness for the first time in the course of the first remand – Commerce nevertheless "took no action . . . to seek information to resolve its newly-

Like "contemporaneity," Commerce's "representativeness" criterion relates to the timing of price information. In contrast to the contemporaneity criterion (which concerns whether the price information is from within the review period at issue), the focus of the representativeness criterion is on whether the price information reflects "review period-wide price averages," rather than prices for a more limited period of time. *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1311–12; *id*., 35 CIT at ____, 800 F. Supp. 2d at 1292–94 (explaining "representativeness," in context of surrogate valuation of plastic jars and lids).[36] Commerce's concern about price quotes for a more limited period of time – like the four price quotes at issue here, all of which are dated either on one day or the very next – is the possibility that the pricing information may not accurately reflect prices throughout the period of review, due to "temporary market fluctuations." *Id*., 35 CIT at ____ & n.102, 800 F. Supp. 2d at 1311–12 & n.102 (noting that representativeness reflects concern about potential "temporary market fluctuations," and specifying dates of price quotes for cardboard packing cartons). However, as *Jinan Yipin II* noted, the administrative record in this proceeding is barren of any evidence whatsoever that might suggest that prices for cardboard packing cartons are subject to any significant volatility. *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1311–12.[37]

identified concerns . . . , by (for example) attempting to clarify whether or not the price of basic cardboard packing cartons in India in fact does fluctuate significantly over relatively brief periods of time (or, more specifically, whether it did so during the period of review, and in the four or five months thereafter), or even the extent to which prices have historically fluctuated over time." *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1311–12.

And it is telling that, as discussed below, although the Domestic Producers placed the Indian import statistics on the record of this proceeding, the Domestic Producers have never affirmatively claimed that the domestic price quotes do not accurately reflect the actual, correct price of cardboard packing cartons throughout the period of review. *See Jinan Yipin II*, 35 CIT at ____ n.101, 800 F. Supp. 2d at 1310 n.101. Moreover, even if the record evidence did establish that prices were subject to some degree of fluctuation, the record is devoid of analysis to indicate that any such price fluctuation would justify resort to the Indian import statistics (in light of the admitted flaws in the import data). It might also be possible to adjust the price quotes to be contemporaneous, using a methodology comparable to that which Commerce used to deflate certain data for use in valuing raw garlic bulbs in the First Remand Determination. *See id*., 35 CIT at ____ n.104, 800 F. Supp. 2d at 1311 n.104.

[36] As *Jinan Yipin II* emphasized, "Commerce's 'contemporaneity' and 'representativeness' criteria have no inherent value in and of themselves. . . . [P]rice data that are not contemporaneous and/or are not representative [– as Commerce uses those terms –] are by no means *per se* inaccurate. The ultimate question to be determined is: Do the price data accurately reflect prices throughout the period of review (whether or not those data are 'contemporaneous' and 'representative,' as Commerce defines those terms)?" *Jinan Yipin II*, 35 CIT at ____ n.76, 800 F. Supp. 2d at 1292 n.76.

[37] As *Jinan Yipin II* noted, the suggestion that prices for cardboard packing cartons are subject to any significant fluctuation does not necessarily comport with common sense.

The record is equally definitive on "public availability." As *Jinan Yipin I* observed, there is room for debate as to the precise meaning of "public availability." *See generally Jinan Yipin I*, 33 CIT at 489–91, 617 F. Supp. 2d at 1313–15.[38] But there is no question that the focus of Commerce's concern about information that is not publicly available is the potential for manipulation. *See Jinan Yipin II*, 35 CIT at ____, ____, ____, 800 F. Supp. 2d at 1287, 1307–08, 1310; *Jinan Yipin I*, 33 CIT at 489–90, 617 F. Supp. 2d at 1313–14. And it is undisputed that there is not even a scintilla of evidence on the record here to suggest that the four price quotes are in any way the product of manipulation or distortion, or are tainted by collusion. No evidence whatsoever. *See Jinan Yipin II*, 35 CIT at ____, ____, ____, 800 F.

Jinan Yipin II, 35 CIT at ____, 800 F. Supp. 2d at 1311–12 (emphasizing, *inter alia*, that "[i]t is not clear why the price of basic cardboard packing cartons would be subject to any significant fluctuation"); *see also Taian Ziyang III*, 37 CIT at ____ & n.23, 918 F. Supp. 2d at 1366–67 & n.23 (in companion case challenging agency determinations in administrative review immediately preceding review at issue here, analyzing "representativeness" of domestic price quotes for cardboard packing cartons, and observing, *inter alia*, that "it is not at all obvious why the price of basic cardboard packing cartons would be subject to appreciable fluctuation over the course of a single year (*i.e.*, the period of review)").

Jinan Yipin II similarly challenged Commerce's unsupported, broadbrush claims of volatility in prices for plastic jars and lids:

> [I]t seems reasonable to assume that some commodities (or factors of production) fluctuate in price, seasonally and/or in response to established market forces such as supply and demand. It is common knowledge, for example, that agricultural produce prices generally tend to fluctuate based on seasonal availability, and that mineral prices may fluctuate in accordance with supply and demand. On the other hand, it is not at all obvious why the price of basic plastic jars and lids would be subject to appreciable fluctuation over the course of a single year (*i.e.*, the period of review). And, contrary to Commerce's assertions . . . , it is certainly not obvious why the price of basic plastic jars and lids would be "*highly* susceptible" to fluctuation.

Jinan Yipin II, 35 CIT at ____, 800 F. Supp. 2d at 1294; *see generally id*., 35 CIT at ____, 800 F. Supp. 2d at 1293–95 (questioning reasonableness of Commerce's claims of volatility in prices for plastic jars and lids). That rationale would seem to hold equal force for prices for basic cardboard packing cartons and prices for basic plastic jars and lids.

[38] *See also Jinan Yipin II*, 35 CIT at ____ & nn.74–75, 800 F. Supp. 2d at 1287–91 & nn.74–75 (characterizing Commerce's approach to public availability as "fluid"; analyzing, *inter alia*, agency determinations involving price quotes and findings concerning "public availability" criterion, and observing, *inter alia*, that "Commerce's determination as to whether information is 'publicly available' is necessarily somewhat fact-specific," but also "occasionally arbitrary and even result-oriented," that "the degree of emphasis that Commerce places on the public availability criterion fluctuates from one case to another," and that Commerce's definition of "publicly available" has been "somewhat less than consistent"; noting that Commerce has never "articulate[d] a satisfactory explanation as to why the agency relies on price quotes and other information that is not publicly available in some cases, but not in others," and criticizing Commerce for failing to set forth – "for the benefit of domestic producers and respondents, as well as agency personnel, the courts, and the public at large – clear, established criteria that the agency consistently, uniformly, and systematically applies in determining when price quotes and other information that is not publicly available are acceptable for use in determining surrogate values in NME cases, and when they are not").

Supp. 2d at 1308, 1309–10, 1311–12; *Jinan Yipin I*, 33 CIT at 490, 617 F. Supp. 2d at 1314–15.[39]

The record evidence favoring use of the Indian import statistics pales by comparison to the evidence supporting the domestic price quotes. It is true that the import statistics are publicly available information. And it is similarly undisputed that the import statistics are both contemporaneous and representative as well. On the other hand, the record evidence on product specificity – the most important of Commerce's criteria – is damning.

In short, it is undisputed that the import statistics on the record are plagued by two serious infirmities. First, because the scope of the tariff heading on which the statistics are based is very broad,[40] the values reflected in the import statistics are inflated by the inclusion of (unknown, potentially vast) quantities of more expensive gift, specialty, and other types of non-packing boxes that bear no resemblance to the basic cardboard packing cartons that the Chinese Producers use to pack and ship garlic. *See Jinan Yipin I*, 33 CIT at 487–88, 493–96 & nn. 48, 50, 617 F. Supp. 2d at 1312–13, 1316–19 & nn. 48, 50; *Jinan Yipin II*, 35 CIT at ____, ____ & n.108, 800 F. Supp. 2d at

[39] As *Jinan Yipin II* pointed out, the Domestic Producers had an obvious incentive to affirmatively challenge the price quotes if they believed the price quotes to be inaccurate. Presumably, if the price quotes did not fairly reflect the price of cardboard packing cartons throughout the period of review, or seemed to be in some way distorted, the Domestic Producers would have been the first to say so. Significantly, however, although the Domestic Producers placed the Indian import statistics on the record of this proceeding, they conspicuously never sought to present any evidence to suggest that the domestic price quotes on the record were manipulated or are in any way not representative of prices through the duration of the period of review. Nor did the Domestic Producers ever make any such claims. *See generally Jinan Yipin II*, 35 CIT at ____ n.101, 800 F. Supp. 2d at 1310 n.101.

Jinan Yipin II made the further point that the nature of the four domestic price quotes at issue here should serve to assuage, at least to some degree, any concerns about potential "manipulation." If one were inclined to forge or manipulate price data, presumably one would produce data that were more clearly decisive – in other words, one would generate a greater number of price quotes, and those price quotes would span the full duration of the period of review. As *Jinan Yipin II* put it, "[v]iewed through this lens, the problems that Commerce sees in the[] price quotes are actually indicia of authenticity." *See generally Jinan Yipin II*, 35 CIT at ____ n.101, 800 F. Supp. 2d at 1310 n.101.

[40] Indian tariff subheading 4819.1010 – the subheading for which Commerce has import statistics – covers gift, specialty, and many other types of non-packing boxes, in addition to the sort of plain cardboard packing cartons that the Chinese Producers use. *See Jinan Yipin I*, 33 CIT at 48788, 493–96 & nn. 48, 50, 617 F. Supp. 2d at 1312–13, 1316–19 & nn.48, 50; *Jinan Yipin II*, 35 CIT at ____, ____ & n.108, 800 F. Supp. 2d at 1308, 1313–15 & n.108.

1308, 1313–15 & n.108.[41] And, second, although garlic producers source their packing cartons domestically, the import statistics include freight charges; and such charges – particularly charges for transportation by air – only further distort (*i.e.*, inflate) the values reflected in the import statistics. *See Jinan Yipin I*, 33 CIT at 487, 493, 496–97 & n.51, 617 F. Supp. 2d at 1312, 1317, 1319–20 & n.51; *Jinan Yipin II*, 35 CIT at ____, ____ & n.109, 800 F. Supp. 2d at 1308, 1313–15 & n.109.[42]

Surveying the state of the administrative record (as outlined above), *Jinan Yipin II* put it bluntly: On the strength of the administrative record before the agency in the Final Results and the First Remand Determination, and given the agency's candid concessions as to the existing, patent flaws in the import statistics (as well as the

[41] That the values reflected in the import statistics are inflated by the inclusion of gift and specialty boxes is not in dispute. There is no question that the basic cardboard packing cartons that the Chinese Producers use are less expensive (and, in some instances, likely much less expensive) than the gift, specialty, and other non-packing boxes that are included in the import statistics. However, it is not possible to state with any precision the full extent of the distortion attributable to the more expensive boxes, because the record evidence on the quantity of such boxes reflected in the statistics (relative to the quantity of basic cardboard packing cartons) is simply inconclusive. *See*, *e.g.*, *Jinan Yipin I*, 33 CIT at 493–96, 617 F. Supp. 2d at 1317–19 (critiquing Commerce's efforts to minimize concerns about distortion); *Jinan Yipin II*, 35 CIT at ____ & n.108, 800 F. Supp. 2d at 1313 & n.108 (noting that "Commerce made no attempt on remand to . . . ascertain the extent to which the values reflected in the Indian import statistics . . . are inflated by the inclusion of 'myriad . . . specialty products'" unlike basic cardboard packing cartons); *id*., 35 CIT at ____, 800 F. Supp. 2d at 1314–15 (faulting agency for failing to "conduct[] any analysis (not even a qualitative analysis, much less a quantitative one) to ascertain the extent of the actual distortion of the import statistics"; noting that import data from Indonesia, Sri Lanka, the Philippines, and Morocco placed on the record by agency in course of first remand fails to "shed any light on the extent of the distortion" attributable to non-comparable products included in import statistics).

[42] *See generally Jinan Yipin I*, 33 CIT at 492 n.45, 496–97, 617 F. Supp. 2d at 1316 n.45, 1319–20 (questioning logic of assumption that, rather than sourcing basic cardboard packing cartons domestically, merchant would purchase cartons that were imported – much less imported by air).

That the values reflected in the import statistics are inflated by the inclusion of freight charges (particularly charges for air freight) is not in dispute. However, it is not possible to state with any precision the full extent of the distortion attributable to such freight charges, because the record evidence on the matter is simply inconclusive. *See*, *e.g.*, *Jinan Yipin I*, 33 CIT at 496–97, 617 F. Supp. 2d at 1319–20 (critiquing Commerce's efforts to downplay concerns about distortion); *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1313–14 (highlighting fact that "Commerce apparently made no attempt on remand to determine the volume of merchandise reflected in the Indian import statistics that was imported by air, or to otherwise demonstrate that the values reflected in the Indian import statistics are not significantly inflated by the inclusion of air freight costs"); *id*., 35 CIT at ____, 800 F. Supp. 2d at 1314–15 (faulting agency for failing to "conduct[] any analysis (not even a qualitative analysis, much less a quantitative one) to ascertain the extent of the actual distortion of the import statistics"; noting that import data from Indonesia, Sri Lanka, the Philippines, and Morocco placed on the record by agency in course of first remand fail to "shed any light on the extent of the distortion" attributable to air freight charges included in import statistics).

absence of any affirmative evidence that the price quotes were not representative and reliable), Commerce's prior decisions to rely on the import statistics over the price quotes constituted a choice of "*admittedly* distorted data over data that the agency speculate[d] may be *potentially* distorted." *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1315. In other words, while the record evidence indisputably establishes that the values reflected in the Indian import statistics are (at least to some extent) inflated and thus do not accurately reflect the cardboard packing cartons at issue, there is no record evidence – absolutely none – to indicate that the domestic price quotes are in any way distorted or otherwise inaccurate.

The bottom line is that, to the extent that Commerce has a general policy that privileges the use of import statistics over price quotes due to concerns about the reliability of the latter, the agency's skepticism may well be justified, and – all other things being equal – its policy would be entitled to great weight and would likely carry the day. *See generally Jinan Yipin I*, 33 CIT at 488, 617 F. Supp. 2d at 1313. But, given the facts of this specific case, all things are decidedly not equal.[43]

Commerce's determination on the valuation of cardboard packing cartons in *this action* must be grounded in the *evidence* on *this record*. And the evidence on domestic price quotes *versus* import statistics is not in equipoise. While neither the Domestic Producers nor Commerce ever adduced even an *iota* of actual evidence to impeach the accuracy and reliability of the domestic price quotes, Commerce itself has candidly and unequivocally conceded that the values reflected in the import statistics are inflated. *See*, *e.g.*, First Remand Determination at 46 (admitting that "[the] Indian import statistics do not perfectly represent the inputs of [the Chinese Producers] because the Indian import data include [1] specialty boxes and [2] boxes transported by air"); *id*. at 70 (same).[44]

[43] The situation would be quite different if the tariff subheading reflected in the import statistics were relatively narrow (and thus relatively "specific" to the input being valued), and if the effect of air freight charges could be reasonably estimated. Similarly, the situation would be different if there were any evidence at all on the record to undermine the reliability of the price quotes.

Here, however, Commerce itself has admitted that the import statistics include a broad range of products that are very much unlike the basic cardboard packing cartons here. And Commerce has also conceded that the import statistics are further distorted by air freight charges, though the extent of that distortion has not been established. In contrast, there is not even a shred of actual record evidence to cast doubt on the reliability of the domestic price quotes. On these specific facts, Commerce's policy preference for the use of import statistics over price quotes cannot prevail.

[44] *See also* First Remand Determination at 45 (acknowledging that "the Indian import data . . . are less [product] specific" than the price quotes); *id*. at 70 (conceding "the inclusion of airfreight in the values included within the Indian import data"); Issues and Decision

Under these circumstances, Commerce's decision in the Second Remand Determination to value cardboard packing cartons using the domestic price quotes (rather than the Indian import statistics) is plainly supported by substantial evidence and otherwise in accordance with law. Commerce's decision therefore must be sustained. *See* Def.'s Response Brief at 15 (noting that "[n]o party objects to the Second Remand Results with respect to Commerce's . . . surrogate value determination[] with respect to cartons," and arguing that "the Court should sustain Commerce's Second Remand Results" on the issue); *id*. at 2 (same).[45]

D. *Surrogate Value for Plastic Jars and Lids*

In the Final Results in this case, Commerce valued the plastic jars and lids that are used to package garlic using a surrogate value derived from World Trade Atlas statistics for imports into India under two broad "basket" provisions of the Indian tariff system – specifically, subheading 3923.3090, a provision covering "[c]arboys, bottles, flasks and similar articles of plastics, [not either specified or included]" (formerly subheading 3923.3000), and subheading 3923.5000, covering "[s]toppers, lids, caps and other closures of plastics." *See Jinan Yipin I*, 33 CIT at 499, 617 F. Supp. 2d at 1321–22; *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1279. As with the Final Results on cardboard packing cartons, the Final Results on plastic jars and lids found the use of Indian import statistics preferable to four domestic Indian price quotes that were submitted by the Chinese Producers, which were obtained from three different Indian vendors in three different cities and are for jars and lids like those used by the Chinese Producers here to pack their peeled garlic. *See Jinan Yipin I*, 33 CIT at 499–501, 617 F. Supp. 2d at 1322–23; *Jinan Yipin II*, 35 CIT at ____ & n.62, 800 F. Supp. 2d at 1279–80 & n.62.[46]

Memorandum at 64 (admitting that "there are many different types of boxes covered by [the Indian import statistics]"); *id*. (acknowledging that Indian import statistics reflect cartons imported by air).

[45] *See also* Def.-Ints.' Brief (offering no comments on any issue other than valuation of raw garlic bulbs); Def.-Ints.' Reply Brief (same); Pls.' Response Brief (same).

[46] Although there was some confusion concerning the number of price quotes for plastic jars and lids submitted by the Chinese Producers, the record establishes that there are, in fact, a total of *four* price quotes from *three* Indian vendors, in Delhi, Bangalore, and Mumbai. *See Jinan Yipin II*, 35 CIT at ____ n.62, ____, ____ n.77, 800 F. Supp. 2d at 1280 n.62, 1284, 1292 n.77. The four price quotes are dated October 8, 2004, November 6, 2004, and November 22, 2004. *See id*., 35 CIT at ____ n.62, 800 F. Supp. 2d at 1280 n.62. Thus, two of the four price quotes fall clearly within the period of review, and the other two are dated a mere one week and three weeks after the period of review ended. *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1284–85.

These price quotes are the exact same price quotes that are also included in the administrative record of the ninth administrative review – that is, the administrative review

In rejecting the domestic price quotes, the Final Results cited concerns about the "public availability" of the price quotes, as well as their "contemporaneity," and their "representativeness." *See Jinan Yipin I*, 33 CIT at 500–01 & n.53, 617 F. Supp. 2d at 1322–23 & n.53; *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1280. *Jinan Yipin I* analyzed all of the grounds cited in the Final Results as a basis for rejecting the price quotes, and found each of them wanting. *See Jinan Yipin I*, 33 CIT at 499–506, 617 F. Supp. 2d at 1322–27. *Jinan Yipin I* acknowledged that "[n]o doubt the[] points [raised by Commerce in the Final Results] diminish, at least to some degree, the utility of the domestic Indian jar" price quotes. *See id*., 33 CIT at 501 n.53, 617 F. Supp. 2d at 1323 n.53. However, *Jinan Yipin I* concluded that the Final Results failed to adequately analyze the relative merits of the domestic price quotes and the seemingly much more seriously flawed Indian import statistics on which the Final Results relied, and therefore remanded the issue to Commerce for further consideration. *See generally id*., 33 CIT at 498–506, 617 F. Supp. 2d at 1321–27; *see also Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1283–84.

Much like the First Remand Determination's treatment of cardboard packing cartons (discussed above), the First Remand Determination's treatment of plastic jars and lids "add[ed] virtually nothing to this case" concerning the relative merits of the use of the Indian import statistics *versus* the four domestic price quotes. *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1284; *see also id*., 35 CIT at ____, 800 F. Supp. 2d at 1306; *see generally id*., 35 CIT at ____, 800 F. Supp. 2d at 1284–1307. Commerce continued to overstate the alleged problems with the domestic quotes and, at the same time, continued to downplay the obvious (and admitted) problems inherent in the Indian import statistics on which the agency continued to rely. *See id*.

Observing that the First Remand Determination seemingly had once again chosen "*admittedly distorted* Indian import statistics over *potentially 'perfect'* price quotes," *Jinan Yipin II* held that the First Remand Determination failed to adequately explain the agency's determination that the Indian import statistics constituted the "best available information" for use in calculating the surrogate value of

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which immediately preceded the review at issue here, and the review that was at issue in the companion case, *Taian Ziyang*. *See Jinan Yipin II*, 35 CIT at ____ n.62, 800 F. Supp. 2d 1280 n.62 (explaining that same four price quotes for plastic jars and lids were placed on records of both ninth administrative review and tenth administrative review); *see generally Taian Ziyang III*, 37 CIT at ____, 918 F. Supp. 2d at 1358–69 (sustaining agency reliance on same four price quotes to value plastic jars and lids in ninth administrative review).

plastic jars and lids, in light of the admitted infirmities in the import statistics. *See Jinan Yipin II*, 35 CIT at ____, ____, 800 F. Supp. 2d at 1301–02, 1306. *Jinan Yipin II* similarly criticized Commerce for failing to adequately explain why the Indian import statistics were preferable to the domestic price quotes, the other source of information on the record. *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1306. *Jinan Yipin II* further held that "[the First Remand Determination's] determination that the Indian import statistics constitute the 'best available information' (as compared to the domestic price quotes) is not supported by substantial evidence in the administrative record." *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1306. The issue was therefore remanded once again, and – as it had with cardboard packing cartons – *Jinan Yipin II* counseled Commerce to use the remand wisely, because a third remand was unlikely. *See id*., 35 CIT at ____, 800 F. Supp. 2d at 1307.

In its Second Remand Determination, Commerce reversed course (implicitly adopting the reasoning underpinning *Jinan Yipin II*, and, in turn, *Jinan Yipin I*, as Commerce did vis-a-vis the valuation of cardboard packing cartons), using the four domestic price quotes – rather than the Indian import statistics – to value plastic jars and lids. The Second Remand Determination states:

> The Court found [in *Jinan Yipin II*] that Commerce had chosen "*admittedly distorted* Indian import statistics over *potentially* '*perfect*' price quotes." While [Commerce] disagrees with this conclusion, [Commerce] is cognizant of the Court's admonition that the [agency] is not likely to "get another bite of the apple on this issue." . . . .
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> . . . .
>
> Accordingly, . . . [Commerce] has determined, under protest, to use the price quote surrogate values provided on the record by the plaintiffs during the underlying proceeding for this final remand redetermination. Using these price quotes, . . . the surrogate value used for plastic jars and lids is 26.8750 Rupees per jar.

Second Remand Determination at 23–24 (footnotes omitted); *see also id*. at 1 (stating that Commerce "has applied, under protest, the price quotes on the record of the underlying review as surrogates to value

. . . plastic jars and lids")[47]; *cf*. Defendant's Response to Comments Regarding Redetermination Pursuant to Court Remand at 9–11 (April 20, 2012), *filed in Taian Ziyang Food Co. v. United States*, Court No. 05–00399 (in companion case contesting Commerce's determinations in administrative review immediately preceding review at issue in this action, which included parallel challenge to agency's reliance on import statistics *versus* price quotes in surrogate valuation of plastic jars and lids, agency ultimately decided to rely on price quotes (as the agency has done here), explaining that "the Remand Results are consistent with the Court's holding" in *Taian Ziyang II*, and that "[i]n light of the Court's concerns about the import statistics, . . . Commerce reasonably adopted plaintiffs' approach and used the domestic price quotes").

As outlined below, and as set forth at length and in painstaking detail in *Jinan Yipin I* and *Jinan Yipin II*, the record evidence solidly favors use of the price quotes as surrogate values for plastic jars and lids. *See Jinan Yipin I*, 33 CIT at 498–506, 617 F. Supp. 2d at 1321–27 (analyzing merits of domestic price quotes *versus* Indian import statistics for valuation of plastic jars and lids); *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1297–1307 (same).

As discussed above, *Jinan Yipin II* explained that – of the five criteria set forth in Policy Bulletin 04.1 – "product specificity" logi-

[47] The quoted language from the Second Remand Determination – particularly the phrase "under protest" – can be read as intimating that *Jinan Yipin II* imposed an outcome or result on Commerce, and ordered the agency to use the domestic price quotes in valuing plastic jars and lids for purposes of the Second Remand Determination. That is not the case.

In the course of the second remand, Commerce was free to value plastic jars and lids using either the import statistics or the price quotes (or some other data set, if it so desired), provided that the agency properly articulated its rationale and supported its determination with substantial evidence. *See*, *e.g.*, *Jinan Yipin II*, 35 CIT at ____ n.97, 800 F. Supp. 2d at 1306 n.97 (suggesting possibility of further development of record in course of second remand, including, for example, development of any evidence demonstrating that "the inclusion of the more expensive products and the air freight charges have no significant distortive effect on the Indian import statistics," and/or "evidence on the potential for manipulation of the price quotes and the extent to which the price quotes accurately reflect prices throughout the period of review"); *see also Tung Mung Development Co.*, 354 F.3d at 1379 (explaining that "the Court of International Trade's remand orders did not compel Commerce to adopt a new policy," where agency was free to "either explain its deviation from 'prior practice' or 'apply a combination rate, consistent with its prior practice'"); *see generally* n.32, *supra* (explaining, in context of analysis of cardboard packing cartons, that – in course of most recent remand – Commerce was free to use import statistics or price quotes (or some other data) to value cardboard packing cartons, provided that agency properly articulated its rationale and supported its determination with substantial evidence; also noting *non sequitur* in Commerce's rationale).

cally must be the most important. *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1304.[48] And it is beyond cavil that, as discussed in *Jinan Yipin I* and *Jinan Yipin II*, the four domestic price quotes on the record of this proceeding are (in the parlance of the Policy Bulletin) highly "specific to the input in question" – that is, the plastic jars and lids actually used by the Chinese Producers here. *See Jinan Yipin I*, 33 CIT at 501, 505–06, 617 F. Supp. 2d at 1323, 1327; *Jinan Yipin II*, 35 CIT at ____, ____, ____, ____, ____, 800 F. Supp. 2d at 1279–80, 1282, 1283, 1296, 1303.

As to "contemporaneity," there is – even as an abstract matter of principle – no real basis for concern, because two of the four price quotes fall squarely within the period of review and the other two are dated one week and three weeks after the period of review ended. *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1284–85. As to "representativeness," it is true that the price quotes span a period of just a little less than seven weeks (rather than the full period of review, or a full year). *See id*., 35 CIT at ____ n.62, 800 F. Supp. 2d at 1280 n.62. However, the policy considerations that underpin both the contemporaneity and its representativeness criteria go to whether the proffered pricing information accurately reflects prices for the input (here, plastic jars and lids) during the period of review. And the record here is clear on that issue.

As *Jinan Yipin II* observed, there is nothing whatsoever on the record of this proceeding to indicate that prices for plastic jars and lids are subject to any appreciable fluctuation. *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1292–95.[49] In other words, there is no record evidence that even hints that the price quotes here do not

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[48] *See generally* n.33, *supra* (discussing extreme examples to illustrate overriding importance of "product specificity" criterion).

[49] Review of the record discloses no apparent reason to suppose that plastic jars and lids (any more than cardboard packing cartons) would be susceptible to significant price fluctuations. *See* n.37, *supra* ; *see also Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1293–95 (questioning reasonableness of Commerce's asserted concerns about volatility in prices for basic plastic jars and lids); *Taian Ziyang III*, 37 CIT at ____, 918 F. Supp. 2d at 1374 (same, in companion case challenging determinations in administrative review immediately preceding review at issue here, involving exact same four price quotes for plastic jars and lids at issue here).

It is telling that, as discussed below, although the Domestic Producers placed the Indian import statistics on the record of this proceeding, the Domestic Producers have never affirmatively claimed that the domestic price quotes do not accurately reflect the actual, correct price of basic plastic jars and lids throughout the period of review. *See Jinan Yipin II*, 35 CIT at ____ n.101, 800 F. Supp. 2d at 1310 n.101. Moreover, *Jinan Yipin II* took note of the fact that, notwithstanding its asserted concerns about the contemporaneity and representativeness of the domestic price quotes, Commerce nonetheless "took no action . . . to obtain . . . information to clarify the extent to which the four domestic price quotes in fact reflect 'broad market averages' and are sufficiently representative of prices over 'a substantial period of time' – that is, sufficiently reflective of prices over the one-year period

accurately represent prices for plastic jars and lids throughout the relevant period of review. The concerns about the contemporaneity and representativeness of data that are reflected in Policy Bulletin 04.1 are entirely reasonable, as a theoretical matter. But, in this particular case, the record evidence on the price quotes for plastic jars and lids does not bear out those concerns. [50]

The record is no less clear on the issue of "public availability." As discussed above, Commerce's concern about information that is not publicly available is the risk of manipulation. *See* section III.C, *supra* (explaining, in analysis of cardboard packing cartons, that policy basis for "public availability" criterion is agency concern about potential for "manipulation"); *Jinan Yipin II*, 35 CIT at ____, ____, 800 F. Supp. 2d at 1286–87, 1290–91 (same, in analysis of plastic jars and lids); *Jinan Yipin I*, 33 CIT at 500, 617 F. Supp. 2d at 1322 (same). But the record here includes no actual, affirmative evidence that can be read even to suggest that the price quotes for jars and lids are in any way distorted or are the product of manipulation or collusion. *See Jinan Yipin II*, 35 CIT at ____, ____, 800 F. Supp. 2d at 1286, 1287–91; *Jinan Yipin I*, 33 CIT at 500, 617 F. Supp. 2d at 1322–23; *see also Taian Ziyang Food Co. v. United States*, 37 CIT ____, ____, 918 F. Supp. 2d 1345, 1374 (2013) ("*Taian Ziyang III*") (in companion case, involving administrative review immediately preceding review at

that constitutes the period of review." *Id*., 35 CIT at ____, 800 F. Supp. 2d at 1295; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1337 (same, in companion case challenging determinations in administrative review immediately preceding review at issue here, involving exact same four price quotes for plastic jars and lids at issue here). Similarly, Commerce "took no action to attempt to ascertain the extent to which the prices of basic jars and lids fluctuated during the period of review at issue here, or even the extent to which prices historically have fluctuated over time." *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1295.

Absent any concrete evidence (or even some sound reason to believe) that prices for basic plastic jars and lids fluctuate to any significant degree over relatively brief periods of time, the contemporaneity and representativeness of the price quotes are of little import. Even if the record evidence did establish that prices were subject to some degree of fluctuation, the record is devoid of analysis to indicate that any such price fluctuation would justify resort to the Indian import statistics (in light of the admitted flaws in the import data). Further, if it were determined that prices were subject to some degree of fluctuation and that adjustment were necessary to avoid recourse to the flawed import statistics, it might well be possible to adjust the price quotes to be essentially fully contemporaneous and representative, using a methodology comparable to that which Commerce used to deflate certain data for use in valuing raw garlic bulbs in the First Remand Determination. *See Jinan Yipin II*, 35 CIT at ____ n.104, 800 F. Supp. 2d at 1311 n.104.

[50] As discussed above, the wisdom of Commerce's general policy favoring the use of import statistics over price quotes is not at issue here, given the specific facts presented – that is, where the record establishes that the values reflected in the statistics are (at least to some extent) inflated and thus do not accurately reflect the factor of production in question, while, at the same time, there is no record evidence whatsoever to indicate that the price quotes are in any way distorted or otherwise inaccurate. *See generally* n.43, *supra*.

issue here, and the exact same four price quotes for plastic jars and lids, noting that record is devoid of any suggestion that price quotes are tainted by distortion, manipulation, or collusion).[51]

The record evidence supporting use of the Indian import statistics is not nearly as strong as that favoring the price quotes. True enough, the import statistics are publicly available, as well as both contemporaneous and representative. However, the record on product specificity – the most important of Commerce's criteria – is a different story entirely.

Like the import statistics that Commerce used to value cardboard packing cartons until the Second Remand Determination, the import statistics that the Final Results and the First Remand Determination used to value plastic jars and lids suffer from two critical defects. The Indian import statistics for plastic jars and lids are much less product-specific than the domestic price quotes, both because the import statistics include a very broad range of "specialty" and other plastic products that bear no resemblance to the simple, basic plastic jars at issue in this case,[52] and because (like the import statistics for

[51] The Domestic Producers had a clear incentive to affirmatively challenge the price quotes if the Domestic Producers believed them to be inaccurate. Presumably, if the price quotes did not fairly represent prices throughout the period of review, or if they appeared to be in some way distorted or manipulated, the Domestic Producers would have been the first to say so. It is therefore telling that, although the Domestic Producers placed the Indian import statistics on the record here, they have never sought to present any evidence to cast doubt on the accuracy of the price quotes. Nor have the Domestic Producers ever claimed that the price quotes are in any way distorted or otherwise inaccurate. *See Jinan Yipin II*, 35 CIT at ____ n.71, 800 F. Supp. 2d at 1287 n.71.

Moreover, as *Jinan Yipin II* observed, the nature of the four domestic price quotes should lay to rest any concerns about the risk of "manipulation." If one were inclined to forge or manipulate price data, presumably one would produce data that were more clearly decisive – in other words, one would generate a greater number of price quotes, and all of those price quotes would be dated within the period of review and would span the full duration of that period. Viewed through this perspective, the seeming flaws in the price quotes are actually indicia of authenticity and reliability. *See Jinan Yipin II*, 35 CIT at ____ n.71, 800 F. Supp. 2d at 1287 n.71.

[52] As explained above, the record establishes that – in addition to the sort of simple, basic plastic jars that the Chinese Producers use – the Indian import statistics for "basket" subheadings 3923.3090 and 3923.5000 also capture many different types of more expensive "specialty" and other plastic products. *See*, *e.g.*, *Jinan Yipin I*, 33 CIT at 499–500, 617 F. Supp. 2d at 1322 (explaining that import statistics include "'specialty jars' and other 'plastic products completely different from the plastic jars used by the [Chinese Producers] to pack . . . peeled garlic,' such as 'slippers,' 'hairdressing accessories,' 'fibre glass,' and 'disposable plasticware'"); *id*., 33 CIT at 501, 617 F. Supp. 2d at 1323–24 (noting that import statistics are "distorted . . . by 'a myriad of specialty products' that 'are not remotely representative of the plastic jars used by the [Chinese Producers]'"; *id*., 33 CIT at 502, 617 F. Supp. 2d at 1324 (noting that subheading 3923.3090 is "a 'broad, basket' tariff provision which captures an extraordinarily wide range of plastic products, above and beyond the very basic plastic

cardboard packing cartons, discussed above) the import statistics for plastic jars and lids include charges for air freight.[53] *See Jinan Yipin I*, 33 CIT at 499, 499–504, 505–06, 617 F. Supp. 2d at 1321, 1322–25, 1327 (discussing inflation attributable to highly diverse group of products captured by import statistics); *id*., 33 CIT at 499, 501–02, 504–05, 617 F. Supp. 2d at 1321, 1323–24, 1326–27 (discussing infla-

jars that the [Chinese Producers] used to pack garlic"); *id.* (explaining that "data indicate that 'the highest quantity of imports . . . driv[ing] the price of [merchandise classified under HTS subheading 3923.3090] is imported from Italy by L'Oreal India Pvt. and is described as 'hair products'").

There is no dispute that the values reflected in the import statistics are inflated by the inclusion of "specialty" and other plastic products that are very different from (and more elaborate than) the simple, basic plastic jars at issue here. There is no dispute that the plastic jars and lids that the Chinese Producers use are less expensive (and, in some instances, likely much less expensive) than other plastic products that are included in the import statistics. However, it is not possible to state with any precision the full extent of the distortion attributable to the other plastic products, because the record evidence on the quantity of such products reflected in the statistics (relative to the quantity of basic plastic jars) is simply inconclusive. *See generally Jinan Yipin II*, 35 CIT at ____ n.81, 800 F. Supp. 2d at 1295 n.81 (stating that, in light of evidence of distortion of import statistics due to "the inclusion of specialty plastic jars and other more expensive products," "[t]he open questions that remain to be addressed are the extent and the significance of the distortion"); *id*., 35 CIT at ____, 800 F. Supp. 2d at 1296 (noting that First Remand Determination made "no attempt to . . . ascertain the extent to which the values reflected in the Indian import statistics are inflated by the inclusion of more expensive specialty products that bear no resemblance to the basic plastic jars and lids" used by Chinese Producers); *id*., 35 CIT at ____, 800 F. Supp. 2d at 1305 (noting existence of "serious unanswered questions about the extent to which the import statistics are distorted by the inclusion of 'specialty jars' and a wide range of other plastic products that are not comparable to the basic plastic jars and lids at issue"); *see also Jinan Yipin I*, 33 CIT at 504, 617 F. Supp. 2d at 1325 (noting that "Commerce cannot accurately ascertain from the existing record the full *extent* of the distortion attributable to the broad scope of the tariff subheading").

[53] *See generally Jinan Yipin I*, 33 CIT at 505, 617 F. Supp. 2d at 1326–27 (questioning logic of assumption that merchant would purchase cartons that were imported – much less imported by air); *Jinan Yipin II*, 35 CIT at ____ n.64, 800 F. Supp. 2d at 1283 n.64 (same).

That the values reflected in the import statistics are inflated by the inclusion of freight charges (particularly charges for air freight) is not in dispute. However, it is not possible to state with any precision the full extent of the distortion attributable to such freight charges, because the record evidence on the matter is simply inconclusive. *See*, *e.g.*, *Jinan Yipin I*, 33 CIT at 504–05, 617 F. Supp. 2d at 1326 (critiquing Commerce's efforts to downplay concerns about distortion); *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1297–98 (highlighting fact that "Commerce made no attempt on remand to ascertain the volume of merchandise reflected in the Indian import statistics that was imported by air, or to otherwise demonstrate that the values reflected in the Indian import statistics are not significantly inflated by the inclusion of air freight costs"); *id*., 35 CIT at ____, ____, 800 F. Supp. 2d at 1298, 1301 (faulting agency for failing to "conduct[] any analysis (not even a qualitative analysis, much less a quantitative one) to ascertain the extent of the *actual* distortion of the import statistics"; noting that import data from Indonesia, Sri Lanka, the Philippines, and Morocco placed on the record by agency in course of first remand fail to "shed any light on the extent of the distortion" attributable to air freight charges included in import statistics).

tion attributable to air freight charges); *Jinan Yipin II*, 35 CIT at ____, ____, ____ & n.81, ____ & n.89, 800 F. Supp. 2d at 1279, 1281–82, 1295–96 & n.81, 130001 & n.89 (discussing inflation attributable to highly diverse group of products captured by import statistics); *id*., 35 CIT at ____, ____, ____ & n.89, 800 F. Supp. 2d at 1282, 1297–98, 1300–01 & n.89 (discussing inflation attributable to air freight charges).

In its First Remand Determination, Commerce flatly admitted that the Indian import statistics reflect inflated values as a surrogate for the plastic jars and lids at issue here, both because the import statistics "include a broad range of products that are different from the plastic jars used to pack garlic," and because the import statistics "include[] products that, unlike those the [Chinese Producers] used, were shipped by air." *See* First Remand Determination at 73; *see also id*. at 50 (same).[54] As such, the facts here are straightforward, compelling, and uncontroverted. While the record evidence indisputably establishes that the values reflected in the Indian import statistics are (at least to some extent) inflated and thus do not accurately represent the basic plastic jars and lids at issue, there is no record evidence – absolutely none – to indicate that the domestic price quotes are in any way distorted or otherwise inaccurate.

Jinan Yipin II put it bluntly: "[I]n contrast to the Indian import statistics (which are admittedly 'imperfect'), there is no affirmative evidence that the domestic price quotes are in any way 'imperfect.'" *See Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1301. Under these circumstances, Commerce's decision in the Second Remand Determination to value plastic jars and lids based on the four domestic price quotes (rather than the Indian import statistics) is clearly supported by substantial evidence and is otherwise in accordance with law. That decision thus must be sustained. *See* Def.'s Response Brief at 15 (noting that "[n]o party objects to the Second Remand Results with respect to Commerce's . . . surrogate value determination[] with respect to . . . jars and lids," and arguing that "the Court should sustain Commerce's Second Remand Results" on the issue); *id*. at 2 (same).[55]

[54] *See also* Issues and Decision Memorandum at 66 (noting Chinese Producers' arguments that, due to "basket" nature of the tariff subheadings reflected in Indian import statistics at issue, import statistics include "plastic products such as specialty hair products, slippers, and fiber glass that do not resemble the plastic jars" used to pack garlic, and that Indian import statistics include air freight charges); *id*. at 68–69 (conceding that Indian import statistics include products imported by air).

[55] *See also* Def.-Ints.' Brief (limiting arguments to calculation of surrogate value for raw garlic bulbs); Def.-Ints.' Reply Brief (same); Pls.' Response Brief (same).

IV. *Conclusion*

For all the reasons set forth above, Commerce's Second Remand Determination must be sustained. Judgment will enter accordingly.

Dated: March 28, 2014
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY JUDGE

Slip Op. 14–35

BAROQUE TIMBER INDUSTRIES (ZHONGSHAN) COMPANY, LIMITED, et al., Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR AMERICAN HARDWOOD PARITY, et al., Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 12–00007[1]

[remand redetermination affirmed in part and remanded in part]

Dated: March 31, 2014

Francis J. Sailer, *Mark E. Pardo*, *Andrew T. Schutz*, *Kavita Mohan*, and *John M. Foote*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of Washington, DC, for Baroque Timber Industries (Zhongshan) Co., Ltd.; Riverside Plywood Corp.; Samling Elegant Living Trading (Labuan) Ltd.; Samling Global USA, Inc.; Samling Riverside Co., Ltd.; and Suzhou Times Flooring Co., Ltd.

Gregory S. Menegaz, *James K. Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, Washington, DC, for Zhejiang Layo Wood Industry Co., Ltd.; Changzhou Hawd Flooring Co., Ltd.; Dunhua City Jisen Wood Industry Co., Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Dalian Huilong Wooden Products Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; and Karly Wood Product Ltd.

Kristin H. Mowry, *Daniel R. Wilson*, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Susan L. Brooks*, *Sarah M. Wyss*, and *Rebecca M. Janz*, Mowry & Grimson, PLLC, of Washington, DC, for Fine Furniture (Shanghai) Ltd.; Great Wood (Tonghua) Ltd.; and Fine Furniture Plantation (Shishou) Ltd.

Kristen S. Smith and *Mark R. Ludwikowski*, Sandler, Travis & Rosenberg, PA, of Washington, DC, for Lumber Liquidators Services, LLC; Armstrong Wood Products (Kunshan) Co., Ltd.; and Home Legend, LLC.

Jeffrey S. Neeley, *Michael S. Holton*, and *Stephen W. Brophy*, Barnes, Richardson & Colburn, Washington, DC, for Zhejiang Yuhua Timber Co., Ltd.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the United States.

[1] This action was consolidated with court nos. 11–00452, 12–00013, and 12–00020. Order, May 31, 2012, ECF No. 37. The complaint filed by the Coalition for American Hardwood Parity in court no. 11–00452 was heard and decided separately in *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __,853 F. Supp. 2d 1290 (2012)("*Baroque I*"), and *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 865 F.Supp. 2d 1300 (2012) ("*Baroque II*"). The Coalition's complaint was ultimately dismissed. *Baroque Timber Indus*., 865 F. Supp. 2dat 1311.

With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief were *Shana A. Hofstetter* and *Melissa M. Brewer*, Attornies, International Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for the Coalition for American Hardwood Parity.

OPINION

Pogue, Chief Judge:

This consolidated action returns to court,[2] following remand[3] and redetermination[4] of the final results of the antidumping duty investigation of multilayered wood flooring from the People's Republic of China ("PRC" or "China").[5] Plaintiffs, cooperative non-investigated respondents who have established their entitlement to a separate antidumping duty rate, challenge the remand redetermination of that rate.[6] Plaintiffs argue that the Department of Commerce's ("the Department" or "Commerce") redetermination is flawed because the Department's legal interpretations are not in accordance with the law and the Department's factual conclusions are not supported by a reasonable reading of the evidence.[7]

Plaintiffs are, in part, correct. Commerce has not articulated a rational connection between the record evidence and the rate applied to the separate rate companies, nor has Commerce explained how its

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[2] The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516a(a)(2)(B)(i) (2006) and 28 U.S.C. § 1581(c) (2006). All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

[3] *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, ___ C.I.T. ___, 925 F. Supp. 2d 1332 (2013) ("*Baroque III*").

[4] Final Results of Redetermination Pursuant to Court Order, Nov. 14, 2013, ECF No. 132 ("*Redetermination*" or "*Remand Results*").

[5] *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) (final determination of sales at less than fair value) ("*Final Determination*") and accompanying Issues & Decision Memorandum, A-570–970, POI Apr. 1, 2010 – Sept. 30, 2010 (Oct. 11, 2011) ("*I& D Memo*").

[6] The Respondents who are party to this case include: Baroque Timber Industries (Zhongshan) Co., Ltd.; Riverside Plywood Corp.; Samling Elegant Living Trading (Labuan), Ltd.; Samling Global USA, Inc.; Samling Riverside Co., Ltd.; Suzhou Times Flooring Co., Ltd.; Zhejiang Layo Wood Industry Co., Ltd.; Changzhou Hawd Flooring Co., Ltd.; Dunhua City Jisen Wood Industry Co., Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Dalian Huilong Wooden Products Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; Karly Wood Product Ltd.; and, Fine Furniture (Shanghai), Ltd. Respondents' Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2, ECF No. 63at 1 n.1.

[7] *See* Comments in Opposition to Final Result of Redetermination Pursuant to Court Order, ECF No. 134; Comments of Fine Furniture (Shanghai) Limited on Department of Commerce November 14, 2013 Final Results of Redetermination Pursuant to Court Remand, ECF No. 136; Response to United States' Remand Redetermination of Separate Rate Appellants, ECF No. 138.

determination bears a relationship to Plaintiffs' economic reality. Accordingly, the court remands to Commerce for further consideration in accordance with this opinion.

BACKGROUND

I. Baroque III

This dispute originates in a petition by the Coalition for American Hardwood Parity ("CAHP") alleging that imports of multilayered wood flooring from the PRC were being dumped in the United States. In response, Commerce initiated an antidumping duty investigation for the period of April 1, 2010 through September 30, 2010. *Multilayered Wood Flooring from the People's Republic of China*, 75 Fed. Reg. 70,714 (Dep't Commerce Nov. 18, 2010) (initiation of antidumping duty investigation) ("*Initiation Notice*"). Commerce indicated that it would select mandatory respondents based on quantity and value ("Q&V") questionnaires. *Id*. at 70,717. Commerce requested Q&V data from 190 companies and received timely responses from 80. *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 30,656, 30,657 (Dep't Commerce May 26, 2011) (preliminary determination of sales at less than fair value) ("*Preliminary Determination*"). From these, Commerce selected three mandatory respondents, the largest cooperating exporters (by volume) of wood flooring, for the investigation: Zhejiang Yuhua Timber Co., Ltd. ("Yuhua"), Zhejiang Layo Wood Industry Co., Ltd. ("Layo"), and the Samling Group[8] ("Samling"). *Id*. at 30,658; *see also* 19 U.S.C. § 1677f-1(c)(2)(B).[9] Those companies that failed to respond to Commerce's Q&V questionnaire were treated as part of the PRC-wide entity. *Preliminary Determination* at 30,661.[10]

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[8] The Samling Group includes Baroque Timber Industries (Zhongshan) Co., Ltd., Riverside Plywood Corp., Samling Elegant Living Trading (Labuan) Ltd., Samling Global USA, Inc., Samling Riverside Co., Ltd., and Suzhou Times Flooring Co., Ltd. *Id*. at 30,658, 30,660.

[9] Fine Furniture (Shanghai) Ltd. ("Fine Furniture"), Shanghai Lizhong Wood Products Co., Ltd. ("Lizhong"), Dun Hua City Jisen Wood Co., Ltd., and Armstrong Wood Products also requested to be treated as voluntary respondents. *Preliminary Determination* at 30,658. Fine Furniture and Lizhong each submitted unsolicited responses to sections A, C, and D of Commerce's original questionnaire. *Id*. Commerce did not grant these companies voluntary respondent status. *I&D Memo*, cmt. 43 at 109 ("[P]ursuant to section 777A(c)(2) of the Act, the Department exercised its discretion to limit its selection of respondents to three producers/exporters.") No party challenged this decision.

[10] Commerce found that the PRC-wide entity was non-responsive and that use of facts available and an adverse inference ("AFA") was appropriate. *Preliminary Determination* at 30,662. Commerce's practice is to "select, as AFA, the higherof the (a) Highest margin alleged in the petition, or (b) thehighest calculated rate of any respondent in the investigation."*Id.*

In addition, because this was a non-market economy ("NME") investigation,[11] Commerce invited those exporters and producers seeking a separate rate to submit a separate-rate status application.[12] Commerce received timely-filed separate-rate applications from 74 companies, all of which demonstrated eligibility for separate rate status. *Final Determination* at 64,321.[13]

In its *Final Determination*, Commerce found that multilayered wood flooring was being dumped in the United States. *Id.* at 64,323–24. Commerce found a *de minimis* dumping margin for Yuhua and assigned margins of 3.98 percent and 2.63 percent to Layo and Samling, respectively. *Id*. Commerce assigned the AFA rate of 58.84 percent (the highest calculated transaction-specific rate among mandatory respondents) to the PRC-wide entity. *Id*. at 64,322. Commerce then assigned the separate rate respondents a rate of 3.31 percent. *Id*. This rate was the simple average of Layo and Samling's margins. *I&D Memo*, cmt. 11 at 51.[14]

Plaintiffs sought judicial review of the *Final Determination* pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and 1516a(a)(2)(B)(i), and Commerce requested a voluntary remand. The court affirmed in part and remanded in part. The court affirmed Commerce's rejection of Respondents' late filed surrogate financial statements. The court remanded to Commerce for reconsideration the surrogate value ("SV") determinations for Layo's plywood input and Samling's HDF input; remanded for reconsideration Commerce's targeted dumping determination, in light of any changes to the surrogate value determinations and current standards; and remanded for further explana-

[11] *See Preliminary Determination* at 30,660; *Final Determination* at 64,321.

[12] With this application, Commerce "assigns separate rates in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities." Preliminary Determination at 30,660. The criteria used to determine the absence of *de jure* and *de facto* control are specified in the *Preliminary Determination* at 30,661.

[13] Of these, twelve companies were wholly foreign-owned, and therefore eligible for a separate rate. *Final Determination* at 64,321. These twelve included separate rate respondents Fine Furniture, Armstrong Wood Products (Kunshan) Co., Ltd., and Kunshan Yingyi-Nature Wood Industry Co., Ltd., and mandatory rate respondents Samling, Layo, and Yuhua. *Preliminary Determination* at 30,661. Sixty-two companies (some joint ventures between Chinese and foreign companies, others wholly-Chinese-owned) demonstrated eligibility for separate rate status. *Id.*

[14] Commerce declined to use the weighted average indicated in 19 U.S.C § 1673d(c)(5)(A) because doing so would have risked disclosure of proprietary information from Samling and Layo. *Id*. ("Specifically, because there are only two respondents for which a company-specific margin was calculated in this review, the Department has calculated a simple average margin to ensure that the total import quantity and value for each company is not inadvertently revealed.").

tion or reconsideration the surrogate value determination for Layo's core veneer, Layo's HDF input, and Layo's brokerage and handling ("B&H") fees to account for the cost of a letter of credit. *Baroque III*, ___ C.I.T. at ___, 925 F. Supp. 2d at 1337; *see also Remand Results* at 1–2.

II. Commerce's Redetermination Pursuant to Remand

In its *Redetermination*, Commerce revised its findings as required by *Baroque III*. Commerce (1) valued Layo's plywood input with an SV reflecting plywood thicknesses of 6.35 mm and 12.7 mm; (2) valued Samling's high-density fiberboard ("HDF") with Philippine Harmonized Tariff Schedule ("HTS") category 4411.11; (3) valued Layo's core veneer input with 2009 data reported by the Global Trade Atlas for Philippine HTS category 4408.9090.06; (4) provided further explanation for Commerce's determination "to continue converting SV for [Layo's] HDF using the average density of HDF used by [Layo]"; (5) adjusted Layo's "B&H SV to remove letter of credit costs not incurred by [Layo]"; and, (6) calculated Layo's and Samling's dumping margins "using an average-to-average comparison method, rather than the average-to-transaction comparison method." *Remand Results* at 2.

As a result of these changes, not only Yuhua, but also Layo and Samling received dumping margins of zero. *Id*. at 26.[15] The changes to Layo and Samling's SVs resulted in a new calculated highest transaction-specific rate of 25.62 percent. Commerce selected this

[15] Plaintiffs do not contest Commerce's six findings or the rates assigned to mandatory respondents. *See* Response to United States' Remand Redetermination of Zhejiang Layo Wood Industry Co., Ltd., ECF No. 137 at 1 ("As [Commerce] has recalculated a *de minimis* final antidumping duty margin for Layo Wood, the Court might consider this issue [Layo's critique of Commerce's *Redetermination*] moot, particularly if the Court ultimately determines to sustain [Commerce's] *de minimis* redetermination."); Motion to Strike Section I(B) of Defendant-Intervenor CAHP's Remand Reply Comments of Alternative Motion for Leave to File Comments in Response to CAHP's Remand Reply Comments, ECF No. 142. As no party contests these aspects of the remand redeterminations, Commerce's findings regarding the SV determinations for Layo's plywood input and Samling's HDF input; Commerce's targeted dumping determinations; Commerce's finding regarding the SV determination for Layo's core veneer, Layo's HDF input, and Layo's brokerage and handling fees; and, the resultant antidumping duty rates for Layo, Samling, and Yuhua are AFFIRMED.

Plaintiffs' motion to strike Defendant-Intervenor's (CAHP's) arguments against these findings is therefore DENIED AS MOOT. *See* Motion to Strike Section I(B) of Defendant-Intervenor CAHP's Remand Reply Comments of Alternative Motion for Leave to File Comments in Response to CAHP's Remand Reply Comments, ECF No. 142; Motion of Zhejiang Layo Wood Industry Co., Ltd. to Strike Portions of Coalition for Hardwood Parity's Reply to Comments on Remand Redetermination, ECF No. 143; Defendant-Intervenor's Response to Motion to Strike Portions of Reply to Comments on Remand Redetermination, ECF No. 147.

rate as the revised AFA rate for the PRC-wide entity. *Id*. at 27. Because all the mandatory rates were zero, Commerce chose to recalculate the separate rate under 19 U.S.C § 1673d(c)(5)(B)'s "any reasonable method provision," taking a simple average of the three mandatory rates of zero and the AFA rate. This resulted in a separate rate of 6.41 percent, *id*., thereby increasing the separate respondents' rate while each of the components of that rate decreased.

STANDARD OF REVIEW

The court will uphold Commerce's determinations 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).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). It must be "more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). In making its judgment, the court "looks to the record as a whole, including any evidence that fairly detracts from the substantiality of the evidence," *Gallant Ocean (Thailand) Co., Ltd. v. U.S.*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (internal quotation marks and citation omitted),[16] and determines "whether the evidence and reasonable inferences from the record support [the agency's] finding." *Daewoo Elecs. Co. v. Int'l Union of Elec.*, Elec., *Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (internal quotation marks and citation omitted).[17] Commerce must provide a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). It must "examine the record and articulate a satisfactory explanation for its action." *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013).

In essence, the substantial evidence standard asks whether Commerce's determination was reasonable. *Nippon Steel*, 458 F.3d at 1351

[16] *See also Universal Camera*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) ("the substantial evidence standard requires review of the entire administrative record").

[17] While the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966), "[t]here must be at least enough evidence to allow reasonable minds to differ." *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009).

(quoting SSIH Equipment SA v. United States ITC, 718 F.2d 365, 381 (Fed.Cir.1983) (Nies, J. additional comments)).[18]

DISCUSSION

I. Commerce's Methodology

A. The statutory provision allows Commerce to use "any reasonable method."

Otherwise lacking statutory guidance,[19] Commerce follows 19 U.S.C § 1673d(c)(5) (method for determining the estimated all-others rate) when calculating the dumping margin for separate rate respondents. *Remand Results* at 45.

Section 1673d(c)(5)(A) provides the general rule,[20] but when all of the weighted average dumping margins for individually investigated exporters and producers are zero, *de minimis*, or based entirely on facts available, an exception, Section 1673d(c)(5)(B), applies and Commerce may use "any reasonable method" to establish the separate rate.[21]

Here, because on remand the mandatory respondents all had weight-averaged dumping margins of zero, Commerce calculated the separate rate margin under the Section 1673d(c)(5)(B) "any reason-

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[18] *Cf. Fuwei Films (Shandong) Co., Ltd. v. United States*, ___ C.I.T. ___, 837 F. Supp. 2d 1347, 1350 (2012) ("Fundamentally, though, 'substantial evidence' is best understood as a word formula connoting reasonableness review.").

[19] *Amanda Foods (Vietnam) Ltd. v. United States*, ___ C.I.T. ___, 714 F. Supp. 2d 1282, 1289 (2010) ("*Amanda Foods II*")("No statutory or regulatory provision directly addresses the methodology to be employed when calculating a dumping margin" for separate rate companies).

[20] The general rule provides that the separate rate is the "estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins [based entirely on facts available]." 19 U.S.C. § 1673d(c)(5)(A).

[21] 19 U.S.C § 1673d(c)(5)(B) provides, in full:

> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are [based on AFA], the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

The Statement of Administrative Action (the "SAA," which is recognized by Congress as an authoritative expression concerning the interpretation and application of the Tariff Act of 1930 under 19 U.S.C. § 3512(d)), provides that the "expected method" under the exception is to "weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available," where "volume data is available," but "if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." Uruguay Round Agreements Act, SAA, HR. doc. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201.

able method" provision. *Remand Results* at 45. Commerce took a simple average of the three mandatory respondent zero rates and the PRC-wide AFA rate. *Id.*

B. It is not per se unreasonable for Commerce to use a simple average of zero and AFA rates to calculate the separate rate.

Section 1673d(c)(5) does not say whether a simple average of three zero percent mandatory respondent rates and the PRC-wide AFA rate is reasonable. Because the statute does not "directly address the precise question at issue," the court is left to decide whether Commerce's interpretation is "a reasonable construction of the statute." *Bestpak*, 716 F.3d at 1377.[22]

Section 1673d(c)(5)(B)'s breadth and flexibility allow for a contextual application of the statute.[23] It follows that there is "no legal error" inherent in using a simple average rather than a weighted average. *Bestpak*, 716 F.3d at 1378. And, as both "[Section] 1673d(c)(5)(B) and the SAA explicitly allow Commerce to factor both *de minimis* and AFA rates [of individually investigated exporters and producers] into the calculation methodology." *Id*. Accordingly, as a method "derived from the relevant statutory language," *id*. at 1378, it is not *per se* unreasonable for Commerce to use a simple average of *de minimis* and AFA rates to calculate the separate rate antidumping duty margin.[24]

II. Commerce's Method is Not Supported by Substantial Evidence

A. Commerce's chosen method must be reasonable as applied in order to be supported by substantial evidence.

While Commerce's chosen method may not be *per se* unreasonable, it must still be reasonable as applied.[25] In order for an antidumping

[22] Commerce's interpretation "need not be the only reasonable interpretation" nor the "most reasonable" nor that which "the court might have preferred." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)).It needs only to have been reasonable.

[23] *See United States v. Eurodif S. A.*, 555 U.S. 305, 317–18 (2009) ("[I]t is well settled that in reading regulatory and taxation statutes, form should be disregarded for substance and the emphasis should be on economic reality." (internal quotation marks and citation omitted)).

[24] *Cf. Bestpak*, 716 F.3d at 1378 ("[T]his court finds that the methodology used by Commerce — although somewhat questionable — meets the statute's lenient standard of 'any reasonable method.'").

[25] *See Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001) ("While various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case when a more

duty determination to be reasonable as applied, Commerce must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines*, 371 U.S. at 168. Commerce must "examine the record and articulate a satisfactory explanation for its action." *Bestpak*, 716 F.3d at 1378.[26] At the very least, it must "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).[27] A determination cannot be considered reasonable if the agency has "entirely failed to consider an important aspect of the problem" before it. *Id*. at 43.

When the problem is dumping, any method Commerce employs must be "based on the best available information and establish[] antidumping margins as accurately as possible." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d

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accurate methodology is available and has been used in similar cases."). *Cf. Bestpak*, 716 F.3d at1378 ("Although Commerce may be permitted to use a simple average methodology to calculate the separate rate, the circumstances of this case renders a simple average of a *de minimis* and AFA China-wide rate unreasonable as applied."); *MacLean-Fogg Co. v. United States*, ___ C.I.T. ___, 885 F. Supp. 2d 1337, 1339 (2012) ("Commerce was permitted to use the AFA rate in calculating the all-others rate, provided it did so in a reasonable manner.").

[26] *See also In re Sang Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002) (The agency "must set forth its findings and the grounds thereof, as supported by the agency record, and explain its application of the law to the found facts.").

[27] This language comes from discussion of the arbitrary and capricious standard. Under the arbitrary and capricious standard, the court seeks to determine whether an agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Like the substantial evidence standard, it requires that the agency articulate a "rational connection between the facts found and the choice made." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines*, 371 U.S. at 168). At the same time, arbitrary and capricious as a standard "communicates a lesser review than substantial evidence: suggesting a restrained critical mood or a high tolerance for the risk of error." Charles Koch, 3 Admin. L. & Prac. § 9:25 (3d ed.); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 143 (1967) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (the substantial evidence test "afford[s] a considerably more generous judicial review than the 'arbitrary and capricious' test").

Accordingly, arbitrary and capricious review considers and requires much of the same factual support and reasoning as substantial evidence, but with a less searching review. *Cf. In re Sang Su Lee*, 277 F.3d at 1342. It is therefore pertinent to a substantial evidence review as the 'very least' an agency must do for its determination to be rooted in fact and considered reasonable.

1376, 1382 (Fed. Cir. 2001).[28] While 19 U.S.C. § 1673d(c)(5)(B) allows Commerce to use "any reasonable method," it must be in service of calculating a margin "reasonably reflective of potential dumping margins for non-investigated exporters or producers." 1994 U.S.C.C.A.N. 4040, 4201.[29]

Because judicial review of an administrative decision must be made on the grounds relied on by the agency,[30] if Commerce has not articulated its reasoning sufficiently, the court will require "such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973).

B. Commerce failed to articulate a rational connection between facts found and choices made.

In its *Redetermination*, Commerce did not consider whether use of an AFA rate, let alone use of the selected transaction-specific margin, was merited in its separate rates calculation. Nor did Commerce consider its responsibility to determine a separate rate that bears some relationship to respondents' actual rates. Rather, Commerce explains that its use of the AFA rate in the separate rate calculation is reasonable because Commerce needed to account for the non-cooperating, PRC-wide companies in the investigation. *Remand Results* at 46. Because some companies refused to respond to Commerce's requests for Q&V data, Commerce correctly notes that it lacks a complete data set. Commerce suggests that because any of the non-cooperating companies could or "may have been selected" as a

[28] *See also Bestpak*, 716 F.3d at 1379 ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible."); *Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007); *SNR Roulements v. United States*, 402 F.3d 1358, 1363 (Fed.Cir.2005) ("Antidumping laws intend to calculate antidumping duties on a fair and equitable basis."); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Amanda Foods II*, 714 F. Supp. 2d at 1292–93; *U.S. Steel Corp. v. United States*, ___ C.I.T. ___, 712 F. Supp. 2d 1330,1354–55 (2010); *Yantai Oriental Juice Co. v. United States*, 27 C.I.T. 477, 488 (2003).

[29] *Cf. Bestpak*, 716 F.3d at 1380 ("[R]ate determinations for nonmandatory, cooperating separate rate respondents must also bear some relationship to their actual dumping margins."); *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States, 701 F.3d 1367, 1379 (Fed. Cir. 2012)* ("the requirement that the method be 'reasonable' imposes a duty on Commerce to select a method appropriate for the circumstances."); *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin.").

[30] *See Sec. & Exch. Comm'n v. Chenery Corp*., 318 U.S. 80, 94–95 (1943) ("an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *Bowman Transp.*, 419 U.S. at 285–86 (The court may not supply the reasoned basis, but "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (internal citations omitted).

mandatory respondent, Commerce must account for them in some way in the separate rate calculation. Commerce suggests that it cannot be sure that the mandatory respondents are reflective of the separate rate respondents. *Id.*[31]

While Commerce may draw reasonable inferences from the failure of uncooperative respondents to provide evidence of the size, quantity, and value of their sales, doing so does not provide a rationale for the redetermination made here. The mere presence of non-cooperating parties "fails to justify [Commerce's] choice of dumping margin for the cooperative uninvestigated respondents." *Amanda Foods (Vietnam) Ltd. v. United States*, 33 C.I.T. 1407, 647 F. Supp. 2d 1368, 1381 (2009) ("*Amanda Foods I*").

Application of the AFA rate to non-cooperating parties is a rebuttable presumption. *See Rhone Poulenc*, 899 F.2d at 1190–91. A rebuttable presumption is not evidence. *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 170 (1938).[32] Even if it were, the fact that the AFA rate applies to other companies is not evidence of dumping on the part of the separate rate companies. *Amanda Foods I*, 647 F. Supp. 2d at 1381. Commerce cannot use the AFA rate in calculating the separate rate for cooperating parties without explanation. *See Changzhou Wujin Fine Chem. Factory*, 701 F.3d at 1379.

Moreover, Commerce failed to make any connection between the transaction-specific margin of 25.62 percent and separate rate respondents' pricing practices. Commerce did not provide a rationale for how its use of this margin results in a reasonably accurate separate rate. While Commerce's concern about incomplete Q&V data provides an explanation for its decision to use a method other than the expected average of individually investigated rates, that rationale has no relationship to the use of the 25.62 percent transaction-specific margin. Why, for example, would it not have been appropriate to include a different or multiple transaction-specific margins in order to get a more accurate rate? Specifically, why this margin? How has Commerce done other than "cherry-picked [a] single data point" and

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[31] *See also* Defendant's Response to Comments Upon the Remand Redetermination, ECF No. 141; Defendant-Intervenor's Reply Comments Regarding Department of Commerce Final Results of Redetermination Pursuant to Court Remand, ECF No. 140.

[32] *See also Routen v. W.*, 142 F.3d 1434, 1439 (Fed. Cir. 1998) ("This court has never treated a presumption as any form of evidence."); *Amanda Foods II*, 714 F. Supp. 2d at 1295 ("a rebuttable presumption with respect to the margins for some companies may not by itself serve as substantial evidence supporting the accuracy of margins assigned to wholly unrelated companies.").

gratuitously added it to the separate rate calculation?[33] Why, on the factual record, is this a reasonable way for Commerce to have exercised its discretion? The *Redetermination* contains no consideration of this aspect of the problem.

It is, of course, correct that, to calculate the separate rate in the *Redetermination*, Commerce has moved from (a modified application of) the general rule of 19 U.S.C § 1673d(c)(5)(A) to the exception in 19 U.S.C § 1673d(c)(5)(B), reflecting changes in the mandatory rates. But Commerce has failed to consider its responsibility to determine rates that bear some relationship to respondents' actual rates, to their economic reality, rendering its chosen method unreasonable. Whether under the general rule or the exception, the mandatory respondents are meant to be representative of the industry, and therefore of the separate rate respondents. *See* 19 U.S.C. § 1677f-1(c)(2).[34] Even under the exception, which allows for "any reasonable method," the expected method is an average of the "estimated weighted average dumping margins determined for the exporters and producers individually investigated." 19 U.S.C. § 1673d(c)(5)(B).[35] Commerce has exercised its discretion to not use the expected method in favor of a method that takes into account the absence of data from the PRC-wide entity. While the use of the AFA rate in the calculation of the separate rate may be reasonable in some circumstances (so long

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[33] *See Changzhou Wujin Fine Chem. Factory*, 701 F.3d at 1379 (finding Commerce had "cherry-picked the single data point" (a transaction-specific margin) for the AFA, that "would have the most adverse effect possible on cooperating voluntary respondents," when added to the separate rate calculation, "in a situation where there was no need or justification for deterrence").

[34] The statute provides that the mandatory respondents should be "a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection," or "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." *See* 19 U.S.C. §§ 1677f-1(c)(2)(A)-(B). The corresponding explanation from the SAA provides that "Commerce will employ a sampling methodology designed to give representative results based on the facts known at the time the sampling method is designed. This important qualification recognizes that Commerce may not have the type of information needed to select the *most* representative sample at the early stages of an investigation or review when it must decide on a sampling technique." 1994 U.S.C.C.A.N. 4040, 4200–01 (emphasis in original).

[35] The *Amanda Foods* court found that:

> When a statutory provision specifically lists "averaging the [zero and *de minimis*] estimated weighted average dumping margins determined for the exporters and producers individually investigated" as the sole provided example of "a reasonable method to establish the estimated all-others rate" when all mandatory respondents' margins are zero or *de minimis,* 19 U.S.C. § 1673d(c)(5)(B), it is impermissible to interpret this provision as expressing a preference against the use of such methodology in such situations.

Amanda Foods II, 714 F. Supp. 2d at 1291.

as supported by substantial evidence), here the seemingly gratuitous inclusion of this transaction-specific rate in the separate rate calculation, to increase the resultant rate, is incongruous. Upon remand, all relevant rates — mandatory, transaction-specific and AFA — decreased, suggesting a decreased likelihood of dumping.[36] But Commerce made the choice to use a method that increased the separate rate both from the zero that would have resulted from the expected method and from the 3.31 percent in Commerce's original determination. Commerce did not explain why it made this choice or how the result was in any way reasonably reflective of Plaintiffs' economic reality.[37]

While it is true that under substantial evidence the court "do[es] not make the determination," it "merely vet[s] the determination," *Nippon Steel*, 458 F.3d at 1352, "that the scope of such review is

[36] *Cf. Yantai Oriental Juice*, 27 C.I.T. at 487 ("Given these facts it appears that Commerce strained to reach its result. This is particularly puzzling given that in reaching its result Commerce abandoned the methodology used in the Final Determination (i.e., weight-averaging the estimated dumping margins of the Fully–Investigated Respondents) even though that method is specifically provided for in the statutory subsection it purported to follow."); *Amanda Foods I*, 647 F. Supp. 2d at 1381 ("Commerce, however, has not provided us with sufficient evidence on the record which could justify ignoring the evidence in favor of assigning a *de minimis* rate to Plaintiffs and which would support as reasonable the alternative rate chosen. Nor has Commerce articulated a clear justification for choosing the dumping margins that it assigned.").

[37] Commerce would use *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States* for the proposition that its method is reasonable because it is lawful to use a simple average of zero and AFA rates to calculate the separate rate. *Remand Results* at 47. But while the *Bestpak* court held a simple average of *de minimis* and AFA rates was not *per se* unreasonable, it also found the method unreasonable in application. *Bestpak*, 716 F.3d at 1380. Commerce faces the same problem here.

Commerce would distinguish the instant case from *Bestpak* on two grounds: First, here the AFA rate is better grounded in economic reality. While the *Bestpak* AFA was based on a petition rate, the AFA rate here is the "highest transaction-specific margin calculated for a mandatory respondent," and therefore "reflects actual economic activity." *Remand Result* at 48. Second, the instant administrative record is fuller than the *Bestpak* record. *Id*. at 48–49. Commerce would argue that these show that the separate rate here is grounded in economic reality.

But Commerce misunderstands *Bestpak*. The *Bestpak* court did not require that the separate rate be grounded in economic reality generally, or to the factual record generally, but rather that it must bear some relationship to respondents' economic reality and factual situation. *Bestpak*, 716 F.3d at 1380 ("[R]ate determinations for nonmandatory, cooperating respondents must . . . bear some relationship to their actual dumping margins."). Commerce has not made this connection here. Commerce has not shown how the method chosen reflects or has some reasonable relationship to the economic reality of separate rate companies. Commerce's method is therefore still unreasonable in application.

Commerce's use here of its reasoning in *Lined Paper Products from India*, Issues & Decision Mem., A-533–843, POR Sept. 1, 2010 – Aug. 31, 2011 (Apr. 9, 2013) (adopted in 78 Fed. Reg. 22,232 (Dep't of Commerce Apr. 15, 2013)) (final results of antidumping duty administrative review, 2010–11 cmt. 5 at 14, fails here for the same reason: those arguments do not touch on the separate rate respondents' economic reality.

narrowly circumscribed is beside the point," *Chenery*, 318 US at 94, where, as here, Commerce's redetermination fails to articulate the required rational connection between the facts found and the rate chosen. It therefore fails substantial evidence review.

CONCLUSION

It is lawful for Commerce to draw reasonable inferences from uncooperative companies' failure to submit evidence of the size, quantity, and value of their sales, and to use a method reasonably derived from the relevant statutory language. But substantial evidence asks a more specific question, and requires a more specific explanation from Commerce.[38] At issue is whether Commerce's determination was based on a reasonable reading of the record in context. Without further explanation, the court cannot consider it so.[39]

Accordingly, this matter is affirmed in part and remanded in part to Commerce for further consideration in accordance with this opinion. Commerce shall have until May 8, 2014 to complete and file its remand redetermination. Plaintiffs shall have until May 22, 2014 to file comments. Defendant and Defendant-Intervenors shall have until June 6, 3014 to file any reply.

IT IS SO ORDERED.

Dated: March 31, 2014
New York, NY

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

[38] *Cf. In re Sang Su Lee*, 277 F.3d at 1345 ("The board cannot rely on conclusory statements when dealing with particular combinations of prior art and specific claims, but must set forth the rationale on which it relies.").

[39] *Cf. Changzhou Wujin Fine Chem. Factory*, 701 F.3d at 1379.