U.S. Court of International Trade

Slip Op. 19–33

ONE WORLD TECHNOLOGIES, INC., Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION, and ACTING COMMISSIONER KEVIN K. MCALEENAN, Defendants, THE CHAMBERLAIN GROUP, INC. and UNITED STATES INTERNATIONAL TRADE COMMISSION Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00017
PUBLIC VERSION

[Denying Defendants' motion to dismiss; Denying Defendants' motion to strike jury demand; Granting Plaintiff's preliminary injunction in part.]

Dated: March 11, 2019

Jason C. White, *Michael J. Abernathy*, and *Nicholas A. Restauri*, Morgan, Lewis & Bockius, LLP, of Chicago, IL, for Plaintiff One World Technologies, Inc.

Guy R. Eddon, *Amy M. Rubin*, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., and *Edward F. Kenny*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendants United States, U.S. Department of Homeland Security, U.S. Customs and Border Protection, and Acting Commissioner Kevin K. McAleenan. *Marcella Powell*, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With them on the brief was *Joseph H. Hunt*, Assistant Attorney General. Of counsel was *Michael Heydrich*, Office of Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

Sidney A. Rosenzweig and *Carl P. Bretscher*, U.S. International Trade Commission, of Washington, D.C., for Defendant-Intervenor U.S. International Trade Commission.

Joseph V. Colaianni, Jr., *Benjamin Elacqua*, and *John T. Johnson*, Fish & Richardson, P.C., of Washington, D.C., Houston, TX, and New York, N.Y., for Defendant-Intervenor The Chamberlain Group, Inc.

OPINION

Choe-Groves, Judge:

This case highlights the procedural and jurisdictional hurdles that a party must overcome when it seeks to prevent the Government from stopping the import of its products into the United States. In this case, One World Technologies, Inc. ("Plaintiff" or "One World") seeks declaratory and injunctive relief from the Court to allow future imports of its merchandise into the United States. Plaintiff faces a frustrating dilemma, but has not met its procedural burdens to establish jurisdiction for declaratory relief.

The U.S. Court of International Trade, as an Article III Court, has limited jurisdiction. The Court is empowered to hear civil actions

brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. § 1581(a)–(i). The Court may grant declaratory, prospective relief for future imports under 28 U.S.C. § 1581(h) in certain circumstances, but only if the parties establish that each of the statutory requirements has been met for the court to exercise proper jurisdiction. In this case 19–00017, and in another case 18-00200 pending before the Court, Plaintiff has attempted to establish jurisdiction under 28 U.S.C. § 1581(h). Plaintiff seeks declaratory relief that will prevent Defendants from taking actions against its imported merchandise, but Plaintiff has failed to satisfy the statutory requirements of 28 U.S.C. § 1581(h) in both cases. Plaintiff may seek to amend its pleadings to meet the requirements as outlined in this opinion.

Before the Court is the Motion for Temporary Restraining Order and Preliminary Injunction ("First Motion for TRO/PI") of One World, and the Motion to Dismiss of the United States, United States Department of Homeland Security, United States Customs and Border Protection and Commissioner Kevin K. McAleenan (collectively, "Defendants"). For the reasons that follow, the court exercises subject-matter jurisdiction over this action under 28 U.S.C. § 1581(i), denies Defendants' motion to dismiss, and grants Plaintiff's motion for preliminary injunction in part.

PROCEDURAL BACKGROUND

The court assumes familiarity with the facts leading up to this dispute as discussed in *One World Technologies, Inc. v. United States*, 42 CIT __, __ F. Supp. 3d. __ (2018) ("*One World I*"). One World brought this action on January 25, 2019, seeking a temporary restraining order ("TRO"), a preliminary injunction ("PI"), the immediate release by U.S. Customs and Border Protection ("Customs") of certain imported, redesigned garage door openers ("GDOs") contained in entries numbers: 442–75658274 ("First Shipment"), 442–75658266 ("Second Shipment"), 442–75661187 ("Third Shipment"), and 442–75661948 ("Fourth Shipment"), and declaratory relief. Pl. Compl. ¶¶ 3–4, 11–18, 60–72 (Jan. 25, 2019), ECF No. 6; Pl. One World Technologies, Inc.'s Mot. for TRO and Prelim. Inj. (Jan. 25, 2019), ECF No. 7 ("Pl.'s Mot."); Mem. of P. & A. Supp. of Pl. Mot. for TRO and Prelim. Inj. (Jan. 25, 2019), ECF No. 8.

The court requested supplemental briefing on the court's subject-matter jurisdiction over this action under 28 U.S.C. § 1581(i) on January 28, 2019. Order, ECF No. 11.

Defendants provided supplemental information regarding the status of the four entries on January 29, 2019 as follows:

Entry No.	Date Presented	Status
442–75658274 [First Shipment]	1/14/2019	Detained at the Port of Savannah, GA Detention no. 20191703000053 issued on January 15, 2019. Reason for detention: Import specialist review.
442–75658266 [Second Shipment]	1/17/2019	Detained at the Port of Savannah, GA Detention no. 20191703000056 issued on January 17, 2019. Reason for detention: Import specialist review.
442–75661187 [Third Shipment]	1/29/2019	Presented for Customs examination[.]
442–75661948 [Fourth Shipment]	N/A	The container ship is arriving today. [January 29, 2019.] [The Amended Status Update, ECF No. 22, dated January 30, 2019, also stated "[t]he container ship is arriving today."]

Def. Status Update, ECF No. 16. Defendants did not identify the importation date for the four entries. *Id.* Defendants provided another status update on February 1, 2019, notifying the court that Customs intended to seize the First and Second Shipments on Tuesday, February 12, 2019. Defs. Status Update, ECF No. 24. At that time, Defendants did not have information regarding seizure dates for the Third and Fourth Shipments. ECF No. 24.

The U.S. International Trade Commission ("ITC") moved to intervene on February 5, 2019. Mot. of the ITC for Leave to Intervene in Support of Defendants, ECF No. 27. The Chamberlain Group, Inc. ("Chamberlain") moved to intervene on February 6, 2019. Chamberlain's Mot. to Intervene, ECF No. 33.

Plaintiff submitted an additional motion for a temporary restraining order on February 6, 2019. Pl. One World Technologies, Inc.'s Mot. for TRO (Feb. 6, 2019), ECF No. 28 ("Pl.'s 2nd Mot. for TRO").

The court held a TRO, Preliminary Injunction and Jurisdiction Hearing ("TRO & PI Hr'g") on February 11, 2019. TRO & PI Hr'g, Feb. 11, 2019, ECF No. 50. Based on the record and the representations of the parties as of that time, the court granted the TRO. TRO, ECF No. 51.

Chamberlain petitioned to attend the TRO & PI Hearing. Chamberlain's Pet. To Attend the TRO & PI Hr'g, ECF No. 47. The court denied Chamberlain's petition because the court was previously notified that confidential information would be discussed in the hearing and Chamberlain was not a signatory to the protective order. Order, ECF No. 48. Chamberlain filed a writ of mandamus in the U.S. Court of Appeals for Federal Circuit on February 13, 2019, which was denied on March 7, 2019.

The court ordered that the Parties respond to Chamberlain's and the ITC's motions to intervene by February 15, 2019. Order, ECF No. 52. Following the Parties' responses, the court granted Chamberlain's motion to intervene, granted ITC's motion to intervene for the limited purpose of challenging subject matter jurisdiction, and requested supplemental briefing as to the court's subject-matter jurisdiction under 28 U.S.C. § 1581 (h) or (i) in this case on February 15, 2019, ECF No. 53; ECF No. 56.[1]

Defendants submitted the instant Motion to Dismiss and Motion to Strike Demand for a Jury Trial, and in Response to Plaintiff's Motion for Preliminary Injunction ("Defs.' Motion to Dismiss") on February 15, 2019. Defs.' Motion to Dismiss, ECF No. 58, 59. In Defendants' motion, Defendants proffered importation and exclusion dates for each entry as follows:

Entry No.	Date of Importation	Date Presented for Examination	Date of Detention	Date of Deemed Exclusion
442–75658274	January 2, 2019	January 14, 2019	January 15, 2019 Notice no.[2] 20191703000053	February 14, 2019
442–75658266	January 2, 2019	January 17, 2019	January 17, 2019 Notice no. 20191703000056	February 17, 2019
442–75661187	January 22, 2019	January 29, 2019	January 31, 2019 Notice no. 20191703000065	March 1, 2019
442–75661948	January 29, 2019	January 31, 2019	February 4, 2019 Notice no. 20191703000067	March 3, 2019

Id. at 4, 6.

The court extended the TRO on February 21, 2019, finding good cause and to preserve the *status quo* while the court received responses to the Defendants' Motion to Dismiss from the Parties. TRO Extension, ECF No. 70.

I. Defendants' Motion to Dismiss

In reviewing a motion to dismiss, the court must draw all reasonable inferences in favor of the non-movant when deciding a motion to dismiss for lack of jurisdiction. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

[1] On February 14, 2019, the court asked for briefing on whether this case should be consolidated with *One World I*. Upon consideration of these cases and the Parties' responses, the court has decided not to consolidate the present case with Court No. 18–00200.

[2] "Notice no." refers to "Detention Notice Number."

A. Subject-Matter Jurisdiction

Plaintiff asserts that 28 U.S.C. § 1581(h) and (i) confer jurisdiction in this action. Pl. Compl. ¶ 5. Defendants contend that this action does not fall within the court's jurisdiction pursuant to 28 U.S.C. § 1581(h) or (i). Defs.' Mot. to Dismiss 8, ECF No. 59.

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. § 1581(a)–(i). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *id.* (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

i. Subject-Matter Jurisdiction Under 28 U.S.C. § 1581(h)

Under 28 U.S.C. § 1581(h), the court has:

> . . . exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to . . . restricted merchandise, entry requirements, . . . or similar matters, but only if the party commencing the civil action demonstrates . . . that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

Plaintiff has the burden of establishing jurisdiction under 28 U.S.C. § 1581(h) by clear and convincing evidence. 28 U.S.C. § 2639(b); *see St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 768–69 (Fed. Cir. 1993). A civil action under 28 U.S.C. § 1581(h) may be commenced "by the person who would have standing to bring a civil action under section 1581(a)," 28 U.S.C. § 2631(h), and "prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required." 28 U.S.C. § 2637(c). Plaintiff must show that four requirements are met in order to establish jurisdiction under subsection (h):

> (1) judicial review must be sought *prior* to importation of goods;
> (2) review must be sought of a ruling, a refusal to issue a ruling

> or a refusal to change such ruling; (3) the ruling must relate to certain subject matter; and (4) irreparable harm must be shown unless judicial review is obtained *prior to* importation.

Best Key Textiles Co. v. United States, 777 F.3d 1356, 1360 (Fed. Cir. 2015) (emphasis in original) (citing *Am. Air Parcel Forwarding Co., Ltd. v. United States*, 718 F.2d 1546, 1551–52 (Fed. Cir. 1983)). The court addresses each requirement in turn.

1) Judicial Review Must Be Sought Prior to Importation of Goods

To determine whether the first requirement is met, the court examines if judicial review was sought, identifies when the goods were imported, and then compares the date that judicial review was sought to the date of importation.

First, Plaintiff contends that for the purposes of 28 U.S.C. § 1581(h) jurisdiction, the date on which judicial review is sought is determined by the date of the complaint in this action Hr'g. Tr. 20:21–25, Feb. 11, 2019. CIT Rule 3 defines the commencement of an action as the filing of a summons and complaint concurrently. CIT R. 3(a)(3). One World filed a summons and complaint with the court on January 25, 2019. Pl. Summons, ECF No. 1; Pl. Compl. ¶4, ECF No. 6. The summons and complaint commenced the action, and thus Plaintiff sought judicial review on January 25, 2019. CIT R. 3(a); 28 U.S.C. § 1581(h) ("The Court of International Trade shall have exclusive jurisdiction of any civil action *commenced* to review . . . .") (emphasis added).

Second, Plaintiff argues that for "importation of goods" for subsection (h) jurisdiction, that date is determined either by: (1) the date of detention or presentment, or (2) the definition of "date of importation" under 19 C.F.R. § 101.1. Hr'g. Tr. 50:6–10, Feb. 11, 2019. 19 C.F.R. § 101.1 states in relevant part: "[i]n the case of merchandise imported by vessel, 'date of importation' means the date on which the vessel arrives within the limits of a port in the United States with intent then and there to unlade such merchandise." Hr'g. Tr. 50:6–10, Feb. 11, 2019; 19 C.F.R. § 101.1.

Defendants counter that the date on which goods are presented for examination is not the date of importation. Defs.' Mot. to Dismiss 3, n.1, ECF 59. Although Defendants do not provide an alternate definition for the date of importation, Defendants contend that the intention of the statute was "to permit judicial review *prior to the completion of the transaction* or payment of the duties," and proffer dates of importation for each entry. Defs.' Mot. to Dismiss 19, ECF

Nos. 58, 59; *Manufacture De Machines Du Haut-Rhin*, 569 F. Supp. at 881 n.3 (emphasis added).[3]

The court finds that the definition of "date of importation" in 19 C.F.R. § 101.1 is the appropriate definition that should be used to determine "importation of goods" for the first requirement of determining jurisdiction under 28 U.S.C. § 1581(h).

Third, having addressed "judicial review" and "importation of goods," the court now addresses whether or not judicial review was sought prior to the importation of goods. *See Inner Secrets/Secretly Yours, Inc. v. United States*, 18 CIT 1028, 1031, 869 F. Supp. 959, 963 (1994) (discussing how judicial review pursuant to 28 U.S.C. § 1581(h) is available only for prospective transactions). At the time of the preliminary injunction and TRO hearing, One World contended that their complaint was filed before the Third and Fourth Shipments were imported. TRO & PI Hr. Tr. 20:21–21:3, Feb. 11, 2019. One World also argued that other, "future shipments . . . destined for the U.S. in the coming weeks and months" would qualify for preimportation. TRO & PI Hr. Tr. 20:21–24, Feb. 11, 2019.[4] Defendants argue that One World's prior entry of a shipment of redesigned GDOs (which are the subject of court no. 18-00200) means that One World cannot claim that it is seeking judicial review prior to importation of the same model redesigned GDOs in the present case. Defs.' Mot. to Dismiss 19, ECF Nos. 58, 59. Plaintiff counters that prior to importation means prior to importation of a specific shipment. TRO & PI Hr. Tr. 35:1–6, Feb. 11, 2019, ECF No. 60.

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[3] Defendants do not explain how the importation dates proffered in their motion to dismiss were determined, nor do they offer a definition of "date of importation" in their motion. Defs.' Motion to Dismiss, 3–4, ECF No. 59. This is inapposite to Defendants' statements during the TRO & PI hearing:

> JUDGE: for purposes of importation, how did the government -- what date would the government deem the entry to be imported? Is it date of presentment [or] the date of detention?
>
> MR. KENNY: Your Honor, I don't think the date of importation is not -- is not a date that's relevant. . . . It's date of presentment, followed by whether or not there's an exclusion within certain days of that date or not.

TRO & PI Hr'g. Tr. 19:1–9.

[4] One World's Supplemental Brief in Support of the Court's Subject Matter Jurisdiction references two additional shipments of redesigned GDOs, identified by entry nos. 442–75662557 and 442–75665436. ECF Nos. 63, 62, Exs. B & C. Customs' detention notice for entry no. 442–75662557 states "[a]dmissibility determination research" as the reason for detention. Entry no. 442–75662557 was presented on February 7, 2019, but does not have an identified importation date. ECF No. 62, Ex. B. One World's brief does not attach a detention notice for Entry no. 442–76565436, but does include an Entry Summary. Entry no. 442–76565436 was listed as imported on February 18, 2019. ECF No. 62, Ex. C. Entry nos. 442–75665436 and 442–75662557 are not listed in the complaint. Compl., ECF No. 6. One World did not amend its complaint in this case or in Court No. 18–00200 to address these additional shipments, and so entry nos. 442–75665436 and 442–75662557 are not properly before this court.

Defendants' argument is not convincing. First, "[i]mporting goods while an appeal of a [28 U.S.C.] § 1581(h) decision is pending is neither prohibited nor protected by § 1581(h)." *Heartland By-Prod., Inc. v. United States*, 568 F.3d 1360, 1366 (Fed. Cir. 2009). Second, previous importation of goods does not preclude an importer from seeking preimportation review for future shipments under 28 U.S.C. § 1581(h).[5] *See Holford USA Ltd., Inc. v. United States*, 19 CIT 1486, 1488, 1492–93, 912 F. Supp. 555, 557, 560–61 (1995). Plaintiff's entries may be prospective transactions for the purposes of determining jurisdiction under subsection (h) and Plaintiff has indicated that other entries currently on order will be forthcoming in the future.

As the court has already found that the date that judicial review is sought is defined by the date of the summons and complaint, and that the date of importation for the purposes of determining jurisdiction under 28 U.S.C. § 1581(h) is defined by 19 C.F.R. § 101.1, the court compares the date of the summons and complaint with the date of importation for each entry to determine whether subject-matter jurisdiction exists.

One World represents that the First Shipment was presented on January 14, 2019. Pl. One World's Supp. Br. Ct.'s Subject Matter Jurisdiction 4, ECF No. 63. One World does not specify whether it believes that the presentment date was the date of importation under 19 C.F.R. § 101.1, or if there was a separate importation date for that shipment. *See* TRO & PI Hr'g Tr. 22:3–7, ECF No. 60; Pl. One World's Supp. Br. Ct.'s Subject Matter Jurisdiction 4, ECF No. 63. Defendants represent that the First Shipment was imported on January 2, 2019 and presented on January 14, 2019. Defs.' Mot. to Dismiss, ECF No. 59; *see* Pl. Supp. Br. Supp. of Ct.'s Subject Matter Jurisdiction 4, ECF No. 63. As all the proffered importation dates for the First Shipment preceded the date of the complaint, January 25, 2019, the court finds that the First Shipment does not meet the first requirement for determining subject-matter jurisdiction under 28 U.S.C. § 1581(h).[6]

One World represents that the Second Shipment was presented on January 17, 2019. Pl. Br. Supp. Ct.'s Subject Matter Jurisdiction 7,

[5] Plaintiff may allege jurisdiction under 28 U.S.C. § 1581(h) in Court No. 18–00200 by amending their complaint to address identifiable future shipments which have not yet been entered. *See* 28 U.S.C. § 2638 ("In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—

(1) applies to the same merchandise that was the subject of the protest; and

(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.").

[6] Even if the importation date is considered to be the date of presentment, the First Shipment does not precede the date of the complaint.

ECF No. 25; *see* TRO & PI Hr'g Tr. 17:19–23, ECF No. 60. One World does not specify whether the presentment date was the date of importation under 19 C.F.R. § 101.1, or if there was a separate importation date for that shipment. *See* TRO & PI Hr'g Tr. 22:3–7, ECF No. 60. Defendants represent that the Second Shipment was imported on January 2, 2019 and presented for importation on January 17, 2019. Defs.' Mot. to Dismiss, ECF No. 59; *see* Pl. Supp. Br. Supp. of Ct.'s Subject Matter Jurisdiction 4, ECF No. 63. As all the proffered importation dates for the Second Shipment precede the date of the complaint, the court finds that the Second Shipment does not meet the first requirement for determining subject-matter jurisdiction under 28 U.S.C. § 1581(h).[7]

One World represents that the Third Shipment was placed on examination hold on January 17, 2019, Pl. Compl. ¶ 18, ECF No. 6, and presented for examination on January 29, 2019. Pl. Br. Supp. Ct.'s Subject Matter Jurisdiction 7, ECF No. 25; *see* TRO & PI Hr'g Tr. 17:19–23, ECF No. 60. One World does not specify whether it alleges that the date of importation under 19 C.F.R. § 101.1 was the presentment date, the date the shipment was placed on examination hold, or another date. *See* TRO & PI Hr'g Tr. 22:3–7, ECF No. 60. Defendants represent that the Third Shipment was imported on January 22, 2019 and presented on January 29, 2019. Defs.' Mot. to Dismiss 3–4, ECF No. 59. Absent Plaintiff's sufficient showing of an importation date, One World has not demonstrated by clear and convincing evidence that the complaint of January 25, 2019 was filed prior to the importation of the Third Shipment.

One World represents that the Fourth Shipment was placed on examination hold on January 24, 2019, Pl. Compl. ¶ 18, ECF No. 6, and presented for examination on January 31, 2019. Pl. Supp. Br. Supp. Ct.'s Subject Matter Jurisdiction 4, ECF No. 63. One World does not specify whether it alleges that the presentment date for the Fourth Shipment was the date of importation under 19 C.F.R. § 101.1, or if there was a separate importation date for that shipment. Defendants represent that the Fourth Shipment was imported on January 29, 2019 and presented on January 31, 2019. Defs.' Mot. to Dismiss 3–4, ECF No. 59.

There is clear and convincing evidence that the importation date for the Fourth Shipment is after the date of the complaint, as Defendants identified the importation date as January 29, 2019, and Plaintiff cross-references the Defendants' identified importation date. Pl.

[7] Even if the importation date is considered to be the date of presentment, the Second Shipment does not precede the date of the complaint.

Suppl. Br. in Supp. of the Ct.'s Subject Matter Jurisdiction, ECF No. 62; TRO & PI Hr. Tr. 17:19–23, 20: 21–24, Feb. 11, 2019, ECF No. 60; *see* Entry Summary for Entry No. 442–75661948, ECF No. 21, Ex. X. Because the proffered January 29, 2019 importation date is after January 25, 2019, the date of the complaint, the court finds that the Fourth Shipment meets the first requirement for determining subject-matter jurisdiction under 28 U.S.C. § 1581(h).

2) Judicial Review Must Be Sought of a Ruling, a Refusal to Issue a Ruling, or a Refusal to Change Such Ruling

Defendants argue that: (1) final agency action has not occurred in this case, and (2) One World has not challenged a Customs ruling in the present case. Defs.' Mot. to Dismiss 14–21, ECF No. 59. One World argues that: (1) Customs' HQ H300129 or HQ H295697 are rulings at issue in this case, even though HQ H300129 was issued in reference to a different entry number, and (2) Customs' "action or inaction" has resulted in Customs' "delay in issuing . . . notices of detention and . . . decisions with respect to admissibility." Mem. P. & A. Supp. Pl. One World's Mot. for TRO & PI 11, ECF No. 8; Pl. Supp. Br. Supp. Ct. Subject Matter Jurisdiction 3, 6, ECF No. 63.

First, the court considers whether Customs' HQ H300129 or HQ H295697 is a ruling for the purposes of meeting the second requirement to establish (h) jurisdiction. *See Inner Secrets / Secretly Yours, Inc. v. United States*, 18 CIT 1028, 1031, 869 F. Supp. 959, 963 (1994) (judicial review pursuant to 28 U.S.C. § 1581(h) is available only for prospective transactions). A ruling within the meaning of 28 U.S.C. § 1581(h) is provided for by 19 U.S.C. § 1502(a) and the statute's implementing regulations under 19 C.F.R. § 177.1. Under 19 C.F.R. § 177.1, preimportation rulings are addressed as rulings issued with respect to prospective transactions. 19 C.F.R. § 177.1(a)(1) ("It is in the interest of the sound administration of the Customs and related laws that persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation.").

A ruling is within the meaning of 28 U.S.C. § 1581(h) if it speaks "to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact of the ruling with virtual certainty." *Pagoda Trading Co. v. United States*, 6 CIT 296, 298, 577 F. Supp. 22, 24 (1983). Customs HQ H295697 was issued on July 20, 2018. ECF No. 62, Ex. A. Although it is unclear precisely when the First, Second, Third, and Fourth Shipments were contemplated, the information provided by One World indicates that these shipments

were contemplated several months following Customs HQ H295697.[8] Customs' HQ H295697 is not identified in the Complaint, while HQ H300129 is identified. *See* Pl. Compl ¶ 54, ECF No. 6. Customs' detention notices for the First, Second, Third, and Fourth Shipments state that the reason for detention is "import specialist review" and makes reference to neither HQ H295697 nor HQ H300129. Pl. Compl. ECF No. 6, Exs. H & I; Pl. Br. Supp. Subject Matter Jurisdiction Under 18 U.S.C. § 1581(i), ECF No. 25, Exs. 1 & 2; TRO & PI Hr'g Tr. 60:4–9, ECF No. 60. Both Plaintiff and Defendants have discussed the ongoing modification proceedings at the ITC. *See* Pl. Mem. P. & A. Supp. Pl. Mot. for TRO & PI 10, ECF No. 8; Pl. Br. Opp. To Defs.' Mot. to Dismiss, Resp. Mot. to Strike, and Supp. Mot. for PI 24 ECF No. 77; Defs.' Mot. to Dismiss 42, ECF No. 59; Chamberlain's Br. Resp. One World's Mot. for PI 3–4, ECF No. 79. Under these circumstances, there is a "presence of additional issues in this action regarding whether the ruling will actually be applied." *Pagoda Trading*, 6 CIT at 298. One World has failed to put forth evidence showing that it requested a specific ruling prior to importation of the First, Second, Third, or Fourth shipments.[9] Plaintiff has thus failed to demonstrate by clear and convincing evidence that Customs' HQ H295697 is at issue in such a manner to meet the second requirement for 28 U.S.C. § 1581(h) jurisdiction.

Customs' HQ H300129 is a written statement issued by the Intellectual Property Rights Branch, the "appropriate office of Customs," that applied the provision of Customs and related laws to a specific set of facts as identified in One World's protest, number 160118100231.[10] HQ H300129 1, 39, ECF No. 6, Ex. F, *see* 19 C.F.R. § 177.1(d)(1). Customs' HQ H300129 spoke to a different entry not at issue in this case. *Id.* One World has not provided additional evidence to demonstrate that Customs is applying the Customs' HQ H300129 in this case. Because Customs' HQ H300129 does not identify the entries at issue in this case, and there is no other evidence cited by Plaintiff to demonstrate Customs' application of the HQ H300129 to the entries at issue in this case, One World has not met its burden of demonstrating that Customs' HQ H300129 is a ruling within the meaning of 28 U.S.C. § 1581(h) by clear and convincing evidence. In

[8] [[ ]]

[9] One World may choose to amend its complaints in 19–00017 or 18–00200 to allege that it challenges a specific ruling prior to importation of additional shipments that have not been detained or seized.

[10] Customs defines the "Headquarters Office" as "Regulations and Rulings, Office of International Trade at Headquarters, U.S. Customs and Border Protection, Washington, DC." 19 C.F.R. § 177.1(d)(6). The decision here was issued by the Intellectual Property Rights Branch within that office.

order to establish (h) jurisdiction properly, One World would need to request a preimportation ruling specifically related to an entry prior to import. One World has not met that procedural burden here.

Second, even if Customs' HQ H300129 is not considered a ruling within the meaning of 28 U.S.C. § 1581(h), the court considers whether or not Customs refused to issue or change a ruling. *Best Key*, 777 F.3d at 1360. One World argues that Customs' notice of their intent to seize the merchandise in the First and Second Shipments implies that Customs made a determination, *i.e.*, a ruling, as to whether the goods contained in the First and Second Shipments infringe within the meaning of the ITC's Limited Exclusion Order, because the ITC's Limited Exclusion Order is not self-executing with respect to any specific entry. *See* Pl. Compl, ECF No. 6, Ex. D & O.

To determine if Customs refused to issue a ruling, the court first asks if a request for a ruling was made. One World represents that it made inquiries to Customs regarding Customs' intended treatment of future redesigned GDO shipments.[11] It is not clear from the record whether these inquiries were made orally, or in writing. Requests for rulings made orally and in writing have different effects. Oral requests will not result in a written ruling. 19 C.F.R. § 177.1(b). Written requests may result in a ruling or an information letter. 19 C.F.R. § 177.1(d)(1)–(2). The record is not clear if One World's requests to Customs were in the form required by 19 C.F.R. § 177.2, nor is the record clear in what form Customs responded, if any.

One World notes that 28 U.S.C. § 2637 does not require exhaustion of administrative remedies prior to the commencement of a suit under 28 U.S.C. § 1581(h). Pl. Mem. P. & A. Supp. Mot. TRO & PI 14, n.5, ECF No. 21. Even if exhaustion of administrative remedies is not required, 28 U.S.C. § 2637 still requires that "the person commencing the action [make] the demonstration required by such section," *i.e.*, that jurisdiction under 28 U.S.C. § 1581(h) is established by clear and convincing evidence. 28 U.S.C. § 2639(b). Even if One World is not required to request a ruling, One World would still have to show by some other clear and convincing evidence that Customs refused to issue a ruling. Based on the facts presented by One World, Plaintiff's challenge to Customs' administrative decision does not allow "the Court to limit its concentration to the correctness of a decision made as to a specific set of circumstances," and thus does not meet the

[11] During the PI/TRO Hearing, counsel for One World stated: "[w]e also at that point sought to learn CBP's intentions with respect to future shipments in view of the Court's order. We reached out to a number of the people at different ports and different jurisdictions, but we were not able to get a response to our inquiry, so again we're unsure as to what position they were going to take." TRO & PI Hr'g Tr. 23:4–10, ECF No. 60.

second requirement. *Pagoda Trading*, 577 F. Supp. at 24; *see also* 19 C.F.R. § 177.7 (identifying circumstances in which Customs will not issue a ruling).

Third, the court considers if Customs refused to change its ruling. *See* 19 U.S.C. 1625(c); 19 C.F.R. § 177.12 (providing for modification or revocation of interpretive rulings and protest review decisions). The record is not clear as to whether or not One World sought a modification or revocation of Customs' HQ H300129.[12] Again, even if exhaustion of administrative remedies is not required, 28 U.S.C. § 2637 still requires that "the person commencing the action [make] the demonstration required by such section," *i.e.*, that jurisdiction under 28 U.S.C. § 1581(h) is established by clear and convincing evidence. 28 U.S.C. § 2639(b). Even if One World is not required to request a modification or revocation of Customs' HQ H300129 (that One World proposes applies to this case), One World would still have to show by clear and convincing evidence that Customs refused to issue a ruling. One World has not provided such evidence. Accordingly, the court finds that One World has not demonstrated by clear and convincing evidence that Customs refused to change its ruling. Thus, the court finds that Plaintiff has failed to show by clear and convincing evidence that the second requirement of (h) jurisdiction has been met.

3) The Ruling Must Relate to Certain Subject Matter

A ruling, refusal to issue a ruling, or a refusal to change a ruling, pertains to certain subject matter when it relates to "classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters." 28 U.S.C. § 1581(h); *see Best Key*, 777 F.3d at 1360. One World's proffered ruling, refusal to issue a ruling, or refusal to change a ruling, all relate to the entry requirements and similar matters (*i.e.*, examination, detention, and enforcement). Because One World's proffered ruling relates to the subject matter of the statute, the proffered ruling, refusal to issue a ruling, or a refusal to change a ruling, may meet the third requirement. *Id.*

4) The Importer Must Demonstrate That Irreparable Harm Would Occur Unless Judicial Review Prior to Importation is Obtained

The "standard for proving irreparable harm [in a § 1581(h) case] is essentially identical to that used to determine irreparable injury in

[12] The record is not clear as to whether One World sought a modification or revocation of Customs' HQ H295697.

cases where injunctive relief is sought." *Connor v. United States*, 24 CIT 195, 199 (2000) (citation omitted). Plaintiff must demonstrate, with clear and convincing evidence, that "the harm is highly probable." *Id.* at 196–97. Irreparable harm is that which "cannot receive reasonable redress in a court of law." *Id.* at 197 (quoting *Manufacture de Machines du Haut–Rhin*, 6 CIT at 64). "In evaluating that harm, the court must consider the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief." *Shree Rama Enter. v. United States*, 21 CIT 1165, 1167, 983 F. Supp. 192, 194 (1997) (quotations omitted). "[I]mmediacy [of the injury] and the inadequacy of future corrective relief" may be weighed more heavily than magnitude of harm. *Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48, 53, 628 F. Supp. 978, 984 (1986) (citations omitted). Irreparable harm may not be speculative, *see Am. Inst. for Imported Steel, Inc. v. United States*, 8 CIT 314, 318, 600 F. Supp. 204, 209 (1984), or determined by surmise, *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F.Supp.2d 1324, 1331 (2001) (citation omitted). Economic harm, or injury to the business, may constitute irreparable harm when "the loss threatens the very existence of the movant's business," *Wisc. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985), and may include financial loss, reputational injuries, and severe business disruption. *Kwo Lee, Inc. v. United States*, 38 CIT __ , 24 F.Supp.3d 1322, 1327, n.5 (2014). Irreparable harm may take the form of "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities." *Id.* at 1327. Affidavit evidence attesting to increased business costs, loss of profits, and loss of business reputation may adequately document irreparable harm. *Holford*, 912 F. Supp. at 560.

As evidence of irreparable harm, One World offered the declaration and testimony of Mark Huggins, a Senior Vice President at One World Technologies and General Manager – Ryobi ONE+. In his declaration, Mr. Huggins explained that he [[

]] The court finds One World has demonstrated irreparable harm by clear and convincing evidence.[13]

Based on the foregoing analysis, the court declines to exercise jurisdiction under 28 U.S.C. § 1581(h).

[13] In making this finding, the court took into consideration, *inter alia*, the cross-examination of Mr. Huggins. TRO & PI Hr'g Tr. 93:25–119:12, ECF No. 58–1.

ii. Subject-Matter Jurisdiction Under 28 U.S.C. § 1581(i)

Under 28 U.S.C. § 1581(i), the Court has exclusive jurisdiction over:

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . .
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i). The court's residual jurisdiction under 28 U.S.C. § 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (quotations omitted). When determining jurisdiction, the court looks to the true nature of the action. *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008) (citing *Norsk Hydro, 472 F.3d at 1355).*

To determine if the court may exercise jurisdiction over One World's claims under 28 U.S.C. § 1581(i), the court looks to the true nature of the action. The true nature of this action is that One World challenges Customs' detention of the First, Second, Third, and Fourth Shipments, and alleges that Customs is continuing to enforce either Customs' HQ H295697 or Customs' HQ H300129 beyond the scope of the protest that was at issue in that decision. *See* Pl. Supp'l. Br. Subject Matter Jurisdiction, 5–9; *see* TRO & PI Hr'g Tr. 25:24–26:3, ECF No. 60. In other words, One World's cause of action speaks directly to the "administration and enforcement," of a matter referred to in subsection (a), *i.e.*, detention arising from the interpretation of a protest decision.

As the true nature of One World's claims pertain to 28 U.S.C. § 1581(a), the court examines if jurisdiction under 28 U.S.C. § 1581(a) was available to One World.[14] Defendants argue that because the First, Second, Third and Fourth Shipments were deemed excluded on February 14, 2019, February 17, 2019, March 1, 2019, and March 3, 2019, respectively, One World may protest those exclusions and follow the statutory scheme leading to 28 U.S.C. § 1581(a) jurisdiction.

[14] 28 U.S.C. § 1581(b)–(g) do not apply to this case.

Defs.' Mot. to Dismiss. 27, ECF Nos. 58, 59; *see* 19 U.S.C. § 1499(c)(5)(A); 19 U.S.C. § 1514; 19 U.S.C. § 1515.[15] Defendants' argument is not convincing. In *Ford Motor Company v. United States*, the Federal Circuit held that "based on the time-of-filing rule the government's post-filings actions . . . may have opened up a new avenue for judicial review under [28] U.S.C. § 1581(a), but the actions cannot defeat subject matter jurisdiction under § 1581(i)." 811 F.3d 1371, 1375 (Fed. Cir. 2016) (quotations omitted). At the time of One World's complaint, One World could not have filed a valid protest because no protestable event had occurred for the First, Second, Third and Fourth Shipments. *See* 19 U.S.C. § 1514; *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1369 (Fed. Cir. 2008). Without being able to file a protest, One World could not seek judicial review under 28 U.S.C. § 1581(a), and One World did not have access to 28 U.S.C. § 1581(a) at the time of filing its complaint.

The court finds that jurisdiction under 28 U.S.C. § 1581(a) and (h) were unavailable to One World at the time the complaint was filed. The court finds that Plaintiff's complaint pertains to "administration and enforcement" with respect to a matter referred to under § 1581(a), and the court may exercise subject-matter jurisdiction over this case under 28 U.S.C. § 1581(i).

ii. Ripeness

A claim is non-justiciable if it is not ripe for judicial resolution, which requires the court to evaluate two factors: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Issues are fit for judicial review if the agency action was final and if the issues presented are purely legal. *Abbott Labs.*, 387 U.S. at 149; *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1383–84 (Fed. Cir. 2012). In contrast, a claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Int'l Customs Prods.*, 29 CIT at 1298 (quoting *Texas v. United States*, 523 U.S. 296, 296 (1998)). Two conditions must be satisfied for agency action to be "final": first, the action must mark the "consummation" of the agency's decision-making process, and second, the action must be one by which "rights or obligations have been deter-

[15] Plaintiff has apparently not yet filed any protests in this case, even though each of the four entries has been deemed excluded and the protest procedures are available to Plaintiff at this time.

mined" or from which "legal consequences will flow." *Tabascos De Wilson, Inc. v. United States*, 42 CIT __, 324 F. Supp. 3d 1304 (2018) (citing *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 (Fed. Cir. 2008)).

Defendants argue that this case is not ripe for judicial review because there was no final agency action at the time One World filed its complaint. Defs.' Mot. to Dismiss 16, ECF Nos. 58, 59. One World argues that final agency action is not required, and even if final agency action is required, Customs' communicated intention to seize the First and Second Shipments on February 12, 2019, was sufficient to consider Customs' actions final agency action. Pl. Br. Opp. Defs.'s Mot. Dismiss, Resp. Mot. to Strike, Supp. Mot. PI 4, 7, ECF No. 77.

Defendants' argument is not convincing. Customs' intention to seize the First and Second Shipments on February 12, 2019 was not merely speculative, and Customs' intention to seize was final for the narrow purpose of determining ripeness. Customs' intention to seize represented the "consummation" of the agency's decision-making process, even though the process by which Customs reached that point is not clear, and a decision from which legal consequences would flow, *i.e.*, that One World would have to seek relief from this court related to the detention of the merchandise or One World would have to challenge a seizure in District Court. Customs' intention to seize was not speculative because Customs' intention to seize was not contingent on future events. *See* One World Letter of March 11, 2019, ECF No. 85, Ex. A (notifying the court that Customs seized entry no. 442–75662557 containing redesigned GDOs). The court concludes that One World's claims are sufficiently ripe for review.

B. Defendant's Motion to Dismiss Under CIT Rule 12(b)(6)

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *United States v. Nitek Elecs., Inc.*, 844 F. Supp. 2d 1298, 1302 (Fed. Cir. 2012) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir. 1993)); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must allege more than threadbare recitals of the elements of a cause of action supported by mere conclusory statements to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Count I of One World's complaint alleges, *inter alia*, that Customs should not have detained the First, Second, Third, and Fourth Shipments because the merchandise falls outside of the scope of the ITC's Remedial Orders, Customs did not intend to make a final admissibility determination regarding the First, Second, Third, and Fourth Shipments, and that Customs refused, "through inaction or otherwise" to make a final admissibility determination regarding the First, Second, Third, and Fourth Shipments. Pl. Compl. ¶¶ 60–72. Count I of One World's complaint seeks injunctive relief. *Id.* Count II of One World's complaint incorporates by reference the allegations of Count I and seeks declaratory relief. Id. at ¶¶ 73–78.

Defendants argue that One World failed to state a claim because there was no final agency action and that "Customs' detention of entries pursuant to 19 U.S.C. § 1499 does not determine any rights or obligations or give rise to any legal consequences." Defs.' Mot. to Dismiss, 9, 30 ECF Nos. 58, 59 (quotations omitted). Plaintiff argues that even if final agency action was required, Customs' actions were final within the meaning of the Administrative Procedures Act because Customs had decided on its actions, and Customs' actions would have legal consequences as to One World's rights regarding the First, Second, Third, and Fourth Shipments. Pl.'s Br. Opp. Defs.' Mot. to Dismiss 9, ECF No. 77.

Defendants' argument is not convincing. Even if Customs' decision was not a final agency action, the court has discretion to determine the circumstances under which the court will require exhaustion of administrative remedies. 28 U.S.C. § 2637(d) (providing that the court "shall, where appropriate, require the exhaustion of administrative remedies"); *see Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998) (reasoning that "where Congress has not clearly required exhaustion, sound judicial discretion governs") (quoting *McCarthy v. Madigan ,* 503 U.S. 140, 144 (1992)). A party who does not exhaust all avenues of administrative relief before presenting a claim to an agency usually is not permitted to raise that claim for the first time before a court reviewing the agency's action. *See Woodford v. Ngo,* 548 U.S. 81, 90 (2006) (citing *United States v. L.A. Tucker Truck Lines, Inc*. 344 U.S. 33, 37 (1952) ("[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.")). The court exercises its discretion to permit One World's claim because Customs indicated its intent to seize the imported merchandise, and thus would have deprived One World of its opportunity to challenge the detention if One World were to follow the statutory scheme for protests and wait to

receive a response from Customs. Under the facts of this case, this action was the first opportunity for One World to challenge Customs' alleged actions or inactions. *See Valley Fresh Seafood, Inc. v. United States*, 31 C.I.T. 1989, 1994 (2007).

As discussed above, One World's claims are cognizable under 28 U.S.C. § 1581(i)(4). One World's claims state a plausible claim for relief because the court is empowered to provide declaratory relief and injunctive relief, subject to certain limitations, when the court has jurisdiction under 28 U.S.C. § 1581(i).[16] 28 U.S.C. § 2643(c)(1); CIT R. 57; CIT R. 65; *see Iqbal*, 556 U.S. at 678; *see* 28 U.S.C. § 2201.

II. Plaintiff's Motion for a Preliminary Injunction

CIT Rule 65 allows for a court to grant injunctive relief in an action. USCIT R. 65; 28 U.S.C. § 2643. The court considers four factors when evaluating whether to grant a temporary restraining order or preliminary injunction: (1) whether the party will incur irreparable harm in the absence of such injunction; (2) whether the party is likely to succeed on the merits of the action; (3) whether the balance of hardships favors the imposition of the injunction; and (4) whether the injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014). No one factor is "'necessarily dispositive,' because 'the weakness of the showing regarding one factor may be overborne by the strength of the others.'" *Belgium v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)). The factors should be weighed according to a "sliding scale," which means that a greater showing of irreparable harm in Plaintiff's favor lessens the burden on Plaintiff to show a likelihood of success on the merits. *See id.* The court evaluates each of the four factors in turn.

A. Irreparable Harm

Plaintiff must show that it will suffer irreparable harm absent a grant of injunctive relief. See Winter, 555 U.S. at 20. Irreparable harm includes "a viable threat of serious harm which cannot be undone." Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983) (internal citations omitted). An allegation of financial loss alone generally does not constitute irreparable harm if future money damages can provide adequate corrective relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Bankruptcy or substantial loss of business

[16] *See* 28 US.C. § 2643(c)(1). The provisions of 28 US.C. § 2643(c)(2)–(5) are not at issue in this case.

may constitute irreparable harm because "loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review." *Harmoni Int'l Spice, Inc. v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1298, 1307 (2017) (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975)). "Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities" may also constitute irreparable harm. CellzDirect, Inc., 664 F.3d at 930.

One World argues that, absent injunctive relief, [[

]] At the PI/TRO hearing, One World presented witness testimony from Mark Huggins, One World's Senior Vice President of Product Development and General Manager – Ryobi ONE+. Mr. Huggins testified that [[

]] *Id.* at 16–17. One World also asserts irreparable harm in the form of loss of goodwill. Mr. Huggins testified that [[

]] *see Kwo Lee*, 24 F.Supp.3d at 1327. One World would suffer loss of business, loss of goodwill, and loss of business opportunities. The court finds that One World has demonstrated irreparable harm for the purposes of a preliminary injunction through the credible testimony and declarations of its witness.

B. Likelihood of Success on the Merits

In order to obtain a preliminary injunction, Plaintiff bears the burden of showing that it is likely to succeed on the merits of its claims. *See Winter*, 555 U.S. at 20. Plaintiff's complaint alleges that Customs' "actions in continuing to enforce the Protest Decision are arbitrary, capricious, an abuse of discretion, and not in accordance with the law." Defendants argue that this case does not involve the continuing enforcement of a prior protest denial because a "protest is limited to the entries it identifies." Defs.' Mot. to Dismiss, ECF Nos. 58, 59 at 25, n.7.

Plaintiff's description of its own claims relies on proving that Customs is detaining the First, Second, Third and Fourth Shipments on the basis of Customs' prior protest denial related to an entry, which is not the subject of the complaint in this matter. Pl. Br. Opp. Defs.' Mot. to Dismiss, Resp. Mot. to Strike, and Supp. Mot. for PI 12, ECF No. 77 ("This case involves One World's challenge to CBP's definitive decision to continue to apply its Protest Decision to detain, exclude, and potentially seize One World's Redesigned GDOs.") (emphasis removed). Plaintiff also notes that the terms of ITC's Limited Exclusion Order are not self-executing with respect to any specific entry. *See* Pl. Compl. ECF No. 6, Ex. D & O. In order to enforce the ITC's Limited Exclusion Order, Customs must conduct an analysis and arrive at a decision specific to the imported merchandise contained in the First, Second, Third and Fourth Shipments. *See* Pl. Compl. ECF No. 6, Ex. F (showing Customs' analysis and decision with respect to the same merchandise contained in a prior entry which is not at issue in this case).

To support its claims, One World provides, *inter alia*, Customs' detention notices for the First, Second, Third and Fourth Shipments, Pl. Compl. ECF No. 6 Exs. H & I; Pl. Br. Supp. Subject Matter Jurisdiction Under 18 U.S.C. § 1581(i), ECF No. 25, Exs. 1 & 2. Customs' detention notices for the First, Second, Third and Fourth Shipments state that the reason for detention is "import specialist review." Pl. Compl. ECF No. 6, Exs. H & I; Pl. Br. Supp. SMJ Under 18 U.S.C. § 1581(i), ECF No. 25 Exs. 1 & 2.

Defendants proffered that "the four entries at issue were likely to be seized in the near future in accordance with the ITC's Seizure and Forfeiture order." Defs.' Mot. to Dismiss, ECF No. 59; *see* Amended Status Update, ECF No. 22. Defendants also advised the court that "Customs intended to seize Entry Nos. 442–75658274 [First Shipment] and 442–75658266 [Second Shipment] on February 12, 2019, and noted that [Defendants] did not yet have information about the planned seizure dates for Entry Nos. 442–75661187 [Third Shipment] and 442–75661948 [Fourth Shipment]." *Id.* at 5.

In the TRO & PI Hearing, One World argued that in order to seize the First and Second Shipments, Customs must make a determination that the merchandise contained in the shipments infringes on U.S. Patent No. 7,161,319 (the "'319 Patent"). TRO & PI Hr'g Tr. 71:18–72:3 ECF No. 60.

Customs' decision to detain the First through Fourth Shipments, and later Customs' intention to seize the First and Second Shipments, must rely on some analytical process because the ITC's Limited Ex-

clusion Order is not self-executing with respect to any specific entry. *See* Pl. Compl. ECF No. 6, Ex. D & O. Customs' previous protest denials (HQ H300129 and HQ H295697) are evidence of that analytical process.[17] There is sufficient evidence on the record to establish that Customs' decision to detain One World's merchandise was based on or informed by Customs' previous protest denial, HQ H300129, or Customs' holding in HQ H295697, in which Customs found that One World's redesigned merchandise infringed Chamberlain's patent and should be excluded under the ITC's Seizure and Forfeiture order. *See* TRO & PI Hr'g Tr. 69:16–72:12, ECF No. 60.

As noted in *One World I*, the court previously conducted a claim construction analysis and infringement analysis, finding that the Redesigned GDOs do not contain all of the limitations of the '319 Patent.[18] 42 CIT at __. The court's decision in *One World I* weighs in favor of Plaintiff's likelihood of success on the merits.

Plaintiff has demonstrated a likelihood of success on the merits at this time.

C. Balance of the Hardships

When evaluating a request for a preliminary injunction, it is the court's responsibility to balance the hardships on each of the Parties. *See Winter*, 555 U.S. at 20. One World points to its allegations of irreparable harm in support of this factor. *See* Pl. Mem. P&A Supp. Mot. TRO & PI, 37–38, ECF No. 21; Pl. Br. Opp. Defs.' Mot. to Dismiss, Resp. Mot. to Strike, Supp. Mot. for PI 22–23, ECF No.77. Defendants contend that the Government has an interest in the administration and enforcement of customs law, including the ITC's Limited Exclusion Order. *See* Defs.' Mot. to Dismiss 11, ECF Nos. 58, 59. Defendants previously notified the court of Customs' intention to seize the First and Second Shipments on February 12, 2019. *See* Defs.' Mot. to Dismiss 4–5, ECF No. 59; One World Letter of March 11, 2019, ECF No. 85, Ex. A (notifying the court that Customs seized entry no. 442- 75662557 containing redesigned GDOs).[19] Seizure would place a greater hardship on Plaintiff than the Defendants, who

[17] The court does not apply the clear and convincing evidence standard in evaluating this preliminary injunction prong, as it did in determining subject-matter jurisdiction under 28 U.S.C. § 1581(h).

[18] One World and Chamberlain presented arguments on claim construction and infringement with respect to the Redesigned GDOs. Chamberlain Br. Resp. One World's Mot. for PI 6–16, ECF No. 79. The court does not reach these issues.

[19] [[

]]

could still potentially seize the goods pending the outcome of this case. The court finds that the balance of hardships tips in favor of the Plaintiff.

D. Injunction Serves the Public Interest

Plaintiff must address whether the grant of a preliminary injunction serves the public interest. *See Winter*, 555 U.S. at 20. Defendants argue that issuance of an injunction is not in the public interest because an injunction would incentivize importers to seek injunctive relief and burden the court. Defs.' Mot. to Dismiss 41, ECF No. 59; *see* [[

]]. Defendants also argue that the public interest is served by the Government's protection and enforcement of intellectual property rights via the mandate of the ITC. *Id.* at 42. One World counters that the "public interest is not served by enforcing a patent beyond its metes and bounds" and argues that patent law promotes innovation by encouraging companies to "design around patents." Pl. Br. Opp. Defs.' Mot. to Dismiss, Resp. Mot. to Strike, Supp. Mot. for PI 22–23, ECF No. 77; *see* [[

]]. One World also highlights the procedural history of this case as support for the proposition that importers will not be further incentivized to seek injunctive relief in this court. *Id.* at 23–24. The court finds that this public interest factor does not tip in favor of either Party.

The court finds Plaintiff has demonstrated a likelihood of success on the merits, Plaintiff has demonstrated credible irreparable harm, the balance of hardships tips in favor of the Plaintiff, and the public interest is neutral between the Parties.

III. Defendants' Motion to Strike Demand for Jury Trial

Defendants' Motion to Strike Demand for Jury Trial is moot as One World has agreed to withdraw its jury trial demand. *See* Pl. Br. Opp. Defs.' Mot. to Dismiss, Resp. Mot. to Strike, Supp. Mot. for PI 24, ECF No. 77.

IV. Conclusion

The court does not have subject-matter jurisdiction under 28 U.S.C. § 1581(h), as Plaintiff did not establish the jurisdictional requirements by clear and convincing evidence. The court has subject-matter

jurisdiction under 28 U.S.C. § 1581(i). Defendants' motion to dismiss is denied and Plaintiff's motion for a preliminary injunction is granted.

An order will issue accordingly.

Dated: March 11, 2019
New York, New York

/s/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 19–51

SHANGHAI SUNBEAUTY TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Court No. 18–00022
Before: Richard K. Eaton, Judge
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record is denied; United States Department of Commerce's final results of administrative review are sustained.]

Dated: April 29, 2019

Fei He, Law Offices of He & Associates, P.C., of Irvine, CA, for Plaintiff.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Natan Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey, *R. Alan Luberda*, and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors.

OPINION

Eaton, Judge:

This case involves the final results of the United States Department of Commerce's ("Commerce" or the "Department") fifteenth administrative review of the antidumping duty order on honey from the People's Republic of China. *See Honey From the People's Rep. of China*, 83 Fed. Reg. 1015 (Dep't Commerce Jan. 9, 2018) ("Final Results"), and accompanying Issues and Dec. Mem. (Jan. 3, 2018), P.R. 75 ("Final IDM"). In the Final Results, Commerce determined that Plaintiff Shanghai Sunbeauty Trading Co., Ltd. ("Plaintiff" or "Sunbeauty"), a honey exporter from China, was not entitled to a

separate rate[1] because the record showed that "Sunbeauty's entries of subject merchandise were reported to [U.S. Customs and Border Protection] as not being subject to [antidumping] duties, and thus, Sunbeauty ha[d] no suspended entries" during the period of review. Final IDM at 11.

By its motion for judgment on the agency record, Sunbeauty disputes Commerce's finding that it was not entitled to a separate rate as unsupported by substantial evidence and otherwise not in accordance with law. *See* Pl.'s Br. Supp. Mot. J. Agency R., ECF No. 26 ("Pl.'s Br."); Pl.'s Reply Supp. Mot. J. Agency R., ECF No. 33.

Defendant the United States, on behalf of Commerce, and Defendant-Intervenors American Honey Producers Association and Sioux Honey Association urge the court to sustain the Final Results. *See* Def.'s Resp. Mot. J. Agency R., ECF No. 31; Def.-Ints.' Resp. Opp'n Pl.'s Mot. J. Agency R., ECF No. 30.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012). Because Commerce's determination that Sunbeauty was not entitled to a separate rate was supported by substantial evidence and in accordance with law, the court denies Plaintiff's motion for judgment on the agency record and sustains the Final Results.

BACKGROUND

Honey from the People's Republic of China has been subject to an antidumping duty order since 2001. *Honey From the People's Rep. of China*, 66 Fed. Reg. 63,670 (Dep't Commerce Dec. 10, 2001) (the "Order"). Seeking to establish its entitlement to a separate rate by way of an administrative review, Sunbeauty, on December 28, 2016, asked Commerce to initiate a review of the Order.[2] *See* Req. Admin. Rev. (Dec. 28, 2016), P.R. 1.

On February 13, 2017, Commerce initiated the fifteenth administrative review of the Order, covering imports entered during the

[1] In proceedings involving non-market economy countries, such as China, "the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate." *Initiation of Antidumping and Countervailing Duty Admin. Rev.*, 82 Fed. Reg. 10,457, 10,458 (Dep't Commerce Feb. 13, 2017); *see Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Applying that presumption here, Commerce determined that Sunbeauty was a part of the China-wide entity, which is subject to the rate of $2.63 per kilogram. *See* Final IDM 9–10.

[2] Previously, Sunbeauty sought its own dumping margin through a new shipper review of its honey sales. Commerce rescinded the review, however, finding that Sunbeauty had no *bona fide* sales during the period of December 1, 2014, to November 30, 2015—a finding that Sunbeauty appealed, and that this Court sustained. *See Shanghai Sunbeauty Trading Co. v. United States*, 42 CIT __, Slip Op. 18–111 (Sept. 6, 2018).

December 1, 2015, to November 30, 2016 period of review. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 82 Fed. Reg. 10,457, 10,460 (Dep't Commerce Feb. 13, 2017) ("Initiation Notice"). Upon initiation of the review, Commerce notified parties that "all firms listed" in the Initiation Notice, including Sunbeauty, "must complete, as appropriate, either a *separate rate application* or [a] certification [that the firm previously was granted a separate rate, and that the separate rate currently applies]." Initiation Notice, 82 Fed. Reg. at 10,458 (emphasis added). Commerce's separate rate application for the People's Republic of China states: "[T]o be considered for separate-rate treatment, the applicant must have a relevant U.S. sale of subject merchandise to an unaffiliated purchaser, *and, for an administrative review, the applicant also must have a suspended entry of subject merchandise into the United States during [the period of review]*." People's Rep. of China Separate Rate Application, DEP'T COMMERCE: ENFORCEMENT & COMPLIANCE (Feb. 22, 2019), https://enforcement.trade.gov/nme/sep-rate-files/app-20190221/prc-sr-app-022119.pdf (emphasis added).

On the same day that the review was initiated, Commerce issued an antidumping duty questionnaire to Sunbeauty, the sole mandatory respondent in the review. *See* Final IDM at 1; Admin. Rev. Questionnaire (Feb. 13, 2017), P.R. 5. Section A of the questionnaire sought information regarding, *inter alia*, whether Sunbeauty sold merchandise subject to the Order in the United States during the period of review. *See* Sunbeauty Sec. A Questionnaire Resp. (Mar. 13, 2017), C.R. 1, P.R. 28 at A-1 (Question 1(a)) ("State the total quantity and value of the merchandise under consideration that you sold during the period of review . . . in the United States."). On February 28, 2017, Sunbeauty sought a ten-day extension of time to complete Section A, which Commerce granted. *See* Extension Req. Initial Questionnaire Resp. (Feb. 28, 2017), P.R. 23; Sunbeauty Questionnaire Extension (Mar. 1, 2017), P.R. 25.

In its March 13, 2017 Section A response, Sunbeauty "certified that it made export sale(s) of subject merchandise to the United States during the [period of review]," and included a Customs Entry Summary (Form 7501). *Honey From the People's Rep. of China*, 82 Fed. Reg. 31,557 (Dep't Commerce July 7, 2017) ("Preliminary Results"), and accompanying Preliminary Issues and Dec. Mem. (June 29, 2017), P.R. 59 ("Preliminary Dec. Mem.") at 10; *see* Sunbeauty Sec. A Questionnaire Resp. Ex. A-7.

On March 17, 2017, Commerce asked Sunbeauty to "submit documentary evidence that [it] had a suspended entry of subject merchandise that entered during the [period of review] and on which [anti-

dumping] duties were deposited."[3] Suppl. Req. Entry Documentation (Mar. 17, 2017), P.R. 32, at 1. Sunbeauty asked for three extensions of time to respond to this request. *See* Sunbeauty Suppl. Entry Doc. Questionnaire Extension (Mar. 20, 2017), P.R. 34; Second Suppl. Entry Doc. Questionnaire Extension (Mar. 24, 2017), P.R. 37; Third Suppl. Entry Doc. Questionnaire Extension (Mar. 29, 2017), P.R. 42. Commerce granted Sunbeauty's three extension requests, in part, and then, on March 30, 2017, "granted Sunbeauty a fourth extension of time, *sua sponte*, in order to aid its analysis of [the suspended entry] issue and provide Sunbeauty an additional opportunity to provide the requested information" until April 7, 2017. Final IDM at 7 n.44; *see* Fourth Suppl. Entry Doc. Questionnaire Extension (Mar. 30, 2017), P.R. 43 at 1. In granting the fourth extension request, Commerce informed Sunbeauty that it would not consider additional requests for an extension of time. *See* Fourth Suppl. Entry Doc. Questionnaire Extension at 2 (stating that "[i]f Sunbeauty is unable [to] submit documentary evidence demonstrating that it currently has a suspended entry of subject merchandise that entered during the [period of review] and on which [antidumping] duties were deposited, the Department may rescind this review with respect to this company.").

On April 6, 2017, *i.e.*, the day before the fourth extended deadline, Sunbeauty asked for an additional three-week extension of time to submit evidence that it had a suspended entry of subject merchandise during the period of review. *See* Sunbeauty's Fourth Extension Req. (Apr. 6, 2017), P.R. 45. Commerce denied Sunbeauty's request. *See* Letter from Commerce to Sunbeauty re: Sunbeauty Entry Doc. Suppl. Fifth Extension (April 7, 2017), P.R. 46 at 1 (reiterating that Commerce had indicated "in the fourth extension memorandum that we would not be extending further.").

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[3] Where merchandise that is subject to an antidumping duty order is entered, a notation is made on the Customs Entry Summary form by the importer, and liquidation of that entry is administratively suspended. *See* Customs and Border Protection Entry Summary Form 7501 Instructions, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/document/forms/form-7501-instructions (Sept. 8, 2016) (describing, *inter alia*, Entry Type 3); *see also* BLOOMBERG BNA, IMPORT REFERENCE GUIDE § 13.103 (2019) ("When an importer enters merchandise that is subject to an [antidumping duty] . . . order, its mandated cash deposits must be in an amount sufficient to cover estimated [antidumping] . . . duties. [Customs and Border Protection] will suspend liquidation in such cases pending administrative review and possible litigation."). "Type 3" entries are subject to antidumping and countervailing duty orders. In its letter request to Sunbeauty, Commerce stated:

> [Y]ou provided sample sales documents regarding your export(s) to the United States during the period of review . . . , including a Customs and Border Protection . . . Form 7501 Entry Summary. The Entry Summary you provided shows Sunbeauty's export(s) to the United States entered as a Type 1 entry not subject to antidumping . . . or countervailing . . . duties.

Suppl. Req. Entry Documentation (Mar. 17, 2017), C.R. 4, at 1.

On June 30, 2017, Commerce issued its Preliminary Results, in which it determined, among other things, that "because Sunbeauty was unable to provide evidence of a suspended entry of subject merchandise into the United States during the [period of review] and is, thus, ineligible to receive a separate rate, [Commerce was] preliminarily treating Sunbeauty as part of the [China]-wide entity." Preliminary Results, 82 Fed. Reg. 31,558.

On August 16, 2017, Sunbeauty submitted its case brief, disputing the Preliminary Results on several grounds, including that Commerce's denial of Sunbeauty's fourth request for an extension of time was "arbitrary and unreasonable," and that the Department's treatment of Sunbeauty as part of the China-wide entity was not supported by the record and was otherwise contrary to law. *See* Sunbeauty's Case Brief (Aug. 16, 2017), C.R. 26 at 2. Nowhere in its case brief, however, did Sunbeauty argue that it could show it had a suspended entry during the period of review. Instead, Sunbeauty conceded it could not do so. *See* Sunbeauty's Case Brief at 6 ("Sunbeauty does not possess any document[ary evidence showing a suspended entry during the period of review on which antidumping duties were deposited] . . . because Sunbeauty is the exporter of the subject merchandise rather than the importer."). Thus, eight months after it asked for the administrative review, Sunbeauty conceded that it could not produce evidence of a suspended entry during the period of review.

On January 3, 2018, Commerce issued the Final Results, having made no changes from the Preliminary Results. *See* Final IDM at 1. This appeal followed.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Commerce's decision to deny a request for an extension of time is reviewed for abuse of discretion. *See Empresa Nacional Siderurgica, S.A. v. United States*, 19 CIT 337, 341, 880 F. Supp. 876, 879 (1995) (holding Commerce did not abuse its discretion in denying respondent's second request for an extension of time noting, *inter alia*, "the statutory time constraints imposed upon Commerce, [and] its discretion in imposing time limits for responses"); *see also* 19 C.F.R. § 351.302(b) (2017) (providing that Commerce may extend time limits "for good cause").

DISCUSSION

In the Final Results, Commerce stated that its practice is to require respondents seeking a separate rate in an administrative review to

show that they have a suspended entry during the period of review—that is, an entry for which estimated antidumping duties have been deposited, and liquidation has been suspended.[4] *See* Final IDM at 10 (citing *Certain Tissue Paper Products from the People's Rep. of China*, 73 Fed. Reg. 18,497, 18,500 (Dep't Commerce Apr. 4, 2008) (preliminary results); *Certain Tissue Paper Products from the People's Rep. of China*, 73 Fed. Reg. 58,113 (Dep't Commerce Oct. 6, 2008) (final results unchanged from preliminary results)). By way of explanation, Commerce stated:

> Suspended entries are required for administrative reviews because of the direct relationship between suspension of liquidation and Commerce's ability to enforce its antidumping duty orders. For a company subject to administrative review, a suspended entry is necessary for Commerce to assess the duties determined in that administrative review. When there is no evidence of a suspended entry, Commerce finds that parties are not eligible for a separate rate because there is no evidence that there is an entry upon which to assess duties.

Final IDM at 10. While this explanation may be of less than crystalline clarity, it is possible to divine Commerce's reasons for requiring a suspended entry as a prerequisite for the determination of a respondent's separate dumping margin in the context of an administrative review. It is, of course, the case that an entry subject to an antidumping duty order is needed for Commerce to determine the export price.[5] That liquidation of the entry be suspended is the natural result of the process by which the entry is made. That is, in the entry papers, the importer declares the merchandise to be subject to an antidumping duty order, and makes a cash deposit of any then-applicable antidumping duties. Once the review is complete, the suspended entry is liquidated at the determined rate, and, in addition, that rate is applied to the respondent's merchandise entered

[4] "*Liquidation* means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1. "[T]he suspension of liquidation creates a contingent liability on the importer for merchandise subject to an antidumping investigation," or an antidumping duty order, until the investigation or an administrative review of the order is complete. *See* 1 US CUSTOMS AND INTERNATIONAL TRADE GUIDE § 20.05 (2d ed. 2019).

[5] "Export price and constructed export price refer to the two methods of calculated prices for merchandise imported into the United States. The Department compares these prices to normal values to determine whether goods are dumped." Glossary of AD Terms for Market and Non-Market Economy Cases, DEP'T COMMERCE: ENFORCEMENT & COMPLIANCE, https://enforcement.trade.gov/glossary.htm (Sept. 30, 2004); *see also* 19 U.S.C. § 1677a (export price and constructed export price). The dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A).

thereafter.[6] *See* 19 U.S.C. § 1675(a)(2)(C) ("The determination under [§ 1675(a)(2)] shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."). Were there to be no suspended entry, then it can be assumed that the importer did not declare the merchandise to be subject to the order, and that the respondent would be asking Commerce to review an entry of non-subject merchandise, on which the estimated antidumping duties imposed by the order had not been paid. This is surely not the result intended by a statute the purpose of which is to provide reviews of merchandise subject to an antidumping duty order. *See* 19 U.S.C. § 1675(a); *see also id.* § 1677(25) (defining "subject merchandise" as "the class or kind of merchandise that is within the scope of . . . a review, . . . [or] an [antidumping duty] order").

Here, Commerce found that Sunbeauty failed to show with record evidence that it had a suspended entry during the period of review. Commerce stated:

> The Department has examined all of the information provided by Sunbeauty and finds that Sunbeauty's entries were classified upon entry as not subject to the [Order], and, therefore, not subject to suspension of liquidation. Absent a suspended entry, as outlined in the separate rate application, Sunbeauty is not eligible for a separate rate. In addition to the requirement of a suspended entry, we further note that one of the Department's primary functions in the course of an administrative review is to determine the appropriate antidumping duty margin to apply to subject merchandise, for the purpose of directing [Customs and Border Protection] to liquidate suspended entries of subject merchandise at that rate. Therefore, because the record shows that Sunbeauty's entries of merchandise were made as not being subject to [antidumping] duties, and, thus, Sunbeauty has no suspended entries, consistent with [19 U.S.C. § 1675(a)(2)(C)[7]], the Department is treating Sunbeauty as part of the [China]-wide entity.

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[6] "A request for an administrative review results in the continuation of the suspension of liquidation." *Canadian Wheat Bd. v. United States*, 33 CIT 1204, 1208 n.6, 637 F. Supp. 2d 1329, 1334 n.6 (2009) (citation omitted); *see also* 19 C.F.R. § 351.212(b)(1) (stating that, after a review of an antidumping duty order, Commerce "will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise").

[7] Section 1675 governs "Administrative Review of Determinations." Subsection 1675(a) addresses "Periodic review of amount of duty." Paragraph 1675(a)(2) pertains to "Determination of antidumping duties," and subparagraph (C) states: "The determination under [1675(a)(2)] shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C).

Preliminary Dec. Mem. at 11; *see also* Final IDM at 9–10, 11 ("Since [Sunbeauty] could not demonstrate that it had any suspended entries, Commerce's determination that Sunbeauty did not have any reviewable entries is supported by the record.").

Commerce's finding that Sunbeauty did not show it had a reviewable entry during the period of review is supported by substantial evidence and otherwise in accordance with law. Not only does the record evidence support this finding,[8] but by its own admission, Sunbeauty could not satisfy the suspended entry requirement, even though Commerce permitted it to place factual information on the record after the Preliminary Results were issued. *See* Sunbeauty's Case Brief at 6 ("Sunbeauty does not possess any document[ary evidence showing a suspended entry during the period of review on which antidumping duties were deposited] . . . because Sunbeauty is the exporter of the subject merchandise rather than the importer.").

The burden to create the administrative record demonstrating entitlement to separate rate status lies primarily with the parties. *See QVD Food Co. v. United States,* 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted) ("Although Commerce has authority to place documents in the administrative record that it deems relevant, the burden of creating an adequate record lies with interested parties and not with Commerce."). Here, Sunbeauty has produced no evidence that it made an entry of merchandise that was suspended, but, indeed, it conceded the point after publication of the Preliminary Results.

Sunbeauty's legal arguments fail to persuade the court that Commerce erred in requiring a suspended entry. First, it argues that the express language of the administrative review statute, in particular § 1675(a)(2)(A), does not require that an entry be suspended, but only that Commerce review "entries of subject merchandise." Pl.'s Br. 7 (quoting and citing 19 U.S.C. § 1675(a)(2)(A), which states that the Department "shall determine– (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry," in an administrative review). Under Sunbeauty's reading of the law, a respondent need only show that an entry of subject merchandise was made during the period of review, not that liquidation of the entry was

[8] Sunbeauty submitted an Entry Summary for entry number [[ ]]. The Entry Summary indicated that the entry was Type 1, which means that the entry was not subject to antidumping or countervailing duties. *See* Sunbeauty Sec. A Questionnaire Resp. Ex. A-7. Consistent with this type of entry, record evidence of correspondence between the customs broker and the importer regarding entry number [[ ]] indicates that no antidumping duties were paid on the entry. *See* Sunbeauty's Fourth Extension Req. (Apr. 6, 2017), C.R. 22, Ex. 1.

suspended. Thus, for Sunbeauty, the entry summary on the record is sufficient under the law. *See* Pl.'s Br. 7.

Plaintiff cites no legal authority to support its proposed construction of the administrative review statute. Pl.'s Br. 7–8. This is not surprising. To accept Sunbeauty's interpretation of § 1675(a)(2)(A) would require Commerce to determine a dumping margin for an entry that its importer had represented was not subject to the Order, a result that is not contemplated by the statute. *See* 19 U.S.C. § 1677(25) (defining "subject merchandise" as "the class or kind of merchandise that is within the scope of . . . a review, [or] . . . an order under this subtitle").

Moreover, accepting Sunbeauty's argument would result in thwarting one of the principal purposes of the review because the resulting antidumping duty rate would not be applied to the entry subject to that review. 19 U.S.C. § 1675(a)(2)(C) ("The determination under [1675(a)(2)] shall be the basis for the assessment of . . . *antidumping duties on entries of merchandise covered by the determination* and for deposits of estimated duties.") (emphasis added). Thus, while the statute does not explicitly require that an entry be suspended as a prerequisite for establishing entitlement to a review, it does explicitly state the determined rate will be used as the liquidation rate for the reviewed entries. This result can only obtain if the liquidation of entries has been suspended. *See* 19 C.F.R § 159.1 (defining "liquidation"); *see also* 1 US CUSTOMS AND INTERNATIONAL TRADE GUIDE § 20.05 (2d ed. 2019) (noting suspension of liquidation creates "contingent liability" for importer pending Commerce's antidumping determination).

In the alternative, Sunbeauty cites Customs and Border Protection regulations that address liquidation generally, and notice requirements when liquidation of an entry is suspended, to contend that liquidation of all entries of subject merchandise are automatically suspended, irrespective of the representations made by the importer of record on the entry documentation. *See* Pl.'s Br. 10 (citing 19 C.F.R. §§ 159.51 and 159.58(a)); Pl.'s Br. 11 ("Because Sunbeauty's honey was within the scope of [the Order] and was obviously entered after [the date of the 2001 Order], its entries shall be suspended and were suspended entries in accordance with laws."). Sunbeauty's entry papers, by failing to acknowledge that its merchandise was subject to the Order, however, serve to claim the reverse, *i.e.*, that its merchandise was not subject to the Order.[9] Therefore, as far as can be deter-

[9] In an email to the importer of record regarding entry number [[ ]], the customs broker stated [[
]]. *See* Sunbeauty's Fourth Extension Req. Ex. 1 (email dated Apr. 4, 2017).

mined, the merchandise was liquidated without the imposition of the Order's antidumping duties. Thus, the facts appear to negate Sunbeauty's argument.

Finally, Sunbeauty's argument that Commerce abused its discretion by denying Sunbeauty's fourth request for a fifth extension of time is without merit. Commerce's regulations provide that it may extend deadlines "for good cause," but it is not required to do so. *See* 19 C.F.R. § 351.302(b); *see also Reiner Brach GmbH & Co.KG v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002) (citation omitted) ("Commerce clearly cannot complete its work unless it is able at some point to freeze the record and make calculations and findings based on that fixed and certain body of information."). Here, no good cause for extending the deadline could be shown, because Sunbeauty stated that it could not demonstrate that it made an entry whose liquidation was suspended no matter how much time it was given. That is, in its case brief, filed on August 16, 2017, four months after it asked for another three-week extension, Sunbeauty conceded that it could not produce evidence of a suspended entry made during the period of review.

CONCLUSION

For the foregoing reasons, Commerce's determination that Sunbeauty was a part of the China-wide entity is supported by substantial evidence and is otherwise in accordance with law. Judgment shall be entered accordingly.

Dated: April 29, 2019
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 19–54

DIAMOND SAWBLADES MANUFACTURERS' COALTION, et al., Plaintiffs, BOSUN TOOLS, CO., LTD., et al. Consolidated Plaintiffs, CHENGDU HIUFENG DIAMOND TOOLS CO., LTD., et al. Consolidated Plaintiffs, v. UNITED STATES, Defendant, WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., et al., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 16–00124

JUDGMENT

The United States Department of Commerce has selected one of the methodologies suggested by the Court in its opinion ordering remand.

No party alleges that the Court's directions were not followed nor are there any objections to the new calculation adjustments made. Therefore, this case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; now, in conformity with said decision it is hereby

ORDERED, ADJUDGED, and DECREED that the Final Results of Second Remand Redetermination Pursuant to Court Remand, Ct. No. 16–00124, Doc. No. 96, by the United States Department of Commerce are **SUSTAINED**.

Dated: May 7, 2019
New York, New York

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

Slip Op. 19–55

JIAXING BROTHER FASTENER CO., LTD., a/k/a JIAXING BROTHER STANDARD PART CO., LTD., IFI & MORGAN LTD., and RMB FASTENERS LTD., Plaintiffs, and v. UNITED STATES, Defendant, and VULCAN THREADED PRODUCTS INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 14–00316

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the fourth administrative review of certain steel threaded rod from the People's Republic of China.]

Dated: May 9, 2019

Gregory Stephen Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., argued for plaintiffs Jiaxing Brother Fastener Co., Ltd., a/k/a Jiaxing Brother Standard Part Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd. With them on the brief was *James Kevin Horgan*.

Patricia Mary McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Elizabeth Anne Speck*, Senior Trial Counsel. Of Counsel on the brief was *Khalil N. Gharbieh*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Roger Brian Schagrin, Schagrin Associates, of Washington, D.C., for defendant-intervenor Vulcan Threaded Products Inc.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on a motion for judgment on the agency record challenging various aspects of the U.S. Department of

Commerce's ("Commerce") final determination in the fourth administrative review of the 2009 antidumping duty ("ADD") order on certain steel threaded rod ("STR") from the People's Republic of China ("PRC"). *Certain [STR] from the [PRC]: Final Results of [ADD] Admin. Review; 2012–2013*, 79 Fed. Reg. 71,743 (Dep't Commerce Dec. 3, 2014) ("*Final Results*") and accompanying Issues & Decision Mem. for the Final Results of the Fourth Admin. Review of the [ADD] Order on Certain [STR] from the [PRC], A-570–932, (Nov. 21, 2014), ECF No. 23–2 ("Final Decision Memo"); *Certain [STR] from the [PRC]: Notice of [ADD] Order*, 74 Fed. Reg. 17,154 (Dep't Commerce Apr. 14, 2009).[1]

Plaintiffs Jiaxing Brother Fastener Co., Ltd., (a/k/a Jiaxing Brother Standard Part Co., Ltd.), IFI & Morgan Ltd., and RMB Fasteners Ltd., ("Jiaxing," collectively)[2] contend that Commerce's selection of Thailand as the primary surrogate country for the calculation of the normal value of Jiaxing's STR products is both unsupported by substantial evidence and arbitrary and capricious. *See* Pls.' Rule 56.2 Mem. In Supp. of J. Upon the Agency R. at 2, 7–29, Apr. 29, 2015, ECF No. 27 ("Pls.' Br."). Plaintiffs also challenge the valuation of Jiaxing's steel wire rod factor of production, brokerage and handling ("B&H") costs, and surrogate financial ratios as related to labor, as unsupported by substantial evidence. *Id.* at 3–4, 31–45. For the reasons set forth below, Commerce's selection of Thailand as the primary surrogate country is sustained, as is Commerce's valuation of Jiaxing's steel wire rod factor of production and the selection of the World Bank's "Doing Business 2014: Thailand" report to value B&H costs. However, Commerce's determination regarding the calculation of the surrogate financial ratios as related to labor is remanded. Commerce's calculation of B&H costs regarding the 10,000 kilogram weight assigned to 20-foot shipping containers and Commerce's decision not to make adjustments for costs associated with acquiring letters of credit is also remanded.

JURISIDCTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)

[1] On January 26, 2015, Defendant submitted an indices to the public and confidential administrative record, which can be found at ECF Nos. 23–4–5. *See* Admin. R., Jan. 26, 2015, ECF No. 23–4–5; *see also* Am. Admin. R., Jan. 4, 2019, ECF No. 97. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these administrative indices.

[2] IFI & Morgan Ltd., and RMB Fasteners Ltd., are the affiliated trading companies through which Jiaxing sold the merchandise it produced in the PRC to the United States. *See* Pls.' Br. at 1 n.1.

(2012),[3] and 28 U.S.C. § 1581(c) (2012). Commerce's antidumping determinations must be in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

On June 3, 2013, Commerce initiated the fourth administrative review covering the subject merchandise entered during the period of review, April 1, 2012, through March 31, 2013. *Initiation of Antidumping and Countervailing Duty Admin. Reviews and Request for Revocation in Part*, 78 Fed. Reg. 33,052 (Dep't Commerce June 3, 2013). Jiaxing was selected as the single mandatory respondent for this review. Decision Mem. for Prelim. Results of Fourth [ADD] Admin. Review: Certain [STR] from the [PRC] at 2, PD 102, bar code 3202470–01 (May 16, 2014) ("Prelim. Decision Memo").

In the preliminary results, Commerce determined that Colombia, Costa Rica, Indonesia, the Philippines, South Africa, Thailand, and Ukraine were all countries at the PRC's level of economic development. Prelim. Decision Memo at 6–7. Commerce also found that Colombia, Costa Rica, Indonesia, the Philippines, South Africa, Thailand, and Ukraine were all significant producers of comparable merchandise. Final Decision Memo at 4. Commerce then limited consideration to the Philippines, Thailand, and Ukraine, as the record only contained surrogate value data for these countries. *Id.* at 6.

On December 3, 2014, Commerce published the *Final Results*, selecting Thailand as the primary surrogate country. *See id.* at 5–14.[4] Commerce ultimately determined that, while both the Ukrainian and Thai data met its selection criteria, Thailand was preferable as a primary surrogate country because it offered both suitable surrogate value data and contemporaneous financial statements. *See id.* at 11, 13–14. Commerce then calculated surrogate values for Jiaxing's factors of production using data from Thailand, including generating a surrogate value for Jiaxing's steel wire rod factor of production through a simple average of three Harmonized Tariff Schedule ("HTS") categories within the Thai data. *Id.* at 17. Commerce also used Thai data to prepare a surrogate value for labor input directly associated with manufacturing. Final Decision Memo at 19–22. In preparing the surrogate value of labor, Commerce determined it was not necessary to make adjustments to avoid double counting labor costs associated with selling, general, and administrative costs in the

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

[4] In the *Final Results*, Commerce modified the preliminary dumping margin calculation for Jiaxing on the basis of a revised database submitted by respondents. *See* Final Decision Memo at 1.

calculation of Jiaxing's surrogate financial ratios. *Id.* Commerce also employed the World Bank's "Doing Business 2014: Thailand" report to generate a surrogate value for Jiaxing's B&H costs. *Id.* at 23–26; Commerce's Surrogate Values for the Prelim. Results at Ex. 15, PD 104–05, bar codes 3202737–01–02 (May 16, 2014) ("Commerce's Prelim. S. V. Memo"). In computing Jiaxing's B&H costs, Commerce did not make a deduction for the cost of acquiring letters of credit. Final Decision Memo at 25–26. Commerce also generated B&H costs on a per-kilogram basis by assigning each shipping container of Jiaxing's STR a weight of 10,000 kilograms. *Id.* at 26–28. Jiaxing filed its Complaint on December 10, 2014, and later an amended complaint. Compl., Dec. 10, 2014, ECF No. 10; First Am. Compl., Sept. 21, 2015, ECF No. 41.[5]

DISCUSSION

Jiaxing alleges that Commerce's selection of Thailand as the primary surrogate country is unsupported by substantial evidence. Pls.' Br. at 2, 7–29. Jiaxing further argues that it was arbitrary and capricious for Commerce to find that Thailand provided reliable surrogate value data. *Id.* at 2–3, 7–20. To the extent that Commerce's selection of Thailand as the primary surrogate country is sustained, Jiaxing also challenges the particular use of Thai data to value the steel wire rod factor of production, B&H costs, and surrogate financial ratios as related to labor, as unsupported by substantial evidence. *Id.* at 3–4, 31–45. The court sustains Commerce's selection of Thailand as the primary surrogate country, as well as Commerce's valuation of steel and use of the "Doing Business 2014: Thailand" report to calculate B&H costs. However, Commerce's calculation of surrogate financial ratios as related to labor, its decision not to adjust B&H costs for the costs associated with acquiring letters of credit, and the weight assigned to shipping containers in the calculation of B&H costs are all unsupported by substantial evidence and are remanded for further explanation or reconsideration consistent with this opinion.

I. Primary Surrogate Country Selection

Jiaxing challenges Commerce's selection of Thailand as the primary surrogate country as unsupported by substantial evidence because Thailand did not provide the "best available information" as compared with that available from Ukraine and the Philippines. *See* Pls.' Br. at 21–31. Jiaxing further argues that it was arbitrary and capricious for Commerce to find that Thailand provided reliable surrogate

[5] On January 30, 2019, the case was reassigned pursuant to 28 U.S.C. § 253(c) and USCIT Rule 77(e)(4).

value data. *See id.* at 8–20. Defendant argues that there is substantial evidence supporting Commerce's selection of Thailand as the primary surrogate country and that it was not arbitrary and capricious for Commerce to treat the Thai import data as reliable. *See* Def.'s Resp. to Pls.' Mot. for J. on the Admin. R. at 7–23, Oct. 9, 2015, ECF No. 45 ("Def.'s Br."). For the following reasons, Commerce's selection of Thailand as the primary surrogate country is sustained.

Dumping occurs when merchandise is imported into the United States and sold at a price lower than its "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See* 19 U.S.C. §§ 1673, 1677(34), 1677b(a). The difference between the normal value of the merchandise 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; *see generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010).

Where the exporting country has a nonmarket economy, as in this case, Commerce identifies one or more market economy countries to serve as a "surrogate" and then "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production" in the relevant surrogate country or countries, 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), (4). This surrogate value analysis is designed to determine a producer's costs of production as if the producer operated in a hypothetical market economy. *See, e.g., Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015).

Commerce must value the factors of production through "the best available information." 19 U.S.C. § 1677b(c)(1). Commerce has discretion to determine what constitutes the best available information, as this term is not defined by statute. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). "Commerce generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited May 1, 2019).

Using the best available information, Commerce "shall [value the factors of production] to the extent possible . . . in one or more market

economy countries that are – (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B). The statute does not define "comparable;" nor does it require Commerce to use any particular methodology in determining which countries are sufficiently comparable.

Commerce has a preference to use one primary surrogate country. *See* 19 C.F.R. § 351.408(c)(2). When several countries are both at a level of economic development comparable to the nonmarket economy country and significant producers of comparable merchandise, Commerce evaluates the reliability and completeness of the data in the similarly situated surrogate countries and generally selects the one with the best data as the primary surrogate country.[6] Final Decision Memo at 5.

An agency's determination is supported by substantial evidence when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). However, the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Nevertheless, "the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence on the record." *Zhaoqing New Zhongya Aluminum Co. v. United States*, 36 CIT __, __, 887 F. Supp. 2d 1301, 1305 (2012) (citing *Universal Camera Corp.*, 340 U.S. at 488).

On this record, Commerce's selection of Thailand as the primary surrogate country over Ukraine and the Philippines is supported by substantial evidence because Thailand was the only country for which there was specific steel input data as well as contemporaneous financial statements from producers of comparable merchandise. Commerce looked at the available data for low carbon steel wire rod

[6] Factors of production to be valued in the surrogate market economy "include, but are not limited to – (A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." *See* 19 U.S.C. § 1677b(c)(3); *see generally Dorbest*, 604 F.3d at 1367–68. However, valuing the factors of production consumed in producing the subject merchandise does not capture certain items such as (1) manufacturing/factory overhead, (2) selling, general, and administrative expenses, and (3) profit. Commerce calculates those surrogate values using ratios – known as "surrogate financial ratios" – that the agency derives from the financial statements of one or more companies that produce identical (or at least comparable) merchandise in the relevant surrogate market economy country. *See* 19 C.F.R. § 351.408(c)(4); 19 U.S.C. § 1677b(c)(1); *Dorbest*, 604 F.3d at 1368.

and round bar ("steel wire rod") – Jiaxing's most significant factor of production – and found surrogate value data from both Thailand and Ukraine to be specific. Final Decision Memo at 7–12. Commerce identified the Philippines, Thailand, and Ukraine as economically comparable to the PRC, significant producers of comparable merchandise, and countries for which the record contained surrogate value data. *Id.* at 6. Commerce found Thai Global Trade Atlas ("GTA") import data to be specific because it was differentiated by carbon content and could be matched to the steel inputs used by Jiaxing. *Id.* at 10. Commerce found Ukrainian GTA data was not specific because it contained only broad basket categories. *Id.* However, Jiaxing also supplemented the record with Ukrainian Metal Expert data which Commerce found specific because it covered a carbon content range that matched Jiaxing's steel input. *Id.* at 11. Commerce determined GTA data from the Philippines was not specific because it grouped together low carbon and mid carbon steel, the latter of which was not used by Jiaxing. *Id.* at 10.Commerce also found that Thailand provided multiple contemporaneous financial statements from producers of comparable merchandise. *Id.* at 13.[7] It found that the financial statements from Ukraine and the Philippines, although from producers of comparable merchandise, were not contemporaneous. *Id.*

Jiaxing lacks support for its argument that it is inappropriate for Commerce to select Thailand because Thailand "presents by far the most expensive home market"[8] and "no reasonable producer would

[7] Jiaxing argues that the Ukrainian company's data is superior to that of the Thai companies because the Ukrainian company "not only produced comparable merchandise, but has a similar production experience" to Jiaxing. Pls.' Br. at 29. Jiaxing fails to argue that Commerce's choice is unreasonable. Instead it argues that Commerce should have chosen the Ukrainian data as the best available information. *Id.* The court will not reweigh the evidence.

Jiaxing further, and incorrectly, claims that the Thai financial statements for Hitech Fastener Manufacture (Thailand) Co., Ltd., ("Hitech") and LS Industries Co., Ltd., ("LS Industries") "include no information on the nature, value, and consumption quantity of the raw materials used in production." Pls.' Br. at 29. Item 14 of Hitech's financial statement – captioned "Cost of production and Costs of sales" – clearly identifies the cost of raw materials used in production. *See* Petitioner's Submission of Surrogate Value Information at Ex. 15, PD 58, bar code 317793505 (Jan. 31, 2014) ("Petitioner's S. V. Submission") (identifying costs for "Materials used" through the addition of "Beginning raw material" and "Purchased materials" minus residual materials at the end of the period). Hitech's statement also contains detailed allocations for costs of production including, among others, "Salary production (Indirect Labor)," "Overtime – Production Department," "Electricity – works," and "Petrol." *Id.* LS Industries' financial statement provides a comparably detailed breakdown. *See* Petitioner's S. V. Submission at Ex. 13, PD 58, bar code 3177935–05 (Jan. 31, 2014) ("Details of Cost of Sale"). Commerce's determination that the Thai financial statements "break out the costs" of material, labor and energy was thus reasonable. Final Decision Memo at 13.

[8] Jiaxing supports this claim only by reference to the fact that Ukrainian import prices of low carbon steel are lower than those in the Thai GTA data. *See* Pls.' Br. at 20.

decide to make Thailand its home market for [STR].”[9] Pls.’ Br. at 20 (emphasis omitted).[10] In nonmarket economy proceedings Commerce values a respondent’s factors of production using the best available information from a country or countries which it considers appropriate. *See* 19 U.S.C. § 1677b(c). There is no requirement that Commerce give weight to a respondent’s preference for a primary surrogate country with lower cost factors of production. *See id.* Jiaxing’s complaint is based on a misunderstanding of the process by which a primary surrogate country is selected by Commerce and thus fails. Commerce’s selection of Thailand as the primary surrogate country is thus supported by substantial evidence.

Nonetheless, Jiaxing argues that no reasonable mind could conclude that Thailand – as opposed to Ukraine – provides the best available information because the Thai data is aberrational and because Ukraine’s Metal Expert data is the “most specific.”[11] Pls.’ Br. at

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[9] Jiaxing further argues that Commerce’s “complete unpredictability” in primary surrogate country selection in PRC related cases (since shifting away from using India as a surrogate country in 2010) means respondents are “unable to comply with the ‘remedial’ purpose of the antidumping laws because they cannot reasonably estimate their normal value in the home market.” Pls.’ Br. at 19. This complaint is unconvincing. Commerce is not required to select the same primary surrogate country in each proceeding. Commerce carries out a separate analysis in each administrative review, which “allows for different conclusions based on different facts in the record.” *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014).

[10] Jiaxing attempts to support its argument by pointing to the legislative history of the statutory provisions governing the determination of normal value for nonmarket economies, and quotes the Committee on Finance stating that the Senate was “‘particularly concerned that imports from certain nonmarket economy countries . . . not be unfairly disadvantaged’ by the surrogate methodology.” Pls.’ Br. at 19 (quoting S. Rep No. 100–71 at 106 (1987)). However, the full quote on which Jiaxing seeks to rely is:

> Because the Commerce Department may have difficulties in getting detailed data from countries not subject to investigation, the bill gives the Commerce Department authority to use “comparable merchandise” as the basis for foreign market value. Comparable merchandise is a broader category than the “such or similar” merchandise comparison which is usually used in antidumping investigations. However, in applying this standard, the Commerce Department should make appropriate adjustments to compensate for quality differences in the merchandise under investigation and the comparable merchandise from the benchmark country. The purpose of making such adjustments is to ensure that the foreign market value assigned to the merchandise under investigation fairly reflects any differential due to inferior or superior quality. The Committee is particularly concerned that imports from certain nonmarket economy countries, such as the [PRC], not be unfairly disadvantaged by use of the new methodology where price differences can be accounted for in whole or in part by quality differences in the imported merchandise.

S. Rep. No. 100–71 at 106 (1987). The excerpt does not provide any indication that Congress intended that nonmarket economy respondents should be allowed to select their own primary surrogate country. Rather, it gives expression to a particular concern with situations where price differences are attributable to differences in quality. No party has sought to raise that issue in these proceedings. Jiaxing’s reference to it is thus inapposite.

[11] The Ukrainian Metal Expert data contains two separate data sets: (1) Ukrainian domestic prices for steel wire rod 6.5–8 mm in diameter (0.14–0.22 percent carbon) for the period between January 1, 2011 and January 1, 2013; and, (2) prices for wire rod and round bar 6.5–32 mm (0.14–0.22 percent carbon) in Dnepropetrovsk, Ukraine, on a weekly basis for

25; *see generally id.* at 21–25. Jiaxing argues that Thai steel prices "are well above the prevailing world prices" reported by the World Bank and several other sources, and thus "the Thai steel values must be considered significantly aberrant for this commodity low carbon product." Pls.' Br. at 24. However, Jiaxing does not establish that the difference in price between the Thai data and other data on the record is significant enough to be considered aberrational.[12] As Commerce noted, data is not aberrational simply because it is the lowest or highest data on the record. *See* Final Decision Memo at 12 (citing *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, 37 CIT __, __ n.9, 929 F. Supp. 2d 1352, 1356 n.9 (2013)). Commerce also found that Jiaxing had not provided it with annual data from prior years to allow it to assess whether the Thai data was aberrational. Final Decision Memo at 12. As such, Jiaxing fails to show that Commerce's determination that the Thai data was not aberrational is unreasonable.[13]

Jiaxing claims further that the Thai data is less specific than the Ukrainian Metal Expert data because it reflects steel wire rod of a "very generic" diameter of less than 14 mm, contains overly fine gradations of carbon that do not "capture [Jiaxing's] purchasing experience," and specifications for silicon and aluminum which are "not known to match [Jiaxing's] steel wire rod inputs." Pls.' Br. at 22–23. However, Jiaxing has not supported these assertions with any evidence that these characteristics mean that the Thai data is so unrelated to the low carbon steel wire rod consumed by Jiaxing as to

the period between September 2012 and April 2013 and including 20% VAT. *See* Jiaxing's Final Surrogate Value Submission at Ex. 6, PD 97, bar code 3195965–01 (Apr. 16, 2014) ("Jiaxing's Final S. V. Submission"). In contrast, the relevant Thai GTA data are average prices across the whole period of review (April 1, 2012 through March 31, 2013) for three HTS categories differentiated by carbon content (containing up to 0.18 percent carbon) (being HTS classification numbers 7213.91.00.10, 7213.91.00.11 and 7213.91.00.12). *See* Petitioner's S. V. Submission at Ex. 1, PD 59, bar code 3177935–01 (Jan. 31, 2014).

[12] Thai import prices are identified by Jiaxing as ranging between $840 and $1,140 per metric ton, as against $606 for average Asian prices, and $680–$790 for average world prices. *See* Pls.' Reply Brief at 9 (citing Petitioner's S. V. Submission at Ex. 1, PD 59, bar code 3177935–01 (Jan. 31, 2014); Jiaxing's Final S. V. Submission at Exs. 1–2, PD 97, bar code 3195965–01 (Apr. 16, 2014)). Jiaxing does not point to any previous cases where such price differentials have been indicative of aberrational prices. The price differential is similar when comparing the Thai GTA data and the Ukrainian Metal Expert data, with the latter providing an average price of $773.388 per metric ton. *See* Jiaxing's Final S. V. Submission at Ex. 6, PD 97, bar code 3195965–01 (Apr. 16, 2014).

[13] Likewise, Jiaxing's claim that Ukrainian GTA data is superior because it is specific and non-aberrational fails. *See* Pls.' Br. at 24–25. Jiaxing's purported reliance on *Yantai Oriental Juice* is similarly inapposite. *Id.* at 16–17 (citing *Yantai Oriental Juice Co. v. United States*, 26 CIT 605 (2002)). Jiaxing seeks to raise *Yantai Oriental Juice* for the principle that price distortion by government action is significant regardless of whether it tends to inflate or deflate surrogate prices, and that it is therefore improper for Commerce to disregard the price impact of the behaviors indicated in the Customs Reports. *See* Pls.' Br. at 17. However, this principle is not relevant as Jiaxing has not established that there is any distortion of Thai steel import prices.

render Commerce's determination that it was specific unreasonable. It is not this court's role to reweigh the evidence. Jiaxing's argument fails as it does not establish that the Thai GTA data does not meet Commerce's criteria for specificity or that Commerce's determination is otherwise unreasonable.

Jiaxing also argues that Philippine steel wire rod input data is superior because it is corroborated by world prices for low carbon steel. Pls.' Br. at 30. Jiaxing further argues that the fact that the data from the Philippines groups together low carbon and mid carbon steel should not weigh against its specificity because that would only tend to "conservatively overestimate" the surrogate value generated by Commerce, as steel with higher carbon concentrations tends to be more expensive. *Id.*[14] Neither of these arguments establish that Commerce's selection of Thai data over that of the Philippines is unreasonable. Thai prices have not been shown to be aberrational and the fact that mid carbon steel could possibly "conservatively overestimate" prices does not show that Commerce's determination regarding the Philippine data's lack of specificity is unreasonable.[15] Commerce's selection of Thailand as the primary surrogate country is supported by substantial evidence.[16]

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[14] Jiaxing also asserts that the financial statements from the Philippines are superior because they reflect companies that "produce comparable merchandise, consume steel wire rod, and draw wire similar to [Jiaxing's] production process." Pls.' Br. at 31. As with Jiaxing's similar claim with respect to the financial statement from the Ukraine, Jiaxing fails to argue that Commerce's choice is unreasonable. Jiaxing argues, instead, that Commerce should have selected the Philippines statements as the best available information. The court will not reweigh the evidence.

[15] The Court ordered supplemental briefing on *Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d. 1289 (Fed. Cir. 2016) ("*Jiaxing Bro. Fastener*") (involving a challenge by the same plaintiffs to Commerce's determination in the second administrative review of the same [ADD] order at issue here) and its impact on Commerce's selection of Thailand as the primary surrogate country here. *See* Order, May 16, 2016, ECF No. 64. *Jiaxing Bro. Fastener* relevantly held that Commerce's selection of Thailand over the Philippines as the primary surrogate country was supported by substantial evidence. *See Jiaxing Bro. Fastener*, 822 F.3d. at 1300–02. Both Jiaxing and Defendant argue that the present proceeding concerns different issues to those in *Jiaxing Bro. Fastener*. *See* Def.'s Suppl. Br. Pursuant to this Ct.'s May 16, 2016 Sched. Order at 7–9, June 17, 2016, ECF No. 66; Pls.' Suppl. Br. in Resp. to May 16, 2016 Ct. Order at 8, June 17, 2016, ECF No. 68. Defendant-Intervenor argues the key issues in relation to the selection of primary surrogate country in *Jiaxing Bro. Fastener* are "equally applicable" in these proceedings. *See* Suppl. Br. of Def.-Int. Vulcan Threaded Products, Inc., at 13, June 17, 2016, ECF No. 67. The court agrees that Commerce's selection of Thailand over the Philippines as the primary surrogate country in *Jiaxing Bro. Fastener* concerned different issues to those in the present proceeding and that consequently *Jiaxing Bro. Fastener*is not dispositive of the issue of the selection of Thailand as primary surrogate country in the present proceedings.

[16] Jiaxing further alleges generally that Commerce failed to adequately consider the arguments raised above in the underlying administrative proceeding. Pls.' Br. at 7–8. As is clear from the discussion above, Commerce responded to each of Jiaxing's arguments in turn and Jiaxing has not established that Commerce's conclusions are unreasonable.

Agency action is arbitrary and capricious if "the agency offers insufficient reasons for treating similar situations differently." *West Deptford Energy, LLC v. Federal Energy Regulatory Commission*, 766 F.3d 10, 21 (Fed. Cir. 2014). A determination is also arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Commerce reasonably found the Thai data reliable. First, Commerce concluded that a 2014 determination that Thai exporters were dumping STR in the United States did not affect the reliability of the Thai import data because the determination only related to Thai exports.[17] Final Decision Memo at 6; *see also [STR] from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 Fed. Reg. 14,476 (Dep't Commerce Mar. 14, 2014) ("*2014 Thai STR ADD Determination*").[18]

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[17] In selecting the "best available information," Congress has directed Commerce to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R. 3, H.R. Rep. No. 100–576 at 590–91 (1998) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24. In assessing whether such evidence exists, Commerce is not expected "to conduct a formal investigation to ensure that such prices are not dumped or subsidized," but, instead, is to "base its decision [as to whether there is 'reason to believe or suspect'] on information generally available to it at that time." *Id.*

[18] Jiaxing argues that the *2014 Thai STR ADD Determination* constitutes a "reason to believe or suspect" that the price of steel imports into Thailand are distorted. *See* Jiaxing's Br. at 9–11. This argument relies on an analogy with countervailing duty cases in which Commerce has found substantial government distortion of a market to indicate other prices in that country are unreliable – including import prices. *See id.* at 10–11 (and administrative determinations cited there). Jiaxing argues this reasoning is "equally applicable in antidumping proceedings" because:

> Although the antidumping and countervailing laws are separate, and serve some different purposes, there is only one law of economics; and the Department has found as a matter of economic law that a substantial distortion in the market renders all prices within and into that market unreliable. In light of the Department's findings that the principal – if not only major producer in Thailand – of steel threaded rod dumps its merchandise, the entire Thai steel threaded rod market, including relevant imports into Thailand, are not reliable or representative of market prices free from distortion.

Id. at 11. In making this argument Jiaxing blurs the distinction between antidumping and countervailing duty proceedings. In fact, Jiaxing has not established that Commerce considers that "as a matter of economic law" any "significant distortion in a market renders all prices within and into that market unreliable." *Id.* Rather, Jiaxing has only established that in certain previous countervailing duty cases Commerce has found a particular market "so dominated by the presence of government" that it concludes "the remaining private prices in the country in question cannot be considered to be independent of the government price." *Id.* at 10–11 (quoting *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,545 (Dep't Commerce Apr. 2, 2002).

Second, Commerce determined that a series of reports and communications which raise concerns about the practices of Thai customs officials (the "Customs Reports") did not constitute specific and objective evidence supporting a reason to believe or suspect that the Thai data as to steel imports were distorted. *See* Final Decision Memo at 6–7; *see also* Jiaxing's Surrogate Country Selection Comments at Exs. 3–9, PD 63–66, bar codes 3178063–02–04 (Jan. 31, 2014) ("Jiaxing's S. V. Comments").[19] A "reason to believe or suspect" must be established by "particular, specific, and objective evidence." *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT 255, 266–67, 264 F. Supp. 2d 1229, 1239 (2003). Commerce concluded that, while the Customs Reports indicated general concerns as to the practices of Thai customs officials, there was no evidence that these general concerns had any impact on the specific import data in question.[20] Final Decision Memo at 7. Commerce cited the Xanthan Gum Memo

In preparing the *2014 Thai STR ADD Determination*, Commerce did not investigate the Thai steel industry for the presence of subsidies, nor did it otherwise investigate the role of the government in the STR market. Rather, as the sole mandatory respondent – Tycoons – failed to participate in the administrative proceeding, Commerce adopted the petitioner's valuations of export price and normal value, applying the petitioner's highest rate to Tycoons through an adverse inference and an average to other exporters (Commerce having concluded in the preliminary determination that the petitioner's rates were reliable and sustained this in the final determination). *See* Decision Mem. for the Prelim. Determination of the [ADD] Investigation of [STR] from Thailand at 3–7, A-549–831, Dec. 20, 2013, *available at* https://enforcement.trade.gov/frn/summary/thailand/2013–31341–1.pdf (last visited May 1, 2019). Commerce did not make a determination as to the provision of government subsidies or market impact in the *2014 Thai STR ADD Determination*. Consequently, the *2014 Thai STR ADD Determination* allows for no more than speculation that the prices of steel imported into Thailand are distorted.

Jiaxing further argues that the failure of Tycoons to cooperate in the *2014 Thai STR ADD Determination* should itself be taken to indicate that Thailand's import prices are distorted. *See* Pls.' Br. at 11–12. This argument is unconvincing as Tycoons is a private company and its lack of cooperation does not provide evidence of distortion in the prices of upstream products used in the production of STR in Thailand's domestic or import steel prices. *See 2014 Thai STR ADD Determination* at 14,477.

[19] In an attempt to supplement the Customs Reports, Jiaxing quotes several paragraphs from an additional 2015 report by the United States Trade Representative ("USTR") and provides a website address for the full report. *See* Pls.' Reply Br. at 6–7, Nov. 16, 2015, ECF No. 48 ("Pls.' Reply Br."). This report is not part of the record and will not be considered.

[20] The Customs Reports – being the USTR's annual "National Trade Estimate Report on Foreign Trade Barriers" for the years 2011–2013, a publication by Commerce's U.S. Commercial Service titled "Doing Business in Thailand: 2012 Country Commercial Guide for U.S. Companies," a country profile of Thailand prepared by FedEx in 2013, and two requests for consultation filed with the World Trade Organization ("WTO") in 2008 – all raise concerns about the behavior of Thai customs officials. *See* Jiaxing's S. V. Comments at Exs. 3–9, PD 63–66, bar codes 3178063–02–04 (Jan. 31, 2014). Although there are differences between the USTR's annual reports, each has a substantially similar section on "Customs Barriers" which contains (substantially identical versions of) the following two sentences:

> The United States continues to have serious concerns about the lack of transparency in the Thai customs regime and the significant discretionary authority exercised by Customs Department officials. . . . The U.S. Government and industry also have expressed concern about the inconsistent application of Thailand's transaction valuation methodology and reports of repeated use of arbitrary values by the Customs Department.

in support of its decision. *See* Final Decision Memo at 7 (citing Issues & Decision Mem. for the Final Determination of the [ADD] Investigation of Xanthan Gum from the [PRC], A-570–985, (May 28, 2013), *available at* https://enforcement.trade.gov/frn/summary/prc/2013–13220–1.pdf (last visited May 1, 2019) ("Xanthan Gum Memo")).[21]

Jiaxing argued that reliance on the Xanthan Gum Memo in this case was inappropriate because the Customs Reports include a number of documents that were not available to Commerce in the Xanthan Gum Memo. *See* Pls.' Br. at 15. Jiaxing's argument fails, however, as Commerce's reference to the Xanthan Gum Memo did not preclude Commerce from considering the additional documents on the record in these proceedings. Commerce simply stated it could not conclude from the Customs Reports that the "Thai import data under consideration should be rejected as unreliable," and that this conclusion was as "indicated" in the Xanthan Gum Memo. Final Decision Memo at 7. Jiaxing has, moreover, not established that the additional documents on the record in these proceedings provide any more persuasive evidence than those considered in the Xanthan Gum Memo.[22]

Id. at Ex. 3 at 355, Ex. 4 at 369, Ex. 5 at 347. Commerce's 2012 "Doing Business in Thailand" publication reproduces these lines from the USTR reports almost verbatim. *See id.* at Ex. 6 at 77. The FedEx profile of Thailand reports that Thai customs officials will regularly assess import values through use of an indicative price prepared from the highest declared price of previous shipments of a product instead of the actual transaction value. *See id.* at Ex. 9 at 4. The two requests for consultation filed with the WTO are communications submitted by the EU and the Philippine delegations to the WTO in 2008 alleging that Thailand had since 2006 been applying arbitrary customs values to certain imports of alcoholic beverages and cigarettes. *See id.* at Exs. 7–8. None of these reports raise specific allegations as to the treatment of steel imports into Thailand by the Thai Customs Department.

[21] In the Xanthan Gum Memo, Commerce concluded that "while the report from the Office of the [USTR] . . . indicates that the United States has expressed concern over the practices of Thailand's Customs Department officials, we cannot conclude from this report that the entirety of the Thai import data should, therefore, be rejected as unreliable." Xanthan Gum Memo at 12.

[22] Commerce's conclusion regarding the Customs Reports was not, as argued by Jiaxing, arbitrary and capricious when compared with other determinations excluding export data on the basis of evidence of subsidies. *See* Pls.' Br. at 15. Jiaxing argued that Commerce arbitrarily applied a higher standard of proof regarding the alleged distortion of imports into Thailand than it ordinarily applies regarding allegedly subsidized imports. *Pls.' Br. at 15*. However, the analogy is inapposite as the factual issues raised by the Customs Reports are dissimilar to those raised by subsidized imports. For example, to support its argument Jiaxing cites to the Stainless Steel Sinks Prelim. Memo. *See* Pls.' Br. at 15 (citing Decision Mem. for Prelim. Determination for the [ADD] Investigation of Drawn Stainless Steel Sinks from the [PRC] at 17, A-570–983, (Sep. 27, 2012), *available at* https://enforcement.trade.gov/frn/summary/prc/2012–24549-(last visited May 1, 2019) ("Stainless Steel Sinks Prelim. Memo")). This is a preliminary antidumping determination in which Commerce stated it would disregard import data relating to products from India, Indonesia and South Korea in the surrogate valuation of stainless steel sinks from the PRC when using Thailand as the primary surrogate country because it had reason to believe or suspect those products were subsidized. *See* Stainless Steel Sinks Prelim. Memo at 17. However, Commerce did not, as Jiaxing alleges, disregard such imports "merely on the fact of one

Third, Commerce found that a consistent difference between Thai import and export prices for the steel wire rod factor of production was not evidence of customs manipulation. Final Decision Memo at 7. Rather, Commerce stated that given the evidence that Thai exporters are dumping steel it was "not surprising that Thai export prices that are tainted with dumping are lower than import prices." Final Decision Memo at 7.[23] Commerce's determination therefore is not arbitrary and capricious. The court sustains Commerce's selection of Thailand as the primary surrogate country.

II. Steel Wire Rod Factor of Production

Having selected Thailand as the primary surrogate country, Commerce calculated the surrogate value of Jiaxing's steel inputs using a simple average of three HTS categories within the Thai data. Final Decision Memo at 17. Jiaxing argues that Commerce should instead use a weighted-average to calculate the surrogate value of steel inputs. *See* Pls.' Br. at 32–33.[24] Defendant argues that Commerce followed its normal practice in employing a simple average, given that Jiaxing's import and sales data were not reported on a weighted-average basis. *See* Def.'s Br. at 25. The court sustains Commerce's calculation of the surrogate value of Jiaxing's steel inputs.

Commerce concluded it was unable to accurately calculate a weighted-average because Jiaxing's import and sales data were reported on different bases. Final Decision Memo at 17. Jiaxing has not established that its import and sales data was reported on a

countervailing duty investigation of one product in the past." Pls.' Br. at 15 (emphasis omitted). Rather, the evidence Commerce relied upon for disregarding imports from those countries in the Stainless Steel Sinks Prelim. Memo was that it had "found in other proceedings that these countries maintain broadly available, non-industry-specific export subsidies" and that consequently "it is reasonable to infer that all exports from these countries to all markets may be subsidized." Stainless Steel Sinks Prelim. Memo at 17. Jiaxing's argument fails because the Customs Reports are not analogous to a prior finding by Commerce that a country maintains broadly available, non-industry specific export subsidies, and thus a comparison of the evidential weight of the two does not indicate that Commerce arbitrarily employed a higher standard of proof in the present case.

[23] In its brief, Jiaxing restates a number of its arguments as to reliability made at the administrative level. *See* Pls.' Br. at 7–18; *see also* Pls.' Reply Br. at 8–14, Nov. 16, 2015, ECF No. 48 ("Pls.' Reply Br."). Jiaxing argues that the general concerns contained in the Customs Reports establish that the Thai data is unreliable because there is nothing on the record limiting the Customs Reports to a specific import. *See* Pls.' Br. at 13; *see generally id.* 12–18. Jiaxing also argues that the difference in price between Thai import and export data for steel wire rod should be taken as evidence of customs manipulation. *See* Pls.' Reply Br. at 8–14. Commerce addressed each of these arguments in the underlying administrative proceedings. Final Decision Memo at 6–7. The court will not reweigh the evidence.

[24] In its brief, Jiaxing also argues that Commerce should employ three additional HTS categories from within the Thai data to value Jiaxing's steel input. *See* Pls.' Br. at 31–32. During oral argument, however, Jiaxing stated that it wished to waive this argument. Oral Arg. at 02:05:10–02:06:40, Mar. 15, 2016, ECF No. 62 (citations to the Oral Argument reflect time stamps from the audio recording).

weighted-average basis. As such, Commerce reasonably employed a simple average in calculating the surrogate value of steel inputs using three Thai HTS categories.

III. SG&A Labor

Jiaxing argues Commerce double counted SG&A labor costs because Commerce used data to value manufacturing labor costs that included costs associated with SG&A labor. *See* Pls.' Br. at 33–36. Defendant argues Commerce was not required to adjust Jiaxing's surrogate financial ratios because Commerce reasonably concluded the data used to value manufacturing labor did not contain SG&A labor costs. *See* Def.'s Br. at 25–27. For the reasons that follow, the court remands Commerce's calculation of Jiaxing's surrogate financial ratios as related to SG&A labor.

In the calculation of normal value in a nonmarket economy the statute provides for the separate valuation of the "hours of labor required" in producing subject merchandise and of additional expenses (i.e., "general" and "other" expenses). *See* 19 U.S.C. § 1677b(c)(3)(A). In identifying the "hours of labor required" as a factor of production, the statute does not distinguish between labor expended to produce subject merchandise (i.e., "production" labor) and labor expended in performing non-production activities (i.e., "non-production" labor), such as labor associated with the performance of SG&A functions. *Id.* Commerce accounts for SG&A costs (including SG&A labor costs) through "surrogate financial ratios" derived from financial statements of companies in the surrogate market economy country. *See* 19 C.F.R. § 351.408(c)(4); 19 U.S.C. § 1677b(c)(1); *Dorbest*, 604 F.3d at 1368.

Commerce may make adjustments to the calculation of surrogate financial ratios to avoid double counting labor costs where the data used to value the labor factor of production includes costs associated with SG&A labor. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 at 36,093–94, (Dep't Commerce June 21, 2011) (stating "the Department will adjust the surrogate financial ratios when the available record information -in the form of itemized indirect labor costs -demonstrates that labor costs are overstated"); *see also* Issues & Decision Mem. for the Final Determination of the [ADD] Investigation of Drawn Stainless Steel Sinks from the [PRC] at 15, A-570–983, (Feb. 19, 2013), *available at* https://enforcement.trade.gov/frn/summary/prc/2013–04379–1.pdf (last visited May. 1, 2019) (stating that "because the NSO data include all labor costs, the Department has treated itemized SG&A labor costs in

the surrogate financial statements as a labor expense rather than an SG&A expense, and we have excluded those costs from the surrogate financial ratios."). Double counting is, as a general rule, not permitted because it distorts antidumping margin calculations. *See, e.g.*, *DuPont Teijin Films China Ltd. v. United States*, 38 CIT __, __, 7 F. Supp. 3d 1338, 1345–46 (2014).

To value labor costs as a factor of production directly associated with manufacturing Jiaxing's STR, Commerce employed data from Thailand's Labor Force Survey of Whole Kingdom published by the National Statistical Office of the Government of Thailand ("NSO Data"). *See* Final Decision Memo at 19; Commerce's Prelim. S.V. Memo at 6–9, Exs. 7–9. Commerce used the costs of "manufacturing" labor identified in the "Industry" column in Tables 15 and 16 of the NSO Data to derive a single country industry-specific wage rate denominated in US dollars. *See* Commerce's Prelim. S. V. Memo at Exs. 7A–7B at Tables 15–16.[25] Commerce did not make any adjustments to the calculation of the surrogate financial ratios to avoid double counting SG&A labor costs. *See* Final Decision Memo at 21. Commerce justified its decision to not make any such adjustments by claiming that the "manufacturing" labor input from the NSO Data did "not include SG&A labor because the labor source identifies individual data line items for 'manufacturing' and 'administrative and support activities.'" *Id.*

Commerce's conclusion is unsupported by substantial evidence as Commerce failed to consider record evidence which supports an alternative conclusion.[26] Commerce did not address Table 8 of the NSO Data, titled "Employed Persons by Occupation and Industry," which lists nine different occupations included within the "manufacturing" industry: (1) legislators, senior officials and managers; (2) professionals; (3) technicians and associate professionals; (4) clerks; (5) service workers and shop and market sales workers; (6) skilled agricultural and fishery workers; (7) craft and related trades workers; (8) plant and machine operators and assemblers; and, (9) elementary occupations. Commerce's Prelim. S. V. Memo at Exs. 7A–7B at Table 8. The

[25] The NSO Data covers the third quarter of 2012 and the first quarter of 2013, with such data respectively contained in Exhibits 7A and 7B. *See* Commerce's Prelim. S. V. Memo at Exs. 7A–7B. These exhibits do not need to be distinguished in this analysis, however, as the structure of the tables contained in them is the same.

[26] If Commerce fails "'to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion[,] [the Department's determination is] unsupported by substantial evidence.'" *Ceramark Tech., Inc. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1317, 1323 (2014) (quoting *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000)). Although Commerce's "explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citing *State Farm*, 463 U.S. at 43).

list of occupations included in the "manufacturing" industry in Table 8 of the NSO Data indicates that, in addition to those occupations directly associated with manufacturing ("plant and machine operators and assemblers" and "elementary occupations"), a significant number of individuals in occupations associated with SG&A labor costs are also identified as working in the "manufacturing" industry ("senior officials and managers," "professionals," "technicians and associate professionals," and "clerks"). *Id.*[27]

The inclusion of occupations not directly associated with manufacturing when calculating the cost of labor directly associated with manufacturing potentially double counts labor costs associated with SG&A labor. As Table 18 of the NSO Data shows, the average income of managers, professionals, and technicians is considerably higher than for the plant and machine operators and elementary occupations. *Id.* at Table 18 (titled "Employee by Occupation, Income Class"); *see also* Pls.' Br. at Ex. 3 (summarizing the difference in income of different occupations). Inclusion of the income of these occupations inflates the cost of manufacturing labor above what manufacturing labor would cost if it was simply derived from the average income of occupations directly associated with manufacturing.

Defendant argues that Commerce's conclusion is reasonable because the category of "administrative and support services" itself also includes low-skilled manual labor such as "plant and machine operators and assemblers" and "elementary occupations." Def.'s Br. at 26 (citing Commerce's Prelim. S. V. Memo at Ex. 7A at Table 8). This response is not convincing as it does not detract from the fact that various occupations associated with SG&A labor costs are clearly listed in Table 8 as within the "manufacturing" industry. Commerce has, consequently, failed to consider record evidence that detracts from Commerce's determination. *See Universal Camera Corp.*, 340 U.S. at 488. Commerce's calculation of Jiaxing's surrogate financial ratios as related to labor is thus unsupported by substantial evidence and is remanded for further explanation or reconsideration consistent with this opinion.

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[27] This interpretation is not excluded by the definition of "Industry" provided in the NSO Data. *See* Commerce's Prelim. S. V. Memo at Ex. 8B at Item 4.6. This section defines "Industry" as: "the nature of economic activity undertaken in the establishment in which a person worked or the nature of business in which he was engaged during the survey week." *Id.*

IV. B&H Costs

Jiaxing makes three arguments regarding B&H costs. First, Jiaxing argues that Commerce unreasonably selected the World Bank's "Doing Business 2014: Thailand" report to value Jiaxing's B&H costs instead of the reported costs of Pakfood Company Limited ("Pakfood"). *See* Pls.' Br. at 36–40. Second, Jiaxing argues that if Commerce is permitted to use the "Doing Business 2014: Thailand" report, it should exclude costs associated with letters of credit in calculating B&H costs. *See id.* at 40–42. Third, Jiaxing argues that Commerce's assumption in the calculation of B&H costs that each shipping container weighs 10,000 kilograms is unsupported by substantial evidence. *See id.* at 42–45. Defendant responds that Commerce properly calculated the surrogate value for B&H costs. *See* Def.'s Br. at 27–31. The court sustains Commerce's reliance on the "Doing Business 2014: Thailand" report to value B&H costs. However, the court remands Commerce's decision not to make adjustments for costs associated with acquiring letters of credit and the weight assigned to shipping containers in the calculation of B&H costs are unsupported by substantial evidence.

A. The "Doing Business 2014: Thailand" Report

In calculating normal value, Commerce subtracts "costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser." 19 U.S.C. § 1677b(a)(6)(B)(ii). The subtraction of these costs from a respondent's normal value is intended to allow a fair comparison to net (or "ex-factory") prices, which are not affected by the extra costs experienced by an exporter in shipping products around the world. These movement expenses include B&H costs, among others. Commerce calculates a surrogate value for movement expenses in nonmarket economies.

Commerce valued Jiaxing's B&H costs using the "Doing Business 2014: Thailand" report.[28] *See* Final Decision Memo at 23–26; *see also*

[28] The "Doing Business 2014: Thailand" report is one of a series of annual reports prepared by the World Bank for various countries which "measures and tracks changes in regulations affecting 11 areas in the life cycle of a business" to show "how easy or difficult it is for a local entrepreneur to open and run a small to medium-size business when complying with relevant regulations." Commerce's Prelim. S. V. Memo at Ex. 15 at 4. The relevant "Trading Across Borders" section employed by Commerce to prepare Jiaxing's surrogate B&H costs measures the "cost (excluding tariffs and the time and cost for sea transport) associated with exporting and importing a standard shipment of goods by sea transport." *Id.* at 72. For exports, such costs include (1) customs clearance and technical control, (2) ports and terminal handling, (3) inland transportation and handling, (4) bills of lading, (5) certificates of origin, (6) commercial invoices, (7) customs export declaration and (8) terminal handling receipts. *Id.* at 78–79. These costs are derived from questionnaires concerning a standardized case scenario and refer to business in Thailand's largest business city. *Id.* at 103.

Commerce's Prelim. S. V. Memo at Ex. 15. Commerce selected the "Doing Business 2014: Thailand" report because it was from the primary surrogate country and met "all of the Department's criteria" for surrogate values, including that the data was "only two months outside the [period of review] and . . . based on a broad survey of costs in the Thailand market." Final Decision Memo at 23.

Commerce reasonably determined that the "Doing Business 2014: Thailand" report constituted the best available information, as compared to the reported B&H costs of Pakfood, because it "reflects a broader experience than simply the experience of a single company." *Id.* at 24.[29] Jiaxing argues that the "Doing Business 2014: Thailand" report is unrepresentative of a broad market average because it is "based upon a hypothetical company's one-time hypothetical shipment of hypothetical merchandise at a hypothetical weight with a hypothetical value." Pls.' Br. at 39. Jiaxing does not, however, substantiate why being "hypothetical" should render the "Doing Business 2014: Thailand" report unrepresentative. Commerce's response to this argument is reasonably discernible from its discussion of the merits of relying on the "Doing Business 2014: Thailand" report over the data from Pakfood. *See* Final Decision Memo at 24–25. Commerce explained that the Doing Business reports represent a broad market average because they are based on "companies' actual experience" and to prepare them the World Bank gathers "comprehensive quantitative data to compare business regulation environments across economies and over time." *Id.* at 25. In contrast, Jiaxing's proposed alternative – the reported B&H costs of Pakfood – relies simply on the costs of a single exporter. Commerce's use of the "Doing Business 2014: Thailand" report is thus supported by substantial evidence as Commerce reasonably found that the "Doing Business 2014: Thailand" report was more representative of a broad market average than the alternative. *See id.*

Although Jiaxing argues that the "Doing Business 2014: Thailand" report is unreliable because it does not specify whether the

[29] In its brief, Jiaxing reiterates its argument that Commerce was incorrect to find that the "Doing Business 2014: Thailand" report was based on a broad market average because it is based on contributions from Thailand's largest city, Bangkok. *See* Pls.' Br. at 38–39. Jiaxing argues that a survey based on just one city – as opposed to one based on data points spread across different geographic locations in a country – cannot accurately be described as broad. *Id.* Jiaxing cites *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT __, 977 F. Supp. 2d 1347 (2014), as a decision in which it had been found that a "broad-based source was one with many data points spread throughout a country." Pls.' Br. at 38. This decision is inapposite because it held that due to a factual error Commerce had relied on data based only on one city when the record contained data from 17 cities which together provided a much broader market average. *See Since Hardware (Guangzhou)*, 38 CIT at __, 977 F. Supp. 2d at 1358.

contributors have any relevant experience, Commerce reasonably inferred that the contributors had relevant experience. Pls.' Br. at 37–38.[30] The World Bank's description of the contributors to the "Doing Business 2014: Thailand" report provides a full list of the names of all entities which participated in the report as a whole. *See* Attachment to the Record at Ex. 22, PD 157, bar code 3810231–01 (Aug. 18, 2014) ("Doing Business Thailand-Contributors"). The World Bank also provides a separate table identifying the number of contributors specifically relied on by each chapter of the report. *See id.*, at Ex. 22 at 1. The table identifying the number of contributors to each chapter of the report does not specify the names of those entities. *See id.* This table makes clear that there were five entities which provided information to the "Trading Across Borders" chapter of the "Doing Business 2014: Thailand" report, but does not provide a means of identifying who specifically these five contributors were. *See id.* As noted by Commerce, however, the report's full list of participants includes freight forwarders, shipping lines, banks, law firms and accounting firms. Final Decision Memo at 24. Commerce reasonably inferred that the five contributors to the "Trading Across Borders" chapter were likely to have been those with relevant experience, such as with exporting customers or the freight–forwarding business. *See id.* Jiaxing's argument that the contributors may have had no relevant experience thus fails as it is speculative. *See* Pls.' Br. at 37.

Nonetheless, Jiaxing contends that it is unreasonable of Commerce to select the "Doing Business 2014: Thailand" report as the best available information to calculate a surrogate value for B&H costs for Jiaxing's STR because there is no raw data from the questionnaires underlying the "Doing Business 2014: Thailand" report. Pls.' Br. at 36. Jiaxing claims this is "a standard that this Court has recently required from the Department as a predicate for relying on Thai surrogate value data sources." *Id.* (citing *Elkay Mfg. Co. v. United States*, 38 CIT __, __, 34 F. Supp. 3d 1369, 1382 (2014) ("*Elkay I*"), and *Elkay Mfg. Co. v. United States*, 39 CIT __, __, Slip Op. 15–33, 12–13 (Apr. 20, 2015) ("*Elkay II*")). However, neither of the opinions cited by Jiaxing support its argument as they do not stand for a proposition that raw survey data is a "predicate for relying on Thai surrogate

[30] Jiaxing also argued that the report does not reflect broad market averages because only two entities contributed information to the relevant chapter (titled "Trading Across Borders"). Pls.' Br. at 37–38 and Ex. 4. This claim fails as it was based on a non-contemporaneous version of the webpage describing the contributors to the "Doing Business 2014: Thailand" report. *Id.* The version of the webpage contemporaneous with the administrative review shows five contributors to the "Trading Across Borders" chapter. *See* Doing Business Thailand -Contributors at Ex. 22 at 1.

value data sources."[31] For the reasons above, Commerce's use of the "Doing Business 2014: Thailand" report to value Jiaxing's B&H costs is supported by substantial evidence.

B. Letters of Credit

Commerce did not subtract fees for obtaining letters of credit from the B&H costs derived from the "Doing Business 2014: Thailand" report because it concluded that the evidence on the record did not establish that such costs were incorporated into that report. Final Decision Memo at 26. Commerce's decision is unsupported by substantial evidence because it fails to consider evidence which detracts from its determination, and arbitrary and capricious because it fails to address the inconsistency of its conclusion with past practice.[32]

It is Commerce's practice to exclude the cost of obtaining letters of credit from the total B&H cost derived from the World Banks's "Doing Business" series "when record evidence can be linked to the specific report" used. Final Decision Memo at 25–26 (citing *Monosodium Glutamate From the [PRC]: Final Determination of Sales at Less Than Fair Value and the Final Affirmative Determination of Critical Circumstances*, 79 Fed. Reg. 58,326 (Dep't of Commerce Sept. 29, 2014); Monosodium Glutamate from the [PRC]: Issues and Decision Mem. for the Final Determination of Sales at Less Than Fair Value at 9–10, A-570–932, (Sept. 22, 2014), *available at* https://enforcement.trade.gov/frn/summary/prc/2014–23136–1.pdf (last visited May 1, 2019) ("Monosodium Glutamate Memo")). Commerce may depart from a prior practice so long as it provides a reasoned explanation for its change. *See Rust v. Sullivan*, 500 U.S. 173, 187 (1991); *State Farm*, 463 U.S. at 42.

Jiaxing provided correspondence which established that earlier iterations of the World Bank's "Doing Business" series incorporated the costs of acquiring letters of credit and that, at least as of 2011, it was the intention of the World Bank to continue to include the cost of acquiring letters of credit in later publications. *See* Jiaxing's S. V. Comments at Ex. 20, PD 70, bar code 3178063–09 (Jan. 31, 2014). The

[31] *Elkay I* held that because the raw survey data were not available, there was no basis in the record to conclude that the value of certain labor data was inflated. *See Elkay I*, 38 CIT at __, 34 F. Supp 3d at 1382. In *Elkay II*, a motion by the defendant-intervenor for reconsideration of *Elkay I* was denied, inter alia, because the party had failed to provide sufficient evidence to support its contention that the previous decision in respect of labor data was erroneous. *See Elkay II*, 39 CIT at __, Slip Op. 15–33 at 11–14.

[32] Jiaxing claims Commerce's determination of Jiaxing's B&H surrogate value was unsupported by substantial evidence. *See* Pls.' Br. at 3–4, 40–42. However, Jiaxing's argument is, in fact, both that Commerce's determination is unsupported by substantial evidence and that it is arbitrary and capricious. *See id.*

first piece of evidence is an email dated April 10, 2013, which provides the "[t]he cost to obtain the export letter of credit" for "the Philippines 2013," "Indonesia 2013," and "Thailand 2013." *Id.* The second is an email chain from September 2011 which states that the "Doing Business Report – includes the time and cost to obtain a letter of credit." *Id.* The third is a letter dated September 23, 2011, from a representative of the World Bank who confirms that the cost of obtaining a letter of credit is embedded in the World Bank's "Doing Business" reports. *Id.* The letter states that the "World Bank applies the same methodology in each country and from year to year to ensure that the results are reasonably comparable." *Id.* The letter further states that "the World Bank confirms that the cost of a letter of credit has always been and continues to be included in the reported figures for brokerage and handling." *Id.* Jiaxing's evidence also appears to be consistent with the World Bank's contemporaneous description of the methodology for the "Doing Business 2014: Thailand" report, which states that "the time, cost and documents required for the issuance or advising of a letter of credit are taken into account." *See* Attachment to the Record at Ex. A at 1, PD 156, bar code 3798217–01 (2013) ("Trading Across Borders Methodology").

Despite this evidence, Commerce held "there is no information on the record of this administrative review regarding whether the cost of obtaining letters of credit is included in the cost of B&H for Doing Business 2014: Thailand." Final Decision Memo at 25 (emphasis omitted). Commerce concluded that it would not adjust the B&H costs in the "Doing Business 2014: Thailand" report because "the record evidence in this review regarding the letter of credit costs refers to Doing Business 2013 but does not specify whether these costs are also included in Doing Business 2014: Thailand." Final Decision Memo at 26 (emphasis omitted).

Commerce supports its decision through reference to the Monosodium Glutamate Memo, in which Commerce refused to treat the same evidence as submitted in these proceedings (which contains information as to the costs of acquiring letters of credit contained in the "2013 Doing Business: Indonesia" report) as persuasive with respect to the "2014 Doing Business: Indonesia" report. *See* Monosodium Glutamate Memo at 9–10. However, in the Hardwood and Decorative Plywood Memo, Commerce accepted the same evidence as persuasive with respect to the World Bank's "Doing Business 2013: Bulgaria" report. *See Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 Fed. Reg. 58273 (Dep't of Commerce Sept. 23, 2013);

[ADD] Investigation of Hardwood & Decorative Plywood from the [PRC]: Issues & Decision Mem. for the Final Determination at 75–76, A-570–986, (Sept. 16, 2013), *available at* https://enforcement.trade.gov/frn/summary/prc/2013–23088–1.pdf (last visited May 1, 2019) ("Hardwood and Decorative Plywood Memo"). As the record in the Hardwood and Decorative Plywood Memo only contained information about the cost of acquiring letters of credit for Thailand, the Philippines, and Indonesia, these costs were averaged and deducted from the surrogate B&H costs in the World Bank's "Doing Business 2013: Bulgaria" report. *See* Hardwood and Decorative Plywood Memo at 75–76. These two determinations appear inconsistent and Commerce provides no explanation as to why it previously considered the same evidence persuasive as to reports issued for different countries, but not as to reports issued in different years.

Commerce's determination is unsupported by substantial evidence because it failed to consider record evidence that the "Doing Business" series has the "same methodology in each country and from year to year." *See* Jiaxing's S. V. Comments at Ex. 20, PD 70, bar code 3178063–09 (Jan. 31, 2014). Commerce's decision to not deduct for the cost of acquiring letters of credit was also arbitrary and capricious because Commerce failed to explain the apparent inconsistency with past practice. On remand, Commerce must reconsider its determination or explain why its conclusion is nonetheless reasonable in light of the record evidence.

C. Shipping Container Weight

After determining a surrogate B&H cost for each 20-foot shipping container from the "Doing Business 2014: Thailand" report, Commerce calculated a per kilogram B&H cost by assuming that each shipping container contained product weighing 10,000 kilograms. Final Decision Memo at 27–28. Jiaxing argues that Commerce's decision to divide the B&H cost by 10,000 kilograms is unreasonable as the "Doing Business 2014: Thailand" report does not support a conclusion that the typical weight of a 20-foot shipping container is 10,000 kilograms. *See* Pls.' Br. at 42–43. Defendant responds that Commerce's decision is reasonable because the 10,000 kilogram figure is consistent with the survey data underlying the "Doing Business 2014: Thailand" report. *See* Def.'s Br. at 30. For the reasons that follow, Commerce's decision is unsupported by substantial evidence.

Commerce generated a surrogate B&H cost for each shipping container of STR shipped by Jiaxing to the United States of $385 by combining the costs for document preparation ($175), customs clear-

ance and technical control ($50), and ports and terminal handling ($160) described as associated with exporting a 20-foot shipping container in the "Doing Business 2014: Thailand" report. *See* Commerce's Prelim. S. V. Memo at Ex. 12, Ex. 15 at 78; *see also* Final Decision Memo at 27–28. Commerce then derived a surrogate average per kilogram B&H cost by dividing $385 by 10,000 kilograms. *See* Commerce's Prelim. S. V. Memo at Ex. 11, Ex. 15 at 78. Similarly, a "[c]ost per kilogram per kilometer" rate was derived for the cost of truck freight using the same 10,000 kilogram figure for each 20-foot shipping container. *Id.* at Ex. 11. Commerce stated that this 10,000 kilograms figure was selected because it was "the standard cargo weight of a 20-ft standard container" used in the "Doing Business 2014: Thailand" report. *See id.* at Exs. 11–12; *see generally* Final Decision Memo at 27–28.

The World Bank's contemporaneous description of the methodology for the "Doing Business 2014: Thailand" report states that the report makes certain assumptions about the businesses and traded goods described in the reports to ensure comparability across different economies. *See* Trading Across Borders Methodology at Ex. A at 1. These assumptions include that the product travels in a dry-cargo, 20-foot, full container load, that weighs 10,000 kilograms, and that it is valued at $20,000. *See id.* However, the report provides B&H costs on a "per container" basis. *See* Commerce's Prelim. S. V. Memo at Ex. 15 at 75. The report does not expressly state that B&H costs are dependent on a specific weight of a 20-foot container of goods. *See id.* at 72–79.

Commerce stated that it was necessary to assume each shipping container weighs 10,000 kilograms when calculating Jiaxing's B&H costs per kilogram of STR because the survey data underlying the "Doing Business 2014: Thailand" report contained an assumption that a 20-foot container weighed 10,000 kilograms. Final Decision Memo at 27. Commerce concluded, then, that to change the weight from 10,000 kilograms would affect the relationship between costs and quantity in the survey data used to prepare the "Doing Business 2014: Thailand" report. *Id.* at 27–28. However, Jiaxing claims that evidence on the record shows that B&H costs are only affected by "whether the container was full or partial." Pls.' Br. at 43.[33] In the

[33] Specifically, Jiaxing relies on several rate schedules from international freight forwarder Hapag-Lloyd describing the B&H costs of 20-foot and 40-foot containers from Thailand, the Philippines, and Ukraine. *See* Jiaxing's Final S. V. Submission at Ex. 16, PD 95, bar code 3195965–04 (Apr. 16, 2014) (providing estimated freight charges from Thailand to the USA for 20-foot and 40-foot shipping containers dated June 24, 2010); Jiaxing's S. V. Comments at Ex. 34, PD 76, bar code 3178063–15 (Jan. 31, 2014) (providing estimated freight charges from the Philippines to the USA for a standard 20-foot shipping container dated December 2, 2011); Jiaxing's S. V. Comments at Ex. 22, PD 69, bar code 3178063–10 (Jan. 31, 2014)

Final Decision Memo, Commerce did not consider this evidence. Jiaxing's evidence that B&H costs, such as the cost of document preparation, customs clearance and technical control, and ports and terminal handling, are not affected by the weight of a particular shipping container require at least some consideration. Commerce's conclusion is unsupported by substantial evidence, as it fails to address Jiaxing's evidence that weight is unrelated to B&H costs. As such, Commerce's decision is remanded for further explanation or reconsideration.

CONCLUSION

For the reasons set forth above, the *Final Results* are sustained in part and remanded in part. Accordingly, it is

ORDERED that Commerce's selection of Thailand as the primary surrogate country is sustained; and it is further

ORDERED that Commerce's surrogate valuation of Plaintiffs' steel wire rod factor of production is sustained; and it is further

ORDERED that Commerce's calculation of Plaintiffs' surrogate financial ratios as related to labor is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce's use of the "Doing Business 2014: Thailand" report for the valuation of Plaintiffs' brokerage and handling costs is sustained; and it is further

ORDERED that Commerce's determination not to adjust Plaintiffs' surrogate brokerage and handling costs to take into account the cost of acquiring letters of credit is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce's use, in calculating Plaintiffs' brokerage and handling costs, of an assumed weight of 10,000 kilograms for a 20-foot shipping container is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

(providing estimated freight charges from various Baltic seaports for a "Factory Stuffed" 40-foot shipping container dated March 1, 2013). Jiaxing notes these rate schedules indicate "costs are set per container, percentage or bill of lading." Pls.' Br. at 43. Jiaxing also observes that a comparison between the charges associated with 20-foot and 40-foot containers in the Hapag-Lloyd rates for Thailand indicates that document charges, bill of lading and carriage fees remain the same, while handling and freight charges increase. *See* Pls.' Br. at 43.

Jiaxing also relies on a declaration by the Vice President of Far East American (a company specializing in the importation and distribution of plywood and related wood products from certain countries in Asia) dated June 13, 2013. *See* Jiaxing's S. V. Comments at Ex. 31, PD 73, bar code 3178063–14 (Jan. 31, 2014). The declarant states that in his professional experience he has found "on a global basis brokerage fees are not established with any regard for the actual kilograms or cubic meters actually loaded per container." *Id.* ¶ 3. The declarant then goes on to account how he sought to confirm this point through "field research" in the Philippines between May 12, 2013, and May 18, 2013. *See id.* ¶¶ 4–10. The declaration makes reference to the "Doing Business: Philippines 2013" report several times. *See id.* ¶¶ 5–6.

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

ORDERED that the parties shall have 30 days thereafter to file their replies to comments on the remand redetermination.

Dated: May 9, 2019
New York, New York

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