U.S. Court of International Trade

Slip Op. 18–97

ARISTOCRAFT OF AMERICA, LLC, SHANGHAI WELLS HANGER CO., LTD, HONG KONG WELLS LTD., HONG KONG WELLS LTD. (USA), BEST FOR LESS DRY CLEANERS SUPPLY LLC, IDEAL CHEMICAL CLEANERS SUPPLY INC., ROCKY MOUNTAIN HANGER MFG CO., ROSENBERG SUPPLY CO., LTD., and ZTN MANAGEMENT COMPANY, LLC, Plaintiffs, v. UNITED STATES, Defendant.

PUBLIC
Before: Leo M. Gordon, Judge
Consol. Court No. 15–00307

[Remand results remanded to Commerce.]

Dated: August 9, 2018

Jonathan M. Freed, *Robert G. Gosselink*, and *Jarrod M. Goldfeder*, Trade Pacific PLLC of Washington, DC for Consolidated Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), Best For Less Dry Cleaners Supply LLC, Ideal Chemical & Supply Company, Laundry & Cleaners Supply Inc., Rocky Mountain Hanger MFG Co., Rosenberg Supply Co., Ltd., and ZTN Management Company, LLC.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Jessica DiPietro*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

OPINION AND ORDER

Gordon, Judge:

Before the court are the Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*"), ECF No. 65–1, filed by the U.S. Department of Commerce ("Commerce") pursuant to *Aristocraft of America, LLC v. United States*, 42 CIT ___, 269 F. Supp. 3d 1316 (2017) ("*Aristocraft*").[1] Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), Best For Less Dry Cleaners Supply LLC, Ideal Chemical & Supply Company, Laundry & Cleaners Supply Inc., Rocky Mountain Hanger Mfg Co., Rosenberg Supply Co., Ltd., and ZTN Management Company, LLC (collectively, "Plaintiffs") challenge (1) Commerce's calculation of irrecoverable value-added tax ("VAT") based on the application of the

[1] All citations to the remand results, the agency record, and the parties' briefs are to their confidential versions unless otherwise noted.

standard VAT levy to the FOB export value of finished wire hangers and (2) Commerce's determination to continue using certain Thai companies' surrogate financial statements to calculate surrogate financial ratios. *See* Pls.' Cmts. on Final Results of Redetermination Pursuant to Court Remand, ECF No. 71 ("Pls.' Cmts."); *see also* Def.'s Response to Pls.' Cmts. on Commerce's Remand Results, ECF No. 76 ("Def.'s Resp."). Familiarity with prior administrative and judicial decisions in this action is presumed. 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) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

For the reasons set forth below, the court remands Commerce's treatment of irrecoverable VAT and surrogate company financial statement selection.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2018). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was rea-

[2] 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.

sonable given the circumstances presented by the whole record." 8A West's Fed. Forms, National Courts § 3.6 (5th ed. 2018).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the Tariff Act. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."); *see generally* Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* 273–280 (3d ed. 2018).

II. Discussion

A. Value Added Tax

Plaintiffs contend that Commerce continues to err in its calculation of the amount of irrecoverable VAT to deduct from Shanghai Wells' export price ("EP") and constructed export price ("CEP"). The court previously held that "Commerce reasonably concluded that the phrase 'export tax, duty, or other charge imposed by the exporting country on the exportation,' [in] 19 U.S.C. § 1677a(c)(2)(B)[,] could be read to include [irrecoverable VAT]." *Aristocraft*, 42 CIT at ___, 269 F. Supp. 3d at 1325. The court also held, however, that Commerce's calculation of the deduction for irrecoverable VAT was unreasonable (unsupported by substantial evidence) and remanded this issue to Commerce for further explanation, and if appropriate, reconsideration. *Id.*, 42 CIT at ___, 269 F. Supp. 3d at 1326. Specifically, the court determined that Commerce's calculation of the amount of irrecoverable VAT, based on the FOB export value of the finished goods, appeared inconsistent with Commerce's definition of irrecoverable VAT as an unrefunded amount of VAT "paid on inputs and raw materials (used in the production of exports)." *See id.*, 42 CIT at ___, 269 F. Supp. 3d at 1326. On remand, Commerce provided further explanation in support of its calculation of an irrecoverable VAT deduction, in the amount of eight percent, from Shanghai Wells' EP and CEP. *See Remand Results* at 3–4.

Commerce's *Remand Results* arrive at the same irrecoverable VAT deduction Commerce made in the final determination. Commerce has added an additional explanation of how Chinese law both supports Commerce's definition of irrecoverable VAT and resolves the apparent inconsistencies between the definition, and calculation, of the amount of irrecoverable VAT. *See id.* at 8–11, 23–25. In addition, Commerce relies upon Shanghai Wells' questionnaire responses to justify its findings for Shanghai Wells' irrecoverable VAT deduction. *See id.* at 11–12, 25–28. Despite Commerce's additional explanation and clari-

fication of its reasoning, Plaintiffs maintain that Commerce's irrecoverable VAT determination remains unreasonable (unsupported by substantial evidence). *See* Pls.' Cmts. at 6–13.

In *Aristocraft* the court could not reconcile (1) Commerce's definition of irrecoverable VAT (an amount of unrefunded tax charged on "inputs and raw materials"), with (2) Commerce's calculation of irrecoverable VAT based on the FOB export value of finished merchandise. *See Aristocraft*, 42 CIT at ___, 269 F. Supp. 3d at 1326. Commerce alluded generally to Chinese law as the source of any inconsistency between (1) the definition and (2) its calculation. *See* Issues & Decision Memorandum for Steel Wire Garment Hangers from the PRC, A–570–918 (Dep't of Commerce Mar. 6, 2015) at cmt. 3, *available at* http://enforcement.trade.gov/frn/2015/1511frn/2015–28757.txt (last visited this date) ("*Decision Memorandum*"). Commerce though did not cite to relevant provisions of Chinese law or otherwise reasonably explain how its (1) definition and (2) calculation of irrecoverable VAT were consistent with one another. *Id.* Accordingly, the court remanded the issue to Commerce to address how "VAT paid on inputs and raw materials (used in the production of exports) that is non-refundable" could reasonably be calculated using the value of finished goods rather than the value of the inputs and raw materials. *See Aristocraft*, 42 CIT at ___, 269 F. Supp. 3d at 1326.

In the *Remand Results* Commerce addresses the court's questions about the apparent inconsistencies between the definition and calculation of irrecoverable VAT by explaining the Chinese law underlying Commerce's irrecoverable VAT policy. *See Remand Results* at 7–10, 23–25 (*citing* Shanghai Wells' June 1, 2015 Supplemental Questionnaire Response, PD 134[3], at Ex. 12, "Circular on Value-Added Tax and Consumption Tax Policies on Exported Goods and Services, Cai Shui 2012 No. 39, May 25, 2012" ("2012 VAT Circular")). Specifically, Commerce relies upon the 2012 VAT Circular that describes the operation of Chinese VAT law. *See Remand Results* at 6–10, 22–26 (*citing* 2012 VAT Circular). The 2012 VAT Circular provides several formulae detailing how Chinese VAT is calculated for exported goods. *See* 2012 VAT Circular. Two of these formulae provide the basis for Commerce's (1) definition and (2) calculation of irrecoverable VAT.

First, Commerce explains that Article 5.1 of the 2012 VAT Circular provides:

[3] "PD ___" refers to a document contained in the public administrative record available at ECF No. 17–4. "CD ___" refers to a document contained in the confidential administrative record available at ECF No. 17–5.

> Tax payable for the current period = output tax for the current period - (input tax for the current period - taxes prohibited from exemption and offset for the current period).

Remand Results at 24 (*quoting* the 2012 VAT Circular at art. 5.1(1) (the "Tax Payable Formula")). In the *Remand Results* Commerce clarifies that the term "irrecoverable VAT" was intended to describe the "taxes prohibited from exemption and offset" amount provided in the above formula. *See Remand Results* at 25.

Second, Article 5.1 of the 2012 VAT Circular provides an additional formula that explains how "taxes prohibited from exemption and offset" is calculated:

> Taxes prohibited from exemption and offset for the current period = FOB of exported goods for the current period × RMB conversion rate of foreign currency × (tax rate applicable to exported goods - tax refund rate for exported goods) -deductions of taxes prohibited from exemption and offset for the current period.[4]

See id. at 24 (*citing* 2012 VAT Circular at art. 5.1(1) (the "Taxes Prohibited from Exemption Formula")). The use of "taxes prohibited from exemption and offset" in these two formulae sheds light on the source of the apparent inconsistency between Commerce's definition and calculation of irrecoverable VAT. Commerce explains that its definition of irrecoverable VAT (an unrefunded amount of VAT "paid on inputs and raw materials") is derived from the Tax Payable Formula in which "taxes prohibited from exemption and offset" (aka "irrecoverable VAT") are deducted from "input tax." *See Remand Results* at 24–25; Tax Payable Formula. Commerce then notes that its calculation of irrecoverable VAT, calculated as "FOB of exported goods for the current period x (tax rate applicable to exported goods - tax refund rate for exported goods)," mirrors the calculation of "taxes prohibited from exemption and offset" in the Taxes Prohibited from Exemption Formula. *See Remand Results* at 25; Taxes Prohibited from Exemption Formula. Accordingly, Commerce's definition of irrecoverable VAT describes how "taxes prohibited from exemption and

[4] The 2012 VAT Circular also provides a formula for calculating "deductions of taxes prohibited from exemption and offset" as: Deductions of taxes prohibited from exemption and offset for the current period = price of duty-free raw materials purchased for the current period × (tax rate applicable to exported goods - tax refund rate for exported goods). 2012 VAT Circular at art. 5.1(1). However, because Plaintiffs have not claimed any use of "duty-free raw materials" in the production of their exported goods, this deduction is irrelevant and is omitted from Commerce's recitation of the formula. *See Remand Results* at 24. Accordingly, for purposes of calculation in this case, Taxes prohibited from exemption and offset for the current period = FOB of exported goods for the current period × RMB conversion rate of foreign currency × (tax rate applicable to exported goods - tax refund rate for exported goods).

offset" is used in the Tax Payable Formula; however, this figure has no direct connection to the amount of input VAT actually assessed on Chinese exported goods. Instead, Commerce appears to say that irrecoverable VAT, or "taxes prohibited from exemption and offset," stands for a numerical value calculated using the VAT tax and refund rates assessed against the value of finished export goods. *See Remand Results* at 8–10, 24–25; Tax Payable Formula; Taxes Prohibited from Exemption Formula.

Beyond the 2012 VAT Circular, Commerce relies upon accounting documents submitted by Shanghai Wells that appear to corroborate the reasonableness of an eight percent adjustment for irrecoverable VAT to Shanghai Wells' EP and CEP. *See Remand Results* at 10–12, 27–28. Specifically, Commerce cites to Shanghai Wells' accounting data for June 2014 under account code X.[5] *See id.* at 27 (*citing* Shanghai Wells' June 1, 2015 Supplemental Questionnaire Response, PD 134, at Ex. 14). Account code X booked an amount approximating eight percent of Shanghai Wells' export sales for June 2014. *Id.* Accordingly, Commerce found that account code X identifies an amount of irrecoverable VAT for June 2014, and the fact that the amount in account code X approximates eight percent of export sales value corroborated the reasonableness of Commerce's calculation of eight percent as the amount of irrecoverable VAT to deduct from Shanghai Wells' EP and CEP. *Id.*

Plaintiffs challenge Commerce's reading of Shanghai Wells' June 1, 2015 Supplemental Questionnaire Response as unreasonable given conflicting evidence in the record as to the correct meaning and translation of account code X. *See* Pls.' Cmts. at 10–11. Plaintiffs suggest that the record contains alternative meanings and translations for account code X. *See id.* (discussing alternate translations for the account code X and suggesting that the labeling of account code X as connected to irrecoverable VAT resulted from a singular "misunderstanding of the question").

As Commerce explained, "[t]he record demonstrates that Shanghai Wells booked to accounting code [X] an amount of approximately eight percent of its export prices and consistently translated the account name in a manner indicating an irrecoverable amount. Commerce did not selectively choose the translation that suited a desired outcome but, rather, considered the record as a whole in deducing the meaning of Shanghai Wells' inconsistent submissions." *Remand Results* at 28. Commerce further explained that this accounting code,

[5] Account code X is [[ ]] identified in Shanghai Wells' questionnaire response as [[ ]].

while assigned slightly different nomenclature in Shanghai Wells' other questionnaire responses[6], appears to "describe an irrecoverable tax." *Id.* at 28. Plaintiffs simply fail to demonstrate that Commerce's interpretation of account code X is unreasonable and that the administrative record leads to one, and only one, reasonable interpretation of its meaning and translation. The court sustains as reasonable Commerce's finding that account code X books Shanghai Wells' irrecoverable VAT.

Although not persuaded by Plaintiffs' challenge to Commerce's interpretation of Shanghai Wells' questionnaire responses, the court nevertheless has some remaining doubts about the overall reasonableness of Commerce's calculation of irrecoverable VAT. Commerce's analysis of Chinese law certainly helps clarify the relationship between the calculation of irrecoverable VAT and its use within the Chinese VAT system. *Remand Results* at 7–9, 24–26. There is, however, an inherent and lingering issue that Commerce itself acknowledges when it notes that the 2012 VAT Circular "indicate[s] a link between the input VAT paid and tax paid or refunded." *Id.* at 9. Although Commerce urges the court not to read this language from the 2012 VAT Circular "in a way that confuses how the exporter incurs the cost on a transaction level for specific exports," Commerce reiterates that the complex rules of the Chinese VAT system confirm a "link" between input VAT paid and tax paid or refunded on the aggregate level. *Id.*

Commerce downplays the relevance of this "link" by explaining that Commerce adjusts for irrecoverable VAT at the transaction-specific level rather than on an aggregate level. *Id.* at 8–9. Commerce further notes that Plaintiffs' alternative methodology for adjusting for irrecoverable VAT, i.e. accounting for input VAT actually paid in the adjustments to EP and CEP, introduces significant distortions to the calculations given that the input VAT figures may include offsets from periods outside of the period of review as well as distortions due to the time lag between the payment of input VAT at production and the subsequent exportation of finished merchandise. *Id.* at 9.

To summarize, Commerce clarified that "irrecoverable VAT" refers to "Taxes prohibited from exemption and offset," i.e., an amount of unrefunded tax charged on "*inputs* and raw materials." *Id.* at 7–10, 24–25 (emphasis added). Commerce further acknowledged that this deduction for "irrecoverable VAT" is in some way linked to the amount of *input* VAT that Shanghai Wells actually pays, but discounts the

[6] Examples of this slightly different nomenclature include "[[ ]]", "[[ ]]", and "Total Un-exempted Tax".

significance of this link. *See id.* at 9. The court is unfortunately still confused and cannot understand how a reasonable mind would conclude that the amount of input tax actually deducted from Shanghai Wells' VAT liability is "not relevant" to the adjustment of Shanghai Wells' EP and CEP. *See id.* at 6. Perhaps the phrase "not relevant" is causing the problem. Did Commerce instead mean "not calculable"? Is the "link" between Plaintiffs' input VAT and tax paid or refunded generally not calculable (or knowable) because of the complexity of the Chinese VAT system (meaning it is just not possible)? Or, is it at least theoretically possible to calculate (and account for) the "link" but not in this particular case because Plaintiffs have failed to proffer enough information and explanation against a dense and complicated Chinese VAT system to enable Commerce to make the (transaction-specific) adjustment to Plaintiffs' EP and CEP? Or is something else going on? The court therefore must remand this issue again for Commerce to further explain, and reconsider, if appropriate, how its deduction of "taxes prohibited from exemption and offset" accounts for an amount of "input VAT not fully recouped on export sales" that Shanghai Wells includes in its price for export sales of finished wire hangers.

B. Surrogate Company Financial Statement Selection

In this, the sixth administrative review, Commerce selected financial statements for calculating surrogate financial ratios from three Thai companies: LS Industries Co. ("LS Industry"), Sahasilp Rivet Industrial Co. Ltd. ("Sahasilp"), and Thai Mongkol Fasteners Co., Ltd. ("Mongkol"). *See Decision Memorandum* at 7–10. In *Aristocraft* the court remanded Commerce's selection of surrogate financial statements for Commerce "to address reasonably the importance of drawing wire from wire rod as a surrogate company selection criterion." *Aristocraft*, 42 CIT at ___, 269 F. Supp. 3d at 1335. On remand, Commerce acknowledged that it prefers "financial statements from companies that draw wire from wire rod to produce identical or comparable merchandise in order to calculate the surrogate financial ratios of an integrated producer such as Shanghai Wells." *Remand Results* at 14. Given that selection criterion, the question for Commerce was whether all three companies or just one, LS Industry, constituted the best available information to use as surrogate companies.

Commerce noted that it "did not directly address record evidence purporting to demonstrate that LS Industry drew wire from wire rod, which resulted in an incomplete analysis of the record information." *Remand Results* at 17. That evidence is "six photos of extremely poor

quality" that appeared on the website of LS Industry. *Remand Results* at 19. Plaintiffs argue that the photos contain images that "obviously resemble" wire rod coils and wire drawing machinery. *See* Pls.' Cmts. at 17. The photos, though, have no captions. *See Remand Results* at 31. Commerce, noting its knowledge of "material and machinery involved in the production of subject merchandise," concluded that the "type of machine is not discernable." *Id.* at 19. Commerce also noted that "Shanghai Wells reported that it used a straightening machine to straighten steel wire before it is fed through the hanger forming machine and there is nothing on the record to support the claim that the machine pictured is not, in fact, a straightening machine rather than a wire drawing machine, or any other type of machine." *Id.* Commerce also concluded that it could not "determine whether the material pictured is wire rod or, instead, any number of other products, e.g. steel bar, reinforcing bar, steel strip, or bundles of any other type of coiled materials." *Id.* at 20. As a result, Commerce determined "that the financial statements of LS Industry, Sahasilp, and Thai Mongkol, all represent equally suitable financial statements ... [and a]bsent definitive evidence to the contrary, all three statements represent the best available information on the record of this review for calculating surrogate financial ratios." *Id.*

Plaintiffs challenge as unreasonable Commerce's conclusion that the three companies "equally satisfy its selection criteria." *Id.* at 14. Plaintiffs, however, do not make the straightforward argument that Commerce's determination is unreasonable because a reasonable mind would have to conclude that the photographs only depict wire rod and wire drawing machinery. *Id.* at 16–19. Rather, Plaintiffs dismiss Commerce's suggestion that the photographs may depict wire straightening machinery and coiled material other than wire rod as speculation, and argue that Commerce must instead accept Plaintiffs' proffered view that the photographs likely depict wire rod and wire drawing machinery. *Id.* According to Plaintiffs, Commerce must accept Plaintiffs' speculative inference about the photographs—that they depict wire drawing machine and wire rod in coils—and reject an alternative, but equally speculative inference—that LS Industry maintains wire straightening machinery and coiled material other than wire rod. The court has no idea which of the two inferences is correct. Both seem plausible. What the court cannot do is direct Commerce to favor Plaintiffs' preferred evidentiary inference over another reasonable inference. *See Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("'[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by

substantial evidence.'" (*quoting Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 229 (1938))). This issue ultimately boils down to a problem of proof for Plaintiffs. Plaintiffs could have done much more to remove doubts about the photographs (and undermine any competing inferences). Better quality photos and better authentication would have helped, as would have affidavits from its own operators and fabricators explaining what the photographs depicted. It bears repeating that the burden to develop the administrative record rests on interested parties like Plaintiffs. *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("'[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.'" (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States,* 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)). Without the additional evidentiary proffer, Plaintiffs simply ask too much of the court to wade into fact finding on a sparse record.

Plaintiffs additionally argue that Commerce unreasonably discounted "other deficiencies" in the financial statements of Mongkol and Sahasilp. *See* Pls.' Cmts. at 19–21. Plaintiffs note that Sahasilp's "company profile" does not list wire rod drawing among its "Key Manufacturing Process." *Id.* at 19. Similarly, Plaintiffs observe that Mongkol's website lists various types of machinery but fails to specifically include wire rod drawing machinery. *Id.* Plaintiffs contend that this absence of evidence indicates that Sahasilp and Mongkol do not even arguably draw wire from wire rod and are accordingly not "equally suitable" as surrogate producers of comparable merchandise. *Id.* The court is not persuaded. Here again Plaintiffs have a problem of proof. Missing is an important evidentiary foundation that companies that draw wire from wire rod would always advertise that fact on their website or list it as a key manufacturing process. Without that foundation on the administrative record, Commerce was able to reasonably conclude that the lack of mention of wire drawing or wire drawing machinery on Mongkol's or Sahasilp's website or online company profile did not provide a sufficient basis to determine whether either company drew wire from wire rod. Accordingly, Commerce found "that no information on the record demonstrates that any of the potential surrogate financial companies draw wire from wire rod." *Remand Results* at 33.

The court here cannot muscle aside Commerce and order it to use LS Industry's financial statement alone. Plaintiffs simply failed to establish on the administrative record that LS Industry, and LS Industry alone, was the best available information to use as a surrogate company. Commerce reasonably concluded that "LS Industry's

financial statements are not superior to Sahasilp's or Mongkol's" and that "all three financial statements are equally suitable for valuing Shanghai Wells' financial ratios." *Remand Results* at 32–33. Accordingly, the court sustains Commerce's use of all three surrogate companies' financial statements.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Commerce's selection of surrogate companies is sustained; it is further

ORDERED that the *Remand Results* are remanded to Commerce to further explain, and reconsider, if appropriate, how its deduction of "taxes prohibited from exemption and offset" accounts for an amount of "input VAT not fully recouped on export sales" that Shanghai Wells includes in its price for export sales of finished wire hangers; it is further

ORDERED the Commerce shall file its remand results on or before September 26, 2018; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files it remand results with the court.

Dated: August 9, 2018
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 18–98

SEAH STEEL VINA CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and MAVERICK TUBE CORPORATION, UNITED STATES STEEL CORPORATION, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., and WELDED TUBE USA INC., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Consolidated Court No. 14–00224

[The court sustains the determinations of the U.S. Department of Commerce.]

Dated: August 13, 2018

Jeffrey M. Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., for plaintiff.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Direc-

tor, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Catherine D. Miller*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Jeffrey D. Gerrish and *Luke A. Meisner*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, D.C., for defendant-intervenor United States Steel Corporation.

Alan H. Price, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor Maverick Tube Corporation.

Roger B. Schagrin, Schagrin Associates, of Washington D.C., for defendant-intervenors Boomerang Tube LLC, Energex Tube (a Division of JMC Steel Group), Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

OPINION AND ORDER

Goldberg, Senior Judge:

This appeal arrives after the court's second remand to the U.S. Department of Commerce ("Commerce" or "the Department") from challenges by SeAH Steel VINA Corporation ("SSV") to the Department's antidumping duty determination for oil country tubular goods ("OCTG") from the Social Republic of Vietnam ("Vietnam"). *See Certain Oil Country Tubular Goods from the Social Republic of Vietnam*, 79 Fed. Reg. 41,973 (Dep't Commerce July 18, 2014) (final determ.) and accompanying Issues & Decision Mem., as amended by *Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 53,691 (Dep't Commerce Sept. 10, 2014) (amended final determ.). Previously, the court had remanded this case twice to Commerce. *SeAH Steel VINA Corp. v. United States*, 40 CIT __, 182 F. Supp. 3d 1316 (2016) ("*SeAH I*"); *SeAH Steel VINA Corp. v. United States*, 41 CIT __, 269 F. Supp. 3d 1335 (2017) ("*SeAH II*"). In its most recent Remand Redetermination, Commerce addressed certain topics as directed by the court's remand order. *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 179 (Feb. 8, 2018) ("Remand Redetermination"). The court now reviews those findings, sustaining Commerce's determinations on all issues.

BACKGROUND

The court assumes familiarity with the facts and law as discussed in its prior opinions, *see SeAH I*, 182 F. Supp. 3d at 1316; *SeAH II*, 269 F. Supp. 3d at 1335, and summarily recounts only the pertinent details of the instant appeal below.

Commerce issued its Remand Redetermination on February 8, 2018, addressing three issues: 1) the surrogate value ("SV") for hot-rolled coil J55-H, Remand Redetermination at 2–7, 20–21; 2) the valuation of domestic inland insurance, *id.* at 7–11, 23–27; and 3) the allocation of domestic brokerage and handling ("B&H") costs, *id.* at 11–18, 29–35. Regarding the SV for hot-rolled coil, the Department

determined that it was more appropriate to value the J55-H using "the average of SSV's [market economy ("ME")] purchase prices of J55-H in the year prior to the [period of investigation ("POI")], and adjusted to the POI using an inflator." *Id.* at 21. In so doing, Commerce rejected data from the harmonized tariff schedule ("HTSUS") 7208.37.00 because it was, as a "basket category," overly broad in that it could capture "all non-alloy steel with width greater than 600 millimeters, rather than just J55-H." *Id.* at 6. Next, Commerce supplemented the record with a more legible version of a document, the Agro Dutch data worksheet, and continues to use this document to calculate a SV for inland insurance. *Id.* at 23–24. While the Department did omit the values for marine insurance, Commerce continues to interpret and apply the Agro Dutch values over SSV's objections. *Id.* at 23–27. Last, Commerce continues to value domestic B&H costs using data from a report titled *Doing Business India: 2014* ("Doing Business Report"). *Id.* at 35.

JURISDICTION AND STANDARD OF REVIEW

This dispute arises under 28 U.S.C. § 1581(c) and, thus, the court will sustain Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Doing so requires that the court assess the Department's reasoning under the arbitrary and capricious standard and review its factual findings for substantial evidence. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012).

DISCUSSION

In this most recent challenge, SSV presents several arguments, all couched within an overarching accusation of bad faith by the Department. The court addresses the bad faith argument and then each of the subsequent challenges to individual findings below.

I. Bad Faith

SSV relies primarily on two cases to suggest that the court ought to infer bad faith based on an allegation of malicious prosecution by Commerce and its arbitrary, results-based findings. *See* Pl.'s Comments on Commerce's Redeterminations 3 n.3, ECF No. 183 (Mar. 12, 2018) ("Pl.'s Comments") (citing *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1311 (Fed. Cir. 2013); *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 116 (2d Cir. 2000)). But, as the Federal Circuit has made clear, "[s]ubjective bad faith is difficult to prove directly, essentially requiring the discovery of a smoking gun," *Kilopass*, 738 F.3d at 1311, circumstances not met—nor hardly even identified—here. In-

stead, SSV attempts to indirectly demonstrate Commerce's predisposition by pointing to a laundry list of "rationalizations that make no sense," Pl.'s Comments at 6, which SSV asserts make "an inference [of bad faith] abundantly warranted," *id.* at 3. Yet, put simply, a party's mere disagreement with Commerce's findings—however adamant and genuinely held it may be—in no way establishes bad faith.

What's more, when such an accusation of bad faith is lodged against the government, the burden of proof is even higher. In order to demonstrate that Commerce has acted in bad faith, SSV must present clear and convincing evidence to overcome the ordinary presumption that the government has acted in good faith. *See SKF USA Inc. v. United States*, 29 CIT 969, 971, 391 F. Supp. 2d 1327, 1329 (2005). Suffice it to say, SSV has not met this heightened burden and its argument of bad faith is unsupported by the entirety of the circumstances found in the record.

II. *SeAH II* Remand Redetermination

The court remanded to Commerce to either further explain or modify its findings with respect to three different areas: 1) the Department's decision to discard SSV's purchases of J55H as a SV for J55-H, 2) the calculation of inland insurance by use of the Agro Dutch data, and 3) the allocation of B&H costs. *SeAH II*, 269 F. Supp. 3d at 1365.

A. Purchases of J55-H Coil

In its remand order, the court expressed a concern that Commerce had failed to adequately explain its valuation of J55-H hot-rolled coil. Specifically, the court could not discern why "Commerce decided to optimize accuracy by using [SVs] specific to the three variations of J55 HRC" and "discarded the more specific [SV]—SSV's actual ME purchases—because the sales occurred about six months before the POI." *Id.* at 1344. At that time, the court lacked the tools to "yet say that Commerce's decision was reasonable." *Id.* Thus, the court directed Commerce "to either provide a more exhaustive explanation of its preference or, alternatively, to change its preference." *Id.*

In its Remand Redetermination, Commerce recalculated the surrogate value for J55-H, selecting data from ME purchase data over the non-specific HTSUS 7208.37.00 information. Remand Redetermination at 4–7, 20–21. Commerce did concede that "in weighing contemporaneity versus specificity, [it] did not [previously] attach sufficient weight to the specificity of the SVs in [its] analysis in the First Remand Redetermination." *Id.* at 5. Ultimately, Commerce concluded that "the ME purchase data that is more specific and would require an inflation adjustment of only six months is the superior data source

when compared with a less specific (*i.e.*, basket category) and three months more contemporaneous data source." *Id.* at 21. Therefore, the Department discarded the HTSUS 7208.37.00 information because that "is a 'basket category' that may contain all non-alloy steel with width greater than 600 millimeters, rather than just J55-H and, thus, is not specific to the input." *Id.* at 6–7.

SSV challenges Commerce's findings in this area, advocating that Commerce ought to have pursued an alternative in valuing J55-H: SSV's actual ME purchases of the subject merchandise. Arguing that since the "simultaneous purchases of J55 and J55H coil [in September 2012] demonstrated that the prices were the same," SSV asserts that "appl[ying] [] this historical price ratio requires the conclusion that the prices for J55 and J55H coils would also be the same during the investigation period." Pl.'s Comments at 9. In response, the Government argues that SSV's proposed alternative of using a single transaction would be less specific. Rather, the Government contends that there is "no record evidence of market economy purchases of J55-H hot-rolled coil during the [POI]" and Commerce resultantly "considered several imperfect options for selecting a [SV]." Def.'s Resp. to Comments Regarding the Remand Redetermination 10, ECF No. 188 (Apr. 11, 2018) ("Def.'s Comments"). At the end of the day, the Government maintains that Commerce decided "that SSV's purchases of J55-H hot-rolled coil shortly before the [POI] were the best information available to determine the [SV] of J55-H hot-rolled coil because they were the most specific record evidence, predated the [POI] by less than one year, and could be made contemporaneous with an inflator." *Id.*

Commerce was faced with choosing between two imperfect alternatives: it could either select the HTSUS 7208.37.00 "basket category," which may be less specific in that it may contain more than just J55-H, or it could examine ME purchase prices specific to the subject merchandise, which pre-date POI (albeit by less than one year). It chose the latter, applying an inflation adjustment in an effort to remedy the infirmities of that data.

As this court has stated—and the court here referred to in *SeAH II*, 269 F. Supp. 3d at 1344—when "Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable." *CS Wind Vietnam Co. v. United States*, Slip Op. 14–128, 2014 WL 5510084, at *3 (CIT Nov. 3, 2014) (quoting *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1273, 641 F. Supp. 2d 1362, 1377 (2009)). But, when doing so, the court requires

that Commerce supply a "well-reasoned decision, sufficiently explaining" the agency action from which the court can derive "the analytical path [Commerce] undertook to arrive at its conclusions." *See Inner Mongolia Jianlong Biochemical Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1332, 1337 (2017). Having now provided a detailed explanation of its practices and reasoning in this space, Commerce has adequately explained its ultimate decision to prioritize specificity over contemporaneity.

Whereas before Commerce had provided "scant explanation," *see SeAH II*, 269 F. Supp. 3d at 1344, the Department has now given a more detailed explanation of its practice. In comparing the strengths and weaknesses of the data (including ways in which the flaws could be mitigated), Commerce has assessed the quality of the data more fully. Commerce's preference of specificity in this instance is reasonable because specificity is one of the primary considerations in determining the "best available information." If a set of data is not sufficiently specific, it is of substantially lesser import whether that data satisfies the other criteria, such as contemporaneity, because a lack of specificity—from including products dissimilar to the subject merchandise—substantially increases the risk of distortive effects in the data. As a result, the Department's preference is neither arbitrary nor capricious.

SSV offers a third surrogate for consideration: SSV's market economy purchases of "regular" J55 hot-rolled coil. In support, SSV cites a single September 2012 transaction in which it purchased J55 and J55-H hot-rolled coil at the same price. This proffered alternative does not adequately address the specificity problem because its accuracy is based on a single transaction, the applicability of which cannot be ascertained from the information on the record. The fact that J55 and J55-H hot-rolled coil were bought at the same price in a single transaction outside of the POR is not probative of whether the two products could always be bought at the same price. Commerce may not elevate its desire to have contemporaneous data over the necessity for accuracy, as contemporaneity is but one factor to be considered in deciding on a surrogate value. *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1691, 462 F. Supp. 2d 1262, 1281 (2006). What's more, SSV's proposed surrogate value is even less specific than the two other options considered by Commerce as neither Commerce nor the court has the ability to disaggregate in any meaningful way J55 and J55-H hot-rolled coil purchased at the same price in the same transaction.

Accordingly, Commerce acted reasonably and its findings are sustained.

B. Inland Insurance Valuation

The court, in previously addressing the issue of Commerce's valuation of inland insurance, ordered that the Department either more fully explain or reconsider its valuation of domestic inland insurance. *SeAH II*, 269 F. Supp. 3d at 1355. During that proceeding, SSV had cited Indian common law in an attempt to establish that it was unreasonable for Commerce to impose a SV for the cost of assigning the risk of loss, something SSV claimed was already reflected in inland freight rates. *Id.* at 1357. The court upheld Commerce's rejection of that argument, but concluded that substantial evidence did not support the Department's selection of the Agro Dutch data as an appropriate SV. *Id.* This was so because it appeared that the Agro Dutch data "reflect[ed] the cost of *both* inland insurance and marine insurance" and was inflated because that data was applied by weight rather than by the value of the merchandise. *Id.* The court found that the selection of this data met only two of the stated criteria Commerce considers when selecting SV data—being publicly available and adjustable for contemporaneity—while ignoring the other factors: that the values be product-specific, representative of a broad market average, and tax-exclusive. *Id.* at 1357–58. As a result, Commerce was left with the task of either fully explaining why the Agro Dutch data was the best information available or reconsidering the selection of that data. *Id.* at 1358.

Accordingly, in its Remand Redetermination, Commerce: 1) acknowledged that the data was too broad because it also included marine insurance and therefore removed the corresponding adjustment from the Department's calculation but 2) disputed SSV's assertion that the Agro Dutch data resulted in a per-ton value roughly ten times that of what it should have been and therefore declined to reopen the record as to this issue. *See* Remand Redetermination at 9–11. SSV highlighted several alleged defects with the document, *see id.* at 21–23, and Commerce acknowledged "that because of the illegibility of the [Agro Dutch worksheet], it is not certain that [the Department] correctly deciphered from the document the cost of $12.75/kilogram as Agro Dutch's reported per-kilogram price." *Id.* at 21. As a result, Commerce placed on the record a more legible copy of the same worksheet. *Id.* at 23. Relying on this corrected document, the Department rejected most of SSV's arguments as to the docu-

ment's defects, *id.* at 23–26, but did agree with SSV that Commerce had "inadvertently inflated the Agro Dutch data from 2005 to 2013 dollars using the Indian consumer price index, rather than the U.S. dollar consumer price index" and corrected that error.[1] *Id.* at 26–27.

SSV asserts that defects with the Agro Dutch document still undermine the Department's findings, even with the corrected document now on the record. First, SSV maintains that "Commerce denied SSV's due process rights by improperly re-opening the record . . . without giving SSV any opportunity to rebut that information or submit additional information supporting alternative calculations." Pl.'s Comments at 9. Next, SSV argues that ambiguities within the documents still exist[2] and, short of supplementing the record with a more complete excerpt, the documents do not provide support for Commerce's proposed resolution of such conflicts. *Id.* at 11–12. Last, SSV asserts that Commerce's decision to simply disregard the marine insurance "cannot . . . be reconciled with" 19 C.F.R. § 351.408(c)(1), *id.* at 12, and that Commerce's stated reason for departing from this regulation is "entirely circular." *Id.* at 13.[3]

Each of these arguments are addressed in turn below.

1. Due Process

SSV's due process argument centers around the idea that when Commerce opened the record to supplement the information as to the SV for inland insurance the Department should have afforded SSV an opportunity to rebut the new information placed on the record. Not

[1] To this point, U.S. Steel argues that "[b]ecause the Agro Dutch data reflect the expenses incurred by an Indian company for domestic inland insurance in India, and because India was the country selected by Commerce for purposes of calculating surrogate values for [SSV], Commerce should have continued to use an Indian price index denominated in Indian rupees to inflate the Agro Dutch data from 2005 values to 2013 values." Comments of U.S. Steel Corp. on the Final Results of Redetermination Pursuant to Court Remand 2, ECF No. 181 (Mar. 12, 2018). U.S. Steel grounds its argument solely in a disagreement with Commerce's choice and does not argue that the decision is unsupported by substantial evidence. As such, U.S. Steel has failed to carry its burden, 28 U.S.C. § 2639(a)(1), and its argument is dismissed.

[2] Specifically, SSV notes that, "[a]mong other things, those documents list two figures that appear to be unit prices: one is 2.00 and the other is 22.75. Commerce has asserted that the first of these prices is a per kilogram amount, and the second is a per-case amount." Pl.'s Comments at 11. Yet, SSV does not appear to further illuminate for the court what these "other things"—that is, alleged defects—are.

[3] Apparently as a supplement to its argument of bad faith, SSV also asserts that "Commerce officials responsible for this case are personally familiar with the actual cost of inland insurance paid by Indian OCTG producers during the relevant period," Pl.'s Comments at 14, and that this fact is "highly indicative of Commerce's state of mind." *Id.* at 15. As this argument goes to the alleged bad faith on the part of the Department, it has been addressed and dismissed above.

doing so, SSV argues, amounts to a denial of due process.[4] However, SSV was on notice that the Agro Dutch data would be used to calculate inland insurance and declined its opportunity to rebut that information. As a result, SSV has not suffered a violation of its due process rights.

Due process "is not a technical conception with a fixed content unrelated to time, place and circumstance;" rather, it "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Even if SSV has satisfied the threshold inquiry of demonstrating it has been deprived of a protected right, it must still demonstrate a lack of specific notice and opportunity to be heard. *See In re Bailey*, 182 F.3d 860, 871 (Fed. Cir. 1999). SSV has failed to do so as Commerce did indeed provide specific notice regarding the Agro Dutch data and SSV declined the opportunity to comment when U.S. Steel placed the document on the record.

In this proceeding, SSV argues not that it was denied an opportunity to comment on the Agro Dutch data but rather that "it had no reason to believe that Commerce would" assign a constructive value for inland insurance. Pl.'s Comments at 9. Indeed, SSV rested on its contention that Commerce should not assign a value for inland insurance and did not argue in the alternative that the record information was insufficient for such a calculation. *See id.* at 10.

While the legibility of the original document is questionable, the notice it provided SSV is not. The document itself clearly provided SSV with actual notice that Commerce may consider calculating a SV for inland insurance. *See* U.S. Steel's Submission of SV Data, ECF No. 60, Tab 16, Tab J (Jan. 17, 2014). Not only did U.S. Steel label the document as "CALCULATION OF SURROGATE VALUE FOR DOMESTIC INLAND INSURANCE," it suggested that Commerce "value[] domestic inland insurance using information submitted by Agro Dutch." *See id.* What's more, the document to which the Agro Dutch data was affixed, a memo from Commerce related to SVs in a different proceeding, discussed the method used by Commerce for valuing domestic inland insurance. *See id.*, Tab J Attach. 2 at 6. SSV cannot now construe such overt notice as being deficient. Given the circumstances, the court finds that the notice given to SSV was adequate. As such, SSV was on notice that the Agro Dutch data could

---

[4] SSV also maintains that Commerce violated 19 C.F.R. § 351.301(c)(4), which states that "[a]n interested party is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information placed on the record of the proceeding by the Department." Yet, that regulation is inapposite here. Where Commerce places a more legible copy of the *same* document on the record, that is not new information under the regulations and the interested party—in this case SSV—is not afforded the opportunity by right to submit rebuttal information.

be used by Commerce to calculate inland insurance and, thus, can only articulate a due process violation if the Department denied it an opportunity to be heard.

However, once on notice that the Argo Dutch data would be used for valuing inland insurance, SSV declined to comment, thus rendering its due process claim without merit. Indeed, SSV acknowledges that it did not rebut the information—or request a cleaner version of the document be placed on the record—because it believed that its argument about Indian common law sufficiently disputed the inland insurance premise altogether. By so doing, SSV left the document unrebutted as the sole source of valuing inland insurance.[5] SSV could have alerted Commerce to the illegibility of the document at the time it was placed on the record and—ideally—even stated SSV's desire that it be afforded an opportunity to rebut the document when a more legible version was provided. Ultimately, SSV did neither and cannot now claim that it did anything but decline its opportunity to be heard on the subject.

As SSV received ample notice that Commerce may indeed value inland insurance using the Argo Dutch data and SSV failed to comment on that data when it was placed on the record, its claim for a denial of due process is without merit.

2. Alleged Ambiguities Within the Agro Dutch Document

SSV presents two primary challenges to Commerce's actions as they pertain to the Agro Dutch worksheet: 1) that the two unit prices listed, 2.00 and 22.75, do not state their applicable denominations and the Department should have corrected this error by placing a more complete excerpt of the document on the record; and 2) that Commerce's "decision not to re-open the record more widely to clarify any ambiguities cannot be sustained." Pl.'s Comments at 11–12. This all amounts to one specific claim of error and a more encompassing claim that Commerce acted unreasonably.

Where a plaintiff seeks to challenge Commerce's determinations as not supported by substantial evidence, it must present specific allegations demonstrating the insufficiency of Commerce's reasoning. *See* 28 U.S.C. § 2639(a)(1) (stating that Commerce's decisions are presumed to be correct and that the "burden of proving otherwise shall rest upon the party challenging such decision.").

Looking first to the alleged error as to the unit prices listed and their corresponding denominations, Commerce reasoned that:

[5] That is, should Commerce decline to take SSV's view that there ought not be a valuation of inland insurance. Of course, Commerce declined to follow SSV's suggestion, and the court has previously upheld that decision. *See SeAH II*, 269 F. Supp. 3d at 1357.

> The figure on this worksheet to which SSV cites as the gross unit price (which SSV believes to be $12.75/kilogram) is GRSUPR2U. It is clear on the worksheet that GRSUPR2U is $22.75. Based on the figures given on the worksheet for "cases," "kilos," and GRSUPR1U, we interpret GRSUPR2U to be the price per case, and GRSUPR1U to be the price per kilogram. Therefore, because the gross unit price (GRSUPR1U) is $2/kilogram, and not $22.75/kilogram, we continue to determine that the record evidence does not support SSV's allegation that the inland insurance SV we used was "incredibly inflated."

Remand Redetermination at 23–24. An examination of the document in question confirms that Commerce's reading was a reasonable one. *See* Analysis Mem. for the Final Redetermination on Remand, ECF No. 190, P.R. 11 Attach. 4 (Feb. 9, 2018). As the GRSUPR1U and GRSUPR2U values align to create roughly equivalent total prices—when interpreted using Commerce's applied methodology—the court disagrees with SSV's suggestion that this was an unreasonable interpretation.

As to Commerce's decision to re-open the record for limited purposes, this court has previously stated on multiple occasions that it will defer to Commerce's discretion, but will nonetheless "review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality." *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1295, 1313 (2017) (quoting *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT __, __, 815 F. Supp. 2d 1342, 1365 (2012)); *see also SeAH II*, 269 F. Supp. 3d at 1358 n.13. Here, Commerce based its decision to re-open the record for limited purposes in part on the fact that "SSV chose not to submit [factual] information to value inland insurance by [the stated] deadline[s], despite [U.S. Steel] having submitted the Agro Dutch inland insurance information" prior to the later of the two deadlines. *See* Remand Redetermination at 26. SSV's argument that Commerce abused its discretion is largely disarmed by its declining to either comment on or supplement the record at the time the Agro Dutch data was first raised. To now assert that Commerce acted unfairly ignores SSV's own strategic decisions. Accordingly, the court defers to Commerce's decision with regard to opening the record and finds no element of unfairness that would contravene that discretion.

All in all, SSV has failed to satisfy its burden of proof. In this instance, rather than merely asserting that there were ambiguities the Department failed to reconcile, SSV has the burden of demonstrating the Commerce's decision was improper. By failing to engage

with Commerce's reasoning and raising only one specific alleged ambiguity, SSV has failed to meet its burden.

3. Commerce's Regulations

In relevant part, 19 C.F.R. § 351.408(c)(1) provides for situations in which the Department is to value the factors of production and states that:

> The Secretary normally will use publicly available information to value factors. However, where a factor is produced in one or more market economy countries, purchased from one or more market economy suppliers and paid for in market economy currency, the Secretary normally will use the price(s) paid to the market economy supplier(s) if substantially all of the total volume of the factor is purchased from the market economy supplier(s).

When quoting this regulation in its briefing, SSV conveniently ignores the discretion the regulation grants to Commerce. Here, the Department stated that this was not a normal circumstance, warranting departure from the regulation because "the Agro Dutch information, which is the only data on the record, does not allow [Commerce] to separate the inland insurance costs from the marine insurance costs because they are represented as one value." Remand Redetermination at 25. As a result, Commerce determined that its methodology—"removing the marine insurance SV" from the combined insurance value—was "the only alternative to ensure that the marine insurance costs are not double counted." *Id.* at 25–26. The regulation cited by SSV "merely indicates a preference for market prices," *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT 255, 264, 264 F. Supp. 2d 1229, 1237 (2003), and does not mandate Commerce's use of any one value. Rather, Commerce retains the discretion to depart from the regulation's stated preference where appropriate. In this case, the only evidence on the record as to inland insurance included marine insurance and the Department's decision to deduct the marine insurance was reasonable. No other evidence on the record would have proved helpful and SSV has offered no other workable solution from other record evidence. Accordingly, the court sustains Commerce's decision with regard to the inland insurance valuation.

C. Allocation of Brokerage and Handling Costs

Finally, the court addresses Commerce's determinations as to the allocation of B&H costs, remanded in the court's prior order for a

more full explanation of the Department's reasoning. *See SeAH II*, 269 F. Supp. 3d at 1365. The court's previous order faulted Commerce for not directly confronting SSV's arguments that: 1) "Commerce's allocation provides aberrational results that are inconsistent with evidence regarding the actual per-unit brokerage and handling costs incurred by Indian exporters," *id.* at 1363; 2) "'any calculation' using Indian surrogate values that assumes a proportional relationship between cost and weight 'is necessarily contrary to the evidence on the record,'" *id.* at 1364; and 3) that "Commerce's reliance on the price formula in SSV's contract with a [non-market economy ("NME")] freight forwarder is unreasonable," *id.*

On remand, Commerce addressed each these arguments and "continue[s] to find that [its] allocation methodology was reasonable." Remand Redetermination at 14. Looking to the court's first concern about B&H costs, Commerce determined that "merely because its calculated values for B&H are seven to 13 times greater than other values SSV placed on the record does not make Commerce's calculated value aberrational," *id.* at 14, finding that "this disparity is only a reflection of the fact that Indian B&H costs can vary widely," *id.* at 15 (citing *Honey from the People's Republic of China*, 70 Fed. Reg. 74,764 (Dep't Commerce Dec. 16, 2005) (prelim. results & partial rescission)). On the second point mentioned above, Commerce acknowledged that evidence on the record and prior departmental practice indicated weight was a proper means by which to allocate the disputed costs. *Id.* at 15–16 (citing *Honey from the People's Republic of China*, 70 Fed. Reg. 74,764 and accompanying Issues & Decision Mem. at cmt. 4). Last, the Department continues to "value B&H on a weight basis because this basis reflects SSV's own service contract," largely relying on statutory and regulatory directives to "calculate normal value in an NME proceeding by valuing the NME producers' factors in an ME country." *Id.* at 16 (citing 19 U.S.C. § 1677b(c)(1)(B)(2); 19 C.F.R. § 351.408(a)). Moreover, Commerce reasoned that "[a]lthough the contract does not show how a Vietnamese company would charge for services that covered only B&H, it is adequate to show that B&H costs can be incurred on a weight basis in Vietnam." *Id.* at 30.

Here, SSV argues that Commerce improperly rejected its prior arguments in continuing to apply the same methodology for the allocation of B&H costs. *See* Pl.'s Comments at 16–24. Specifically, SSV contends that: 1) Commerce's framework is unacceptable because it produced "results that are 7 to 13 times greater than the actual per-ton [B&H] costs reported by the Indian producers," *id.* at 17; 2) "Commerce improperly relied on a fee amount charged by a

Vietnamese supplier for a bundle that includes freight and [B&H] services to determine the manner in which an Indian supplier would charge for separately itemized document preparation and customs clearance services," *id.* at 18; and 3) "Commerce's attempt to mix-and-match figures from the Doing Business Report with calculations from the GVN questionnaire response is fundamentally inconsistent," *id.* at 22–23.

Ultimately, by addressing each of SSV's arguments and dispensing of them reasonably, Commerce has adequately rectified the previous shortcomings that prevented the court from sustaining the Department's determinations. *See SeAH II*, 269 F. Supp. 3d at 1365. In the court's prior opinion, there was a concern that "Commerce never responded to the[] legitimate critiques [made by SSV], and the court [could] not manufacture an answer for Commerce." *Id.* (citing *SEC v. Chenery*, 332 U.S. 194, 196 (1947)). Of course, not only must Commerce confront SSV's arguments, it must *overcome* them. That requires substantial evidence in the Department's favor. Through reasonable and thorough analysis of each of the issues on remand, Commerce has done just that.

The substantial evidence standard requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Importantly, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Ultimately, SSV's allegations are not enough to defeat Commerce's reasoning in this instance as substantial evidence supports the Department's findings. Accordingly, the court sustains Commerce's allocation of B&H costs.

1. Allegedly Aberrational Results

Under 19 U.S.C. § 1677b(c)(1), Commerce is to determine the value of subject merchandise "based on the best available information . . . considered to be appropriate by the [Department]." As this court has stated previously, "Congress has granted Commerce substantial discretion and has bound the Court to respect that discretion, even where the Court would have reached a different conclusion . . . ." *Wonderful Chem. Indus., Ltd. v. United States*, 27 CIT 411, 418, 259 F. Supp. 2d 1273, 1281 (2003) (quoting *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 159 F. Supp. 2d 714, 722 (2001)). In particular, "Commerce has wide discretion in selecting surrogate

value data." *Grobest*, 36 CIT at __, 815 F. Supp. 2d at 1351. Where Commerce declines to rely on certain information and chooses other information on which to base its ultimate determination, that decision is granted significant latitude so long as it is supported by substantial evidence.

Here, SSV argues that Commerce's reliance on the values from the Doing Business Report produced results that are so aberrational as to indicate that Commerce's methodology is unreasonable. SSV contends that the total B&H costs by Indian OCTG exporters "would work out to $0.64 per metric ton [for document preparation and customs clearance costs], and the terminal handling and port charges would work out to $10.36 per metric ton." Pl.'s Comments at 17. By contrast, the data adopted by Commerce, contained in the Doing Business Report, would substantially increase costs by 7 to 13 times greater than the actual per-ton B&H costs reported by the Indian producers. *Id.* SSV also maintains that its proposed methodology of relying on evidence of values from individual Indian companies is better suited for these circumstances and is "consistent with the other record evidence concerning the [B&H] costs incurred by Indian exporters." *Id.*

SSV has failed to establish how the other record evidence would have provided a reasonable alternative to actual market conditions found in the Doing Business Report. Ultimately, Commerce explained that just because the averages were higher did not mean that they were aberrational; rather, Commerce reasoned that the higher values reflected the variability of actual market conditions in India. Remand Redetermination at 14–15. Indeed, in so doing, Commerce noted that it has previously rejected similar arguments when the results were alleged to be even more inflated than what SSV has represented here. *See id.* at 14–15 (citing *Honey from the People's Republic of China*, 70 Fed. Reg. 74,764). As the Department acted in line with previous decisions and the application of that methodology was reasonable here, Commerce cannot be said to have made an arbitrary determination in this instance. What's more, this court has previously upheld Commerce's decision to rely on country-wide reports, rather than individual company data placed on the record. *See Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1350, 1368–69 (2016). Considering these factors, the Department's choice to consider market conditions in India rather than individual companies' information on the record was reasonable. As a result, SSV's results-based argument is unconvincing.

2. Allocation of B&H Costs by Weight

Next, Commerce's decision to allocate B&H costs by weight is also supported by substantial evidence. The Department relied on *Honey from the People's Republic of China*, 70 Fed. Reg. 74,764, finding that that that decision supported Commerce's findings here that: 1) the data from the Doing Business Report is "representative of actual B&H prices paid" by exporters in India, Remand Redetermination at 29, and 2) "Indian B&H costs can vary widely." *Id.* at 30.

Specifically, SSV challenges the "separate amounts for document preparation or for customs clearance;" rather, SSV asserts that its freight forwarder charged SSV "for a basket of services that included freight from SSV's plant to the port, customs clearance, loading and unloading [], and security services for the cargo . . . ." *See* Pl.'s Comments at 19. Additionally, SSV argues that since the "pricing practice on which [Commerce] relies . . . is not a market-economy transaction[,] . . . Commerce cannot, in good faith, rely on the fee structure used by SSV's Vietnamese supplier to identify how a market-economy supplier in India would have set its fees." *Id.* at 20–21.

While SSV has highlighted evidence that shows that sometimes B&H costs may be allocated on a per-container basis, Commerce determined that in this instance it was more appropriate to do so based on weight. Specifically, Commerce pointed out that some of the B&H data on which SSV relies actually is charged based on its weight. *See* Remand Redetermination at 15–16 ("GVN indicated that two of the five categories of B&H expenses, (*i.e.*, 'agency charges' and 'other charges (various expenses)') are charged on a metric-ton basis."). That, in the Department's view, cut against SSV's argument because it showed that record evidence, submitted by SSV, demonstrated that there were indeed some Indian B&H costs charged by their weight. *Id.* at 16. And so Commerce found that it was reasonable to treat B&H costs in a similar manner here. As with the last issue, the court finds support for Commerce's position in a previous decision of this court sustaining the Department's calculation of B&H costs based on weight. *See Fine Furniture*, 40 CIT __, __, 182 F. Supp. 3d at 1368–69. Thus, not only is Commerce's general allocation of B&H costs based on weight reasonable, but so too is its inclination to do so in this case when SSV has failed to establish that a different methodology would be more prudent.

SSV then asserts that the transaction in question is not a ME transaction and so the Department erred in using the fee structure it applied. The Government contends that the Doing Business Report did lay out a fee structure for B&H costs in India and, therefore,

"Commerce logically referred to a fee structure on the record—SSV's contract with its Vietnamese supplier." Def.'s Comments at 24. Indeed, Commerce pointed out that it had previously considered and rejected the argument about the fee structure issue in an earlier portion of the administrative proceedings. Remand Redetermination at 17. Clearly, the Department has discretion to choose the most appropriate values in calculating SVs, *Grobest*, 36 CIT at __, 815 F. Supp. 2d at 1351, but it must pull that data *from the record itself*. Accordingly, as Commerce's choice was a reasonable exercise of its discretion and SSV has failed to identify any other record evidence on which the Department could have relied, this challenge is denied.

3. The GVN Questionnaire

Last, SSV argues that: 1) there is no evidence that the values pulled from the GVN questionnaire were incurred on a per ton basis and 2) figures from both the GVN questionnaire and the Doing Business Report cannot be reconciled with one another. In essence, SSV argues that "GVN's questionnaire response indicated that GVN paid a total of roughly $5.42 per ton for all [B&H] services" such that Commerce "cannot plausibly justify [its] assertion that GVN's questionnaire response supports Commerce's calculation of [B&H] costs of $75 to $85 per ton." Pl.'s Comments at 23.[6] For its part, the Government contends that the GVN questionnaire "simply provided Commerce with additional factual support to justify Commerce's reasonable inference that [B&H] fees for Indian OCTG producers vary by weight." Def.'s Comments at 22.

"Commerce can, and does, mix and match the data that it chooses in its surrogate value selection, for instance through the use of gap-filling data." *Dorbest*, 30 CIT at 1684, 462 F. Supp. 2d at 1275. Commerce's overarching goal is to make its determinations based on the best information available, an aim that takes precedence over any inclination to derive its results from a single methodology or source. *See Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). As a result, SSV's bald assertion that certain information found in the GVN Questionnaire cannot be reconciled with the Doing Business Report falls on deaf ears.

[6] Moreover, SSV argues that a decision relied upon by Commerce, *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 82 Fed. Reg. 26,912 (Dep't Commerce June 12, 2017) (final results), "is logically incoherent and does not provide a reasonable basis for allocating the Doing Business Report figures." Pl.'s Comments at 23. Yet, Commerce merely cited to *Diamond Sawblades* to show its practice in choosing a denominator from the same source as the numerator because those figures were "dependent upon one another." Remand Redetermination at 34. SSV's broad-based attack on the *Diamond Sawblades* decision misfires as it is not aimed at the purposes for which that decision was relied on by Commerce.

In any event, the Government's view of the GVN data is more consistent with Commerce's reasoning. Commerce stated that it could not determine from the record what the exact B&H costs GVN paid for by weight, but that did not undermine its use of the Doing Business Report. Remand Redetermination at 32. Thus, Commerce did not rely on the GVN questionnaire in its findings, but merely provided that the GVN questionnaire did not detract from its analysis. *See id.*

Accordingly, SSV's characterization of Commerce's reliance on the GVN questionnaire is misguided and even if it were accurate, the Department's methodology would be sustained.

CONCLUSION AND ORDER

For the foregoing reasons, upon consideration of the parties' motions for summary judgment and all papers and proceedings herein, it is hereby:

ORDERED that Commerce's determinations as to all issues raised on appeal are supported by substantial evidence and are hereby sustained; it is further

ORDERED that final judgment is entered for Defendant.

Dated: August 13, 2018
New York, New York

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

Slip Op. 18–99

THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD. and STANLEY BLACK & DECKER, INC., Plaintiffs, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 17–00071

[United States Department of Commerce's final results are sustained.]

Dated: August 13, 2018

Lawrence J. Bogard, Neville Peterson, LLP, of Washington, DC, argued for plaintiffs. With him on the brief was *Peter J. Bogard*.

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

tor, and *Patricia M McCarthy*, Assistant Director. Of counsel on the brief was *Jessica R. DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Ping Gong, The Bristol Group PLLC, of Washington DC, argued for defendant-intervenor. With her on the brief was *Adam H. Gordon*.

OPINION

Eaton, Judge:

Before the court is The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc.'s (collectively, "Stanley" or "plaintiff") motion for judgment on the agency record challenging the final results of the United States Department of Commerce ("Commerce" or the "Department") in *Certain Steel Nails From the People's Republic of China*, 82 Fed. Reg. 14,344 (Dep't Commerce Mar. 20, 2017), P.R. 290, bar code 3551507–01, ECF No. 34 ("Final Results"), *as amended by* 82 Fed. Reg. 19,217 (Dep't Commerce Apr. 26, 2017), P.R. 307, bar code 3566359–01, ECF No. 34 ("Amended Final Results"), and accompanying Issues and Decision Memorandum, P.R. 289, bar code 355147601, ECF No. 34 ("Final I&D Memo").

Stanley objects to the Final Results on three grounds, claiming that (1) Commerce contravened 19 C.F.R. § 351.414(f) (2008) by, among other things, self-initiating a targeted dumping analysis; (2) the differential pricing analysis manifests an unreasonable interpretation of 19 U.S.C. § 1677f–1(d)(1)(B) primarily because the Cohen's *d* test is not reasonably used to evaluate targeted dumping and is incorrectly calculated; and (3) the World Trade Organization ("WTO") Appellate Body has held that the differential pricing analysis contravenes U.S. obligations under the antidumping agreement, thereby calling into question Commerce's arguments regarding the reasonableness of its differential pricing analysis. *See* Pls.' Mem. Supp. Mot. J. Admin. R., ECF No. 29–1 ("Pls.' Br.") 2–3, 46.

Defendant, the United States (the "Government" or "defendant"), on behalf of Commerce, argues that (1) 19 C.F.R. § 351.414(f) (2008) does not apply to administrative reviews; (2) many of Stanley's arguments have been foreclosed by the Federal Circuit; and (3) Stanley's WTO argument notwithstanding, Commerce was reasonable in interpreting the relevant statute and regulations when conducting its differential pricing analysis to reach the conclusion that an alternative comparison method should be used to calculate Stanley's dumping margin. *See* Def.'s Resp. Opp'n Pls.' Mot. J. Agency R., ECF No. 31 ("Def.'s Br.") 4–5.

For its part, Defendant-Intervenor, Mid Continent Steel & Wire, Inc., argues that Commerce's implementation of the differential pricing analysis is reasonable and adds that "[t]he WTO decision . . . is not

binding on the United States unless and until Congress and the Administration implement it pursuant to the statutory scheme." Def.-Int.'s Resp. Br., ECF No. 30 ("Def.-Int.'s Br.") 2, 4.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, Commerce's Final Results are sustained.

LEGAL FRAMEWORK

In an administrative review of an antidumping duty order, Commerce determines the amount of any antidumping duty by first determining "the normal value[1] and export price[2] (or constructed export price[3]) of each entry of the subject merchandise" and then calculates "the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A)(i)-(ii) (2012). A "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). In an antidumping investigation, there are three methods by which Commerce may compare normal value with export price to determine whether merchandise is being sold for less than fair value (*i.e.*, whether it is being dumped). *See* 19 U.S.C. § 1677f–1(d). Generally, Commerce uses one of two methods: (1) a comparison of the weighted-average of an exporter's normal values to the weighted-average of its export prices for comparable merchandise (the "A-A" method), or (2) a comparison of the normal values of an exporter's individual transactions to the export prices of an exporter's individual transactions

---

[1] [Normal value is:

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B)(i) (2012).]

[2] [Export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

19 U.S.C. § 1677a(a).]

[3] [Constructed export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of this section.

19 U.S.C. § 1677a(b). The export price or constructed export price is sometimes referred to as the U.S. price.]

for comparable merchandise (the "T-T" method).[4] *See* 19 U.S.C. § 1677f–1(d)(1)(A)(i)-(ii).

If Commerce finds, however, that there is evidence of targeted dumping, *i.e.*, that "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and "explains why such differences cannot be taken into account using" the A-A or T-T methods, it may use an alternative method and compare "the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions" (the "A-T" method). 19 U.S.C. § 1677f–1(d)(1)(B).[5]

Commerce has promulgated a targeted dumping regulation to flesh out the statute, 19 C.F.R. § 351.414(f) (2008). *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,373–76 (Dep't Commerce May 19, 1997) ("Final Rule"). The salient elements of this regulation are:

> (f)(1) [Commerce] may apply the [A-T] method . . . in an antidumping investigation if:
>
> (i) As determined through the use of, among other things, *standard and appropriate statistical techniques*, there is targeted dumping in the form of a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time . . . [§ 351.414(f)(1)(i)] . . . .

[4] Although § 1677f–1(d)(1)(A) lists both the A-A and T-T methods as Commerce's general methods for comparing normal value with export price to determine whether merchandise is being dumped, in actual practice, Commerce's regulations specify that T-T will be rarely used. *See* 19 C.F.R. § 351.414(c)(1)-(2) (2015) ("In an investigation or review, [Commerce] normally will use the [A-A] method unless [Commerce] determines another method is appropriate in a particular case. . . . [Commerce] will use the [T-T] method only in unusual situations . . . .").

[5] 19 U.S.C. § 1677f–1(d)(1)(A), provides:

> In an investigation under [19 U.S.C. § 1673], [Commerce] shall determine whether the subject merchandise is being sold in the United States at less than fair value—
>
> (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or
>
> (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

19 U.S.C. § 1677f–1(d)(1)(A). Section 1677f–1(d)(1)(B) (targeted dumping) provides:

> [Commerce] may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise [*i.e.*, by using the A-T method], if—
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) [Commerce] explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

19 U.S.C. § 1677f–1(d)(1)(B).

(2) [Commerce] normally will limit the application of the [A-T] method to those sales that constitute targeted dumping . . . [§ 351.414(f)(2) (2008) (*i.e.*, the Limiting Rule)].

(3) [Commerce] normally will examine only targeted dumping described in an allegation . . . . Allegations must include all support factual information, and an explanation as to why the [A-A] or [T-T] method could not take into account any alleged price differences [§ 351.414(f)(3) (2008)].

19 C.F.R. § 351.414(f)(1)-(3) (2008) (emphasis added). Notably, by their plain language, the statute and the regulation only address antidumping investigations. 19 U.S.C. § 1677f–1(d)(1)(A)-(B) ("In an investigation . . . [Commerce] may determine whether subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise . . . ."); 19 C.F.R. § 351.414(f) (2008) ("[Commerce] may apply the [A-T] method . . . in an antidumping investigation . . . .").[6]

As to administrative reviews, although the statute and regulations give Commerce a framework for determining whether, in antidumping investigations, merchandise is being sold at less than fair value, or whether targeted dumping may be occurring, the section of the code addressing reviews (§ 1677f–1(d)(2)) does not specify which comparison method it must use. *See* 19 U.S.C. § 1677f–1(d)(2).[7] Commerce's regulations, however, state that it will apply the AA method in both investigations *and* reviews "unless [Commerce] determines another method is appropriate in a particular case." 19 C.F.R. § 351.414(c)(1) (2015). To determine whether another method is appro-

[6] Commerce attempted to withdraw this regulation in 2008, but the Federal Circuit later invalidated the withdrawal. *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008); *see also Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1368 (Fed. Cir. 2017) ("Commerce violated the requirements of the APA in withdrawing the regulation, leaving the regulation in force . . . ."). Thus, the Limiting Rule (*i.e.*, the provision of the regulation directing Commerce to limit its application of the A-T method to those sales that constitute targeted dumping) remained in force for investigations following the attempted withdrawal. In *Apex Frozen Foods Private Ltd. v. United States*, however, the Federal Circuit found that this provision did not apply to administrative reviews. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1336 (Fed. Cir. 2017).

[7] Title 19 U.S.C. § 1677f–1(d)(2) states:

> In a review under section 1675 of this title [*i.e.*, in an administrative review of an antidumping duty order, countervailing duty order, or a notice of suspension of liquidation], when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, [Commerce] shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

19 U.S.C. § 1677f–1(d)(2).

priate, Commerce's practice, where there appears to be targeted dumping, is to use the same approach in administrative reviews that it does in investigations. *See JBF RAK LLC v. United States*, 790 F.3d 1358, 1364 (Fed. Cir. 2015). Thus, in an administrative review, Commerce will apply the A-T method when it (1) finds that there is evidence of targeted dumping, *i.e.*, "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and (2) explains "why such differences cannot be taken into account using [the A-A or A-T methods]." 19 U.S.C. § 1677f–1(d)(1)(B)(i)-(ii).

In both investigations and reviews, when determining whether targeted dumping may be occurring in both investigations and reviews, and therefore, whether Commerce may apply the A-T method, Commerce uses the differential pricing analysis. *See Timken Co. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1168, 1173 (2016); *see also Certain Steel Nails From the People's Republic of China*, 81 Fed. Reg. 62,710 (Dep't Commerce Sept. 12, 2016) ("Preliminary Results"), and accompanying Preliminary Issues and Decision Memorandum, P.R. 256, bar code 3503883–01, ECF No. 34 ("Preliminary I&D Memo") at 19. The differential pricing analysis is a two-stage process involving three separate "tests." In the first stage, Commerce uses what it calls the "Cohen's *d* test"[8] together with the "ratio test" to determine whether there is "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f–1(d)(1)(B)(i); *see* Preliminary I&D Memo at 20.

If the results of these tests do not suggest that there is a pattern of prices that differ significantly for comparable merchandise among purchasers, regions, or periods of time, then Commerce may not consider the application of the A-T method. *See* Preliminary I&D Memo at 20–21. If, however, the results of these tests reveal that such a pattern exists, that is, that targeted dumping may be occurring, Commerce will move to the second stage of the differential pricing analysis, and use the "meaningful difference test" to determine whether the price differences can be taken into account using the A-A method. *See* Preliminary I&D Memo at 20–21; *Timken*, 179 F. Supp. 3d at 1173–74; *Apex Frozen Foods Private Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1331 (2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017) ("*Apex I*") ("Once Commerce establishes that there is a pattern of significant price differences, Commerce's practice in reviews requires it to explain whether A-A cannot account for such price

[8] As will be seen, labeling the formula Commerce uses as a "Cohen's *d* test" has raised questions as to its appropriateness for identifying differential pricing.

differences before deciding to apply A-T. Commerce has chosen to answer whether A-A cannot account for such price differences by engaging in its meaningful differences analysis, which is the second stage of the differential pricing analysis."). Thus, Commerce uses the Cohen's *d* test to determine whether targeted dumping may be occurring, the ratio test to see if any potential targeted dumping matters, and the meaningful difference test to determine whether the A-A method can account for any pricing differences found, *i.e.*, whether the A-A method can "unmask" targeted dumping.

As currently applied, Commerce's differential pricing analysis is product specific and is performed at the level of individual product control numbers (*i.e.*, "CONNUMs"[9]), net of adjustments to gross U.S. selling price. Before Commerce begins its differential pricing analysis, it (1) disaggregates sales data collected from respondents and then (2) sorts the sales of each CONNUM into sales made to particular purchasers, geographic regions, or time periods. A group of CONNUM sales specific to one particular purchaser, region, or time period will form a "test" group, while the CONNUM's remaining sales (*i.e.*, sales to all other purchasers, regions, or from all other time periods) will form a "comparison" or "base" group. *See* Preliminary I&D Memo at 19–20. The differential pricing analysis serially analyzes prices to each purchaser, region, and time period as a test group, and then reuses those prices when forming other comparison groups for that particular CONNUM.

As to the purpose of the first test, the so called Cohen's *d* test, Commerce seeks to measure the "effect size" between two groups.[10] That is, this test measures the extent to which "the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise" by taking the difference between the weighted-average net prices of the test and comparison groups, divided by the "pooled" standard deviation of the net prices of the two groups.[11] Final I&D Memo at 18. The resulting coefficient is then categorized as either falling within a "small," "me-

[9] A CONNUM is a product control number, or "a numerical representation of a product consisting of a series of numbers reflecting characteristics of a product in the order of their importance used by Commerce to refer to particular merchandise." *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1301 n.28 (2016).

[10] Commerce describes "effect size" as "'quantify[ing] the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*.'" Final I&D Memo at 10 (quoting *Xanthan Gum From the People's Republic of China*, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) and accompanying Issues and Decision Mem., Cmt. 3).

[11] To calculate the pooled standard deviation, Commerce takes the square root of: the sum of the square of the comparison group's standard deviation and the square of the test group's standard deviation, divided by two.

dium," or "large" threshold.[12] Preliminary I&D Memo at 20. Notably, Commerce does not consider whether a test group's weighted-average price is higher or lower than the comparison group's weighted-average price in determining the effect size.

Of these thresholds, Commerce has concluded that the "large" threshold (a 0.8 standard deviation or greater) indicates a significant difference between the two groups. Thus, if the resulting coefficient meets or exceeds the "large" threshold (*i.e.*, if the weighted-averages of the comparison group and the test group differ by at least 0.8 standard deviations), the sales within that test group are considered to have "passed" the Cohen's *d* test. Commerce has further determined that sales "passing" the test differ significantly from all other sales for that particular CONNUM. *See* Preliminary I&D Memo at 20. Commerce then performs the same analysis on a different CONNUM test group and continues until it has cycled through all of a respondent's sales.

Following the Cohen's *d* test, Commerce uses the "ratio test" to "assess[] the extent of significant price differences for all sales measured by the Cohen's *d* test." Preliminary I&D Memo at 20. Under the ratio test, if the value of sales to certain purchasers, regions, and time periods that "pass"[13] the Cohen's *d* test account for 66 percent or more of the value of a respondent's total sales, then Commerce considers there to be an "identified pattern of prices that differ significantly" such that it may consider the application of the A-T method to all sales. Preliminary I&D Memo at 20. If the value of passing sales accounts for only 33 percent or less of the value of a respondent's total sales, however, then the results do not support the consideration of the application of the A-T method to any of respondent's sales. If the value of passing sales is more than 33 percent but less than 66 percent of the value of a respondent's total sales, then Commerce may consider the application of the A-T method for all passing sales, but the A-A method will be used for all remaining sales. Preliminary I&D Memo at 20.

In those instances where the Cohen's *d* test and the ratio test have found evidence that targeted dumping may be occurring, *i.e.*, where passing sales represent more than 33 percent of the value of a respondent's total sales, Commerce then moves on to the second stage of its analysis. In the second stage of Commerce's differential pricing

---

[12] These thresholds were developed, and used by, Dr. Jacob Cohen himself. *See* Stanley Submission of Factual Material, P.R. 230, bar code 3483603–01, Attach. A, ECF No. 34 ("Robert Coe, *It's the Effect Size, Stupid*") at 5.

[13] As described above, a sale "passes" the Cohen's *d* test if the Cohen's *d* coefficient falls within the "large" classification threshold, *i.e.*, if the Cohen's *d* test results in a 0.8 or higher standard deviation.

analysis, Commerce seeks to determine "whether using only the [A-A method] can appropriately account for such differences" found in the previous stage by applying what is known as the "meaningful difference test." Preliminary I&D Memo at 20. Under this test, Commerce first calculates the dumping margin that would result by applying the A-A method to all sales and then calculates dumping margins using the A-T method based on the results of the Cohen's *d* and ratio tests described above (*i.e.*, by (1) applying the A-T method to all passing sales and the A-A method to the remaining sales, and (2) applying the A-T method to all sales). Preliminary I&D Memo at 20. Commerce then compares the A-A margin with the appropriate A-T margin to determine if there is a "meaningful difference" between the two. Commerce considers there to be a "meaningful difference" when the comparison demonstrates: (1) where both margins calculated are above the *de minimis* threshold, that there is a 25 percent relative change in the margins; or (2) where the margin calculated using the A-A method is *de minimis*, that the A-T method generates a dumping margin that crosses the *de minimis* threshold. If a meaningful difference exists, Commerce infers that the A-A method is unable to account for the price differences to particular purchasers, regions, or in particular periods of time (*i.e.*, that the A-A method would not "unmask" observed pricing differences which evidence targeted dumping). *See* Preliminary I&D Memo at 20–21.

BACKGROUND

In August 2008, Commerce published an antidumping duty order covering certain steel nails from China. *See Certain Steel Nails From the People's Republic of China*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008) (order). In October 2015, following a request by, among others, Stanley, Commerce initiated the seventh administrative review of the order for the period of August 1, 2014, through July 31, 2015 (the "POR"). *Initiation of Antidumping and Countervailing Duty Admin. Review*, 80 Fed. Reg. 60,356, 60,360 (Dep't Commerce Oct. 6, 2015). Stanley was named as a mandatory respondent in the review and submitted responses to all of Commerce's initial and supplemental antidumping questionnaires. Selection of Respondents for Individual Review Mem. (Dec. 16, 2015), P.R. 76, bar code 3426396–01, ECF No. 34; Stanley Section A-D Questionnaire Resp., P.R. 90, bar code 3433013–01, P.R. 110, bar code 3442643–01, P.R. 117, bar code 3442681–01, ECF No. 34; Stanley Suppl. Section A, C, and D Questionnaire Resp., P.R. 198, bar code 3472991–01, ECF No. 34.

During the course of the review, the Department, on its own initiative, considered whether targeted dumping was present during the

POR. Commerce published the preliminary results of its seventh administrative review in the Federal Register on September 12, 2016, employed its differential pricing analysis, and, having found evidence of targeted dumping, preliminarily calculated a weighted-average dumping margin of 5.90 percent for Stanley. Preliminary Results, 81 Fed. Reg. at 62,711; *see also* Preliminary I&D Memo 19–20. As part of its analysis, Commerce concluded that there was a pattern of export prices for comparable merchandise that differed significantly among purchasers, regions, or time periods. Preliminary I&D Memo at 21. Specifically, the Department found that 77.8 percent of the value of Stanley's U.S. sales "passed" the Cohen's *d* test, "confirm[ing] the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods." Preliminary I&D Memo at 21.

Commerce also preliminarily found that the A-A method could not account for such differences because the differences in the weighted-average dumping margins were meaningful, *i.e.*, Stanley's margin crossed the *de minimis* threshold when calculated using the A-T method. Preliminary Results Analysis Memorandum for Stanley (Sept. 6, 2016), P.R. 259, bar code 3504519–01, ECF No. 34 ("Preliminary Analysis Memorandum") at 16. In other words, Commerce determined that the A-A method could not account for the observed differences in prices among purchasers, regions, or periods of time. Thus, in accordance with the ratio test, because the value of passing sales represented 66 percent or more of Stanley's total U.S. sales value, Commerce applied the A-T method to all of Stanley's sales and calculated a 5.90 percent dumping margin. *See* Preliminary Analysis Memorandum at 16.

On March 20, 2017, Commerce issued its Final Results, which were amended on April 26, 2017, for a ministerial error. *See* Final Results, 82 Fed. Reg. at 14,344; Amended Final Results, 82 Fed. Reg. at 19,217. In its Final Results, Commerce again employed its differential pricing analysis and all of its elements. In so doing, Commerce quoted two academic articles in support of the use of the Cohen's *d* test: *It's the Effect Size, Stupid*,[14] by Robert Coe, and *Difference Between Two Means*,[15] by David Lane. Final I&D Memo at 10, 11 n.70. Based on the results of its differential pricing analysis, Commerce calculated a final dumping margin for Stanley of 5.78 percent. Amended Final Results Analysis Memorandum for Stanley (Apr. 19, 2017), P.R. 305, bar code 3565149–01, ECF No. 34 ("Amended Final Results Analysis Memo") at 2. Had Commerce not applied the A-T

---

[14] Robert Coe, *It's the Effect Size, Stupid*.

[15] Stanley Submission of Factual Material, P.R. 230, bar code 3483603–01, Attach. B, ECF No. 34 ("David Lane, *Difference Between Two Means*").

method, Stanley's dumping margin would have been zero. *See* Amended Final Results Analysis Memo at 2.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. The "Allegation" and "Appropriate Statistical Techniques" Requirements of 19 C.F.R. § 351.414(f) and Their Application to Administrative Reviews

In 1997, Commerce promulgated regulations dealing with its procedures and standards for determining whether a respondent in an investigation is engaged in targeted dumping. *See* Final Rule, 62 Fed. Reg. at 27,373–76. As a procedural matter, since the regulation dealt with investigations, Commerce was directed to "normally . . . examine only targeted dumping described in an allegation" that included "all supporting factual information, and an explanation as to why the [A-A] or [T-T] method could not take into account any alleged price differences." 19 C.F.R. § 351.414(f)(3) (2008).

Additionally, the regulations directed Commerce to (1) use "standard and appropriate statistical techniques" when determining whether there is a pattern of prices that differ significantly, and (2) "limit the application of the [A-T] method to those sales that constitute targeted dumping" (*i.e.*, the Limiting Rule). 19 C.F.R. §§ 351.414(f)(1)(i), (f)(2) (2008). In *Apex Frozen Foods Private Ltd.*, the Federal Circuit found that the Limiting Rule only applied to antidumping investigations, not administrative reviews. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F. 3d 1322, 1336 (Fed. Cir. 2017). Stanley argues, however, that the Final Results violate the remaining sections of the 1997 targeted dumping regulation—in particular, the "allegation" requirement and the "appropriate statistical techniques" requirement—which, Stanley notes, the Federal Circuit did not specifically address in *Apex*.[16] Pls.' Br. 16–17.

---

[16] Plaintiff additionally claims that the Final Results contravene the Limiting Rule of § 351.414(f)(2), but concedes that the Federal Circuit has found that the Limiting Rule applies only to antidumping investigations. Pls.' Br. 16 ("The Final Results also contravene the 'limiting rule' in § [351.414(f)(2)]. However . . . the [Federal Circuit] recently concluded that the limiting rule only applies to antidumping investigations.").

A. The "Allegation" Requirement Does Not Apply to Administrative Reviews

As to the "allegation" requirement found in § 351.414(f)(3) (2008), Stanley claims that Commerce acted unlawfully by initiating a differential pricing analysis without an allegation by an interested party that Stanley was engaged in targeted dumping (*i.e.*, by self-initiating a targeted dumping analysis). Pls.' Br. 16. According to Stanley, Commerce previously "recognized the substantive importance of requiring a petitioner to allege targeting" when Commerce promulgated its targeted dumping regulation, but failed to explain why here it "no longer needs a petitioner's 'intimate knowledge' and 'expertise' to 'focus appropriately any analysis of targeted dumping.'" Pls.' Br. 16 (quoting Final Rule, 62 Fed. Reg. at 27,296). Therefore, plaintiff maintains that Commerce's *sua sponte* initiation of its differential pricing analysis in this review was unlawful.

Stanley's argument is unconvincing because it ignores the differences in the manner in which investigations and reviews are commenced. Investigations, in nearly every case, begin with the filing of a petition by a domestic interested party (normally a manufacturer or labor union). *See* 19 C.F.R. § 351.201. These petitions may be hundreds of pages long and must contain reasonably available data supporting the allegations of dumping. *See* 19 C.F.R. § 351.202.

A request for a review, on the other hand, is a far less detailed affair. Indeed, a request need not contain any allegations or data at all. All that is required is that the interested party requesting a review provide a reason why a review should be commenced. *See* 19 C.F.R. § 351.213(b)(1). Moreover, any interested party, including a foreign manufacturer or exporter, may request a review. *See* 19 C.F.R. § 351.213(b)(1) ("Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party . . . may request in writing that [Commerce] conduct an administrative review . . . of specified individual exporters or producers covered by an [antidumping] order . . . ."). Indeed, these requests are typically a letter of one or two pages that contain no more specific claim than that dumping may have been occurring or that a company wishes to have an accurate dumping margin for the period of review. Given the differences in commencing these two proceedings, it is not reasonable that the "allegation" requirement be retained in administrative reviews.

In addition, the court notes that the "allegation" requirement specifically states that a targeted dumping allegation must be "filed within the time indicated in § 351.301(d)(5)," a subsection that, by its own terms, applies only to investigations. 19 C.F.R. § 351.414(f)(3)

(2008); *see* 19 C.F.R. § 351.301(d)(5) (2008); *see also* Final Rule, 62 Fed. Reg. at 27,336 ("[Section] 351.301(d)(5) sets forth the time limit for a targeted dumping allegation in an [antidumping] investigation."). Therefore, the court finds that the "allegation" requirement of § 351.414(f)(3) (2008) does not apply to administrative reviews, and therefore, Commerce did not act unlawfully by self-initiating its targeted dumping analysis.

B. The "Appropriate Statistical Techniques" Requirement Applies to Administrative Reviews

Next, Stanley claims that the Final Results violate the "appropriate statistical techniques" requirement of 19 C.F.R. § 351.414(f)(1)(i) (2008) because "the Cohen's *d* [test] is not appropriately used in a targeted dumping context." Pls.' Br. 16–17.

In response, the Government argues that the "appropriate statistical techniques" requirement does not apply to administrative reviews. Def.'s Br. 11 ("Stanley fails its heavy burden of showing that Commerce's interpretation of its own regulation, 19 C.F.R. § 351.414(f), as not applying to administrative reviews, such as the one presently at issue, is not entitled to deference. As such, the Court should sustain Commerce's final results.").

Even considering Commerce's sometimes extravagant claims for deference, stating that it need not comply with the requirement that it use an appropriate statistical technique to determine if targeted dumping may be present in a review, is surprising. Having chosen to employ the same method to ferret out targeted dumping in reviews as in investigations,[17] the Department cannot willy-nilly decide to use portions of the regulations that lay out the method and discard others. Using a statistical technique that is not appropriate would simply not be reasonable. In fact, it would be an abuse of discretion to use an inappropriate statistical technique. *See Impact Steel Can. Corp. v. United States*, 31 CIT 2065, 2074, 533 F. Supp. 2d 1298, 1305 (2007). Therefore, Commerce must comply with the "appropriate statistical techniques" part of its regulation. As shall be seen, however, the court further finds that an appropriate statistical technique was used here.

[17] Commerce first used the Cohen's *d* test in the antidumping investigation *Xanthan Gum From the People's Republic of China*, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) (final determination).

II. Differential Pricing is a Reasonable Interpretation of the Statute

Stanley argues that "[a]ll three elements [of differential pricing] manifest an unreasonable interpretation of the statute and do not effectuate the statute's purpose." Pls.' Br. 18.

A. The Cohen's *d* Test

Stanley's first argument against the use of Commerce's differential pricing analysis is that the Cohen's *d* test "contravenes both congressional guidance and Commerce's obligation to calculate dumping margins as accurately as possible." Pls.' Br. 18–19 (citation omitted). According to Stanley, this is primarily because the Cohen's *d* measures the effect of an intervention, and not just the difference between two groups or sets of data, and therefore its use is inappropriate in the targeted dumping context. Pls.' Br. 19.

As an initial matter, Stanley's claims, taken as a whole, invite the court to answer the question as to whether the Cohen's *d* test, as used by Commerce, together with the ratio test constitute a reasonable way of determining if differential pricing is present. In other words, the question is whether Commerce's method is fit for the purpose to which it is put. While it may be that, were the question whether the Cohen's *d* statistic, as originally envisioned by Dr. Cohen, is a reasonable way of identifying a pattern of prices that differ significantly among purchasers, regions, or periods of time, then Stanley's arguments would have some purchase.[18] Because, however, the court is tasked with determining whether Commerce's method, as actually applied, is a reasonable interpretation of the statute (as distinct from, for instance, a reasonable interpretation of Dr. Cohen's work) it must look at what Commerce has actually done, not what the Cohen's *d* has been used for in other contexts.

Notwithstanding the origin of the Cohen's *d* as generally for use in the social sciences, Commerce states that the test "may be instructive for purposes of examining whether to apply an alternative comparison method in this administrative review" because it "is a generally recognized statistical measure of the extent of the difference between

[18] Commerce stated in its Final Results that it "has relied upon . . . a specific approach developed by Jacob Cohen called the '*d*' statistic or, as the Department has labeled it, the 'Cohen's *d* coefficient.'" Final I&D Memo at 9. As shall be seen, while there are some differences in how Commerce calculates the Cohen's *d* and the method generally used in the social sciences to determine the effect size of a particular intervention, Commerce's calculation is nevertheless based on the method developed by Dr. Cohen himself, and any differences do not make the test unrecognizable, but instead, appear to be the result of Commerce's ultimate purpose for conducting the test, *i.e.*, determining whether prices for comparable merchandise differ significantly by purchaser, region, or period of time.

the mean . . . of a test group and the mean of . . . a comparison group." Preliminary I&D Memo at 19–20. Although Stanley argues that using the Cohen's *d* test is inappropriate in the targeted dumping context, plaintiff points to no evidence demonstrating why the test cannot be used in a "business" or "finance" context or should be restricted to the social sciences. Moreover, it is not the case, as Stanley argues, that effect size may only be used to quantify the effectiveness of a particular intervention. *See, e.g.*, Robert Coe, *It's the Effect Size, Stupid* at 1. As Commerce notes:

> The difference in two prices, such as the difference in the mean prices for two groups (*e.g.*, ten dollars), has no inherent meaning unless it is relevant to a given benchmark. For example, a ten dollar difference in the price of two cars is substantially different than a ten dollar difference in the price of a hamburger. . . . For the Cohen's *d* coefficient, this examination of the price differences between test and comparison groups is relative to the "pooled standard deviation." The use of a simple average in determining the pooled standard deviation equally weighs a respondent's pricing practices to each group and the magnitude of the sales to one group does not skew the outcome. . . . The pooled standard deviation reflects the dispersion, or variance, of prices within each of the two groups. . . . When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, then this value is expressed in standardized units based on the dispersion of the prices within each group. This is the concept of an effect size, as represented in the Cohen's *d* coefficient.

Final I&D Memo at 11–12. Thus, as used by Commerce, the Cohen's *d* test performs a task frequently performed by statistical analysis by converting absolute differences to standardized variations from a mean. Here, Commerce hopes to find whether there is a "pattern of export prices" for comparable merchandise that "differ significantly" among purchasers, regions, or periods of time, as required by the statute. *See* 19 U.S.C. § 1677f–1(d)(1)(B)(i). The purpose of the Cohen's *d* test is to help determine whether the difference between two groups is significant enough to be of practical importance. *See, e.g.*, Robert Coe, *It's the Effect Size, Stupid*, at 2. In other words, Cohen's *d* can contextualize the difference between two means by using the variation found within each group of sales as a yardstick to compare the differences in prices to certain purchasers, regions, or periods of time. By looking at the results of the test, Commerce can determine how far apart the means of the two sales groups are in standardized

units, which, when combined with Cohen's general interpretation conventions, allows Commerce to contextualize the magnitude of that difference, and whether that difference is large enough to matter (*i.e.*, whether Commerce should consider the application of the A-T method).

This, to the court, is a reasonable way to determine whether prices "differ significantly" as required by the statute, particularly because, as Commerce emphasizes, simply finding a difference between the groups in terms of a dollar amount does not necessarily inform Commerce about the magnitude of that difference (*i.e.*, whether it is "significant"). Commerce has supplied an adequate explanation as to why it is useful to use a statistical analysis, such as the Cohen's *d* test (as applied by Commerce), as distinct from an arithmetical comparison. Stanley has supplied no reason why Commerce's use of the Cohen's *d* is not an appropriate statistical technique and the court cannot find one. Therefore, the court finds that Commerce's use of the Cohen's *d* test as used in Commerce's targeted dumping analysis is reasonable, adequately explained, and therefore, lawful and supported by substantial evidence.

Next, Stanley argues that Dr. Cohen's classification of effect sizes as small, medium, and large is "arbitrary" and the classifications are "neither fixed nor defined by Cohen's *d*," but are "merely conventions . . . that Jacob Cohen himself acknowledge[d] the danger of using . . . out of context." Pls.' Br. 22 (internal quotations marks omitted) ("Commerce defended [Dr. Cohen's classifications] by asserting that 'the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups.' This rationale merely relies on the obvious: something 'large' is bigger than something 'small.' It fails to explain *why* any of Cohen's classifications are appropriately used to analyze nail prices or why price differences that are a fraction (0.8) of a standard deviation mean anything at all in selling nails.").

The court is unconvinced, however, that Commerce's use of the "small," "medium," and "large" thresholds is not reasonable. First, as Commerce stated, its classifications are "generally accepted thresholds for the Cohen's *d* test" which "have been widely adopted" by practitioners using the Cohen's *d* coefficient. Final I&D Memo at 11 (internal quotation marks omitted); *see also* David M. Lane, *Difference Between Two Means* at 2. The articles referenced by Stanley[19]

[19] Stanley submitted several academic articles for the record of this review, including: *It's the Effect Size, Stupid: What Effect Size Is and Why It Is Important* by Robert Coe, and *Difference Between Two Means* by David M. Lane. *See* Stanley Submission of Factual Material (July 1, 2016), P.R. 230, bar code 3483603–01, Attachs. A, B, ECF No. 34.

demonstrate as much. *See, e.g.*, Robert Coe, *It's the Effect Size, Stupid*, at 5 ("Another way to interpret effect sizes is to compare them to the effect sizes of differences that are familiar. For example, Cohen . . . equates [an effect size of 0.8] to the difference between the heights of 13 year old and 18 year old girls.").

Moreover, Commerce does not apply the chosen thresholds in an arbitrary manner: only the "large" threshold (which Cohen generally described as a "grossly perceptible [effect size] and therefore large" and has also equated it to the difference in IQ between a Ph.D.[20] degree holder and a typical college freshman) becomes the touchstone measure of a "significant" difference in prices. Robert Coe, *It's the Effect Size, Stupid*, at 5; *see* Final I&D Memo at 11–12. Keeping in mind that the Cohen's *d* does not identify dumping, but rather a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, the use of a grossly perceptible standard is reasonable. Accordingly, the court finds that Commerce lawfully used these thresholds to help it determine which sales "pass" its Cohen's *d* test.

Stanley then argues that the Cohen's *d* is "a form of statistical inference" which should not be "used when the entire data population is known" and must generally be accompanied by a "confidence interval,"[21] which Commerce failed to provide. Pls.' Br. 23–24. In addition, Stanley claims that Commerce must account for "statistical significance" in conducting its differential pricing analysis. Pls.' Br. 25.

---

[20] While it may be that only the holder of a Ph.D. such as Dr. Cohen would have used this example, the point is well taken.

[21] In statistics, determining how well a sample statistic (*i.e.*, when the entire population is not known) estimates the underlying population value can be addressed by using a confidence interval which provides a range of values likely to contain the population parameter of interest. In *It's the Effect Size Stupid*, Coe explains how a confidence interval may be used in the context of determining effect size:

> Clearly, if an effect size is calculated from a very large sample it is likely to be more accurate than one calculated from a small sample. This 'margin for error' can be quantified using the idea of a 'confidence interval', which provides the same information as is usually contained in a significance test: using a '95% confidence interval' is equivalent to taking a '5% significance level'. To calculate a 95% confidence interval, you assume that the value you got (e.g. the effect size estimate of 0.8) is the 'true' value, but calculate the amount of variation in this estimate you would get if you repeatedly took new samples of the same size (i.e. different samples of 38 children). For every 100 of these hypothetical new samples, by definition, 95 would give estimates of the effect size within the '95% confidence interval'. If this confidence interval includes zero, then that is the same as saying that the result is not statistically significant. If, on the other hand, zero is outside the range, then it is 'statistically significant at the 5% level'. Using a confidence interval is a better way of conveying this information since it keeps the emphasis on the effect size – which is the important information – rather than the p-value.

Robert Coe, *It's the Effect Size, Stupid*, at 8.

Stanley's complaints about the use of a form of the Cohen's *d* test when the entire population is known are a bit puzzling. As Commerce notes

> the data upon which the statistical measure of effect size is based are not random samples, but rather the entire population of data (*i.e.*, the U.S. sales to each purchaser, region, and time period). Stanley has reported all of its sales of subject merchandise in the U.S. market during the [POR], and it is this data upon which the Department is basing its analysis consistent with the requirements of [19 U.S.C. § 1677f–1(d)(1)(B)], just as it has when calculating Stanley's weighted-average dumping margin. Accordingly, the Department's calculation of the Cohen's *d* coefficient includes no noise or sampling error as the underlying means and variances used to calculate the Cohen's *d* coefficient are not estimates, but the actual values based on the complete U.S. sales data as reported by Stanley in this review.

Final I&D Memo at 10–11.

This is an important observation, as normally the Cohen's *d* is used to make inferences from samples. Then, another test, a statistical significance test, is used to determine whether the findings were likely due to chance. Statistical significance and effect size are difference concepts: the former demonstrates that there is a difference between groups that is probably not the result of chance, while the latter says something about the size of the difference. *See, e.g.*, Robert Coe, *It's the Effect Size, Stupid*, at 8 ("It is important to know the statistical significance of a result, since without it there is a danger of drawing firm conclusions from studies where the sample is too small to justify such confidence. However, statistical significance does *not* tell you the most important thing: *the size of the effect*."). Because the Cohen's *d* test, as used by Commerce, employs the entire universe of data, there is no need to test for statistical significance. That is, no inference is being made from a sample. *See* Final I&D Memo at 10–11. Thus, since the entire data population is available, the concerns that normally require a finding of statistical significance using a second test and an accompanying confidence interval are not present in Commerce's differential pricing analysis.

Moreover, simply because the Cohen's *d* has traditionally been applied as a form of statistical inference (*i.e.*, a test used when only samples of a population are available), plaintiff points to no evidence tending to suggest that it cannot be used when the entire population is known. As with many statistical tests, the appropriateness of a particularly formula depends on how the problem is defined. Where, as here, Commerce has defined the problem as determining whether

the magnitude of the difference among sales is worth paying attention to (and knowing that the pricing data is not merely a sample, but represents the entire population), using the Cohen's *d* test is not unreasonable. *See* Final I&D Memo at 10–11. The Cohen's *d* has been described as the "standardised mean difference between two groups," and as such, can be useful to Commerce in finding whether there is a pattern of prices that differ significantly, as required by the statute. *See* Robert Coe, *It's the Effect Size, Stupid*, at 3. Put simply, the results of the Cohen's *d* test, where 100 percent of the sales are known, are likely to be more reliable because they do not rely on inference.

For these reasons, the court finds that Commerce's use of the Cohen's *d* test in the context of a targeted dumping evaluation is not unreasonable and that it aids in Commerce fulfilling its obligation to calculate dumping margins as accurately as possible.

B. Commerce's Calculation of the Cohen's *d*

Next, Stanley argues that "[e]ven if it were reasonable to use the Cohen's *d* statistic in a targeted dumping context, the Final Results would nevertheless be unlawful because Commerce incorrectly calculates the Cohen's *d* statistic, which inflates the Cohen's *d* coefficients and the resulting [Cohen's *d* test] 'pass' rates." Pls.' Br. 26. Stanley makes three arguments to support its position.

First, Stanley claims that the Cohen's *d* test is incorrectly calculated because Commerce "calculated the pooled standard deviation[22] in the Cohen's *d* statistic," which gives equal weight to the squared standard deviations of the test and comparison price groups, "despite irrefutable evidence that the test groups for Stanley were much smaller in volume and had smaller standard deviations than the comparison groups." Pls.' Br. 26–27. To bolster its argument, Stanley looks to the Robert Coe article it submitted, *It's the Effect Size, Stupid* (often cited by Commerce), which the company claims "is clear that where either the size or the variability of the test and comparison groups is different, the correct calculation of the pooled standard deviation in the Cohen's *d* statistic requires that the standard deviations must be weighted by size." Pls.' Br. 27 ("'The use of a pooled estimate of standard deviation depends on the assumption that the two calculated standard deviations are estimates of *the same* population value,' and '[i]nterpretation of effect-size generally depends on the assumptions that 'control' and 'experimental' group values are normally distributed and *have the same standard deviations*.'" (quot-

[22] [The pooled standard deviation is an aggregate measure of the distribution of prices (that is, the variances) within the test and comparison groups.]

ing Robert Coe, *It's the Effect Size, Stupid*, at 6, 9)). Thus, Stanley claims that, by not weighting the standard deviations of the groups, Commerce's approach effectively assumed the test and comparison groups for Stanley's CONNUMs were of equal population values with equal standard deviations from the mean. For Stanley, because the test and comparison groups are not of equal population value and do not have the same variances, Commerce's method is unreasonable.

Commerce's calculation of its Cohen's *d* test is reasonable. Stanley's argument is essentially that what Commerce calls the "Cohen's *d* test" is not actually the Cohen's *d* test, and that Commerce's tinkering with the test has resulted in an unreasonably high number of "passing" sales. It is possible that Commerce's insistence that it is applying the Cohen's *d*, rather than a variation of it, has caused some mischief. While it may be that the Department concluded that affixing a famous name to its calculations would enhance its claim that it was satisfying the injunction found in the regulation that it use "standard and appropriate statistical techniques," attaching the Cohen's *d* name has opened a world of possibilities to talented lawyers. The court reiterates, however, that the appropriateness of any statistical formula depends on how the problem is defined. Indeed, even the Coe paper, relied on by Stanley, demonstrates that there are different ways to calculate a Cohen's *d* statistic depending on population sizes and type of intervention.[23] *See, e.g.*, Robert Coe, *It's the Effect Size, Stupid*, at 10–11.

Here, the calculation of the pooled standard deviation is important because a smaller standard deviation can result in small price differences[24] having a "large" effect size (and therefore, "passing" the Cohen's *d* test). Stanley is correct in noting that the test group will likely have a smaller number of observations (and variance) than the comparison group,[25] and that in these circumstances, using a simple average of the groups' standard deviations would result in a lower pooled standard deviation than would a pooled standard deviation based on a weighted-average of the groups' standard deviations. Commerce, however, has stated that the pooled standard deviation should reflect the average pricing behavior for the two groups, and not necessarily an average of all individual sales. *See* Final I&D Memo at 12 ("The use of a simple average in determining the pooled standard

---

[23] It bears repeating that here the entire universe of sales is known, and there is no intervention.

[24] Price differences, in this case, refer to differences in the weighted-average net prices of the test and comparison groups.

[25] And indeed, the specific numbers given by Stanley show that this was the case here. Pls.' Br. 27–28.

deviation equally weighs *a respondent's pricing practices to each group* and the magnitude of the sales to one group does not skew the outcome.") (emphasis added).

Commerce's decision to use a simple average is reasonable in the targeted dumping context where the nature of the problem is to ferret out certain unlawful pricing behavior, *i.e.*, that higher priced sales are being used to mask other dumped sales. Accordingly, a standard deviation that gives equal weight to the pricing behavior toward a certain purchaser, or in a certain region or period of time, is a reasonable way to create a benchmark by which to measure the differences in a certain group of sales to the overall range of differences in the test and comparison groups. *See Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1326, 1342 (2017) ("It is discernible from Commerce's explanations that Commerce views the pooled standard deviation as an average reflective of the respondent's average pricing behavior for these two groups, rather than an average reflective of all of the individual prices.").

In the Final Results, Commerce states that its goal is to determine if an exporter's pricing behavior as to a certain purchaser, region, or period of time differs significantly from that exporter's pricing behavior as to all other purchasers, regions, or periods of time, and thus, that an exporter's pricing behavior in a "test" group is equally important to its pricing behavior in a "control" group. *See* Final I&D Memo at 12. Because of this, Commerce reasonably found that using a simple average achieved this balance:

> The pooled standard deviation reflects the dispersion, or variance, of prices within each of the two groups. When the variance of prices is small within these two groups, then a small difference between the weighted-average sale prices of the two groups may represent a significant difference, but when the variance within the two groups is larger (*i.e.*, the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sale prices of the two groups must be larger in order for the difference to perhaps be significant. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, then this value is expressed in standardized units based on the dispersion of the prices within each group. This is the concept of an effect size, as represented in the Cohen's *d* coefficient.

Final I&D Memo at 12. In other words, any price differences found using Commerce's Cohen's *d* test are relative to the variance of prices within the two groups, and thus are tailored to the individual pricing

behavior at issue. *See* Final I&D Memo at 12; *see also Soc Trang Seafood Joint Stock Co. v. United States*, 42 CIT __, __, Slip Op. 18–75, at 17 (June 21, 2018) ("Commerce's [Cohen's *d* test] evaluates whether the price variance is significant as compared to the actual prices at issue, and not as compared to some other set of prices. The statute allows Commerce to look at individual pricing behavior."). The court finds this explanation reasonable because Commerce is able to contextualize the magnitude of the pricing differences between the test and comparison groups, which helps it to determine whether there is a pattern of prices that differ significantly among purchasers, regions, or periods of time. That is, notwithstanding the difference in population and variance between the two groups, the pricing behavior in each group is of equal importance, and therefore, using a simple average to calculate the pooled standard deviation (thereby giving equal weight to the standard deviations in both groups) is reasonable.

Plaintiff's second argument is that there is an "upward bias" in Commerce's Cohen's *d* test calculations which is "systemic." Pls.' Br. 29. Stanley argues that Commerce's use of the Cohen's *d* test in the targeted dumping context, together with its method of calculating the pooled standard deviation, results in a test meant to lead to high pass rates. *See* Pls.' Br. 30. To support its position, Stanley references a chart attached to its initial case brief that reviews the preliminary results of Commerce's proceedings from March 2013 (its first use of the Cohen's *d* test in *Xanthan Gum From the People's Republic of China*) through September 30, 2016 (shortly after Commerce published the Preliminary Results of this review). Pls.' Br. 29 (citing Stanley Case Br., Addendum C, P.R. 269, bar code 3518140–01). For Stanley, the chart demonstrates that "Commerce's incorrect calculations of the Cohen's *d* coefficient generate 'pass' rates that exceed the Department's 33 percent threshold for using the A-T method in over three-quarters of the decisions."[26] Pls.' Br. 29. This upward bias,

---

[26] Specifically, Stanley claims:

> As of September 30, 2016, Commerce had issued preliminary decisions with respect to 279 respondents that exported a wide variety of merchandise ranging across an array of industries. Of these 279 respondents, the Department found only 25 not to have any sales that "passed" [Cohen's *d* test] and only 45 more to have [Cohen's *d* test] "pass" rates below the 33 percent threshold. The remaining 209 respondents included 95 respondents with [Cohen's *d* test] "pass" rates over 66 percent and three respondents with [Cohen's *d* test] "pass" rates of 100 percent. In other words, Commerce has concluded that 45 percent of the respondents in preliminary decisions each targeted more than two-thirds of their sales – and that three respondents targeted *every* sale. It makes no economic or financial sense for any one company to "target" the majority of its sales. It is unreasonable to conclude that almost half of all investigated companies do so, particularly when those companies sell a wide variety of products under an equally wide variety of market dynamics. Moreover, Commerce's conclusions that three companies targeted *all* of their sales is simply illogical – if all of a company's sales are "targeted," then none can be.

Pls.' Br. 29–30.

according to plaintiff, "leads to an unreasonably frequent use of the ratio and meaningful difference tests," which "[does] not effectively protect respondents from the bias inherent in the [Cohen's *d* test]" and ultimately results in an inappropriate use of the A-T method. Pls.' Br. 30–31.

Commerce's use of the Cohen's *d* test in the targeted dumping context is not "systemically biased" toward finding passing sales. The court has previously explained its view as to the reasonableness of using the Cohen's *d* test in the targeted dumping context as well as Commerce's calculation of the pooled standard deviation. *See supra* Part II.A, B. As to the chart cited by Stanley purporting to show an upward bias in its calculation method, the court agrees with defendant that the data fails to establish "that a bias exists in Commerce's application of the Cohen's *d* test." Def.'s Br. 22. Commerce states:

> The data show that 207 of the 276 cases cited involved a sufficient percentage of sales passing the Cohen's *d* test to consider the application of an alternative comparison methodology. Of these, the Department only applied the [A-T] method to either a portion or all of a respondent's sales in 85 of these 207 determinations. Accordingly, relying upon Stanley's own data, there does not exist a bias in the Department's application of the differential pricing analysis, including the Cohen's *d* test, based on the use of a simple average in determining the pooled standard deviation. *Around one-third of the cases to which Stanley cites resulted in the application of an alternative comparison methodology, representing less than one-half of the cases in which there existed a pattern of prices that differ significantly pursuant to the Cohen's* d *and ratio tests*.
>
> Stanley states that the data show 95 respondents with [Cohen's *d* test] "pass" rates of over 66 percent, and three with "pass" rates of 100 percent. Stanley avers that this demonstrates the unreasonableness of differential pricing because it makes no economic sense for any one company to "target" the majority of its sales, and because if *all* sales are "targeted," then none can be. This line of reasoning demonstrates a misunderstanding of how the Department determines the existence of a pattern of export prices that differs significantly among purchasers, regions, or time periods. Indeed, the focus is not on "targeting" and economic decision-making, but on the difference between export prices. For example, consider two purchasers, A and B. If the prices to purchaser A are found to differ significantly from the prices to purchaser B, then it follows that the prices to purchaser B differ significantly from the prices to purchaser A.

> Here, it is reasonable to conclude that *all* prices differ significantly. Similarly, if the prices to purchaser A do not differ significantly from the prices to purchaser B, then it follows that the prices to purchaser B do not differ significantly from the prices to purchaser A. Here, it is reasonable to conclude that *none* of the prices differ significantly. While Stanley pointed to three instances where all of the respondent's sales prices differed significantly, there are also 25 cases in the data where none of the sales prices differed significantly. This demonstrates that the Department's approach is reasonable and does not exhibit a bias; the phenomenon to which Stanley points as proof of bias is greatly outweighed by the opposite result, *i.e.* that no sales pass the Cohen's *d* test. *Accordingly, Stanley's own data demonstrate that, if anything, there is a tendency against finding a pattern of prices that differ significantly across purchasers, regions, or time periods*.

Final I&D Memo at 14–15 (emphasis added). In addition, Stanley's own numbers show that the ratio test and meaningful difference test weed out circumstances in which the A-T method need not be applied (*i.e.*, circumstances in which there is not sufficient evidence that targeted dumping may be occurring). Therefore, since less than half of the cases cited in Stanley's numbers resulted in an application of the A-T method, it is apparent that there is no unreasonable, or biased, result in Commerce's use of the Cohen's *d* test.

Finally, Stanley claims that it is "unreasonably difficult" for a respondent to revise its pricing to avoid high "pass" rates "because the standard deviations of the test and comparison groups comprising the pooled standard deviation become smaller as any differences in a respondent's prices for that CONNUM are eliminated." Pls.' Br. 31. Plaintiff then argues that Commerce's calculation fails to account for "decreases in the size of price variances that result from a respondent's efforts to eliminate differences in its prices." Pls.' Br. 32. For plaintiff, because "smaller price differences render smaller pooled standard deviations" in Commerce's application of the Cohen's *d* test, Cohen's *d* coefficients will fall into the "large" category (and thus, "pass" the Cohen's *d* test) even if a respondent attempts to attain price homogeneity. Pls.' Br. 32.

Stanley's argument appears to misunderstand the relation of the Cohen's *d* test to the statute. The Cohen's *d* test does not determine whether Commerce will calculate a dumping margin using the A-T method, but rather, is only one of two tests[27] used to determine

[27] The other test is the ratio test.

whether prices differ significantly, *i.e.*, whether there is a pattern of differing prices for comparable merchandise among purchasers, regions, or periods of time. Indeed, under the ratio test, before Commerce can even consider applying the A-T method to any of Stanley's sales, more than 33 percent of its total sales value must pass the Cohen's *d* test. In addition, even if Commerce's Cohen's *d* and ratio tests suggest there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time, such that Commerce may consider the application of the A-T method, it still must explain why the A-A method cannot account for these differences.

As the Department noted, "[a] company may sell subject merchandise in the United States market at significantly different prices, yet none of these sales are priced at less than normal value," and that in such situations, "the [A-A] method will be able to account for such differences" because there are no dumped sales. Final I&D Memo at 15. Moreover, in the hypothetical suggested by plaintiff, where an exporter has changed its pricing practices to attain near homogeneity, there will likely not be a "meaningful difference" between the margin calculated using the A-A method and that calculated using the A-T method. This is because, under such circumstances, the weighted-average export price (*i.e.*, the export price calculated using the A-A method) would be very close to the price of individual transactions in the United States, and therefore, the A-A method would be deemed able to account for such differences. *See infra* Part II.C.ii. Thus, high Cohen's *d* pass rates do not automatically lead to the application of the A-T method. In any event, all that is required of Commerce under the statute at this stage in its analysis is to determine whether "there is a pattern of export prices (or constructive export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f–1(d)(1)(B)(i). Commerce's calculation of the Cohen's *d* test, in conjunction with its ratio test, is a reasonable method for making this determination.

C. Differential Pricing Does Not Contravene the Statute

i. The Ratio Test

Following the Cohen's *d* test, Commerce uses the "ratio test" to "assess[] the extent of the significant price differences for all sales as measured by the Cohen's *d* test." Preliminary I&D Memo at 20. If the value of sales to certain purchasers, regions, and time periods that "pass" the Cohen's *d* test accounts for 66 percent or more of the value of a respondent's total sales, then, for Commerce, "the identified pattern of prices that differ significantly supports the consideration of

the application of the [A-T method] to all sales . . . .” Preliminary I&D Memo at 20. If the value of passing sales accounts for 33 percent or less of the value of a respondent’s total sales, however, then the results do not support the application of the A-T method to any of the respondent’s sales. If the value of passing sales is between 33 and 66 percent of the value of a respondent’s total sales, then Commerce may consider the application of the A-T method for all passing sales, but the A-A method will be used for all remaining sales. *See* Preliminary I&D Memo at 20.

Stanley argues that the differential pricing analysis fails to meet either of the two preconditions necessary before Commerce may apply the A-T method under 19 U.S.C. § 1677f– 1(d)(1)(B). Pls.’ Br. 32. That is, for Stanley, the differential pricing analysis does not identify a “pattern” of prices that differ significantly among purchasers, regions, or periods of time, nor does it explain why the A-A method cannot account for such differences. Stanley asserts that this is because (1) the “ratio” test merely “stratifies Cohen’s *d* test pass rates,” it does not describe a pattern; and (2) the meaningful difference test fails to explain why Commerce cannot account for a perceived price difference using the A-A method. Pls.’ Br. 33, 35.

Defendant responds that “Commerce explained in the final results how the stratification of pass rates under the Cohen’s *d* test identifies a pattern of prices that differ significantly.” Def.’s Br. 26. According to defendant, Commerce uses the ratio test to “complete its determination of whether there exists a pattern of prices that differ significantly by purchaser, region, or period of time” because, even if sales for one or more groups of comparable merchandise may pass the Cohen’s *d* test, “it does not necessarily follow that, in relation to the total volume of a respondent’s export sales, there is sufficient evidence that a pattern of prices exists that differ significantly.” Def.’s Br. 26. In other words, for Commerce, the ratio test completes Commerce’s determination of whether a pattern of prices exists that differ significantly by “assess[ing] the extent of the significant price differences for all sales as measured by the Cohen’s *d* test.” Preliminary I&D Memo at 20.

Commerce has reasonably explained how the ratio test, in conjunction with the Cohen’s *d* test, satisfies 19 U.S.C. § 1677f–1(d)(1)(B)(i) (*i.e.*, how the tests identify a “pattern of export prices” for comparable merchandise that “differ significantly among purchasers, regions, or periods of time.”). Here, Commerce has found that, when the value of a respondent’s U.S. sales that “pass” the Cohen’s *d* test accounts for more than 33 percent of the value of its total sales, this indicates a

pattern of price differences exists such that Commerce may consider applying the A-T method to a limited amount of the respondent's sales. *See* Final I&D Memo at 18. Likewise, Commerce maintains that when the value of a respondent's U.S. sales that "pass" the Cohen's *d* test accounts for 66 percent or more of the value of its total sales, this indicates there exists a pattern of price differences such that Commerce may consider applying the A-T method to all of the respondent's sales. *See* Final I&D Memo at 17–18. By creating these thresholds, Commerce reasonably identified when price differences are more than just random occurrences, *i.e.*, when a "pattern" exists. Indeed, in order for Commerce to apply A-T to all of a respondent's sales, most of the respondent's sales (roughly two thirds) must have "passed" the Cohen's *d* test, a threshold unlikely to be the result of chance.

This method is a reasonable one for meeting the prerequisite of § 1677f–1(d)(1)(B)(i), particularly since the statute gives no guidance as to how Commerce should make its determination. 19 U.S.C. § 1677f–1(d)(1)(B); *see also* Final I&D Memo at 17 ("Neither the statute nor the SAA[28] provide any guidance in determining how to apply the [A-T] method once the requirements of [19 U.S.C. § 1677f–1(d)(1)(B)(i)] and (ii) have been satisfied. Accordingly, the Department has reasonably created a framework to determine how the [A-T] method may be considered as an alternative to the standard [A-A] method based on the extent of the pattern of prices that differ significantly as identified with the Cohen's *d* test."). Commerce was faced with the task of creating a method for determining when it should use the A-T method. Stanley has failed to show that Commerce's method does not do what it is supposed to do. Accordingly, the court finds that Commerce's use of the ratio test is a reasonable interpretation of § 1677f– 1(d)(1)(B)(i).

ii. The Meaningful Difference Test

Under the meaningful difference test, Commerce first calculates the dumping margin that would result by applying the A-A method to all sales, *i.e.*, Commerce calculates a dumping margin the same way that it would absent any targeted dumping procedures. Commerce then calculates two additional dumping margins: (1) by applying the A-T

[28] [Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA"), H.R. Doc. No. 103–316, vol. 1, at 842–43, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177–78. The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).]

method to all sales that passed the Cohen's *d* test and the A-A method to the remaining sales, and (2) by applying the AT method to all sales.[29] Preliminary Analysis Memorandum at 16. Depending on the results of the ratio test,[30] Commerce then compares (1) the margin calculated under its normal method (*i.e.*, using the A-A method), and (2) the dumping margin calculated using the A-T method, to determine if there is a "meaningful difference" between the two. Preliminary I&D Memo at 20. Commerce considers there to be a "meaningful difference" when the comparison demonstrates (1) that there is a 25 percent relative change in the weighted-average dumping margin between the A-A method and the appropriate A-T method where both margins are above the *de minimis* threshold; or (2) that the A-T method generates a dumping margin that crosses the *de minimis*-threshold when compared to the A-A method. If a meaningful difference exists, Commerce infers that the A-A method is unable to account for the price differences among particular purchasers, regions, or in particular periods of time (*i.e.*, that the A-A method would not "unmask" observed pricing differences which evidence targeted dumping). *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1348 (Fed. Cir. 2017) ("*Apex II*") ("Commerce's meaningful difference analysis—comparing the ultimate antidumping rates resulting from the A-A methodology, without zeroing; and the A-T methodology, with zeroing—was reasonable.").

Notwithstanding the Federal Circuit's approval of Commerce's meaningful difference test[31] (applied and explained in the same manner as Commerce has done so here), Stanley argues that the Court has not addressed its argument, which is that the meaningful difference test is "flawed methodologically" because Commerce performs

---

[29] While Commerce states that "the Department tests whether using an alternative comparison method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the [A-A] method only," Preliminary I&D Memo at 20, the Amended Final Results Analysis Memo shows that Commerce actually calculated three margins: (1) by applying the A-A method to all sales; (2) by applying the A-T method to those sales that passed the Cohen's *d* test and the A-A method to all remaining sales; and (3) by applying the A-T method to all sales. *See* Amended Final Results Analysis Memo at 2. The Department then, based on the results of the ratio test, selects the appropriate A-T method and compares that margin to the margin calculated using the A-A method. Amended Final Results Analysis Memo at 2.

[30] As described above, the sales to which Commerce will apply the A-T method (provided a "meaningful difference" is found) depends on the results the ratio test. If the results of the ratio test indicate that passing sales represent 66 percent or more of a respondent's total sales value, Commerce will use the margin calculated by applying A-T to all sales for its "meaningful difference" comparison. If the passing sales represent more than 33 percent and less than 66 percent of a respondent's sales, then Commerce will use the margin calculated using the A-T method on passing sales and the A-A method on remaining sales.

[31] *Apex II*, 862 F.3d at 1348.

it's A-A and A-T comparison "based on Stanley's *total sales* even though it performed the [Cohen's *d* test] based on *sales of individual CONNUMs*." Pls.' Br. 37, 39–40 ("By separating the basis for its determination of a meaningful difference from the specific products that displayed significant price differences Commerce failed to meet its statutory burden to explain why [the A-A method] could not account for those price differences . . . ."). Therefore, Stanley claims that "the methodological error that is fatal to the meaningful difference test was not at issue" in *Apex II*. Pls.' Br. 37; *see also* Pls.' Reply Br., ECF No. 32, 12 ("While the Federal Circuit was explicit in approving Commerce's rationale . . . it has not addressed . . . the question Stanley has raised here concerning whether Commerce's specific implementation of the meaningful difference test contravenes 19 U.S.C. § 1677f–1(d)(1)(B)(ii).").

For Stanley, the absence of a "reasonable nexus" between the meaningful difference test and the Cohen's *d* test not only "produce[s] distorted results," but also represents an unreasonable interpretation of 19 U.S.C. § 1677f–1(d)(1)(B). Pls.' Br. 37. Stanley's argument is based on its reading of the "such differences" language found in § 1677f–1(d)(1)(B)(ii)'s requirement that Commerce "explain why *such differences* cannot be taken into account using [the A-A] method . . . ." 19 U.S.C. § 1677f–1(d)(1)(B)(ii) (emphasis added).[32] Stanley claims that the "such differences" language references the "prices" portion of the "pattern of export *prices* for comparable merchandise that *differ* significantly" language found in the statute. Pls.' Br. 37 (citing 19 U.S.C. § 1677f–1(d)(1)(B)(i) (emphasis added)); Transcript of Oral Argument, ECF No. 40 at 6–7. Thus, because Commerce found significant pricing differences using a CONNUM-specific approach (the Cohen's *d* test), Stanley argues that Commerce must also conduct its meaningful difference test on a CONNUM-specific basis, *i.e.*, by applying the A-A method to sales of individual CONNUMs, rather than to Stanley's overall sales.

Although the Federal Circuit did not specifically address the argument raised by Stanley, its holding nonetheless directs the court to

[32] Section 1677f–1(d)(1)(B) provides:

> [Commerce] may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) [Commerce] explains why *such differences* cannot be taken into account using [the A-A method] . . . .

19 U.S.C. § 1677f–1(d)(1)(B) (emphasis added).

find for the Government. As the *Apex II* Court noted, "Commerce devised its meaningful difference test, in which antidumping rates—*as they would ultimately be applied for the A-A methodology versus an alternative*—are compared, across *all sales*," and concluded that "there is no basis (statutory or otherwise) for demanding a distinction between the meaningful difference analysis and the ultimate margin calculation." *Apex II*, 862 F.3d at 1346, 47 (emphasis added). Thus, the Federal Circuit was fully aware of the method by which the meaningful difference test was conducted and approved its use. Also, in "assess[ing] whether Commerce's reading of the statute was permissible and whether its implementation was otherwise . . . unreasonable," the Federal Circuit specifically found that the meaningful difference test, that is, "comparing the ultimate antidumping rates resulting from the A-A methodology" with the appropriate A-T method, "was reasonable." *Id.* at 1348.

Here, as Commerce states, "finding that there exists a pattern of prices that differ significantly means only that the Department will consider whether the standard comparison methodology can account for such differences," *i.e.*, whether using the A-A method as it would ultimately be applied could account for the pattern of price differences found using the Cohen's *d* test. Final I&D Memo at 15. For Commerce, "comparing the weighted-average dumping margins calculated using the two comparison methods allows the Department to quantify the extent to which the [A-A] method cannot take into account different pricing behaviors exhibited by the exporter in the U.S. market." Final I&D Memo at 13. The court agrees. The meaningful difference test fulfills the statutory requirement that Commerce explain why the A-A method cannot account for the perceived pattern of pricing differences. Moreover, the Federal Circuit has noted that "[u]nder a plain reading of the statute [19 U.S.C. § 1677f–1(d)(1)(B)(ii)], the use of 'such differences' does not, in itself, manifest Congress's intent to dictate how Commerce is to make the determination whether the A-A method[] can account for potential targeted or masked dumping." *Apex II*, 862 F.3d at 1345. Thus, Commerce's approach has been approved by the Federal Circuit, and the court therefore finds that it was also reasonable here.

Accordingly, the court finds the meaningful difference test, as applied, to be lawful under 19 U.S.C. § 1677f–1(d)(1)(B)(ii).

D. Differential Pricing Does Not Contravene Congressional Intent as Expressed in the Legislative History

In the Final Results, Commerce found that 77.8 percent of Stanley's U.S. sales "passed" the Cohen's *d* test, and therefore, using the ratio test,[33] applied the A-T method to all of Stanley's sales for the POR. Amended Final Results Analysis Memorandum at 2. Notably, Commerce deemed sales to have "passed" the Cohen's *d* test whether they passed because the test group's sales were higher priced than the comparison group or lower priced than the comparison group, with no inquiry into whether passing sales were actually dumped.[34] Final I&D Memo at 16. Stanley argues that "Commerce's failure to limit its targeting analysis to sales that 'pass' the [Cohen's *d* test] with 'low' prices conflicts with the SAA's express statement that 'targeted dumping' comprises prices that are *both* dumped and below prices 'to other customers.'" Pls.' Br. 42 ("[T]he standard described in the SAA is prices 'to other customers,' not a price to 'any other customer,' evidencing Congress' intent that the possibility of targeted dumping is to be measured in relation to prices below the general norm."). Thus, for plaintiff, "[b]y embracing higher than normal price sales as evidence of 'targeting,'" the differential pricing analysis "contravenes Congress's intent as to what comprises the problem—targeted dumping—that Commerce is authorized to address." Pls.' Br. 42. Stanley thus argues that Commerce's approach does not properly address targeted dumping, as it is supposed to, because Commerce considers sales that are sold at a higher price than other sales to be evidence of targeted dumping.

Stanley then claims that "embracing higher than normal prices as evidence of 'targeting' is conceptually absurd." Pls.' Br. 43. Stanley reasons that because "[t]he only rational reason to 'target' is to gain sales," a seller cannot "successfully gain sales by charging the allegedly 'targeted' customer a higher price than it charges other customers for identical merchandise." Pls.' Br. 43. Therefore, Stanley claims that the Final Results are unlawful because they ignore the intent of the statute as articulated in the SAA to focus only on sales that were lower than the norm. Pls.' Br. 43.

---

[33] As discussed above, the ratio test provides that if the value of sales to certain purchasers, regions, and time periods that "pass" the Cohen's *d* test account for 66 percent or more of the value of a respondent's total sales, then Commerce considers there to be an "identified pattern of prices that differ significantly" such that it may consider the application of the A-T method to all sales. Preliminary I&D Memo at 20.

[34] That is, as long as there was a 0.8 standard deviation difference between the test and comparison groups, Commerce considered the sales to have passed the Cohen's *d* test.

The court is not persuaded that the differential pricing analysis runs counter to congressional intent. As an initial matter, the statute does not specify whether prices must "differ" by being priced lower or higher than comparison sales. *See* 19 U.S.C. § 1677f–1(d)(1)(B). Thus, Commerce has not violated the plain language of the statute. Moreover, as the Department emphasized, "higher priced sales will offset lower priced sales, either implicitly through the calculation of a weighted-average sale price for a U.S. averaging group, or explicitly through the granting of offsets when aggregating the [A-A] comparison results, that can mask dumping." Final I&D Memo at 16. Therefore, when Commerce calculates the weighted-average export price (or constructed export price) for sales included in a particular averaging group,[35] higher priced sales may drive the averaging group's export price up, potentially concealing dumped sales within the group. In addition, when aggregating the results of the averaging groups to determine the weighted-average dumping margin, higher priced sales could result in averaging groups for which the weighted-average export price exceeds the weighted-average normal value, which would offset the results of any averaging groups for which the weighted-average export price is less than the weight-average normal value. Therefore, higher priced sales are relevant to Commerce's analysis. This is consistent with the SAA's description of "concealed" targeted dumping, which, according to the text, occurs when "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions." SAA at 842, 1994 U.S.C.C.A.N. at 4177–78. Thus, considering that the purpose of applying the A-T method is to unmask targeted dumping, Commerce's consideration of "higher priced" sales (which may mask lower priced, or dumped, sales) is reasonable.

As to Stanley's argument that the SAA links "targeting" with "dumping," the court is also not convinced that the only sales relevant when determining whether prices differ significantly are those that are lower priced than the comparison group. First, the SAA mentions that the targeted dumping statute (19 U.S.C. § 1677f–1(d)(1)(B)) will provide a comparison method in situations where the A-A or T-T method cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, "where targeted dumping *may* be occurring." SAA at 843, 1994 U.S.C.C.A.N. at 4178 (emphasis added). This statement does not, on its face, confine Com-

---

[35] An averaging group consists of "subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade." 19 C.F.R. § 351.414(d)(2).

merce's method to solely analyzing sales at less than fair value, nor does it require Commerce to make an affirmative finding of targeted dumping. *See Stanley Works (Langfang) Fastening Sys. Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1172, 1191 (2017). As has been previously stated, the Cohen's *d* test in no way measures dumping—it only identifies a pattern of differing prices. In fact, every sale used to reach a finding that there was such a pattern could be dumped or not dumped. That is, merely because a sale is high in relation to the mean does not tell Commerce anything about whether or not it is a sale at less than fair value (*i.e.*, "dumped"). At the initial stage of its analysis, Commerce is only tasked with determining whether there is a pattern of prices that differ significantly. If such a pattern is found, Commerce will consider whether the A-A method can account for these differences, and if it cannot, the SAA considers this to be evidence that targeted dumping may be occurring.

In addition, the SAA itself anticipates that targeted dumping encompasses "situations [in which] an exporter may sell at a dumped price to particular customers or regions, while selling at *higher prices* to other customers or regions" and thus, explicitly considers higher priced sales to be relevant. SAA at 842, 1994 U.S.C.C.A.N. at 4177–78 (emphasis added). Thus, not only does the SAA contemplate considering higher prices in the targeted dumping context, but also, as the Department states, by "considering all sales, higher priced sales and lower priced sales, the Department is able to analyze an exporter's pricing practice and to identify whether there is a pattern of prices that differ significantly" by purchaser, region, or period of time. Final I&D Memo at 16. As this Court has found, "[a]ll sales are subject to the differential pricing analysis because its purpose is to determine to what extent a respondent's U.S. sales are differentially priced, not to identify dumped sales," and therefore, "Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-T is appropriate." *Apex I*, 144 F. Supp. 3d at 1330.

In the end, plaintiff's argument appears to conflate passing the Cohen's *d* test with the application of the A-T method and ultimately "unmasking" targeted dumping. The latter, however, requires not only a finding of a pattern of prices that differ significantly among purchasers, regions, or periods of time, but also an explanation as to why the A-A method cannot account for such differences and a finding of dumping using A-T. These are separate analyses, and a high result in the first does not necessarily determine the result of the second. Therefore, the court finds that the differential pricing analysis is not

inconsistent with congressional intent, and Commerce reasonably considered both higher priced sales and lower priced sales in evaluating whether there exists a pattern of export prices that differ significantly among purchasers, regions, or periods of time.

E. Commerce's Implementation of the Differential Pricing Analysis is Reasonable

Next, Stanley argues that the procedure Commerce uses to form comparison groups in its differential pricing analysis also results in high Cohen's *d* test pass rates, and therefore, is an unreasonable interpretation of the statute. According to Stanley, this is because Commerce includes sales from test groups that "pass" the Cohen's *d* test in its base (or "comparison") groups, thereby causing other sales to "pass" the Cohen's *d* test that otherwise would not have passed. Pls.' Br. 44–45. Plaintiff thus argues that "when Commerce finds a sale in a test group to pass the [Cohen's *d* test], it nevertheless includes the anomalous price of that sale in the comparison (*i.e.*, base) group used to evaluate the prices of other test groups," which results in "passing" sales that would otherwise not pass. Pls.' Br. 45. Therefore, plaintiff argues, Commerce is double-counting irregular sales prices.

Plaintiff then maintains that the problem is exacerbated because of Commerce's "refusal to consider any of the many circumstances of sale that cause net prices to vary" such as movement costs, credit costs, or warranty costs. Pls.' Br. 45. As a result, plaintiff argues, even if a respondent sells products having the same CONNUM to all customers at the same gross price, adjustments to the U.S. selling price could nonetheless cause a sale to "pass" the Cohen's *d* test. Pls.' Br. 45–46. For Stanley, it is unreasonable for Commerce to conduct the Cohen's *d* test at a net price level because "the antidumping statute overtly recognizes the potential for different circumstances of sale to distort the calculation of dumping margins," and therefore, "expressly directs Commerce to correct for such distortions by adjusting normal values." Pls.' Br. 46 (citing 19 U.S.C. § 1677b(a)(6)(C)[36]). Stanley thus claims that "[i]t is unreasonable for Commerce to ac-

[36] Title 19 U.S.C. § 1677b(a)(6)(C) provides, in pertinent part, that the normal value shall be

> increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of [Commerce] to be wholly or partly due to . . . other differences in the circumstances of sale.

19 U.S.C. § 1677b(a)(6)(C)(iii).

count for differences in circumstances of sale when calculating dumping margins[37] but not when determining whether such dumping was targeted." Pls.' Br. 46.

The court finds that Commerce's method is reasonable. As to plaintiff's double-counting theory, the court agrees with this Court's analysis in *Timken*:

> The purpose of Commerce's [differential pricing] analysis is to find a pattern of prices that differ significantly . . . . Under Commerce's methodology, even if some sales are included in a test group and later in a comparison group, their value is counted only once in the numerator of the ratio [test] if they pass Cohen's *d*.

Timken, 179 F. Supp. 3d at 1178–79. Put simply, in determining whether the total value of sales that "pass" the Cohen's *d* test is such that Commerce might consider the application of the A-T method (*i.e.*, whether the value of passing sales is greater than 33 percent of a respondent's total sales value), Commerce counts the value of any particular passing sale only once in the numerator.

Moreover, to remove passing sales from subsequent comparison groups because they are, as Stanley suggests, "anomalous" would lead to inconsistent results. As Commerce stated:

> If the weighted-average price to purchaser A differs significantly from the weighted-average price to purchaser B, then the weighted-average price to purchaser B also differs significantly from the weighted-average price to purchaser A. Stanley's suggestion, that once the Department finds that the weighted-average price to purchaser A differs significantly from the weighted-average price to purchaser B, then the sales prices to purchaser A should be excluded henceforth from the analysis, is illogical. This would result in no comparison being made for the weighted-average price to purchaser B. Further, if purchaser B's sales were tested first, then purchaser A's sales would not be tested. Such an approach would lead to arbitrary and unpredictable results that would depend upon the order in which purchasers, regions or time periods were examined.

Final I&D Memo at 18–19. Similarly, if sales from purchaser A to purchaser B were found not to have passed the Cohen's *d* test, then so too will the sales from purchaser B to purchaser A, and the value of

[37] [As noted above, to calculate a dumping margin, Commerce determines the difference between the export price (or constructed export price) and the normal value of the product.]

both will be included in the denominator of the ratio test. *See Timken*, 179 F. Supp. 3d at 1178–79. Stanley's argument does not make Commerce's rationale unreasonable.

In addition, the court finds that the use of net prices in the differential pricing analysis is a reasonable interpretation of the statute. As the Department states, its "analysis is to determine whether the [A-A] method is appropriate to measure the amount of dumping for a respondent" and that to "calculate a weighted-average dumping margin . . ., the Department uses net U.S. prices . . . ." Final I&D Memo at 13. Therefore, Commerce considered the use of net prices "consistent with the view that discounts, rebates and similar price adjustments are not expenses, but instead form part of the price itself." Final I&D Memo 13. This interpretation is reasonable as it appears to implement the intent of the statute (*i.e.*, to determine whether the A-A method is the appropriate tool with which to measure a respondent's dumping). Also, as Commerce emphasized, "the use of net U.S. prices would increase the variability of the sale prices within a group and thus require a larger difference in the weighted-average sale prices between the two groups . . . ." Final I&D Memo at 14. Therefore, the court finds that Commerce's use of net prices in its differential pricing analysis is a reasonable interpretation of the statute.

At bottom, plaintiff once again appears to conflate passing the Cohen's *d* test with the application of the A-T method, and ultimately, a finding that there is targeted dumping. As discussed above, (1) finding a pattern of prices that differ significantly among purchasers, regions, or periods of time, and (2) explaining why the A-A method cannot account for such differences are two separate analyses. The results of the former does not necessarily determine the result of the latter. Accordingly, the court finds that Commerce's differential pricing analysis is a reasonable interpretation of 19 U.S.C. § 1677f–1(d)(1)(B).

III. The World Trade Organization Appellate Body Decision

Finally, Stanley argues that the World Trade Organization ("WTO") Appellate Body decision in *United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*[38] demonstrates that Commerce has interpreted and applied 19 U.S.C. § 1677f–1(d)(1)(B) in an unreasonable manner that is inconsistent with the United States' international obligations. Pls.' Br. 47. Specifically, plaintiff argues that Commerce's differential pricing analysis violates

[38] Appellate Body Report, *United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R (adopted Sept. 7, 2016).

the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 because (1) "Commerce did not limit its 'pattern' analysis [to] sales that 'pass' the [Cohen's *d* test] because they are lower than the comparison group mean"; and (2) "Commerce employed a rote application of a series of mathematical formulae in the guise of 'tests'. . . while ignoring the nature of any factors causing price differences . . . and thus considered only quantitative criteria."[39] Pls.' Reply Br. 18 (citing the Appellate Body Report, *United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, ¶¶ 101, 102, WTO Doc. WT/DS464/AB/R (adopted Sept. 7, 2016)). In other words, Stanley uses *Washers from Korea* to illustrate its view that Commerce's interpretation of what constitutes "a *pattern* of export prices . . . for comparable merchandise that differ *significantly* among purchasers, regions, or periods of time" pursuant to 19 U.S.C. § 1677f–1(d)(1)(B) is unreasonable because it violates the WTO agreement. *See* Pls.' Br. 47 (emphasis added).

This argument is unconvincing. WTO decisions are irrelevant to the interpretation of domestic U.S. law. *See* 19 U.S.C. § 3512(a)(1) ("Nothing in [the Uruguay Round Agreements Act] shall be construed . . . to amend or modify any law of the United States."); *see also Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005) ("WTO decisions are 'not binding on the United States, much less this court.'" (quoting *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004))); *see also Corus Staal BV*, 354 F.3d at 1346 ("Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law."). Further, "[t]he SAA provides that '[r]eports issued by . . . the Appellate Body under the [WTO Dispute Settlement Understanding] have no binding effect under the law of the United States . . . [and] do not provide legal authority for federal agencies to change their regulations or procedures.'" *Corus Staal BV v. U.S. Dep't of Commerce*, 27 CIT 388, 399, 259 F. Supp. 2d 1253, 1264 (2003) (citing SAA at 1032, 1994 U.S.C.C.A.N. at 4318).

Issues brought before WTO panels and the Appellate Body deal with whether a country is complying with the terms of the WTO

[39] The court notes that, in its opening brief, plaintiff argued that (1) "Commerce did not limit its 'pattern' analysis to sales that 'pass' the [Cohen's *d* test] because they are lower than the comparison group mean"; (2) "Commerce applied the A-T comparison methodology to all of Stanley's sales"; (3) "Commerce employed a rote application of a series of mathematical formulae in the guise of 'tests'"; and (4) "Commerce used A-T with zeroing both in the meaningful difference test and in the calculation of Stanley's dumping margin" in contravention of the *Washers from Korea* Appellate Body decision. Pls.' Br. 47–48. In its reply brief, however, plaintiff claims that only "[t]wo of [the Appellate Body's] reasons [why differential pricing violates the Agreement] support a conclusion that the Final Results are unreasonable and should be remanded." Pls.' Reply Br. 18. Accordingly, the court will address only the two arguments that remain in plaintiff's subsequent reply brief.

Agreement. *See Corus Staal BV v. United States*, 29 CIT 777, 786, 387 F. Supp. 2d 1291, 1300 (2005). Cases brought before the Court of International Trade present questions dealing with domestic U.S. law. *Id.* ("In sum, the WTO decision-making process operates apart from the decision-making in this court. WTO decision-making starts with an international agreement, which may not match the domestic statute and which is interpreted pursuant to different principles."). Commerce's interpretation of a statute might well be a perfectly reasonable interpretation of U.S. law and nonetheless be found to violate the WTO Agreement, as, for instance, was the case with zeroing. *See, e.g.*, *id.* Thus, plaintiff's argument that the Appellate Body's decision in *Washers from Korea* somehow shows that Commerce's interpretation and implementation of the targeted dumping statute is unreasonable under U.S. law is far wide of the mark.

CONCLUSION

For the foregoing reasons, the court finds that Commerce's method is a reasonable one for determining if targeted dumping may be occurring and therefore denies plaintiff's motion for judgment on the agency record. Commerce's Final Results are sustained. Judgment shall be entered accordingly.

Dated: August 13, 2018
New York, New York

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

Slip Op. 18–100

NATURAL RESOURCES DEFENSE COUNCIL, INC., CENTER FOR BIOLOGICAL DIVERSITY, AND ANIMAL WELFARE INSTITUTE, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, CHRIS OLIVER, in his official capacity as Assistant Administrator of the NATIONAL MARINE FISHERIES SERVICE, NATIONAL MARINE FISHERIES SERVICE, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 18–00055

[Addressing defendants' motion to clarify and issuing an updated order.]

Dated: August 14, 2018

Giulia C.S. Good Stefani and *Daniel N. Carpenter-Gold*, Natural Resources Defense Council, of Santa Monica, CA, argued for plaintiffs. With them on the brief were *Stephen Zak Smith* for plaintiff, Natural Resources Defense Council Inc. and *Sarah Uhlemann*, of Seattle, WA, for plaintiffs, Center for Biological Diversity, and Animal Welfare Institute.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief were *Jason Forman*, National Oceanic and Atmospheric Administration, of Silver Spring, MD; *Daniel J. Paisley*, Department of the Treasury, of Washington, DC; and *Glenn Kaminsky*, Department of Homeland Security, of New York, NY.

OPINION

Katzmann, Judge:

On July 26, 2018, presented with the desperate plight of the vaquita—the world's smallest porpoise, now on the verge of extinction as they are caught and strangled in the gillnets of fisheries in the Northern Gulf of California in Mexican waters—this Court granted "plaintiffs' [Natural Resources Defense Council, Center for Biological Diversity, and Animal Welfare Institute] motion for a preliminary injunction requiring the Government, pending final adjudication of the merits, to ban the importation of all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range." *Nat. Res. Def. Council v. United States*, 42 CIT ___, Slip Op. 18–92 (July 26, 2018) ("*NRDC I*") at 49. The Government (herein the collective reference to several United States agencies and officials) now returns to this Court, seeking to limit the scope of the preliminary injunction and also to question whether the preliminary injunction is effective immediately.

The Court must observe that in the short days that have intervened since the issuance of the preliminary injunction, there has been no reduction in the risk to the vaquita by gillnet death, and it is undisputed that "even one more bycatch death in the gillnets of fisheries in its range threatens the very existence of the species." *NRDC I* at 48. The Court todays holds that there should be no doubt, as *NRDC I* made clear, that the Government is enjoined and ordered to ban the importation from Mexico of all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range. Furthermore, as that opinion also makes clear, there is a real danger that the vaquita will disappear from the planet. Consequently, the import ban ordered by the Court pursuant to the Marine Mammal Protection Act ("MMPA") is effective immediately. Finally, to facilitate future action, the Court issues an updated order, reproduced in the Appendix below.

BACKGROUND

The Court explained in *NRDC I* that the vaquita is a critically endangered marine mammal endemic to the northern Gulf of California, in Mexican waters. *NRDC I* at 2. It is the world's smallest porpoise, measuring only about five feet long and weighing one hundred pounds. *Id.* The vaquita's population has plummeted from 567 in the late 1990s, when it was first surveyed, to approximately fifteen today. *Id.* The status of the species is so precarious that even one mortality could increase the likelihood of extinction. *Id.* It is undisputed that the cause of the vaquita's precipitous decline is its inadvertent tangling, strangulation, and drowning in gillnets, which are fishing nets hung in the water to entangle fish and shrimp. *Id.*

In the hopes of avoiding exactly this type of disaster, Congress in 1972 enacted the MMPA, Pub. L. No. 92–522, 86 Stat. 1027 (codified as amended in scattered sections of 16 U.S.C.). That Act commands "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371 (a)(2). Invoking the conditional ban on imports of fish and fish products found in Section 101(a)(2) of the MMPA, 16 U.S.C. § 1371(a)(2) (2012),[1] also known as the Imports Provision, plaintiffs brought this action on March 21, 2018 in the United States Court of International Trade. Plaintiffs sought an injunction requiring the Government to ban the import of fish or fish products from any Mexican commercial fishery that uses gillnets within the vaquita's range. Orig. Compl., ECF No. 1; Summ., ECF No. 2; Compl. at 19.

In *NRDC I*, the Court explained that the vaquita's range is approximately 4,000 square kilometers in size, and overlaps with commercial fisheries that target shrimp, curvina, chano, and sierra, and with an illegal fishery targeting the endangered totoaba. *NRDC I* at 9–10. The Court noted that gillnet fishing for curvina and sierra remains legal, while fishing for shrimp and chano with gillnets inside the vaquita's range is illegal, but continues anyway. *Id.* at 6–7. Curvina, chano, and sierra fishing occurs year-round in the northern Gulf of California, while shrimp fishing occurs from September to March. *Id.* at 9–10. Plaintiffs and the Government agree that, though the vaquita is not a target of Mexican fishermen, it is threatened and inadvertently killed by gillnets deployed to capture these other species with which it shares its territory. The parties also agree that the vaquita is on the verge of extinction as a result.

[1] Subsequent references to sections of federal statutes are to the relevant portions of the official 2012 edition of the United States Code.

After consideration of the parties' filings and all the appropriate factors, the Court denied the Government's motion to dismiss and, as noted, granted "plaintiffs' motion for a preliminary injunction requiring the Government, pending final adjudication of the merits, to ban the importation of all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range." On August 3, 2018, the Government moved to clarify the Court's *Order*, "in particular the specific species covered by the injunction." Def.'s Mot. to Clarify ("Def.'s Br.") at 1, ECF No. 34. Plaintiffs responded to the Government's motion on August 6, 2018. Pl.'s Resp. to Def.'s Mot., ECF No. 36.[2] The parties participated in a teleconference with the Court on August 7, 2018.

In the "Motion to Clarify," now before this Court, the Government asserts that the Court's *Order* is unclear as to the fisheries that are covered under the importation ban and as to the effective start date of the ban because: the MMPA does not generally apply to illegal commercial fisheries and therefore that Northern Gulf of California shrimp and chano commercial gillnet fisheries are excluded from the scope of the preliminary injunction; other federal statutes, namely the Lacey Act and the Magnuson-Stevens Fishers Conservation and Management Act ("Magnuson-Stevens Act") render inoperative the express duty imposed by the MMPA; and the purported regulatory challenges of implementation make immediate implementation impossible. The Court rules that there should be no doubt that: (1) the ban on the importation of commercial fish mandated by the MMPA is not limited to legal fisheries, but applies to illegal fisheries as well; (2) as is clear from the Court's opinion in *NRDC I*, the Government is enjoined and ordered to ban the importation from Mexico of all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range; (3) other laws may also restrict the import of some of the fish covered by the ban does not bar from the Court from preliminarily enjoining the Government to ban importation under the MMPA; and (4) the import ban ordered by the Court pursuant to the MMPA is effective immediately.[3]

The Court addresses the Government's contentions in turn.

---

[2] The Court commends the excellent briefing and argument, under urgent deadlines, by all counsel for the parties in these proceedings.

[3] Observing that the Government in its "Motion to Clarify" is raising arguments not previously made, plaintiffs argue that the motion is properly construed as a motion to narrow a preliminary injunction pursuant to CIT Rule 59(e) (mirroring Fed. R. Civ. Pro. R. 59(e)), and thus "not a vehicle to present a new legal theory that was available" before. *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 217 (D.C. Cir. 2018) (internal quotation marks and citation omitted). The Court need not resolve this claim as it determines that under any standard, the Government's contentions lack merit.

DISCUSSION

I. *The MMPA Imports Provision Applies to Legal and Illegal Fisheries.*

Submitting that "[e]nforcement of prohibitions against illegal fishing activities is not generally governed by the MMPA," the Government essentially questions whether the Court's *Order* is meant to ban imports of shrimp and chano — species for whom gillnet harvesting is already illegal in Mexico — and suggests that "[t]here may be other fish species harvested illegally with gillnets within the vaquita's range that were not addressed at all in plaintiffs' motion." Def.'s Br. at 2–3.

The ban on the importation of commercial fish mandated by the Imports Provision, 16 U.S.C. § 1371(a)(2), is not limited to legal fisheries, but applies to illegal fisheries as well. The Court explained in *NRDC I* that the embargo *Order* applies to the curvina, sierra, shrimp, and chano fisheries. *See NRDC I* at 9 (listing the commercial fisheries that target "shrimp, curvina, chano, and sierra" as overlapping with the vaquita's range); 9–10 (noting fishing seasons of "[c]urvina, chano, [] sierra [and] shrimp"); 12–13 (discussing "curvina and sierra" and "shrimp and chano" gillnet fishing within the vaquita's habitat); 28 (referring to "curvina, sierra, shrimp, and chano" as the "gillnet fisheries in question"); 40 (listing "shrimp, sierra, and chano fisheries" and "fourth fishery . . . curvina"). The Court noted that gillnet fishing for sierra and curvina is legal, and that "[p]ursuant to the permanent ban on gillnet fishing of species other than the curvina and sierra, fishing for shrimp and chano with gillnets inside the vaquita's range is illegal, but continues anyway." *Id.* at 12–13.

As has been noted, the Imports Provision requires the Government to "ban the importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental kill . . . of ocean mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2). Nothing in the statute's language limits the Imports Provision ban to "legal" fisheries, and the statute does not define the term "commercial fish," let alone define the phrase in a way that excludes unlawfully caught fish.

The Government acknowledges that the MMPA requires the Secretary of the Treasury to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards," 16 U.S.C. § 1371(a)(2), and asserts that neither "commercial" nor "incidental" are defined in the statute. Def.'s Br. at 3. The Government

submits that these terms are defined under 50 C.F.R. § 216.3. *Id.* That provision defines "incidental catch" as the "taking of a marine mammal" in connection with "commercial fishing operations," and "commercial fishing operation" as "the lawful harvesting of fish from the marine environment for profit as part of an ongoing business enterprise." 50 C.F.R. § 216.3.

The Government's suggestion that the Imports Provision should be modified by the part 216 regulatory definitions is unpersuasive. By the regulation's own terms, those definitions only apply to the part 216 regulations themselves. *See* 50 C.F.R. § 216.3 (stating that general definitions apply "in this part 216"). To the extent that a regulatory definition of the term "commercial fishing operation" could inform the plain meaning of the statutory ban under the Imports Provision that this Court is enforcing, NOAA Fisheries has promulgated a separate, more specific definition of that term under its implementing regulations, which does not implicate the legality of imports under the moratorium. *See* 50 C.F.R. 216.24(h)(3)(i)(A). Under that definition, which applies "[f]or the purposes of paragraph (h) of this section, commercial fishing operation means vessels or entities that catch, take, or harvest fish . . . from the marine environment . . . that results in the sale or barter of all or part of the fish caught, taken or harvested."[4] *Id.* Even so, the Court notes, as it did in its previous opinion, that "[t]he prohibitions of [50 C.F.R. § 216.24(h)(1)]," which provide for a comparability finding regime under the implementing regulations, "do not apply during the exemption period," which is "the one-time, five-year period that commences January 1, 2017." *Id.* §§ 216.24(h)(2)(ii), 216.3; *see NRDC I* at 9, 20, 36–37.

Altogether, the Imports Provision ban applies to legal and illegal fisheries whose "fish or fish products [] have been caught with commercial fishing technology which results in the incidental kill . . . of ocean mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2).

[4] Moreover, NOAA Fisheries itself acknowledged that the Imports Provision applies to illegal commercial fisheries when it included gillnet caught shrimp from the northern Gulf of California as an "export" fishery on its 2018 List of Foreign Fisheries. Pl.'s Br. Ex. 3, at 122, ECF No. 14–1. As noted, gillnet fishing for shrimp has been illegal in Mexico's Gulf of California at least since April 16, 2015, and well before the 2018 List of Foreign Fisheries was published. *See* O'Connell Decl. ¶¶ 15–16, Apr. 11, 2018, ECF No. 14–5. The fisheries on the List of Foreign Fisheries are identified as either "exempt," because they have a "remote likelihood of, or no known" marine mammal bycatch, or "export," defined as a "foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and to have more than a remote likelihood of incidental mortality and serious injury of marine mammals . . . in the course of its commercial fishing operations." 50 C.F.R. § 216.3. Any "[c]ommercial fishing operations not specifically identified in the current List of Foreign Fisheries as either exempt or export fisheries are deemed to be export fisheries . . . ." *Id.*

II. *The Lacey Act and Magnuson-Stevens Act Do Not Render the MMPA Inoperative.*

The Government also argues that the preliminary injunction cannot include imports of shrimp and chano caught in gillnets contrary to Mexican law because the Lacey Act and the Magnuson-Stevens Act statutorily ban fish harvested in violation of foreign law and impose steeper penalties than the MMPA. Def.'s Mot. at 2. The Lacey Act prohibits the import of "any fish or wildlife taken . . . in violation of foreign law," 16 U.S.C. § 3372(a)(2)(A), and provides for potential criminal penalties against violators, *id.* § 3373(d). The Magnuson-Stevens Act imposes greater maximum civil penalties that the MMPA. *Compare* 16 U.S.C. § 1858(a) (providing for civil penalties of up to $100,000 for each violation) *with* 16 U.S.C. § 1375 (providing up to $20,000 in civil penalties for each knowing violation of the MMPA).

The Government's argument is unavailing. Federal statutes can and do have complementary and overlapping objectives, and the existence of one source of enforcement authority does not render other statutory authorities inoperative. *See Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 31, 48, 52 (D.D.C. 2017) (finding that neither the Food and Drug Administration nor the Lacey Act had sole authority for promulgating regulations on seafood labelling); *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1031–32 (9th Cir. 2005) (holding that compliance with the registration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") did not relieve the agency of its Endangered Species Act obligations even though FIFRA included an endangered species provision).

The three acts in question here — the Lacey Act, the Magnuson-Stevens Act, and the MMPA — serve complementary, non-duplicative functions as part of a wider framework of wildlife protection legislation. *See* Lacey Act Amendments of 1981, S. Rep. 97–123, at 2, *reprinted in* 1981 U.S.C.C.A.N. 1748, 1749 ("[W]ildlife trade is subject to the customs law, the Lacey [Act] and a number of other federal wildlife laws such as the Endangered Species Act, the Marine Mammal Protection Acts [sic], and the Migratory Bird Treaty Act."). The Lacey Act bars trafficking in illegal wildlife, 16 U.S.C. § 3372(a), and managing invasive species potentially harmful to people, agriculture, or wildlife in the U.S., 18 U.S.C. § 42(a)(1), while the Magnuson-Stevens Act addresses fish stock management and fish, 16 U.S.C. § 1801(a)(6). In contrast, the MMPA is concerned with marine mammals, *id.* § 1361(6), many of which — including the vaquita — are not a trafficked animal under the Lacey Act or a fish regulated by the Magnuson-Stevens Act.

Moreover, neither the Lacey Act, *id.* § 3372(a)(1), or Magnuson-Stevens Act, *id.* § 1857(1)(G), provides that either statute is the exclusive source of federal authority for regulating fish imports, as the Government implicitly acknowledges by citing both statutes. The Magnuson-Stevens Act does not address its interaction with other federal statutes. *See id.* § 1856 (discussing the interaction of federal and state law only). The Lacey Act states that "[n]othing in this chapter shall be construed as . . . repealing, superseding, or modifying any provision of Federal law other than those specified in subsection (b)," *id.* § 3378(c)(1), which does not include the MMPA, *id.* § 3378(b). Moreover, as mentioned previously, the Lacey Act was intended to function as one part of a framework of wildlife protection statutes. *See* Lacey Act Amendments of 1981, S. Rep. 97123, at 2, *reprinted in* 1981 U.S.C.C.A.N. 1748, 1749. Thus, neither the Lacey Act nor Magnuson-Stevens Act provides the exclusive source of federal authority for regulating fish imports—as the Government implicitly acknowledges by citing them both—and does not excuse the Government from its MMPA obligations or prevent the issuance of a preliminary injunction requiring the Government to ban imports as mandated by the MMPA.

III. *The Court's Order Preliminarily Enjoining the Government Is Effective Immediately.*

In its motion, citing "certain implementation challenges," the Government appears to question whether the importation ban imposed by the Court is effective immediately. It states that the regulatory process that it is pursuing diligently to "create a certificate of admissibility that exporters and importers of products of the United States Harmonized Tariff Schedule categories covering the species included in the ban" — which, the Court repeats, are shrimp, curvina, chano, and sierra — "would be required to provide to certify that their fish imports were not harvested with gillnets within the vaquita's range." Def.'s Br. at 4–5. The Government contends that these steps are required under 50 C.F.R. § 216.24(h)(9) to effectuate the Court's *Order*. *Id.* The Government also notes, and reiterated during teleconference with the Court, that this process involves multiple administrative entities and is of indeterminate length. *Id.*

The Court discerns no merit in the Government's suggestion that the import ban is not effective immediately. The Court reiterates that it is effective immediately. The Government's position is inconsistent with the moratorium imposed by the Imports Provision of the MMPA. 16 U.S.C. § 1371(a)(2). The Court has explained that the text of the Imports Provision imposes on the Government an *immediate and continuous duty* to ban fish caught with fishing gear that kills marine mammals, such as the vaquita, in excess of United States standards.

NRDC I at 22–23, 35. By the terms of the statute, it is the immediate goal that bycatch be "reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. §1371(a)(2). The Court's *Order* enjoins the Government pursuant to the statutory Imports Provision of the MMPA and not pursuant to the implementing regulations, which do not become effective until January 1, 2022. The regulatory procedures governing certification of admissibility, *see* 50 C.F.R. § 216.24(h)(1)(ii)(B), (9), impose the import prohibitions encapsulated in § 216.24(h)(1). As the Court discussed in *NRDC I*, as mentioned *supra*, "[t]he prohibitions of [50 C.F.R. § 216.24(h)(1)]," which provides for a comparability finding regime under the implementing regulations, "do not apply during the exemption period," which is "the one-time, five-year period that commences January 1, 2017." *Id.* §§ 216.24(h)(2)(ii), 216.3; *see NRDC I* at 9, 20, 36–37.

In short, the Court's *Order* enjoining the Government to ban imports from the four specified fisheries — shrimp, curvina, chano, and sierra — that use gillnets in the vaquita's range is effective immediately as to all such imports, unless affirmatively identified as having been caught with a gear type other than gillnets or affirmatively identified as having been caught outside the vaquita's range. Pursuant to CIT Rule 65(d), the Court on this date issues an updated Order, also set forth below in the Appendix to this Opinion.

SO ORDERED.

Dated:

New York, New York

/s/ Gary S. Katzmann

Gary S. Katzmann, Judge

APPENDIX A

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE GARY S. KATZMANN, JUDGE

Natural Resources Defense Council, Inc., Center for Biological Diversity, and Animal Welfare Institute, Plaintiffs, v. Wilbur Ross, in his official capacity as Secretary of Commerce, United States Department of Commerce, Chris Oliver, in his official capacity as Assistant Administrator of the National Marine Fisheries Service, National Marine Fisheries Service, Steven Mnuchin, in his official capacity as Secretary of the Treasury, United States Department of the Treasury, Kirstjen Nielsen, in her official capacity as Secretary of Homeland Security, and United States Department of Homeland Security, Defendants.

Court No. 18–00055

Further Order on Plaintiffs' Motion for Preliminary Injunction

Plaintiffs brought this case on March 21, 2018. ECF No. 1. On April 16, 2018, plaintiffs filed a motion for a preliminary injunction. ECF No. 14. The Government moved to dismiss this case on May 7, 2018. ECF No. 15. On July 10, 2018, oral argument was held before the Court on both motions. On July 26, 2018, the Court granted Plaintiffs' Motion for Preliminary Injunction "requiring the Government, pending final adjudication of the merits, to ban the importation of all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range." The Court also denied Defendants' Motion to Dismiss. ECF No. 30. On July 31, 2018, plaintiffs paid the ordered security into the registry of the Court. On August 7, 2018, the parties participated in a teleconference with the Court. Pursuant to CIT Rule 65(d), the Court issues this Order:

(A) Reasons a preliminary injunction is warranted

Findings of Fact

The cause of the vaquita's precipitous decline is its inadvertent tangling, strangulation, and drowning in gillnets, and with only about 15 vaquita remaining, the status of the species is so precarious that even one mortality could increase the likelihood of extinction. The vaquita's range overlaps with commercial gillnet fisheries that target shrimp, curvina, chano, and sierra, and each of these fisheries poses a risk of entanglement. Fishing for curvina and sierra with gillnets inside the vaquita's range is legal, and fishing for shrimp and chano with gillnets inside the vaquita's range is illegal but continues anyway. Plaintiffs have provided persuasive evidence demonstrating that the United States is a significant export market for the curvina, sierra, shrimp, and chano gillnet fisheries in question.

Conclusions of Law

Plaintiffs have demonstrated a fair likelihood of success on the merits of their claim, that they are likely to suffer irreparable harm without a preliminary injunction, that the balance of equities favors an injunction, and that a preliminary injunction is in the public interest. Section 101(a)(2) of the MMPA, 16 U.S.C. § 1371(a)(2), also known as the Imports Provision, imposes on the Government an immediate and continuous duty to ban fish caught with fishing gear that kills marine mammals, such as the vaquita, in excess of United States standards. That statute provides that "it shall be the immediate goal that the incidental kill or incidental serious injury of

marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." Plaintiffs have established a fair likelihood that potential biological removal level, also known as PBR, is a marker of "United States standards" and that vaquita are being incidentally killed by gillnets in the northern Gulf fisheries in excess of their PBR. The likely, imminent extinction of the vaquita in the absence of statutorily mandated action constitutes irreparable harm, and a preliminary injunction would effectuate the MMPA's purpose of preserving marine mammal populations—in this case, the vaquita—which the Government acknowledges is on the verge of extinction.

(B) The terms of the preliminary injunction & acts required

It is **ORDERED** that Plaintiffs' Motion for Preliminary Injunction (ECF No. 14) is **GRANTED**. Defendants, their agents and their employees, and those in active concert and participation with them are enjoined and hereby **ORDERED** to immediately ban the importation from Mexico of all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range.

It is further **ORDERED** that this ban shall include all shrimp, curvina, sierra, and chano and their products sourced from the Gulf of California, Mexico, unless affirmatively identified as having been caught with a gear type other than gillnets or affirmatively identified as caught outside the vaquita's range.

It is further **ORDERED** that Defendants shall within the next 15 days submit for publication in the Federal Register notice of the ban on shrimp, curvina, sierra, and chano and their products from Mexico caught with gillnets within the vaquita's range.

It is further **ORDERED** that Defendants will file a status report with the Court within 30 days documenting compliance with this order, and every 30 days thereafter until the preliminary injunction is fully implemented.

It is further **ORDERED** that this order shall be effective immediately and continue until further order of the Court.

Dated: August 14, 2018
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE