# U.S. Court of International Trade

Slip Op. 24–47

JIANGSU SENMAO BAMBOO AND WOOD INDUSTRY CO., LTD., Plaintiff, and LUMBER LIQUIDATORS SERVICES, LLC, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 22–00190

[Remanding the U.S. Department of Commerce's Final Results of Redetermination Pursuant to Remand Order in the antidumping duty review of multilayered wood flooring from the People's Republic of China.]

Dated: April 19, 2024

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*Matt R. Ludwikowski* and *Kelsey Christensen*, Clark Hill, PLC, of Washington, D.C., for Plaintiff-Intervenor Lumber Liquidators Services, LLC. With them on the brief was Sally Alghazali.

*Kelly M. Geddes*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of Counsel was *Christopher Kimura*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

*Timothy C. Brightbill* and *Stephanie M. Bell*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring. *Maureen E. Thorson* and *Theodore P. Brackemyre* also appeared.

## *OPINION*

**Choe-Groves, Judge:**

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination in the administrative review of the antidumping duty order on multilayered wood flooring from the People's Republic of China ("China") for the period of December 1, 2019 through November 30, 2020, filed pursuant to the Court's Opinion and Order in *Jiangsu Senmao Bamboo & Wood Industry Co., Ltd. v. United States* ("*Senmao I*"), 47 CIT __, 651 F. Supp. 3d 1348 (2023). *See Final Results of Redetermination Pursuant to Remand Order* ("*Remand Redetermination*"), ECF No. 55–1; *see also Multilayered Wood Flooring from the People's Republic of China* ("*Final Results*"), 87 Fed. Reg. 39,464 (Dep't of Commerce July 1, 2022) (final results of antidumping duty administrative review; 2019–2020) and accompanying Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Multilayered Wood Floor-

ing from the People's Republic of China; 2019–2020 (Dep't of Commerce June 24, 2022) ("IDM"), PR 245.[1] For the reasons discussed below, the Court remands Commerce's *Remand Redetermination*.

## ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination to select Brazil as the primary surrogate country, while using Brazilian and Malaysian data for valuing log inputs, is supported by substantial evidence; and
2. Whether Commerce's determination to adjust the Brazilian surrogate value data for plywood is supported by substantial evidence.

## BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case as set forth in *Jiangsu Senmao Bamboo & Wood Industry Co., Ltd. v. United States* ("*Senmao I*"), 47 CIT __, __, 651 F. Supp. 3d 1348, 1354 (2023).

Commerce initiated an administrative review of the antidumping duty order on multilayered wood flooring from China for the period of December 1, 2019 to November 30, 2020 and selected Plaintiff Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. ("Plaintiff" or "Senmao") as the mandatory respondent in the investigation. *Initiation of Antidumping and Countervailing Duty Admin. Review Multilayered Wood Flooring from the People's Republic of China*, 86 Fed. Reg. 8166, 8169–71 (Dep't of Commerce Feb. 4, 2021); Commerce's Resp. Selection Mem. (Mar. 9, 2021), PR 112.

In its *Final Results*, Commerce selected Brazil as the primary surrogate country and valued Senmao's oak and non-oak logs with Malaysian surrogate values. IDM at 9; *see also Multilayered Wood Flooring from the People's Republic of China* ("*Preliminary Results*"), 86 Fed. Reg. 73,252 (Dep't of Commerce Dec. 27, 2021) (preliminary results of the antidumping duty administrative review, preliminary determination of no shipments, and rescission of review, in part; 2019–2020) and accompanying Decision Memorandum for the Preliminary Results of Antidumping Administrative Review (Dec. 17, 2022) ("PDM") at 17, PR 213. Commerce determined that Brazilian surrogate values were not usable for oak and non-oak log inputs. *Senmao I*, 47 CIT at __, 651 F. Supp. 3d at 1357 (citing PDM at 17). Commerce did not cite any record evidence to support its determina-

[1] Citations to the administrative record reflect the public record ("PR") and public remand record ("PRR") numbers filed in this case, ECF Nos. 48, 64.

tion that Brazilian surrogate values regarding oak log inputs were highly questionable, inadequate, or unavailable such that a departure from a single surrogate country was warranted. *Id.*

Commerce also adjusted the Brazilian surrogate values for plywood by excluding data that it determined to be incorrect regarding the quantity of plywood. IDM at 9. Commerce determined that the Spanish import data for 2020 were incorrect because the data reported the same quantity of plywood in cubic meters ("$m^3$") as it did in kilograms ("kg"). *Id.* Because the $m^3$ unit measures volume and the kg unit measures weight, Commerce concluded that it was "illogical for the Spanish import data to report the same quantity in these two different units of measure." *Id.* As a result, Commerce removed the Spanish import data. In making this determination, Commerce relied on Exhibit 9 of Multilayered Wood Flooring from the People's Republic of China: Surrogate Value Comments ("AMMWF Surrogate Value Comments" or "AMMWF Surrogate Value Cmts."), but never placed the document on the record. *Senmao I*, 47 CIT at __, 651 F. Supp. 3d at 1361; AMMWF Surrogate Value Cmts. (July 29, 2021), PR 180, 182. Commerce calculated Senmao's antidumping duty margin at 39.27%. *Final Results*, 87 Fed. Reg. at 39,465.

Because Commerce failed to cite necessary record evidence, provide adequate explanations, and include cited evidence on the record, the Court remanded for Commerce to reconsider its determinations. *Senmao I*, 47 CIT at __, 651 F. Supp. 3d at 1358, 1361. The Court remanded for Commerce to reconsider its determination to apply Malaysian surrogate values for both oak and non-oak log inputs without providing a reasonable explanation for departing from Commerce's established practice of using one surrogate country or supporting its determination with substantial evidence. *Id.* at __, 651 F. Supp. 3d at 1357. The Court also directed Commerce to reconsider or further explain its adjustment of plywood surrogate values because Commerce cited evidence that was not on the record. *Id.* at __, 651 F. Supp. 3d at 1361.

On remand, Commerce continued to select Brazil as the primary surrogate country. *Remand Redetermination* at 5–6. Commerce also determined that it was appropriate to value Senmao's non-oak log inputs using Brazilian data and its oak log inputs using Malaysian data. *Id.* at 15. Commerce revised the antidumping duty rate and assigned a 34.68% dumping margin to Senmao. *Id.* at 17.

Senmao filed Plaintiff's Comments in Opposition to Remand Redetermination. Pl.'s Cmts. Opp'n Remand Redetermination ("Senmao's Cmts."), ECF No. 57. Plaintiff-Intervenor Lumber Liquidators Services, Inc. ("Plaintiff-Intervenor" or "Lumber Liquidators") filed Lum-

ber Liquidators' Comments in Opposition to the Remand Redetermination. Pl.-Interv.'s Cmts. Opp'n Remand Redetermination ("Pl.-Interv.'s Cmts."), ECF No. 58. Defendant United States ("Defendant" or "the Government") filed Defendant's Response to Comments on Remand Results. Def.'s Resp. Cmts. Remand Results ("Def.'s Resp."), ECF No. 60. Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring ("Defendant-Intervenor" or "AMMWF") filed Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring's Comments in Support of Remand Determination. Def.-Interv.'s Cmts. Supp. Remand Determination ("AMMWF's Cmts."), ECF No. 59.

## JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an antidumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), aff'd, 802 F.3d 1339 (Fed. Cir. 2015).

## DISCUSSION

### I. Legal Framework

Antidumping duties are calculated as the difference between the normal value of subject merchandise and the export price or the constructed export price of the subject merchandise. 19 U.S.C. § 1673. To determine the normal value of the subject merchandise in a non-market economy, Commerce must calculate surrogate values using "the best available information regarding the values of such factors in a [comparable] market economy." *Id.* § 1677b(c). In doing so, Commerce relies on one or more market economy countries that are (1) "at a level of economic development comparable to that of the non[-]market economy country," and (2) "significant producers of comparable merchandise." *Id.* § 1677b(c)(4). Commerce's task is to "attempt to construct a hypothetical market value" of the subject merchandise in the non-market economy. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999). When Commerce determines that there is more than one country at the same level of economic

development as the non-market economy country and is a significant producer of comparable merchandise, Commerce will consider the quality and availability of the surrogate value data. *See Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1075, 638 F. Supp. 2d 1325, 1347 (2009).

Commerce's regulatory preference is to value all factors of production with surrogate values from a single surrogate country. 19 C.F.R. § 351.408(c)(2); *see Jiaxing Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1302 (Fed. Cir. 2016). Commerce may use a second surrogate country, however, if data from the primary surrogate country are unavailable or unreliable. *See* Import Admin. Policy Bull. No. 04.1: Non-Market Economy Surrogate Country Selection Process ("Policy Bulletin No. 04.1") (Dep't of Commerce Mar. 1, 2004). When the data from a single surrogate country are "demonstrably aberrational as compared to certain benchmark prices, and alternative data sources could be better corroborated," Commerce's preference for using data from a single country may be deemed unreasonable. *Peer Bearing Co.-Changshan v. United States*, 35 CIT 103, 119, 752 F. Supp. 2d 1353, 1369–72 (2011).

## II. Selection of Surrogate Country and Surrogate Values for Log Inputs

Senmao argues that Commerce failed to provide sufficient evidence or explanations that would justify a departure from Commerce's preference for a single surrogate country or would support Commerce's use of a secondary surrogate country to value Senmao's inputs. Senmao's Cmts. at 7.

If Commerce has a routine practice for addressing similar situations, it must either apply that practice or provide a reasonable explanation regarding why Commerce has deviated from that practice. *See SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("An agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." (internal citation omitted)); *see also M.M. & P. Mar. Advancement, Training, Educ. & Safety Program v. Dep't of Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984) ("An agency is obligated to follow precedent, and if it chooses to change, it must explain why."); *see also Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) ("Commerce can reach different determinations in separate administrative reviews but it must employ the same methodology or give reasons for changing its practice.").

19 C.F.R. § 351.408(c) provides that, "[f]or purposes of valuing the factors of production, . . . [Commerce] normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2). Commerce

explained that when promulgating its regulations, the preference for a single country is meant to prevent parties from "margin shopping," and Commerce may depart from its regulatory preference for a single surrogate country when Commerce determines that the "accuracy of available information regarding prices for particular factors in the surrogate country is 'highly questionable,'" in which case Commerce may reject the questionable values and use data from a second country. *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7345 (Dep't of Commerce Feb. 27, 1996). Commerce may use a secondary surrogate country if financial data are "inadequate or unavailable." *See* Policy Bulletin 04.1 ("After all, a country that perfectly meets the requirements of economic comparability and significant producer is not of much use as a primary surrogate if crucial factor price data from that country are inadequate or unavailable.").

In evaluating surrogate value data, Commerce considers several factors, including whether the surrogate values are publicly available, contemporaneous with the period of review, representative of a broad market average, tax and duty-exclusive, and specific to the inputs being valued. *See* Policy Bulletin No. 04.1; *see also Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citing the same factors). Commerce explained that comparable merchandise is determined on a case-by-case basis, the meaning of a significant producer can differ from case to case, and fixed standards have not been adopted in Commerce's surrogate country selection process. *See* Policy Bulletin No. 04.1. In assessing whether a country is a significant producer of comparable merchandise, Commerce considers whether all of the potential surrogate countries have significant exports of comparable merchandise but does not consider levels of significance in comparison with other countries. *See id.*

### A. Commerce's Selection of Brazil as a Surrogate Country

The remand states that, "Commerce found that the [surrogate value] data on the record for both Brazil and Malaysia are publicly available, contemporaneous with the [period of review], representative of broad market averages, tax- and duty-exclusive, and specific to the inputs being valued." *Remand Redetermination* at 5 (citing PDM at 17).

Commerce determined that it was appropriate to continue with its selection of Brazil as the primary surrogate country because:

> (1) the record contains usable Brazilian data for valuing the majority of Senmao's [factors of production]; and (2) the financial statements of Brazilian company Duratex S.A. [("Duratex")] on

> the record are contemporaneous with the [period of review] and superior to the financial statements of Malaysian company Focus Lumber Berhad [("Focus Lumber")]."

*Id.* at 5–6 (citing PDM at 17; Commerce's Surrogate Values for the Preliminary Results (Dec. 17, 2021) ("Prelim. Surrogate Value Mem."), PR 210–211).

Commerce failed to cite any specific documents on the record in support of its determination. Commerce only cited to the Preliminary Determination Memorandum to support its conclusory statement in the *Remand Redetermination* that Brazilian and Malaysian surrogate values were publicly available, contemporaneous with the period of review, representative of a broad market average, tax and duty-exclusive, and specific to the inputs being valued. There is no further discussion of any documents in evidence, nor any further explanation in the *Remand Redetermination* of how any record evidence supports Commerce's determinations.

19 U.S.C. § 1516a(b)(1)(B)(i) requires that Commerce must support its determinations with substantial record evidence. By merely citing "PDM at 17" as support for its remand determination that the surrogate value data for both Brazil and Malaysia are publicly available, contemporaneous with the period of review, representative of broad market averages, tax- and duty-exclusive, and specific to the inputs being valued, Commerce failed to cite substantial evidence. *See Remand Redetermination* at 5.

First, Commerce's Preliminary Determination Memorandum itself is not record evidence because it expresses the agency's views. Moreover, a review of page 17 of the Preliminary Determination Memorandum states that, "[w]e considered the [surrogate value] data on the record and determine that both the Brazilian and Malaysian data generally are publicly available, contemporaneous with the [period of review], representative of broad market averages, tax- and duty-exclusive, and specific to the inputs being valued." PDM at 17. No citation to record evidence appears in support of this conclusory statement on page 17 of the Preliminary Determination Memorandum.

Second, Commerce only cited to the Preliminary Determination Memorandum and Preliminary Surrogate Value Memorandum to support its determination that Brazil was the appropriate primary surrogate country. Neither the Preliminary Determination Memorandum nor the Preliminary Surrogate Value Memorandum are record evidence; both documents merely express the agency's views. Commerce's references to the Preliminary Determination Memorandum

and Preliminary Surrogate Value Memorandum did not include any citations to particular documents in evidence that show how Commerce reached the determination that Brazil was the appropriate primary surrogate country.

The *Remand Redetermination* states that, "[t]o comply with the Court's *Remand Order*, we reconsidered the [surrogate value] for Senmao's log inputs and determined that the substantial evidence did not lead us to conclude that the Brazilian log [surrogate value] is either highly questionable, inadequate, or unavailable to use to value Senmao's log inputs." *Remand Redetermination* at 6. Commerce only cites to the Draft Remand Redetermination, the IDM, and Final Surrogate Value Memorandum. None of these are documents in evidence.

It is insufficient under 19 U.S.C. § 1516a(b)(1)(B)(i) for Commerce to simply declare that its determination is supported by substantial evidence, citing to its own determinations, without actually discussing any documents on the record that support its determinations. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."). The Court already remanded once for Commerce's failure to cite evidence, and must now remand again for the same failure.

The Court holds that Commerce's determinations are not supported by substantial evidence because Commerce failed to identify any record evidence on which it relied on for the determinations that Brazilian and Malaysian surrogate value data were publicly available, contemporaneous with the period of review, representative of a broad market average, tax and duty-exclusive, and specific to the inputs being valued, nor any evidence to support its determination that Brazil was the appropriate primary surrogate country. The Court remands these issues for further reconsideration consistent with this Opinion.

### B. Surrogate Values for Log Inputs

With respect to log inputs, Commerce used Brazilian surrogate values for the valuation of Senmao's non-oak log inputs and used Malaysian surrogate values for the valuation of Senmao's oak log inputs. *Remand Redetermination* at 14–15.

Senmao argues that Commerce's selection of Malaysia as a secondary surrogate country is inconsistent with Commerce's policy preference to use a single surrogate country to value inputs. Senmao's Cmts. at 7–10. Senmao contends that Commerce's decision to use Malaysian data to value oak logs was based solely on a finding that

Malaysian data were more specific than Brazilian data. *Id.* at 9. Senmao also argues that Commerce did not cite to any record evidence that shows that Brazilian data under Harmonized Tariff Schedule ("HTS") subheading 4403.99 would distort the margin if the data were used to value oak logs that are classified under HTS subheading 4403.91. *Id.* at 10.

Defendant counters that Commerce's decision to use Malaysian data was based on the fact that there were no Brazilian data available on the record to value oak logs, not because Malaysian data were more specific. Def.'s Resp. at 7. Defendant argues that there was no evidence of Brazilian imports classified under HTS subheading 4403.91 for the period of review and that the unavailability of such information warranted the use of a secondary primary country, consistent with Commerce's practice. *Id.* at 9 (citing Policy Bulletin No. 04.1).

The Court is remanding Commerce's determination to select Brazil as the primary surrogate country due to Commerce's failure to cite substantial evidence, and therefore does not reach the issue of whether Commerce's determination to use Malaysia as a secondary surrogate country to value oak log inputs is supported by substantial evidence.

**III. Adjustment of Surrogate Values for Plywood**

Senmao argues that Commerce's determination to adjust surrogate values for plywood is inconsistent with Commerce's practice of adjusting a surrogate value after considering whether it is aberrational in the aggregate. Senmao's Cmts. at 12.

As noted previously, if Commerce has a routine practice for addressing similar situations, it must either apply that practice or provide a reasonable explanation regarding why Commerce deviated from that practice. *See SKF USA, Inc.*, 263 F.3d at 1382. Commerce has a standard practice of considering whether the average unit value ("AUV") is aberrational in the aggregate for the economically comparable surrogate countries or as compared to historical AUVs of the surrogate country at issue. *See SolarWorld Americas, Inc. v. United States*, 42 CIT __, __, 320 F. Supp. 3d 1341, 1351–52 (2018) ("Commerce explains that its practice is to assess aberrationality by examining HTS data both across potential surrogate countries and within the surrogate country over multiple years . . . [and] considers import data to be aberrationally high if that data [are] 'many times higher than import values from other countries.'"). Interested parties need to demonstrate that the import data are aberrational in the aggregate. *Id.*

On remand, Commerce maintained that its initial determination to adjust the plywood surrogate values by removing erroneous data was reasonable. *Remand Redetermination* at 15. Commerce stated that it complied with the Court's Order in *Senmao I* by attaching Exhibit 9 of AMMWF's Surrogate Value Comments ("Exhibit 9"), which demonstrates "the density of various wood species and standard conversion factors of wooden products." *Id.* (citing AMMWF's Surrogate Value Comments, at Ex. 9). Commerce explained that Exhibit 9 supports Commerce's decision to remove an erroneous line of Spanish import data from the plywood AUVs because Exhibit 9 "demonstrates that a quantity of plywood expressed in [$m^3$] cannot be the same as the quantity expressed in [kg]." *Id.* at 15–16. Commerce determined that instead of disqualifying an entire dataset for containing erroneous data, it was unnecessary to do so in this instance because the problem caused by the erroneous data was "easily remedied" by removing the distinct subset of Spanish import data, thus making the remaining dataset "more accurate" and enabling Commerce to use the surrogate values of plywood from the primary surrogate country of Brazil. *Id.* at 16.

Senmao argues that Commerce's determination is inconsistent with Commerce's practice of removing data only if the data are "aberrational in the aggregate." Senmao's Cmts. at 10–15. Senmao asserts that when Commerce removed the data subset containing Spanish values for Brazilian plywood imports, it distorted the data in a manner that was grossly adverse to Senmao. *Id.* at 16.

The Government counters that Commerce only applies the "aberrational in the aggregate" test when a party argues that a data point is unusually high or low and is therefore likely to distort the average value. Def.'s Resp. at 12. The Government argues that in this case, Commerce's determination to remove the Spanish data was not based on the reasoning that the data were aberrational, but because the quantities expressed in $m^3$ and kg units made the data incorrect and Commerce could not rely on such data when calculating Senmao's dumping margin. *Id.* at 13. The Government also asserts that removing the data subset with the Spanish values did not distort the data on the record because Commerce removed incorrect data in order to use "the best available information" to determine an accurate antidumping margin. *Id.* at 14.

Commerce explained that its decision to remove the data subset with the Spanish values for the Brazilian imports was not based on a determination that the data were many times higher than import values from other countries, but based on the fact that the quantities

expressed in association with the units of measurement made the data incorrect for the purposes of measuring the quantity of plywood. *Remand Redetermination* at 16. By removing the incorrect data subset, Commerce stated that it was able to calculate Senmao's dumping margin using the best available information on the record and as accurately as possible. *Id.* (citing *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001)).

Commerce simply cited to Exhibit 9 as support for Commerce's decision to remove Spanish import data that Commerce deemed erroneous, but Commerce failed to explain how Exhibit 9 demonstrates that a quantity of plywood expressed in $m^3$ cannot be the same as the quantity expressed in kg. Commerce attached Exhibits 9, 9A, and 9B to the *Remand Redetermination* and AMMWF's Surrogate Value Comments, yet Commerce did not identify which of these exhibits it actually relied on to show how the density of various wood species and standard conversion factors demonstrate that the Spanish import data were erroneous. At no point did Commerce cite to specific information in Exhibits 9, 9A, or 9B to illustrate that it was illogical for the Spanish $m^3$ and kg values to be expressed in the same quantity.

Furthermore, Commerce made a conclusory statement that removing the Spanish import data would enable Commerce to calculate the dumping margins as accurately as possible. Commerce failed to explain, however, how the removal of the Spanish import data would be more accurate, or how such removal made the rest of the dataset the "best available information" pursuant to 19 U.S.C. § 1677b(c)(1). *See* 19 U.S.C. § 1677b(c)(1) ("[T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.").

The fact that the kg and $m^3$ quantities cannot be the same does not support the automatic conclusion, without any explanation, that removal of erroneous data led to a more accurate dataset. Senmao points out that Commerce's adjustment of the dataset led to an increase of the Brazilian plywood surrogate value from $1.33 per $m^3$ to $7.36 per $m^3$, yet Commerce concluded that it was using the best information available without showing how the $7.36 per $m^3$ was more accurate than the $1.33 per $m^3$. Senmao's Cmts. at 16. The Court agrees with Senmao that Commerce did not provide a reasonable explanation for how its removal of the Spanish import data led to a more accurate dataset, and Commerce did not establish how removing the Spanish import data would result in the best available information for calculating Senmao's dumping margin rate. The Court

notes that Commerce removed the purportedly erroneous data without providing the parties with a chance to correct the information and without explaining why it was more accurate to remove the incorrect data than to allow the parties to provide corrected data. On remand, the Court suggests that Commerce should consider providing the parties with the opportunity to submit corrected information that will lead to a more accurate dumping margin calculation, rather than simply removing data from a larger dataset without explaining how removal is more accurate than allowing for the submission of corrected information. It seems to the Court that allowing the Parties to submit corrected information would lead to a more accurate result than merely deleting subsets of information that Commerce deems to be erroneous.

The Court concludes that Commerce's determination to adjust the Brazilian plywood dataset by removing the Spanish import data is not supported by substantial evidence on the record. The Court remands the issue for further consideration consistent with this Opinion.

## CONCLUSION

For the foregoing reasons, the Court concludes that Commerce's *Remand Redetermination* is not supported by substantial evidence. Accordingly it is hereby

**ORDERED** that Commerce's Final Results of Redetermination Pursuant to Remand Order, ECF No. 55–1, are remanded to Commerce for reconsideration consistent with this Opinion; and it is further

**ORDERED** that this case shall proceed according to the following schedule:

(1) Commerce shall file the remand determination on or before June 20, 2024;

(2) Commerce shall file the administrative record on or before July 3, 2024;

(3) Comments in opposition to the remand determination shall be filed on or before August 20, 2024;

(4) Comments in support of the remand determination shall be filed on or before September 20, 2024; and

(5) The joint appendix shall be filed on or before September 30, 2024.

Dated: April 19, 2024
New York, New York

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

Slip Op. 24–48

TENARIS BAY CITY, INC., MAVERICK TUBE CORPORATION, IPSCO TUBULARS INC., TENARIS GLOBAL SERVICES (U.S.A.) CORPORATION, AND SIDERCA S.A.I.C., Plaintiffs, and TMK GROUP AND TUBOS DE ACERO DE MEXICO, S.A., Consolidated Plaintiffs, and TENARIS BAY CITY, INC., MAVERICK TUBE CORPORATION, AND IPSCO TUBULARS INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, BORUSAN MANNESMANN PIPE U.S. INC., PTC LIBERTY TUBULARS LLC, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, and WELDED TUBE USA INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00344

[Remanding the U.S. International Trade Commission's affirmative material injury determination resulting from the investigations involving oil country tubular goods from Argentina, Mexico, Russia, and South Korea.]

Dated: April 19, 2024

*Gregory J. Spak*, *Frank J. Schweitzer*, *Kristina Zissis*, and *Matthew W. Solomon*, White and Case, LLP, of Washington, D.C., for Plaintiffs Tenaris Bay City, Inc., Maverick Tube Corporation, IPSCO Tubulars Inc., Tenaris Global Services (U.S.A.) Corporation, and Siderca S.A.I.C., and Consolidated Plaintiff Tubos de Acero de Mexico, S.A.

*Michael J. Chapman*, *Jeffrey M. Winton*, *Amrietha Nellan*, *Vi Mai*, *Ruby Rodriguez*, and *Jooyoun Jeong*, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff TMK Group.

*Andrea C. Casson*, Assistant General Counsel for Litigation, and *Noah A. Meyer*, U.S. International Trade Commission, of Washington, D.C., argued for Defendant United States. With them on the brief were *Dominic L. Bianchi*, General Counsel, and *Jason F. Miller*, Attorney-Advisor, Office of the General Counsel.

*Thomas M. Beline, Myles S. Getlan, James E. Ransdell*, and *Nicole Brunda*, Cassidy Levy Kent, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

*Luke A. Meisner* and *Saad Y. Chalchal*, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenors Borusan Mannesmann Pipe U.S. Inc., PTC Liberty Tubulars LLC, United Steel, Paper, and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube USA Inc. With them on the brief were *Roger B. Schagrin* and *Jeffrey D. Gerrish*.

## *OPINION AND ORDER*

**Choe-Groves, Judge:**

This appeal from the final affirmative material injury determination by the U.S. International Trade Commission ("Commission" or "ITC") investigating oil country tubular goods ("OCTG") from Argen-

tina, Mexico, Russia, and South Korea includes unique issues on the impact on competitiveness of sanctions imposed due to Russia's invasion of Ukraine. *See Oil Country Tubular Goods from Argentina, Mexico, Russia, and South Korea*, 87 Fed. Reg. 69,331 (ITC Nov. 18, 2022) ("*Final Determination*"), PR 169; *see also Views of the Commission*, USITC Pub. 5381, Inv. Nos. 701-TA-671–72, 731-TA-1571–73 (Final) (Nov. 18, 2022), PR 165[1] ("*Views*"); Final Staff Report (Oct. 14, 2022), PR 61 ("Staff Report").

Consolidated Plaintiff TMK Group, Plaintiffs Tenaris Bay City, Inc., Maverick Tube Corporation, IPSCO Tubulars Inc., Tenaris Global Services (U.S.A.) Corporation, and Siderca S.A.I.C., and Consolidated Plaintiff Tubos de Acero de Mexico, S.A. (collectively, "Plaintiffs") contest certain aspects of the final affirmative material injury determination.

Before the Court are USCIT Rule 56.2 motions for judgment on the agency record filed by TMK Group and filed by Tenaris Bay City, Inc., Maverick Tube Corporation, IPSCO Tubulars Inc., Tenaris Global Services (U.S.A.) Corporation, Siderca S.A.I.C., and Tubos de Acero de Mexico, S.A. (collectively, "Tenaris"). Pl.'s R. 56 Mot. J. Agency R. Pursuant to USCIT R. 56.2 ("TMK Group's Motion"), ECF No. 42; R. 56 Mot. J. Agency R. ("Tenaris' Motion"), ECF No. 46; *see also* Mem. Supp. Pl.'s R. 56.2 Mot. J. Agency R. ("TMK Group's Br."), ECF No. 42–1; Mem. Points Authorities Supp. Pls.' R. 56.2 Mot. J. Agency R. ("Tenaris' Br."), ECF No. 46.

Defendant-Intervenors Borusan Mannesmann Pipe U.S. Inc., PTC Liberty Tubulars LLC, United States Steel Corporation, United Steel, Paper, and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube USA Inc. (collectively, "Defendant-Intervenors") filed Defendant-Intervenors' Rule 56.2 Response Brief ("Def.-Intervs.' Resp."), ECF No. 50. Defendant ITC ("Defendant" or "the Government") filed its Memorandum in Opposition to Plaintiff's Rule 56. 2 Motion for Judgment on the Agency Record. Def.'s Mem. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("Def.'s Resp."), ECF No. 52. TMK Group and Tenaris filed their reply briefs. Reply Supp. Pls.' R. 56.2 Mot. J. Agency. R. ("Tenaris' Reply"), ECF No. 56; Reply Br. TMK Group ("TMK Group's Reply"), ECF No. 57. Oral argument was held on January 25, 2024. Oral Arg. (Jan. 25, 2024), ECF No. 69.

For the following reasons, the Court remands the Commission's *Final Determination*.

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[1] Citations to the administrative record reflect the public administrative record ("PR") document numbers. ECF No. 59.

## BACKGROUND

Petitions requesting investigations were filed with the U.S. Department of Commerce ("Commerce") and the ITC on October 6, 2021 by Borusan Mannesmann Pipe U.S., Inc., PTC Liberty Tubulars LLC, U.S. Steel Tubular Products, Inc., the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube USA, Inc. Petitions (Oct. 6, 2021), PR 1.

The Commission initiated an investigation and determined preliminarily that there was a reasonable indication that the domestic industry was materially injured or threatened with material injury by reason of subject imports. Views of the Commission (Preliminary) (Dec. 1, 2021) ("Preliminary Views"), PR 74.

The Parties filed their respective administrative briefs. Tenaris' Pre-Hearing Br. (Sept. 14, 2022), PR 128; TMK Group's Pre-Hearing Br. (Sept. 14, 2022), PR 122; TMK Group's Post-Hearing Br. (Sept. 29, 2022), PR 143; Tenaris' Post-Hearing Br. (Sept. 29, 2022), PR 144.

The Commission published its *Final Determination* on November 18, 2022, determining that an industry in the United States was materially injured by reason of imports of oil country tubular goods ("OCTG") from Argentina, Mexico, Russia, and South Korea. *See Final Determination*, 87 Fed. Reg. at 69,331.

TMK Group and Tenaris initiated proceedings to contest various aspects of the Commission's *Final Determination*, such as the Commission's cumulation of subject imports and findings of volume, price effects, and impact. The Court held oral argument on January 25, 2024. Oral Arg. (Jan. 25, 2024), ECF No. 69.

## ISSUES PRESENTED

The Court reviews the following issues:

1. Whether the Commission's cumulation of subject imports is supported by substantial evidence and in accordance with law;
2. Whether the Commission's volume determination is supported by substantial evidence and in accordance with law;
3. Whether the Commission's price effects determination is supported by substantial evidence and in accordance with law; and
4. Whether the Commission's impact determination is supported by substantial evidence.

## JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and Section 516A(a)(2)(B)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(ii), which grant the Court authority to review

actions contesting the ITC's final injury determinations following an antidumping or countervailing duty investigation. The Court will uphold the ITC's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record, or are otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Court from holding that the Commission's determinations, findings, or conclusions are supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)); *see also Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

## DISCUSSION

### I. Legal Framework

To make an affirmative material injury determination, the ITC must find that (1) material injury existed and (2) the material injury was caused by reason of the subject imports. *See Swiff-Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997)). Material injury is defined by statute as harm that is not inconsequential, immaterial, or unimportant. 19 U.S.C. § 1677(7)(A). To determine whether a domestic industry has been materially injured or threatened with material injury by reason of unfairly subsidized or less than fair value imports, the Commission considers:

(I) the volume of imports of the subject merchandise,

(II) the effect of imports of that merchandise on prices in the United States for domestic like products, and

(III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States.

*Id.* § 1677(7)(B)(i). The Commission may consider other economic factors that are relevant to determining whether there is material injury by reason of imports. *Id.* § 1677(7)(B)(ii). No single factor is dispositive and the significance to be assigned to a particular factor is for the ITC to decide. *See* S. Rep. No. 96–249, at 88 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 474. The statute neither defines the phrase "by reason of," nor provides the ITC with guidance, on how to determine whether the material injury is by reason of subject imports. The Court of Appeals for the Federal Circuit ("CAFC") has interpreted the

"by reason of" statutory language to require the Commission to consider the volume of subject imports, their price effects, their impact on the domestic industry, and to establish whether there is a causal connection between the imported goods and the material injury to the domestic industry. *See Swiff-Train Co.*, 793 F.3d at 1361; *see also* S. Rep. No. 96–249, at 57–58, 74–75 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 443–44, 460–61.

## II. The Commission's Cumulation of Subject Imports

The Commission cumulated subject imports from Argentina, Mexico, Russia, and South Korea because it determined that the cumulation factors of fungibility, channels of distribution, geographic overlap, and simultaneous presence in the market showed a "reasonable overlap of competition" among subject imports and the domestic like product. *Views* at 16–23.

Plaintiffs contend that there was no "reasonable overlap of competition" among subject imports and the domestic like product, and that the Commission's cumulation determination was not supported by substantial evidence or in accordance with law. *See* TMK Group's Br. at 15–30; Tenaris' Br. at 18–25.

### A. Legal Standard

In evaluating material injury, the Commission must "cumulatively assess the volume and effect of imports of the subject merchandise from all countries," if such imports compete with each other and with domestic like products. 19 U.S.C. § 1677(7)(G)(i)(I), (II). The ITC refers to this requirement as "cumulation." The Statement of Administrative Action to the Uruguay Round Agreements Act ("SAA") states that the statutory requirement is satisfied if there is a reasonable overlap of competition. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 848 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4190. Because the Commission need only find that a "reasonable overlap" of competition exists, a finding of "'complete overlap' of competition" is not required to support a cumulation decision. *Mukand Ltd. v. United States*, 20 CIT 903, 909, 937 F. Supp. 910, 916 (1996) (quoting *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989)); *see also Goss Graphics Sys., Inc. v. United States*, 216 F.3d 1357, 1362 (Fed. Cir. 2000) (stating that the ITC's inquiry is "whether 'reasonable overlap' of competition exists.").

To determine whether imports compete with each other and with the domestic like product, or if there is a "reasonable overlap" of competition, the Commission analyzes four factors:

(1) the degree of fungibility between subject imports from different countries and between subject imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;

(2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and

(4) whether the subject imports are simultaneously present in the market

*Int'l Indus., Ltd. v. United States*, 42 CIT ___, ___, 311 F. Supp. 3d 1325, 1329–30 (2018) (citation omitted).

The Commission's use of these criteria for determining whether competition exists between and among subject imports and the domestic like product have been approved by the U.S. Court of International Trade ("CIT") and the CAFC. *See Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 985, 33 F. Supp. 2d 1082, 1085 (1998), *aff'd sub nom.*, 216 F.3d 1357 (Fed. Cir. 2000); *see also Fundicao Tupy S.A. v. United States*, 12 CIT 6, 10–11, 678 F. Supp. 898, 902 (1988) (summarizing the factors as "the fungibility and similar quality of the imports, the similar channels of distribution, the similar time period involved, and the geographic overlap of the markets"), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988). No one factor in the Commission's analysis is dispositive. *Noviant OY v. United States*, 30 CIT 1447, 1461, 451 F. Supp. 2d 1367, 1379 (2006).

The Commission must "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry" when considering the impact of subject imports on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). The statute does not provide further guidance, giving the ITC discretion to assess the conditions of competition in a particular industry. The ITC's determinations regarding competition and market conditions must be supported by substantial record evidence. *See* 19 U.S.C. § 1615a(b)(1)(B)(i); *see also Siemens Energy, Inc.*, 806 F.3d at 1369. When the Commission makes a determination on volume, price, or impact that is premised on speculation about industry conditions, that determination has not been "evaluate[d] . . . within the context of the business cycle and the conditions of competition that are distinctive to the affected industry." 19 U.S.C. §

1677(7)(C)(iii); *see also Catfish Farmers of America v. United States*, 37 CIT 717, 733 (2013) ("[S]peculation does not amount to reasonable inference, as it provides no factually-grounded basis for sustaining an agency's determination.").

**B. OCTG from Russia**

The ITC stated that it was "unpersuaded by Tenaris'[] and TMK [Group]'s argument that measures taken in response to Russia's February 2022 invasion of Ukraine have prevented subject imports from Russia from competing in the U.S. market such that cumulation of these imports is inappropriate." *Views* at 22. Tenaris argues that:

> Record evidence demonstrates the obvious: subject imports from Russia competed differently in the U.S. market than other subject imports and should not have been cumulated with other subject imports. Remarkably, the Commission was "unpersuaded by Tenaris'[] and TMK [Group]'s argument that measures taken in response to Russia's February 2022 invasion of Ukraine have prevented subject imports from Russia from competing in the U.S. market such that cumulation of these imports is inappropriate."

Tenaris' Br. at 24. Tenaris states that these measures targeting Russia included the loss of API-certification for OCTG produced in Russia, the revocation of permanent normal trade relations status for Russia, Section 232 duties, and sanctions imposed on Russian entities and individuals. *Id.*

Plaintiffs challenge the ITC's cumulation of subject imports from Russia, arguing that the ITC's determination was (1) not in accordance with law because the timing of cumulation was improper and (2) not supported by substantial evidence because Russian steel companies did not compete in the same manner in the U.S. market as subject merchandise from the other countries due to sanctions imposed on Russia during the last four months of the period of investigation (referred to as the "second competitive environment" by TMK Group) from February 2022 to June 2022. *See* TMK Group's Br. at 3–5; Tenaris' Br. at 24–25; TMK Group's Reply at 4–5.

**1. Timing of Assessment**

The ITC established the period of investigation as January 2019 to June 2022. *Views* at 12. Russia invaded Ukraine in February 2022. Sanctions were imposed against Russian companies, which Plaintiffs argue significantly reduced the ability of Russian OCTG to compete during the last four months of the period of investigation. TMK

Group's Br. at 3, 9–11; Tenaris' Br. at 6. These sanctions included: (1) the revocation of Russian producers' ability to API-certify its products beginning on March 17, 2022; (2) the withdrawal of most-favored-nation status for Russia by the United States in April 2022; (3) the prohibition of Russia-affiliated vessels from entering U.S. ports in April 2022; and (4) the imposition of an across-the-board increase in tariffs applicable to Russian merchandise imported into the United States to 35 percent in June 2022. *See* TMK Group's Reply at 3.

In summary, the ITC determined that the sanctions had no significant effect on the Russian products' ability to compete over the course of the entire 42-month period of review. TMK Group contends that the ITC's cumulation of Russian subject imports with other subject imports was not in accordance with law because the ITC based its determination on competitive conditions that existed during the initial part of the period of investigation (before the sanctions due to Russia's invasion of Ukraine were imposed), and there was no "reasonable overlap of competition" of these subject imports at the end of the period of investigation when the Commission took its final vote. *Id.* at 8. TMK Group argues that Russian subject imports were effectively excluded from competing in the market from February 2022 to June 2022, and thus Russian imports had no competitive overlap with subject imports from Argentina, Brazil, Mexico, or domestic producers at the end of the period of investigation. *Id.* at 3.

TMK Group asserts that the language of 19 U.S.C. § 1677(7)(G)(i), providing for cumulation "if such imports compete with each other and with domestic like products in the United States market," suggests that the assessment of competitive overlap for cumulation purposes should be made at the time of the Commission's vote. 19 U.S.C. § 1677(7)(G)(i); TMK Group's Reply at 7 (citing *Chaparral Steel Co. v. United States* ("*Chaparral Steel*"), 901 F.2d 1097 (Fed. Cir. 1990)). "Vote day" is the day that the ITC determines whether subsidized or dumped imports actually cause, or threaten, significant injury to the domestic industry for the time period under investigation. *Chaparral Steel*, 901 F.2d at 1104 n.6.

The Government argues that it was reasonable for the Commission to assess cumulation of the subject imports over the full 42 months of the period of investigation to develop the competitive relationship between Russian OCTG and other subject imports and the domestic like product, rather than relying on a "snapshot of data on or around [vote] day." Def.'s Resp. at 25.

The Commission is required to "cumulatively assess the volume and effect of imports of the subject merchandise from all countries" if "such imports compete with each other and with domestic like prod-

ucts in the United States market." 19 U.S.C. § 1677(7)(G)(i). The CAFC has upheld the ITC's interpretation of the clause "subject to investigation" to include only imports that are still under investigation on "vote day" and imports that were proven "unfair" and have a continuing impact on vote day. *Chaparral Steel*, 901 F.2d at 1104. TMK Group argues that the conditions of competition essentially ceased to exist after the sanctions due to the Ukraine war took effect in February 2022, the conditions arguably did not exist during the latter part of the period of investigation on vote day, and the ITC's determination that a reasonable overlap of competition existed is not in accordance with law. *See* TMK Group's Br. at 8–9, 22. The CAFC stated that, "[e]ven when the Commission makes a determination of 'threat of material injury' it assesses the 'threat of the specific indicia of *present* material injury.'" *Chaparral Steel*, 901 F.2d at 1104 (citing *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 50, 592 F. Supp. 1318, 1322 (1984)).

The Court observes that the statutory language is written in the present tense: if "such imports compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1677(7)(G)(i). Consequently, the Court concludes that it is reasonable to require the ITC's determination to be made in the present tense on vote day, meaning that the conditions of competition must exist in the present tense, not in the past tense. It is not sufficient if the conditions of competition leading to an unfair determination existed at some point during the period of investigation. The unfair condition must continue to exist on vote day. The Court holds that it was unreasonable for the ITC to view the conditions of competition over the 42-month period of investigation without considering the effects of competition at the end of the investigation and on vote day. Moreover, it was unreasonable for the ITC to not address potentially contrary evidence on the record suggesting that competition was severely curtailed during the last four months of the period of investigation and that competition by Russian OCTG was effectively eliminated by vote day. If the conditions leading to the assessment that subject imports of Russian OCTG were "unfair" or otherwise threatened material injury did not exist on the vote day of October 26, 2022, the Commission's determination to make a cumulation assessment for the full period of investigation was not in accordance with law. Consequently, the Court remands for the Commission to reassess the timing and determine whether the imports under investigation were proven unfair and had a continuing impact during the full period of investigation, including on vote day.

### 2. Cumulation

The ITC considered subject imports from Argentina, Mexico, Russia, and South Korea on a cumulated basis because "the statutory criteria for cumulation [were] satisfied." *Views* at 19. The ITC explained that it was "unpersuaded by Tenaris'[] and TMK [Group]'s argument that measures taken in response to Russia's February 2022 invasion of Ukraine have prevented subject imports from Russia from competing in the U.S. market such that cumulation of these imports is inappropriate." *Id.* at 22.

In addition to challenging the timing as discussed above, TMK Group challenges the ITC's cumulation determination as not supported by substantial evidence. TMK Group contests the determinations of all four cumulation factors, arguing that (1) the loss of American Petroleum Institute ("API")-certification for Russian subject imports rendered subject imports not fungible with other subject imports; and (2) the sanctions imposed on Russia (aside from the loss of API-certification) and Section 232 duties affected subject Russian OCTG from sharing simultaneous presence, channels of distribution, and geographic overlap with other subject imports. *See* TMK Group's Br. at 6–24.

First, TMK Group contests the ITC's fungibility determination. TMK Group argues that because Russian producers lost the ability to certify their OCTG as meeting the relevant API standards required by other subject countries, Russian OCTG were not fungible with OCTG from Argentina, Mexico, and South Korea that were not subject to the API sanction. *Id.* at 16. TMK Group explains that the API revoked the license that permitted Russian producers of subject merchandise to certify their pipe by applying the API monogram to products. *Id.* at 12. TMK Group contends that the API-certification:

> is critical to most U.S. consumers of OCTG as an indication of quality and reliability, especially in oil and gas applications operating under high pressure. Consequently, the loss of Russian producers' ability to provide API[-]certification for its subject merchandise changed the conditions of competition faced by Russian producers of subject merchandise and created a substantial competitive disadvantage for Russian producers relative [to] Argentinian, Mexican, South Korean, and domestic producers of subject OCTG products.

*Id.*

The Commission did not focus on the impact that a loss of API-certification would have on competition, but rather determined that "all OCTG, regardless of source, is generally produced in accordance

with API standards," except for "limited service" OCTG, which can still be used in certain OCTG applications even without meeting API specifications, and certain types of "green tube" OCTG that is not sold as meeting any particular API grade. *Views* at 19–20; *id.* at 20 n.94.

The ITC acknowledged the potential effect of Russian producers' loss of API-certification on the fungibility of Russian OCTG, but continued to determine that Russian OCTG were fungible with other subject imports. *Id.* at 20, 22–23. The ITC cited to the Staff Report, stating that Russian OCTG can still be manufactured with API standards because a majority of responding purchasers reported that "OCTG from Russia always or usually meets minimum quality specifications" and "rated OCTG from Russia as comparable to the domestic like product—which is generally produced to API specifications—with respect to quality meets industry standards." *Id.* at 20 n.95 (citing Staff Report at Tables II-12 and II-14).

Table II-12 of the Staff Report provides a count of purchasers' responses regarding suppliers' ability to meet minimum quality specifications. Staff Report at II-30. Purchasers were asked how often domestically produced or imported OCTG meets minimum quality specifications for their own or customers' uses, with purchasers referring to API specifications or another quality management system as the basis for quality. *Id.* The table indicates that a majority of responding purchasers reported that Russian suppliers "always" or "usually" met minimum quality specifications. *Id.* Table II-14 shows a count of purchasers' responses comparing U.S.-produced and imported product by factor and country pair. *Id.* at II-32. Purchasers were asked to compare OCTG produced domestically and OCTG produced in subject and non-subject countries. *Id.* at II-31–II-39. This table indicates that a majority of responding purchasers reported that Russian OCTG were "comparable" to the domestic product for quality meeting or exceeding industry standards. *Id.* at II-33. While this information pertains to the quality of Russian OCTG as compared to other countries, these responses do not reflect responses for quality after the loss of API-certification for Russian subject imports, nor does this information address the competitive impact that losing API-certification would have on the subject Russian products.

In determining whether Russian subject imports should be cumulated, the ITC also seemed to make contradictory statements. The ITC stated that the impact of loss of API-certification "is not yet clear, particularly in light of continued subject imports from Russia after March 2022," but it proceeded to predict and discuss the effect of this sanction. *Views* at 23. The ITC cited to the Responses to Commission Questions, stating that the loss of API-certification to Russian OCTG

producers would not prevent Russian-produced OCTG from being sold in the U.S. market with the certification because Russian producers could still send green tubes to API-certified processors and then sell the processed tubes in the U.S. market. *Id.* (citing Petitioners' Post-Hearing Br. (Sept. 29, 2022) at Ex. 1 ("Responses to Commission Questions") at II-55–II-56, PR 143)). The Court observes that the Responses to Commission Questions was not placed in its in entirety on the record filed with the Court. The record only includes three pages of the document, pages II-29–II-32, which do not pertain to any information about the loss of API-certification or green tubes. The ITC cited to pages II-55–II-56 of the document, but the Court is unable to review these pages or the entire document.

In addition, the Commission failed to address potentially contrary evidence on the record cited by TMK Group as to the fungibility of Russian OCTG. For example, TMK Group argues that the Russian products' inability to provide API-certification altered U.S. consumers' willingness to purchase Russian OCTG, making these products no longer able to compete with other subject imports that were able to be certified. TMK Group's Br. at 12 (citing USITC Hearing Transcript (Oct. 11, 2022) at 248, PR 149, and TMK Group's Pre-Hearing Br. at Ex. 2 ("Letter from American Petroleum Institute")). The API ceased its certification services within the Russian Federation "in response to restrictions on financial and business activities imposed by the U.S. and Russian governments" on March 17, 2022. Letter from American Petroleum Institute. During the administrative hearing, a witness from API testified about the practical impact of TMK Group's inability to apply the API monogram or license number to their products. USITC Hearing Tr. at 248. The witness testified that the loss of API-certification would be a "major setback" for Russia and it would not be possible for Russia to sell its OCTG to international markets. *Id.* At oral argument before this Court, TMK Group explained that OCTG products without an API-certification cannot be sold, and the lack of an API-certification essentially put the Russian OCTG companies out of business. *See* Oral Arg. at 14:08–15:13, 24:29–24:45.

The Court holds that the ITC's determination that Russian OCTG were fungible with other subject OCTG is not supported by substantial evidence because the ITC did not consider contrary evidence on the record pertaining to effects of the sanctions on Russian OCTG, especially the loss of API-certification on Russian OCTG, and failed to file with the Court the relevant evidence from the Responses to Commission Questions that the ITC cited.

Second, TMK Group contends that other sanctions against Russia, in addition to the loss of API-certification, effectively excluded Russian OCTG from the U.S. marketplace after February 2022. TMK Group's Br. at 6–14. The ITC addressed the following two sanctions: the suspension of normal trade relations in Russia that resulted in high "Column 2" duties on Russian OCTG and the prohibition of Russia-affiliated vessels from entering the United States ports on April 21, 2022 with the issuance of Presidential Proclamation 10371. *Views* at 18–19; Staff Report at VII-17 n.19. The ITC determined that the domestic like product and subject imports from all subject countries were simultaneously present throughout almost the entire period of investigation, with subject imports from Russia present in 38 of 42 months. *Views* at 22.

The ITC rejected TMK Group's and Tenaris' arguments during the administrative proceedings that these measures prevented Russian OCTG from competing in the U.S. market during the period of investigation because Russian OCTG were not prohibited entry or sale in the U.S. market and significant volumes of Russian OCTG entered in two out of the four post-invasion months, March 2022 and May 2022. *Id.* at 22–23 (citing Staff Report at Tables IV-18, IV-2, and G-4; *Raw in-Shell Pistachios from Iran*, USITC Inv. No. 731-TA-287 (June 1, 2017) (determination that the revocation of the antidumping duty order on raw in-shell pistachios from Iran would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time and that the existence of financial sanctions would not prevent Iranian exporters from supplying the U.S. market in the event of revocation)).

TMK Group also contends that the imposition of Section 232 duties on Russian OCTG, when combined with the other sanctions, affected the Russian subject imports' ability to compete with the other subject imports. TMK Group's Br. at 22–23. The ITC determined that the Section 232 duties of 25% on Russian OCTG did not make it uncompetitive with other subject imports, citing to Tables IV-3 and IV-18 of the Staff Report. *Views* at 22 n.113 (citing Staff Report at Tables IV-3 and IV-18). The ITC reasoned that the duties did not prevent subject Russian OCTG from entering the U.S. market in significant volumes throughout the period of investigation or from being present in the U.S. market for 38 months of the 42 months, "even though responding domestic producers, importers, and purchasers reported that the section 232 duties had effects in the U.S. market." *Id.*

The ITC cited to Tables IV-3, IV-18, IV-2, and G-4 in the Staff Report to show that the volume of subject imports from Russia increased in 2022 compared to 2021 and that subject imports entered in the U.S.

market during the post-invasion months of March 2022 and May 2022. Table IV-18 presents monthly U.S. import data during the entire period of investigation, January 2019 through June 2022. Staff Report at IV-34–IV-37. This table shows OCTG from Russia were imported in February 2022, March 2022, and May 2022. *Id.* at IV-35. There is no import data for April 2022 and June 2022. *Id.* Tables IV-2 and Tables G-4 demonstrate that the volume of subject imports from Russia, as well as the U.S. shipments from these imports, were higher in interim 2022 than in 2021. Table IV-2 provides information on the firms of responding U.S. importers of OCTG from Argentina, Mexico, Russia, South Korea, their headquarter locations, and their shares of total imports (subject and non-subject) by source in 2021. Tables IV-1 and IV-2 show the share of total subject imports from Russia in 2021. *Id.* at IV-2–IV-3. The Court observes that these tables do not show, however, the total market share of subject imports in 2022 for a comparison of the shares in 2021 versus 2022.

Table G-4 shows the domestic shipments of imports from Russia by domestic importers, by end finish and grade, and indicates that Russian OCTG imports from January 2022 to June 2022 were higher than the amount of imports from January 2021 to June 2021. *Id.* at G-12. Table IV-3 provides data for U.S. imports of OCTG from Argentina, Mexico, Russia, South Korea, and all other sources and provides the import volume for each of the six months in 2022. *Id.* at IV-4–IV-5. Table IV-3 indicates that a significant number of short tons of Russian OCTG were entered from January 2022 to June 2022. Table IV-18, as noted above, indicates that OCTG from Russia were imported in February 2022, March 2022, and May 2022 and no OCTG from Russia were imported in April 2022 or June 2022. *Id.* at IV-35.

TMK Group challenges the ITC's cumulation of Russian subject imports because the imports from March 2022 and May 2022 do not accurately reflect the effects of the sanctions. TMK Group asserts that: (1) virtually all of such imports were made under another Harmonized Tariff Schedule of the United States ("HTSUS") code that is not intended for "Oil or Gas Drilling"; (2) the March 2022 importation was made before the revocation of Russia's most-favored-nation status on April 18, 2022, the barring of Russian ships on April 2022, and the production of subject merchandise without API-certification; and (3) the May 2022 imports had taken advantage of an unintended gap in Column 2 of the HTSUS tariff tables that permitted some unfinished subject merchandise to enter with a tariff rate of 1%, which no longer exists because of the President's Proclamation 10420 that eliminated this gap by raising the rates of duty on all products of the Russian Federation by 35%. TMK Group's Br. at 21–22 (citing Letter

from American Petroleum Institute and TMK Group's Pre-Hearing Br. at Ex. 3 ("Suspending Normal Trade Relations with Russia and Belarus Act" or "H.R. 7018")). The ITC did not address these possibilities in its cumulation analysis, which is relevant to the effect of Russian sanctions on subject OCTG from competing fairly with other subject imports during the post-invasion months.

While record evidence shows the import of some Russian subject merchandise in two post-invasion months, the ITC did not provide an adequate explanation to account for the lag of the sanction measures taking place or the impact of the loss of API-certification services on Russian OCTG's competitiveness. The ITC must address the potential contrary evidence regarding the competitiveness of imports from Russian OCTG relative to the other subject imports from Argentina, Mexico, and South Korea. *See* 19 U.S.C. § 1677(7)(G) (requiring the ITC to "cumulatively assess the volume and effect of imports of the subject merchandise from all countries," if such imports *compete with each other* and with domestic like products).

Accordingly, the Court concludes that the ITC's determination to cumulate subject imports from Russia is not supported by substantial evidence. The ITC's timing of cumulation is improper, and the ITC failed to consider potentially contrary evidence on the record for its cumulation determination and file the Responses to Commission Questions with the Court. The Court remands this issue for further explanation or reconsideration by the ITC.

### C. OCTG from South Korea

Plaintiffs challenge the Commission's determination to cumulate OCTG from South Korea as not in accordance with law and not supported by substantial evidence. Plaintiffs argue that the ITC's cumulation determination was not in accordance with law because the ITC included non-subject imports from South Korea. Plaintiffs also contend that this determination was not supported by substantial evidence because the ITC included subject imports from South Korea that were under an antidumping order and not fungible with subject imports from Argentina and Mexico.

#### 1. Subject Imports from South Korea

Plaintiffs allege two arguments regarding the ITC's inclusion of subject imports from South Korea in the cumulation analysis. First, Tenaris argues that subject imports from Argentina and Mexico are not fungible with South Korean imports. Tenaris contends that the ITC ignored record evidence when it determined that "welded and seamless OCTG can be used interchangeably in most if not all other applications" because subject imports from Argentina and Mexico

during the period of investigation were "essentially all seamless," whereas the OCTG imports from South Korea were "nearly all welded" and the average unit values ("AUVs") for seamless OCTG were consistently higher than welded OCTG. Tenaris' Br. at 18–21.

Second, Plaintiffs contest the ITC's inclusion of subject merchandise from South Korea that had already been used to support a finding of material injury to the domestic OCTG industry in 2014 in a different proceeding and was subject to an existing antidumping order, which Plaintiffs contend artificially inflated the cumulated volume of imports while adding little or no impact to the potential harm suffered by the U.S. industry. TMK Group's Br. at 4–5; Tenaris' Br. 23–24.

**a. Waiver of Seamless/Welded Argument**

The Court first discusses Tenaris' argument that subject imports from Argentina and Mexico were not fungible with South Korean imports. Defendant-Intervenors assert that part of Tenaris' argument, which concerns the difference between seamless and welded subject imports, is waived because such argument rests on Tenaris' contention that seamless and welded OCTG are not alike. Def.-Intervs.' Resp. at 12–13 (citing Preliminary Views); *see also* Def.'s Resp. at 18 n.5. Defendant-Intervenors reason that Tenaris, by failing to raise that seamless and welded OCTG are separate like products in the final phase of the administrative proceedings, is precluded from bringing its argument and has conceded the interchangeability of seamless and welded products. *Id.*

Tenaris counters that it is not precluded from raising its argument because the Commission had in a previous investigation found that the single like product and the subject imports were not fungible. Tenaris' Reply at 3 (citing *Grain-Oriented Silicon Electrical Steel from Italy and Japan*, Inv. Nos. 701-TA-355 and 731-TA-660 (Final), USITC Pub. 2778 at I-8, I-13 (May 1994)).

In challenging final agency actions, such as the underlying material injury determination by the ITC at issue here, litigants generally must exhaust administrative remedies. *See* 28 U.S.C. § 2637(d). The Court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (citations omitted). There are limited exceptions to the exhaustion requirement, such as futility of raising an argument at the administrative level. *See Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1145–48, 724 F. Supp. 2d 1327, 1351–53 (2010); *see also Holmes Prod. Corp. v. United States*, 16 CIT 1101, 1104 (1992) ("[E]xhaustion may

be excused if the issue was raised by another party, or if it is clear that the agency had an opportunity to consider it."). The CIT has discretion as to whether exhaustion is required in its cases. *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) ("[T]he decision whether to require exhaustion in a particular case is a matter committed to the discretion of the trial court; in particular, we have held that applying exhaustion principles in trade cases is subject to the discretion of the judge.").

The ITC had preliminarily determined that, "in light of the preponderance of similarities between seamless and welded OCTG, and in the absence of any contrary argument, we define seamless and welded OCTG as a single domestic like product." Preliminary Views at 12. The ITC recognized that "[a]lthough subject imports from South Korea primarily comprise welded OCTG, whereas subject imports from other countries primarily comprise seamless OCTG, the record shows that these differences do not limit the fungibility between these subject imports." *Id.* at 25. The ITC also noted that "while the parties disagree on the degree, they do not dispute that welded OCTG can be substituted for seamless OCTG in many applications, or that seamless OCTG can be substituted for welded OCTG in all applications." *Id.* at 26.

Tenaris raised its concerns about the interchangeability of welded and seamless OCTG in the preliminary phase of the investigation. Specifically, the ITC recognized that, "[w]hile Tenaris disputes Petitioners' estimation of a 99-percent overlap in end-use applications, and contends that there are 'important limitations' on the interchangeability of welded and seamless OCTG, it does not dispute that welded OCTG is interchangeable with seamless OCTG in less-demanding applications, or that seamless OCTG is interchangeable with welded OCTG in all applications." *Id.* at 11 n.49 (citing Tenaris' Post-Conference Br. (Nov. 1, 2021) at 11, PR 41). The ITC noted that, "Tenaris does not argue or suggest that these customer testimony and reporting establish that welded and seamless OCTG cannot be used interchangeably in other applications." *Id.*

Because Tenaris disputed the interchangeability of seamless and welded products during the preliminary phase of the administrative proceedings, Tenaris did not fail to exhaust its administrative remedies regarding this issue and is therefore not precluded from raising this argument on appeal before the Court.

**b. Waiver of Antidumping Order Argument**

The Court now turns to Tenaris' argument that the ITC improperly included subject imports from South Korea that were previously

under an antidumping order. Defendant-Intervenors assert that Plaintiffs did not sufficiently raise this issue—specifically, the implications of the antidumping order on South Korean imports regarding the cumulation analysis—in their final phase briefing, and thus Plaintiffs failed to exhaust their administrative remedies. Def.-Intervs.' Resp. at 20–21.

TMK Group contends that this issue was raised before the ITC during both the preliminary and final phases of the investigation. TMK Group's Reply at 14 (citing TMK Group's Post-Conference Br. (Nov. 1, 2021) at 6–7, PR 39, and Tenaris' Final Comments (Oct. 21, 2022), PR 167). TMK Group argues that even if the doctrine of administrative exhaustion applies, it should be allowed to expand on an argument based on the final record before the Court. *Id.* at 14–15 (citing *Juancheng Kangtai Chem. Co. v. United States*, Slip Op. 15–93, 2015 WL 4999476 (CIT Aug. 21, 2015) (holding that the doctrine of exhaustion does not prevent a plaintiff from expanding on an argument based on the final record before the court and that an argument below does not need to be exactly worded to the court)).

The Court observes that both TMK Group and Tenaris raised the issue of subject imports from South Korea affected by an antidumping order during different phases of the investigation.

In the preliminary phase of the investigation, TMK Group discussed the implications of the South Korean antidumping order on the cumulation analysis as follows:

> [T]he Commission must consider the fact that subject imports from South Korea have already been found to be injurious and are consequently already under an [antidumping] order as a relevant additional factor beyond its "general{}" "framework" that compels de-cumulation of South Korea from Argentina, Mexico, and Russia in this particular instance. To do otherwise would result in cumulation when not "appropriate in light of the conditions of competition"—again, South Korea already being under an [antidumping] order while the other subject countries are not—inconsistent with Article 3.3 of the [Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement")] and Article 15.3 of the [WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement")].

TMK Group's Post-Conference Br. at 6–7. The Commission rejected this argument, asserting:

> TMK [Group] does not explain how these considerations [regarding the antidumping duty order on OCTG from Korea] could

> detract from a finding that there is a reasonable overlap of competition between the subject imports from South Korea and the other subject imports under the factors considered by the Commission.

Preliminary Views at 27 n.152.

In the final phase of the investigation, Tenaris referenced this issue by stating that, "[c]umulating imports from Korea was always questionable given they are subject to an injury finding that resulted in an [antidumping duty order]." Tenaris' Final Comments at 9 (citing Preliminary Views at 23–24 (noting TMK Group's arguments that the Commission should not cumulate subject imports because imports from Korea are subject to an antidumping duty order)).

Both TMK Group and Tenaris put forth administrative arguments regarding the effect of the antidumping duty order on South Korean OCTG. TMK Group contended, for example, that the effect of the antidumping order on the impact determination was its inconsistency with the AD Agreement and SCM Agreement. *See* TMK Group's Post-Conference Br. at 6–7. Now before the Court, TMK Group argues that the effect of the antidumping order on South Korean imports, which placed a "discipline" on pricing designed to ensure that the sales of South Korea subject merchandise would not cause material injury due to dumping results, would mean that harm to the U.S. industry attributable to South Korean imports would have to be based solely on underselling caused by subsidies, but these subsidies were found to be a *de minimis* amount of 1.33% on a portion of South Korean imports. TMK Group's Br. at 28–29; TMK Group's Reply at 12–13. Plaintiffs' argument that the antidumping order would result in a "discipline" on pricing is a reasonable expansion of Plaintiffs' previous administrative arguments regarding the effects of the antidumping duty order on the South Korean imports. The Court deems Plaintiffs' argument not waived.

**2. Non-Subject Imports from South Korea**

In addition to challenging the inclusion of subject imports from South Korea, Plaintiffs assert that the Commission's cumulation determination is not in accordance with law because the ITC's inclusion of non-subject imports violated 19 U.S.C. § 1677(7)(G)(i) through its reliance on Tables II-16, II-19, and IV-7 of the Staff Report. *See* TMK Group's Br. at 25–26; Tenaris' Br. at 23–24. Plaintiffs request a remand to ensure that the inclusion of non-subject imports did not affect the material injury determination, citing *Celanese Chemicals Ltd. v. United States*, 31 CIT 279, 293 (2007). *Id.*

The Court first turns to whether the ITC violated its statutory obligations under 19 U.S.C. § 1677(7)(G)(i) by including non-subject imports from South Korea.

Pursuant to 19 U.S.C. § 1677(7)(G)(i), "the Commission shall cumulatively assess the volume and effect of *imports of the subject merchandise* from all countries . . . if *such imports* compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1677(7)(G)(i) (emphasis added).

Record evidence establishes that the ITC included non-subject imports of South Korean OCTG in the Commission's cumulation determination. For example, Tables II-16, II-19, and IV-17 include data on non-subject South Korean OCTG. *See* TMK Group's Br. at 25–26; Tenaris' Br. at 23–24. The ITC relied on these tables for its fungibility and geographic overlap determinations. *See Views* at 19–22. The Government argues that the ITC properly considered Tables II-16 and II-19 because responses from South Korean OCTG importer Hyundai Steel USA concerned the fungibility of OCTG from whole countries, including both subject and non-subject data, and had probative value for the ITC's fungibility determination. Def.'s Resp. at 22 (citing Blank U.S. Importer Questionnaire (June 14, 2022) at III-21–III-22, PR 92). The Government also contends that the ITC properly considered Table IV-17 in finding a geographic overlap of the subject imports because the table reflected 99.9% of all imports from South Korea. *Id.*

The Court observes that the ITC included data that included both non-subject and subject imports from South Korea. *See* Staff Report at Tables II-16, II-19, and IV-17. The inclusion of non-subject imports could not be separated because Hyundai Steel USA was asked questions about the interchangeability of domestic OCTG and OCTG produced in other countries. These questions did not distinguish between subject imports or non-subject imports. *See* Blank U.S. Importer Questionnaire. The ITC included non-subject imports due to the nature of responses solicited from Hyundai Steel USA. The Government emphasizes that "given that Hyundai Steel USA's responses compiled in these tables did not tend to support cumulation, if there was any error in considering them—which there was not—it was in Plaintiffs' favor and was, at most, harmless." Def.'s Resp. at 23.

Regardless of whether the ITC believes that the inclusion of non-subject imports was harmless error, the statute is clear that only subject imports shall be included in the cumulation analysis and does not allow for the cumulation of non-subject imports. The Court holds that the ITC's cumulation of non-subject South Korean imports is a violation of 19 U.S.C. § 1677(7)(G)(i) and is not in accordance with

law. Therefore, the Court remands the ITC's determination to cumulate non-subject imports from South Korea for further consideration in accordance with this Opinion.

**3. Cumulation**

The Court now turns to the question of whether the ITC's determination to cumulate South Korean OCTG is supported by substantial evidence.

Tenaris argues that subject imports from South Korea should not have been cumulated because they were not fungible with subject imports from Argentina and Mexico, which had higher AUVs than those from South Korea and Russia. Tenaris' Br. at 18–21.

The ITC determined that there was a sufficient degree of fungibility between the subject imports from South Korea and those from Argentina and Mexico, even though there were differences in the AUVs between these countries, based on data that showed interchangeability between all subject imports. *See Views* at 27 (citing Staff Report at Tables II-15–II-17).

In addition to looking at Tables II-16, II-19, and IV-17, the ITC cited to Tables II-1, II-15, II-18, and II-20 to support its cumulation determination.

Tables II-15 through II-17 of the Staff Report demonstrates the interchangeability between subject imports from Argentina and Mexico and subject imports from Russia and South Korea. Tables II-15 through II-17 provide information on the responses of U.S. producers, importers, and purchasers reporting the interchangeability between domestic OCTG and OCTG from other countries, by country pair. Staff Report at II-40. Table II-15 pertains to responses from U.S. producers, Table II-16 pertains to responses from producers, and Table II-17 pertains to purchasers. *See id.* at II-40–II-41. All three tables demonstrate the interchangeability between subject imports from Argentina and Mexico and subject imports from Russia and South Korea by indicating that a majority of U.S. producers, importers, and purchasers responded that OCTG from both Argentina and Mexico are "always" or "frequently" interchangeable with subject imports from both Russia and South Korea. *See id.* Because the interchangeability between these subject imports seems to be demonstrated in the responses, the record evidence could support a "reasonable overlap" of competition between OTCG from Mexico and Argentina and OCTG from South Korea in theory, if any non-subject imports are excluded from the cumulation analysis.

The ITC rejected Tenaris' administrative argument that imports from Argentina and Mexico were not fungible with imports from

Russia or South Korea and determined that there was a substantial degree of overlap between U.S. shipments of subject imports from all four subject imports in terms of end finish, grade, and product type because: (1) "majorities of responding domestic producers, importers, and purchasers reported that subject imports from both Argentina and Mexico are always or frequently interchangeable with subject imports from both Russia and South Korea," *Views* at 20; *id.* at 20 n.97 (citing Staff Report at Tables II-15–II-17); (2) "majorities of responding domestic producers, importers, and purchasers reported that differences other than price are only sometimes or never significant when choosing between and among subject imports from the four sources," *id.* at 20; *id.* at 20 n.98 (citing Staff Report at Tables II-18–II-20); and (3) "majorities or pluralities of responding purchasers rated subject imports from both Argentina and Mexico as comparable with subject imports from both Russia and South Korea with respect to at least 14 of 15 purchasing factors," *id.* at 20; *id.* at 20 n.99 (citing Staff Report at Table II-14).

The ITC also determined that there was a geographic overlap of the subject imports because nearly all subject imports from all four sources entered the United States through the Southern border of entry. *Views* at 22 (citing Staff Report at Tables II-1, IV-17). Table IV-17 presents data on U.S. imports of OCTG by source and border of entry, based on official Commerce import statistics in 2021, indicating a geographic overlap in the Southern border of entry. Staff Report at IV-33.

Only a finding of "reasonable overlap" is required for cumulation, although record evidence shows that the ITC's determination impermissibly cumulated both subject and non-subject imports from South Korea. The Staff Report tables cited by the ITC seem to support the fungibility and geographic overlap determinations, except for the statutory problem that the ITC's cumulation determination included non-subject imports from South Korea. Three tables cited by the ITC included non-subject imports: Tables II-16 and II-19 included responses for whole countries, including both subject and non-subject data, and Table IV-17 reflected 99.9% of all imports from South Korea. The ITC cited to additional evidence that related to subject imports, such as Tables II-1, II-15, II-18, and II-20.

The Government points out that the use of this data, which included non-subject imports, was in Plaintiffs' favor. *See* Def.'s Resp. at 23. Plaintiffs do not contest that the result of this data was in their favor. *See* TMK Group's Reply; Tenaris' Reply. The fact that such data may have weighed in Plaintiffs' favor does not excuse the ITC from

complying with its statutory obligation under 19 U.S.C. § 1677(7)(G)(i) that "the Commission shall cumulatively assess the volume and effect of imports of the *subject merchandise*." 19 U.S.C. § 1677(7)(G)(i) (emphasis added). It is clear to this Court that the statute does not permit non-subject merchandise to be included in the Commission's cumulation analysis.

Accordingly, the ITC's determination to cumulate both subject and non-subject South Korean imports is neither supported by substantial evidence nor in accordance with law. The Court remands the ITC's determination to cumulate South Korean OCTG because non-subject imports from South Korea may not be included in the ITC's cumulation determination. Further, the ITC did not address the possible effect resulting from the subject imports from South Korea that were under an antidumping order in its final determination.

**D. OCTG from Argentina and Mexico**

Tenaris challenges the ITC's determination to cumulate subject imports from Argentina and Mexico as unsupported by substantial evidence. Tenaris argues that OCTG from Argentina and Mexico did not sufficiently share channels of distribution with subject imports from Russia or South Korea to warrant a "reasonable overlap of competition." Tenaris' Br. at 21–23. Tenaris contends that the Commission did not consider representative data from the period of investigation as a whole or record evidence that Tenaris sold subject imports from Argentina and Mexico and its U.S.-produced OCTG to its U.S. customers mainly using its unique "Rig Direct" program. *Id.*

The ITC determined that the domestic like product and subject imports from each country source were sold through overlapping channels of distribution during the period of investigation because importers from Argentina and Mexico primarily sold OCTG to customers while also selling a smaller amount to distributors. *Views* at 22; *id.* at 22 n.108 (citing Staff Report at Tables II-1–II-2). The ITC also rejected Tenaris' administrative argument that subject imports from Argentina and Mexico did not share common channels of distribution because a substantial share of subject imports from Mexico and a lesser share of subject imports from Argentina were sold to distributors, as were most subject imports from both Russia and South Korea. *Id.* (citing Staff Report at Table II-1).

Tenaris first contends that the ITC relied on a "small overlap," rather than a "reasonable overlap," and that the Commission's reliance on 2021 data overstated the overlap. Tenaris' Br. at 22. The ITC cited to Tables II-1 and II-2 to support its channels of distribution

determination. *Views* at 22. Table II-1 presents data for channels of distribution for OCTG in the U.S. market, by share and by quantity, for the entire period of investigation, showing that importers from Argentina and Mexico primarily sold OCTG to similar customers. Staff Report at II-5–II-8. Table II-2 shows a count of U.S. producers' and U.S. importers' geographic markets, indicating that every responding producer and importer reported selling OCTG in the Central Southwest. *Id.* at II-9. Table II-1 shows that for the share of subject imports sold for 2019 through interim 2021, the typical share of subject imports from Mexico sold to end users was a fairly significant percentage and the typical share of subject imports from Argentina sold to end users was a higher percentage. *Id.* at II-5–II-8. The share of subject imports sold to end users from South Korea was a very small percentage in comparison. *Id.* Based on these two tables in the Staff Report, the ITC's determination that there was a "reasonable overlap" is supported by substantial evidence, even though there were varying degrees of shares of sales in each country.

Second, Tenaris asserts that the ITC's determination to cumulate subject imports from Argentina and Mexico is not supported by substantial evidence because the ITC did not consider Tenaris' "Rig Direct" program as the reason for the shift in market share and the increase in Tenaris' market share. *See* Tenaris' Br. at 22–23. Tenaris contends that the record demonstrates that the "distributor" model for sales of subject imports from South Korea using unaffiliated producers, processors, and distributors is not the same as Tenaris' "Rig Direct" program for sales of Tenaris' domestic and imported OCTG using affiliated parties to provide OCTG and services on a "fully integrated" basis. Tenaris' Reply at 4.

The Government and Defendant-Intervenors argue that the "Rig Direct" program is Tenaris' rebranding of standard services performed by affiliated entities, and the Commission should not have weighed this differently. *See* Def.-Intervs.' Resp. at 16; Def.'s Resp. at 20.

The ITC considered whether other factors may have had an adverse impact on the domestic industry not attributable to subject imports alone. *Views* at 44. The ITC rejected Tenaris' administrative argument that the shift in market share toward cumulated subject imports was caused by Tenaris' "Rig Direct" program, which allegedly provided "superior availability and technical assistance." *Id.* at 45–46; *id.* at 46 n.258 (citing Table C-1 (summary data concerning the U.S. market for the period of investigation)).

The ITC did not view the "Rig Direct" program as a factor for the shift in market share because: (1) "large majorities of purchasers

rated domestically produced OCTG as superior or comparable to subject imports with respect to both availability and technical support/service"; (2) signed declarations with supporting documentation corroborated that domestic producers in combination with their distributors provided the same services as the "Rig Direct" program; and (3) the domestic industry also lost market share to subject imports from Russia and South Korea that were not sold via the "Rig Direct" program. *Id.* at 46.

The ITC cited to Table II-14 in the Staff Report and documents attached to Petitioners' Post-Hearing Brief to show that Tenaris' "Rig Program" was not a unique model, but other OCTG producers implemented similar strategies in selling subject imports. *See* Staff Report at Table II-14; Petitioners' Post-Hearing Br. at Ex. 3 ("Declaration of Robert J. Beltz"), Ex. 4 ("Declaration of Brett Mendenhall"). As noted above, Table II-14 shows the number of purchasers' responses comparing U.S.-produced and imported product by factor and country pair. Staff Report at II-32. This evidence demonstrates that for the factors of availability and technical support/service, a majority of responding purchasers reported that Russian OCTG merchandise were "superior" or "comparable" to the domestic product. *Id.* at II-33. There is no record evidence demonstrating the use of the "Rig Direct" model by Russian OCTG producers or importers.

The Petitioners' Post-Hearing Brief included the Declaration of Robert J. Beltz and the Declaration of Brett Mendenhall. Both declarations indicate that the services provided by Tenaris' "Rig Direct" program is not unique to Tenaris but is a strategy offered by other domestic producers and manufacturers. The Declaration of Robert J. Beltz, who is employed as the general manager for U.S. Steel Tubular Products ("USSTP") by United States Steel Corporation, a domestic producer of OCTG, discussed USSTP's services and stated that Tenaris' "Rig Direct" model only differs in its reliance on an affiliated distributor that primarily supplies Tenaris-produced OCTG products, but does not differ in terms of the nature of services provided to end users. Decl. of Robert J. Beltz at 1–2. The Declaration of Brett Mendenhall, who is the President and CEO of P2 Energy Services ("P2"), a domestic distributor of OCTG, stated that the services provided by Tenaris' "Rig Direct" were not unique to Tenaris because P2 typically enters program agreements in combination with an OCTG manufacturer, and just as in the Tenaris "Rig Direct" model, the end user received the full range and distributor services required under the model. Decl. of Brett Mendenhall at 1. He also attached portions of a business presentation from an OCTG manufacturer that discussed similar services to those in Tenaris' "Rig Direct" program. *Id.* at 2.

The Staff Report also supported the ITC's determination that "superior availability and service" was not exclusive to Tenaris' "Rig Direct" program and thus could not account for the loss of market share for domestic producers. The ITC cited to Table IV-19 to show that the domestic industry also lost market share to subject imports from Russia and South Korea that were not sold via the "Rig Direct" program. *Views* at 46. Table IV-19 provides data on apparent U.S. consumption and market shares based on quantity for OCTG, by source and period, showing that subject imports from Russia and South Korea contributed to the total market share of OCTG in the U.S. market. Staff Report at IV-41. Based on the record evidence, the ITC considered Tenaris' "Rig Direct" program in assessing possible factors that attributed to the shift in market share toward cumulated subject imports. Therefore, the ITC's determination that the "Rig Direct" program was not a cause of the loss of domestic market share is supported by substantial evidence. The Court holds that the ITC's determination to cumulate subject imports from Argentina and Mexico is supported by substantial evidence.

Because the Court remands the final determination to reconsider the ITC's determination to cumulate subject imports from Russia, non-subject imports from South Korea, and subject imports from South Korea under an antidumping order, as explained above, the Court defers its analysis of the challenges to the ITC's additional determinations regarding volume, price effects, and impact in the material injury determination at this time.

## CONCLUSION

For the foregoing reasons, the Court concludes that the Commission's cumulation determination is not supported by substantial evidence and not in accordance with law. Accordingly, it is hereby

**ORDERED** that the Commission's *Final Determination* is remanded for reconsideration consistent with this Opinion; and it is further

**ORDERED** that this case shall proceed according to the following schedule:

(1) The Commission shall file its remand redetermination on or before August 16, 2024;
(2) The Commission shall file the administrative record on or before August 30, 2024;
(3) The Parties shall file any comments on the remand redetermination on or before September 27, 2024;
(4) The Parties shall file replies to the comments on the remand redetermination on or before October 25, 2024; and
(5) The joint appendix shall be filed on or before November 22, 2024.

Dated: April 19, 2024
New York New York

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

Slip Op. 24–50

COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Plaintiff, and FONTAINE INC., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and FONTAINE INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 19–00122

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the countervailing duty expedited review of certain softwood lumber products from Canada.]

Dated: April 22, 2024

[1]*Sophia J.C. Lin* and *Jessica M. Link*, Picard Kentz & Rowe LLP, of Washington, DC, argued for Plaintiff Committee Overseeing Action for Lumber International Trade Investigations or Negotiations. On the brief were *Lisa W. Wang*, *Andrew W. Kentz*, *David A. Yocis*, *Nathanial M. Rickard*, *Whitney M. Rolig*, *Heather N. Doherty*, and *Zachary J. Walker*.

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*Mark B. Lehnardt*, Law Offices of David L. Simon, PLLC, of Washington, DC, argued for Consolidated Plaintiff/Defendant-Intervenor Fontaine Inc. On the brief was *Elliot J. Feldman*, Baker Hostetler, LLP, of Washington, DC.

*John R. Magnus*, TradeWins LLC, of Washington, DC, argued for Consolidated Plaintiff/Defendant-Intervenor Mobilier Rustique (Beauce) Inc.

*Elizabeth A. Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. On the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and Stephen C. Tosini, Senior Trial Counsel. Of counsel at the hearing was *Jesus N. Saenz*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

[1] The briefs relevant to the issues addressed herein were filed in 2019 and 2020. With the passage of time, certain attorneys listed on those briefs are no longer with the firm involved or the firm itself is no longer involved in the action. Certain government attorneys have left government service or now occupy new positions. For the sake of accuracy, the court lists the attorneys included on the last merits brief filed and their respective firms or positions as of the time of filing.

*Aaron R. Hutman*, Pillsbury Winthrop Shaw Pittman LLP, of Washington, DC, argued for Defendant-Intervenor Government of New Brunswick. On the brief were *Stephan E. Becker* and *Moushami P. Joshi*.

*Edward M. Lebow*, Haynes and Boone, LLP, of Washington, DC, argued for Defendant-Intervenors Les Produits Forestiers D&G Ltée and Marcel Lauzon Inc.

*Rajib Pal*, *Richard L.A. Weiner*, and *Alex L. Young*, Sidley Austin LLP, of Washington, DC, for Defendant-Intervenors North American Forest Products Ltd, Parent-Violette Gestion Ltée, and Le Groupe Parent Ltée.

*Yohai Baisburd*, *Jonathan M. Zielinski*, and *James E. Ransdell*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Defendant-Intervenor Scierie Alexandre Lemay & Fils Inc.

## *OPINION AND ORDER*

**Barnett, Chief Judge:**

In 2019, the U.S. Department of Commerce ("Commerce" or "the agency") issued its final results in the countervailing duty ("CVD") expedited review of certain softwood lumber products from Canada. *See Certain Softwood Lumber Prods. From Can.*, 84 Fed. Reg. 32,121 (Dep't Commerce July 5, 2019) (final results of CVD expedited review) ("*Final Results*"), ECF No. 99–5, and accompanying Issues and Decision Mem., C-122–858 (June 28, 2019) ("I&D Mem."), ECF No. 99–6. In *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States* (*Coalition IV*), 45 CIT __, 535 F. Supp. 3d 1336 (2021), this court vacated prospectively Commerce's *Final Results*, finding an absence of statutory authority for Commerce to conduct CVD expedited reviews. The matter returns to the court for resolution of the parties' substantive claims following the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit") reversal, holding that Commerce has statutory authority to conduct CVD expedited reviews. *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* (*Coalition V*), 66 F.4th 968, 979 (Fed. Cir. 2023). For the reasons discussed herein, Commerce's *Final Results* will be remanded in part and sustained in part.[2]

[2] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 99–2, and a Confidential Administrative Record ("CR"), ECF Nos. 99–3, 99–4. Parties submitted joint appendices containing record documents cited in their briefs and requested by the court. Public J.A. ("PJA"), ECF No. 148; Confid. J.A. ("CJA"), ECF No. 149; [Public] Correction to J.A. ("Rev. PJA"), ECF No. 230 (correct version of PJA Tab 66); Rev. and Add. to [PJA], ECF Nos. 239, 239–1, 239–2; Rev. and Add. to [CJA] ("1st Suppl. CJA"), ECF Nos. 240, 240–1, 240–2 (complete versions of Tabs 47 and 50, and new Tabs 67 and 68); Submission of Admin. R. Doc. Referenced at the Feb. 14, 2024 Hr'g, ECF No. 243; Submission of R. Doc. Following Oral Arg., ECF Nos. 244 (confid.), 245 (public). The court references the confidential version of record documents when available unless otherwise specified.

## BACKGROUND

### I. Commerce's Authority to Conduct CVD Expedited Reviews

CVD expedited reviews are principally a creature of Commerce's regulations, specifically provided for in 19 C.F.R. § 351.214(k)(2020).[3] In the decision memorandum accompanying the *Final Results*, Commerce relied on section 103(a) of the Uruguay Round Agreements Act ("URAA" or "the Act"), 19 U.S.C. § 3513(a), as authority for the promulgation of 19 C.F.R. § 351.214(k). I&D Mem. at 19. Commerce stated that 19 C.F.R. § 351.214(k) is intended "[t]o implement Article 19.3 of the [Subsidies and Countervailing Measures ("SCM")] Agreement" in CVD investigations in which Commerce limits the number of individually examined respondents pursuant to 19 U.S.C. § 1677f-1(e)(2)(A). I&D Mem. at 19–20 & n.124 (first alteration in original) (quoting *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,318 (Dep't Commerce Feb. 27, 1996) (notice of proposed rulemaking and request for public comments)). Commerce asserted that section 103(a) of the URAA afforded the agency "the authority to promulgate regulations to ensure that remaining obligations under the URAA which were not set forth in particular statutory provisions were set forth in the Code of Federal Regulations." *Id.* at 19.

In this lead case, Plaintiff, Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("Plaintiff" or "the Coalition"), challenged Commerce's authority to promulgate 19 C.F.R. § 351.214(k) pursuant to section 103(a) of the URAA. *See* Compl. ¶¶ 15–16, ECF No. 2.[4] The Act, which became effective on January 1, 1995, amended the domestic antidumping and countervailing duty laws in connection with the Uruguay Round Agreements, which included the SCM Agreement. *See* 19 U.S.C. §§ 3511(a)(1), (d),

[3] The court cites to the 2020 edition of the Code of Federal Regulations unless otherwise specified. On October 20, 2021, subsection (k) was redesignated as subsection (*l*) without material change. *See Regulations to Improve Admin. and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300, 52,371, 52,373–74 (Dep't Commerce Sept. 20, 2021). For consistency with prior proceedings in this case, the court refers to 19 C.F.R. § 351.214(k). Broadly speaking, 19 C.F.R. § 351.214 governs new shipper reviews. However, subsection (k) of the regulation provides for an administrative procedure referred to as a CVD expedited review. Subsection (k) permits a respondent that was not "select[ed] for individual examination" or "accept[ed] as a voluntary respondent" in a CVD investigation in which Commerce "limited the number of exporters or producers to be individually examined" to "request a review . . . within 30 days of the date of publication in the Federal Register of the [CVD] order." 19 C.F.R. § 351.214(k)(1).

[4] The Coalition is an association of domestic manufacturers, producers, and wholesalers of softwood lumber products. Compl. ¶ 9.

& 3501(7).[5] Section 103(a) of the URAA delegated authority to "appropriate officers" to promulgate regulations "necessary to ensure that any provision of this Act, or amendment made by this Act, . . . is appropriately implemented." 19 U.S.C. § 3513(a)(2).

In reviewing Plaintiff's claim, this court held "that Commerce exceeded its authority to the extent that it promulgated 19 C.F.R. § 351.214(k) pursuant to URAA § 103(a)." *Coalition III*, 483 F. Supp. 3d at 1263–64. The court grounded its holding primarily in the plain language of section 103(a), which only grants Commerce authority to issue regulations necessary to implement enacted provisions of the URAA. *Id.* at 1264.

Before the court, Defendant United States ("the U.S. Government" or "the United States") and certain Canadian parties appearing as Defendant-Intervenors with respect to this issue "offered various *post hoc* justifications for Commerce's regulation and the agency's administration of CVD expedited reviews." *Id.* at 1271–72. Those justifications included Commerce's authority to issue interim regulations regarding the URAA, Commerce's authority to reconsider prior decisions, and various other statutory provisions in which the Canadian parties had identified gaps for Commerce to fill using the CVD expedited review procedure. *See id.*[6] In light of these *post hoc* justifications, the court remanded the matter for the agency to address the alternatives and provide the explanation necessary for judicial review. *See id.* at 1272–73.

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[5] Article 19.3 of the SCM Agreement states, *inter alia*:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

SCM Agreement, Annex 1A, art. 19.3, Marrakesh Agreement Establishing the World Trade Org., Apr. 15, 1994, 1869 U.N.T.S. 14. The court did not find it necessary or appropriate to construe the intent of this provision because it is not self-executing and has legal force only insofar as there is implementing legislation. *See Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* (*Coalition III*), 44 CIT __, __, 483 F. Supp. 3d 1253, 1266 (2020).

[6] No parties argued, nor did the court find, that these statutory provisions were plain in this regard. Rather, the parties argued as to whether Congress left gaps for Commerce to fill, and whether Commerce's CVD expedited review procedure reflected a permissible method of doing so. *See, e.g.*, Joint Br. of Def.-Ints. Gov't of Can. and Gov't of Que. in Opp'n to Pl.'s Mot. for J. on the Agency R. at 15–18, 22–27, ECF No. 120.

On remand, Commerce reviewed the statutory provisions, including 19 U.S.C. §§ 1671d, 1675(a),(b), and 1677f-1,[7] and found that none of them explicitly or implicitly authorized Commerce to conduct CVD expedited reviews. Final Results of Redetermination Pursuant to Ct. Remand ("Remand Results") at 10–12, 19–21, ECF No. 173–1. Additionally, after considering the court's prior holdings on alternative justifications, Commerce concluded that it "lack[ed] the statutory authority" to promulgate 19 C.F.R. § 351.214(k) or conduct CVD expedited reviews. *Id.* at 12.[8] Finding that Commerce had discharged its duty to consider the alternatives and upon agreeing with the agency's interpretation of the provisions not to confer authority for the regulation, the court sustained Commerce's Remand Results. *Coalition IV*, 535 F. Supp. 3d at 1349–50, 1364.[9] The court vacated 19 C.F.R. § 351.214(k) and vacated prospectively Commerce's *Final Results*. *Id.* at 1352–64.

Certain Canadian parties appealed the court's decision to the Federal Circuit. *See Coalition V*, 66 F.4th at 976–77. The United States did not participate in the Canadian parties' appeal until, following oral argument, the Federal Circuit ordered the U.S. Government to file an amicus brief. *See id.* In that brief, the U.S. Government, for the first time, adopted the argument that 19 U.S.C. § 1677f-1(e) authorized CVD expedited reviews. *Id.* at 976–77.

Section 1677f-1(e) sets forth a general rule that when Commerce is "determining countervailable subsidy rates under section 1671b(d), 1671d(c), or 1675(a) of this title, the [agency] shall determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise." 19 U.S.C. § 1677f-1(e)(1). The statute also provides certain exceptions, such that if Commerce "determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review,"

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[7] Section 1671d governs Commerce's final determinations following a CVD investigation. Section 1675(a) and (b) governs administrative reviews and changed circumstances reviews, respectively. Section 1677f-1, as will be discussed herein, sets forth the procedures for Commerce's use of sampling and averaging to determine antidumping or countervailing duties.

[8] In the Remand Results, Commerce relied on *Coalition III* to "presume" that URAA section 103(a) did not authorize the regulation, Remand Results at 10, but did not state that the agency considered the alternative theories under protest, *see id.*; *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003) (a decision adopted by Commerce "under protest" and subsequently sustained places the U.S. Government in the position of the non-prevailing party for purposes of preserving its right to appeal).

[9] Insofar as Commerce disclaimed authority to conduct CVD expedited reviews pursuant to the considered provisions, Remand Results at 11–12, 19–21, there was no agency decision that interpreted those sections to provide such authority and as to which Commerce could have sought judicial deference for its interpretation of statutory ambiguities.

Commerce may instead "determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to . . . a sample of exporters or producers" or the "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that [Commerce] determines can be reasonably examined." *Id.* § 1677f-1(e)(2)(A).[10] Section 1677f-1(e) thus operates in service of agency determinations issued pursuant to the specified statutory provisions.

In considering this issue, the Federal Circuit stated that "the question of whether there is statutory authority for [section] 351.214(k) . . . presents an issue of law, decided *de novo*, requiring no exercise of discretion that belongs to the agency under [the *Chenery* line of cases]."[11] *Coalition V*, 66 F.4th at 976. With the *Chenery* reference indicating that the appellate court found the statute plain and providing no discretion to Commerce, the Federal Circuit located "statutory authority for the expedited-review process . . . in the URAA's enactment of [section] 1677f-1(e) to favor individual-company determinations and the URAA's grant of regulatory-implementation power to Commerce in [section] 3513(a)." *Id.* at 977.[12]

While Commerce, thus, may conduct CVD expedited reviews pursuant to section 1677f-1(e), that provision is not among the determi-

[10] Commerce may also determine a single country-wide subsidy rate to be applied to all exporters and producers. 19 U.S.C. § 1677f-1(e)(2)(B).

[11] Those cases consist of *Securities and Exchange Commission v. Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943), and *Securities and Exchange Commission v. Chenery Corp.* (*Chenery II*), 332 U.S. 194 (1947). *Chenery II* states the general rule that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." 332 U.S. at 196. When, however, "the sole issue is one of statutory construction," the court does not intrude on the agency's discretion insofar as "the plain language of the statute compels [a particular] conclusion." *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1101 (Fed. Cir. 1996). Nevertheless, *Chenery II* precludes a court from "affirm[ing] on a basis containing any element of discretion—including discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court." *Id.* (citation omitted); *see also Women Involved in Farm Econs. v. U.S. Dept. of Agric.*, 876 F.2d 994, 998 (DC Cir. 1989) (noting that *Chenery I* "ordinarily prevents agency counsel from proffering alternative theories—not explicitly embraced by a department or agency head—to support a challenged regulation" because to do so "risks *judicial* 'intru[sion] upon the domain which Congress has exclusively entrusted to an administrative agency'" (quoting *Chenery I*, 318 U.S. at 88) (alterations in original)).

[12] The Federal Circuit based its conclusion on language in the Statement of Administrative Action accompanying the URAA and set forth various reasons why CVD expedited reviews may be necessary to the implementation of "the individualized-determination preference of § 1677f-1(e)." *Coalition V*, 66 F.4th at 977–78. The appellate court also found support in 19 U.S.C. § 1677m, which permits Commerce to select voluntary respondents in investigations or administrative reviews that timely submit the necessary information. *Id.* at 978. Lastly, the appellate court acknowledged that CVD expedited reviews "do not occur during a CVD investigation, but only *after* publication of a CVD order," but did not find the timing material to its construction of the statute. *See id.* at 978–79.

nations listed in 19 U.S.C. § 1516a(a)(1) that are judicially reviewable pursuant to 28 U.S.C. § 1581(c). Accordingly, Commerce's CVD expedited review determinations are reviewable pursuant to 28 U.S.C. § 1581(i).[13] *See Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* (*Coalition II*), 43 CIT __, 413 F. Supp. 3d 1334 (2019) (finding jurisdiction pursuant to 28 U.S.C. § 1581(i)(4)(2018)); *Coalition V*, 66 F.4th at 976 n.4 (finding "no reversible error" in this exercise of jurisdiction).[14]

## II. Commerce's *Final Results* and Procedural Posture[15]

With the statutory authority addressed, the court reviews the parties' substantive challenges to the *Final Results*. In that determination, issued on July 5, 2019, Commerce announced the results of expedited reviews requested by eight Canadian producers and their affiliates that were not selected for individual examination during the investigation and had been assigned the "all-others" rate of 14.19 percent. *See generally Certain Softwood Lumber Prods. From Can.*, 83 Fed. Reg. 347, 348–49 (Dep't Commerce Jan. 3, 2018) (am. final affirmative CVD determination and CVD order) ("*CVD Order*"); *Certain Softwood Lumber Prods. From Can.*, 83 Fed. Reg. 9,833, 9,833 (Dep't Commerce March 8, 2018) (initiation of expedited review of the [*CVD Order*]) ("*Initiation Notice*").[16] For those companies, Commerce determined reduced or *de minimis* rates as follows: (1) Les Produits Forestiers D&G Ltée and its cross-owned affiliates ("D&G"): 0.21 percent; (2) Marcel Lauzon Inc. and its cross-owned affiliates ("MLI"): 0.42 percent; (3) North American Forest Products Ltd. and its cross-

[13] In 2020, section 1581(i)(4) was redesignated as section 1581(i)(1)(D) without material change. *See* 28 U.S.C. § 1581(i)(1)(D) (2018 & Supp. II 2020). Section 1581(i)(1)(D) provides the court with exclusive jurisdiction over a civil action commenced against the United States "that arises out of any law . . . providing for" the "administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of [paragraph (1)] and subsections (a)-(h) of this section." 28 U.S.C. § 1581(i)(1)(D). Subsection (i) cannot confer jurisdiction over an antidumping or countervailing determination that is judicially reviewable pursuant to 19 U.S.C. § 1516a (2018) (which does not include CVD expedited reviews). 28 U.S.C. § 1581(i)(2)(A). Judicial review of those determinations is reserved to 28 U.S.C. § 1581(c).

[14] Prior to resolving the court's jurisdiction, this court issued an opinion vacating a temporary restraining order requested by Plaintiff barring U.S. Customs and Border Protection ("CBP") from liquidating unliquidated entries of softwood lumber produced or exported by Canadian companies that received reduced or *de minimis* rates in the *Final Results* and denying the Coalition's corresponding request for a preliminary injunction. *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* (*Coalition I*), 43 CIT __, 393 F. Supp. 3d 1271 (2019).

[15] When necessary, additional background specific to each claim accompanies the court's analysis of the claim.

[16] The period of review ("POR") for the CVD expedited review was January 1, 2015, through December 31, 2015, the same as the period of investigation for the investigation. *Initiation Notice*, 83 Fed. Reg. at 9,833.

owned affiliates ("NAFP"): 0.17 percent; (4) Roland Boulanger & Cie Ltée and its cross-owned affiliates ("Roland"): 0.31 percent; (5) Scierie Alexandre Lemay & Fils Inc. and its cross-owned affiliates ("Lemay"): 0.05 percent; (6) Fontaine Inc. and its cross-owned affiliates ("Fontaine"): 1.26 percent; (7) Mobilier Rustique (Beauce) Inc. and its cross-owned affiliates ("Rustique"): 1.99 percent; and (8) Produits Matra Inc. and Sechoirs de Beauce Inc. and their cross-owned affiliate ("Matra"): 5.80 percent. *Final Results*, 84 Fed. Reg. at 32,122.

The rates calculated for D&G, MLI, NAFP, Roland, and Lemay are considered *de minimis*;[17] therefore, Commerce stated it would instruct CBP "to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by" those companies that were entered on or after July 5, 2019; "liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by" those companies; and "refund all cash deposits of estimated countervailing duties collected on all such shipments." *Id.* As to the companies receiving a lower—but not *de minimis*—rate (Fontaine, Rustique, and Matra), Commerce stated it would instruct CBP "to collect cash deposits of estimated countervailing duties" at the lower rates calculated in the *Final Results*. *Id.*[18]

Plaintiff commenced this action on July 15, 2019. Summons, ECF No. 1. After ruling on jurisdiction, *Coalition II*, 413 F. Supp. 3d 1334, the court consolidated Court Nos. 19–00154, 19–00164, 19–00168, and 19–00170 under this lead action. Order (Nov. 12, 2019), ECF No. 93.[19] The court heard oral argument on the merits claims on February 14, 2024. Docket Entry, ECF No. 241.

The following table lists the filings before the court pertinent to the remaining claims:

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[17] For ease of reference, the court refers to D&G, MLI, NAFP, Roland, and Lemay collectively as the *de minimis* companies.

[18] In *Coalition IV*, the court ordered Commerce to reinstate the *de minimis* companies in the *CVD Order* prospectively and, for the remaining companies, to "impose a cash deposit requirement based on the all-others rate from the investigation or the company-specific rate determined in the most recently completed administrative review in which the company was reviewed." 535 F. Supp. 3d at 1363. Following *Coalition V*, the court granted the *de minimis* companies' motion (with the exception of Roland, which did not participate in the litigation) to reinstate their exclusion from the *CVD Order*. *See generally Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* (*Coalition VI*), 47 CIT __, __, 665 F. Supp. 3d 1347, 1355 (2023).

[19] The consolidated actions were filed by Fontaine, Rustique, the Government of Québec ("GOQ"), and the Government of Canada ("GOC"). Various Canadian parties intervened on the plaintiff or defendant side of the respective actions; their filings are reflected in the table of briefs.

| **Plaintiff's Claims** |
|---|
| **Moving Brief** |
| Confid. Pl.'s Rule 56.2 Mot. for J. on the Agency R. and accompanying Confid. Mem. in SUPP. of Pl.'s Rule 56.2 Mot. for J. on the Aaencv R. ("**Coal. Mem.**") ECF No. 101. |
| **Response Briefs** |
| Confid. Def.'s Resp. [to] Pls.' Mots. for J. on the Agency R. ("**U.S. Resp.**"), ECF No. 110. |
| Joint Br. of Def.-Ints. [GOC]. and [GOO] in Opp'n to Pl.'s Mot. for J. on the Agency R. ("**CGP Resp.**"), ECF No. 120.[20] |
| Br. of Def.-Ints. [D&G] and [MLI] in Opp'n to Pl.'s Mot. for J. on the Agency R. ("**D&G/MLI Resp.**"), ECF No. 117. |
| Resp. of Def.-Int. [Lemay] in Opp'n to Pl.'s Mot. for J. on the Agency R. ("**Lemay Resp.**"), ECF No. 119.[21] |
| Def.-Int. NAFP's Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("**NAFP Resp.**"), ECF No. 125. |
| Resp. of Def.-Int. Gov't of N.B. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("**N.B. Resp.**"), ECF No. 141. |
| **Reply Brief** |
| Pl. [Coal.'s] Reply Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("**Coal. Reply**"), ECF No. 127. |
| **Claims by Consolidated Plaintiffs** |
| **Moving Briefs** |
| Mot. for J. Upon the Agency R. under Rule 56.2 of Consol. Pl. [Rustique], ECF No. 100, and accompanying Pl.'s Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 100–1 ("**Rustique Mem.**"). |
| Rule 56.2 Mot. of [Fontaine] for J. on the Agency R. , ECF No. 103, and accompanying Confid. Corrected Mem. in Supp. of Rule 56.2 Mot. of [Fontaine] for J. on the Agency R. ECF No. 150 ("**Fontaine Mem.**"). |
| Consol. Pl. [GOC's] Rule 56.2 Mot. for J. on the Agency R., ECF No. 105, and accompanying Confid. Consol. Pl. [GOC's] Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 156 ("**GOC Mem.**"). |
| Consol. Pl. [GOQ's] Rule 56.2 Mot. for J. on the Agency R., ECF No. 106, and accompanying Consol. Pl.'s Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 145 ("**GOQ Mem.**"). |
| Consol. Pl.-Int.'s [GOC's] Mem. in Supp. of Rule 56.2 Mots. for J. on the Agency R. Submitted by [Fontaine], [Rustique], and the [GOQ] ("**GOC Int. Mem.**"), ECF No. 108. |
| **Response Briefs** |
| Confid. Def.-Int. [Coal.'s] Resp. to Rule 56.2 Mots. for J. on the Agency R. Submitted by [Fontaine], [Rustique], the [GOC], and the [GOQ] ("**Coal. Resp.**"), ECF No. 114. |
| **U.S. Resp.** |

[20] CGP stands for "Canadian Governmental Parties," and consists of the GOC and GOQ.

[21] Lemay adopted by reference the arguments made by other parties and raised no additional arguments. Lemay's Resp. at 2.

**Reply Briefs**

Consol. Pl. [Rustique's] Reply Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("**Rustique Reply**"), ECF No. 126.

Confid. Corrected Reply Br. of [Fontaine] in Supp. of its Rule [56.2] Mot. for J. on the Agency R. ("**Fontaine Reply**"), ECF No. 152.

Consol. Pl. [GOC's] Reply Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("**GOC Reply**"), ECF No. 132.

Confid. Revised Consol. Pl. [GOQ's] Reply to Resp. of Def. United States and Def.-Int. [Coal.] to Rule 56.2 Mots. for J. on the Agency R. Submitted by [Fontaine], [Rustique], the [GOC], and the [GOQ] ("**GOQ Reply**"), ECF No. 146.

Consol. Pl.-Int. [GOC's] Reply Mem. in Supp. of Rule 56.2 Mots. for J. on the Agency R. Submitted by [Fontaine], [Rustique], and the [GOQ] ("**GOC Int. Reply**"), ECF No. 136.[22]

## JURISDICTION AND STANDARD OF REVIEW

As noted, the court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(D). The court reviews an action commenced pursuant to 28 U.S.C. § 1581(i) in accordance with the standard of review set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, as amended. *See* 28 U.S.C. § 2640(e). Section 706 directs the court, *inter alia*, to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

## DISCUSSION

### I. The Coalition's Claims

The Coalition challenges three aspects of the *Final Results*: Commerce's treatment of the *de minimis* companies, Commerce's decision not to attribute supplier subsidies to the CVD expedited review respondents, and Commerce's adjustment to the benchmark used to calculate the benefit from the Government of New Brunswick's property tax program. Coal. Mem. at 32–47; Coal. Reply at 12–24. The U.S. Government and several Defendant-Intervenors responded in

[22] In its capacity as consolidated plaintiff-intervenor, the GOQ filed letters in lieu of briefs supporting the arguments made by consolidated plaintiffs. Consol. Pl.-Int. [GOQ's] Letter in Lieu of Mot. for J. on the Agency R., ECF No. 107; Consol. Pl.-Int. [GOQ's] Letter in Lieu of Reply Br., ECF No. 135.

support of Commerce's determinations. U.S. Resp. at 14–31; CGP Resp. at 31–44; D&G/MLI Resp. at 2–5; NAFP Resp. at 14–23; GNB Resp. at 9–14.

The court will sustain Commerce's treatment of the *de minimis* companies and benchmark adjustment but will remand Commerce's decision not to attribute subsidies received by suppliers to the respondents.

### A. Commerce's Treatment of the *De Minimis* Companies

The Coalition contends that Commerce violated 19 C.F.R. § 351.214(k)(3)(iii) when it instructed CBP to liquidate entries from the *de minimis* companies "without regard to countervailing duties" and to refund cash deposits paid on those entries. Coal. Mem. at 32–33. That regulation states that a determination pursuant to subsection (k) "will not be the basis for the assessment of countervailing duties." 19 C.F.R. § 351.214(k)(3)(iii). The Coalition points out language in the liquidation and cash deposit instructions regarding "the assessment of countervailing duties," which it claims is inconsistent with the regulation. Coal. Mem. at 33 (citing CBP Message No. 9234309 (Aug. 22, 2019) ("Liquidation Instructions"), PR 776, CJA Tab 65; CBP Message No. 9288315 (Oct. 15, 2019) ("Cash Deposit Instructions"), PR 784, Rev. PJA Tab 66); *see also* Coal. Reply at 13.

Regulations, like statutes, must be "read as a whole." *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1336 (Fed. Cir. 2017). The regulation here goes on to state that, subject to verification requirements, Commerce "may exclude from the countervailing duty order in question any exporter for which the [agency] determines an individual net countervailable subsidy rate of zero or *de minimis*." 19 C.F.R. § 351.214(k)(3)(iv). In directing CBP to exclude the *de minimis* companies from the *CVD Order*, Commerce adhered to the plain language of the regulation and Commerce's prior interpretation of the provisions. As Commerce explained in the preamble accompanying the regulation:

> The objective [of a CVD expedited review] is to provide a non-investigated exporter with its *own cash deposit rate* prior to the arrival of the first anniversary month of the order, at which point the exporter may request an administrative review. In this regard, in paragraph (k)(3)(iii) we have clarified that the final results of a paragraph (k) review will *not be the basis for the assessment of countervailing duties*, except, of course, under the automatic assessment provisions of § 351.212(c).

> Finally, because the [agency] will be reviewing the original period of investigation, we have provided in paragraph (k)(3)(iv) for the *exclusion from a CVD order* of a firm for which the [agency] determines an individual countervailable subsidy rate of zero or *de minimis*.

*Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,321 (Dep't Commerce May 19, 1997) (final rule) ("*Preamble*") (emphases added).

"Assessment," for these purposes, refers to the "'retrospective' assessment system" used in the United States "under which final liability for antidumping and countervailing duties is determined after merchandise is imported." 19 C.F.R. § 351.212(a). Pursuant to this retrospective system, "[g]enerally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time," *id.*; in CVD cases, those reviews consist of administrative reviews and new shipper reviews, *see id.* § 351.212(b)(2). Thus, 19 C.F.R. § 351.214(k)(3)(iii) confirms that the final results of a CVD expedited review do not trigger the assessment provision in 19 C.F.R. § 351.212(b)(2).[23] Read together, 19 C.F.R. § 351.214(k)(iii) and (iv) demonstrate that entities that receive a zero or *de minimis* rate in a CVD expedited review are to be excluded from the underlying order, much as they would have been had they received that rate during the original investigation. Entities that receive an above-*de minimis* rate, however, are not, at the time, assessed duties based on the results of the expedited review but are assigned a new cash deposit rate based on those results pending assessment pursuant to a subsequent administrative review.[24]

Exclusion from the order from the time of its issuance is further confirmed by the reference to 19 C.F.R. § 351.204(e)(1) in 19 C.F.R. § 351.214(k)(3)(iv). Section 351.204(e)(1) states that Commerce "will exclude from an affirmative final determination . . . or an order . . .

[23] The reference in 19 C.F.R. § 351.212(b)(2) to assessment based on new shipper reviews does not specify any particular subsection of 19 C.F.R. § 351.214; thus, the specific language of 19 C.F.R. § 351.214(k)(iii) makes plain that CVD expedited reviews are not covered by the assessment provision of 19 C.F.R. § 351.212(b)(2) applicable to new shipper reviews.

[24] The Coalition's assertion that "Commerce asked CBP *to conduct* the 'assessment of countervailing duties . . . on entries of this merchandise,'" Coal. Mem. at 33 (emphasis added), mischaracterizes Commerce's instructions. The Liquidation Instructions and Cash Deposit Instructions merely observe that "[t]he assessment of countervailing duties by CBP on entries of this merchandise is subject to the provisions of Section 778 of the Tariff Act of 1930, as amended," and provide further instructions for CBP's treatment of interest for overpayments or underpayments of estimated duties, as the case may be. Liquidation Instructions ¶ 6; *see also* Cash Deposit Instructions ¶ 4. Commerce's inclusion of the term "assessment" in the instructions does not constitute a regulatory violation when the substantive aspects of Commerce's instructions are entirely consistent with the governing regulation.

any exporter or producer for which the [agency] determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis*." 19 C.F.R. § 351.204(e)(1). As such, the exclusion referenced in section 351.214(k)(3)(iv) appears intended to function in the same way as an exclusion based on section 351.204(e)(1). This interpretation is consistent with the coincident periods of investigation and review, *see id.* § 351.214(k)(3)(i), and the purpose of the CVD expedited review to provide an exporter with an individual rate before the first administrative review, *see Preamble*, 62 Fed. Reg. at 27,321.[25]

Commerce's instructions were therefore necessary to implement the results of the CVD expedited review with respect to the *de minimis* companies because the *CVD Order* no longer provided a basis for the suspension of liquidation of those companies' entries or the collection or retention of cash deposits. Accordingly, the Coalition's challenge fails.

### B. Supplier Subsidies

#### 1. Additional Background

Information placed on the record of the CVD expedited review demonstrated that Rustique, D&G, and D&G's affiliate, Portbec, purchased subject merchandise from unaffiliated suppliers and either further processed the merchandise prior to exportation to the United States as subject merchandise or resold the merchandise without further processing. Rustique reported that it "[o]ccasionally . . . buys sawn white cedar softwood from Canadian producers that is then further processed in Rustique's factory into finished merchandise for sale in Canada or in the United States." [Rustique] Apr. 12 Questionnaire Resp. (Apr. 12, 2018) ("Rustique IQR") at 8, CR 114, PR 238, CJA Tab 11. Portbec reported that it "exported (and on those sales also served as an importer of record) . . . a limited volume of subject merchandise produced by other companies in Canada." Resps. of [D&G] to the [CVD] Questionnaire (Apr. 12, 2018) at ECF p. 58, CR 99, PR 223, CJA Tab 10a. Portbec "also served in a limited capacity as a remanufacturer whereby it purchased lumber in Canada and cut that lumber down to thin widths for resale." *Id.*

In light of this information, the Coalition urged Commerce to attribute subsidies received by unaffiliated suppliers of subject merchan-

[25] At oral argument, the Coalition argued that 19 C.F.R. § 351.214(k)(3)(iv) does not contemplate exclusion from a CVD order from the time of issuance but instead refers to prospective exclusion. Oral Arg. 2:27:00–2:30:00 (time stamp from the recording), https://www.cit.uscourts.gov/sites/cit/files/20240214_19–00122_MAB.mp3. For the reasons stated, the Coalition's argument lacks merit.

dise to Rustique and D&G/Portbec. *See* [The Coal.'s] Case Br. (Mar. 11, 2019) ("Coal. Case Br.") at 19–34, CR 900, PR 717 1st Suppl. CJA Tab 47. The Coalition argued that, for any respondents acting as resellers, Commerce should establish combination rates pursuant to 19 C.F.R. § 351.107(b) or cumulate subsidies pursuant to Commerce's trading company regulation, 19 C.F.R. § 351.525(c). *Id.* at 24–29. As for subject merchandise further processed by Rustique or D&G/Portbec, the Coalition first averred that there is "no question of 'upstream subsidies' or 'passthrough' . . . raised by the situation of the 'independent remanufacturer'" because the supplier subsidies are provided with respect to the "manufacture [or] production" of subject merchandise, not inputs into "the production or manufacture of subject merchandise." *Id.* at 30 n.85 (alteration in original). The Coalition thus argued that Commerce should likewise calculate combination rates that include the all-others rate from the investigation applied to the producer and the subsidy rate specific to the expedited review respondent. *Id.* at 29–34. For this latter scenario, the Coalition relied on an earlier softwood lumber proceeding in which Commerce included sales of "remanufactured lumber" (i.e., "softwood lumber that undergoes some further processing") in the subsidy calculations. *Id.* at 31 & n.87 (citing Issues and Decision Mem. for Certain Softwood Lumber Prods. from Can., C-122–839 (Dec. 5, 2005) at 5, 20, 38;[26] Issues and Decision Mem. for Certain Softwood Lumber Prods. From Can., C-122–839 (Mar. 21, 2002) at 25 ("Lumber IV Mem.")).[27]

Commerce disagreed on all points. First, the agency, unlike Plaintiff, characterized lumber that underwent further processing as "inputs to the respondents' exports to the United States." I&D Mem. at 38.[28] Noting that the Coalition had not submitted an upstream subsidy allegation, Commerce stated that it "did not investigate upstream subsidies" and therefore "lacked a basis to attribute subsidies" provided to the "unaffiliated suppliers." *Id.* Commerce did not address the Coalition's reliance on *Lumber IV*. *See id.*

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[26] Commerce's decision memoranda are publicly available at https://access.trade.gov/public/FRNoticesListLayout.aspx, with separate links for pre- and post-June 2021 memoranda.

[27] The Lumber IV Memorandum is dated March 21, 2001, which appears to be a typographical error given that the associated Federal Register notice is dated April 2, 2002. *See Certain Softwood Lumber Prods. From Can.*, 67 Fed. Reg. 15,545 (Dep't Commerce Apr. 2, 2002) (notice of final affirmative CVD determination and final neg. critical circumstances determination).

[28] Commerce asserted that the Coalition failed to submit an upstream subsidy allegation consistent with the requirements of 19 C.F.R. § 351.523(a). I&D Mem. at 38. That regulation defines "input product" to "mean[] any product used in the production of the subject merchandise." 19 C.F.R. § 351.523(b).

Next, Commerce rejected the Coalition's reliance on 19 C.F.R. § 351.107(b) and 19 C.F.R. § 351.525(c). *Id.* 38–39. Commerce found that "the record does not contain information pertaining to subsidies that each unaffiliated producer/supplier received" and the agency therefore was unable to apply 19 C.F.R. § 351.525(c). *Id.* at 39.

With respect to combination rates pursuant to 19 C.F.R. § 351.107(b), Commerce further explained that the agency has "refrained from examining whether a producer of subject merchandise (whose merchandise is resold by the respondent) received subsidies when the amount of such resales is small relative to the respondent's overall sales." *Id.* at 39 & n.247 (citing *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China*, 75 Fed. Reg. 9,163, 9,170 (Dep't Commerce Mar. 1, 2010) (prelim. affirmative CVD determination, prelim. affirmative critical circumstances determination) ("*Pipe From China*")). Commerce found that "only a relatively small proportion of D&G/Portbec's business involves sales of merchandise from Canada to the United States" and that "the vast majority of D&G/Portbec's transactions involve purchasing Canadian lumber on a duty paid basis in the United States and reselling the lumber to buyers in the United States." *Id.* at 39. Commerce also found that, "for Rustique, its purchases of rough-hewn lumber actually represent a very small percentage of its wood fiber inputs." *Id.*

**2. Analysis**

The Coalition challenges Commerce's interpretation of the upstream subsidy provision to preclude consideration of subsidies to suppliers of lumber purchased and further processed by the respondents absent an upstream subsidy allegation, and Commerce's decision otherwise not to apply the combination rate or trading company regulations. Commerce must further explain or reconsider its decisions.

**a. The Upstream Subsidy Provision**

Consistent with the agency's analysis, the court addresses first Commerce's decision, based on the absence of an upstream subsidy allegation, not to attribute subsidies received by unaffiliated suppliers of lumber that Rustique and D&G/Portbec purchased and further processed. *See* I&D Mem. at 38.[29] From Commerce's decision to require an upstream subsidy allegation, the court discerns a corre-

[29] While Commerce discusses certain respondents' manufacture of lumber from logs, I&D Mem. at 38, the Coalition's challenge is directed solely at respondents' purchases of lumber (subject merchandise) from unaffiliated suppliers, *see* Coal. Case Br. at 19; Coal. Mem. at 41.

sponding determination to treat the so-called respondent-remanufacturers as the producers and exporters of this merchandise. *See id.* (referring to "further manufacturing on lumber acquired from unaffiliated suppliers").[30]

In reaching this decision, Commerce failed to engage with the Coalition's arguments concerning remanufacturing and, in particular, the type of "minor" activities that may constitute "remanufacturing." *See* Coal. Case Br. at 29–30. This omission is material because suppliers of lumber that would otherwise be covered by the *CVD Order* and subject to a higher rate would appear to be able to escape duties by selling merchandise through a "remanufacturer" with a more favorable rate. *See* Coal. Mem. at 40; Coal. Reply at 20.[31]

If, on remand, Commerce continues to find that the respondent-remanufacturers are the producers of the subject merchandise, Commerce must reconsider or further explain its determination to require an upstream subsidy allegation for purchases of lumber that is within the class or kind of covered merchandise. Commerce explained its decision by way of reference to the agency's finding that "logs and lumber are inputs to the respondents' exports to the United States." I&D Mem. at 38. However, Commerce provided no discussion of the agency's reasons for interpreting section 1677–1(a)(1) to include subject merchandise in the statutory definition of an *upstream* product.

Section 1671 provides:

> (e) Upstream subsidies
>
> Whenever the administering authority has reasonable grounds to believe or suspect that an upstream subsidy, as defined in section 1677–1(a)(1) of this title, is being paid or bestowed, the administering authority shall investigate whether an upstream

[30] Part of the court's difficulty in discerning Commerce's position on this issue is based on Commerce's discussion of Rustique's purchases of rough-hewn lumber (that were further processed) in its discussion of the respondents' reselling activities. *See* I&D Mem. at 39. However, at oral argument, the Government confirmed Commerce's position that the respondent-remanufacturers are the producers of the subject merchandise while noting that further explanation for this decision could be provided on remand. Oral Arg. 0:11:50–0:12:25.

[31] At the hearing, Rustique suggested that it would be impossible to separate the allegedly small volume of subject merchandise for which Rustique acted as a remanufacturer from the entries for which Rustique did not. Oral Arg. 32:00–33:25. Rustique also suggested that any adjustment to its rate to account for supplier subsidies would amount to a "rounding error." *Id.* at 33:40–34:00. The court is unable to discern whether such concerns formed the basis for Commerce's reference to Rustique's input purchases in its discussion of reselling activities. *See* I&D Mem. at 39 ("Similarly, for Rustique, its purchases of rough-hewn lumber actually represent a very small percentage of its wood fiber inputs."). If, in fact, Commerce's decision on this issue turns on considerations other than the agency's interpretation of the upstream subsidy provision, Commerce must explain that decision in the first instance with sufficient clarity to enable judicial review.

> subsidy has in fact been paid or bestowed, and if so, shall include the amount of the upstream subsidy as provided in section 1677–1(a)(3) of this title.

19 U.S.C. § 1671(e) (footnotes omitted).[32] Section 1677–1(a)(1), in turn, states that an "'upstream subsidy' means any countervailable subsidy, other than an export subsidy, that—(1) is paid or bestowed by an authority . . . with respect to a product (hereafter in this section referred to as an 'input product') that is used in the same country as the authority in the manufacture or production of merchandise which is the subject of a countervailing duty proceeding." 19 U.S.C. § 1677–1(a)(1).

The U.S. Government and CGP's respective arguments on this issue focus, as Commerce did, on whether the purchased lumber may be characterized as an input. *See* U.S. Resp. at 24; CGP Resp. at 35, 37.[33] Those arguments, however, are nonresponsive to the question whether inputs that otherwise are subject merchandise may be considered "upstream" to the subject merchandise exported to the United States; in other words, whether the statutory language "a product . . . that is used . . . in the manufacture or production of merchandise which is the subject of a countervailing duty proceeding" should be interpreted broadly, as Commerce did, to include subject and nonsubject inputs, or narrowly, as the Coalition suggests, such that it captures only nonsubject inputs used to produce subject merchandise.

In light of the sparsity of Commerce's explanation of its statutory interpretation and the limited briefing on the salient issues, the court will remand this issue for Commerce to provide its explanation, and

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[32] The U.S. Code contains two footnotes concerning errors in the original such that the reference to section 1677–1(a)(1) "[p]robably should be 'section 1677–1(a)'" and the reference to section 1677–1(a)(3) "[p]robably should be section 1677–1(c)." 19 U.S.C. § 1671(e) nn.1–2.

[33] The CGP also rely on *Canadian Meat Council v. United States*, 11 CIT 362, 661 F. Supp. 622 (1987), to argue that the court has rejected the premise of the Coalition's argument, namely, that inputs that otherwise are subject merchandise may not be considered "upstream" to the subject merchandise pursuant to section 1677–1(a)(1). CGP Resp. at 35–36. *Canadian Meat Council* is largely inapposite. The underlying agency determination involved live swine and fresh, chilled, and frozen pork products from Canada. *Canadian Meat Council*, 11 CIT at 363, 661 F. Supp. 3d at 623. Commerce had concluded, without conducting an upstream subsidies investigation, that subsidies on live swine benefitted pork producers. *Id.* at 363, 365, 661 F. Supp. 3d at 623, 624. The disagreement centered, however, on Commerce's narrow interpretation of the term "input" that led the agency to determine that live swine was not an input into the subject pork products and, thus, disregard the upstream subsidy provision prior to finding a pass-through of benefits. *Id.* at 364–72, 661 F. Supp. at 624–29. The *Canadian Meat Council* court did not squarely address the meaning of the term "upstream" or whether the statute requires an upstream subsidy allegation when the input is within the class or kind of covered merchandise. Furthermore, the court later vacated its opinion and dismissed the action when the U.S. International Trade Commission's negative injury determination became final. *See Canadian Meat Council v. United States*, 12 CIT 108, 111–12, 680 F. Supp. 390, 393 (1988).

for the parties to fully brief their respective views.[34] In providing this explanation, Commerce should reconcile its position with seemingly inconsistent earlier agency statements. *See Live Swine From Can.*, 59 Fed. Reg. 12,243, 12,255 (Dep't Commerce Mar. 16, 1994) (final results of CVD admin. review) (stating generally that "[a]n upstream subsidy analysis is concerned with determining the effect of benefits received by producers of a product which itself is *not subject* to a countervailing duty investigation or order, but which is an input into the subject merchandise") (emphasis added); *cf.* Lumber IV Mem. at 16 (declining to require an upstream subsidies allegation to investigate subsidies received by producers of dimension lumber and remanufactured products, since both are considered subject merchandise);[35] *Ball Bearings and Parts Thereof From Thai.*, 62 Fed. Reg. 728, 730 (Dep't Commerce Jan. 6, 1997) (final results of CVD admin. review) (stating that the statute "expressly excludes export subsidies from its coverage (based on the presumption that an export subsidy paid on a *nonsubject input product* benefits the exportation of that product, not the downstream product)" (emphasis added)).[36]

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[34] At the hearing, the court directed the U.S. Government to the legislative history accompanying the Trade and Tariff Act of 1984, which discussed upstream subsidies in reference to "a product *subsequently used* to manufacture or produce in that country merchandise *which itself becomes* the subject of either a CVD or [antidumping] investigation[]." H.R. REP. 98–1156, at 171 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 5220, 5288 (emphases added); *see also id*. (comparing the "intermediate product" to the "final merchandise"). Section 1677–1 was first enacted as part of the Trade and Tariff Act of 1984, Pub. L. 98–573, Title VI, § 613(a), 98 Stat. 2948. While the above-quoted sentence was contained in the document in reference to the House bill, the definition contained in the Senate bill was the same except for the omission of the need to investigate or assess upstream subsidies in antidumping cases. *See* H.R. REP. 98–1156, at 171, *as reprinted in* 1984 U.S.C.C.A.N. at 5288.

[35] The CGP argue that this determination is inapposite because Commerce conducted the investigation on an aggregate basis, not a company-specific basis. CGP Resp. at 37. While Commerce relied on the aggregate nature of the investigation to reject arguments that certain respondent-remanufacturers did not benefit from stumpage programs, Commerce rejected the argument that an upstream subsidy allegation was necessary because "[b]oth dimension lumber and the remanufactured products covered by the scope are of necessity the same class or kind of merchandise." Lumber IV Mem. at 16.

[36] In response to the Coalition's argument that 19 U.S.C. § 1671(a)(1) required Commerce to account for supplier subsidies, the CGP rely on *Delverde, SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000), to argue that "Commerce may not presume that the purchaser benefitted from any subsidies previously bestowed on the seller of the asset." CGP Resp. at 34; *see also* Coal. Mem. at 33–34. *Delverde* involved the sale of assets, rather than subject merchandise, and the Federal Circuit's opinion relied on its interpretation of the "Change in Ownership" provision of the statute, 19 U.S.C. § 1677(5)(F), which is inapposite here.

**b. Commerce's Regulations**

The issue of upstream subsidies aside, the court next turns to Commerce's regulations. The element common to Commerce's combination rate and trading company regulations is the presence of an exporter that is not the producer.

Section 351.107(b)(1)(i) provides:

> (b) Cash deposit rates for nonproducing exporters—
>
> (1) Use of combination rates—(i) In general. In the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the [agency] may establish a 'combination' cash deposit rate for each combination of the exporter and its supplying producer(s).

Section 351.525(c) provides:

> (c) Trading companies. Benefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated.

For subject merchandise potentially covered by these regulations, Commerce first relied on the absence of company-specific information for the producer/suppliers. I&D Mem. at 38–39.[37] Contrary to Commerce's explanation, the administrative record contains company-specific information for one of the suppliers.[38] *See* Coal. Case Br. at 20 & n.50.[39]

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[37] Commerce appeared to rely on this rationale specifically in connection with the trading company regulation. *See* I&D Mem. at 39 (stating that the agency "cannot apply 19 CFR 351.525(c)" because of the lack of record information regarding subsidies received by unaffiliated suppliers). Later, in discussion of this analysis, Commerce states that "the petitioner's arguments regarding the combination rate and trading company provisions are unfounded," *id.*, suggesting that the rationale also applies to Commerce's analysis of its combination rate regulation.

[38] The identity of the supplier is treated as business proprietary information by the parties. While this supplier sold lumber to Rustique, Coal. Case Br. at 20, which did not act as a pure reseller of the subject merchandise but instead performed further processing on all purchased lumber inputs, *see* Rustique IQR at 8, the court considers this issue here in the event it is relevant to Commerce's redetermination on remand.

[39] The U.S. Government argues that "there would be no need for Commerce to capture [the] subsidies" received by this individually examined producer because "that company is already being assessed duties for exports of subject merchandise." U.S. Resp. at 27. While that may be the case for subject merchandise produced and exported by that company, the U.S. Government's assertion was not part of the grounds advanced by Commerce and may not account for lumber purchased from that company and exported under Rustique's rate based on the finding that Rustique is the producer of remanufactured merchandise.

For the remaining suppliers, Commerce explained that it declines to examine suppliers for receipt of subsidies when the "amount of such resales is small relative to the respondent's overall sales." I&D Mem. at 39 & n.247 (citing *Pipe From China*, 75 Fed. Reg. at 9,170). The rationale for Commerce's approach appears to be the administrative burden in conducting an analysis of the supplier akin to that of a mandatory respondent. *Id.* at 38–39 (explaining the steps involved to cumulate benefits); *see also, e.g.*, Prelim. Decision Mem. for Cast Iron Soil Pipe Fittings From China, C-570–063 (Dec. 11, 2017) at 26 (explaining the analysis necessary to apply the trading company regulation).[40]

There are two problems with this explanation. First, Commerce's practice did not account for the unusual circumstances of CVD expedited reviews. The POR for the *Final Results* is the same as the period of investigation for the original determination. *Initiation Notice*, 83 Fed. Reg. at 9,833. Thus, for this POR, Commerce has subsidy rates for every producer in Canada—either an individually determined rate or the all-others rate. *See CVD Order*, 83 Fed. Reg. at 348–49. Commerce's reliance on its practice failed to account for the period-specific information the agency has at its disposal.

Second, in explaining its decision not to apply 19 C.F.R. § 351.525, Commerce did not address whether it was appropriate to disregard any subsidies to the respondents' suppliers based on asserted small volumes when accounting for such subsidies might otherwise be the difference between zero or *de minimis* subsidy rates and subsidy rates above *de minimis*. Commerce has recognized that otherwise small changes may nevertheless be considered significant when they can cause such a change in the subsidy rate. *See* 19 C.F.R. § 351.224(g)(2) (defining a "significant ministerial error" to include one that would make the difference between a *de minimis* rate and a non-*de minimis* rate, or vice versa).

With respect to 19 C.F.R. § 351.107(b), Commerce exercised its discretion not to use combination rates because only subject merchan-

[40] The CGP contend that the trading company regulation applies solely to companies that do not produce any subject merchandise and is therefore inapplicable here. CGP Resp. at 39. Commerce did not adopt that rationale in the decision memorandum despite arguments advanced by the GOC, *see* I&D Mem. at 36 & n.231 (citing Rebuttal Br. of the [GOC] (Mar. 18, 2019) at 24, CR 908, PR 733, 1st Suppl. CJA Tab 67), perhaps because the agency has not limited its application of the trading company regulation to "pure resellers," *see, e.g.*, Prelim. Decision Mem. for Steel Concrete Reinforcing Bar from the Republic of Turk., C-489–830 (Sept. 6, 2019) at 6 (stating the agency would cumulate any subsidies received by a producer and exporter with subsidies received by an unaffiliated subcontractor/toller "in a manner similar to the attribution of a trading company's subsidies to an unaffiliated producer" because "such a determination is consistent with the general understanding of attribution of subsidies") (unchanged for the final determination). As such, the court need not further address the CGP's *post hoc* argument.

dise that is produced and exported by the *de minimis* companies is excluded from the payment of duties. I&D Mem. at 40. Commerce further stated that "the unaffiliated producers that elected to export subject merchandise produced by a respondent, such as D&G, and claim a zero cash deposit rate would be unable to circumvent the payment of duties, as the merchandise would nonetheless be subject to the all-others rate." *Id.*

Commerce frames the issue backwards: the issue is not the unaffiliated producers exporting merchandise produced by the *de minimis* companies, but, rather, the issue lies in the respondents exporting merchandise produced by unaffiliated suppliers that would otherwise be subject to a higher rate. To that end, Commerce's instructions to CBP require application of the all-others rate (or the producer's own rate, as appropriate) to subject merchandise produced by an unaffiliated supplier and exported by one of the *de minimis* companies. Liquidation Instructions ¶ 3; *see also Final Results*, 84 Fed. Reg. at 32,122 ("Merchandise which [the *de minimis* companies] export[] but does not produce . . . remains subject to the CVD order."). While Commerce's instructions therefore effectuate a combination rate with respect to merchandise produced by an unaffiliated supplier and exported by D&G/Portbec, the situation with Rustique is less clear.

Rustique obtained an above-*de minimis* rate pursuant to the *Final Results*. 84 Fed. Reg. at 32,122. Rustique did not, however, act as a pure reseller for any subject merchandise. *See* Rustique IQR at 8. Accordingly, as discussed above, Commerce presently appears to consider Rustique to be the "producer" for all of Rustique's exports to the United States. Thus, there does not, at present, appear to be any basis for Commerce to apply the combination rate regulation to Rustique. Because the court is instructing Commerce to reconsider its determination that respondent-remanufacturers constitute the producers of such merchandise, on remand, Commerce may also need to reconsider its position with respect to the application of the combination rate regulation to Rustique.

Commerce's determination not to attribute subsidies received by the unaffiliated suppliers of lumbers to the respondents lacks clear, affirmative statements regarding the agency's views on respondent-remanufacturers and respondent-resellers, as well as the agency's reasons for interpreting and applying the relevant legal principles in the chosen manner. Commerce's determination will therefore be remanded for reconsideration or further explanation consistent with the foregoing.

### C. New Brunswick Property Tax Assessment Program

#### 1. Additional Background

Property owners in New Brunswick typically pay property taxes based on an assessment of the "real and true value" of the land." I&D Mem. at 85. However, "land classified as freehold timberland" is assessed property taxes at a rate of 100 Canadian dollars per hectare. *Id.* Commerce concluded that this tax program is countervailable. *Id.*

To calculate the benefit conferred on NAFP from this program, Commerce first had to construct a benchmark for the "real and true value" of the land owned by NAFP. *Id.* at 90. For the preliminary results of the CVD expedited review, Commerce used "private sales of timberland in the province during the POR." *Id.* While Commerce continued to use private sales for the *Final Results*, Commerce agreed with NAFP and GNB that Commerce should adjust the benchmark to "remove the value of standing timber on this land." *Id.* Commerce explained that the relevant tax laws defined "real property" to exclude "growing or non-harvested crops in or on land" such that "the value of the trees" should not be included in the benchmark. *Id.* at 90–91.

To determine the value of the land minus the standing timber, Commerce used a ratio derived from information contained in an opinion issued by the Court of Queen's Bench of New Brunswick, titled *Higgins and Tuddenham v. Province of N.B.*, which concerned compensation for appropriated land. *Id.* at 91 & n.598 (citing Rebuttal Cmts. to NAFP's Sept. 6, 2018 Suppl. Questionnaire Resp. (Sept. 17, 2018), Ex. 5 ¶¶ 17, 45, PR 602, CJA Tab 31a). While the Coalition had placed the *Higgins and Tuddenham* opinion on the record, *see id.*, NAFP subsequently relied on that opinion to advocate for the ratio referenced therein, *see* NAFP's Case Br. (Mar. 11, 2019) at 31, CR 903, PR 721, CJA Tab 51. Commerce agreed and applied a ratio of approximately 22 percent to the total land value including stumpage to determine the land value without stumpage. Final Results Calculations for [NAFP] (June 28, 2019), Attach 2, CR 912, PR 755, CJA Tab 58; *see also* I&D Mem. at 91 & nn.596–98.

#### 2. Analysis

The Coalition seeks to challenge Commerce's reliance on *Higgins and Tuddenham* to determine the appropriate methodology for adjusting the benchmark to remove the value of standing timber. Coal. Mem. at 46. The U.S. Government, NAFP, and GNB each contend that the Coalition failed to exhaust its administrative remedies with respect to this argument. U.S. Resp. at 18–20; NAFP Resp. at 3,

15–16; GNB Resp. at 9–10. The Coalition, replying primarily to the U.S. Government, argues that the United States has conflated the issues of benchmark selection with Commerce's adjustment to the benchmark, Coal. Reply at 20, and asserts that it was not required to exhaust arguments regarding any adjustment because Commerce did not decide to remove the value of standing timber until the agency issued the *Final Results*, *id.* at 22. Thus, the Coalition contends, it "had no opportunity" to present arguments regarding any adjustment to the benchmark. *Id.* at 23.

"[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d).[41] The statute "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). The doctrine of administrative exhaustion is well-settled and requires a party to raise issues with specificity and "at the time appropriate under [an agency's] practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952). Doing so both "protect[s] administrative agency authority and promot[es] judicial efficiency." *Corus Staal BV*, 502 F.3d at 1379 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

Here, administrative exhaustion required the Coalition to present relevant arguments in its administrative case and rebuttal briefs before raising those issues before this court. *Cf. Dorbest Ltd v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010).[42] Contrary to the Coalition's suggestion, exhaustion in this case did not require "clairvoyance." Coal. Reply at 23. Instead, exhaustion required the Coalition to respond substantively to the issues NAFP explicitly raised in its administrative case brief. *See* NAFP's Case Br. at 31 (proposing various methods for Commerce to adjust the benchmark, including by using the ratio from *Higgins and Tuddenham*). While the Coalition argued that Commerce should not remove the value of standing timber from the land value, Plaintiff failed to address NAFP's specific proposals for doing so in the event Commerce agreed that an adjust-

[41] The Coalition does not dispute the applicability of the doctrine of administrative exhaustion given that this case is governed by the APA. In any event, the court has recently addressed and rejected this contention, finding that the APA does not bar the court from applying prudential exhaustion pursuant to 28 U.S.C. § 2637(d). *See Ninestar Corp. v. United States*, Slip Op. 24–24, 2024 WL 864369, at *9–11 (CIT Feb. 27, 2024).

[42] While *Dorbest* addressed a case arising under the court's jurisdiction pursuant to 28 U.S.C. § 1581(c) and involving 19 C.F.R. § 351.309(c)–(d), exhaustion is similarly appropriate here given that the court reviews Commerce's decision on the record developed before the agency, and that process included the opportunity to file case and rebuttal briefs. *Cf. L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 36–37.

ment was warranted. *See* Rebuttal Br. (March. 19, 2019) at 40, CR 909, PR 734, CJA Tab 54 (asserting generally (and inaccurately) that Commerce "would not have an objective or reasonable way to [adjust the benchmark]" because "[t]he Canadian Parties *have not proposed any methodology* to separate the value of standing timber from the bare land" (emphasis added)).[43]

"[P]arties having notice of an issue may not withhold pertinent arguments at the administrative level, seeking a new 'bite at the apple' before the courts." *Calgon Carbon Corp. v. United States*, 44 CIT __, __, 443 F. Supp. 3d 1334, 1353–54 (2020) (citation omitted). The Coalition was on notice that Commerce might consider both benchmark selection and adjustments to the benchmark, including using the *Higgins and Tuddenham* data, prior to the *Final Results*, and the Coalition was required to exhaust relevant arguments accordingly. Because the Coalition failed to exhaust its arguments before the agency, the court will not now consider them in the first instance.

## II. Consolidated Plaintiffs' Claims

Rustique, joined by the GOC and the GOQ, contends that Commerce erred in countervailing certain federal and provincial tax credits. Rustique Mem. at 4–13; Rustique Reply at 2–6; GOC Mem. at 11–18; GOC Reply at 2–10; GOQ Mem. at 4–11; GOQ Reply at 3–9. Fontaine, also joined by the GOC and the GOQ, contends that Commerce erred in using its fiscal year ("FY") 2014 tax returns to determine the benefit conferred by various tax programs during the 2015 POR. Fontaine Mem. at 10–18; Fontaine Reply at 2–12; GOC Int. Mem. at 3–4; GOQ Mem. at 11–13; GOQ Reply at 9–11. The U.S. Government and the Coalition responded in support of Commerce's determinations. U.S. Resp. at 31–46; Coal. Resp. at 4–8.

The court will sustain Commerce's determination as to Rustique's challenge but remands Commerce's benefit determination with respect to Fontaine.

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[43] At oral argument, the Coalition attempted to characterize its assertion regarding the lack of an "objective or reasonable way" method for performing the adjustment as responsive to the NAFP's proposals and sufficient to exhaust the arguments it now seeks to assert. Oral Arg. 42:35–43:30. This argument fails because the Coalition's assertion, read together with the incorrect assertion regarding the absence of any proposed methodology, suggests instead that the Coalition overlooked the proposals. *See id.* at 41:00–42:30 (referring to the number of pages of argument to digest). Even if the proposals were not overlooked, the Coalition must do more than offer mere characterization of the proposals. Instead, the Coalition was required to present arguments as to *why* Commerce should reach the same conclusion. "[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553–54 (1978).

### A. The Federal Logging Tax Credit ("FLTC") and Provincial Logging Tax Credit ("PLTC")

#### 1. Additional Background

Corporations in Québec that conduct logging operations must pay a ten percent tax on logging income in addition to federal and provincial income taxes. *See* I&D Mem. at 45–46. The GOC provides a tax credit equal to two thirds of the logging tax (the FLTC) and the GOQ provides a tax credit equal to one third of the logging tax (the PLTC), credits that logging companies claim on their federal and provincial tax returns, respectively. *See id.* at 45, 48; Resp. of the [GOQ] to the Dep't's Apr. 13, 2018 Suppl. Questionnaire Vol. II at QC-TAX-10–11, CR 288, PR 341, CJA Tab 18a.

Commerce found that the FLTC and the PLTC 1) each constitute a financial contribution in the form of revenue forgone that was otherwise due to the federal and provincial governments; 2) are *de jure* specific; and 3) confer a benefit. I&D Mem. at 45–46. Commerce disagreed with the argument that a Canadian policy against double taxation means that revenue is not forgone. *Id.* at 46. Commerce also addressed and rejected the argument that the FLTC and the PLTC do not confer a net benefit, *id.* at 47–48, or that the credits "act as a transfer of funds from the federal to the provincial government," *id.* at 48. According to Commerce, "[a]ny arrangement" between the federal and provincial governments, and "the purpose of such an arrangement, is beyond the purview of what Commerce is able to consider under the [statute] and its regulations." *Id.* at 48–49. Lastly, Commerce concluded that the logging tax could not be construed as an application fee or deposit paid to qualify for the FLTC and the PLTC. *Id.* at 46–47 (discussing 19 U.S.C. § 1677(6)(A)).

#### 2. Analysis

A countervailable subsidy "exists when . . . a foreign government provides a financial contribution . . . to a specific industry" that confers "a benefit" to "a recipient within the industry." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677(5)(B)). Section 1677(5) defines a financial contribution to include, *inter alia*, "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." 19 U.S.C. § 1677(5)(D)(ii). "A benefit shall normally be treated as conferred where there is a benefit to the recipient." *Id.* § 1677(5)(E).

Rustique and the GOQ each contend that Commerce erred in finding that revenue was forgone by the federal and provincial govern-

ments. Rustique asserts that Commerce must consider "the prevailing domestic standard and the normative benchmark of the tax system in question," which in this case, Rustique contends, constitutes the 26.9 percent total tax rate (federal plus provincial) applicable to all corporations. Rustique Mem. at 4–5; Rustique Reply at 3. According to Rustique, the ten percent logging tax is simply "a mechanism for annual inter-governmental wealth shifts," Rustique Mem. at 6,[44] and the FLTC and the PLTC together prevent double taxation of logging income, *id.* at 6–7. The GOQ similarly asserts that "[t]he logging tax *would not exist* if the offsetting tax credits were not available." GOQ Mem. at 8 (emphasis added). These arguments are dependent on the relationship between the ten percent logging tax and the FLTC and the PLTC.

Commerce was within its discretion to reject such arguments because the record does not support the claim that the logging tax would not exist but for the credits forgiving the tax. Documents submitted by the GOC and the GOQ do support that a "policy rationale" behind the FLTC and the PLTC is to avoid double taxation. Resp. of the [GOC] to the Dep't's Apr. 13, 2018 Suppl. Questionnaire (May 7, 2018) ("GOC SQR") at GOC-ER-20, CR, 231, PR 324, CJA Tab 17. The existence of a general policy against double taxation does not, however, substantiate the assertion that the logging tax and the tax credits must stand or fall together. Contrary to the GOQ's assertion that Commerce failed to consider the policy rationale for the tax credits, GOQ Reply at 5–7, Commerce considered the rationale and concluded that a policy against double taxation does not outweigh the evidence demonstrating that the FLTC and PLTC are otherwise countervailable as programs by which the federal and provincial governments, respectively, forgo revenue, I&D Mem. at 46. Commerce acknowledged that the GOQ has never received the full ten percent logging tax but explained that was because the provincial government elected to provide a tax credit in the form of the PLTC and that such decision, even if intended to offset double taxation, remains countervailable. *Id.* Mere disagreement with Commerce's conclusions is not a sufficient basis for a remand.

A corollary to this argument is the proposition that Commerce should have considered the logging tax and the tax credits to constitute a single subsidy program. *See* GOC Mem. at 12; Rustique Mem. at 11–13 (arguing there was no benefit because the logging tax and the tax credits effectively cancel each other out); Rustique Reply at 7

[44] With respect to the FLTC, Rustique contends that although the GOC "does forego some revenue," that shortfall ends up with the GOQ such that there is no financial contribution to the company. Rustique Mem. at 8; *see also* Rustique Reply at 4–5.

(asserting that the logging tax and tax credits "legally must be" considered a single program). However, the parties identify no factual evidence calling into question Commerce's decision not to treat tax credits enacted by different government entities as a single program, or any examples of Commerce doing so.[45] To that end, the GOC errs in relying on *Government of Sri Lanka v. United States*, 42 CIT __, 308 F. Supp. 3d 1373 (2018) ("*GOSL*"), and *Inland Steel Indus., Inc. v. United States*, 21 CIT 553, 967 F. Supp. 1338 (1997), *aff'd*, 188 F.3d 1349 (Fed. Cir. 1999). GOC Mem. at 13–15; GOC Reply at 3–5. As Commerce found, these cases are distinguishable.[46] I&D Mem. at 48.

In *GOSL*, the court remanded Commerce's benefit determination when the agency countervailed payments made by the Government of Sri Lanka ("GSL") reimbursing tire manufacturers/rubber buyers for payments made to rubber smallholders. *GOSL*, 308 F. Supp. 3d at 1379–84. The program examined in that case involved an above-market "guaranteed price" to smallholders that rubber buyers were required to pay, subject to reimbursement by the GSL for any difference between the "market price" and the "guaranteed price," i.e., the value of the guarantee to the smallholders. *Id.* at 1379–80. The court concluded that Commerce erred in ignoring evidence that the rubber buyers had effectively extended "interest-free loans" to the GSL such that the "reimbursement payments" at issue were not properly considered a benefit. *Id.* at 1382.

In *Inland Steel*, the Government of France ("GOF") and Usinor Sacilor entered into an agreement pursuant to which each would provide funds to regional development companies and that "the GOF would transmit its share of the funds through Usinor Sacilor, with Usinor Sacilor receiving the funds from the GOF as shareholders'

[45] The record suggests that the FLTC predates the enactment of the logging tax in Québec and the enactment of the PLTC but does not indicate the temporal relationship between the tax and the PLTC. *See* GOC SQR, Ex. FLTC-1, CR 233, PR 326, CJA Tab 17a (documenting statements concerning the enactment of the FLTC and supporting similar action at the provincial level to fully offset the logging tax then enacted in the provinces of British Columbia and Ontario).

[46] Rustique cites *Hynix Semiconductor Inc. v. United States*, 29 CIT 995, 1003, 391 F. Supp. 2d 1337, 1345 (2005), for the proposition that the phrase "subsidy program" is broadly interpreted to include various elements supporting a single governmental purpose. Rustique Reply at 7. Rustique stretches the reasoning of *Hynix* too far. *Hynix* addressed 19 U.S.C. § 1677(5)(B)(iii), which describes a subsidy whereby the authority was "entrust[ing] or direct[ing] a private entity to make a financial contribution." 29 CIT at 998 n.3, 391 F. Supp. 2d at 1341 n.3 (citation omitted). Noting Commerce's "case-by-case discretion" to decide when the statute applies and congressional intent to "close any loopholes which might enable governments to provide indirect subsidies," the court sustained Commerce's decision to treat "a series of loans and equity infusions made by multiple financial institutions" as "a single government program of direction." *Id.* at 1003–04, 391 F. Supp. 2d at 1345–46. *Hynix* does not, as Rustique contends, require Commerce "to consider the logging tax and the credits canceling it as component parts of a single program." Rustique Reply at 7.

advances and then funneling those same funds to the [regional development companies]." 21 CIT at 560, 967 F. Supp. at 1349. Commerce concluded that the "agreement between Usinor Sacilor and the GOF did not relieve Usinor Sacilor of any obligations it [previously] had" so Usinor Sacilor received no benefit from the contributions that it "merely channeled" to the regional development companies. *Id.* The court sustained this determination. *See id.* at 586, 967 F. Supp. at 1368.

In each of these cases, record evidence documented the nature and purpose of the program that effectively placed the respondent in the position of an intermediary in order to effectuate the program's purpose. In contrast, here, Commerce reasonably concluded that "the logging tax credits are not flowing through an intermediary" to effectuate a transfer of funds to the GOQ but are instead tax credits provided by the federal and provincial governments to the respective companies. I&D Mem. at 48; *see also* GOC SQR at GOC-ER-20 (explaining that the FLTC is intended to avoid double taxation of the logging companies).

Rustique's argument that the FLTC and PLTC confer no benefit because together they result in Rustique paying the same tax rate as non-logging corporations is also misplaced. *See* Rustique Mem. at 10; Rustique Reply at 4. Commerce's benefit regulation, 19 C.F.R. § 351.509(a), directs the agency to determine whether "a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program." Each of the two programs at issue here, the FLTC and the PLTC, lower Rustique's tax burden. *See* I&D Mem. at 46. Commerce was not required to compare Rustique's tax rate to non-logging companies that are not subject to the logging tax and are ineligible for both the FLTC and PLTC.

Lastly, Commerce correctly rejected the GOC's argument that Commerce should treat the logging tax as a payment used to qualify for the FLTC and the PLTC such that the amount of the tax should be deducted from any subsidy. *See* GOC Mem. at 17; GOC Reply at 8–9; I&D Mem. at 47. Section 1677(6)(A) permits Commerce to "subtract from the gross countervailable subsidy the amount of--(A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy." 19 U.S.C. § 1677(6)(A). In its construction of the statute, the GOC reads out the word "similar" preceding "payment." GOC Mem. at 17 (stating that "the tax was a 'payment paid in order to qualify for, or to receive, the benefit' of the FLTC and PLTC" (quoting 19 U.S.C. § 1677(6)(A))). If this were true, then any tax for which a government provides a

corresponding credit could be deducted from the final subsidy rate. While the GOC faults Commerce for failing to explain why the logging tax does not fall within the category of "similar payment," GOC Mem. at 18, nowhere does the GOC explain why the logging tax should be considered a payment "similar" to an "application fee" or "deposit" or why its interpretation of the term would not substantially weaken the statute. *See id.*

Because Commerce's determinations regarding the FLTC and PLTC are supported by substantial evidence, and in the absence of any detracting record evidence that Commerce overlooked, the court will sustain Commerce's determinations.

### B. Date of Receipt of Tax Benefits

#### 1. Additional Background

As previously noted, the POR for the CVD expedited review was January 1, 2015, through December 31, 2015. I&D Mem. at 27. Fontaine's FY 2015 ended on October 31, 2015. *Id.* at 94.

Fontaine "is required by law to pay its federal and provincial taxes within sixty days of the end of its fiscal year," i.e., by December 31. *Id.*;[47] *see also* Verification of the Questionnaire Resps. of Fontaine Inc. (Oct. 23, 2018) at 5–6, CR 844, PR 657, CJA Tab 36 (verifying Fontaine's payments of FY 2015 taxes within the POR). Consistent therewith, the record shows that Fontaine's FY 2014 federal tax return reflects payments made during the 2014 calendar year with no balance owing in 2015. Fontaine's Resp. to Initial Questionnaire (Apr. 13, 2018) ("Fontaine IQR"), Ex. 5 at ECF pp. 310, 317, CR 131–38, 144–50, 152, 154, 156, PR 254, CJA Tab 13a). For the provincial tax return, Fontaine made payments in 2014 that exceeded the amount of total income tax payable and obtained a refund. *Id.* at ECF pp. 129, 829. For 2015, the record likewise shows that December 31, 2015, represented Fontaine's balance-due date for federal and provincial taxes. *See* Fontaine's 2SQR, Ex. A-4 at ECF pp. 227–29, 231 (explaining balance-due dates). Fontaine's FY 2015 federal and provincial tax returns reflected the sum of installments made during the fiscal year and refunds owing upon filing. *See* Fontaine IQR, Ex. 5 at ECF pp. 762, 829.

[47] Corporations, such as Fontaine, must make periodic federal tax payments throughout the year and any remaining federal taxes "on or before the balance-due day for the year." Resp. to the Second Suppl. Questionnaire to [Fontaine] (July 25, 2018) ("Fontaine's 2SQR"), Ex. A-4, [Federal] Income Tax Act ¶ 157 (ECF pp. 211–12), CR 701, PR 545, CJA Tab 25. The balance-due day "is two months after the day on which the taxation year ends," *id.* ¶ 248 (subpart (d)(ii)) (ECF pp. 227–29). Similar rules apply to provincial tax payments. *Id.*, Ex. A-4, [Provincial] Taxation Act ¶ 1 (ECF p. 231) (defining "balance-due day" for a corporation).

For the preliminary results of the CVD expedited review, Commerce used Fontaine's FY 2014 tax return to calculate the benefit received for certain tax programs because Fontaine filed that tax return in 2015. I&D Mem. at 93. Fontaine challenged this decision before the agency, urging Commerce to use Fontaine's FY 2015 tax returns because Fontaine paid the taxes associated with those returns during the POR even though Fontaine filed the FY 2015 tax returns in 2016. *Id.* at 93–94. Commerce disagreed. *Id.* at 94.

The relevant regulation states:

> (b) Time of receipt of benefit—(1) Exemption or remission of taxes. In the case of a full or partial exemption or remission of a direct tax, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. Normally, this date will be the date on which the firm filed its tax return.

19 C.F.R. § 351.509(b)(1).

Commerce explained that its "goal is to equate the timing of receipt of the benefit with the date the firm knew the amount of its tax liability, and thus the definitive amount of its tax savings under any particular tax-related subsidy program." I&D Mem. at 94. Commerce stated that, "[b]ased on our experience, the date on which [a firm] files its tax return is the date on which a firm knows, definitively, the amount of its tax liability, and thus any attendant savings realized under tax-related subsidy programs." *Id.* at 94 & n.626 (citing *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,376 (Dep't Commerce Nov. 25, 1998) (final rule) ("*CVD Preamble*")).

Applying this "definitive knowledge" standard, Commerce concluded that "Fontaine makes estimated tax payments throughout the year prior to filing its tax return, but it does not know the full extent of its tax liability until it files its tax return." *Id.* at 94. To support this finding, Commerce noted that Fontaine identified periodic payments as "installments made" on its federal tax return and that Fontaine made identical monthly installments throughout the year. *Id.* at 94 & nn.633–34 (citing Fontaine IQR, Ex. 5).

**2. Analysis**

Fontaine challenges Commerce's reliance on the company's FY 2014 tax returns because those returns reflect pre-POR liabilities. Fontaine Mem. at 10. Fontaine contends that when the date of payment and date of filing differ, the date of payment is the operative

date. *Id.* at 12. Here, Fontaine argues, the date of payment fell in 2015 and Commerce therefore should have used its FY 2015 tax returns. *Id.* at 11. Fontaine asserts that Commerce's regulation does not impose a knowledge requirement and that even if it did, Fontaine knew its tax liability when it made its final payment. Fontaine Reply at 8–9. The GOQ and GOC advance similar arguments. GOQ Mem. at 11–13; GOC Int. Mem. at 3–4; GOQ Reply at 9–11.

The United States argues that "Commerce's focus on the date on which a firm knew of its tax liability" reflects the agency's "longstanding practice." U.S. Resp. at 43. The Coalition supports Commerce's use of a "definitive knowledge" standard and Fontaine's FY 2014 tax returns. *See* Coal. Resp. at 8.

A remand is required when an agency's "decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Star Fruits*, 393 F.3d at 1281. Commerce must reconsider or further explain its decision to use Fontaine's FY 2014 tax returns to determine the POR benefits.

Ascertaining the appropriate date for calculating any benefit is a factual matter specific to each case, and Commerce's experience must yield to those facts. *See* I&D Mem. at 94 (stating that, "[b]ased on our experience, the date on which it files its tax return is the date on which a firm knows, definitively, the amount of its tax liability"). As discussed above, the record shows that Fontaine made FY 2014 payments in 2014 and FY 2015 payments in 2015. Thus, this case appears to be one in which the date of payment (December 31, two months after the end of the fiscal year) and date of filing (the following calendar year) do not align.

Commerce's focus on "definitive knowledge of the amount of or benefit from the tax credits," *id.*, resulted in the agency's failure to grapple with record evidence that undermined its decision.[48] The outcome might be different if Fontaine's FY 2015 tax returns were not available for Commerce to use in ascertaining the relevant tax credits

[48] Commerce's reliance on the *CVD Preamble* fails to persuade the court to adopt the agency's interpretation. *See* I&D Mem. at 94 & n.624 (citing *CVD Preamble*, 63 Fed. Reg. at 65,376). The *CVD Preamble* refers to a set of regulations proposed in 1997 and characterized those regulations as "propos[ing] to consider the benefit as having been received on the date the firm knew the amount of its tax liability." 65 Fed. Reg. at 65,376. The regulations proposed in 1997 did not explicitly evince a standard based on knowledge (definitive or otherwise). Instead, Commerce proposed a standard based on when "the recipient firm became capable of calculating the amount of the benefit" and equated that date, "[n]ormally," with "the date on which the firm filed its tax return." *Countervailing Duties*, 62 Fed. Reg. 8,818, 8,852 (Dep't Commerce Feb. 26, 1997) (notice of proposed rulemaking and request for public comments). Regardless, as the *CVD Preamble* acknowledges, Commerce has adopted a standard based "on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission, which is usually the date it files its tax return." 65 Fed. Reg. at 65,376. It is that standard Commerce must apply.

received during the POR. However, those tax returns were available, and Commerce has not explained why they do not contain the information the agency needs to determine Fontaine's benefit for the subsidy programs notwithstanding the aggregate refunds reflected in the returns. Commerce has not identified substantial evidence or provided a reasoned explanation to support its reliance on Fontaine's FY 2014 tax returns merely because those returns were filed in 2015 or the agency's rejection of the FY 2015 tax returns. Accordingly, this issue will be remanded for reconsideration or further explanation.

## CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce's *Final Results* are remanded in part and sustained in part; it is further

**ORDERED** that, on remand, Commerce shall reconsider or further explain its determination not to account for subsidies received by suppliers of lumber to the CVD expedited review respondents; it is further

**ORDERED** that, on remand, Commerce shall reconsider or further explain its determination to use Fontaine's FY 2014 tax returns to perform benefit calculations for the 2015 POR; it is further

**ORDERED** that Commerce shall file its remand redetermination on or before July 22, 2024; it is further

**ORDERED** that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

**ORDERED** that any comments or responsive comments must not exceed 5,000 words.

Dated: April 22, 2024
New York, New York

*/s/ Mark A. Barnett*
MARK A. BARNETT, CHIEF JUDGE

Slip Op. 24–51

COLUMBIA ALUMINUM PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 19–00185

[Sustaining remand redetermination in litigation contesting an agency determination of "evasion" of antidumping duty and countervailing duty orders]

Dated: April 24, 2024

*Jeremy W. Dutra*, Squire Patton Boggs (US) LLP, of Washington, D.C., for plaintiff. With him on the submission was *Peter J. Koenig*.

*Alexander J. Vanderweide*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant. With him on the submission were *Justin R. Miller*, Attorney-in-Charge, and *Aimee Lee*, Assistant Director, International Trade Field Office. Also on the submission were *Brian M. Boynton*, Principal Deputy Attorney General, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of counsel on the submission was *Tamari J. Lagvilava*, Attorney, Office of Chief Counsel, U.S. Customs and Border Protection, of Washington, D.C.

## OPINION

**Stanceu, Judge:**

Plaintiff Columbia Aluminum Products, LLC ("Columbia") contested two related decisions that U.S. Customs and Border Protection ("Customs" or "CBP") issued under the Enforce and Protect Act, 19 U.S.C. § 1517 (2018) (the "EAPA"). In both decisions, Customs determined that door thresholds Columbia imported from Vietnam were "covered merchandise" that evaded an antidumping duty ("AD") order and a countervailing duty ("CVD") order (the "Orders") on aluminum extrusions from the People's Republic of China.

In a redetermination issued earlier this year in response to an order of the court, Customs concluded that Columbia's imported door thresholds did not evade the Orders and informed the court of its intention to discontinue the "interim measures" it earlier imposed on Columbia's imports of door thresholds from Vietnam. Plaintiff advocates that the court sustain CBP's decision that Columbia's imports did not evade the Orders but objects to the redetermination to the extent that it would not result in liquidation of the affected import entries prior to a final and conclusive court decision in this action. The court sustains CBP's redetermination.

## I. BACKGROUND

Background on this litigation is set forth in the court's previous opinion and order and is supplemented herein. *Columbia Aluminum Products, LLC v. United States*, 2024 WL 257026 (Jan. 16, 2024) ("*Columbia I*"). In *Columbia I*, the court ordered Customs to "submit to the court a Redetermination upon Remand that is consistent with this Opinion and Order and addresses the actions it will take with respect to the Interim Measures it previously imposed." *Id*., 2024 WL at *13.

Before the court is CBP's Final "Remand Redetermination" (Feb. 15, 2024), ECF No. 86 ("*Remand Redetermination*"). Plaintiff filed comments on the Remand Redetermination. Columbia Aluminum Products, LLC's Comments on Remand Redetermination (Feb. 24, 2024), ECF No. 87 ("Columbia's Comments"). Defendant responded to

those comments. Def.'s Response to Pl.'s Comments on Remand Redetermination (Mar. 5, 2024), ECF No. 88 ("Def.'s Response").

## II. DISCUSSION

In the Remand Redetermination, Customs concluded "that Columbia correctly entered merchandise as entry type "01" consumption entries, instead of as entry type "03" AD/CVD entries and, accordingly, no AD/CVD duties are applicable." *Remand Redetermination* at 6. Customs concluded, further, that "[t]hus, Columbia did not enter covered merchandise into the United States through material false statements or omissions." Customs stated that "[g]iven this reversal of the March 2019 Determination and Administrative Review [the agency decisions contested in this litigation[1] ], CBP intends to terminate the interim measures imposed on May 17, 2018 and process refunds of any cash deposits, as appropriate, once judgment is entered in this matter." *Id*. at 6—7. Customs added that "[a]ny unliquidated entries will be liquidated consistent with the final and conclusive court decision in this case, including all remands and appeals." *Id*. at 7. The "interim measures" to which Customs referred "included 'rate-adjusting' the entries . . . for the collection of cash deposits, requiring 'live entry' for 'all future imports of products believed to be aluminum thresholds by Columbia' . . . and extending and suspending liquidation of entries." *Columbia I*, 2024 WL 257026 at *2 (quoting *Notice of Initiation of Investigation and Interim Measures* at 6—7 (May 17, 2018), P.R. Doc. 18).

Columbia agrees in part, and disagrees in part, with the Remand Redetermination. Columbia states that it agrees with the agency's deciding "that Columbia did not enter covered merchandise into the United States by means of evasion" and "requests that the Court sustain the Remand Redetermination of no evasion and enter judgment in Columbia's favor." Columbia's Comments 1. At the same time, Columbia objects that "[h]aving made a negative determination, CBP states that it intends to terminate interim measures implemented on May 17, 2018." *Id*. "This suggests that interim measures against Columbia remain in place . . . contrary to CBP regulations, which require immediate termination of interim measures upon a negative finding of evasion." *Id*. at 1–2 (citing 19 C.F.R. § 165.27(c)). Further, Columbia objects to any delay in the liquidation of unliquidated entries that are affected by this litigation, arguing as follows:

[1] *Notice of Final Determination as to Evasion* (Mar. 20, 2019), P.R. Doc. 61; *Enforce and Protect Act ("EAPA") Case Number 7232* (Aug. 26, 2019), P.R. Doc. 67. Citations herein to documents from the Joint Appendix (Apr. 28, 2023), ECF Nos. 83 (conf.), 82 (public) are referenced herein as "P.R. Doc. __" for public versions. All information disclosed in this Opinion and Order is public information.

> CBP further indicates that it will liquidate any unliquidated entries following a final and conclusive court decision, including all remands and appeals. Respectfully, there will be no appeal here. Columbia succeeded in its challenge to the original evasion determination. The United States, moreover, did not make its finding of no evasion under protest. And Endura, the instigator of this matter, abandoned any participation at the Court or before CBP, thus waiving any right to appeal. But for the interim measures, all Columbia entries suspended by CBP would have liquidated over four years ago. Under the circumstances, Columbia requests that the Court order CBP to terminate immediately interim measures and liquidate all previously suspended entries upon the Court's entry of judgment.

*Id*.

In its response to Columbia's comments, defendant contests Columbia's assertion that "CBP has not abided by its regulations," pointing out that the regulation on which Columbia relies, 19 C.F.R. § 165.27(c) (2023), provides as follows: "If CBP makes a determination under paragraph (a) of this section that covered merchandise was not entered into the customs territory of the United States through evasion, then CBP will cease applying any interim measures taken under § 165.24 and liquidate the entries in the normal course.'" Def.'s Response 5 (quoting 19 C.F.R. § 165.27(c)).

Columbia's objection that 19 C.F.R. § 165.27(c) required Customs to terminate the interim measures immediately upon a negative finding of evasion, i.e., upon CBP's issuing the Remand Redetermination, is not persuasive. The Remand Redetermination, which was submitted in response to court order, is submitted for the court's review and is not in effect prior to the court's sustaining it through the entry of judgment. In accordance with the Remand Redetermination, the court will order Customs to terminate immediately all interim measures it imposed in the EAPA investigation. To effectuate the Remand Redetermination, the court also will direct that Customs not require the filing of entry type "03" entries on future imports of door thresholds from Vietnam that are of a class or kind that would have been subject to the EAPA investigation and not require the deposit of antidumping or countervailing duties on these future entries.

With respect to all entries affected by this litigation that were made prior to the entry of judgment, Columbia is entitled, upon the entry of judgment, to receive a prompt refund of all estimated antidumping or countervailing duties that were deposited, with interest as provided

by law. But Columbia has not made the case for the court's ordering immediate liquidation of the entries affected by this litigation.

Columbia correctly points out that Customs did not reach its negative determination of evasion "under protest." Columbia's Comments 2. Also, defendant states that "we envision that no appeal will be taken here." Def.'s Response 5. Nevertheless, the court is not convinced that it should order immediate liquidation of the affected entries, a remedy provided for neither in the EAPA nor in 19 C.F.R. § 165.27(c). Moreover, whether the government's issuing the negative EAPA determination absent a protest will preclude the government's successful appeal of a judgment in this action is a question for the Court of Appeals for the Federal Circuit ("Court of Appeals"), not this Court, to decide. Additionally, whether liquidation of the entries affected by this litigation effectively would moot any appeal by the government of a judgment in this action is an unsettled question. Defendant has not ruled out the possibility that it will appeal, and the court will avoid taking an action that could moot any appeal of this Court's judgment that the government might pursue.

Finally, Columbia has not shown it will be prejudiced by a delay in the liquidation of the affected entries pending a final and conclusive judgment in this action. Columbia is awarded all the relief on its future entries that this court may grant and will receive an adequate remedy as to past entries provided it promptly receives a refund of all estimated antidumping and countervailing duties that were deposited on these entries, with interest as provided by law.

To ensure that Columbia receives an adequate remedy even should liquidation be delayed pending appeal, the court will order that Customs not liquidate with the assessment of antidumping or countervailing duties any entries of merchandise that is of the same class or kind as the merchandise that was the subject of the EAPA investigation prior to a final and conclusive judgment in this litigation. The court will order, further, that any entries that are liquidated contrary to the court's order promptly shall be restored to unliquidated status.

## III. CONCLUSION

For the reasons stated above, the court will enter judgment to sustain the Remand Redetermination.

Dated: April 24, 2024
New York, New York

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

Slip Op. 24–52

GRUPO ACERERO S.A. de C.V., GRUPO SIMEC S.A.B. de C.V., et al., Plaintiffs, and GERDAU CORSA, S.A.P.I de C.V., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:22-cv-00202 (SAV)

[Remanding the Final Results to Commerce for further proceedings consistent with this opinion.]

Dated: April 25, 2024

*James L. Rogers, Jr.*, Nelson, Mullins, Riley & Scarborough LLP, of Greenville, SC, for Plaintiff Grupo Simec S.A.B. de C.V., *et al*.

*Irene H. Chen*, VCL Law LLP, of Vienna, VA, for Consolidated Plaintiff Grupo Acerero S.A. de C.V. With her on the briefs was *Mark B. Lehnardt*, Law Offices of David L. Simon, PLLC, of Washington, DC.

*Craig A. Lewis*, Hogan Lovells US LLP, of Washington, DC, for Plaintiff-Intervenor Gerdau Corsa, S.A.P.I de C.V. With him on the briefs were *Jonathan T. Stoel* and *Nicholas R. Sparks*.

*Kara M. Westercamp*, 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 *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, *L. Misha Preheim*, Assistant Director, Commercial Litigation Branch, and *Ian A. McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Rebar Trade Action Coalition. With her on the brief were *Alan H. Price*, *John R. Shane*, *Jeffrey O. Frank*, and *Paul J. Coyle*.

## *OPINION*

**Vaden, Judge:**

This case concerns an antidumping review conducted under the shadow of the 2019 novel coronavirus pandemic — a review during which three of Plaintiff Simec's employees died and a fourth was hospitalized and intubated.[1] Simec sought a deadline extension to submit information related to its downstream sales as part of a

[1] The opinion refers to the Plaintiff singularly because Commerce treats the various affiliates as one entity for purposes of its review. Issues and Decisions Memorandum accompanying the Final Results (IDM) at 1 n.2, J.A. at 7,713, ECF No. 68. Simec is comprised of Grupo Simec S.A.B. de C.V.; Aceros Especiales Simec Tlaxcala, S.A. de C.V.; Compania Siderurgica del Pacifico S.A. de C.V.; Fundiciones de Acero Estructurales, S.A. de. C.V.; Grupo Chant S.A.P.I. de C.V.; Operadora de Perfiles Sigosa, S.A. de C.V.; Orge S.A. de C.V.; Perfiles Comerciales Sigosa, S.A. de C.V.; RRLC S.A.P.I. de C.V.; Siderúrgicos Noroeste, S.A. de C.V.; Siderurgica del Occidente y Pacifico S.A. de C.V.; Simec International 6 S.A. de C.V.; Simec International, S.A. de C.V.; Simec International 7 S.A. de C.V.; and Simec International 9 S.A. de C.V. Pls.' Br. at 1, ECF No. 43.

supplemental questionnaire. The United States Department of Commerce (Commerce) denied the request, stating that "none of the reasons for extension requests ... were *novel*." IDM at 10, J.A. at 7,722, ECF No. 68 (emphasis added). The resulting missing information led Commerce to draw an adverse inference using facts available to calculate Simec's dumping margin, which in turn impacted the rate for the companies not selected for review.

This case is an outlier, both in terms of its factual context and Commerce's response; but "[COVID-19] did not suspend the general principles of administrative law." *See Bonney Forge Corp. v. United States*, 46 CIT __, 560 F. Supp. 3d 1303, 1305 (2022). Those principles lead the Court to conclude that the denial of Simec's extension request was an abuse of discretion and that Commerce's explanation of why it denied the extension is unsupported by substantial evidence. The Court therefore **REMANDS** this case to Commerce with instructions.

## BACKGROUND

This case involves an appeal from the Final Results of the Fifth Administrative Review of the Antidumping Order on Steel Concrete Reinforcing Bar (rebar) from Mexico for the period from November 1, 2019 to October 31, 2020 (the Review Period). *See Steel Concrete Reinforcing Bar from Mexico* (Final Results), 87 Fed. Reg. 34,848 (Dep't of Com. Jun. 8, 2022), J.A. at 7,781, ECF No. 68; IDM, J.A. at 7,713, ECF No. 68; *Questionnaire Deficiencies Analysis* (Deficiencies Memo), J.A. at 91,515, ECF No. 67. More specifically, this case is about how Commerce treated two experienced respondents, Simec and Deacero S.A.P.I. de C.V. (Deacero), differently in the review conducted during the COVID-19 pandemic in Mexico.

In 2014, Commerce published an antidumping order covering rebar from Mexico (the Order). *Steel Concrete Reinforcing Bar from Mexico*, 79 Fed. Reg. 65,925 (Nov. 6, 2014). Simec and Deacero are two Mexican rebar producers. Simec participated in the original investigation as a voluntary respondent, and Deacero participated as a mandatory respondent. *See Steel Concrete Reinforcing Bar from Mexico*, 79 Fed. Reg. 22,802 (Dep't of Com. Apr. 24, 2014). Simec and Deacero participated as mandatory respondents in the 2014–15, 2016–17, and 2017–18 administrative reviews. *See Steel Concrete Reinforcing Bar from Mexico*, 82 Fed. Reg. 27,233 n.2 (Dep't of Com. June 14, 2017) (2014–15 review); *Steel Concrete Reinforcing Bar from Mexico*, 84 Fed. Reg. 35,599 (Dep't of Com. July 24, 2019) (2016–17 review); *Steel Concrete Reinforcing Bar from Mexico*, 85 Fed. Reg. 71,053 (Dep't of Com. Nov. 6, 2020) (2017–18 review). Deacero participated as a man-

datory respondent in the 2018–19 review. *See Steel Concrete Reinforcing Bar from Mexico*, 86 Fed. Reg. 50,527 (Dep't of Com. Sept. 9, 2021). Simec participated in the 2018–19 review but was not a mandatory respondent. *See id.*; *see also Steel Concrete Reinforcing Bar from Mexico* at 2, A-201–844, (Mar. 17, 2021), https://bit.ly/44brJ6q (last visited April 25, 2024). (Preliminary Decision Memo explaining that Simec requested review of its entries for the period of review, but Commerce limited the review to Deacero).

## I. The Disputed Administrative Review

On November 3, 2020, Commerce published a notice of opportunity to request an administrative review. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 86 Fed. Reg. 69,586 (Dep't of Com. Nov. 3, 2020). Defendant-Intervenor Rebar Trade Action Coalition (the Coalition) petitioned Commerce for a review. *Steel Concrete Reinforcing Bar from Mexico* (Request for Administrative Review), J.A. at 1,004, ECF No. 68. On January 6, 2021, Commerce published a notice of administrative review for the parties subject to the Order for 2019–20. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 511 (Dep't of Com. Jan. 6, 2021), J.A. at 1,040, ECF No. 68. Commerce selected Simec and Deacero as mandatory respondents; and Consolidated Plaintiff Grupo Acerero and Plaintiff-Intervenor Gerdau Corsa remained subject to the review as non-selected companies.[2] *See Steel Concrete Reinforcing Bar from Mexico* (Preliminary Results), 86 Fed. Reg. 68,632–33 (Dep't of Com. Dec. 3, 2021), J.A. at 7,269–70, ECF No. 68.

During the review, Mexico experienced a COVID-19 Delta Variant outbreak, which lagged a similar wave in the United States a few months prior. *See* Oral Arg. Tr. at 22:6–12, ECF No. 71. Both mandatory respondents faced Mexico-wide COVID-19 restrictions on travel and on-site work. *See, e.g.*, Simec Second A&D Questionnaire Extension Req. (Aug. 16, 2021) at 1–2, J.A. at 4,910–11, ECF No. 68; Deacero Second Suppl. Questionnaire Extension Req. (Oct. 1, 2021) at 1–2, J.A. at 6,606–07, ECF No. 68. These restrictions hampered the companies' coordination with employees in different departments and geographically dispersed affiliates. *Id.* They proved particularly burdensome during the information-gathering period before Commerce

[2] Gerdau Corsa is the successor-in-interest to Sidertul S.A. de C.V. (Sidertul) as of December 1, 2021. Joint Mot. of Grupo Acerero and Gerdau Corsa at 1 n.1, ECF No. 44 (Joint Opening Br.). Sidertul participated in the administrative review at issue here as a foreign producer but was not selected for individual examination. *Id.*

published its Preliminary Results. *Id.* Mexico also lacked the same level of access to COVID-19 vaccines as the United States. Oral Arg. Tr. at 22:12–18, ECF No. 71.

As Mexico's Delta outbreak and COVID-19 restrictions continued, Commerce required the respondents to produce significant amounts of information, often from on-site records. Simec and Deacero both faced Mexico-wide COVID issues, but Simec also notified Commerce of the outbreak's tragic consequences — the deaths of three key accountants and the intubation of another. *See* Simec Third A&D Questionnaire Extension Req. (Aug. 16, 2021) at 1, J.A. at 4,914, ECF No. 68; *see also* Pls.' Br. at 38, ECF No. 43. Given the pandemic, both respondents requested multiple extensions from Commerce to produce the requested information.

**A. Simec's Initial and Supplemental Questionnaire Periods**

On February 8, 2021, Commerce issued initial questionnaires to Deacero and Simec. Deacero Initial Questionnaire, J.A. at 1,094, ECF No. 68; Simec Initial Questionnaire, J.A. at 1,246, ECF No. 68. Simec experienced several challenges when responding to its questionnaire: (1) a key accountant died from COVID-19; (2) an at-risk pregnant employee had to be isolated; (3) some workers contracted COVID-19; and (4) a Texas winter storm affected power, heat, and internet at Simec's facilities. *See, e.g.*, Simec Initial Questionnaire Extension Req. (Mar. 19, 2021), J.A. at 3,707, ECF No. 68. Simec received three extensions ranging from one to four weeks. IDM at 7, J.A. at 7,719, ECF No. 68; Def.'s Br. at 4, ECF No. 47. It filed responses for sections A through D from March 8 through April 14, providing downstream sales data and analysis. Deficiencies Memo at 1, J.A. at 91,515, ECF No. 67.

After identifying deficiencies in Simec's responses, Commerce issued supplemental questionnaires for sections A through C on July 27, 2021, and sections A and D on August 4, 2021. Simec A–C Questionnaire, J.A. at 4,873, ECF No. 68; Simec A&D Questionnaire, J.A. at 4,890, ECF No. 68.[3] Commerce initially provided Simec three

[3] It is unclear whether the A–C and A&D Questionnaires constitute Simec's first and second supplemental questionnaires or are merely two parts of one supplemental questionnaire. *Compare* Simec First A&D Questionnaire Extension Req. (Aug. 16, 2021), J.A. at 4,908, ECF No. 68 (characterized as two questionnaires), *with* Pls.' Br. at 11, ECF No. 43 (contrasting Simec's situation with Deacero, which received more than one supplemental questionnaire). To the extent the distinction is relevant to assess Commerce's decision to issue multiple supplemental questionnaires to Deacero but not Simec, the Court notes that Simec's A–C and A&D Questionnaires came due at an earlier point in the review process than Deacero's second and third questionnaires. *Compare* Simec A&D Questionnaire Resp. (Sept. 10, 2021) at 1, J.A. at 86,713, ECF No. 66, *with* Deacero Second Suppl. Questionnaire Resp. (Oct. 19, 2021), J.A. at 6,629, ECF No. 68, *and* Deacero Third Suppl. Questionnaire Resp. (Nov. 10, 2021), J.A. at 7,162, ECF No. 68.

weeks to respond to the A–C Questionnaire and one week to respond to the A&D Questionnaire. Simec A–C Questionnaire, J.A. at 4,873, ECF No. 68 (due August 17, 2021); Simec A&D Questionnaire, J.A. at 4,890, ECF No. 68 (due August 11, 2021). All parties agree that the supplemental questionnaires, which contained 275 questions over 29 pages, were extensive. Pls.' Br. at 6, ECF No. 43; *see also* Joint Opening Br. at 9–10, ECF No. 44; Def.'s Br. at 30, ECF No. 47 (quoting IDM at 27, J.A. at 7,739, ECF No. 68) (characterizing the Initial Questionnaire deficiencies as "so extensive that they resulted in over 200 supplemental questions"); Def.-Int.'s Br. at 2, ECF No. 54 (stating that Commerce identified many deficiencies, which yielded "more than two hundred supplemental questions spread over two supplemental questionnaires"). Deacero did not receive any supplemental questionnaires until September 7, 2021. Deacero First Suppl. Questionnaire, J.A. at 4,962, ECF No. 68 (due September 14, 2021).

Simec once again requested multiple extensions to answer its supplemental questionnaires. Those requests and Commerce's responses show the cumulative and compounding effects of the pandemic on Simec and contrast with Deacero's treatment. On August 9, 2021, Simec requested a three-week extension for both supplemental questionnaires, citing the burden of answering them and Mexico's COVID-19 restrictions. Simec A–C/A&D Questionnaire Extension Req. (Aug. 9, 2021), J.A. at 4,904, ECF No. 68. Commerce granted the request in part but warned:

> Pursuant to 19 CFR 351.302(d)(1)(i) ... any information submitted after the applicable deadline will be considered untimely filed and may be rejected. In such a case, we may have to resort to the use of facts available, as required by section 776(a)(2)(B) of the Tariff Act of 1930, as amended.

Simec A–C/A&D Extension Grant (Aug. 10, 2021), J.A. at 4,907, ECF No. 68. This boilerplate warning appeared on extension request responses to both Simec and Deacero. *See, e.g.*, Deacero First Suppl. Questionnaire Extension Grant (Sept. 8, 2021) at 1, J.A. at 6,280, ECF No. 68.

On August 16, Simec sent another A&D Questionnaire extension request in three letters that portrayed a quickly worsening situation. In the first letter, Simec stated that employees were "working flat out to answer Commerce's two ... questionnaires" and "[f]or reasons ... in [its] first and only extension request," it needed more time. Simec First A&D Questionnaire Extension Req. (Aug. 16, 2021) at 1, J.A. at 4,908, ECF No. 68. In its second letter, Simec added that (1) Mexico's Delta Variant outbreak was worsening; (2) Commerce extended its

own deadlines by several months when the United States experienced its own COVID-19 outbreak in 2020; (3) Simec retained an experienced Indian attorney, but he was unable to travel because of COVID-19 restrictions in Mexico and India; and (4) Commerce had extended its preliminary decision deadline and had not yet issued any supplemental questionnaires to Deacero. Simec Second A&D Questionnaire Extension Req. (Aug. 16, 2021) at 1–2, J.A. at 4,910–11, ECF No. 68. In its third letter, Simec offered a startling update: Two of its accountants had died from COVID-19 and another was intubated. Simec Third A&D Questionnaire Extension Req. (Aug. 16, 2021) at 1, J.A. at 4,914, ECF No. 68. Simec now had to rely on less experienced accountants to answer the supplemental questionnaires. *Id.* Commerce granted the August 16 request in full. Simec A&D Extension Grant (Aug. 16, 2021), J.A. at 4,916, ECF No. 68.

On August 20, Simec sent another A–C Questionnaire extension request, citing the burden of the questionnaire and reiterating the reasons stated in its three August 16 letters. Simec A–C Questionnaire Extension Req. (Aug. 20, 2021), J.A. at 4,917, ECF No. 68. Simec also quoted its August 9 request observing that "the burden to answer [275 questions over 29 pages] is overwhelming." *Id.* at 2, J.A. at 4,918. Simec added that Mexico's Delta outbreak was "far worse than ever." *Id*. On August 23, 2021, Commerce partly granted the request. Simec A–C Extension Grant (Aug. 23, 2021), J.A. at 4,921, ECF No. 68.

On Saturday, August 28, Simec filed an extension request for both supplemental questionnaires but noted specific questions from the A&D questionnaire it believed required additional time. Simec A–C/A&D Questionnaire Extension Req. (Aug. 28, 2021) at 1, J.A. at 4,926, ECF No. 68. Simec attached a copy of its August 20 extension request as background information and noted the impact of Mexico-wide COVID-19 restrictions on its ability to coordinate across companies. *Id.* at 1, J.A. at 4,926. It also responded to the Coalition's opposition to granting additional extensions, arguing that "Petitioners heartlessly fail to mention that two Simec individuals ... recently died from [COVID-19] and a third is ... clinging to life on a respirator." *Id.* at 2, J.A. at 4,927.

Before Commerce could respond, Simec filed another request on August 30. Simec A–C/A&D Questionnaire Extension Req. (Aug. 30, 2021), J.A. at 4,932, ECF No. 68. Simec sought similar deadlines as its previous request and additional time for the A–C questionnaire responses for affiliate and downstream sales. *Id.* at 1, J.A. at 4,932. Simec reiterated its challenges retrieving information across a diffuse company impacted by COVID-19. *Id.* On August 30, Commerce partly extended the deadline and granted Simec extra time to respond to the

A–C questions for affiliate and downstream sales. Simec A–C Extension Grant (Aug. 30, 2021), J.A. at 4,939, ECF No. 68. Commerce also partly extended the A&D Questionnaire deadline. Simec A&D Extension Grant (Aug. 31, 2021), J.A. at 4,940, ECF No. 68.

On September 1, Simec filed another A–C Questionnaire extension request for the affiliate and downstream sales questions. Simec A–C Questionnaire Extension Req. (Sept. 1, 2021) at 1, J.A. at 4,941, ECF No. 68. Simec stated that the obstacles in its August 20 and August 30 requests persisted. *Id.* It also argued that Commerce should grant more time because "entry summaries and other documents are not readily accessible[] given [COVID-19] restrictions." *Id.* Commerce granted a blanket extension but gave no extra time for the specific questions. Simec A–C Extension Grant (Sept. 1, 2021), J.A. at 4,944, ECF No. 68. Commerce also warned that "given the amount of time already granted ... as well as the statutory and regulatory deadlines in this case and ongoing workloads, we are unlikely to be able to accommodate any additional extensions of time ...." *Id.*

On September 2, Simec filed a similar one-week A&D Questionnaire extension request. Simec A&D Questionnaire Extension Req. (Sept. 2, 2021) at 1, J.A. at 4,945, ECF No. 68. Commerce granted two extra days but warned that it was unlikely to grant more extension requests. Simec A&D Extension Grant (Sept. 3, 2021), J.A. at 4,953, ECF No. 68.

In a September 6 letter to Commerce, Simec took stock of its situation. The A–C Questionnaire was due September 7, and the A&D Questionnaire was due September 9. Simec A–C Questionnaire Extension Req. (Sept. 6, 2021) at 1, J.A. at 4,954, ECF No. 68. Simec noted, "Commerce said don't expect further extensions[,]" so that the submissions would be "based on what has been possible to do to date." *Id.* Simec also reported that its employees were "sleep depriv[ed] for days and weeks" from trying to answer the questions and that the reasons detailed in the August 20, August 30, and September 2 extension requests justified a further extension. *Id.* Simec asked for a two-week extension, specifying that it needed extra time to submit affiliated company downstream sales and window period sales data.[4] *Id.* It noted that answering downstream sales questions required manually reviewing more than 800 invoices. *Id.* Commerce denied Simec's extension request the next day. It found, "The [September 6]

[4] "Window period" sales data involve situations where there are U.S. sales but no comparable home market sales during the same month(s). The "window period" refers to home market sales made up to ninety days before or sixty days after the U.S. sales month that lacks contemporaneous home market sales data. *See Rebar Trade Action Coal. v. United States*, 45 CIT __, 503 F. Supp. 3d 1295, 1305 (CIT 2021). Those window period sales prices may then be compared to the U.S. sales prices to determine if dumping occurred. *Id.*; *see* 19 C.F.R. § 351.414(f).

request for additional time provides no detailed justification for why the preparation of responses for questions 70–75 or the window period sales requires additional time beyond the six weeks already allotted." Simec A–C Extension Denial (Sept. 7, 2021), J.A. at 4,958, ECF No. 68.

Later that day, at around 4:30 p.m., Simec responded. Simec A–C Questionnaire Extension Req. (Sept. 7, 2021) at 1, J.A. at 4,959, ECF No. 68. Simec stated that it now sought one extra week for questions 70 to 75. *Id.* It maintained that its previous requests detailed its need but added details about how COVID-19 restrictions hampered its response. *Id.* The company also stated that it needed to extract various rebar expenses from invoices that did not separate rebar data from other products. *Id.* Commerce did not respond before the deadline so that Simec filed public and confidential A–C Questionnaire responses on September 7 and September 8. *See* Simec A–C Questionnaire Resp. (Sept. 8, 2021) at 1, J.A. at 4,973, ECF No. 68. Under Commerce's regulations, Simec's unanswered September 7 extension request automatically moved the deadline to September 8 at 8:30 a.m. Simec A–C Extension Denial (Sept. 9, 2021) at 1 n.1, J.A. at 6,282, ECF No. 68 (citing *Extension of Time Limits*, 78 Fed. Reg. 57,790, 57,792 (Dep't of Com. Sept. 30, 2013)). Simec nonetheless missed the deadline for questions 70 to 75 and failed to submit responses for those questions. *See* Simec A–C Questionnaire Resp. (Sept. 8, 2021) at 53, J.A. at 5,034, ECF No. 68; *see also* Simec Cover Letter (Oct. 18, 2021) at 1–4, J.A. at 6,625–28, ECF No. 68.

Commerce belatedly responded on September 9 and rejected Simec's extension request. Simec A–C Extension Denial (Sept. 9, 2021) at 1–2, J.A. at 6,282–83, ECF No. 68. Commerce noted that it granted three extra weeks to respond to the questionnaire and already denied an extension request for questions 70 through 75. *Id.* Commerce was left to analyze an incomplete record because the rest of Simec's downstream cost information never became part of the record.

On September 9, Simec submitted a final extension request for the A&D Questionnaire, which was due that same day. Simec A&D Questionnaire Extension Req. (Sept. 9, 2021) at 1–2, J.A. at 6,284–85, ECF No. 68. It noted issues with file corruption and challenges compiling and formatting data. *Id.* Simec also recounted many of the COVID-related issues that plagued the supplemental questionnaire period, including the lack of available COVID-19 vaccines in Mexico in comparison to the United States. *Id.* at 2 n.3, J.A. at 6,285. Commerce granted Simec's one-day extension request but reiterated that it was unlikely to grant more extensions. Simec A&D Extension Grant

(Sept. 9, 2021), J.A. at 6,287, ECF No. 68. Simec timely filed its A&D responses on September 10. Simec A&D Questionnaire Resp. (Sept. 10, 2021) at 1, J.A. at 86,713, ECF No. 66. Although it would be nearly three months until Commerce issued its Preliminary Results, Commerce did not seek or accept additional factual information from Simec. Pls.' Reply Br. at 1–2, ECF No. 51.

### B. Deacero's Supplemental Questionnaires and Simec's October 18 Filing

Simec's role in the fact-gathering portion of the administrative review was finished, but Deacero's continued. On September 7, 2021, Commerce issued its first supplemental questionnaire to Deacero for Section A of its Initial Questionnaire. Deacero First Suppl. Questionnaire, J.A. at 4,962, ECF No. 68. Deacero later received multiple extensions across three supplemental questionnaires.

On September 8, Deacero requested a one-week extension because the questionnaire: (1) requires a "significant amount of information from Deacero and other separate entities"; (2) involves participation from multiple departments; (3) involves "separate legal entities with different systems and records"; (4) requires coordination with personnel in charge of the information; (5) involves translating long documents; and (6) requires counsel to review the responses, follow up with questions, and format the narrative and exhibits for submission. *See* Deacero First Suppl. Questionnaire Extension Req. (Sept. 8, 2021) at 1–2, J.A. at 6,277–78, ECF No. 68. Commerce granted this request in full. Deacero First Suppl. Questionnaire Extension Grant (Sept. 8, 2021), J.A. at 6,280, ECF No. 68. Deacero timely filed its First Supplemental Questionnaire. Deacero First Suppl. Questionnaire Resp. (Sept. 20, 2021), J.A. at 6,515, ECF No. 68.

On September 22, Commerce issued Deacero's Second Supplemental Questionnaire comprised of seventy-seven questions. Deacero Second Suppl. Questionnaire, J.A. at 6,589, ECF No. 68; Deacero Second Suppl. Questionnaire Extension Req. (Sept. 24, 2021) at 2, J.A. at 6,602, ECF No. 68. Deacero requested a two-week extension on September 24 because: (1) the questionnaire was "quite extensive"; (2) it needed to update its sales databases and submit voluminous supplemental documents; (3) the responses involve multiple departments; (4) relevant documents were maintained in separate departments and "separate entities with separate records"; (5) COVID-19 imposed "administrative constraints"; (6) most employees were still teleworking, which delayed contact, discussion, and obtaining documents; (7) Deacero was responding to a supplemental questionnaire in another review, which involved the same employees and resources; and (8) counsel needed to review the responses, follow up with questions, and

format the narrative and exhibits for submission. Deacero Second Suppl. Questionnaire Extension Req. (Sept. 24, 2021) at 1–2, J.A. at 6,601–02, ECF No. 68. Commerce partly granted this request. Deacero Second Suppl. Questionnaire Extension Grant (Sept. 24, 2021) at 1, J.A. at 6,604, ECF No. 68.

On October 1, Deacero requested another one-week extension, restating the reasons identified in its September 24 request and saying "despite Deacero's redoubled efforts and its staff working around the clock and through weekends," it needed more time. Deacero Second Suppl. Questionnaire Extension Req. (Oct. 1, 2021) at 1, J.A. at 6,606, ECF No. 68. Deacero also noted that COVID-19 teleworking limited employees' ability to access company systems and coordinate staff to gather, send, and review the requested information. *Id.* at 1–2, J.A. at 6,606–07. Commerce granted this request. Deacero Second Suppl. Questionnaire Extension Grant (Oct. 1, 2021) at 1, J.A. at 6,609, ECF No. 68.

Deacero next submitted a four-day extension request. Deacero Second Suppl. Questionnaire Extension Req. (Oct. 13, 2021), J.A. at 6,614, ECF No. 68. Deacero reiterated that most employees were teleworking and that its resources were split between this questionnaire and responding to another questionnaire in a different review. *Id.* at 1–2, J.A. at 6,614–15. It did not mention COVID-19 in this request. *See id.* at 1–3, J.A. at 6,614–16. Deacero also claimed that: (1) it was experiencing internet connection issues, which hampered access to its systems, delayed attempts to retrieve and locate documents, and delayed updates for its sales databases; (2) counsel needed to review the information, follow up with questions, and format the documents for submission; and (3) "Deacero respectfully submits that this short extension will not adversely affect any other party or unduly hinder [Commerce's] ability to analyze the information within the statutory deadlines." *Id.* at 1–2, J.A. at 6,614–15. Commerce partly granted this request — setting the deadline for October 18, 2021. Deacero Second Suppl. Questionnaire Extension Grant (Oct. 13, 2021), J.A. at 6,617, ECF No. 68. Deacero timely filed its Second Supplemental Questionnaire. *See* Deacero Second Suppl. Questionnaire Resp. (Oct. 19, 2021), J.A. at 6,629, ECF No. 68.[5]

On October 18, as Deacero was filing its Second Supplemental Questionnaire, Simec attempted to file its missing responses to the A–C Suppl. Questionnaire (the October 18 Filing). *See* Rejected October 18 Filing, J.A. at 6,619–24, ECF No. 68 (blank placeholder sheets for the rejected data). Simec sought to include (1) information related to affiliated and downstream sales; (2) other information on

[5] Deacero dated its filing October 18; however, the filing is timestamped October 19.

cost allocation methodology; and (3) Spanish-to-English translations that had been inadvertently stripped during the original filing process. Pls.' Br. at 12, ECF No. 43 (citing Simec Cover Letter (Oct. 18, 2021) at 1–4, J.A. at 6,625–28, ECF No. 68). It requested that Commerce accept this filing because of challenges faced during the supplemental review period and because Commerce was still accepting information from Deacero. Simec Cover Letter (Oct. 18, 2021) at 1–4, J.A. at 6,625–28, ECF No. 68. At the time of Simec's attempted submission, Deacero had no further outstanding questionnaires. Had Commerce accepted the October 18 Filing, Simec and Deacero would have been on equal footing with their responses' timing. Commerce rejected the filing as untimely. Simec October 18 Filing Denial (Oct. 19, 2021), J.A. at 7,108, ECF No. 68 (citing 19 C.F.R. § 351.302(d)(1)(i)).

Despite having no time for further information from Simec, Commerce issued a third supplemental questionnaire to Deacero on November 3, 2021. *See* Deacero Third Suppl. Questionnaire at 1, J.A. at 7,120, ECF No. 68. Two days later, Deacero requested a two-day extension because it needed more time to manually search its records. Deacero Third Suppl. Questionnaire Extension Req. (Nov. 5, 2021) at 1, J.A. at 7,123, ECF No. 68. It again asserted that this extension would not adversely affect any other party or hinder Commerce's ability to analyze the information within its statutory deadlines. *Id.* at 2, J.A. at 7,124. Commerce granted the request. Deacero Third Suppl. Questionnaire Extension Grant (Nov. 5, 2021) at 1, J.A. at 7,126, ECF No. 68. Deacero timely filed its Third Supplemental Questionnaire. Deacero Third Suppl. Questionnaire Resp. (Nov. 10, 2021), J.A. at 7,162, ECF No. 68.

### C. Commerce's Preliminary and Final Results

Commerce published its Preliminary Results on December 3, 2021. Preliminary Results, 86 Fed. Reg. 68,632, J.A. at 7,269, ECF No. 68. It applied facts available with an adverse inference against Simec because Simec "failed to provide any responses to the questions related to downstream sales" and the responses the company did submit "fail[ed] to provide information Commerce requested, [incorrectly] stated that various errors or discrepancies had been corrected ... and provided supporting documentation which indicated that certain reported data were incorrect." Issues and Decisions Memorandum accompanying the Preliminary Results (PDM) at 5, J.A. at 7,222, ECF No. 68. Commerce assigned Simec a dumping margin of 66.70 percent, which was the same margin assigned to Simec during the original investigation. Def.'s Br. at 6, ECF No. 47 (citing PDM at 9,

J.A. at 7,226, ECF No. 68); *see also Steel Concrete Reinforcing Bar from Mexico* (Final Determination), 79 Fed. Reg. 54,967 (Dep't of Com. Sept. 15, 2014). Commerce calculated a zero percent rate for Deacero. PDM at 10, J.A. at 7,227, ECF No. 68. It also calculated the rate for the companies not selected for individual examination by averaging Simec's rate and Deacero's rate. *Id.* (citing 19 U.S.C. § 1673d(c)(5)(B)). That simple average resulted in a 33.35 percent dumping margin for non-selected companies with transactions during the review period. Def.'s Br. at 7, ECF No. 47.

Commerce published its Final Results on June 8, 2022. *See generally* IDM, J.A. at 7,713, ECF No. 68. Commerce continued to apply facts available with an adverse inference against Simec. *See id.* at 1, J.A. at 7,713. All dumping margins remained the same. *Id.* at 41, J.A. at 7,753. It concurrently published the public version of its Deficiencies Memorandum, which details deficiencies in Simec's submissions. [6] Deficiencies Memo, J.A. at 7,817, ECF No. 68.

## II. The Present Dispute

On August 8, 2022, Simec brought this action under § 516A of the Tariff Act of 1930, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(iii), challenging Commerce's Final Results. Compl. ¶¶ 2, 8–11, ECF No. 8. The Coalition intervened as Defendant-Intervenor. Order Granting Intervention, ECF No. 16. Grupo Acerero filed a separate action challenging the Final Results. Compl., *Grupo Acerero S.A. de C.V. v. United States*, No. 22–230 (CIT Aug. 26, 2022), ECF No. 8. In addition to the issues Simec raises, Grupo Acerero challenges the 33.35 percent non-selected company rate as unsupported by substantial evidence. *Id.*¶ 28. The Coalition intervened as a Defendant-Intervenor in that case as well. Order Granting Intervention, *Grupo Acerero S.A. de C.V. v. United States*, No. 22–230 (CIT Sept. 6 2022), ECF No. 16. Gerdau Corsa joined as Plaintiff-Intervenor on September 23, 2022. Order Granting Intervention, *Grupo Acerero S.A. de C.V. v. United States*, No. 22–230 (CIT Sept. 23, 2022), ECF No. 23. After an in-person status conference on October 26, 2022, the Court consolidated both actions with Simec's action designated as the lead case. Consolidation Scheduling Order, ECF No. 27.

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[6] Commerce initially failed to place its Deficiencies Memo on the record because "a case analyst unfamiliar with the administrative review was covering for the assigned case analyst, who was on leave, and inadvertently failed to file the public and confidential versions of the Deficiencies Memorandum ...." Def.'s Mot. to Correct the R. at 2, ECF No. 28. The Court took briefing on the issue and ultimately allowed Commerce to supplement the administrative record with the confidential Deficiencies Memo. ECF No. 39.

In their briefs, the parties focus on (1) whether Commerce abused its discretion in denying Simec's extension requests and rejecting the October 18 Filing, (2) Commerce's drawing an adverse inference, and (3) Commerce's use of simple averaging to calculate the non-selected company rate. In response, Commerce broadly defends its use of total adverse facts available for Simec and use of a simple average for the non-selected company rate. Def.'s Br. at 12–46, ECF No. 47. It claims it did not abuse its discretion in denying the extension requests and rejecting the October 18 Filing. *Id.* at 12–19. Commerce asserts that adverse inferences were appropriate because Simec failed to cooperate to the best of its ability. *Id.* at 30–39.

In its reply brief, Simec focuses its argument on Commerce's disparate treatment of Simec vis-à-vis Deacero, observing that Commerce cut Simec out of the fact gathering portion two months before Deacero's submissions ended. Pls.' Reply at 1–10, ECF No. 51. Simec also reiterates its arguments that Commerce abused its discretion in rejecting the October 18 Filing and assigning Simec a 66.70 percent dumping margin. *Id.* at 10–15. In their joint reply brief, Grupo Acerero and Gerdau Corsa also argue that the non-selected company rate did not reasonably reflect the potential dumping margins for the non-selected respondents. Joint Reply Br. at 12–23, ECF No. 52.

The Court held oral argument on December 15, 2023. ECF No. 64. Simec's counsel represented to the Court — and Commerce did not find in its decision to the contrary — that the documents Simec sought to file on October 18 were the same as Simec would have filed had Commerce granted its September 7 extension request. Oral Arg Tr. 19:20–25, ECF No. 71 (The Court: "[D]o I hear you representing to the Court that essentially what you did on October 18th was attempt to give [Commerce] ... the same thing that they would have received in the first ten days of September had they given you a couple of additional days?" Mr. Rogers: "Yes, Your Honor."). Simec's counsel also represented that Simec chose to submit its information on October 18 to coincide with Deacero's Second Supplemental Questionnaire deadline, which at the time was Deacero's last opportunity to submit information before the Preliminary Results. *Id.* at 19:25–20:13. All parties agreed that, should the Court remand on the issue of Commerce's failure to grant an extension of time to Simec, it should stay any consideration of the non-selected company rate until the remand determination. *Id.* at 83:12–19, 94:2–7, 98:13–20. Any change in Simec's rate would necessarily affect the non-selected company rate. *Id.* at 94:7–11 (Defendant's counsel noting that a change in Simec's rate would "necessarily flow [and affect] the non-selected rate ...."); *id.* at 98:20–22 (Coalition's counsel agreeing that, if the case were re-

manded, the non-selected company rate issue "could go away depending on what happens on remand.").

## JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under 28 U.S.C. § 1581, which grants authority to review challenges to antidumping order final determinations. The Court must set aside any of Commerce's "determination[s], finding[s], or conclusion[s]" found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law ...." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* 28 U.S.C. § 2640(b) (noting that § 516A civil actions are reviewed under 19 U.S.C. § 1516a(b)). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *New Am. Keg v. United States*, 45 CIT __, 2021 Ct. Intl. Trade LEXIS 34, at *15. When reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses if the agency's 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."). The Federal Circuit describes "substantial evidence" as "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)).

Commerce has discretion to set and enforce deadlines in administrative reviews. *See Dongtai Peak Honey Indus. Co., Ltd. v. United States*, 777 F.3d 1343, 1352 (Fed. Cir. 2015); *see also* 19 C.F.R. § 351.302 (extension of time limits). But that discretion is not absolute. *See Grobest & I-Mei Indus. (Viet.) Co., Ltd. v. United States*, 36 CIT 98, 122 (2012) (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (Fed. Cir. 1995)). Commerce's exercise of discretion is reviewed under the default standard of the Administrative Procedure Act. *See SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that, in cases reviewed under 28 U.S.C. § 2640(b), section 706 review applies "since no law provides otherwise"); *Oman Fasteners, LLC v. United States*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 28, at *10 ("Commerce's exercise of discretion in § 516A cases is subject to the default standard of the Administrative Procedure Act."). This standard allows the Court to "set aside

agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

## DISCUSSION

### I. SUMMARY

Commerce abused its discretion when it cut Simec out of the fact-gathering portion of the review nearly three months before publishing the Preliminary Results by citing the need to meet statutory deadlines. Meanwhile, it granted Deacero multiple extension requests over three supplemental questionnaires for nearly two more months. Both companies cited COVID-related difficulties and submitted less-than-perfect initial questionnaires — requiring triple-digit numbers of supplemental questions for both. However, only Simec experienced three deaths and an intubation among the accountants responsible for responding to Commerce's questionnaires. Only Simec noted that its experienced counsel, who had assisted in previous reviews, could not travel because of COVID-19 restrictions. Commerce failed to appreciate the severe disruptions COVID-19 caused in Simec's ability to respond while crediting Deacero's more generic claims of difficulty. That the agency's fact-finding process lasted nearly three months after it told Simec no additional time was available undermines any finality justification for Commerce's actions.

Commerce's explanation also fails to properly characterize Simec's situation. The Issues and Decisions Memorandum is bereft of discussion of Simec's specific COVID-19 challenges and fails to consider how those challenges detract from Commerce's conclusion that none of the reasons Simec presented for one additional extension were "novel." Their absence mars the conclusion as unsupported by substantial evidence. Because Commerce abused its discretion and its conclusion is unsupported by substantial evidence, the Court remands the case to Commerce to reopen the record and allow Simec to add the information it would have included had Commerce granted its final A–C Supplemental Questionnaire extension request.

Commerce's use of facts available, drawing of adverse inferences, and use of a simple average to determine the non-examined company rate all flow from Commerce's unjustified decision to reject Simec's final extension request. Because Commerce's final determination may change after it accepts Simec's data, it would be inappropriate for the Court to decide Plaintiffs' remaining claims. On remand, Commerce should analyze the information in Simec's October 18 Filing and any additional information it may request in its discretion to calculate (1) a new dumping margin for Simec and (2) a new non-selected company

rate. The agency remains free to use facts available to fill any gaps remaining after accepting Simec's October 18 Filing and may draw adverse inferences if legally appropriate.

## II. Commerce's Disparate Treatment of Simec Was an Abuse of Discretion

Commerce abused its discretion when it denied Simec's September 7 extension request. It cut Simec out of the fact-gathering portion of the review well before releasing the Preliminary Results while continuing to issue Deacero multiple supplemental questionnaires and time extensions. *Cf. SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)) ("[I]t is well-established that 'an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.'") (second alteration in original). Although Simec and Deacero both proffered COVID-19 restrictions as justification for their extension requests, Simec faced more acute challenges. Nonetheless, Commerce denied Simec's September 7 extension request, continued to request and accept information from Deacero until November 10, and did not publish its Preliminary Results until December 3. *Compare* Simec A–C Questionnaire Extension Denial (Sept. 9, 2021), J.A. at 6,282, ECF No. 68, *and* Deacero Third Suppl. Questionnaire Resp. (Nov. 10, 2021), J.A. at 7,162, ECF No. 68, *with* Preliminary Results, 86 Fed. Reg. 68,632, J.A. at 7,269, ECF No. 68. Commerce's differential treatment was an abuse of discretion.

Commerce issued detailed questionnaires for both Simec and Deacero. *Compare* Simec Initial Questionnaire, J.A. at 1,246, ECF No. 68, *with* Deacero Initial Questionnaire, J.A. at 1,094, ECF No. 68. Both companies' responses required extensive supplementation. *See* Simec A–C Questionnaire Extension Req. (Aug. 20, 2021) at 1–2, J.A. at 4,917–18, ECF No. 68 (noting Simec received 275 supplemental questions); Oral Arg. Tr. at 15:1–15, 37:17–18, ECF No. 71 (noting Deacero received about 100 supplemental questions). Both filed multiple extension requests during the supplemental questionnaire period, citing COVID-19 restrictions and the questionnaires' extensiveness as their primary challenges. *See*, *e.g.*, Simec A–C/A&D Questionnaire Extension Req. (Aug. 9, 2021) at 1, J.A. at 4,904, ECF No. 68 (stating that it was a "huge" burden to answer both questionnaires and citing ongoing COVID-19 restrictions); Deacero Second Suppl. Questionnaire Extension Req. (Sept. 24, 2021) at 1–2, J.A. at 6,601–02, ECF No. 68 (stating the questionnaire is "quite extensive" and COVID-19 imposed "administrative constraints").

However, Simec faced far more severe hurdles. Three of its key employees died from COVID-19 — one during the initial questionnaire period and two during the supplemental questionnaire period. Pls.' Br. at 5, ECF No. 43. Another employee needed intubation. Simec Third A&D Questionnaire Extension Req. (Aug. 16, 2021), J.A. at 4,914, ECF No. 68. Simec attempted to bring in experienced outside counsel to assist, but Mexican and Indian COVID-19 restrictions blocked these efforts. Simec Second A&D Questionnaire Extension Req. (Aug. 16, 2021) at 2, J.A. at 4,911, ECF No. 68. The record reflects that Simec faced uniquely severe fallout from COVID-19. Indeed, Commerce conceded at oral argument that it was unaware of any other COVID-era respondent that experienced the level of hardship Simec did. Oral Arg. Tr. at 29:15–19, ECF No. 71 (The Court: "[A]re you aware of any other administrative review engaged in during this time period in which multiple key employees died during the administrative review?" Ms. Westercamp: "I am not, Your Honor.").

Deacero, by contrast, contended with the general COVID-19 hurdles multiple pandemic-era respondents faced. *See*, *e.g.*, Deacero Second Suppl. Questionnaire Extension Req. (Sept. 24, 2021) at 2, J.A. at 6,602, ECF No. 68 (noting that COVID-19 imposed "administrative constraints" and citing general COVID-19 issues such as telework requirements). Deacero suffered no deaths or hospitalizations among key employees. Instead, its extension requests (1) made general assertions of continued difficulty because of Mexican COVID-19 restrictions; (2) cited issues that Simec also raised, such as having a geographically dispersed company structure and the breadth of the questionnaires; and (3) raised issues that were comparatively less severe than Simec's. *See, e.g.*, Deacero Second Suppl. Questionnaire Extension Req. (Oct. 13, 2021) at 1–3, J.A. at 6,614–16, ECF No. 68 (noting unexpected computer connection issues). In some extension requests, Deacero did not mention COVID-19 at all. *See id.* Nevertheless, Commerce continued to grant Deacero's requests well after it denied Simec's September 7 extension request on the grounds that time was of the essence.

Commerce faced two respondents in this review. One confronted calamitous consequences because of COVID-19. The other experienced disruptions akin to those of any respondent in the pandemic era. Commerce chose to reward Deacero's more generic descriptions of difficulty with extensions while downplaying the much more severe difficulties Simec faced. Citing time constraints, Commerce shut Simec down two months before it ended its examination of Deacero. IDM at 12, J.A. at 7,724, ECF No. 68 (citing the "need to ensure

sufficient time for review and possible further supplemental questionnaires" as justification to deny the last extension request).

Commerce and the Coalition offer several reasons for why the agency did not abuse its discretion when it denied Simec's September 7 extension request. Their arguments focus on the timeline of events and the supposed divergence between Simec's and Deacero's respective reviews. Def.'s Br. at 15, 18–19, 31, 34, ECF No. 47; *see also* Def-Int.'s Br. at 8, 10–12, ECF No. 54. These arguments are unavailing.

Commerce and the Coalition first argue that Simec attempted to file its information on October 18 — well past the September 16 deadline Simec originally requested in its September 7 extension request. *See* Def.'s Br. at 5, 31, ECF No. 47 (quoting IDM at 28, J.A. at 7,740, ECF No. 68); *see also* Simec A–C Questionnaire Extension Req. (Sept. 7, 2021), J.A. at 4,959, ECF No. 68. They also assert that Simec received nearly all the time it sought in prior extension requests and still did not submit timely responses. *See* Oral Arg. Tr. at 50:22–51:2, ECF No. 71 (Coalition's counsel arguing that Simec eventually received the time it originally requested after notifying Commerce of employee deaths).

It is true that Simec did not meet its proposed September 16 deadline. However, Commerce rejected that deadline, stating "the deadline for the submission ... *was* 8:30 a.m., September 8, 2021[,]" and "we previously denied [Simec's] request for an extension ... [and] we are similarly denying [this] requested extension." Simec A–C Questionnaire Extension Denial (Sept. 9, 2021) at 1–2, J.A. at 6,282–83, ECF No. 68 (emphasis added). Although it would have been prudent for Simec to try to submit the missing information at the first opportunity, Commerce can hardly fault Simec for failing to abide by a deadline the agency rejected. *Cf. Celik Halat ve Tel Sanayi A.S. v. United States*, 46 CIT __, 557 F. Supp. 3d 1348, 1359 (2022) ("While this court agrees that it would have been prudent for Celik Halat's representative to file an extension request, timely or otherwise, the court also notes the existence of record evidence to support a reasonable belief ... that both of these efforts would have been futile.").

The Coalition and Commerce attempt to explain the refusal to grant Simec additional time by citing the need for finality and the burden of accepting late-filed information. *See* Def.'s Br. at 18–19, ECF No. 47; Def-Int.'s Br. at 9–10, ECF No. 54; *see also* Oral Arg. Tr. at 51:23–25, ECF No. 71 ("[E]veryone seems to agree ... the balance that is before the Court [is] accuracy versus finality."). However, Commerce's interest in finality nearly three months before releasing the Preliminary Results was not just at a nadir; it was nearly zero.

*See Timken United States Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) ("This court ... has never discouraged the correction of errors at the preliminary result stage; we have only balanced the desire for accuracy in antidumping duty determinations with the need for finality at the final results stage."). That interest in finality was even lower in early September, when Commerce rejected Simec's extension request, than in mid-October, when Commerce rejected Simec's final attempted filing.

Commerce's concern with finality rings hollow when one considers it would be nearly three months and three supplemental questionnaires for Deacero before Commerce issued the Preliminary Results. Neither Simec nor Deacero submitted stellar initial questionnaires. Both necessitated multiple rounds of supplementation amounting to triple-digit numbers of additional queries. But Commerce opted to cut Simec out of the remaining fact-gathering portion while continuing to allow Deacero additional extensions. *Compare* Deacero Second Suppl. Questionnaire Extension Req. (Oct. 13, 2021) at 2, J.A. at 6,615, ECF No. 68 ("Deacero respectfully submits that this short extension will not adversely affect any other party or unduly hinder [Commerce's] ability to analyze the information within the statutory deadlines."), *and* Deacero Second Suppl. Questionnaire Extension Grant (Oct. 13, 2021), J.A. at 6,617, ECF No. 68, *with* IDM at 12, J.A. at 7,724, ECF No. 68 (citing the "need to ensure sufficient time for review and possible further supplemental questionnaires" as justification to deny Simec's last extension request). Deacero answered over one hundred supplemental questions *after* Commerce had ended Simec's role in the fact gathering process. Pls.' Reply at 6, ECF No. 51. Commerce attempted to explain its wildly differential treatment:

> Deacero was farther along in the administrative process than Grupo Simec because of the significant amount of time that it took Commerce to review Grupo Simec's initial questionnaire responses and because Commerce had granted Grupo Simec a significant amount of time to prepare its first supplemental questionnaire responses. More importantly, though, as the administrative process runs its course, the deadlines and requests for information from each respondent diverge, and, as such, Commerce's deadlines for one respondent are not comparable with those of another, nor is the submission of untimely filed information justifiable simply because we accept information from another party on that date.

IDM at 18, J.A. at 7,730, ECF No. 68.

This statement does little to clarify Commerce's actions. Though Simec's and Deacero's deadlines might diverge during the supplemental questionnaire process, there is no escaping their common deadline — the Preliminary Results. Commerce ended Simec's participation in the review as Deacero continued to submit a significant amount of information for two more months. As the Consolidated Plaintiffs correctly note, "[T]he likely burden on Commerce to receive responses to six questions ... five to seven days after receiving responses to 269 other questions was comparatively insignificant" — particularly when Commerce made time over the next couple of months to issue and review more than one hundred queries from Deacero. Joint Opening Br. at 27, ECF No. 44.

By Commerce's own admission, no respondent was more affected by the COVID-19 pandemic than Simec. Meanwhile, Deacero experienced the same frustrations as every other pandemic-era respondent going through the administrative review process. Commerce credited Deacero's general complaints and granted sufficient time for it to submit the required information. Conversely, the agency downplayed the rising death toll at Simec, grew frustrated, and prematurely ended Simec's ability to respond to Commerce's questionnaires. Because Commerce's actions were arbitrary, its decision to reject Simec's request for an extension may not stand.

Simec asserts that (1) it could have timely submitted its missing information had Commerce granted it one final extension; (2) its attempted October 18 Filing was the same information that it would have submitted had Commerce granted one final extension; and (3) it chose to submit information on October 18 because that date coincided with Deacero's second supplemental questionnaire deadline — the then-final date that Commerce would take factual evidence from either respondent. *See* Oral Arg. Tr. at 18:10–18, 19:20–20:13, ECF No. 71. In other words, Simec sought to be on equal footing with Deacero at the end of the supplemental questionnaire period. Commerce did not refute these representations. *See* IDM at 20, J.A. at 7,732, ECF No. 68 ("Simec elected to ignore Commerce's established supplemental questionnaire deadlines and then *later attempted to submit the information that it failed to submit* in a timely manner ....") (emphasis added); *see also* Def.'s Br. at 5, ECF No. 47 ("[O]n October 18, *40 days* after the September 7 deadline and automatically extended September 8 8:30 a.m. deadline, Simec filed a submission containing the information Commerce had requested in the A-C supplemental questionnaire."). The Court therefore **REMANDS** the case to Commerce to reopen the record and accept the October 18 Filing.

## III. Commerce's Conclusions Are Unsupported by Substantial Evidence

Were it not an abuse of discretion, Commerce's decision to reject Simec's request for additional time would also fail for not being supported by substantial evidence. *See Universal Camera Corp.*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Commerce claimed that "none of the reasons for [Simec's] extension requests ... were novel." *See* IDM at 10, J.A. at 7,722, ECF No. 68. Three dead accountants, a fourth hospitalized, and an outside counsel unable to help because of pandemic restrictions are the very definition of "novel." Commerce's attempt to say otherwise does not find sufficient evidentiary support in the record.

Simec faced severe challenges in both the initial and supplemental questionnaire periods. While answering the initial questionnaire, Simec notified Commerce that its workers contracted COVID-19, an at-risk pregnant worker needed to be isolated, and a key accountant died from COVID-19. *See, e.g.*, Simec Initial Questionnaire Extension Req. (Mar. 19, 2021) at 1, J.A. at 3,707, ECF No. 68. It also notified Commerce that a record-setting Texas winter storm affected power, heat, and internet at Simec's facilities. *Id.*

Things did not get better during the supplemental questionnaire period. Simec's COVID-19 challenges persisted and compounded. In early August, Simec requested extensions for both supplemental questionnaires, explaining Mexican COVID-19 restrictions hindered coordination and on-site work across multiple locations. Simec A–C/A&D Questionnaire Extension Req. (Aug. 9, 2021), at 1, J.A. at 4,904, ECF No. 68. On August 16, Simec's situation worsened. In addition to citing ongoing restrictions, Simec informed Commerce that two more accountants died from COVID-19; another accountant was intubated; and Simec's experienced outside counsel, who was "extremely helpful" in a prior administrative review, could not travel to Mexico because of COVID-19 restrictions. Simec A&D Extension Reqs. (Aug. 16, 2021), J.A. at 4,911, 4,914, ECF No. 68. From mid-August to the rejected September 7 extension request, Simec reiterated these challenges and advised Commerce of new hurdles. *See, e.g.*, Simec A–C Questionnaire Extension Req. (Sept. 6, 2021), J.A. at 4,954, ECF No. 68.

Commerce claims that it properly credited Simec's COVID-19 challenges when considering its extension requests. Def.'s Br. at 31–32, ECF No. 47. It characterized Simec's difficulties this way:

> Grupo Simec informed Commerce of its challenges early on and, while the extension letters *made minor updates* to the effects of COVID-19 on the respondent, these were essentially the same reasons that were provided early on in the proceeding and had been considered by Commerce. As such, Grupo Simec's argument that Commerce failed to consider the whole picture [is] inaccurate. Commerce was well aware of Grupo Simec's situation, particularly as *none of the reasons for extension requests to the supplemental questionnaire were novel*.

IDM at 9–10, J.A. at 7,721–22, ECF No. 68 (emphases added). Letters announcing additional deaths are not "minor updates." And Commerce forthrightly acknowledged at oral argument that Simec experienced more COVID difficulties than any other pandemic-era respondent. Oral Arg. Tr. at 29:16–19, ECF No. 71 (The Court: "[A]re you aware of any other administrative review engaged in during this time period in which multiple key employees died during the administrative review?" Ms. Westercamp: "I am not, Your Honor."). The closest Commerce's memorandum comes to acknowledging Simec's death toll is its statement, "[W]e ... appreciated the burden that Grupo Simec has previously expressed it was experiencing due to the effects of COVID-19, including the loss of staff ...." IDM at 12, J.A. at 7,724, ECF No. 68. Read in the context of the remainder of the decision, a disinterested reader would likely surmise that Simec experienced normal workforce attrition, not three deaths and a hospitalization. *See id.* (nowhere noting the hospitalization, the number of employees "los[t]," the inability of outside counsel to travel to the location, *etc.*).

This is not merely a memorandum decision's being "anodyne or perhaps antiseptic." Oral Arg. Tr. at 31:14–16, ECF No. 71 (Government counsel's characterization). This is an agency decision that failed to link the facts found to the choice made. Many "novel" events occurred. It was Commerce's job to acknowledge that and explain how it took those sad novelties into account in making its decision to reject Simec's request for further time. Because Commerce failed to engage with record evidence that detracts from its conclusion, its decision to deny Simec's extension request is also unsupported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (requiring determinations without substantial evidentiary support to be set aside).

## CONCLUSION

Commerce is granted broad authority to set and administer deadlines to ensure it can issue results on a timely basis. Its discretion is

not unlimited, however. *Cf. Grobest*, 36 CIT at 123 (describing a court's analysis of whether Commerce's rejection of an untimely filing is an abuse of discretion as "necessarily case specific"). Despite its claim that Simec was unreasonably slow, Commerce gave Simec five fewer days than Deacero received to respond to 175 more supplemental questions than Deacero answered.[7] Simec submitted answers for all but six questions despite facing unprecedented hardships because of COVID-19's toll in Mexico. Commerce failed to acknowledge the compounding difficulties Simec faced, and it cut Simec's opportunity to provide evidence short while allowing Deacero the opportunity to answer questions for an additional two months. Because Commerce abused its discretion in denying Simec's extension request and its analysis is unsupported by substantial evidence, the Court **GRANTS** Plaintiffs' Motions for Judgment on the Agency Record. It is further:

**ORDERED** that Commerce shall reopen the record and accept the information Simec proffered on October 18, 2021. Commerce, in its discretion, may request any other information it may need after reviewing the October 18 data;

**ORDERED** that Commerce shall conduct a new analysis to determine if facts available or adverse inferences are warranted;

**ORDERED** that Commerce shall reanalyze the non-selected company rate and make any needed adjustments; and it is further

**ORDERED** that Commerce shall file its Remand Determination with the Court within 120 days of today's date;

**ORDERED** that all Plaintiffs shall have 30 days from the filing of the Remand Determination to submit comments to the Court;

**ORDERED** that Defendant shall have 30 days from the date of Plaintiffs' filing of comments to submit a response;

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[7] Simec received its A–C Supplemental Questionnaire on July 28, 2021, and submitted its A&D Supplemental Questionnaire responses on September 10, 2021, for a total of 45 calendar days working on supplemental questionnaires. Simec A–C Questionnaire, J.A. at 4,873, ECF No. 68; Simec A&D Questionnaire Resp. (Sept. 10, 2021) at 1, J.A. at 86,713, ECF No. 66.

Deacero received its First Supplemental Questionnaire on September 7, 2021, and submitted responses on September 20, 2021. *See* Deacero First Suppl. Questionnaire, J.A. at 4,962, ECF No. 68; Deacero First Suppl. Questionnaire Resp. (Sept. 20, 2021), J.A. at 6,515, ECF No. 68. Deacero received its Second Supplemental Questionnaire on September 22, 2021, and submitted the last of its responses on October 19, 2021. *See* Deacero Second Suppl. Questionnaire, J.A. at 6,589, ECF No. 68; Deacero Second Suppl. Questionnaire Resp. (Oct. 19, 2021), J.A. at 6,629, ECF No. 68. Deacero received its Third Supplemental Questionnaire on November 3, 2021, and submitted responses on November 10, 2021. *See* Deacero Third Suppl. Questionnaire, J.A. at 7,120, ECF No. 68; Deacero Third Suppl. Questionnaire Resp. (Nov. 10, 2021), J.A. at 7,162, ECF No. 68. Thus, Deacero spent fourteen, twenty-eight, and eight days responding to three questionnaires — totaling fifty calendar days working on its supplemental questionnaires.

In examining the respective supplemental questionnaire periods, the Court used the time-stamped file date and included both the date a questionnaire was sent and the date the company filed responses as working days.

**ORDERED** that Defendant-Intervenor shall have 15 days from the date of Defendant's filing of comments to submit its response; and

**ORDERED** that all Plaintiffs shall have 15 days from the date of Defendant- Intervenor's filing to submit any reply.

**OR ORDERED**

Dated: April 25, 2024
New York, New York

*Stephen Alexander Vaden*

STEPHEN ALEXANDER VADEN, JUDGE

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