U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF INFLATABLE OLAF SNOWMAN WITH A SPRIG OF HOLLY LEAVES AND RED BERRIES ON ITS SCARF

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of an inflatable Olaf snowman with a sprig of holly leaves and red berries on its scarf.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of an inflatable Olaf snowman with a sprig of holly leaves and red berries on its scarf under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 19, on May 17, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 22, 2024.

FOR FURTHER INFORMATION CONTACT: Nicholas A. Horne, Chemicals, Petroleum, Metals & Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 19, on May 17, 2023, proposing to revoke one ruling letter pertaining to the tariff classification of an inflatable Olaf snowman with a sprig of holly leaves and red berries on its scarf. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling (NY) N325599, dated April 27, 2022, CBP classified an inflatable Olaf snowman with a sprig of holly leaves and red berries on its scarf in heading 6307, HTSUS, specifically in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other." CBP has reviewed NY N325599 and has determined the ruling letter to be in error. It is now CBP's position that an inflatable Olaf snowman with a sprig of holly leaves and red berries on its scarf is properly classified, in heading 9505, HTSUS, specifically in subheading 9505.10.25, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and

accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Christmas Ornaments: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N325599 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H325364, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H325364

May 2, 2024
OT:RR:CTF:CPMMA H325364 KSG/NAH
CATEGORY: Classification
TARIFF NO.: 9505.10.25

MS. LINDSAY B. MEYER, ESQ.
VENABLE LLP
600 MASSACHUSETTS AVENUE, NW
WASHINGTON, D.C. 20001

RE: Revocation of NY N325599, tariff classification of inflatable Olaf snowman with a sprig of holly leaves and red berries on its scarf

DEAR MS. MEYER:

This letter is in reference to your request for reconsideration on behalf of Gemmy Industries Co. of New York Ruling Letter (NY) N325599, dated April 27, 2022. Upon review, we have reconsidered NY N325599, and find the ruling is in error.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice proposing to revoke NY N087996 was published on May 17, 2023, in Volume 57, Number 19, of the *Customs Bulletin*. No comments were received in response to the notice.

FACTS:

In NY N325599, U.S. Customs and Border Protection (CBP) classified an inflatable lawn ornament Olaf Snowman with a red scarf with snowflake pattern and a sprig of holly leaves and red berries on the scarf in subheading 6307.90.98, HTSUS. Olaf is a fictional Disney character that was in the animated movie "Frozen." "Frozen" is an animated movie about a mythical kingdom that is experiencing eternal Winter. The lawn ornament is made of polyester material. The Olaf Snowman inflatable lawn ornament described below is designed and marketed for the Christmas holiday and is sold as a seasonal item.

The inflatable lawn ornament was described in NY N325599 as follows:

> SKU# 32189201, described as "Olaf Inflatable Lawn Ornament," is a three-dimensional Air-blown® inflatable decoration of a snowman "Olaf" from the Disney movie Frozen. The inflatable snowman is composed of 100 percent polyester woven fabric. The item is decorated with screen printed brown eyebrows, black pupils inside a round blue eye, three black buttons, and a 10 1/2 inch long by 4 1/2 inch wide blue smile. The snowman features three-dimensional brown twigs as arms and hair on its head, a carrot nose, and two snowball legs. The snowman also features a red scarf with white snowflakes, a semicircle of 100 percent polyester nonwoven fabric measuring 3 7/8 inches in length by 1 inch in width to provide the appearance of buck teeth when inflated, and two holly leaves with three acrylonitrile butadiene styrene (ABS) plastic red holly berries. Inside the snowman sewn to the bottom are three pouches, measuring 7 5/8 inches in length by 4 1/2 inches in width, filled with crushed stone weighing 300 grams each, to help the snowman stand upright in a sitting pose when inflated and a LED light that is attached to a blower fan with

a 120V AC/DC power adapter. When the power adapter is connected to an electrical outlet and the air intake is zippered closed, the item will inflate and illuminate. The inflatable lawn decoration does not provide practical illumination. The snowman measures 29 inches in length by 27 1/2 inches in width by 48 inches in height when fully inflated. The item is imported with four iron stakes and two tethers that attach to four two-inch white polyester webbing side loops for securing it to the ground.

ISSUE:

Whether the Olaf figure inflatable lawn ornament described above that has a sprig of holly leaves and red berries on the scarf is classifiable in heading 9505, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2024 HTSUS headings under consideration are the following:

6307	Other made up articles, including dress patterns:
6307.90	Other:
	Other:
6307.90.98	Other
9505	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:
9505.10	Articles for Christmas festivities and parts and accessories thereof:
	Christmas Ornaments:
9505.10.25	Other

In *Midwest of Cannon Falls, Inc. v. United States*, (Midwest) 122 F.3d 1423, 1429 (Fed. Cir. 1997), the Court of Appeals for the Federal Circuit (CAFC) held that classification as a "festive article" under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article must be used or displayed principally during that festive occasion. Additionally, the items must be "closely associated with a festive occasion" to the degree that "the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant." *Michael Simon Design, Inc. v. United States*, (Michael Simon) 452 F. Supp 2d. 1316, 1323 (Ct. Int'l Trade 2006 and *Park B. Smith, Ltd. v. United States*,(Park B. Smith) (347 F.3d 922 (Fed. Cir 2003)).

In *Michael Simon*, the Court of International Trade applied a two-prong test for determining whether a particular article is classifiable as a good of heading 9505, HTSUS: "[C]lassification as a 'festive article' under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article [be] used or displayed principally

during that festive occasion." Additionally, the Court stated that the items must be "closely associated with a festive occasion" to the degree that "the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant." In Park B. Smith, the Court of International Trade ruled that articles "bearing 'festive symbols,' such as Christmas trees, Santa's, holly, ghosts and bats, Easter eggs and bunnies," were prima facie classifiable as "festive articles" under heading 9505.

CBP has considered a feature such as a hat or scarf bearing holly leaves and red holly berries as a festive symbol closely associated with Christmas. For instance, *see* NY N306252, dated September 20, 2019, in which CBP classified a water globe lantern with a snowman wearing a top hat decorated with holly leaves and berries as a festive article in heading 9505, HTSUS; NY N286040, dated May 16, 2017, in which a snowman with a stocking cap featuring holly leaves and berries was classified as a festive article in heading 9505, HTSUS.

While there is a connection between Olaf and snow and the season of Winter, the Olaf figure alone is not specifically associated with Christmas. An Olaf figure alone might be appropriate to display for instance at a children's event or an event associated with the movie "Frozen." It would not be aberrant to display an Olaf figure outside the Christmas season. However, this Olaf figure has a sprig of holly on its scarf. The holly leaves and red berries are a motif traditionally closely associated with Christmas and used or displayed principally during the Christmas season. The Olaf figure with a sprig of holly leaves and red berries is closely associated with Christmas to the degree that its use during other time periods would be aberrant. It is not a general winter decoration; it is likely to be displayed only during the Christmas season because of the holly leaves and red berries motif. Further it is marketed as a Christmas decoration and sold during the Christmas season. Based on the above, we find that pursuant to GRI's 1 and 6, the Olaf inflatable lawn ornament is classified in subheading 9505.10.25, HTSUS.

HOLDING:

Pursuant to GRI's 1 and 6, the Olaf inflatable lawn ornament, as described above, is classified according to GRI 1 in heading 9505, HTSUS, and in accordance with GRI 6, in subheading 9505.10.25, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Christmas Ornaments: Other". The column one, general rate of duty is FREE.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at *https://hts.usitc.gov/*.

EFFECT ON OTHER RULINGS:

NY N325599 is revoked in accordance with the above analysis.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: NIS Sandra Carlson, NCSD

U.S. Court of International Trade

Slip Op. 24–53

JINKO SOLAR IMPORT AND EXPORT CO., LTD., et al., Plaintiffs, and JA SOLAR TECHNOLOGY YANGZHOU CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN ALLIANCE FOR SOLAR MANUFACTURING, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 22–00219
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination of the 2019–2020 administrative review of the antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: May 1, 2024

Ned H. Marshak, *Dharmendra N. Choudhary*, and *Jordan C. Kahn*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY and Washington, D.C., for plaintiffs Jinko Solar Import and Export Co. Ltd., Jinko Solar Co., Ltd., Jinkosolar Technology (Haining) Co., Ltd., Yuhuan Jinko Solar Co., Ltd., Zhejiang Jinko Solar Co., Ltd., Jiangsu Jinko Tiansheng Solar Co., Ltd., Jinkosolar (Chuzhou) Co., Ltd., Jinkosolar (Yiwu) Co., Ltd., and Jinkosolar (Shangrao) Co., Ltd.

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific PLLC, of Washington D.C., for consolidated plaintiffs Trina Solar Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., Trina Solar (Hefei) Science & Technology Co., Ltd., Changzhou Trina Hezhong Photoelectric Co., Ltd.

Jeffrey S. Grimson, *Sarah M. Wyss*, *Bryan P. Cenko*, and *Jacob M. Reiskin*, Mowry & Grimson, PLLC, of Washington D.C., for consolidated plaintiffs and plaintiff-intervenors JA Solar Technology Yangzhou Co., Ltd., and Shanghai JA Solar Technology Co., Ltd.

Craig A. Lewis, and *Nicholas W. Laneville*, Hogan Lovells US LLP, of Washington D.C., for plaintiff-intervenor BYD (Shangluo) Industrial Co., Ltd.

Gregory S. Menegaz, and *Alexandra H. Salzman*, DeKieffer & Horgan, PLLC, of Washington D.C., for consolidated plaintiff-intervenor Risen Energy Co., Ltd.

Joshua E. Kurland, Senior Trial Attorney, and *Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for the defendant United States. On the brief were *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of counsel was *Brishailah Brown*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brightbill, *Laura El-Sabaawi*, and *Paul A. Devamithran*, Wiley Rein, LLP, of Washington D.C., for defendant-intervenor American Alliance for Solar Manufacturing.

OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the Court on motions for judgment on the agency record. *See* Consol. Pls.' [Trina Solar Co. LTD][1] Mot. J. Agency R., Mar. 24, 2023, ECF No. 35 ("Trina Mot."); Mot. J. Agency R. Of Consol. Pls. and Pl.-Int. JA Solar Technology Yangzhou Co., Ltd. and Shanghai JA Solar Technology Co., Ltd. (collectively, "JA Solar"), Mar. 24, ECF No. 36 ("JA Solar Mot."); Pls.' [Jinko Solar Import and Export Co.][2] Mot. J. Agency R., Mar. 24, 2023, ECF No. 37; [Consolidated Pl. Risen Energy Co., Ltd.'s] Mot. J. Agency R. & Memo. Supp'n, Mar. 24, 2023, ECF Nos. 38–39 ("Risen Mot."); Pl.-Int. BYD (Shangluo) Industrial Co., Ltd.'s ("BYD") Mot. J. Agency R., Mar. 23, 2023, ECF No. 41 ("BYD Mot.").

Plaintiffs challenge 12 determinations in the United States Department of Commerce's ("Commerce") 2019–2020 final determination concerning crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("PRC" or "China"). *See* 87 Fed. Reg. 38,379 (Dep't Commerce June 28, 2022), *as amended by Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 87 Fed. Reg. 48,621 (Dep't Commerce Aug. 10, 2022) (amended final results) ("*Final Results*") and accompanying issues and decision memo. ("Final Decision Memo."). Plaintiff Trina challenges (1) Commerce's rejection of its certifications for a review-specific rate ("Separate Rate"), and Commerce's application of the extraordinary circumstances standard from its regulations. Plaintiffs Jinko, Risen, JA Solar, BYD, and Trina challenge the (2) selection of surrogate glass data from Romania and (3) valuation of ocean freight. Jinko, JA Solar, BYD, and Trina challenge Commerce's (4) calculation of surrogate financial ratios; (5) deduction of Section 301 duties from U.S. sales prices; (6) valuation of air freight; and (7) valuation of electricity. Risen, JA Solar, BYD, and Trina further challenge (8) the valuation of backsheet; (9) the valuation of EVA; (10) Commerce's application of adverse facts available in connection with unaffiliated producers to provide their factors utilized to produce the subject merchandise ("factors of production" or

[1] Consolidated Plaintiffs Trina Solar Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Trina Solar (Hefei) Science & Technology Co., Ltd.; and Changzhou Trina Hezhong Photoelectric Co., Ltd.

[2] Plaintiffs Jinko Solar Import and Export Co., Ltd.; Jinko Solar Co., Ltd.; Jinkosolar Technology (Haining) Co., Ltd.; Yuhuan Jinko Solar Co., Ltd.; Zhejiang Jinko Solar Co., Ltd.; Jiangsu Jinko Tiansheng Solar Co., Ltd.; Jinkosolar (Chuzhou) Co., Ltd.; Jinkosolar (Yiwu) Co., Ltd.; and Jinkosolar (Shangrao) Co., Ltd.

"FOPs"); and (11) Commerce's adverse facts available methodology. Trina, JA Solar, and BYD further argue that (12) Commerce should recalculate the separate rate because the rates calculated for the mandatory respondents are not supported by substantial evidence.

BACKGROUND

Commerce published the antidumping duty order on solar cells from the PRC on December 7, 2012. *See generally Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination). On February 4, 2021, in response to timely requests, Commerce initiated its eighth administrative review of the antidumping duty order. *See generally Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 8,166, 8,168–69 (Dep't Commerce June 8, 2020). Commerce chose Jinko and Risen as mandatory respondents. Respond. Select. Memo. at 1–5, PD 53, CD 5, bar code 4092029–01 (Feb. 25, 2021).[3] On December 23, 2021, Commerce published its preliminary determination. *See generally Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2019–2020*, 86 Fed. Reg. 72,923 (Dep't Commerce Dec. 23, 2021) (preliminary results and partial rescission) ("*Preliminary Results*") and accompanying preliminary issues and decision memo. ("Prelim. Decision Memo."). Commerce issued its *Final Results* in October 2020. *See generally Final Results*; Final Decision Memo.

Given that Commerce considers the PRC to be a nonmarket economy ("NME") when calculating the dumping margin for the mandatory respondents, Commerce determined the surrogate value ("SV" or "normal value") of the respondents' entries of subject merchandise by using data from a surrogate market economy country ("surrogate country") to value FOPs. *See* Section 773(c)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(c)(4).[4] Commerce chose Malaysia as the primary surrogate country for purposes of valuing all FOPs. Prelim. Decision Memo. at 16–19, 23–28; Final Decision Memo. at 18. However, Commerce determined that import data under Romanian Harmonized Tariff Schedule ("HTS") 7007.19.80 was the best information to value the respondents' solar glass because it was more

[3] On October 5, 2022, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. *See* ECF No. 242–3. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

specific, reliable, and accurate to that input. [Commerce] Prelim. [SV] Memo. at 3, PD 403, bar code 4194750–01 (Apr. 16, 2021) ("Commerce Prelim. SV Memo."); Final Decision Memo. at 15–19.

Commerce selected Descartes and Maersk Line data to value ocean freight; Freightos data was selected to value air freight. Commerce Prelim. SV Memo. at 8; Prelim. Decision Memo. at 27; Final Decision Memo. at 22–25, 41–44. To calculate the surrogate financial ratios, Commerce selected JA Solar Malaysia SDN BHD ("JA Solar Malaysia"), a Malaysian solar cell and module producer. Prelim. Decision Memo. at 28; Final Decision Memo. at 37–39; Commerce Prelim. SV Memo. at 9–10 (citing [Jinko's] First [SV] Cmts. at Exh. 11A, PDs 201–241, CDs 314–351, bar codes 4137975–36–37 (June 28, 2021) ("Jinko First SV Cmts."); [Risen] First SV Cmts. at Ex. SV-11, PDs 197–98, bar code 4137935–01 (June 28, 2021) ("Risen First SV Cmts.")). Commerce used Malaysian HTS data to value Jinko and Risen's EVA and backsheet using the Malaysian HTS data corresponding to "sheet" rather than "film" because it was the subheading most specific to Jinko and Risen's inputs. Final Decision Memo. at 44–47. Commerce also used Malaysian data for electricity, but excluded rates from the Sabah and Sarawak regions and off-peak hours. *Id.* at 58–60.

Commerce granted Jinko's request to be excused from reporting FOP data for some of its solar module and solar cell suppliers. Prelim. Decision Memo. at 15. Commerce reasoned that Jinko had a limited amount of missing data that could be remedied by substitution of evidence already on the record. *Id.* Thus, Commerce made no adverse inference in place of the missing factor of production data for Jinko. *Id.* Conversely, Commerce determined to apply partial facts available with an adverse inference to value Risen's missing data. *Id.* at 15–16; Final Decision Memo. at 8–10. Commerce determined that Risen, by virtue of continuing to utilize suppliers who did not cooperate with Commerce's requests, failed to cooperate with the proceeding to the best of its ability, and calculated a facts otherwise available with an adverse inference rate that was "sufficiently adverse" so as to incentivize cooperation. Prelim. Decision Memo. at 15–16; Final Decision Memo. at 8–13. Furthermore, Commerce, in performing its comparison of normal value and export price, deducted Section 301 duties from U.S. prices when calculating dumping margins pursuant to 19 U.S.C. § 1677a(c)(2)(A). Final Decision Memo. at 73–74.

The entities comprising Trina did not timely respond to Commerce's request regarding the incomplete separate rate information Trina had previously provided. Prelim. Decision Memo. at 13; Final Decision Memo. at 67–71. Commerce rejected Trina's untimely supple-

mental questionnaire response and separate rate certifications ("SRCs") regarding the separate rate information, as well as Trina's untimely extension of time request for the questionnaire response. Prelim. Decision Memo. at 13; Final Decision Memo. at 69–70. As a result, Commerce determined that Trina had failed to demonstrate its continued eligibility to obtain a separate rate and thus would be considered part of the China-wide entity for the review. Prelim. Decision Memo. at 13; Final Decision Memo. at 71. Given the *Final Results*, Commerce, calculated antidumping duty margins of 20.99 percent for Jinko, 12.24 percent for Risen, 14.79 percent for separate rate companies, and 238.95 percent for the China-wide entity (including Trina). *Final Results* at 48,621–22.

JURISDICTION AND STANDARD OF REVIEW

This Court 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 determination in an administrative review of an antidumping duty order. The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Separate Rate

Trina makes several claims challenging Commerce's denial of a separate rate based on its failure to submit timely SRCs for all its collapsed entities. First, Trina challenges Commerce's rejection of its response to Commerce's supplemental questionnaire as untimely. Trina Mot. at 18–22. Further, Trina claims that Commerce abused its discretion by declining to extend time for Trina to submit its SRCs. *Id.* at 23–31. Moreover, Trina argues that Commerce's assignment of the China-wide rate to Trina does not accurately reflect its antidumping rate. *Id.* at 31–33. Trina also contends Commerce's regulation governing time extensions under the "extraordinary circumstances" standard should be invalidated as arbitrary and capricious. *Id.* at 37–46. Finally, Trina contends Commerce's determination is not supported by substantial evidence because Commerce failed to distinguish the two sub-entities for which Trina submitted timely SRCs and the remaining sub-entities for which it submitted untimely

SRCs. *Id.* at 46–53. Defendant argues that Commerce decisions are in accordance with law, within its discretion, and supported by substantial evidence. Def. Resp. at 70–92.

Commerce presumes that a respondent in an NME is government-controlled and thus subject to a single country-wide rate unless the respondent can establish de jure and de facto independence from the central government. Prelim. Decision Memo. at 13; Import Admin., [Commerce], Separate-Rates Prac. & Appl. Combin. Rates In Antidumping Invest. [In re NMEs], Pol'y Bulletin 05.1 at 1–2 (Apr. 5, 2005), *available at* https://access.trade.gov/Resources/policy/bull05–1.pdf (last visited Apr. 22, 2024) ("Policy Bulletin 05.1"). To overcome this presumption, companies submit certain information to Commerce in an application or SRC. *See* Policy Bulletin 05.1 at 3–6 (outlining separate rate application procedure); *Diamond Sawblades Manufacturers Coal. v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017) ("We have consistently sustained Commerce's application of a rebuttable presumption of government control to exports and producers in NME countries").

Each entity seeking separate rate treatment must complete either a separate rate application or SRC. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 8,166, 8,167 (Dep't Commerce Feb. 4, 2021).[5] An entity submits an SRC to certify that it continues to meet the criteria for obtaining a separate rate that was previously assigned by Commerce through a separate rate application. *Id.* Those certifications are due 30 days following the date of the federal register notice initiating the review. *Id.*

Where there are affiliated companies seeking separate rate treatment in an antidumping analysis comparing export price in the U.S. with normal value in the foreign market, Commerce will "collapse" or treat closely related companies as a single entity. *See* 19 C.F.R. § 351.401(a), (f)(1).[6] Commerce's regulations provide that when two or more affiliated producers "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the [agency] concludes that there is a significant potential for the manipulation of price or production," then Commerce will treat those affiliated producers as a single entity. *Id.* Commerce applies a separate rate to collapsed entities as a whole, regardless of whether the

[5] An entity submits a separate rate application when it does not have a separate rate from a completed segment of the proceeding to demonstrate eligibility for a separate rate. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. at 8167.

[6] All references to the Code of Federal Regulations refer to the most recent version in effect at the time of the period of review.

individual companies export the subject merchandise. *See Certain Preserved Mushrooms From The People's Republic of China*, 69 Fed. Reg. 54,635 (Dep't of Commerce Sept. 9, 2004) (final results) and accompanying issues and decision memo. at Cmt. 1; Final Decision Memo. at 70–71.[7]

Commerce's regulations govern filing deadlines and requests for extensions of time. Commerce has discretion to extend any time limit established by 19 C.F.R. § 351.302 for good cause, either on its own accord or at the request of a party. 19 C.F.R. § 351.302(b)–(c). Generally, Commerce will not consider untimely submitted extension requests or materials, *see* 19 C.F.R. § 351.302(c), (d)(1)(i), but may consider an untimely extension request by a party if "extraordinary circumstances exist." 19 C.F.R. § 351.302(c). An extraordinary circumstance in this context is "an unexpected event that: (i) [c]ould not have been prevented if reasonable measures had been taken, and (ii) [p]recludes a party or its representative from timely filing an extension request through all reasonable means." *Id.*

This Court reviews Commerce's determinations regarding its deadlines for abuse of discretion. *See Ajmal Steel Tubes & Pipes Indus. LLC v. United States*, No. 21–00587, 2022 WL 15943670, at *3 (Ct. Int'l Trade Oct. 28, 2022). 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." *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (internal citation omitted).

Here, Commerce reasonably rejected Trina's SRC response to its supplemental questionnaire as untimely. Trina initially submitted incomplete SRCs in March of 2021, accounting for only two of the eight individual entities that make up the "single-entity Trina." *See* [Trina] [SRCs], PD 89, CD 14, bar code 4098387–01 (Mar. 15, 2021). Commerce sent Trina a supplemental questionnaire, dated June 28, 2021, identifying its deficient submission and requesting Trina to correct and supplement its SRCs by July 6, 2021. Final Decision

[7] The antidumping statute "does not address the consequences of finding entities affiliated in terms calculating the dumping margin." *Jinko Solar Co., Ltd. v. United States*, 229 F.Supp.3d 1333, 1344 (Ct. Int'l Trade 2017) (citing 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677b(a)). Commerce has determined that

> implicit in the Department's decision to collapse [a respondent and its affiliated companies] is that the resulting rate would apply to all of the companies in the collapsed entity, provided that the entity as a whole is eligible for a separate rate, because to do otherwise would defeat the purpose of collapsing them in the first place.

Certain Preserved Mushrooms From the People's Republic of China, 69 Fed. Reg. at 54,635 and accompanying issues and decision memo. at Cmt. 1; *see also* Final Decision Memo. at 70–71.

Memo. at 67; Trina Mot. at 10. Trina did not respond until August 24, 2021—49 days after the deadline provided by Commerce—when it requested, for the first time, an extension of the deadline to submit its response. Final Decision Memo. at 67; Trina Mot. at 11. This significantly belated response led Commerce to reasonably reject Trina's untimely SRCs and extension request on December 16, 2021, pursuant to 19 C.F.R. § 351.302(d)(1)(i). *See* Final Decision Memo. at 68; *see also* Trina Mot. at 14–15.

There are no "extraordinary circumstances" here that warrant an extension of Trina's deadline. *See* 19 C.F.R. § 351.302(c). As Commerce explains, the preamble to its regulations illustrates what constitutes an extraordinary circumstance, including: "natural disaster, riot, war, force majeure, or medical emergency." Final Decision Memo. at 68–69 (citing *Extension of Time Limits*, 78 Fed. Reg. 57,790, 57,793 (Dep't Commerce Sept. 20, 2013)). The preamble also explicitly anticipates circumstances that are unlikely to fall within the exception, including "inattentiveness[] or the inability of a party's representative to access the Internet on the day on which the submission was due." *Id.* at 69 (citing *Extension of Time Limits*, 78 Fed. Reg. at 57,793). Therefore, Commerce reasonably determined that Trina's general inattentiveness here should not constitute an extraordinary circumstance under 19 C.F.R. § 351.302(c). *Id.*

Trina's challenge to the regulation's "extraordinary circumstance" standard as arbitrary and capricious lacks merit. Trina argues that "[s]etting a single very stringent standard for all respondents is an unreasonable, arbitrary, and capricious application of Commerce's authority." Trina Mot. at 37. Trina appears to argue that this single standard is arbitrary because it does not take account for complex scenarios or differentiate between those circumstances where one party was aware of the deadline and another was not. *Id.* at 37–39.

Trina's challenge to the regulation is unpersuasive. A rule is arbitrary where it ignores or relies on factors outside of Congress' intent, fails to consider key aspects of the problem, or when the agency does not "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted). As explained in the request for comments and final ruling on the proposed modification to 19 C.F.R. § 351.302, Commerce considered alternatives and justified the modification it made by reasonably explaining its decision to be consistent with Commerce's policies. *See Modification of Regulation Regarding the Extension of Time Limits*, 78 Fed. Reg. 3,367, 3,369–70 (Dep't Commerce Jan. 16 2013) ("[a proposed alternative] will not

serve the objective of the proposed rule to avoid confusion, will perpetuate the current difficulties in the Department's organization of its work, and will perpetuate the undue expenditure of Departmental resources in addressing extension requests"); *Extension of Time Limits*, 78 Fed. Reg. at 57,792–93 (considering comments to proposed rule modification). That Trina would prefer a different rule does not render Commerce's regulation arbitrary or capricious.

Trina also argues that Commerce's assignment of the China-wide rate does not accurately reflect its antidumping rate. Trina Mot. at 31–33. However, the Court will not "set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012). Trina lost its ability to argue for the separate rate when it missed the deadline to return its SRCs. *See* 19 C.F.R.§ 351.302(d) (explaining Commerce's ability to reject untimely filed material).

Lastly, Trina's argument that Commerce fails to distinguish the two sub-entities for which Trina submitted timely SRCs and the remaining sub-entities for which it submitted untimely SRCs is unpersuasive. *See* Trina Mot. at 46–53. Commerce explains that it must determine whether there is de jure or de facto control with respect to all companies making up the collapsed entity. *See* Final Decision Memo. at 71; Policy Bulletin 05.1 at 2. To make this determination, it is necessary for each company to respond to the supplemental questionnaire issued by Commerce and provide information on their relationship with the Chinese government. Final Decision Memo. at 71. Therefore, Commerce reasonably determined that timely responses from each of the companies making up the collapsed entity, both exporting and non-exporting, are relevant and necessary. *Id.* Accordingly, Commerce's decision to deny Trina a separate rate is reasonable and thus sustained.

II. Valuation of Solar Glass

Plaintiffs Jinko and Risen challenge Commerce's solar glass import valuation under Romanian HTS 7007.19.80, rather than Malaysian HTS 7007.19.90. Jinko Mot. at 7–28; Risen Mot. at 10–23. Jinko and Risen argue that Commerce should have relied on the Malaysian HTS—as data from the primary surrogate country—to value solar glass SV, and that Commerce's claim that the Malaysian data is

unreliable is without merit.[8] Jinko Mot. at 7–28; Risen Mot. at 10–23. Jinko also argues that the Romanian HTS "does not cover" the glass it produces. Jinko Mot. at 11–19. It further argues that Commerce incorrectly rejected its submission of the Tarif Intégré Communautaire ("TARIC"),[9] of which this Court should take judicial notice. *Id.* at 25–28; Letter [Commerce] to Grunsfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP at 1–2, PD 442, bar code 4245339–01 (May 25, 2022) ("Rejection Memo."). Defendant contends that Commerce's use of Romanian HTS 7007.19.80 is lawful and supported by substantial evidence, and that judicial notice of the TARIC was not appropriate. Def. Resp. at 14–50. For the following reasons, Jinko's request for judicial notice of the TARIC is denied; nevertheless, Commerce's determination to value solar glass based on import prices under the Romanian HTS is remanded for further explanation or reconsideration.

A. Judicial Notice

Commerce refused to consider Jinko's arguments regarding the scope of Romanian HTS 7007.19.80, based on the TARIC, because the TARIC was not timely placed on the record. *See* Def Resp. at 19 n.4. Jinko disputes Commerce's decision and requests the Court take judicial notice of the TARIC because it is publicly available and can be accurately and readily confirmed. Jinko Mot. at 25–28. The Court will not take judicial notice of the TARIC.

Pursuant to 19 U.S.C. § 1516a(b), the Court must review the record made before the agency. 19 U.S.C. § 1516a(b)(1)–(2) (limiting review to the record before the agency and establishing what constitutes that record). Thus, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Tri Union Frozen Prod., Inc. v. United States*, 161 F. Supp. 3d 1333, 1339 (Ct. Int'l Trade 2016) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Nonetheless, in some instances a court may take judicial notice of certain facts. *See Brown v. Piper*, 91 U.S. 37, 42 (1875) ("Facts of universal notoriety need not be proved. . . . Among the things of which judicial notice is taken are the law of nations; the general customs and usages of merchants; the

[8] Plaintiffs Trina, JA Solar, and BYD incorporate and adopt both Jinko and Risen's arguments regarding the proper HTS subheading for valuing solar glass. *See* Trina Mot. at 53–54; JA Solar Mot. at 10; BYD Mot. at 13.

[9] TARIC is the database implemented by the Taxation and Customs Union of the European Commission, integrating all measures relating to the European Union's customs tariff, commercial, and agricultural legislation. *TARIC*, Tax'n and Customs Union, https://taxation-customs.ec.europa.eu/customs-4/calculation-customsduties/customs-tariff/eu-customs-tariff-taric_en (last visited Apr. 22, 2024).

notary's seal; things which must happen according to the laws of nature; the coincidences of the days of the week with those of the month . . .").

Here, Commerce's rejection of the TARIC information was in accordance with law and within its discretion, and the Court will not take judicial notice of the information. Commerce has discretion over the acceptance of untimely filed materials. *See* 19 C.F.R. § 351.301 (governing time limits for factual information); 19 C.F.R. § 351.302 (governing time extensions). Commerce rejected the TARIC information because it was factual information, and thus subject to the timelines set forth in Commerce's regulations. *See* 19 C.F.R. § 351.301(c)(ii); Rejection Memo. at 1–2; *see also* Digit. Audio File re Oral Arg. Proc. at 1:19:00, Feb. 28, 2024, ECF No. 73 ("Oral Arg."). Jinko does not dispute that the information is factual or that it was not submitted within the timeframe required by Commerce's regulations.[10] *See generally* Jinko Mot.; Oral Arg.; *see also* Rejection Memo. at 1 (containing the submission date of Jinko's agency brief with the appended TARIC information as well as submission deadlines for the review). Thus, Commerce acted within its authority and discretion to reject Jinko's untimely TARIC submissions by enforcing its deadlines pursuant to its regulations. *See Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 123 (2012) (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–07 (Fed. Cir. 1995)).

Jinko's argument that the Court should take judicial notice of the TARIC is unpersuasive. Even assuming the materials are those that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," *see* Fed. R. Evid. 201(b)(2), considering the TARIC information on review would undermine the

[10] What constitutes "factual information" in an antidumping review is defined by Commerce's regulations, including:

> (i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
> (ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
> (iii) Publicly available information submitted to value factors under [Section] 351.408(c) or to measure the adequacy of remuneration under [Section] 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;
> (iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department; and
> (v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)–(iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

19 U.S.C. § 351.102(b)(22).

Court's role.[11] Jinko's invocation of the Federal Rules of Evidence is misplaced. Jinko cites Rule 201(b) to argue that a court may, at any stage of the proceeding, take judicial notice of any fact "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b), (d), to support its request for judicial notice of the TARIC. Jinko Mot. at 12 (citing Fed. R. Evid. 201(b)(2)); *id.* at 25–26 (citing 551 F. Supp. 3d 1338, 1350–51 (Ct. Int'l Trade 2021)). Although there may be "facts of universal notoriety" of which the Court can and should take notice, *see Brown*, 91 U.S. at 42, administrative law principles generally caution against considering factual information which was not placed on the record before the agency and which the agency did not consider even though it may otherwise satisfy the criteria of Rule 201. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("in dealing with a determination or judgment which an administrative agency alone is authorized to make, [the reviewing court] must judge the propriety of such action solely by the grounds invoked by the agency"); *see also* 28 U.S.C. § 2637 (requiring exhaustion of administrative remedies before an issue may be reviewed by the Court).

Further, as a general matter, the Federal Rules of Evidence do not apply where the Court conducts record review. *Nat'l Min. Ass'n v. Sec'y, U.S. Dep't of Lab.*, 812 F.3d 843, 875 (11th Cir. 2016) (disfavoring the ability of a court to "go outside the administrative record" unless the requesting party makes a "strong showing of bad faith or improper behavior"). *But see New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.21 (10th Cir. 2009) (taking judicial notice of a document included in the record before that court in another case). Thus, where the Court reviews the record compiled before the agency, it would generally be inappropriate to invoke the Federal Rules of Evidence to admit new evidence not previously

[11] Jinko's citation to *Xiping Opeck Food Co. v. United States* to support its request for judicial notice of the TARIC is unpersuasive. Jinko Mot. at 25–26 (citing 551 F. Supp.3d 1339, 1350–51 (Ct. Int'l Trade 2021). In *Xiping Opeck*, there was no claim that information was missing from the record. The parties disputed the proper TARIC heading to value the FOPs of live freshwater crawfish. *Xiping Opeck*, 551 F. Supp. 3d at 1346. The government valued the product under a TARIC heading—already placed on the record—without producing a direct quote, printout, or photocopy of the TARIC description itself in the final results or final decision memorandum. *See Freshwater Crawfish Tail Meat From The People's Republic Of China; 2017–2018*, 84 Fed. Reg. 58,371 (Dep't Commerce Oct. 31, 2019) (final results) and accompanying issues and decision memo. at Cmt. 2. Rather, Commerce provided a narrative description and "incorporated [the heading] by reference in the [final results and final decision memorandum]." *Id.* The Court rejected what it viewed as the plaintiff's argument "that Commerce could only satisfy the substantial evidence requirement by reproducing a direct quote, printout, or photocopy of the product description from the TARIC database itself." 551 F. Supp. 3d at 1346.

before the agency. Although one might conceive of situations where there are "facts of universal notoriety" of which both the agency and the Court should take notice, *see Brown*, 91 U.S. at 42, there is no argument here that the TARIC contains such facts. Accordingly, Jinko's request to take judicial notice of the TARIC is denied.

B. Commerce's Determination

Commerce values FOPs "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." 19 U.S.C. § 1677b(c)(1); *see also Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). Commerce selects the best available information by evaluating data sources based on their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Import Admin., [Commerce], [NME] Surrogate Country Selection Process, Pol'y Bulletin 04.1 at 1 (Mar. 1, 2004), *available at* https://enforcement.trade.gov/policy/bull04–1.html (last visited Apr. 22, 2024) ("Policy Bulletin 04.1");[12] *see also* Prelim. Decision Memo at 21. To value a respondent's FOPs and expenses, Commerce uses data from surrogate market economy countries that are: "(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). To the extent possible, Commerce's regulatory preference is to "value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2). Commerce's determination must be supported by substantial evidence, meaning "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp.*, 322 F.3d at 1374 (quoting *Consol. Edison Co.*, 305 U.S. at 229).

Plaintiffs challenge the use of the Romanian HTS subheading by Commerce to value Jinko and Risen's solar glass. Romanian HTS 7007.19.80, used by Commerce in its determination, reads: "Toughened (Tempered) Safety Glass (Excl. Enamelled, Coloured Throughout The Mass, Opacified, Flashed Or With An Absorbent Or Reflecting Layer, Glass Of Size And Shape Suitable For Incorporation In Motor

[12] When choosing a primary surrogate country, Commerce considers: (1) each country's economic comparability with the NME country; (2) each country's production of comparable merchandise; (3) whether the potential surrogate countries that produce comparable merchandise are significant producers of comparable merchandise; and (4) the quality and availability of FOP data for the countries. Policy Bulletin 04.1.

Vehicles, Aircraft, Spacecraft, Vessels And Other Vehicles)." *See* Am. Alliance for Solar Mfr. Pre-Prelim. Cmts. & Subm. [SV] at Exh. 9, PD 334, CD 433, bar code 4149598–03 (Aug. 3, 2021) ("Pets. Pre-Prelim SV Cmts") (containing Romanian HTS heading); *see also* Final Decision Memo. at 13 n.42; Def. Resp. at 14. Both Jinko and Risen allege Commerce should use Malaysian HTS 7007.19.90 import values to value their solar glass. The Malaysian HTS reads: "Safety glass, consisting of toughened (tempered) or laminated glass, Toughened (tempered) safety glass: Other than Of size and shape suitable for incorporation in vehicles, aircraft, spacecraft or vessels: Other than Suitable for machinery of heading 84.29 or 84.30." *See* [Jinko's] Final [SV] Cmts. at Exh. 1, PDs 304–20, CDs 404–21, bar code 4149126–01 (Aug. 3, 2021) ("Jinko Final SV Cmts."); *see also* Jinko Mot. at 7; Risen Mot. at 12; Final Decision Memo. at 13 n.43.

Here, Commerce's determination must be remanded for further consideration or explanation because Commerce's choice to value solar glass using import values under the Romanian HTS is unsupported on this record. Commerce fails to explain how the data from Malaysia, as the primary surrogate country, is unreliable such that departure from its standard practice of using the data from the primary surrogate country is justified. *See* 19 C.F.R. § 351.408(c)(2) (explaining Commerce's regulatory preference to "normally value all factors in a single surrogate country"). First, Commerce concludes that the Malaysian data is not suitable even though Malaysia is the primary surrogate country, because "both respondents reported the quantity of glass they consumed in manufacturing solar modules in kilograms." Commerce Prelim. SV Memo. at 3; *see also* Final Decision Memo. at 18; Def. Resp. at 15. However, the respondents reported their glass consumption in kilograms because Commerce specifically requested Jinko and Risen's consumption measurements to be based on weight in their Section D responses for this review. *See* [Jinko] Sect. D, E, App'xs XIII, Add'l Sect D, & Doubl. Remedies Resps. At App'x XIII:8, PDs 148–52, CDs 186–68 (May 4, 2021) ("Jinko DEQR"); [Risen's] Sect. D Questionnaire Resp. at App'x XIII:7, PD 147, CD 122, bar code 4116609–01 (Apr. 30, 2021) ("Risen Sect. D Resp."); *see also* Oral Arg. at 1:08:03–1:09:30.

Commerce's rationale that conversion considerations render the Malaysian data unreliable fails to acknowledge record information that detracts from its conclusion. Risen purchases solar glass "on a 'piece' basis," meaning that its glass consumption measured in kilograms, relied upon by Commerce in its determination, was itself a conversion. *See generally* Final Decision Memo.; *see also* Risen Sect. D Resp. at Exh. D-34; Risen Mot. at 15–16. Although Jinko tracked its

glass consumption in kilograms, *see* Commerce Prelim. SV. Memo. at 3, Commerce fails to acknowledge Jinko's proposed conversion methodology based upon the factors contained in the record, such as the dimensional specifications of Jinko's coated glass input grades, that could establish reliable conversions using Malaysian data. *See generally* Final Decision Memo.; *see* Jinko DEQR at Exh. AD-9 (containing Jinko's glass conversion factors); [Jinko] Redacted Admin. Case Br. at Attach. 4, PD 450, CD 499 (May 27, 2022) ("Jinko Admin Br.") (containing Jinko's glass dimension specifications and kilogram conversion ratios); *see also* Jinko Mot. at 21–22. These gaps in Commerce's final determination undermine a finding that its solar glass valuation is supported by substantial evidence.

Further, Commerce did not adequately address record evidence which detracts from its determination that the Romanian HTS is specific to valuing Jinko's glass. Jinko contends that the Romanian HTS heading expressly excludes Jinko's anti-reflective coated glass.[13] Jinko Mot. at 11–15. Commerce rejected Jinko's argument based on the wording of the exclusion, which it determined encompassed glass that was "light limiting" or glass with an "[a]bsorbent or [r]eflecting [l]ayer" through the words "Enameled, colored, opacified (made opaque), and flashed (colored)." Final Decision Memo. at 17. Thus, Commerce concluded Jinko's glass, which has an "anti-reflective layer," was not encompassed by the exclusion. *Id.*[14]

It is unclear how Commerce can reasonably view the list of exemplars in Romanian HTS 7007.19.80 as light limiting. The exclusion includes glass with an absorbent layer. Commerce itself defines absorbent as "something that takes in without releasing" light. *See* Final Decision Memo. at 17. Jinko submitted evidence that its glass captures and retains light. *See* [Jinko's] Sect. A & App'x XI Questionnaire Resps at Exh. A-8C, A-12, PD, bar code 4108239 (Apr. 8, 2021) ("[Jinko's polycrystalline module features] new glass technology [that] improves light absorption and retention"); *id.* at Exh. A-12C ("[Jinko's mono perc module features] advanced glass technology

[13] Jinko and Risen argue in their briefs before the Court that the Romanian HTS is a basket category covering numerous types of glass unspecific to solar glass. Jinko Mot. at 13; Risen Mot. at 14. Although Commerce does not explicitly address this argument, it is reasonably discernible that Commerce found that the solar glass was nonetheless specific despite the inclusion of other types of glass within the heading when it compared the Romanian HTS data to the Malaysian HTS data. Final Decision Memo. at 18–19.

[14] Further, Commerce responds to the argument that the record lacks evidence of Romanian manufacturers of solar modules by stating that Risen itself argued for use of the Romanian HTS in the prior review. Final Decision Memo. at 17. However, "each administrative review is a separate segment of proceedings with its own unique facts" and thus stands on its own record. *See Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1310 (2008).

[that] improves light absorption and retention").[15] Thus, the record indicates that the function of Jinko's anti-reflective glass places it within both Commerce's definition of "absorbent" and also the Romanian HTS exclusion. Commerce explanation fails to consider Jinko's record submissions and arguments which detract from its determination. *See* Final Decision Memo. at 17–18. Accordingly, Commerce's solar glass valuation is unsupported, and its determination on the issue is remanded for reconsideration or further explanation.

III. Valuation of Electricity

Jinko challenges Commerce's valuation of electricity in its final determination.[16] Jinko Mot. at 29. Jinko argues that Commerce's decision to exclude off-peak hour rates as well as rates from the Sabah and Sarawak regions renders its decision unsupported by substantial evidence.[17] *Id.* Defendant argues that Commerce's choice is supported by substantial evidence. Def. Resp. at 41–43. For the reasons that follow, the Court sustains Commerce's electricity valuation.

Here, Commerce's decision is reasonable. When determining the best available information, Commerce determined that its interest in specificity would be better served by using the electricity rate from peninsular Malaysia—the location of the only known Malaysian producer of solar cells and modules. Final Decision Memo. at 59. Commerce reasoned that although it generally prefers SVs that represent broad-market averages, the inclusion of rates from regions where solar cells are not manufactured—such as the Sabah and Sarawak regions—would produce a less specific SV. Final Decision Memo. at 59–60. Commerce's determination is reasonable given the high-voltage electricity rates required for solar cell and module manufacturing that is present in Peninsular Malaysia and absent from areas without known producers. *See id.*; Def. Resp. at 41–42.

Jinko's challenge to Commerce's exclusion of the Sabah and Sarawak regions, which it claims is based upon "speculative presumptions," fails to persuade. *See* Jinko Mot. at 29. Commerce inferred that there were no solar cell manufacturers in these regions. *See* Final Decision Memo. at 59; Def. Resp. at 42. Record evidence suggests peninsular Malaysia contains the only known solar cell and

[15] Commerce does not address the remainder of the exclusionary language contained in Romanian HTS 7007.19.80, reading "Glass Of Size And Shape Suitable For Incorporation In Motor Vehicles, Aircraft, Spacecraft, Vessels And Other Vehicles." Pets. Pre-Prelim SV Cmts. at Exh. 9.

[16] Plaintiffs Trina, JA Solar, and BYD each support, incorporate, and adopt Jinko's arguments concerning Commerce's valuation of electricity. *See* Trina Mot. at 53–54; JA Solar Mot. at 8; BYD Mot. at 13.

[17] The Sabah and Sarawak regions are located on the Island of Borneo, which is east of the Malaysian peninsula that connects to the mainland. *See* Final Decision Memo. at 59.

module manufacturer in the country. Jinko First SV Cmts. at Exh. 11B. Commerce explains that rates in the Sabah and Sarawak regions "do not include high voltage industrial rates" of electricity use that would be indicative of solar cell and module manufacturing. *See id.* at Exh. 6 (containing electricity rates for peninsular Malaysia and the Sabah and Sarawak regions); Final Decision Memo. at 59. In the absence of submissions by Jinko to the contrary, Commerce's inferences from the record evidence are reasonable. *See State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (requiring a demonstration of a rational connection between the agency's conclusion and the facts found); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (determining that Commerce may draw reasonable inferences from the record).

Moreover, and contrary to Jinko's contention, *see* Jinko Mot. at 29–30, Commerce's decision to exclude off-peak hour rates is also reasonable. *See* Final Decision Memo. at 60. Both Jinko and Risen provided information indicating that the peak hour electricity rates in peninsular Malaysia were in effect 14 hours a day. *See* Jinko First SV Cmts. at Exh. 6 (containing electricity rates for peninsular Malaysia and the Sabah and Sarawak regions); Risen First SV Cmts. at Exh. SV-6–SV-7 (same); *see also* Final Decision Memo. at 60. Although Jinko argues that Commerce's selection is not specific because Jinko operates during both peak and non-peak hours, neither Jinko nor Risen submitted their hours of operation. *See* Final Decision Memo. at 60; Def. Resp. at 42; *see also* Jinko Mot. at 29 (stating the record does not contain Jinko's hours of operation); *QVD Food Co., Ltd.*, 658 F.3d at 1324 (noting it is the parties' burden to develop the record). Thus, Commerce reasonably selected peak hour electricity rates as they are in effect for the majority of the day in all of the regions. Final Decision Memo. at 60. Accordingly, Commerce's electricity valuation is sustained.

IV. Ocean Freight

Jinko challenges Commerce's use of Descartes and Maersk Line data to value ocean freight, claiming: (1) they are unreliable because the rates used by Commerce are price quotes and do not reflect broad market averages; and (2) alternatively, that Commerce should have included Drewry and Freightos Data in its ocean freight valuation because Jinko claims them to be "more reliable than Maersk and provide an all-in, fully loaded cost" of the ocean freight at issue. Jinko Mot. at 33–37; *id.* at 36. Risen also challenges Commerce valuation of ocean freight, claiming Commerce should rely only on the more specific Descartes data, which includes coverage of solar panels and

other solar products, unlike the Maersk data that reflects a "general category of electronic appliances." Risen Mot. at 25–26.[18] Defendant contends that Commerce reasonably relied on Maersk and Descartes data rather than Drewry and Freightos data because the data were publicly available, "inclusive of product-specific rates for similar shipping routes to those used by the respondents." Def. Resp. at 31, 36. For the following reasons, the Court sustains Commerce's determination.

Here, Commerce's use of the Descartes and Maersk Line data to value ocean freight is reasonable. First, Commerce's determination that the Descartes and Maersk Line data are specific is supported by the record. The Descartes data reflects rates for shipping monocrystalline modules, and the Maersk data reflects rates for the same type of containers and the same size of shipments for electronic goods—which Commerce considers comparable to monocrystalline modules. *See* [Risen's] Final [SV] Cmts. at Exh. SV2–7, PDs 321–323, bar code 4149250–01, (Aug. 3, 2021) ("Risen Final SV Cmts.") (containing Descartes ocean freight rate data as exhibits); Am. Alliance for Solar Mfg. Ocean Freight [SV] Data at Exh. 1, PD 393, bar code 4189032–01 (Dec. 8, 2021) ("Pet. SV Cmts.") (containing Maersk ocean freight rates data as exhibits); Final Decision Memo. at 23 ("[Commerce] believe[s] solar modules would correspond to items within the electronic goods shipment category").

Moreover, Commerce confirmed the data from Descartes excluded rates for shipments of hazardous materials and those in temperature-controlled containers—rates that are inapplicable to the merchandise at issue. Final Decision Memo. at 23. Commerce reached the same conclusion for the Maersk data based upon its "high level of detail" that similarly failed to include charges for hazardous material or temperature-controlled containers, which "would [be] expected[ed] if such charges were included."[19] *Id.* Commerce reasonably concluded that the shipping of modules does not incur special charges nor require special handling or containers in the absence of evidence to the contrary—a contention that Risen fails to rebut. *See generally*

[18] Plaintiffs Trina, JA Solar, and Shangluo BYD each support, incorporate, and adopt Jinko and Risen's arguments concerning Commerce's ocean freight valuations. *See* Trina Mot. at 53–54; JA Solar Mot. at 8; BYD Mot. at 13.

[19] Both the Maersk and Descartes data include detailed information regarding the types of charges calculated in the total ocean freight rate, such as brokerage and handling charges. *See* Risen Final SV at Exh. SV2–7; Pet. SV at Exh. 1; *see also* Final Decision Memo. at 23.

Risen Mot. Commerce thus justifies the use of both Descartes and Maersk data based on its finding both are specific.[20]

Although the Maersk data does not reflect actual transactions, it is reasonably discernable that Commerce viewed the data as reliable. In particular, Commerce explains that it relied upon Maersk data in part because the data reflected daily reported prices at which international ocean freight is offered by Maersk. *See* Final Decision Memo. at 24 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2011–2012*, 80 Fed. Reg. 1,021 (Dep't Commerce Jan. 8, 2021) (preliminary results) and accompanying preliminary decision memo. at 33; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 81 Fed. Reg. 93,888 (Dep't Commerce Dec. 22, 2016) (preliminary results and determination) and accompanying preliminary decision memo. at 26). Additionally, Commerce did not rely solely on the Maersk data. Rather, because Commerce needed to value ocean freight expenses for multiple routes, using both the Descartes and Maersk rates provided the best information for the various routes they cover based on Commerce's finding that the sources are comparable in terms of specificity.[21] Thus, the Descartes data combined with the Maersk data reasonably supports Commerce's determination that the data it relied upon reflected broad market averages. *See* Final Decision Memo. at 23; Def. Resp. at 34–35.

Commerce also sufficiently explained its decision to reject the Drewry and Freightos data. Commerce explains the Drewry and Freightos data fail to identify the types of materials shipped and whether the materials were hazardous, and further that the Freightos data does not identify whether the containers were temperature controlled. Final Decision Memo. at 23. In contrast to the Descartes data, the Drewry and Freightos data fails to include a precise itemized breakdown identifying specific rates. *Compare* Risen Final SV Cmts. at Exh. SV2–7, and Pet. SV Cmts. at Exh. 1, *with* Jinko First SV Cmts. at Exh. 10C–10D (containing Drewry and Freightos ocean

[20] Commerce states it needs to value expenses for multiple routes, but Descartes rates for shipping monocrystalline modules apply to only a single route. *See* Risen Final SV at Exh. SV2–7; Final Decision Memo. at 23.

[21] Risen claims Commerce did not properly consider contemporaneity when averaging the Maersk and Descartes data. Risen Mot. at 26–27. Risen argues that Commerce should have weighted the Descartes data, containing data from every month during the period of review, more than the Maersk data, containing four months of data. *Id.* at 26. Commerce considered both contemporaneity and specificity when it averaged the Descartes and Maersk data. *See* Final Decision Memo. at 22–23, 25; Def. Resp. at 31–37. Risen objects to Commerce's weighing of those concerns in averaging the data. The Court will not reweigh the evidence.

freight rates data as exhibits); *see also* Final Decision Memo. at 23. Indeed, a review of the data reflected in Drewry and Freightos reveals the sources include only the dates of shipment, the ports of origin and destination, the container types, the canonical loads, and the price statistics and rates—but not the type of merchandise shipped—and therefore is not sufficiently specific. *See* Jinko First SV Cmts. at Exh. 10C–10D. Accordingly, Commerce's decision to value ocean freight based on Maersk and Descartes data is reasonable, and its determination on the issue is sustained.

V. Air Freight

Jinko argues that Commerce should value air freight using data from the International Air Transport Association ("IATA") because it is publicly available and route specific.[22] Jinko Mot. at 30–33. Defendant counters that Commerce reasonably relied on the Freightos data to value air freight rates because Freightos data is publicly available, represents broad-market averages, and is specific to the inputs being valued. Def. Resp. at 37. For the reasons that follow, the Court remands Commerce's determination for further explanation or consideration.

Commerce reasons that the Freightos data satisfied several of its criteria, stating it was "publicly available, contemporaneous with the period under consideration, broad-market averages, tax and duty-exclusive and specific to the inputs being valued." Final Decision Memo. at 43. Commerce rejected the IATA data because portions of it were not on the public record of this review. *Id.* Commerce states that:

> The only public IATA information on the record is a monthly average of its rates. The public information contains no details about the rates and no details about how the data were obtained. Thus, almost none of the underlying IATA data and information regarding the IATA data collection are publicly available.

Id.

Although Jinko placed the IATA data on the record, much of it is designated as business proprietary information ("BPI") and is thus on the confidential record rather than the public record of this review. Commerce appears to view the preference for publicly available information as one that requires information to be placed on the public

[22] Jinko's challenge to air freight is joined by Trina, JA Solar, and BYD. *See* Jinko Mot. at 30–33; Trina Mot. at 53–54; JA Solar Mot. at 8; BYD Mot. at 14.

record.[23] *Id.* at 43–44 (emphasizing "publicly available" nature of the Freightos data when rejecting the IATA data). Commerce's regulations and policy bulletin do not appear to mandate that information be on the public record; rather, Commerce prefers data that is "publicly available." *See* 19 C.F.R. § 351.408(c) (stating normally Commerce will use publicly available information); Policy Bulletin 04.1 (noting Commerce's stated practice is to use publicly available data).

It is unclear why "publicly available" reasonably means "on the public record." Indeed, Commerce's regulation governing calculations of normal value in NMEs, *see* 19 C.F.R § 351.408(c), was modified in 1996 to indicate a preference of using "publicly available information" from the pre-modification preference of "published information." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,344 (Dep't Commerce Feb. 27, 1996). In the modification's promulgation, Commerce shed light on the balance sought in preferencing publicly available information:

> Two important practices have arisen to promote the accuracy, fairness and predictability of the factor valuation process. First, the Department has developed a preference for using publicly available, published information ("PAPI") to derive factor prices. This practice, along with the practice of attempting to use data derived from a single surrogate country, clearly enhances the transparency and predictability of our determinations. However, based on experience, the Department has concluded that a preference for PAPI also can result in decreased accuracy. This is particularly true where surrogate country trade statistics are used and the import/export categories used to derive unit values are broad.
>
> In order to strike a better balance between the goals of accuracy and transparency, paragraph (c)(1) drops the preference for published information, limiting the preference to publicly available information. The public availability standard is aimed at promoting transparency, while the deletion of the published information standard enables the Department to achieve greater accuracy when information on the specific factor can be derived outside of published sources. Paragraph(c)(1) is not meant to preclude the Department from using published information. Instead, it is intended to reflect the Department's pref-

[23] Jinko also claims that although the route specific Shanghai-Atlanta data was originally submitted as BPI, it was subsequently disclosed and put on the public record. Jinko Mot. at 31. Commerce nonetheless found the public data insufficient because it only included monthly average rates and no details about how the data was obtained. Final Decision Memo. at 43.

> erence for input specific data over the aggregated data that frequently appear in published statistics.

Id. (internal citations omitted). Thus, it would appear that Commerce prefers publicly available information to foster accuracy, fairness, and predictability.

Given the nature of the administrative proceeding in which Commerce assesses data to determine whether it is the best information available, it is unclear from Commerce's explanation why the information must not only be publicly available, albeit through a subscription, but also on the public record. Presumably, Commerce and interested parties can debate the accuracy or relevance of information on the confidential record. Interested parties would also presumably be able to subscribe to the data to ascertain whether there were concerns of the type that might arise with other non-publicly available information, i.e., price quotes. *See e.g., An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 179 F. Supp. 3d 1256, 1277–78 (Ct. Int'l Trade 2016) (noting sometimes the origin of price quotes may be unclear). If Commerce is concerned with verifying the accuracy of the data and its origin, it can do so with reference to the confidential data. Thus, Commerce should further consider or explain how publicly available information on the confidential record fails to promote accuracy, fairness and predictability.

VI. Backsheet

Risen[24] contends that its backsheet should be categorized as film instead of sheet, and thus should be valued by Commerce using Malaysian HTS 3920.62.90[25]—covering film—rather than Malaysian HTS 3920.62.10—covering sheet.[26] Risen Mot. at 23–25; Def. Resp. at 27. Defendant argues that Commerce supports its determination to value backsheet using the HTS heading 3920.62.10, covering sheet, rather than HTS 3920.62.90, covering film, because ASTM specifications provide that film would be less than 0.25mm thick, and the backsheet at issue is greater than 0.25mm thick. Def. Resp. at 26–27. For the reasons that follow Commerce's determination is sustained.

Here, Commerce reasonably relies on the use of the Malaysian HTS 3920.62.10 to value Risen's backsheet. Commerce placed the ASTM

[24] Risen's challenge to the backsheet SV is joined by Trina, JA Solar, and BYD. *See* Risen Mot. at 23–25; Trina Mot. at 53–54; JA Solar Mot. at 8; BYD Mot. at 14.

[25] The description Malaysian HTS 3920.62.90 is: "Polyethylene Terephthalate: Other than plates and sheets." Final Decision Memo. at 48 n.268.

[26] The description for Malaysian HTS 3920.62.10 is: "Polyethylene Terephthalate: plates and sheets." Final Decision Memo. at 48 n.269.

abstracts on record and determined that Risen's backsheet is sheet rather than film, and thus classifiable under HTS 3920.62.10 rather than HTS 3920.62.90.[27] Final Decision Memo. at 45. The ASTM abstracts explain that plastic film is less than 0.25mm thick, while plastic sheet is 0.25mm thick or greater. *See* [Commerce] Memo.: Placing [SV] Info on the Rec. at Attachs. IV, VI, PD 78–79, bar codes 4096146–01–02 (Mar. 8, 2021) ("Commerce SV Memo."). ASTM is an "authoritative standards organization," and the ASTM abstracts offer a definition of the term "film." Commerce SV Memo. at Attach. IV:2 ("Film is defined in Terminology D883 as an optional term for sheeting having a nominal thickness no greater than 0.25mm[.]"). As Risen argues, the ASTM abstracts "is not focused on film compared to sheet or providing definitive, necessary differences between the two terms." Risen Mot. at 24. Nonetheless, Commerce reasonably infers the parameters of film and sheet from these standards. *See* Commerce SV Memo. at Attach IV:2.

Risen further claims that its backsheet conforms to industry standards that would recognize it as film. Risen Mot. at 24–25 (first citing Risen Sect. D Resp. at Exh. D-32; and then citing Risen Final SV at Exh. SV2–4, 2–5). Risen's argument is unpersuasive. Commerce considered and discounted Risen's position that 3M's specifications refer to backsheet as film. The record lacks evidence that 3M's characterization "is based on the technical definition [of film] . . . [or] correspond to the term 'film' used in the Malaysian HTS or in other generally recognized authoritative sources." Final Decision Memo. at 46; *see generally* Risen Final SV Cmts. at Exh. SV2–5 (containing 3M's backsheet information). Risen's other two submissions of solar manufacturer data are similarly lacking in this regard and devoid of any indication they are based on technical definitions or authority. *See* Risen Final SV at Exh. SV2–5. Accordingly, Commerce's decision on the issue is sustained.

VII. EVA

Similar to the dispute over Commerce's backsheet SV determination, Risen[28] argues that Commerce should have valued Risen's EVA—claimed to be recognized by both 3M and Chinese national standards as "film"—under Malaysian HTS 3920.10.90.[29] Risen Mot. at 23–25. Defendant counters that Commerce properly selected Ma-

[27] The Malaysian HTS itself does not distinguish "sheet" and "film." *See* Final Decision Memo. at 48 nn.268–69.

[28] Risen's challenge to the EVA SV is joined by Trina, JA Solar, and BYD. *See* Risen Mot. at 23–25; Trina Mot. at 53–54; JA Solar Mot. at 8; BYD Mot. at 14.

[29] The description for HTS 3920.10.90 is "Polymers of ethylene: other than plates and sheets." Final Decision Memo. at 46 n.256.

laysian HTS 3920.10.19[30] covering "sheet" based on the ASTM standards concerning thickness of the materials. Def. Resp. at 29–30 (citing Commerce SV Memo. at Attach. IV, VI); Final Decision Memo. at 46–47. Consistent with the determination on backsheet, Commerce's decision on EVA SV is sustained.

As previously discussed, the ASTM abstracts provides a description of "sheet" and "film" on the record. ASTM describes plastic film as being less than 0.25mm thick. Commerce SV Memo. at Attach. IV:2 (citing Terminology D883). Conversely, plastic sheet is 0.25mm thick or even thicker. *Compare id.* at Attach IV:2 ("film is defined . . . as an optional term for sheeting having a nominal thickness no greater than 0.25 mm"), *with* Commerce SV Memo. at Attach. VI:1 ("standard specification for polyethylene sheeting in thickness of 0.25 mm [] and greater").

Here, Commerce's decision to value Risen's EVA using HTS 3920.10.19 data is reasonable. Record evidence supports Commerce's conclusion that Risen's EVA is over 0.5mm thick and thus Commerce properly determined that Risen's EVA is categorized as sheet rather than film pursuant to the ASTM abstracts' description. Furthermore, the 3M and Chinese national standards fail to contain any authoritative definition of "film" or "sheet" or references to any other definitions of these terms submitted to the record. As discussed, it is unclear if the specifications and standards offered by Risen are supported by "other generally recognized authoritative sources". *See generally* Risen Final SV at Exh. SV2–5 (containing 3M's specifications); [Commerce] Suppl. Questionnaire To [Risen] at Attach. II, Exhs. SQ8, PD 255, CD 354–55, bar code 4140187–02 (July 7, 2021) (containing EVA Film Chinese National Standard). The Court will not re-weigh the evidence on the record. Therefore, it was reasonable for Commerce to rely on ASTM abstracts and Malaysian HTS 3920.10.19 to value Risen's EVA. Accordingly, Commerce's decision on the matter is sustained.

VIII. Financial Statements

Jinko challenges Commerce's financial ratios calculation, arguing that Commerce should have included Flextronics Shah Alam SDN. BHD.'s ("Flextronics") financial statements in addition to JA Solar Malaysia's when calculating surrogate financial ratios used in this

[30] The description for HTS 3920.10.19 is: "Polymers of ethylene: plates and sheets (other than rigid)." Final Decision Memo. at 46 n.257.

review.[31] Jinko Mot. at 37–41. Jinko reasons that doing so (i) creates a broader market average, and (ii) makes the surrogate financial ratio more specific. *Id.* Defendant responds that Commerce properly excluded Flextronics' financial statements from the calculations, reasoning that its statements are less specific than JA Solar Malaysia's because Flextronics does not produce identical merchandise. *See* Final Decision Memo. at 37–39; Def. Resp. at 43.

When selecting the best available information to calculate surrogate financial ratios, *see* 19 U.S.C. § 1677b(c)(1); Policy Bulletin 04.1, Commerce gives preference to financial statements from companies that produce identical merchandise rather than merely comparable merchandise. Final Decision Memo. at 37; *see also* Def. Resp. at 44 (citing *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. at 7,345–45 (expressing preference for identical merchandise in the interest of specificity)).

Here, Commerce's decision to use JA Solar Malaysia's financial statements rather than Flextronics' for calculating surrogate financial ratios is reasonable. Respondents produce solar cells and solar modules. The record evidence confirms that JA Solar Malaysia produces both solar cells and solar modules—merchandise that is exactly identical to what is being considered in the underlying review. *See* Jinko First SV Cmts. at Exhibit 11A; Risen First SV Cmts. at Exh. SV-11. Despite Jinko's claims, the record does not support the assertion that Flextronics produces identical merchandise. *See* Jinko First SV Cmts. at Exh. 11C. Rather, Flextronics engages in "contract manufacturing for electronic products and trading of electronic goods and related products." *See id.* Further, Jinko's challenge amounts to an improper request for the Court to re-weigh the evidence on the record. *See Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015). Thus, surrogate financial ratios produced from JA Solar Malaysia's financial statements are more representative and specific than those of Flextronics. For the above reasons, Commerce's determination on the matter is reasonable and thus sustained.

IX. Deductibility of 301 Duties

Jinko claims Commerce improperly deducted Section 301 duties from U.S. prices, arguing that the Section 301 duties are special

[31] Jinko's challenge to Commerce's surrogate financial ratio calculations is joined by Trina, JA Solar, and BYD. *See* Jinko Mot. at 37–41; Trina Mot. at 53–54; JA Solar Mot. at 8; BYD Mot. at 13–14.

duties and not "United States import duties."[32] *See* Jinko Mot. at 41–45 (citing 19 U.S.C.§ 1677a(c)(2)(A)). Defendant contends that Commerce appropriately treated the Section 301 duties as U.S. import duties. Def. Resp. at 50–59. The Court sustains Commerce's determination.

Commerce calculates a dumping margin equal to "the amount by which the normal value exceeds the export price or constructed export price." *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353 (Fed. Cir. 2010) (citing 19 U.S.C. § 1677(35)(A)). Congress has provided for certain adjustments to the export price. *See* 19 U.S.C. § 1677a(c). Pertinent here, 19 U.S.C. §1677a(c)(2)(A) provides:

> The price used to establish export price and constructed export price shall be reduced by . . . the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States[.]

Congress provided for the deduction of U.S. import duties from the export price or U.S. price as part of the normal cost of importation in order to maintain an "apples with apples" comparison between U.S. price and normal value. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983). Antidumping duties are not deducted from the U.S. price because they are considered special duties—rather than U.S. import duties—which avoids a "circularity problem in which the imposition of antidumping duties would itself result in increased antidumping duties." *Shanghai Tainai Bearing Co., Ltd. & Precision Components, Inc.*, 658 F. Supp. 3d 1269, 1292 (Ct. Int'l Trade 2023).

Beyond antidumping duties, the Court of Appeals concluded that Section 201 duties are akin to antidumping duties as remedial measures and therefore not deductible as U.S. import duties. *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1362 (Fed. Cir. 2007) (finding that under step two of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), Commerce's interpretation of Section 201 safeguard duties as remedial duties was reasonable). More recently, the Court of Appeals in *Borusan Mannesmann Boru Sanayi v. Ticaret A.S.* emphasized the character of the "authorized governmental action that actually prescribed the duty on imports at

[32] Plaintiffs Trina, JA Solar, and BYD adopt and incorporate Jinko's challenge to the deductibility of 301 duties. *See* Trina Mot. at 53–54; JA Solar Mot.; 9; BYD Mot. 14.

issue" to determine whether a duty is an import duty. 63 F.4th 25, 34 (Fed. Cir. 2023) (holding that certain duties imposed under Section 232 were U.S. import duties and deductible). As recently explain in *Shanghai Tainai*, the "Federal Circuit cited language in Proclamation [No.] 9705[, 83 Fed. Reg. 11,625 (Mar. 8, 2018) ("Proclamation 9705")] declaring that the duties are to be imposed 'in addition to any other duties' and that '[a]ll anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed.'" 658 F. Supp. 3d at 1292 (quoting Proclamation 9705). If the duties were not deducted from U.S. price, the antidumping margin would offset the effect of the Section 232 duties.[33] *Id.*

Borusan Mannesmann also clarified that the Court of Appeals' holding was consistent with its prior decision in *Wheatland Tube*, 495 F.3d 1355, because it did not make a statute-wide categorical determination but rather focused on the government action imposing the duties:

> Thus, we need not make a statute-wide categorical determination regarding all duties imposed on imports by presidential action under [Section] 232. We will focus on the character of Proclamation 9705 specifically—the authorized governmental action that actually prescribed the duty on imports at issue. This proclamation-specific approach is consistent with our decision in the [Section] 201 setting in *Wheatland*, where . . . our approval of Commerce's determination relied in part on specifics of the particular proclamation at issue there and on Commerce's own declaration that it is for the President, in the duty-creating action under the [Section] 201 regime, to determine the duty's relationship to antidumping duties.

Borusan Mannesmann, 63 F.4th at 34.

Here, and as this Court concluded in *Shanghai Tanai*, the Section 301 duties were enacted to be an "additional duty of 25 percent on a list of products of Chinese origin[.]" *See* 658 F. Supp. 3d at 1293 (citing *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 14,906 (Off. U.S. Trade

[33] In *Wheatland*, the Court of Appeals concluded that the Section 201 duties, unlike U.S. duties, were subject to termination provisions and were thus more akin to antidumping duties. 495 F.3d at 1362. In *Borusan Mannesmann*, the Court of Appeals invoked *Wheatland* to affirm that a proclamation-specific approach to import duties was consistent with *Wheatland* because in that case, the Court's approval of Commerce's determination "relied in part on specifics of the particular proclamation at issue[.]" *Borusan Mannesmann*, 63 F.4th at 34 (citing 495 F.3d at 1363–64).

Rep. Apr. 6, 2018) ("*Notice of Determination Pursuant to Section 301*")). Although, Jinko contends that *Borusan Mannesmann* involved Section 232 duties concerning national security, Jinko Mot. 44, *Borusan Mannesmann* rejects such statute-wide distinctions. Rather, it is the text of the order imposing the duty that controls. 63 F.4th at 34. Here, the text of the notice of determination pursuant to Section 301 indicates that the Section 301 duties imposed are to be in addition to normal duties. *See Notice of Determination Pursuant to Section 301*, 83 Fed. Reg. at 14,907. Accordingly, Commerce's determination is reasonable, and its decision on the issue is sustained.

X. Application of Facts Available with an Adverse Inference

Risen argues that Commerce's resort to partial facts available with an adverse inference is unsupported by the record because market realities prevented Risen from obtaining the withheld FOP information despite multiple requests from its unaffiliated producers of solar cells and solar modules.[34] Risen Mot. at 27–28. Defendant counters that Risen failed to act to the best of its ability in responding to requests for the missing information by choosing to do business with previously uncooperative suppliers. Def. Resp. at 61–65. For the reasons that follow, Commerce's determination to apply facts available with an adverse inference is sustained.

Commerce normally seeks to calculate a dumping margin based on information submitted by parties. *See Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010) (explaining that Commerce calculates a dumping margin after requesting information from the interested parties). Where information necessary to calculate a respondent's dumping margin is not available on the record, Commerce shall use "the facts otherwise available" in place of the missing information. 19 U.S.C. § 1677e(a). Typically, when using the facts otherwise available, Commerce selects neutral facts from the record. *See* 19 U.S.C. § 1677e(b) (outlining criteria for when Commerce may use an adverse inference when selecting among the facts available).

In certain circumstances, Commerce may use "an inference that is adverse to the interests of that party in selecting among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A). However, Section 1677e(b) requires Commerce to first "find[] that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[.]" 19 U.S.C. § 1677e(b)(1). A respon-

[34] Risen's challenge to Commerce's application of facts available with an adverse inference is joined by Plaintiffs Trina, JA Solar, and BYD. *See* Trina Mot. at 53–54; JA Solar Mot. at 9; BYD Mot. at 13.

dent cooperates to the "best of its ability" when it "has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Use of an adverse inference is normally not warranted against a cooperative party. *See Canadian Solar Int'l Ltd. v. United States,* 378 F. Supp. 3d 1292, 1319 (Ct. Int'l Trade 2019) (citing *Mueller Comercial de Mexico S. De R.L. de C.V. v. United States*, 753 F.3d 1227, 1236 (Fed. Cir. 2014) ("*Canadian Solar I*")). *But see Mueller*, 753 F.3d at 1234 (indicating that under certain limited circumstances, Commerce may select adverse facts against a cooperative party); *see also Risen Energy Co. v. United States*, 477 F. Supp. 3d 1332, 1342–43 (Ct. Int'l Trade 2020) (noting Commerce failed to point to record evidence to demonstrate that a party had leverage over its supplier).

Thus, to use an adverse inference when selecting among the facts otherwise available under Section 1677e(b), Commerce must assess whether the party used its maximum efforts to secure the missing information. *See Nippon Steel Corp.*, 337 F.3d at 1382. Where the party seeks information from an uncooperative supplier, Commerce must "consider record evidence concerning the practical ability of a respondent to induce the supplier's cooperation." *Venus Wire Industries Pvt. Ltd. v. United States*, 471 F. Supp. 3d 1289, 1309 (Ct. Int'l Trade 2020).

Commerce's determination to use an adverse inference in selecting among the facts otherwise available is reasonable on this record. The parties do not dispute that Risen failed to provide the necessary FOP information to Commerce, caused by Risen's unaffiliated producers' failure to cooperate. Final Decision Memo. at 8–9; Risen Mot. at 29. Risen's claim that it "used maximum market leverage" to induce cooperation of its producers by threatening to cease business relationships rings hollow. *See* Risen Mot. at 28. Risen indicates it threatened repercussions affecting business relationships with its suppliers if the suppliers failed to disclose FOP data to Commerce. *See* Risen Sect. D Resp. at Exh. D-16 (containing letter to suppliers requesting FOP data and indicating that Risen "would be forced to refuse to purchase any products" if the supplier does not cooperate); *id.* at App'x XIII:14 (claiming that in the first, second, and third rounds of emailed requests for FOP data, Risen "stated clearly" that it would "cease purchasing from uncooperative suppliers"). However, Risen argues in its brief that "it is not a viable business option for Risen to simply stop purchasing cells" from uncooperative producers. Risen Mot. at 28. Risen essentially concedes that its attempts to induce its suppliers' participation in this review amounted to empty threats.

Furthermore, Risen's reliance on market realities do not excuse it from its duty to use its maximum efforts to secure missing information. Risen complains it could not "stop purchasing solar cells from whichever unaffiliated producer refuses to provide FOP data." Risen Mot. at 28. But as Commerce explains, Risen could have attempted to secure compliance before doing business with these suppliers. Final Decision Memo. at 9 (noting that Risen could have taken steps to pre-emptively avoid non-compliance given the history of noncompliance). Even if Risen had no retroactive market leverage over uncooperative suppliers in past reviews, Risen certainly had leverage over suppliers that had previously been found uncooperative. Although Risen may contend that it cannot sever relationships with every single uncooperative supplier, it certainly could sever relationships with some. Risen could undertake efforts to incentivize compliance with suppliers, i.e., offer to pay more or establish an agreement to keep information confidential.

This Court's role is not to imagine efforts Risen could have made to try to secure compliance; Risen is tasked with putting forth its maximum effort. *Nippon Steel Corp.*, 337 F.3d at 1382. But it is not hard to imagine efforts that could have been taken. Risen offers nothing. Certainly, for Risen to cooperate to the "best of its ability" and "put forth its maximum effort" does not require complete success in every instance, but it does require that Risen show that it has tried to do something more than that which has failed in the past. Because Risen was aware that it was dealing with uncooperative suppliers, its inaction fails to demonstrate that it has put forth its best effort to induce cooperation.

Risen cites prior opinions of this Court to argue that an adverse inference is not warranted in cases where a respondent has no control over an uncooperative supplier. Risen Mot. at 30–31 (first citing *Canadian Solar I*, 378 F. Supp. 3d 1292; and then citing the Court's discussion of *Mueller* in *Risen Energy Co.*, 477 F. Supp. 3d at 1343–44). Risen extends these cases passed what their holdings permit.[35] Whether a party has put forth the maximum effort is necessarily case and context specific. A party asked to retroactively secure compliance over a non-cooperative supplier in the absence of market leverage is different from a respondent who purchases from a supplier who it knows has been non-compliant in the past. Risen's past efforts threatening termination of business arrangements proved unsuccessful. Final Decision Memo. at 9 (explaining that Risen was aware that

[35] The cases cited by Risen also involved Commerce's invocation of 19 U.S.C. § 1677e(a) as prescribed by *Mueller*. Risen Mot. at 30–31. The Court of Appeals concluded in *Mueller* that Commerce may incorporate an adverse inference under Section 1677e(a) to calculate a cooperative respondent's margin in certain circumstances. 753 F.3d at 1233.

its suppliers had been uncooperative in the past). Given its past inability to secure information from its suppliers, it is not unreasonable to expect Risen to demonstrate that it put forth its maximum effort in advance of this review. [Risen] Supp. Questionnaire Resp. at 17–19, Exh. SQ-8, PD 179, CDs 294, 296, bar code (June 21, 2021) (listing uncooperative suppliers with whom Risen has continued doing business despite failure to comply with Commerce's requests); *see also* Risen Sect. D Resp. at Exh. D20, D-24 (listing length of supplier relationships). Commerce's determination to apply facts available with an adverse inference is therefore reasonable and sustained.

XI. Calculation of Rate for Facts Available with an Adverse Inference

Risen argues that Commerce should follow the methodology it used in previous segments of this proceeding, entailing use of facts available with an adverse inference to adjust each reported FOP quantity, rather than averaging quantities from three separate groups of input data as used in the instant review.[36] Risen Mot. at 31–34. Defendant argues that continued use of the previous methodology would fail to yield a consumption rate that is "sufficiently adverse" for Risen, and thus it appropriately elected to use a different methodology under the circumstances. Def. Resp. at 65–70. For the reasons that follow, Commerce's final determination to apply this alternative methodology is remanded for further explanation or reconsideration.

As previously discussed, Commerce is instructed by statute to "use the facts otherwise available" in reaching its determination in certain circumstances where "necessary information is not available on the record" 19 U.S.C. § 1677e(a). Once Commerce decides to use the facts otherwise available, Section 1677e(b) allows Commerce to impose "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available[.]" 19 U.S.C. § 1677e(b)(1). An adverse inference "may include reliance on information derived from," inter alia, any information placed on the record. 19 U.S.C. § 1677e(b)(2).

Although the statute permits Commerce to rely on an adverse inference, Commerce is still obligated to base its determinations on substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Gallant Ocean*, 602 F.3d at 1325. The purpose of determining a rate using an adverse inference in selecting facts available is to incentivize cooperation, rather than imposition of "punitive, aberrational, or uncor-

[36] Risen's challenge to Commerce's calculation methodology is adopted and incorporated by Plaintiffs Trina, JA Solar, and BYD. *See* Trina Mot. at 53–54; JA Solar Mot. at 9; BYD Mot. at 13.

roborated margins." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 ("[Under 19 U.S.C. § 1677e(b), Commerce] may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully"). Although Commerce may include a built-in increase for deterrence, "Commerce cannot impose a deterrence factor far beyond the amount sufficient to deter respondents from future non-compliance." *Dongguan Sunrise Furniture Co. v. United States*, 37 CIT 1404, 1407–08 (2013) (citing *Gallant Ocean*, 602 F.3d at 1324), *superseded on other grounds by statute,* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362, *as recognized in Deacero S.A.P.I. de C.V. v. United States*, 456 F. Supp. 3d 1263, 1271 n.13 (Ct. Int'l Trade 2020).

Here, Commerce, noting that the record is missing FOP data (including the quantities of inputs consumed in producing solar cells and solar modules), explains its methodology in its Preliminary Results Analysis Memorandum at 3, PD 398, CDs 462–69, bar code 4194623–01 (Dec. 16, 2021) ("Commerce Prelim. Results Memo. For Risen"):[37]

> We based the [facts otherwise available with an adverse inference] adjustment on the average of ratios that we calculated for each input by dividing the average of the consumption figures for that input that were reported for multi-crystalline CONNUMs, other than the multi-crystalline CONNUM with the highest per-unit consumption of the input, by the highest consumption figure reported by Risen for that input for any multi-crystalline CONNUM (or in the case of by-products, the lowest reported consumption figures reported for these CONNUMs). We divided the average of all of these ratios into 1 to derive [facts otherwise available with an adverse inference] adjustments . . .[38]

Commerce then explained its methodology in the Final Decision that it:

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[37] Data was missing for [[ ]] percent of the solar cells that were used in the solar modules that Risen produced during the period of review (POR) and [[ ]] percent of the solar modules that Risen produced during the POR. Commerce Prelim. Results Memo. For Risen at 3.

[38] The specific adjustment rates are [[ ]] for solar cells, [[ ]] for solar modules, and [[ ]] for packing. Commerce Prelim. Results Memo. For Risen at 3.

> applied [facts otherwise available with an adverse inference] by calculating average ratios of the reported consumption quantities to the highest consumption quantities for three separate groups of inputs, all solar module FOPs, all solar cell FOPs, and all packing FOPs. . . . then multiplied the reported per-unit consumption quantity of each solar module FOP, each solar cell FOP, and each packing FOP, by the relevant average adjustment ratio to increase the reported quantities, as [facts otherwise available with an adverse inference].

Final Decision Memo. at 11. Commerce determined that applying this increase to each "per-unit consumption quantity" was a reasonable methodology to calculate a rate because simply selecting the most adverse facts available would not have been sufficiently adverse in Commerce's view. *Id.* at 11–12. Defendant argues that Commerce's approach is permitted under the statute, which allows it to "base [a facts otherwise available with an adverse inference] rate on any other information placed on the record." Def. Resp. at 67 (internal citation and quotations omitted).

Commerce's methodology is contrary to law and unsupported by substantial evidence. Commerce failed to select among the facts otherwise available in the instant review, and instead created facts by manipulating evidence on the record. Defendant argues that Commerce "base[d] a[] [facts otherwise available with an adverse inference] rate" on record facts and thus derived the rate from record information. *Id.* Even if the statute were capacious enough to allow Commerce to derive facts by manipulating factual information, the random manipulation of data to construct an adjustment ratio cannot be considered a derivation under 19 U.S.C. § 1677e(b)(2). Commerce offers no explanation of why it grouped various inputs together or why it chose the formula it did.

Further, assuming that the statute allows Commerce to manipulate record data to construct an adjustment ratio, the methodology would need to be reasonable. *Vincentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1323, 1342 (Ct. Int'l Trade 2019) (noting that even though Commerce has discretion to select a calculation methodology in a determination, that methodology must nonetheless be reasonable), *aff'd*, 42 F.4th 1372, 1382 (Fed. Cir. 2022). Commerce would need to explain why the grouping it selected was logical, how the formula worked, and how any of the choices made serve the purpose of the statute to promote accuracy and deterrence. *See* 19 U.S.C. § 1677e(b), (c). Commerce's statement that selecting from the facts available is not "sufficiently adverse" does not explain why its new methodology is

reasonable. Here, Commerce created three categories of inputs and manipulated the consumption ratios for the inputs in the categories to arrive at a consumption adjustment rate. Final Decision Memo. at 11. Even if Commerce could argue that it "derived" the adjustment rate from facts on the record, it fails to explain why its methodology in doing so is reasonable or promotes accuracy. *See Mueller*, 753 F.3d at 1233; *Vincentin S.A.I.C.*, 404 F. Supp. 3d at 1342. Accordingly, Commerce's determination on the issue is remanded for reconsideration or further explanation.

XII. Recalculation of the Separate Rate

Trina, JA Solar, and BYD argue that as the separate rate is derivative of the mandatory respondent's rate, that the Court should instruct Commerce to recalculate the separate rate consistent with its redeterminations. Trina Mot. at 54; JA Solar Mot. at 7–8; BYD Mot. at 12–13. Commerce will necessarily recalculate the separate rate for JA Solar and BYD following its redetermination.[39]

CONCLUSION

Commerce's determinations concerning: (1) Trina's separate rate status; (2) valuations of Plaintiffs' electricity, ocean freight, backsheet, and EVA; (3) use of JA Solar Malaysia's financial statements to calculate surrogate financial ratios; (4) deduction of Section 301 duties; and (5) use of facts available with an adverse inference against Plaintiffs are sustained. Commerce's determinations involving its solar glass and air freight valuations and its methodology for calculating facts available with an adverse inference rate are remanded for further explanation or consideration consistent with this opinion. In light of the foregoing, it is

ORDERED that the final results, *see* ECF No. 24–4, are remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce's determination of the review specific rate applicable to JA Solar and BYD is remanded for reconsideration consistent with this opinion; and it is further

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

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

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

[39] Trina is not entitled to assignment of a recalculated separate rate given the Court's determination that Commerce reasonably denied assigning Trina a separate rate in the instant review.

ORDERED that the parties shall file the joint appendix within 14 days after the filing of replies to the comments on the remand redetermination; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its remand redetermination.

Dated: May 1, 2024
New York, New York

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

Slip Op. 24–56

ASSAN ALUMINYUM SANAYI VE TICARET A.S., Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP AND ITS INDIVIDUAL MEMBERS, et al., Defendant-Intervenors/Consolidated Plaintiffs.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:21-cv-00616 (SAV)

[Granting Defendant's Motion for Voluntary Remand, Granting in Part and Denying in Part Plaintiff's Motion for Judgment on the Agency Record, and Granting Defendant Intervenors'/Consolidated Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: May 8, 2024

Leah N. Scarpelli and *Matthew M. Nolan*, ArentFox Schiff LLP, Washington, DC, for Plaintiff Assan Aluminyum Sanayi ve Ticaret A.S. With them on the briefs were *Yun Gao* and *Jessica R. DiPietro*.

Emma E. Bond, Trial Attorney, U.S. Department of Justice, Civil Division, Washington, DC, and *JonZachary Forbes*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, Washington, DC, for Defendant United States. With them on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Catharine M. Parnell*, Trial Attorney.

John M. Herrmann II and *Joshua R. Morey*, Kelly Drye & Warren LLP, Washington, DC, for Defendant-Intervenors/Consolidated Plaintiffs Aluminum Association Trade Enforcement Working Group and Its Individual Members. With them on the briefs were *Paul C. Rosenthal* and *Julia A. Kuelzow*.

OPINION

Vaden, Judge:

This case involves an assortment of challenges to the U.S. Department of Commerce's (Commerce) Final Determination in its investigation of aluminum foil from Turkey. Plaintiff Assan Aluminyum Sanayi ve Ticaret A.S. (Assan) is a Turkish aluminum foil manufacturer. Assan alleges that four deficiencies in Commerce's Final Determination resulted in its receiving an inflated dumping margin: (1)

the denominator used in the duty drawback calculation, (2) the treatment of late filing fees in the duty drawback calculation, (3) the treatment of certain management fees as indirect selling expenses, and (4) the averaging of raw material costs. Conversely, the Aluminum Association Trade Enforcement Working Group, made up of individual members Gränges Americas Inc., JW Aluminum Company, and Novelis Corporation (collectively, the Aluminum Association), alleges Commerce's treatment of Assan's hedging revenues as part of Assan's cost of production resulted in Assan's receiving a deflated dumping margin. Commerce also asks the Court for a voluntary remand to reconsider the denominator it used to calculate the duty drawback adjustment and urges the Court to sustain the remainder of its Final Determination. For the reasons set forth below, the Court **GRANTS** Commerce's request for a voluntary remand on the duty drawback denominator issue, **REMANDS** the case to Commerce for further proceedings consistent with this opinion regarding Commerce's averaging of Assan's raw material costs and treatment of Assan's hedging revenues, and **SUSTAINS** the remainder of Commerce's Final Determination.

BACKGROUND

I. Procedural Background

In October 2020, Commerce published a notice of its initiation of a less-than-fair-value investigation. *See Certain Aluminum Foil from the Republic of Armenia, Brazil, the Sultanate of Oman, the Russian Federation, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 67,711 (Dep't of Com. Oct. 26, 2020). The period of investigation ran from July 1, 2019, through June 30, 2020. *Certain Aluminum Foil from the Republic of Turkey: Final Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 52,880 (Dep't of Com. Sept. 23, 2021) (Final Determination). Assan was a mandatory respondent in the investigation. Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. at 5, ECF No. 29 (Pl.'s Br.); Def.'s Consol. Resp. to Pl.'s and Consol. Pls.' Mot. for J. on the Agency R. at 3, ECF No. 39 (Def.'s Resp.). Commerce published a preliminary negative determination on May 4, 2021, assigning Assan a zero percent dumping margin. *Certain Aluminum Foil from the Republic of Turkey: Preliminary Negative Determination of Sales at Less Than Fair Value, Postponement of Final Determination*, 86 Fed. Reg. 23,686, 23,687 (Dep't of Com. May 4, 2021). It published the Final Determination on September 23, 2021, assigning Assan a 2.28 percent dumping margin. Final Determination, 86 Fed. Reg. at 52,881.

Assan filed suit challenging Commerce's Final Determination. Summons, ECF No. 1. The Aluminum Association filed its own challenge the next day. Summons, *Aluminum Ass'n Trade Enf't Working Grp. and Its Individual Members v. United States*, No. 21–618 (CIT Dec. 10, 2021), ECF No. 1. The Aluminum Association intervened as Defendant-Intervenor in Assan's challenge, and Assan did the same in the Aluminum Association's challenge. Order Granting Aluminum Ass'n's Mot. to Intervene, ECF No. 18; Order Granting Assan's Mot. to Intervene, *Aluminum Ass'n Trade Enf't Working Grp. and Its Individual Members v. United States*, No. 21–618 (CIT Feb. 7, 2022), ECF No. 22. The Court later consolidated the two cases under this court number. *See* Def.'s Mot. to Consolidate, ECF No. 20; Consolidation Order Granting Def.'s Mot. to Consolidate, ECF No. 21. Assan and the Aluminum Association each moved for judgment on the agency record. Pl.'s Br., ECF No. 29; Def.-Ints.'/Consol. Pls.' Mem. of Law in Supp. of Mot. for J. on the Agency R., ECF No. 31 (Def.-Ints.'/Consol. Pls.' Br.). The Court heard oral argument on the Motions. ECF No. 60. Following Oral Argument, the Court ordered supplemental briefing. Minute Order, ECF No. 59.

II. The Present Dispute

This case involves antidumping duties. Antidumping duties are imposed on merchandise that is "sold in the United States at less than its fair value." 19 U.S.C. § 1673. They are "equal to the amount by which the normal value exceeds the ... constructed export price ... for the merchandise." *Id.* That amount is called the dumping margin. 19 U.S.C. § 1677(35)(A). Normal value is the price in the home market — in this case Turkey — and constructed export price is the price in the United States. *See Nagase & Co. v. United States*, 47 CIT __, 628 F. Supp. 3d 1326, 1331 (2023) (citing *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed. Cir. 2001)). Here, a lower normal value and higher constructed export price result in lower duties for Assan.

To fairly compare the normal value and the constructed export price, Commerce must compare apples to apples. *Shanghai Tainai Bearing Co. v. United States*, 47 CIT __, 658 F. Supp. 3d 1269, 1291 (2023) (quoting *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983)). That is, Commerce must factor in the inherent cost differences between selling in the home market and selling in the United States. To achieve an apples-to-apples comparison, Commerce uses a series of calculations and adjustments to account for factors such as unequal transportation costs, rebated duties, and other differences between the home market and the U.S. market. *See generally* 19 U.S.C. §§ 1677a, 1677b; 19 C.F.R. § 351.402(a) ("[T]o establish

export price, constructed export price, and normal value, the Secretary must make certain adjustments to the price ... in both the United States and foreign markets."). Assan and the Aluminum Association each challenge portions of these calculations.

A. Duty Drawback Adjustment

Assan's first two challenges involve the duty drawback adjustment. When a producer normally pays import duties on a manufacturing input but receives some type of duty rebate or exemption for exporting goods containing that input to the United States, Commerce must adjust the constructed export price to factor in the forgiven duties. 19 U.S.C. § 1677a(c)(1)(B); *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011). The duty drawback adjustment thus accounts for the fact that producers pay duties on subject merchandise sold domestically but not on subject merchandise sold in the United States. *Saha Thai*, 635 F.3d at 1338.

Turkey's duty drawback program, the Inward Processing Regime, provides duty exemptions. *Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. v. United States*, 47 CIT __, 654 F. Supp. 3d 1311, 1318 (2023). A company imports raw materials without paying duties and receives an inward processing certificate. *Id.* The company must then export a set quantity of goods within a given time to "close" the certificate and be officially released from duty liability by the Turkish government. *Id.* If the company does not export enough goods within the given time, it can still receive a drawback under certain circumstances if it later exports sufficient goods and pays a late fee. Pl.'s Br. at 31, ECF No. 29; *see also* Issues and Decisions Mem. at 29, J.A. at 7,645, ECF No. 53 (IDM). Commerce's practice here, which no party expressly challenges, is to only award a drawback adjustment for closed certificates. IDM at 29, J.A. at 7,645, ECF No. 53; *see also Icdas Celik*, 47 CIT __, 654 F. Supp. 3d at 1319 (explaining Commerce's practice). Commerce previously allowed drawback adjustments even for open certificates but in recent years has imposed stricter requirements on respondents to prove certificate closure. *See Icdas Celik*, 47 CIT __, 654 F. Supp. 3d at 1320–21 (explaining Commerce's evolving practices on closure requirements); *Tosçelik Profil ve Sac Endüstrisi A.S. v. United States*, 42 CIT __, 348 F. Supp. 3d 1321, 1324–25 (2018) (explaining Commerce's new policy of requiring certificate closure to grant a duty drawback adjustment).

i. Methodology

Commerce applies the duty drawback adjustment by calculating a per-unit adjustment that Commerce then applies to all U.S. sales.

IDM at 28, J.A. at 7,644, ECF No. 53. To calculate a per-unit adjustment, Commerce selects a numerator — an amount of exempted or rebated duties — and a denominator — a quantity of sales. *See id.*; *see also Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 44 CIT __, 429 F. Supp. 3d 1353, 1362–65 (2020) (analyzing the lawfulness of a previous duty drawback methodology). Commerce then divides the numerator by the denominator to get a per-unit adjustment, which it applies to every U.S. sale. *See* IDM at 28, J.A. at 7,644, ECF No. 53; *Icdas Celik*, 44 CIT __, 429 F. Supp. 3d at 1362–65.

Assan's first challenge is to the denominator Commerce used. Pl.'s Br. at 26, ECF No. 29. To calculate the per-unit adjustment, Commerce divided the duties forgiven under closed inward processing certificates by total U.S. sales of subject merchandise. IDM at 28, J.A. at 7,644, ECF No. 53. Assan argues that Commerce should instead have divided the duties forgiven under closed inward processing certificates only by the sales of goods exported under those closed certificates, a smaller denominator. *Id.* at 26–27, J.A. at 7,642–43 (summarizing Assan's arguments to Commerce). Commerce rejected this approach and said it would, in effect, give Assan credit for drawbacks it did not receive. *Id.* at 27–28, J.A. at 7,643–44 (summarizing the Aluminum Association's arguments and then rejecting Assan's proposed methodology). By dividing the drawbacks received under closed certificates only by sales of goods exported under those closed certificates, but then multiplying that per-unit adjustment across all U.S. sales, the Aluminum Association says Commerce would essentially credit Assan as though all U.S. sales were made under closed certificates even though that is not the case. Def.Ints.'/Consol. Pls.' Resp. at 17, ECF No. 40. Commerce similarly claimed at oral argument that Assan's challenge to the denominator is really a challenge to the numerator — a challenge to Commerce's practice of only awarding a drawback for closed certificates. Oral Arg. Tr. at 59:22–24, ECF No. 66 ("Assan, in a way ... actually challenged the numerator under the guise of challenging the denominator."). *See generally Icdas Celik*, 47 CIT __, 654 F. Supp. 3d at 1320–21 (explaining Commerce's evolving practices on closure requirements).

At oral argument, the parties disagreed over Commerce's evolving duty-drawback practices. Assan informed the Court that Commerce, in the time since issuing its Final Determination, used Assan's preferred denominator in other investigations. Oral Arg. Tr. at 24:11–25:9, ECF No. 66. Counsel for the Aluminum Association acknowledged that Commerce adopted Assan's preferred denominator in its investigation of common alloy aluminum sheet from Turkey, which the Aluminum Association is currently challenging in litigation

before this Court. *Id.* at 67:12–68:18. Commerce's counsel claimed that she did not know of any investigation where Commerce used Assan's preferred denominator. *Id.* at 33:17–23. Following oral argument, the Court requested supplemental briefing to clarify this uncertainty. Minute Order, ECF No. 59.

In response to the Court's order, Assan filed two notices of supplemental authority and a supplemental brief arguing Commerce's approach in this case differs from Commerce's practice in other cases involving the Turkish Inward Processing Regime. *See* Pl.'s First Notice of Supp. Authority, ECF No. 61; Pl.'s Second Notice of Supp. Authority, ECF No. 63; Pl.'s Supp. Br., ECF No. 64. Assan's filings cited multiple instances after the Final Determination where Commerce used Assan's preferred methodology and rejected suggestions that it employ the methodology used here. In a pending case — involving the same parties as this case — challenging Commerce's final determination in its investigation of common alloy aluminum sheet from Turkey, Commerce rejected the drawback methodology it used here. Remand Determination at 13, *Assan Aluminyum Sanayi ve Ticaret A.S. v. United States*, No. 21–246 (CIT May 31, 2023), ECF No. 94. In its Remand Determination in that case, Commerce used Assan's proposed methodology, which it described as "the most appropriate methodology." *Id.* It further stated that "any other method ... would likely introduce inaccuracies ...." *Id.* Commerce similarly applied Assan's preferred methodology in its first administrative review of the antidumping order on common alloy aluminum sheet from Turkey. Pl.'s Supp. Br. at 12–13, ECF No. 64; Def.'s Mot. for Voluntary Remand at 5, ECF No. 67 (Remand Mot.).

In the wake of Assan's filings, Commerce filed a Motion for Voluntary Remand. Remand Mot., ECF No. 67. Commerce acknowledged that, on multiple occasions after the Final Determination, it rejected the methodology it used here and instead used Assan's preferred methodology. *Id.* at 3–4. Because of the conflict between its Final Determination and later agency actions, Commerce requests "that the case be remanded for Commerce to reconsider its previous position regarding the applied ratio in its duty drawback adjustment, without confessing error." *Id.* at 5. Assan supports the voluntary remand request. *Id.* at 2. The Aluminum Association argues a remand is unnecessary and asks the Court to sustain Commerce's methodology and deny the remand request. Def.-Ints.'/Consol. Pls.' Supp. Br. at 9–10, ECF No. 71.

ii. Late Fees

Assan also challenges Commerce's treatment of late fees in its duty drawback adjustment. Pl.'s Br. at 31, ECF No. 29. Turkey's duty drawback regime allows a company to receive drawbacks for untimely exports if the company pays a late fee. *Id.*; *see also* IDM at 29, J.A. at 7,645, ECF No. 53. Assan did this during the period of investigation, and Commerce offset the duty drawback adjustment by the amount of the late fees. IDM at 29, J.A. at 7,645, ECF No. 53. The statute instructs Commerce to increase the constructed export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). Assan contends that the statute does not permit Commerce to offset the duty drawback adjustment by the amount of the late fees. However, Assan concedes that it only paid the fees because of its participation in Turkey's drawback system. Oral Arg. Tr. at 30:14–20, ECF No. 66. Commerce found that it was appropriate to offset the duty drawback adjustment by the late filing fees because Assan would not have received any drawback without paying the late fees. IDM at 29, J.A. at 7,645, ECF No. 53 (Assan "would have no duty drawback benefit" without paying late filing fees.). Accordingly, Commerce says the late fees are equivalent to unforgiven duty liability. *See* Def.'s Resp. at 27, ECF No. 39.

B. Management Fees

Assan's third challenge is to Commerce's treatment of certain management fees related to Assan's wholly-owned affiliate, Kibar Americas (Kibar). *See* Pl.'s Br. at 39, ECF No. 29; IDM at 3, J.A. at 7,619, ECF No. 53. Commerce must deduct from the constructed export price "expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise." 19 U.S.C. § 1677a(d)(1). Commerce treated management fees Kibar paid to Assan as selling expenses, which Assan contests. IDM at 8–11, J.A. at 7,624–27, ECF No. 53; Pl.'s Br. at 39, ECF No. 29.

Kibar is Assan's U.S. reseller; it does no manufacturing. Oral Arg. Tr. at 72:25–73:11, ECF No. 66. Kibar paid management fees to Assan for "overall group support," which Assan describes as "head office administrative activities to manage group operations." Pl.'s Br. at 39, ECF No. 29. Commerce treated these fees as selling expenses, saying "[general and administrative] expenses of a company that is exclusively a reseller ... should be treated as indirect selling expenses, because the expenses can only be in support of the company's sole

function as a reseller." IDM at 10, J.A. at 7,626, ECF No. 53. Assan argues that the management fees are not properly treated as selling expenses because they were incurred in Turkey rather than the United States and because they "did not relate to sales or economic activities" in the United States. Pl.'s Br. at 43, ECF No. 29.

C. Raw Material Costs

Assan's fourth and final challenge is to Commerce's raw material cost calculation, which is part of Commerce's cost of production calculation. Pl.'s Br. at 32, ECF No. 29.[1] Cost of production does not directly affect the dumping margin because it does not directly factor into the normal value or constructed export price. However, cost of production can affect the dumping margin because, while calculating normal value, Commerce may disregard "sales made at less than the cost of production." 19 U.S.C. § 1677b(b)(1). A higher cost of production therefore allows Commerce to disregard low-priced sales in the home market. Disregarding low-priced sales raises the normal value, which increases the dumping margin.

Assan buys its raw material inputs in three different forms: scrap, sheet, and primary aluminum. *See* IDM at 34, J.A. at 7,650, ECF No. 53. The inputs vary in cost and, according to Assan, in the labor and other expenses it requires to convert them into aluminum foil. Oral Arg. Tr. at 42:24–43:14, ECF No. 66. Although Assan prefers to use certain inputs for certain products, it can generally use any of the three inputs in any of its products. IDM at 34, J.A. at 7,650, ECF No. 53; Oral Arg. Tr. at 43:19–44:3, ECF No. 66. *But see* Oral Arg. Tr. at 44:6–17 (counsel for Assan explaining that using scrap is impractical for a "small percentage" of Assan's products).

Assan's aluminum cost contains two elements, the market price for aluminum on the London Metal Exchange and the raw material premium. *See* IDM at 33–34, J.A. at 7,649–50, ECF No. 53. The raw material premium is an adjustment to the London Metal Exchange market price that reflects the "conversion cost plus profit of the raw material supplier." Assan Section D Second Suppl. Questionnaire Resp. at 5S-21, J.A. at 85,510, ECF No. 53. For both elements, Commerce used an average cost from across the period of investigation rather than the actual cost Assan reported for each product. IDM at 34–35, J.A. at 7,650–51, ECF No. 53.

Commerce used an average for the London Metal Exchange element to eliminate distortions caused by changing aluminum prices

[1] Assan initially raised a fifth argument regarding Section 232 tariffs. Pl.'s Br. at 10, ECF No. 29. It now concedes that this argument is foreclosed by *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25 (Fed. Cir. 2023). Oral Arg. Tr. at 5:18–6:1, ECF No. 66.

throughout the period of investigation. *Id.* at 34, J.A. at 7,650. Assan does not challenge that decision. Pl.'s Br. at 33, ECF No. 29 ("Assan agreed with Commerce's decision to average [the London Metal Exchange] costs ...."). Commerce used an average for the raw material premium because it found the differences in premium costs across products were not attributable to physical differences in the products. IDM at 35, J.A. at 7,651, ECF No. 53. Assan challenges this decision because it claims its records are accurate and Commerce did not properly find that Assan's reported costs were distortive. Pl.'s Br. at 32, 37, ECF No. 29 (arguing "Commerce made no finding that Assan's reported costs either did not reasonably reflect costs or were distortive" and Assan's records are "more accurate" than using an average) (emphasis omitted); *see also* Oral Arg. Tr. at 48:4–17, ECF No. 66. Assan further argues that Commerce should have examined any cost of manufacturing differences by comparing total cost of manufacturing rather than focusing on raw material costs. Pl.'s Br. at 34–35, ECF No. 29.

Commerce must rely on Assan's records if the records (1) "are kept in accordance with the generally accepted accounting principles" in Turkey and (2) "reasonably reflect" the cost of production. 19 U.S.C. § 1677b(f)(1)(A); IDM at 33, J.A. at 7,649, ECF No. 53. Commerce claims it can depart from Assan's records because they contain "significant cost differences" between products that are unrelated to the physical characteristics of those products.[2] IDM at 35, J.A. at 7,651, ECF No. 53; Def.'s Resp. at 30, ECF No. 39. Commerce found that the cost differences from using different raw material inputs were not related to the physical characteristics of the products in large part because Assan acknowledged that it can use any of the three inputs for any of its products. IDM at 35, J.A. at 7,651, ECF No. 53. It thus departed from Assan's records and used an average. *Id.*

Assan makes several arguments for why Commerce erred by averaging the raw material premium costs. It argues that Commerce did not appropriately find Assan's reported costs were distortive. Pl.'s Br. at 37, ECF No. 29 ("Commerce made no finding that Assan's reported costs either did not reasonably reflect costs or were distortive."). Assan claims this is a prerequisite for Commerce to depart from Assan's reported costs. *Id.* at 36 (Commerce must rely "on the actual books and records used by a respondent to report costs unless the cost allocation is distortive."). Assan also says its reported costs are more accurate than Commerce's averaging method and that averaging results in distortions. *Id.* at 37.

[2] Commerce identified "gauge, coating, width, casting method, alloy, temper, and surface finish" as the relevant physical characteristics. IDM at 33, J.A. at 7,649, ECF No. 53.

Assan makes one other argument: that Commerce should have examined cost differences using the total cost of manufacturing rather than focusing on raw material costs. *Id.* at 35. This is because differences in labor and other costs offset differences in raw material costs. *Id.* Considering either in isolation might give the mistaken impression of cost differences where none exist. *Id.* Assan asserts that any analysis of price differences must consider the total cost of manufacturing. *Id.* It further argues that, if Commerce does any averaging, Commerce should average the total cost of manufacturing rather than just the raw material costs. *Id.*; Pl.'s Reply at 19–20, ECF No. 45.

Assan made this same argument during the administrative proceedings before Commerce. *See* Assan's Case Br. at 5, J.A. at 91,263, ECF No. 53. Commerce noted Assan's argument in its Issues and Decisions Memorandum but otherwise failed to engage with it. *See* IDM at 31, J.A. at 7,647, ECF No. 53. In fact, the memo only mentions total cost of manufacturing when summarizing Assan's argument; it does not mention total cost of manufacturing in its discussion of Commerce's position or explain why Commerce elected not to use the total cost of manufacturing. *See id.* at 29–35, J.A. at 7,645–51. Only the Aluminum Association addresses this argument in its briefing. *See* Def.-Ints.'/Consol. Pls.' Resp. at 33, ECF No. 40 ("Commerce reasonably analyzed cost differences based on material costs and not the total cost of manufacture[.]"). The Aluminum Association argues other portions of the total cost of manufacture — such as labor costs and overhead costs — did not contain differences unrelated to products' physical characteristics, making it unnecessary to average them. *Id.* It further argues that the record does not support Assan's claim that metal premium costs are inversely related to conversion costs. *Id.* at 33–34.

D. Hedging

The Aluminum Association challenges Commerce's decision to include Assan's hedging revenues as part of its cost of production. *See* Def.-Ints.'/Consol. Pls.' Br. at 8–9, ECF No. 31; IDM at 36–43, J.A. at 7,652–59, ECF No. 53. As described above, Commerce uses Assan's records to calculate cost of production if the records (1) "are kept in accordance with the generally accepted accounting principles" in Turkey and (2) "reasonably reflect" the cost of production. 19 U.S.C. § 1677b(f)(1)(A). The Aluminum Association claims hedging revenues are unrelated to production and thus do not reasonably reflect the cost of production. Def.-Ints.'/Consol. Pls.' Br. at 2–3, ECF No. 31.

Assan's business model subjects it to risk from changing aluminum prices. Assan purchases raw aluminum from suppliers, converts it

into aluminum foil, and then sells it. When Assan sells aluminum foil, it passes on the cost of aluminum to its customers. Pl.'s Resp. at 4–5, ECF No. 36. However, the price customers pay for aluminum is based on the value of raw aluminum at the time of sale, not at the time Assan purchased the raw aluminum.[3] Pl.'s Resp. at 9; ECF No. 36. Assan also uses mark-to-market accounting. IDM at 42, J.A. at 7,658, ECF No. 53. Mark-to-market accounting means that the value of Assan's inventory is periodically adjusted in Assan's books to match the inventory's current market value. Pl.'s Resp. at 10 n.2, ECF No. 36. If aluminum prices rise or fall, Assan records an accounting gain or loss on aluminum held in its inventory. *Id.* at 9–10.

Assan hedges with aluminum futures contracts to combat the risk of changing aluminum prices. *Id.* at 5 ("Assan engages in raw material hedging ... in the normal course of business."); IDM at 41–42, J.A. at 7,657–58, ECF No. 53. These contracts obligate Assan to either purchase or sell aluminum at a fixed price at a given point in the future when the contract matures. *Id.* at 41–42, J.A. at 7,657–58. Assan's futures contracts play out without Assan's physically taking possession of any of the aluminum involved. *Id.* at 42, J.A. at 7,658 ("Assan closes the hedging contracts by reversing its position in the commodities market."). It primarily engages in "short hedging," meaning Assan agrees to sell aluminum at a fixed price when the contract matures. Pl.'s Resp. at 5, ECF No. 36; Def.-Ints.'/Consol. Pls.' Br. at 11, ECF No. 31. To fulfill this obligation, Assan buys aluminum on the London Metal Exchange at the current market price at the time the contract matures. IDM at 42, J.A. at 7,658, ECF No. 53. This means Assan profits on its hedging if the price of aluminum declines between the contract's start and its maturation. In this way, Assan reduces the risk it faces in its purchase of raw aluminum for conversion into aluminum foil. If the price of raw aluminum declines over a given time, Assan loses money on the raw aluminum it took physical possession of to make aluminum foil but gains money on its aluminum hedging.

Assan records its hedging gains and losses as part of its cost of production. *Id.* at 41, J.A. at 7,657 (Hedging revenues "were recorded as a part of cost of goods sold in the audited financial statements."). Assan profited on its hedging contracts during the period of investigation. *Id.* Commerce treated Assan's hedging revenues as part of its

[3] Depending on Assan's contractual agreement with its customer, the sales price may use the current (or "spot") London Metal Exchange price or an average London Metal Exchange price from a given time period (*e.g.*, the monthly average or three-month average). Pl.'s Resp. at 9; ECF No. 36. Regardless, the price at the time of sale differs from Assan's purchase price. *Id.*

cost of production, which resulted in a lower cost of production. *Id.* The Aluminum Association challenges this decision and argues recording hedging revenues as part of the cost of production does not reasonably reflect the cost of production. Def.-Ints.'/Consol. Pls.' Br. at 8, ECF No. 31.

The Aluminum Association claims Assan's hedging revenues are unrelated to its cost of production and are instead related to the sales price of Assan's finished goods. *Id.* at 2. According to the Aluminum Association, hedging protects against a future risk. *Id.* at 17 ("The purpose of hedging ... is to manage the risk associated with an expected future transaction.") (emphasis omitted). It notes that Assan opens hedging contracts only after purchasing raw materials. *Id.* at 18–19. By that time, Assan's raw material cost is set. *Id.* The only risk comes from a later event. *Id.* The Aluminum Association points to the sale price as the risk source. *Id.* at 22 ("Assan's hedges pertain to its sales ...."). During the administrative proceeding, the Aluminum Association also pointed to mark-to-market accounting losses as a potential risk source. IDM at 36–37, J.A. at 7,652–53, ECF No. 53.

Commerce rejected the Aluminum Association's arguments. *Id.* at 42–43, J.A. at 7,658–59. It stated: "We disagree with [the Aluminum Association] that Assan's hedging transactions are related to Assan's sales of finished goods, and thus the hedging gains are unrelated to Assan's cost of production." *Id.* at 42, J.A. at 7,658. Commerce further stated that the Aluminum Association's "argument with regard to marking to market is misplaced," rejecting the argument that Assan's hedges were intended to mitigate potential losses from mark-to-market accounting. *Id.* at 42–43, J.A. at 7,658–59.

Assan and Commerce now make a different claim — that the Aluminum Association's arguments have some merit but that Commerce's Final Determination is nonetheless supported by substantial evidence. Assan concedes two key points. First, it concedes that its hedging is in some way related to the sales price of its finished goods. Oral Arg. Tr. at 89:11–12, ECF No. 66 ("Everything at some level is related to the final transaction by necessity."). Second, it concedes that it does hedge — at least in part — against the risk imposed by mark-to-market accounting of its raw material inventory. Pl.'s Resp. at 12–13, ECF No. 36. Commerce, for its part, acknowledges that the record may support the Aluminum Association's view but argues that the record also supports Commerce's view. Oral Arg. Tr. at 100:17–25, ECF No. 66.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over these challenges to Commerce's Final Determination under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final determinations in antidumping investigations. The Court must sustain Commerce's "determination[s], finding[s], or conclusion[s]" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). If they are unsupported by substantial evidence or not in accordance with the law, the Court must "hold unlawful any determination, finding, or conclusion found." *Id.* "[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." *See New Am. Keg v. United States*, 45 CIT __, 2021 Ct. Intl. Trade LEXIS 34, at *15. Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). 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)).

DISCUSSION

The parties raise a variety of challenges to Commerce's Final Determination. The Court first grants Commerce's voluntary remand request. It then examines the four remaining challenges to the Final Determination. Assan's challenges to Commerce's treatment of its late fees and management fees fail because Commerce's decision was supported by substantial evidence and in accordance with the law. Assan's raw materials premium challenge and the Aluminum Association's hedging challenge succeed because Commerce's contemporaneous explanations are unsupported by substantial evidence.

I. Duty Drawback

A. The Voluntary Remand Request

Commerce seeks a voluntary remand "to further explain or to reconsider its duty drawback adjustment." Remand Mot. at 6, ECF No. 67. Commerce does not confess any error but wishes to reconsider its duty drawback methodology "in light of developments in practice." *Id.* Assan supports Commerce's request, but the Aluminum Association does not. *Id.* at 2; Def.-Ints.'/Consol. Pls.' Supp. Br. at 9, ECF No. 71. The Court grants Commerce's request because Commerce's concern is substantial and legitimate. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

Commerce may, without confessing error, ask for a voluntary remand to reconsider its decision. *Id.* at 1028. "[T]he reviewing court has discretion over whether to remand" and may refuse a request that is "frivolous or in bad faith." *Id.* at 1029. A remand is appropriate "if the agency's concern is substantial and legitimate." *Id.* An agency's concern is substantial and legitimate if "(1) [the agency] supports its request with a compelling justification, (2) the need for finality does not outweigh the justification, and (3) the scope of the request is appropriate." *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, 37 CIT 1123, 1127 (2013) (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 67, 71 (2013)). Allowing agencies to address issues first promotes accuracy and judicial economy. *Cf. Ellwood City Forge Co. v. United States*, 46 CIT __, 582 F. Supp. 3d 1259, 1272 (2022) ("Exhaustion ... promotes judicial efficiency ...."). Even if the Court ultimately must decide the issue, allowing the parties to develop a record before Commerce will still create "'a useful record for subsequent judicial consideration.'" *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

Commerce's request for a voluntary remand satisfies the requisite factors. *See Baroque Timber*, 37 CIT at 1127. First, Commerce provides an appropriate justification for remand by invoking its evolving agency practices on duty drawback. *See* Remand Mot. at 6, ECF No. 67. Commerce rejected Assan's proposed methodology as "not consistent with [Commerce's] practice." IDM at 28, J.A. at 7,644, ECF No. 53. Since its Final Determination, Commerce has done an about-face and stated that any methodology other than Assan's proposed methodology "would likely introduce inaccuracies." Remand Determination at 13, *Assan Aluminyum Sanayi ve Ticaret A.S. v. United States*, No. 21–246 (CIT May 31, 2023), ECF No. 94. It may need to consider the issue further. *Cf. Assan Aluminyum Sanayi ve Ticaret A.S. v. United States*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 42, at *14–25

(Apr. 11, 2024) (holding that Assan's suggested methodology may not comply with the statute). The need to reexamine a decision in light of changing agency practice is a compelling justification. *Cf. SKF*, 254 F.3d at 1029 ("[E]ven if there are no intervening events, the agency may request a remand ... to reconsider its previous position.").

Second, the need for finality does not outweigh Commerce's justification. Allowing Commerce to reconsider its decision will provide a more complete record if the Court eventually needs to decide this issue. *See Ellwood City*, 46 CIT __, 582 F. Supp. 3d at 1272. Both Plaintiff and Defendant-Intervenor can argue their positions before Commerce, and they may argue those positions again before the Court if necessary. *Cf. Baroque Timber*, 37 CIT at 1133 ("[T]he possibility that any decision this court would make on the merits regarding the targeted dumping challenges will become moot diminishes concerns of finality.") (citing *Ad Hoc Shrimp*, 37 CIT at 71). Third, the scope of Commerce's remand request, which is limited to one issue in this case where Commerce's practice has changed since issuing its Final Determination, is appropriate. The Court therefore **GRANTS** Commerce's Motion for Voluntary Remand and **REMANDS** the case to Commerce to reconsider or further explain its duty drawback methodology.

B. Late Fees

Separate from the methodology question discussed above, Assan also challenges Commerce's decision to offset the duty drawback adjustment by the amount of late filing fees Assan paid. Pl.'s Br. at 31, ECF No. 29. The relevant statute directs Commerce to increase the export price of merchandise — and thus decrease the dumping margin — by the amount of certain "duties imposed by the country of exportation" that have been rebated or not collected "by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). According to Assan, Commerce's decision was unlawful because "nothing in the statute ... authorize[s] offsetting a drawback adjustment based on late penalties paid ...." Pl.'s Br. at 31, ECF No. 29. Commerce, however, interprets the statute to allow an offset for late fees. Def.'s Resp. at 27, ECF No. 39. Commerce's interpretation is both correct and common sense.

During the period of investigation, Assan received duty drawbacks through the Turkish Inward Processing Regime. IDM at 26, J.A. at 7,642, ECF No. 53. However, Assan paid late fees to receive its drawback. *Id.*; *see also* Pl.'s Br. at 31, ECF No. 29 (The Turkish Inward Processing Regime "authorizes companies to export goods under an [Inward Processing Certificate] within two months after the expiration date ... by being subject to a fine."). Those late fees are part

of the Inward Processing Regime. Assan acknowledged at oral argument that it only paid the late fees because of its participation in the Inward Processing Regime. Oral Arg. Tr. at 30:14–20, ECF No. 66 (counsel for Assan responding "no" when asked if Assan would have been required to pay the late fees if it did not seek a drawback). Commerce adjusted Assan's duty drawback to account for the filing penalties, offsetting the drawback by the amount of the penalties. IDM at 26, J.A. at 7,642, ECF No. 53. Assan says the statute does not allow for this offset. Pl.'s Br. at 31, ECF No. 29.

The statute instructs Commerce to increase the export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). Assan's argument rests on a semantic distinction. Because the filing penalty is stylized as a separate ledger item rather than as a reduction of the drawback granted by the Turkish government, Assan claims it is not part of the "amount of any import duties ... which have been rebated, or which have not been collected." *Id.*; *see also* Oral Arg. Tr. at 30:21–24, ECF No. 66 (Assan's counsel arguing the late fees are "a separate line item"). This does not comport with the statute.

The word "amount" means the "sum total of two or more sums or quantities," the "aggregate," or the "whole effect, substance, value, significance, or result." WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 88 (1954); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 61 (4th ed. 2000) (defining amount as "the aggregate" and the "full effect or meaning"). An amount is not a single number standing alone; it is an aggregate or a total. Assan would have the Court read "amount" to mean the single number that is labeled as a drawback, ignoring the related number labeled as a late fee. This would not fairly reflect the entirety of Assan's participation in Turkey's duty drawback system. Assan's reading of the statute is not the most natural reading; it distorts the text and ignores economic reality, leading to an unfair windfall for Assan. *Cf. Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 539 (Fed. Cir. 2019) ("accuracy and fairness must be Commerce's primary objectives") (citing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1354 (Fed. Cir. 2016)). The late fees are akin to duty not forgiven by the Turkish government because Assan needed to pay the fees to receive its drawback. *See* Oral Arg. Tr. at 30:14–20, ECF No. 66; *see also* IDM at 29, J.A. at 7,645, ECF No. 53 ("Assan would have no duty drawback benefit" without paying the late fees.). Under Assan's proposed interpretation, it would receive credit for the full duty drawback as though

it never had to pay late fees to receive that drawback. Commerce's interpretation abides by the statute and gives Assan fair credit for the amount of the actual benefit it received. The Court **SUSTAINS** Commerce's decision to deduct the late fees from Assan's duty drawback adjustment.

II. Raw Material Costs

Assan's aluminum raw material costs contain two components: the London Metal Exchange price for aluminum and the raw material premium. *See* IDM at 34–35, J.A. at 7,650–51, ECF No. 53; Def.-Ints.'/Consol. Pls.' Resp. at 23–24, ECF No. 40. The raw material premium includes conversion cost and the profit of the raw material supplier. Assan Section D Second Suppl. Questionnaire Resp. at 5S21, J.A. at 85,510, ECF No. 53. Commerce departed from Assan's reported costs for both portions of its raw material costs and instead used an average calculated across the period of investigation. IDM at 33–34, J.A. at 7,649–50, ECF No. 53. Assan agrees with Commerce's decision to average the London Metal Exchange price but challenges Commerce's decision to average the raw material premium. Pl.'s Br. at 33–34, ECF No. 29. The Court remands because Commerce failed to address one of Assan's arguments in its Final Determination.

Assan argues that Commerce improperly focused on differences in raw material premium costs while ignoring related differences in other production costs, such as labor. *Id.* at 35. It claims metal premiums vary between inputs because some are easier to convert to foil than others. *Id.* at 34–35. *But see* Def.-Ints.'/Consol. Pls.' Resp. at 33–34, ECF No. 40 ("Assan offers no record evidence for this supposed relationship."). Cheaper inputs require more work to convert into foil and thus have higher labor and other costs. Pl.'s Br. at 34–35, ECF No. 29. Accordingly, "any analysis of cost differentials" should look at the total cost of manufacturing, not just the raw material costs. *Id.* at 35. Assan made this argument in the proceedings before Commerce, which Commerce acknowledged in its Issues and Decisions Memorandum. *See* Assan's Case Br. at 5, J.A. at 91,263, ECF No. 53; IDM at 31, J.A. at 7,647, ECF No. 53. However, Commerce did not address Assan's argument aside from acknowledging its existence.

Commerce must provide an explanation for its decisions. The Court will uphold a less-than-perfect agency decision "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). However, the Court can only sustain Commerce's decision on the grounds Commerce articulated at the time of its decision. *Id.* at 285–86 ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given ...."). And it is legal error for an agency to fail to consider an

important aspect of the problem before it. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem ...."); *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1356–57 (Fed. Cir. 2005) (holding that 19 U.S.C. § 1677f(i) codifies the *State Farm* standard's application to antidumping and countervailing duty final determinations). The Court cannot consider *post hoc* rationalizations to justify an agency's decision. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action[.]").

Assan argued to Commerce that it should analyze cost differences using the total cost of manufacturing rather than focusing on just the raw material costs. Assan's Case Br. at 5, J.A. at 91,263, ECF No. 53 ("[A]ny analysis of the cost differentials between [products] should be based on [total cost of manufacturing] rather than material costs."). Commerce failed to address Assan's argument. Assan now raises that same argument to the Court. *See* Pl.'s Br. at 35, ECF No. 29; Pl.'s Reply at 19–20, ECF No. 45. Commerce failed to provide any explanation for why it rejected Assan's argument. *See* IDM at 29–35, J.A. at 7,645–51, ECF No. 53. The Aluminum Association provided an argument in its briefing, but the Court cannot consider answers Commerce never gave. *See* Def.-Ints.'/Consol. Pls.' Resp. at 33–34, ECF No. 40; *Burlington Truck Lines*, 371 U.S. at 168; *Bonney Forge Corp. v. United States*, 46 CIT __, 560 F. Supp. 3d 1303, 1315 (2022) ("The Court cannot review an explanation not given."). Because the Court has no basis on which to sustain Commerce's decision and Commerce failed to consider an important aspect of the problem, the Court **REMANDS** the issue to Commerce to reconsider or further explain its treatment of Assan's raw material premium costs. The Court declines to address the parties' other arguments at this time because Commerce's actions on remand may change the Court's analysis or moot the arguments.

III. Management Fees

In its Final Determination, Commerce included as indirect selling expenses certain management fees Kibar Americas — Assan's wholly-owned affiliate and U.S. reseller — incurred. IDM at 3, J.A. at 7,619, ECF No. 53. Assan challenges this decision and argues that the management fees were for services unrelated to U.S. sales and that the management fees were incurred in Turkey. Pl.'s Br. at 39–40, ECF No. 29. Because the management fees were related to U.S. sales and

where they were incurred is irrelevant, the Court sustains Commerce's treatment of the management fees as indirect selling expenses.

The relevant statute instructs Commerce to deduct from the constructed export price "expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise." 19 U.S.C. § 1677a(d)(1). The corresponding regulation requires Commerce to deduct "expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid." 19 C.F.R. § 351.402(b). When applying the statute to a U.S. reseller, this Court previously upheld Commerce's decision to treat "intercompany transfers" for services performed by the reseller's parent company as indirect selling expenses. *See Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1101–02 (1995).[4] In *Aramide*, the Court sustained Commerce's decision to treat administrative charges, such as for legal and audit services, as indirect selling expenses. *Id.* This supports Commerce's position in its Final Determination that "[general and administrative] expenses of a company that is exclusively a reseller, with no manufacturing activities, should be treated as indirect selling expenses, because the expenses can only be in support of the company's sole function as a reseller." IDM at 10, J.A. at 7,626, ECF No. 53.

Commerce found Kibar Americas was Assan's U.S. reseller. *Id.* Assan admits Kibar is only a reseller, not a manufacturer. Oral Arg. Tr. at 72:25–73:11, ECF No. 66. The management fees here are exactly the type of administrative expenses *Aramide* found properly classifiable as indirect selling expenses. 19 CIT at 1101–02. Indeed, logic dictates that an affiliate's expenses are all selling expenses if the affiliate's only commercial activity is selling. Accordingly, Commerce may classify the intercompany transfers from Kibar to Assan as indirect selling expenses. *See id.*

Assan additionally argues Commerce's treatment of the management fees was also improper because the fees were incurred in Turkey, not the United States. *See* Pl.'s Br. at 44–45, ECF No. 29; Pl.'s Reply at 20–21, ECF No. 45. The Court begins with the text of the statute. *See Van Buren v. United States*, 593 U.S. 374, 381 (2021) ("[W]e start where we always do: with the text of the statute."). Even if the fees were incurred in Turkey and not the United States, the statutory language does not limit indirect selling expenses to those

[4] The Court in *Aramide* analyzed an earlier version of § 1677a with slightly different language: "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." 19 CIT at 1101 (citing 19 U.S.C. § 1677a(e)(2) (1988)). The Court continues to find the case analysis persuasive.

incurred in the United States. The statute instructs Commerce to deduct from the constructed export price "expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise." 19 U.S.C. § 1677a(d)(1).

Although the statute contains the phrase "in the United States," that phrase does not modify the word "expenses" or the word "incurred." Instead, applying the nearest-reasonable-referent canon, the phrase modifies the nearest reasonable referent "seller," not a more remote alternative like "expenses" or "incurred." *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152–53 (2012) (describing the nearest-reasonable-referent canon); *Hall v. United States Dep't of Agric.*, 984 F.3d 825, 837–38 (9th Cir. 2020) (same); *Grecian Magnesite Mining, Indus. & Shipping Co., SA v. Comm'r of Internal Revenue Serv.*, 926 F.3d 819, 824–25 (D.C. Cir. 2019) (same); *see also Lockhart v. United States*, 577 U.S. 347, 352 (2016) (describing the related last-antecedent canon). That the phrase "or the affiliated seller in the United States" is offset by commas further supports reading "in the United States" as modifying only "affiliated seller" and not an earlier word or phrase before the offsetting comma. This interpretation makes sense in context; it would be strange indeed if a company were rewarded with a lower duty rate for offshoring its American operations.

A plain reading of the statute confirms the cannon's construction. The statute references expenses "generally incurred by ... the producer or exporter." 19 U.S.C. § 1677a(d)(1). Both the producer and the exporter are outside the United States. By definition, products exported to the United States must come from outside the country. A common sense reading of the statute thus dictates that expenses "incurred by" a producer or exporter outside the United States can qualify as indirect selling expenses. *Id.*

The relevant regulation is even less favorable to the Plaintiff. It expressly disclaims a geographic limitation and instructs Commerce to deduct indirect selling expenses "no matter where ... paid." 19 C.F.R. § 351.402(b). As long as the expense is "associated with commercial activities in the United States that relate to the sale" of subject merchandise, the regulation instructs Commerce to deduct them as indirect selling expenses. *Id.* The fees here meet that standard because Kibar is a reseller only so that all its expenses are appropriately considered to be associated with sales in the United States. *See Aramide*, 19 CIT at 1101–02. Assan's argument fails because it is unsupported by both the relevant statute and its accom-

panying regulation. The Court **SUSTAINS** Commerce's treatment of the management fees as indirect selling expenses.

IV. Hedging

The Aluminum Association challenges Commerce's decision to treat Assan's hedging gains and losses as part of its cost of manufacturing. Def.-Ints.'/Consol. Pls.' Br. at 8, ECF No. 31. According to the Aluminum Association, Assan's hedging revenues are unrelated to its cost of manufacturing and thus do not reasonably reflect the cost of production. *Id.* at 17 ("[T]he very nature of Assan's futures contracts ... indicate that they do not manage the risk of Assan's raw material purchases ...."); *see also* 19 U.S.C. § 1677b(f)(1)(A). Because the explanation Commerce originally gave is unsupported by substantial evidence and the Court cannot consider its *post hoc* rationalizations, the Court remands this portion of the case to Commerce.

The dispute here centers around whether one could reasonably view Assan's hedging as mitigating risks from raw material purchases and thus as part of its cost of production. That is how Assan's books treat the hedging, and Commerce will accept Assan's books and records if they reasonably reflect the cost of production. *See* 19 U.S.C. § 1677b(f)(1)(A); IDM at 36, J.A. at 7,652, ECF No. 53 (explaining that Assan records its hedging gains and losses as part of its cost of production).

As the Aluminum Association sees it, hedging protects against a future risk. Def.-Ints.'/Consol. Pls.' Br. at 17, ECF No. 31. Because Assan's hedging happens after it purchases aluminum, its hedge is not against any risk from the purchase price. *Id.* at 19. ("The fact that Assan enters into futures contracts after a raw material purchase indicates that those contracts do not manage the risk of the past raw material purchase ....") (emphasis omitted). Rather, the risk is from the sale price of the finished good. *Id.* at 7 ("[H]edges are related to the aluminum price included as part of the total sales price to purchasers of Assan's finished goods ...."). In the proceedings before Commerce, the Aluminum Association also argued that Assan hedges against risks from mark-to-market accounting losses. IDM at 36, J.A. at 7,652, ECF No. 53.

Commerce rejected the Aluminum Association's arguments in its Final Determination. *Id.* at 42, J.A. at 7,658. It explicitly rejected the notion that Assan's hedging is related to Assan's sales. *Id.* ("We disagree ... that Assan's hedging transactions are related to Assan's sales of finished goods...."). Commerce also rejected the notion that Assan's hedges mitigate risks from mark-to-market accounting. *Id.* ("The [Aluminum Association's] argument with regard to marking to market is misplaced.").

Assan now admits that the Aluminum Association's arguments have some merit but says Commerce was still correct to accept Assan's books. Assan claims its hedging serves to maintain a consistent cost for its raw material inputs. Pl.'s Resp. at 5, ECF No. 36 (Assan hedges to "ensure that raw material costs are fixed during the production of downstream products."). It agrees that, in a certain sense, its hedges relate to the eventual sale of its goods. Oral Arg. Tr. at 89:11–12, ECF No. 66 ("Everything at some level is related to the final transaction by necessity."). It also agrees that its hedging, at least in part, combats accounting losses because of price changes and marking its inventory to market. Pl.'s Resp. at 12–13, ECF No. 36 (Assan "engag[es] in short hedges to protect the value of its ... raw materials inventory."). However, Assan says Commerce's finding that its records reasonably reflect the cost of production was nonetheless supported by substantial evidence. *Id.* at 4, 19. Assan's argument rests on the fact that the substantial evidence standard allows Commerce to choose between multiple options when the record supports either. *See Matsushita Elec.*, 750 F.2d at 933.

Commerce and Assan's new explanation is a *post hoc* rationalization that differs in several key areas from Commerce's contemporaneous explanation. Assan now says its hedging, at least in part, combats losses because Assan marks its inventory to the market. Oral Arg. Tr. at 87:2–6, ECF No. 66 ("[Assan hedges] to make sure that [it does not] lose money because ... aluminum prices collapsed ... which obviously from [mark-to-market accounting] results in a reduction in [Assan's] inventory."); Pl.'s Resp. at 12–13, ECF No. 36. But Commerce's contemporaneous explanation rejected this notion. IDM at 42, J.A. at 7,658, ECF No. 53. ("The [Aluminum Association's] argument with regard to marking to market is misplaced."). Similarly, Assan now concedes that, as the Aluminum Association argues, its hedging relates "at some level" to the sale. Oral Arg. Tr. at 89:9–12, ECF No. 66. Again, Commerce's contemporaneous explanation rejected this notion. *See* IDM at 42, J.A. at 7,658, ECF No. 53 ("We disagree ... that Assan's hedging transactions are related to Assan's sales of finished goods, and thus ... are unrelated to Assan's cost of production.").

At oral argument, counsel for Commerce went so far as to suggest that the record may support either the Aluminum Association's preferred approach or the approach Commerce actually took. Oral Arg. Tr. at 100:17–25, ECF No. 66 (stating that the "substantial evidence standard allows for two inconsistent results in the record" and the Aluminum Association's "view is not the only view that is supported

by the record"). Commerce is correct that the substantial evidence standard allows the Court to sustain Commerce's decision even if the record also supports a different outcome. *See Matsushita Elec.*, 750 F.2d at 933. But this feature of the substantial evidence standard still requires Commerce's *explanation* be supported by substantial evidence. Here, Commerce's Final Determination rests on the rejection of a series of claims that Commerce and Assan now concede are at least partially correct. It is thus unsupported by substantial evidence.

The Court can only sustain Commerce's actions based on the rationale Commerce gave at the time of its Final Determination; *post hoc* rationalizations will not suffice. *See Burlington Truck Lines*, 371 U.S. at 168; *Shanghai Tainai*, 47 CIT __, 658 F. Supp. 3d at 1285 (rejecting Commerce's attempt to change its rationale); *Bonney Forge*, 46 CIT __, 560 F. Supp. 3d at 1312 ("[T]he Court may not 'presume' an answer for Commerce."). This is even more true when, as here, the *post hoc* rationalizations directly contradict Commerce's original explanation. *See Shanghai Tainai*, 47 CIT __, 658 F. Supp. 3d at 1285. Because Commerce's contemporaneous explanation — the only explanation that counts — is unsupported by substantial evidence, the Court **REMANDS** the issue to Commerce to reconsider or further explain its treatment of Assan's hedging revenues and to support that explanation with substantial evidence.

CONCLUSION

The parties raise a variety of claims in this case. Some challenges fail because Commerce's decision followed the law and was supported by substantial evidence. Others succeed because Commerce failed to provide an adequate explanation at the time of its Final Determination and now relies on *post hoc* rationalizations. For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Voluntary Remand, **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Judgment on the Agency Record, **GRANTS** Defendant-Intervenors'/Consolidated Plaintiffs' Motion for Judgment on the Agency Record, and **REMANDS** this case to Commerce for it to reconsider or further explain: (1) its duty drawback methodology, (2) its treatment of the raw material premium, and (3) its treatment of Assan's hedging revenues. It is hereby:

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

ORDERED that Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Remand Determination; and it is further

ORDERED that Plaintiffs and Consolidated 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' and Consolidated Plaintiffs' filing of comments to submit a response; and

ORDERED that Plaintiffs and Consolidated Plaintiffs shall have 15 days from the date of Defendant's filing of comments to submit any reply.

SO ORDERED.

Dated: May 8, 2024
New York, New York

Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 24–57

KENT DISPLAYS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 20–00156

[Granting Defendant's motion for summary judgment on Kent Displays, Inc.'s claim that its imported goods are entitled to exclusion from Section 301 duties.]

Dated: May 9, 2024

Herbert J. Lynch, Sullivan & Lynch, P.C., of North Andover, MA, for plaintiff Kent Displays, Inc.

Marcella Powell, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, NY for defendant United States. Also on the brief were *Patricia M. McCarthy*, Director, Commercial Litigation Branch, Civil Division, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of counsel on the brief was *Justin R. Miller*, Attorney-In-Charge for the International Trade Field Office, U.S. Department of Justice.

OPINION AND ORDER

Kelly, Judge:

Before the Court are cross-motions for summary judgment. Plaintiff Kent Displays, Inc. ("Kent Displays") protested the entry of its merchandise subject to additional duties of 25 percent ad valorem under Section 301 of the Trade Act of 1974's ("Section 301") (subheading 9903.88.01, Harmonized Tariff Schedule of the United States ("HTSUS")).[1] Its merchandise had been entered in a duty-free provision, subheading 9013.80.7000, HTSUS that was subject to the Section 301 duties, but Kent Displays claimed it received an exclusion from the duties from the United States Trade Representative ("USTR") under

[1] All references to the HTSUS refer to Revision 7 of the 2018 edition, the most recent version of the HTSUS in effect at the time of Kent Displays' entry of merchandise. *See* Rev. Entry Summ. at 1, Nov. 21, 2019, ECF No. 7.

subheading 9903.88.19, HTSUS. Kent Displays moves for summary judgment on its claim challenging the denial of its protest of the Section 301 duties by United States Customs and Border Protection's ("CBP"). *See* Pl.'s Mot. Summ. J. & Memo. L Supp'n at 1, Oct. 27, 2023, ECF No. 20 ("Pl. Mot."). Defendant opposes Kent Displays' motion and cross-moves for summary judgment, claiming that CBP concluded that the imported goods are not classified in subheading 9013.80.7000, HTSUS at all, but rather classified in subheading 8543.70.9960, HTSUS subject to a 2.6 percent ad valorem duty but not additional Section 301 duties. *See* Def. Cr. Mot. Summ. J. & Memo. L. Supp'n & Opp'n [Pl. Mot.] at 1, Feb. 16, 2024, ECF No. 27 ("Def. Mot."). For the reasons that follow, Defendant's motion is granted, and Kent Displays' motion is denied.

BACKGROUND

On July 17, 2018, Kent Displays entered merchandise into the port of Cleveland, Ohio under Entry DE6–5007164–5. *See* Pl. Am. Stmt. Mat. Facts at ¶ 2, Mar. 15, 2024, ECF No. 32 ("Pl. Stmt. Facts"); Def. Resp. [Pl. Stmt. Facts] at ¶ 2, Feb 16, 2024, ECF No. 27 ("Def. Resp. Pl. Facts"); Rev. Entry Summ. at 1. The entry consisted solely of electronic writing tablets, or eWriters, and specifically the Model No. WT16312 Dashboard ("Dashboard") sold by Kent Displays. *See* Def. Stmt. Mat. Facts at ¶ 1, Feb. 16, 2024, ECF No. 27 ("Def. Stmt. Facts"); Pl. Resp. [Def. Stmt. Facts] at ¶ 1, Mar. 8, 2024, ECF No. 28–1 ("Pl. Resp. Def. Facts").

The Dashboard is "a battery powered flexible eWriter device containing a flexible pressure sensitive liquid crystal writing film." Pl. Stmt. Facts at ¶ 8; Def. Resp. Pl. Facts at ¶ 8. The Dashboard is a "green technology paper replacement" product, with a "bistable cholesteric reflective liquid crystal display ('LCD'), a plastic sleeve case, a small coin battery and electronics, including an electronic switch to erase the display." Def. Stmt. Facts at ¶ 4; Pl. Resp. Def. Facts at ¶ 4. The liquid crystal writing film component is produced in the United States and then shipped to the People's Republic of China ("PRC"), where it is assembled "into a plastic housing with a printed circuit board." Def. Stmt. Facts at ¶ 5; Pl. Resp. Def. Facts at ¶ 5. The Dashboard allows analog information to be written on its display by way of its internal electronics, which create an electric field. Def. Stmt. Facts at ¶ 6; Pl. Resp. Def. Facts at ¶ 6. Anything written on the display will remain until it is erased by pressing an electronic switch which, together with its coin battery, applies an electric field to the liquid crystal material. Def. Stmt. Facts at ¶¶ 8–9; Pl. Resp. Def. Facts at ¶ 8–9. The Dashboard is fully assembled when imported; it

is neither presented in the piece nor presented cut to special shapes. Def. Stmt. Facts at ¶¶ 5, 12–13; Pl. Resp. Def. Facts at ¶¶ 5, 12–13.

When imported, the merchandise was entered under subheading 9013.80.7000, HTSUS, which is ordinarily duty-free.[2] *See* Protest at 1, Nov. 21, 2019, ECF No. 7; Rev. Entry Summ. at 1; HTSUS Ch. 90 Rev. 7. However, imports originating from the PRC classified under that subheading are subject to a rate of duty of 25 percent ad valorem pursuant to Section 301, indicated by the annex to the federal register notice as designated by subheading 9903.88.01, HTSUS.[3] *See Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28,710 (Off. U.S. Tr. Rep. June 20, 2018) ("*Section 301 Action Notice*"); Pl. Stmt. Facts at ¶ 12; Def. Resp. Pl. Facts. at ¶ 12. Section 301 duties were promulgated to combat unfair trade practices from the PRC by imposing an additional 25 percent ad valorem duty rate on certain goods identified by the USTR. *Section 301 Action Notice*, 83 Fed. Reg. at 28,711. Parties may, under certain circumstances, request and receive a product exclusion from the Section 301 duties.[4]

Kent Displays paid the Section 301 duty for the subject entry, which was liquidated on June 14, 2019, as entered under subheadings 9013.80.7000 and 9903.88.01, HTSUS. Pl. Stmt. Facts at ¶¶ 13–14; Def. Resp. Pl. Facts at ¶¶ 13–14. On August 2, 2018, Kent Displays filed a product exclusion request with the USTR to exempt its Dashboards in the subject entry from the additional 25 percent ad valorem Section 301 duties. Pl. Stmt. Facts at ¶ 17; Def. Resp. Pl. Facts at ¶ 17. Kent Displays reported that its Dashboards were classified subheading 9013.80.7000, HTSUS. Pl. Stmt. Facts at ¶ 19; Def. Resp. Pl.

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[2] The full article description for subheading 9013.80.7000, HTSUS at the time of entry read:

> Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof: Other devices, appliances, and instruments: Flat panel displays other than for articles of heading 8528, except subheadings 8528.52 or 8528.62.

See HTSUS Ch. 90 Rev. 7.

[3] The full article description for subheading 9903.88.01, HTSUS at the time of entry read: "Articles the product of China, as enumerated in U.S. note 20 to this subchapter." *See* HTSUS Ch. 99 Rev. 7.

[4] The USTR established procedures for interested parties to request exclusions from Section 301 duties by filling out a product exclusion request form. *See Procedures To Consider Requests For Exclusion Of Particular Products From [Section 301 Action Notice]*, 83 Fed. Reg. 32,181, 32,182 (Off. [USTR] July 11, 2018) ("*Exclusion Procs.*").The filing party must provide the 10-digit HTSUS code most applicable to the merchandise for which the Section 301 duty exclusion was requested, as well as a description of the merchandise's physical characteristics "that distinguish it from other products within the covered 8-digit subheading." *Id.*

Facts at ¶ 19. The USTR responded on July 16, 2019, and requested that Kent Displays confirm that the Dashboards were properly classified under the HTSUS subheading listed in the initial exclusion request. Pl. Stmt. Facts at ¶ 20; Def. Resp. Pl. Facts at ¶ 20. The USTR also instructed Kent Displays to provide a revised product description for the Dashboard, including its physical characteristics distinguishing it from other products covered by the HTSUS subheading that would enable CBP to "consistently and correctly classify the covered product at the time of entry." Pl. Stmt. Facts at ¶ 20; Def. Resp. Pl. Facts at ¶ 20. Kent Displays replied to the USTR's request on July 30, 2019, proposing a product description of "flexible pressure sensitive liquid crystal flat panel display device used as a surface for electronic writing." Pl. Smt. Facts at ¶ 21; Def. Resp. Pl. Facts at ¶ 21. The USTR responded on September 26, 2019.[5] *See* USTR Exclusion Letter.

On November 21, 2019, Kent Displays' Customs Broker filed Protest No. 4101–19–100594, challenging the classification of the subject entry under subheadings 9013.80.7000 and 9903.88.01, HTSUS, and claiming the entry was exempt from Section 301 duties pursuant to the USTR Exclusion Letter and should be classified in subheadings 9013.80.7000 and 9903.88.19, HTSUS. Pl. Stmt. Facts at ¶ 23; Def. Resp. Pl. Facts at ¶ 23; *see also* Protest at 1. Kent Displays requested that CBP reliquidate the subject entry and refund the Section 301 duty paid by Kent Displays. Pl. Stmt. Facts at ¶ 23; Def. Resp. Pl. Facts at ¶ 23; *see also* Protest at 1, Nov. 21, 2019, ECF No. 7. On March 2, 2020, CBP denied Kent Displays' protest because the "merchandise in the instant shipment is an electrical device with an individual function that is more properly classified under HTSUS 8543.70.9960," and that "[n]o correction has been made to [HTSUS]

[5] The parties dispute whether the USTR advised Kent Displays that its product exclusion request was granted. Kent Displays claims that the exclusion was granted, and that "flexible pressure sensitive LCD panel display devices used as a surface for electronic writing (described in [HTSUS] 9013.80.7000) imported on or after July 6, 2018 were excluded from [Section 301 duty]." Pl. Stmt. Facts at ¶ 22. Defendant denies Kent Displays' fact statement, instead citing Exhibit D: Letter from USTR, Sept. 26, 2019, ECF No. 27–1 ("USTR Exclusion Letter"), in its response to Kent Displays' statement of material facts. *See* Def. Resp. Pl. Facts at ¶ 22. Specifically, the letter states:

> [T]he [USTR] has determined to grant [Product Exclusion Request Number USTR-2018–0025–0282] submitted pursuant to notice published at 83 [Fed. Reg.] 32[,]181 . . .
>
> An exclusion in response to your request has been granted by excluding from the additional tariff's products covered by a specially drafted description contained in the annex to the exclusion notice. The scope of the exclusion is governed by the scope of the 10-digit HTSUS subheadings and product description in the annex to the product exclusion notice, and not by the product descriptions set out in any particular request for exclusion.

USTR Exclusion Letter.

8543.70.9960 as the result would be adverse to [Kent displays]."[6] Pl. Stmt. Facts at ¶ 24; Def. Resp. Pl. Facts at ¶ 24. At the time of entry, subheading 8543.70.9960, HTSUS was subject to a 2.6 percent ad valorem duty but not additional Section 301 duties.[7] *See* HTSUS Ch. 85 Rev. 7; *see also* Compl. at Prayer for Relief ¶ 3, July 18, 2022, ECF No. 8; Pl. Mot. at 10–11; Def. Mot. at 7. CBP neither re-classified nor reliquidated the subject entry under subheading 8543.70.9960, HTSUS when it denied the protest. Pl. Stmt. Facts at ¶ 25; Def. Resp. Pl. Facts at ¶ 25.

Kent Displays filed a summons pursuant to 28 U.S.C. § 1581(a) to contest CBP's denial of the protest. *See* Summons at 1–2, Aug. 18, 2020, ECF No. 1. On July 18, 2022, Kent Displays filed its complaint in the instant action. *See* Compl. at 1, 7. On October 27, 2023, Kent Displays moved this Court for summary judgment in its favor. *See* Pl. Mot. at 1. Defendant cross-moved for summary judgment on February 16, 2024, which was fully briefed on March 29, 2024. *See* Def Mot. at 1; Def. Reply Br. Supp'n [Def. Mot.] at 1, Mar. 29, 2024, ECF No. 33.

JURISDICTION AND STANDARD OF REVIEW

The Court has exclusive jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."[8] 28 U.S.C. § 1581(a). Denied protests are subject to de novo review, i.e., "upon the basis of the record made before the court." *See* 28 U.S.C. § 2640(a)(1).

The Court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). To raise a genuine issue of material fact, a party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

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[6] The full article description for subheading 8543.70.9960, HTSUS at the time of entry read: "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Other: Other: Other." HTSUS Ch. 85 Rev. 7.

[7] Since the time of entry, the USTR designated merchandise within the subheading 8543.70.9960, HTSUS as subject to Section 301 duties. *See Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 40,823 (Off. [USTR] Aug. 16,2018).

[8] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

DISCUSSION

Kent Displays argues the Dashboard is classified under subheadings 9013.80.7000 and 9903.88.19, HTSUS, duty free and specifically excluded from Section 301 duties, because (1) neither CBP nor the Court may change the "as entered" classification of its merchandise in subheading 9013.80.7000, HTSUS; and (2) CBP improperly denied its protest requesting exclusion from Section 301 duties entitling it to classification under subheading 9903.88.19, HTSUS. Pl. Mot. at 7–10. Alternatively, Kent Displays asserts that its merchandise should be classified under subheading 8543.70.9960, HTSUS, dutiable at 2.6 percent ad valorem but not subject to Section 301 duties.[9] *Id.* at 10–11. Defendant also moves for summary judgment, contending that: (1) because Kent Displays protested the entry, liquidation was not final and CPB was within its authority to consider the classification of the Dashboard in both subheadings 9013.80.7000 and 9903.88.01, HTSUS in denying the protest; (2) the Dashboard is not classified in subheading 9013.80.7000, HTSUS, but rather under subheading 8543.70.9960, HTSUS; and (3) the Dashboard does not meet the product description set forth in the exclusion notice for Section 301 duty exclusion.[10] Def. Mot. at 11–18. For the following reasons, Defendant's motion is granted, and Kent Displays' motion is denied.

I. Finality of Classification at Entry

Kent Displays argues that this Court should order CBP to reliquidate its entry with the "benefit of Section 301 Product Exclusion 9903.88.19." Pl. Mot. at 11. Kent Displays argues that when it protested the classification of its entry, it only protested CBP's failure to classify its merchandise as entitled to the Section 301 duty exclusion provided in subheading 9903.88.19, HTSUS. *Id.* at 7–9. According to Kent Displays, CBP could not change the classification of the Dashboards under subheading 9013.80.7000, HTSUS. *Id.* at 8. Rather, Kent Displays contends that CBP could only decide whether the entry was entitled to exclusion from Section 301 duties because (i) only the denial of the exclusion (and classification in subheading 9903.88.01, HTSUS) was protested, and (ii) Kent Displays reasonably relied on CBPs prior tariff treatment of imported Dashboards. *Id.* at 7–9. Given

[9] Defendant agrees that if Kent Displays' first challenge is rejected, then "the Court should classify the merchandise in [HTSUS 8543.70.9960], order the reliquidation of the merchandise in that subheading, and refund 22.4 percent ad valorem." Def. Mot. at 7.

[10] The exclusion notice provided for exclusion for products that are "Flexible pressure sensitive LCD panel display devices used as a surface for electronic writing (described in statistical reporting number 9013.80.7000)." *See Exclusion Notice*, 84 Fed. Reg. at 52,567.

that this Court reviews the dispute underlying a protest de novo, *see* 28 U.S.C. § 2640(a)(1), Kent Displays appears to be arguing by implication that this Court is also powerless to alter the classification of the Dashboards under subheading 9013.80.7000, HTSUS. *See, e.g.,* Pl. Mot. at 6 ("The Court must reach the correct result but should start from the premise that at the most operative events, entry, liquidation, and [p]rotest denial, the [p]arties agreed or assented to the classification of [the Dashboards] under HTSUS subheading 9013.80.7000");[11] *see also id.* at 7–10. Defendant contends that CBP properly considered classification of the Dashboards under subheading 9013.80.7000, HTSUS, when it denied Kent Displays' protest, and also that Kent Displays lacks a legal basis for its reasonable reliance claim. Def. Mot. at 15–18. For the following reasons, Kent Display's arguments are rejected.

A. Finality of Liquidation

Kent Displays claims that CBP was prohibited from "re-open[ing] an [e]ntry that had passed the voluntary re-liquidation period" and re-classifying the Dashboards when reviewing the protest. Pl. Mot. at 8. Implicit in its argument is the suggestion that the Court is similarly constrained in its review of the dispute. *See id.* at 5–6 (contending that the Court should start its analysis from the premise that the parties agreed on classification under subheading 9013.80.7000, HTSUS). Defendant argues that the liquidation was never finalized due to Kent Displays' protest. Def. Mot. at 15–18.

When a good is imported into the United States, 19 U.S.C. § 1484 instructs the importer of record to make entry of the good using reasonable care. Among the procedural requirements of entry, the importer must assert a classification for the merchandise under the HTSUS and declare a dutiable value. 19 U.S.C. § 1484(a). CBP is also directed to ascertain the correct classification, value and rate, and amount of duty on imported goods in an entry under 19 U.S.C. § 1500.

Unless CBP voluntary reliquidates an entry within 90 days of initial liquidation under 19 U.S.C. § 1501, liquidations by CBP are normally final and conclusive, including a merchandise's final classification and applicable rate of duty. 19 U.S.C. §§ 1500, 1514(a). However, liquidation is not final if an importer files a protest within 180 days of the liquidation. *See* 19 U.S.C. §§ 1500, 1514(a).

[11] Kent Displays submits that four previous entries of the Dashboard, spanning from March of 2017 to January of 2018, were all entered and liquidated under subheading 9013.80.7000, HTSUS. Pl. Stmt. Facts at ¶ 15; Pl. Mot. at 9–10. Defendant objects to Kent Displays' submission as immaterial, indicating that the entries are included in this case. Def. Resp. Pl. Facts at ¶ 15.

Civil actions arising out of the denial of a protest must be filed with the Court within 180 days and are reviewed de novo. *See* 28 U.S.C. §§ 2636(a), 2640(a)(1). Upon review of a classification challenge, the Court first considers whether CBP's classification is correct, either independently or by comparison of competing HTSUS headings proposed by the parties. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The common meaning of a tariff term under consideration is a question of law to be decided by the Court, while the determination of whether a particular item fits within that meaning is a question of fact. *E.M. Chemicals V. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990). The importer assumes the burden of demonstrating that CBP's classification was incorrect. *Jarvis Clark Co.*, 733 F.2d at 876. Generally, factual determinations by CBP are presumed correct. *Goodman Mfg. L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (citing 28 U.S.C. § 2639(a)(1)). However, the presumption concerns only issues of fact—not questions of law. *Id.* The Court determines "the correct result, by whatever procedure is best suited to the case at hand" when an imported good's classification is challenged. *Jarvis Clark Co.*, 733 F.2d at 878 (emphasis omitted).

Here, the classification is not final. CBP liquidated the subject entry on June 14, 2019, under subheadings 9013.80.7000 and 9903.88.01, HTSUS. Pl. Stmt. Facts at ¶ 14; Def. Resp. Pl. Facts at ¶ 14. Kent Displays protested the subject entry's classification on November 21, 2019—within the 180-day time constraint provided by statute. *See* Pl. Stmt. Facts at ¶ 23; Def. Resp. Pl. Facts at ¶ 23; *see also* 19 U.S.C. §1514(a); 28 U.S.C. § 2636(a). Kent Displays' protest forestalled the final liquidation of the entry. *See Cyber Power Sys. (USA) v. United States*, 586 F. Supp. 3d 1325, 1331–32 (Ct. Int'l Trade 2022) (finding that the filing of a timely protest rendered CBP's liquidation of the imported goods not final). Congress granted this Court the authority to find the correct classification as a consequence of Kent Display' challenge to CBP's denial of its protest here. *See* 28 U.S.C. § 2643; *see also* Summons at 1–2. *Jarvis Clark Co.*, 733 F.2d at 878.

The parties both invoke this Court's decision in *Cyber Power Systems* to support their respective positions. *See* Pl. Mot. at 8 (citing 586 F. Supp. 3d 1325); Def. Mot. at 16–17 (same). Kent Displays offers the case to support its assertion that "CBP does not have the right to challenge the classification of the involved goods after the voluntary re-liquidation period has expired." Pl. Mot. at 8 (citing *Cyber Power Sys.*, 586 F. Supp. 3d 1325). Kent Displays is mistaken. *Cyber Power Systems* provided that the Government lacked statutory authority to

assert a counterclaim against an importer challenging the denial of a protest to seek reliquidation from CBP under a different HTSUS classification. *See* 586 F. Supp. 3d at 1330. Here, there is no counterclaim asserted by the Government that might render the narrow holding of that case applicable to Kent Displays' protest.

Defendant asserts that *Cyber Power Systems* stands for the blanket proposition that "a timely protest suspends finality for all parties," which allows CBP consider the classification of the Dashboards in evaluating Kent Displays' request for an exclusion and denying the protest. Def. Mot. at 16–17 (citing 586 F. Supp. 3d at 1331–32). It is unclear whether Defendant is arguing that CBP could re-classify merchandise beyond the time allowed for voluntary reliquidation. *See* Pl. Mot. at 7–9 (arguing that CBP lacks the power to re-classify after the time period for voluntary reliquidation). *Cyber Power Systems* specifically refrained from ruling on whether CBP could re-classify merchandise in a subheading different from the one asserted in a protest or as entered. 586 F. Supp. 3d at 1332 n.12 ("Because CBP did not reclassify the Subject Cables after reviewing the Protest, the court cannot address CBP's authority to do so here").

Similar to *Cyber Power Systems*, the Court here need not determine whether CBP could re-classify merchandise in a heading different from the one proposed by the protester when ruling on a protest. First, CBP did not re-classify the merchandise; it considered the classification of the Dashboards in assessing whether it would be entitled to an exclusion of Section 301 duties when reviewing Kent Displays' protest.[12] Second, the Court's mandate to reach the correct result moots the parties' dispute regarding the extent of CBP's authority to consider the classification in this case. *See* 28 U.S.C. § 2643(b); *Jarvis Clark Co.*, 733 F.2d at 878. Therefore, the issue concerning classification of the Dashboard in subheading 9013.80.7000, HTSUS is properly before this Court.

B. Reasonable Reliance

Kent Displays argues the classification of its merchandise in subheading 9013.80.7000, HTSUS cannot now be changed by either CBP or this Court. Pl. Mot. at 5–9. Invoking equitable considerations, Kent Displays avers "importers should be able to reasonably rely upon the actions taken by CBP regarding Tariff treatment of the goods imported by the importer." *Id.* at 10. Defendant counters that Kent Displays offers no legal basis for its claimed reliance and asserts that

[12] As noted by Defendant, "CBP did not reliquidate the entry under subheading 8543.70.99[60], HTSUS, pursuant to 19 U.S.C. § 1515(a), which has no statutory mechanism that allows CBP to issue bills as a result of the re-classification of the merchandise upon denying a protest." Def. Mot. at 6

eligibility for Section 301 duty exclusions is governed by "the 10-digit HTSUS provision and the product description set forth in the exclusion." Def. Mot. at 18.

Kent Displays' appeal to general principles of equity is unpersuasive. In its brief, Kent Displays claims that under 19 U.S.C. § 1315, "actual uniform liquidations can establish an established and uniform practice" that might hold CBP to act consistently with prior HTSUS classifications. Pl. Mot. at 10. However, it then concedes that the requirements of a "de facto established and uniform practice are stringent," *id.* (citing *Atari Caribe, Inc. v. United States*, 16 CIT 588, 595 (1992)), and that it further "does not claim that CBP had an established and uniform practice within the context of 19 U.S.C. § 1315." *Id.* Thus, Kent Displays seemingly raises and then abandons any application of the doctrine, and instead argues "the essence of 19 U.S.C. § 1315 and 19 U.S.C. § 1514" warrant an importer to reasonably rely on CBP's past classifications of imported goods. *See id.* Kent Displays points to no authority that might support its assertion that equitable principles preclude this Court from ruling on the proper classification of the Dashboard. *See id.* at 9–10. Accordingly, Kent Displays' argument lacks merit and is thus rejected.

II. Proper Classification of the Dashboard

Defendant argues that Kent Displays' Dashboards are properly classified under subheading 8543.70.9960, HTSUS dutiable at a rate of 2.6 percent and not subject to the 25 percent ad valorem Section 301 duties of subheading 9903.88.01, HTSUS, nor in need of the Section 301 duty Exclusion granted by the USTR.[13] Def. Mot. at 11–15. Kent Displays concedes that should the Court reject its argument that the classification in subheading 9013.80.7000, HTSUS, was final, that the Dashboards are classifiable under subheading 8543.70.9960, HTSUS.[14] Pl. Mot. at 10–11. For the following reasons, Dashboards are classified under subheading 8543.70.9960, HTSUS dutiable at a rate of 2.6 percent and not subject to Section 301 duties.

[13] In its motion, Kent Displays fails to analyze whether HTSUS 9013.80.7000 is the proper classification for the imported Dashboards. *See generally* Pl. Mot. Rather, Kent Displays concedes that should the Court reject its argument that liquidation of the subject entry was final, that its imported Dashboards are classifiable under HTSUS 8543.70.9960. *Id.* at 10–11. Nonetheless, the Court must determine whether HTSUS 9013.80.7000 or 8543.70.9960 is the correct classification for Dashboards in the subject entry. *See Jarvis Clark Co.*, 733 F.2d at 878.

[14] Kent Displays indicates that at the time of import, goods classified under 8543.70.9960, HTSUS were not subject to Section 301 duties, and thus Kent Displays should be refunded for the charged amount. Pl. Mot. at 10–11. The parties agree that if the Court finds the merchandise classifiable under 8543.70.9960, HTSUS then liquidation should be ordered under that subheading and Kent Displays should be refunded 22.4 percent ad valorem. Def. Mot. at 7.

The HTSUS consists of headings, which are "general categories of merchandise," and subheadings, which "provide a more particularized segregation of the goods within each category." *See Dependable Packaging Solutions, Inc. v. United States*, 757 F.3d 1374, 1377 (Fed. Cir. 2014). Classification under the HTSUS is governed by the General Rules of Interpretation ("GRIs") and, if necessary, the Additional United States Rules of Interpretation ("ARIs"), both of which are to be applied in numerical order. *See BASF Corp. v. United States*, 482 F.3d 1324, 1326 (Fed. Cir. 2007); *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). GRI 1 provides, in pertinent part, that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." By design, most classification questions are answered by application of GRI 1. *Telebrands Corp. v. United States*, 36 CIT 1231, 1235 (2012), *aff'd* 522 Fed. Appx. 915 (Fed. Cir. 2013).

When determining the proper HTSUS classification of imported merchandise, the Court must "find the correct result," either independently or by comparison of competing HTSUS headings proposed by the parties. *Jarvis Clark Co.*,733 F.2d at 878. The meaning of a tariff term is a question of law to be decided by the Court. *E.M.* Chemicals, 920 F.2d at 912. "The terms of the HTSUS are construed according to their common commercial meanings." *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009). The "Explanatory Notes" ("ENs"), promulgated by the World Customs Organization ("WCO") to supplement each chapter of the HTSUS, are persuasive tools and "'generally indicative' of the proper interpretation of the tariff provision." *Dependable Packing Solutions, Inc.*, 757 F.3d at 1377 (quoting *Lemans Corp. v. United States*, 660 F.3d 1311, 1316 (Fed. Cir. 2011)).

The parties present the Court with two potential HTSUS headings for classification of the Dashboards:

> Heading 9013, "Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof"

HTSUS Ch. 90 Rev. 7; Pl. Mot. at 7–10,[15] and

[15] At the time of entry, subheading 9013.80.7000, HTSUS was duty-free but designated as subject to a 25 percent ad valorem rate of duty by virtue of subheading 9903.88.01, HTSUS. HTSUS Ch. 90 Rev. 7; HTSUS Ch. 99 Rev. 7.

> Heading 8543: "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:"[16]

HTSUS Ch. 85 Rev. 7; Def. Mot. at 13.[17]

Given the Court's obligation to reach the correct result, other chapters of the HTSUS must also be considered, regardless of whether they were submitted by the parties. A survey of the HTSUS chapters reveals that there are a handful to which the Dashboard might apply. Potential alternative chapters include Chapter 95, consisting of "Toys, games and sports requisites; parts and accessories thereof," the "Miscellaneous manufactured articles" of Chapter 96, or a different heading in Chapter 90. Of Chapter 95, the only somewhat relevant heading to the Dashboards might be 9504, including, inter alia, "Video game consoles and machines." HTSUS Ch. 95 Rev. 7. However, no party contends that the Dashboard is intended to function as a video game, or that it might be capable of operating in that manner. *See generally* Pl. Mot; Def. Mot. Chapter 96 fares no better, as no heading in the chapter provides for any sort of electronic writing tablet or an electronic device that could function in that capacity. *See generally* HTSUS Ch. 96 Rev. 7. Application of GRI 1 renders Chapters 95 and 96 inapplicable to the Court's analysis.

A search of other headings in Chapter 90 suggests Heading 9017, HTSUS might be considered. The heading includes items used for "Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators)," inter alia. However, no party asserts that the Dashboard primarily serves a calculation function. *See generally* Pl. Mot.; Def. Mot. Heading 9023 pertains to "Instruments, apparatus and models, designed for demonstrational purposes (for example, in education or exhibitions), unsuitable for other uses, and parts and accessories thereof." Although the Dashboard could serve a demonstrational purpose, it is undisputed that its primary function is to serve as an eWriter as an alternative for paper. Def. Stmt. Facts at ¶ 4; Pl. Resp. Def. Facts at ¶ 4. Thus, application of GRI 1 precludes consideration of other headings in Chapter 90, as none provide a possible means for classification of the Dashboard based upon their

[16] At the time of entry, subheading 8543.70.9960, HTSUS was subject to a 2.6 percent rate of duty. HTSUS Ch. 85 Rev. 7.

[17] The Court begins its analysis by first examining and comparing the four-digit headings and any relevant section or chapter notes; after the proper heading is selected, the Court will move to the terms of the subheadings to determine the correct classification. *See* GRI 1, 6 (2018); *see also Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998).

terms. Accordingly, the only two headings which could apply to the Dashboards are those headings raised in the protest.

With respect to Heading 9013, HTSUS, it is located in Section XVIII of the HTSUS, covering "Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches, musical instruments; parts and accessories thereof." HTSUS Section XVIII Rev. 7. Chapter 90 in particular relates to "Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus." HTSUS Ch. 90 Rev. 7. Heading 9013, HTSUS provides for "Liquid crystal devices not constituting articles provided for more specifically in other headings."[18] HTSUS Ch. 90 Rev. 7.

A liquid crystal display is an "electronic display device," consisting of liquid crystals sandwiched between electrodes, that "operates by applying a varying electric voltage to [the] layer of liquid crystal, thereby inducing changes in its optical properties." Harry G. Walton & David Dunmur, *Liquid Crystal Display*, Encyclopaedia Britannica, https://www.britannica.com/technology/liquid-crystal-display (last visited Apr. 30, 2024). The EN for the 2018 version of the WCO ENs explains that the heading pertains to "[l]iquid crystal devices consisting of a liquid crystal layer sandwiched between two sheets or plates of glass or plastics . . . presented in the piece or cut to special shapes." EN 90.13 (2018). Thus, the plain wording and the EN together suggest that the scope of subheading 9013.80.7000, HTSUS includes liquid crystals sandwiched between plates containing electrodes that are entered on a "piece" basis or that are cut into special and particular shapes. HTSUS Ch. 90 Rev. 7; EN 90.13 (2018); *see also Sharp Microelectronics Tech., Inc.*, 122 F.3d at 1451 (finding that Heading 9013, HTSUS was designed to "exclude therefrom finished articles

[18] Heading 9013, HTSUS refers to "liquid crystal devices" and does not use the term "liquid crystal displays." The Court construes the terms of the HTSUS according to their common commercial meaning. *See Millenium Lumber Distrib.*, 558 F.3d at 1329. The ENs and the literature suggests these two terms are interchangeable. *Compare* EN 90.13 (2018) ("Liquid crystal devices consisting of a liquid crystal layer sandwiched between two sheets or plates of glass or plastics, whether or not fitted with electrical connections"), *with* Fawwaz Ulaby & Umberto Ravaioli, Fundamentals of Applied Electromagnetics 336 (Pearson Prentice Hall ed., 8th ed. 2022) https://em8e.eecs.umich.edu/pdf/tb14.pdf (last visited Apr. 30, 2024) (explaining that an LCD contains a "sandwiched liquid-crystal layer [that] is straddled by a pair of optical filters [or "grooved glass substrates"] with orthogonal polarizations"); *LCD*, Merriam-Webster's Dictionary, https://www.merriamwebster.com/dictionary/LCD (last visited Apr. 30, 2024) ("an electronic display . . . that consists of segments of a liquid crystal whose reflectivity varies according to the voltage applied to them"); What Is A Liquid Crystal Display (LDC)?, Lenovo https://www.lenovo.com/us/en/glossary/what-is-lcd/ (last visited Apr. 30, 2024) ("An LCD consists of a layer of liquid crystals sandwiched between two transparent electrodes. When an electric current is applied, the crystals align to control the amount of light passing through them, creating the image you see on the screen"); *see also Sharp Microelectronics Tech., Inc. v. United States*, 122 F.3d 1446, 1451 (Fed. Cir. 1997) (using "liquid crystal devices" and "liquid crystal displays" interchangeably).

using the properties of liquid crystals," as the HTSUS Nomenclature Committee and the Harmonized System Committee of the Customs Cooperation Council intentionally left "finished articles incorporating such displays in their particular appropriate headings.").

Heading 8543, HTSUS is located in Chapter 85 of Section XVI of the schedule. Section XVI pertains to "Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles." HTSUS Section XVI Rev. 7. Chapter 85 in particular pertains to "Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles." HTSUS Ch. 85 Rev. 7. The 2018 EN for heading 8543 indicates that the heading is a basket category covering "all electrical appliances and apparatus, not falling in any other heading of this Chapter, nor covered more specifically by a heading of any other Chapter of the Nomenclature" that have "individual functions." EN 85.43 (2018). Although most of the covered merchandise "consist of an assembly of electrical goods or parts" that operate "wholly electrically," the EN states that heading 8543 also includes "electrical goods incorporating mechanical features provided that such features are subsidiary to the electrical function of the machine or appliance." *Id.*

In this case, the parties do not dispute the properties of the merchandise at issue. The parties agree that the Dashboard is an electronic writing tablet containing a "flexible pressure sensitive liquid crystal writing film" that is intended to serve as a "green technology paper replacement" product. Def. Stmt. Facts at ¶ 4; Pl. Resp. Def. Facts at ¶ 4. The Dashboard consists of a "bistable cholesteric reflective [LCD], a plastic sleeve case, a small coin battery and electronics, including an electronic switch to erase the display." Def. Stmt. Facts at ¶ 4; Pl. Resp. Def. Facts at ¶ 4. A user can draw or write on the surface of the display, which will remain without the use of power until it is erased. Def. Stmt. Facts at ¶ 6–7; Pl. Resp. Def. Facts at ¶ 6–7. To erase the display, the user presses an electronic switch, which "applies an electronic field to the liquid crystal material" through use of the coin battery. Def. Stmt. Facts at ¶ 8–9; Pl. Resp. Def. Facts at 8–9. The size of the Dashboard spans from 5 inches diagonal to 14 inches diagonal. Def. Stmt. Facts at ¶ 10–11; Pl. Resp. Def. Facts at ¶ 10–11.

Here, the Dashboards are not classifiable under Heading 9013, HTSUS. The Dashboard is a finished product incorporating elements and characteristics that render it more than an LCD. It is undisputed

that in addition to the LCD screen, the dashboard features plastic housing, a battery, and an electronic switch. Def. Stmt. Facts at ¶4; Pl. Resp. Def. Facts at ¶4.. The liquid crystal writing film component of the Dashboard is fully assembled "into a plastic housing with a printed circuit board.". Def. Stmt. Facts at ¶ 5; Pl. Resp. Def. Facts at ¶ 5. The parties do not contend that any additional assembly occurs after importation before Kent Displays sells the product, only that the Dashboards are "packaged as a consumer product." Def. Stmt. Facts at ¶ 5; Pl. Resp. Def. Facts at ¶ 5.

Thus, as fully assembled items, the Dashboards are neither "presented in the piece" nor "cut to special shapes" when entered. Def. Stmt. Facts at ¶¶ 12–13; Pl. Resp. Def. Facts at ¶¶ 12–13; *see also* EN 90.13 (2018). The plain terms of heading 9013, HTSUS and the EN do not cover the characteristics of the Dashboards that might allow for classification under the heading. Accordingly, Kent Displays' proposed HTSUS classification under subheading 9013.80.7000, HTSUS for its Dashboards is rejected.

The Dashboards are properly classified under heading 8543, HTSUS. The Dashboards are a battery-powered electronic writing tablet device. *See* Def. Stmt. Facts at ¶¶ 1–9; Pl. Resp. Def. Facts at ¶¶ 1–9. Containing a "bistable cholesteric reflective [LCD]," the Dashboard essentially has two stable states: one where analog information is displayed after input by a finger or stylus, created through an electric field; and one where the display is blank after the erase button is pressed. Def. Stmt. Facts at ¶¶ 6–9; Pl. Resp. Def. Facts at ¶¶ 6–9. A function of the Dashboard is its ability to reset the surface, which occurs through application of "an electronic field" to the LCD display enabled through use of the coin battery. Def. Stmt. Facts at ¶ 8–9; Pl. Resp. Def. Facts at ¶¶ 8–9. The product's purpose to serve as a replacement to paper reveals the importance of the Dashboard's erasing capability. Def. Stmt. Facts at ¶ 3; Pl. Resp. Def. Facts at ¶ 3.

Given the importance of its ability to electronically erase its display, the Dashboard can be classified under heading 8543, HTSUS as an electronic apparatus, with individual function to write and erase without requiring paper. *See* EN 85.43 (2018). Heading 8543, HTSUS covers not only an apparatus that is wholly electrical, but also products where a mechanical feature is subsidiary to an electric feature. Here, the primary feature of the Dashboard is its electronic erasing function; the subsidiary feature is the display of the Dashboard on which a person writes. *See* Def. Stmt. Facts at ¶ 3; Pl. Resp. Def. Facts at ¶ 3; *see also* EN 85.43 (2018) (including "electrical goods incorporating mechanical features provided that such features are subsidiary to the electrical function of the machine or appliance"). Accord-

ingly, the Dashboard is properly classified in Heading 8543, HTSUS, under the basket category of subheading 8543.70.9960, HTSUS, providing for "electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Other: Other: Other."

Subheading 8543.70.9960, HTSUS is the correct classification of the Dashboards in the subject entry. At the time of entry, merchandise classified under subheading 8543.70.9960, HTSUS had a dutiable rate of 2.6 percent free of Section 301 duties. Thus, Kent Displays' argument concerning the applicability of Section 301 duty exclusion to the Dashboards is moot. Accordingly, Defendant's motion is granted, and Kent Displays' motion is denied. The subject entry shall be reliquidated under subheading 8543.70.9960, HTSUS.

CONCLUSION

For the foregoing reasons, the Dashboards are classified in subheading 8543.70.9960, HTSUS. Therefore, Defendant's motion is granted, and Kent Displays' motion is denied. The entry DE6–5007164–5 shall be liquidated under subheading 8543.70.9960, HTSUS, and Kent Displays shall be refunded 22.4 percent ad valorem of the duty paid, being the difference between the 2.6 percent ad valorem duty owed on goods classified in subheading 8543.70.9960, HTSUS and the 25 percent ad valorem duty it paid in connection with the Section 301 duties assessed on the merchandise when entered under subheadings 9013.80.7000, 9903.80.01, HTSUS. Judgment will enter accordingly.

Dated: May 9, 2024
New York, New York

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

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