U.S. Court of International Trade

Slip Op. 18–173

ONE WORLD TECHNOLOGIES, INC., Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION, and ACTING COMMISSIONER KEVIN K. MCALEENAN, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00200
PUBLIC VERSION

[Granting Defendants' partial motion to dismiss and motion to strike jury demand; Denying the motions to intervene filed by the International Trade Commission and The Chamberlain Group, Inc.; Granting a preliminary injunction in favor of Plaintiff.]

Dated: December 14, 2018

Stephen E. Ruscus, *Jason C. White*, and *Michael J. Abernathy*, Morgan, Lewis & Bockius, LLP, of Washington, D.C. and Chicago, IL, argued for Plaintiff One World Technologies, Inc.

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

OPINION

Choe-Groves, Judge:

This action concerns garage door openers that were redesigned to avoid infringing a registered patent. Plaintiff One World Technologies, Inc. ("Plaintiff" or "One World") commenced this action to obtain judicial review of a decision by U.S. Customs and Border Protection ("Customs") excluding an entry of One World's Ryobi Ultra-Quiet Garage Door Opener, Model No. GD126 ("Redesigned GDO"),[1] pursuant to a Limited Exclusion Order issued by the International Trade Commission ("Commission" or "ITC"). Plaintiff asserts that Customs denied its protest regarding the entry of the Redesigned GDO based on a flawed interpretation of the registered patent and that its product is not included in the scope of the Limited Exclusion Order.

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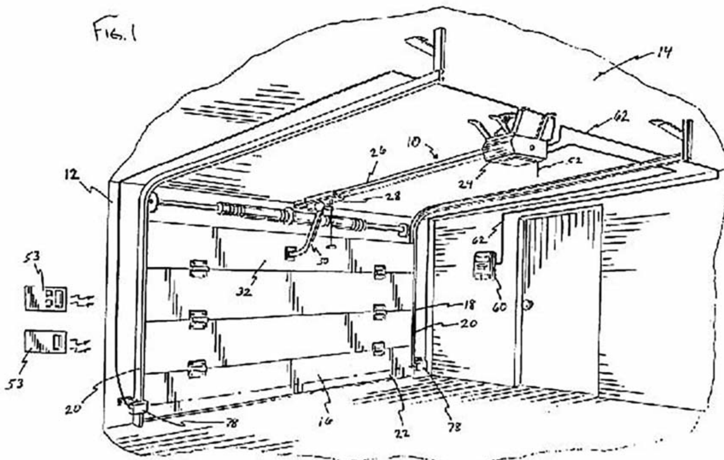
[1] In prior administrative proceedings, One World referred to Model Nos. GD126 and GD201 as the "Redesigned GDOs." Entry No. 442–75629994 contained only units of Model No. GD126 and is therefore the only merchandise properly before the court.

Before the court are multiple motions filed by the Parties, including Plaintiff's motion for temporary restraining order and preliminary injunction, ECF No. 5, a partial motion to dismiss and motion to strike demand for jury trial filed by Defendants United States, U.S. Department of Homeland Security, Customs, and Acting Commissioner Kevin K. McAleenan (collectively, "Defendants" or "Government"), ECF No. 39, and motions to intervene filed by the ITC and The Chamberlain Group, Inc. ("Chamberlain"), ECF Nos. 43 and 47. For the reasons explained below, the court grants Defendants' partial motion to dismiss with respect to Plaintiff's claim under 28 U.S.C. § 1581(h) and issues a preliminary injunction with respect to Plaintiff's claim under 28 U.S.C. § 1581(a). The motions to intervene are denied. Defendants' motion to strike Plaintiff's demand for a jury trial is granted.

BACKGROUND

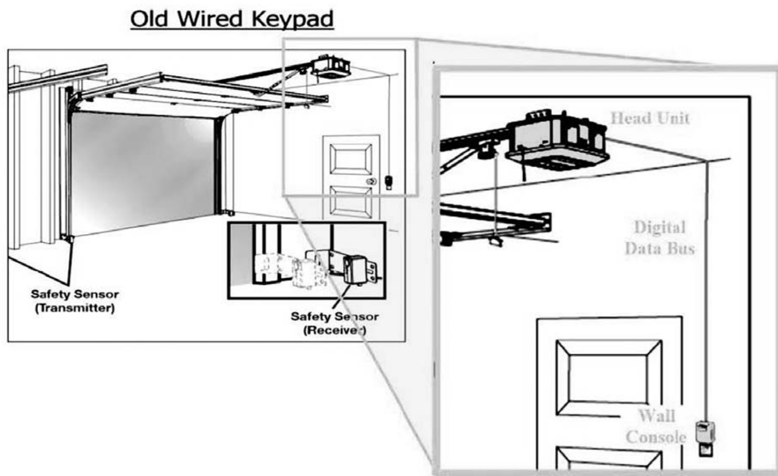
One World is a company that designs, markets, and sells power tools and outdoor products under, *inter alia*, the Ryobi brand. Ryobi products are sold exclusively at The Home Depot.

The ITC initiated Investigation 337-TA-1016 ("ITC's 1016 Investigation") on August 9, 2016 pursuant to a complaint filed by Chamberlain. *See Certain Access Control Systems and Components Thereof*, 81 Fed. Reg. 52,713, 52,713 (Int'l Trade Comm'n Aug. 9, 2016) (institution of investigation by Commission of Section 337 violations). Chamberlain alleged that several companies sold products that infringed Chamberlain's patents, including U.S. Patent No. 7,161,319 ("'319 Patent"). *See id.* The '319 Patent includes the following illustration:



Compl. Ex. A, at 4, Sept. 13, 2018, ECF No. 4–1 ("'319 Patent"). The motor drive unit, which opens and closes the garage door, contains a microcontroller (or controller) that is connected to the wall console "by means of a digital data bus." *Id.* at 23.

One World's Ryobi Ultra-Quiet Garage Door Opener, Models Nos. GD125, GD200, and GD200A (collectively, the "Original GDOs"), were part of the ITC's 1016 Investigation. *See* Compl. Ex. B, at 8, Sept. 13, 2018, ECF No. 4–2. The Original GDOs contain a wire that extends from the wall console to the head unit:



Mem. P. & A. Supp. Pl. One World Technologies, Inc.'s Mot. TRO & Prelim. Inj. 18, Sept. 13, 2018, ECF No. 6 ("Pl.'s Mem.").

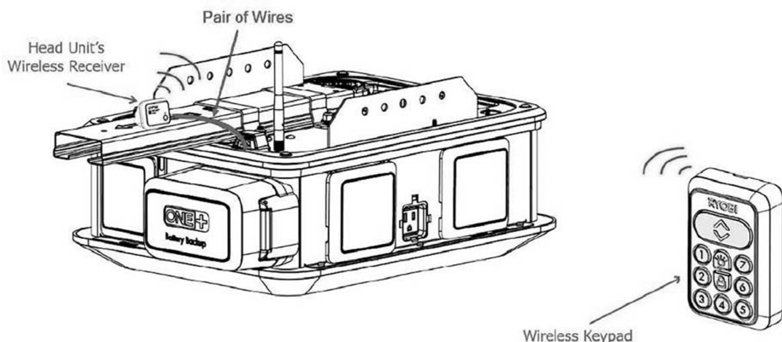
The Commission issued a final determination on March 23, 2018, in which it found a violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2012). *See Certain Access Control Systems and Components Thereof*, 83 Fed. Reg. 13,517, 13,517 (Int'l Trade Comm'n Mar. 29, 2018) (notice of the Commission's final determination finding a violation of Section 337; issuance of limited exclusion order and cease and desist orders; termination of investigation). The Commission adopted a Limited Exclusion Order barring importation of products covered by one or more claims in the '319 Patent and issued a cease and desist order to the investigated companies, including One World. *See id.* at 13,519. Paragraph 1 of the Limited Exclusion Order states:

> Access control systems and components thereof that infringe one or more of claims 1–4, 7–12, 15, and 16 of U.S. Patent No. 7,161,319 ("the '319 patent") that are manufactured by, or on

> behalf of, or are imported by or on behalf of Techtronic Industries Co., Ltd.; Techtronic Industries North America, Inc.; One World Technologies, Inc.; OWT Industries, Inc.; or Et Technology (Wuxi) Co. or any of their affiliated companies, parents, subsidiaries, agents, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining terms of the '319 patent except under license of the patent owner or as provided by law.

Compl. Ex. O, at 35, Sept. 13, 2018, ECF No. 4–15. The final determination is under review at the U.S. Court of Appeals for the Federal Circuit. *See* Compl. ¶ 19, Sept. 13, 2018, ECF No. 4.

One World redesigned their products as a result of the ITC's final determination, including the Redesigned GDO produced under the Ryobi brand. *See id.* ¶ 21. Ryobi's Redesigned GDO replaces the wired connection between the wall console and the head unit with a wireless connection. *See id.* ¶¶ 21–23. The head unit connects to a receiver through small wires, and the receiver communicates wirelessly to the keypad. *See* Pl.'s Mem. 19–21. The new design is illustrated in the following graphic:



Id. at 21.

One World and its related companies, Techtronic Industries Co. Ltd., Techtronic Industries North America Inc., OWT Industries, Inc., and Et Technology (Wuxi) Co., Ltd., submitted a letter to Customs' Intellectual Property Rights Branch ("IPRB"), seeking a ruling prior to importation that Model Nos. GD126 and GD201 are not covered by the final determination and are not subject to the Limited Exclusion Order. The IPRB issued Ruling HQ H295697 on July 20, 2018, de-

termining that the two models infringe the '319 Patent. *See* Compl. Ex. E, Sept. 13, 2018, ECF No. 4–5 ("HQ H295697"). IPRB concluded that the two models are included in the ITC's final determination and are subject to the Limited Exclusion Order. *See id.* at 35.

While awaiting Customs' ruling letter, One World attempted to import the Redesigned GDO. Customs excluded one entry of the Redesigned GDO (Entry No. 442–75629994) at the Port of Charleston on June 29, 2018. *See* Compl. ¶ 40; *see also* Compl. Ex. H, Sept. 13, 2018, ECF No. 4–8; Summons, Sept. 13, 2018, ECF No. 1. The entry contained 936 pieces of the Redesigned GDO. *See* Compl. Ex. F, at 1, Sept. 13, 2018, ECF No. 4–6 ("HQ H300129"). One World filed a timely protest with Customs, contesting the exclusion of the entry. *See id.* at 1 n.1. The IPRB denied the protest on September 7, 2018 by issuing Ruling HQ H300129, relying on its infringement determination from its previous ruling letter. *See id.* at 33.

IPRB concluded that the Redesigned GDO infringes Claims 1 and 9 of the '319 Patent. *See* HQ H295697 at 35; HQ H300129 at 33. IPRB found that the merchandise includes "(a) a wireless, wall-mounted keypad, (b) a wireless receiver, and (c) a pair of wires that extends from the wireless receiver to the head unit." HQ H300129 at 35. Relying on representations made by One World at a hearing before the IPRB, the IPRB determined that "the pair of wires connecting the head unit to the wireless receiver" in the Redesigned GDO "is a digital data bus that connects the wireless receiver to the controller in the head unit." *Id.* IPRB rejected One World's contention that Chamberlain was estopped from arguing that the '319 Patent encompasses part-wired, part-wireless connections. *Id.* at 36–37.

One World initiated this action on September 13, 2018, challenging Customs' denial of its protest. *See* Summons; Compl. One World asserts that Customs improperly excluded the Redesigned GDO because the merchandise is not infringing, and requests that the products be allowed entry into the United States. *See* Compl. ¶¶ 52–61. One World also seeks a declaration that the Redesigned GDO does not infringe Claims 1–4, 7–12, 15, and 16 of the '319 Patent and that Customs may not exclude the subject imports. *See id.* ¶¶ 62–66. Plaintiff alleged in its original complaint that the court has subject matter jurisdiction over this action under 28 U.S.C. § 1581(a), which grants the U.S. Court of International Trade exclusive jurisdiction over any civil action commenced to contest the denial of a protest. *See id.* ¶¶ 2–3.

Plaintiff filed a motion for a temporary restraining order and preliminary injunction, seeking entry of the Redesigned GDO. *See* Pl. One World Technologies, Inc.'s Mot. TRO & Prelim. Inj., Sept. 13,

2018, ECF No. 5; *see also* Pl.'s Mem. Defendants filed a brief opposing Plaintiff's motion, as well as a motion to stay the proceedings pending a final decision in the related matters before the ITC, U.S. Patent and Trademark Office, U.S. Court of Appeals for the Federal Circuit, and the U.S. District Court for the Northern District of Illinois. *See* Defs.' Mot. Stay, Sept. 21, 2018, ECF No. 22; *see also* Defs.' Mem. Supp. Mot. Stay & Opp'n Pl.'s Mot. TRO & Prelim. Inj., Sept. 21, 2018, ECF No. 22 ("Defs.' Opp'n"). The court held a hearing on September 25, 2018. *See* Hearing, Sept. 25, 2018, ECF No. 27; *see also* Conf. Tr., Oct. 3, 2018, ECF No. 33. One World presented testimony during the hearing from two witnesses, Mr. Mark Huggins and Mr. Stewart Lipoff, and both witnesses were cross-examined by the Government.

Plaintiff filed an amended complaint, adding 28 U.S.C. § 1581(h) as a basis of subject matter jurisdiction over this action. *See* Am. Compl. ¶¶ 2–3, Sept. 28, 2018, ECF No. 30. Defendants submitted a partial motion to dismiss, contending that the court should dismiss Plaintiff's amended complaint to the extent that it pleads jurisdiction under 28 U.S.C. § 1581(h) because Plaintiff has not met the requirements to assert jurisdiction sufficiently under 28 U.S.C. § 1581(h). *See* Defs.' Partial Mot. Dismiss 1, Oct. 9, 2018, ECF No. 39; *see also* Defs.' Mem. Supp. Partial Mot. Dismiss & Mot. Strike Demand Jury Trial & Resp. Pl.'s Supp. Br. Supp. Mot. TRO & Prelim. Inj. & Request Declaratory J. 1, Oct. 9, 2018, ECF No. 39 ("Defs.' Mem."). Defendants also filed a motion to strike Plaintiff's request for a jury trial on the complaint. *See* Defs.' Mot. Strike Jury Trial, Oct. 9, 2018, ECF No. 39. The ITC and Chamberlain filed motions to intervene in the action under 28 U.S.C. § 1581(h). *See* Mot. U.S. Int'l Trade Comm'n Leave Intervene Supp. Defs., Oct. 12, 2018, ECF No. 43 ("ITC's Mot."); Chamberlain Group, Inc.'s Mot. Intervene, Oct. 15, 2018, ECF No. 47 ("Chamberlain's Mot.").

During the pendency of this action, the U.S. Patent Trial and Appeal Board ("PTAB") published a Final Written Decision in response to One World's petition for *inter partes* review of the '319 Patent. The PTAB concluded that multiple claims, including Claims 1 and 9 of the '319 Patent, are unpatentable as obvious in light of prior art. *See* Pl. One World Technologies, Inc.'s Notice Suppl. Authority, Oct. 16, 2018, ECF No. 48; *see also* Ex. 1, Oct. 16, 2018, ECF No. 48–1 ("PTAB Op.").

ANALYSIS

I. Subject Matter Jurisdiction

Defendants filed a partial motion to dismiss, arguing that the court does not have subject matter jurisdiction over Plaintiff's action under

28 U.S.C. § 1581(h). *See* Defs.' Mem. 1, 7–11. Plaintiff alleges that the court possesses subject matter jurisdiction over Customs' "exclusion of goods from entry into the U.S. and its denial of One World's Protest of that exclusion that was filed pursuant to 19 U.S.C. § 1514 (HQ H300129)." Am. Compl. ¶ 2. To the extent that One World requests relief with respect to future imports of its merchandise, One World contends that the court may exercise subject matter jurisdiction pursuant to 28 U.S.C. § 1581(h). *See* Pl. One World Technologies, Inc.'s Opp'n Defs.' Omnibus Mot. & Resp. 5, Oct. 15, 2018, ECF No. 45.

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

A. Subject Matter Jurisdiction Over the Excluded Entry

The U.S. Court of International Trade has exclusive jurisdiction over any civil action commenced to contest Customs' denial of a protest, in whole or in part, under 19 U.S.C. § 1515. 28 U.S.C. § 1581(a). A party may protest a decision made by Customs, including decisions concerning the entry, liquidation, or reliquidation of merchandise. 19 U.S.C. § 1514(a). Customs excluded one entry of One World's Redesigned GDO. One World submitted a timely protest to the exclusion, which Customs denied. *See* HQ H300129. The court has subject matter jurisdiction over the excluded entry pursuant to 28 U.S.C. § 1581(a) because this action contests Customs' denial of a protest relating to One World's entry.

B. Subject Matter Jurisdiction Over Future Entries

An importer may seek review of a ruling prior to the importation of goods under 28 U.S.C. § 1581(h), which provides in relevant part that:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of

> the Treasury, . . . relating to . . . restricted merchandise, . . . or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h). This provision sets out four requirements to establish jurisdiction: (1) judicial review must be sought prior to importation; (2) judicial review must be sought of a ruling, a refusal to issue a ruling, or a refusal to change such a ruling; (3) the ruling must relate to certain subject matter; and (4) the importer must demonstrate that irreparable harm will result unless judicial review prior to importation is obtained. *See Best Key Textiles Co., Ltd. v. United States*, 777 F.3d 1356, 1360 (Fed. Cir. 2015); *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551–52 (Fed. Cir. 1983).

Jurisdiction under 28 U.S.C. § 1581(h) is "an extraordinary instrument, and a significant exception to the procedural requirements traditionally placed on those challenging a decision by Customs." *Heartland By-Prods., Inc. v. United States*, 26 CIT 268, 274, 223 F. Supp. 2d 1317, 1324 (2002). A plaintiff may invoke subsection (h) "only when the traditional route will inflict irreparable harm on a plaintiff." *Id.* at 274, 223 F. Supp. 2d at 1325. The legislative history "makes clear that Congress did not intend for subsection (h) to replace jurisdiction under [28 U.S.C. § 1581(a)], and, therefore, limited the scope of relief under (h) to declaratory judgment, explicitly precluding injunctive relief." *Id.*; *see also Otter Prods.*, 38 CIT at __, 37 F. Supp. 3d at 1319 n.8.

One World imported multiple entries totaling thousands of units of the Redesigned GDO prior to initiating this action and clearly will not be harmed if it does not obtain judicial review prior to importation. The court has jurisdiction over the excluded entry pursuant to 28 U.S.C. § 1581(a), and Plaintiff may not utilize 28 U.S.C. § 1581(h) as a way of circumventing the procedures required by 28 U.S.C. § 1581(a). The court concludes that One World has failed to establish jurisdiction under 28 U.S.C. § 1581(h), in light of the court's judicial review under 28 U.S.C. § 1581(a). Defendants' partial motion to dismiss is granted.

II. Defendants' Motion to Strike Demand for Jury Trial

Plaintiff requested a jury trial in its complaint. *See* Am. Compl. Defendants move to strike this demand. *See* Defs.' Mem. 38–39. Jury

trials are not allowed in cases brought under 28 U.S.C. § 1581(a). *See Wash. Int'l Ins. Co. v. United States*, 863 F.2d 877, 879 (Fed. Cir. 1988). The court grants Defendants' motion to strike Plaintiff's demand for a jury trial.

III. Motions to Intervene

Both the ITC and Chamberlain filed motions to intervene in this matter pursuant to USCIT Rule 24. *See* ITC's Mot.; Chamberlain's Mot. Both the ITC and Chamberlain seek defendant-intervenor status to the extent that One World asserts subject matter jurisdiction under 28 U.S.C. § 1581(h). Because the court concludes that it does not have subject matter jurisdiction over One World's claims under 28 U.S.C. § 1581(h), both motions to intervene are denied.

Chamberlain requests, in the alternative, that the court reconsider Chamberlain's motion to appear as *amicus curiae* to the extent that One World seeks relief under 28 U.S.C. § 1581(a). *See* Chamberlain's Mot. 1. The court denied Chamberlain's first motion to appear as *amicus curiae*. *See* Order, Sept. 24, 2018, ECF No. 25. The court reiterates that a party is prohibited from intervening in an action contesting Customs' denial of a protest and alleging jurisdiction under 28 U.S.C. § 1581(a). *See* 28 U.S.C. § 2631(j)(1)(A); *see also Otter Prods.*, 38 CIT at __, 37 F. Supp. 3d at 1319 (denying a motion to appear as *amicus curiae* in action over which the court exercised jurisdiction under 28 U.S.C. § 1581(a)); *Corning Gilbert Inc. v. United States*, 36 CIT __, __, 837 F. Supp. 2d 1303, 1305 (2012) (same). The court denies Chamberlain's motion to intervene in the instant matter under 28 U.S.C. § 1581(a).

IV. Plaintiff's Motion for Injunctive Relief

Rule 65 of the Rules of this Court allows for a court to grant injunctive relief in an action. USCIT R. 65. The court considers four factors when evaluating whether to grant a temporary restraining order or preliminary injunction: (1) whether the party will incur irreparable harm in the absence of such injunction; (2) whether the party is likely to succeed on the merits of the action; (3) whether the balance of hardships favors the imposition of the injunction; and (4) whether the injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014). No one factor is "'necessarily dispositive,' because 'the weakness of the showing regarding one factor may be overborne by the strength of the others.'" *Belgium v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir.

2006) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)). The factors should be weighed according to a "sliding scale," which means that a greater showing of irreparable harm in Plaintiff's favor lessens the burden on Plaintiff to show a likelihood of success on the merits. *See id.* The court evaluates each of the four factors in turn.

A. Irreparable Harm

Plaintiff must show that it will suffer irreparable harm absent a grant of injunctive relief. *See Winter*, 555 U.S. at 20. Irreparable harm includes "a viable threat of serious harm which cannot be undone." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (internal citations omitted). An allegation of financial loss alone generally does not constitute irreparable harm if future money damages can provide adequate corrective relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Bankruptcy or substantial loss of business may constitute irreparable harm, however, because "loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review." *Harmoni Int'l Spice, Inc. v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1298, 1307 (2017) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)). "Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities" may also constitute irreparable harm. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012).

One World argues that, absent injunctive relief, One World will be unable to supply The Home Depot with enough inventory to meet customer demands, especially during the holiday season. *See* Pl. One World Technologies, Inc.'s Suppl. Br. Supp. Mot. TRO & Prelim. Inj. & Req. Declaratory J. 44–47, Oct. 4, 2018, ECF No. 34. One World claims that its inability to provide a consistent supply of the Redesigned GDO will cause The Home Depot to terminate its existing business relationship with One World. *See id.* One World alleges that the termination of its relationship with The Home Depot will preclude One World from entering the garage door opener market because The Home Depot is the sole distributor of One World's Ryobi-branded products, including the Redesigned GDO. *See id.*

At the hearing, One World presented witness testimony from Mark Huggins, One World's Senior Vice President of Product Development. Mr. Huggins described how the new garage door openers were designed at The Home Depot's request for a "game changer" in the market. *See* Conf. Tr. at 145:20–146:21. Mr. Huggins testified that One World has a close relationship with The Home Depot and he believes that The Home Depot will terminate its program with One

World if the court denies entry of the Redesigned GDO into commerce. *See id.* at 142:24–144:6, 161:3–163–4.[2]

Without injunctive relief, One World claims that it will not only suffer a permanent loss of business, but it will lose its market share and innovative advantage. One World claims that its reputation with its exclusive supplier will be irrevocably damaged. The court finds that One World has demonstrated irreparable harm for the purposes of a preliminary injunction through the credible testimony and declarations of its witnesses.

B. Likelihood of Success on the Merits

In order to obtain a preliminary injunction, Plaintiff bears the burden of showing that it is likely to succeed on the merits of its claims. *See Winter*, 555 U.S. at 20. Customs conducted an infringement analysis and determined that the Redesigned GDO met each and every limitation of Claims 1 and 9 of the '319 Patent. *See* HQ H295697 at 24–28. Customs denied One World's protest contesting the exclusion. The issue before the court is whether Customs improperly denied One World's protest regarding the one entry of the Redesigned GDO.[3] The court reviews actions involving denied protests *de novo*. 28 U.S.C. § 2640(a)(1).

1. Deference

The Government argues that the two ruling letters, HQ H295697 and HQ H300129, issued by IPRB deserve deference under *United States v. Mead Corporation*, 533 U.S. 218 (2001), because they are "formal, thorough, well-reasoned, and persuasive." *See* Defs.' Suppl. Br. 4–5. A Customs ruling may "at least seek a respect proportional to its power to persuade," and may "claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Mead*, 553 U.S. at 2175–76 (internal citations omitted); *see also Corning Gilbert Inc. v. United States*, 37 CIT __, __, 896 F. Supp. 2d 1281, 1288 (2013). As explained below, the court finds that the IPRB failed to consider substantively Plaintiff's multiple arguments, including the effect of prior art on claim construction. Because the IPRB's letters do not show "thoroughness,

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[2] In a subsequently-submitted declaration, Mr. Huggins states that [[ ]] Decl. Mark Huggins ¶¶ 6–7, Dec. 7, 2018, ECF No. 63–1.

[3] To be clear, One World is not contesting the ITC's infringement findings as applied to the Original GDOs in this case. ITC infringement findings are final and conclusive unless appealed to the U.S. Court of Appeals for the Federal Circuit. *See* 19 U.S.C. § 1337(c); *see also Corning Gilbert*, 37 CIT __, __, 896 F. Supp. 2d 1281, 1288 (2013). One World's action before the court concerns Customs' application of the ITC's Limited Exclusion Order to the excluded entry of the Redesigned GDO.

logic and expertness" with respect to Plaintiff's contentions here, the court does not find the IPRB's letters sufficiently persuasive to merit deferential treatment under *Mead*.

2. Infringement

Plaintiff alleges that Customs denied its protest due to an incorrect interpretation of the ITC's findings. Plaintiff argues that the asserted claims of the '319 Patent do not cover the Redesigned GDO, which use wireless communications, and to the extent that they do, the claims are invalid. *See* Pl.' Mem. 11.

The court applies the requisite two-step patent infringement analysis to determine whether the Redesigned GDO infringes Claims 1 and 9 of the '319 Patent. *See Tessera, Inc. v. Int'l Trade Comm'n*, 646 F.3d 1357, 1364 (Fed. Cir. 2011); *see also Corning Gilbert*, 37 CIT at __, 896 F. Supp. 2d at 1291. The court must first construe the contested claim terms. *See Tessera*, 646 F.3d at 1364. The ordinary and customary meaning of claim terms are the meanings that the terms would have to a person of ordinary skill in the art. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc). The court turns next to whether the product at issue contains each limitation of the patent's claim. *See Tessera*, 646 F.3d at 1364. To find that the Redesigned GDO infringes a claim of the '319 Patent, the court must find each and every limitation of the claim embodied in the Redesigned GDO. *See V–Formation, Inc. v. Benetton Gr. SpA*, 401 F.3d 1307, 1312 (Fed. Cir. 2005) ("Literal infringement requires that each and every limitation set forth in a claim appear in an accused product."); *Atlantic Thermoplastics Co., Inc. v. Faytex Corp.*, 970 F.2d 834, 846 (Fed. Cir. 1992) ("An accused infringer can avoid infringement by showing that the accused device lacks even a single claim limitation.").

a. Claim Construction

The Parties contest two independent claims of the '319 Patent in this action: Claim 1 and Claim 9. Claim 1 of the '319 Patent states:

> An improved garage door opener comprising a motor drive unit for opening and closing a garage door, said motor drive unit having a microcontroller and a wall console, said wall console having a microcontroller, said microcontroller of said motor drive unit being connected to the microcontroller of the wall console by means of a digital data bus.

'319 Patent at 23. Claim 9 of the '319 Patent states:

> An improved garage door opener comprising a motor drive unit for opening and closing a garage door, said motor drive unit having a controller and a wall console, said wall console having

a controller, said controller of said motor drive unit being connected to the controller of the wall console by means of a digital data bus.

Id. The language is nearly identical, except Claim 1 references a "microcontroller" and Claim 9 discusses a "controller." For the sake of clarity, the court uses the term "controller" when referring to both claims.

In interpreting Claims 1 and 9 of the '319 Patent, the ITC adopted the following constructions based on the plain and ordinary meaning of the terms in the ITC's 1016 Investigation:

Term/Phrase	**ITC Construction**
"wall console"	"a wall-mounted control unit"
"digital data bus"	"a conductor or group of conductors which conveys digital data"
"controller"	"any type of control device"
"motor drive unit"	"unit where a driven motor resides"

Compl. Ex. B, at 120–24, Sept. 13, 2018, ECF No. 4–2 ("ITC ALJ Determ."); *see also* Mem. P. & A. Supp. Pl. One World Technologies, Inc.'s Mot. TRO & Prelim. Inj. Ex. C, at 19, Sept. 13, 2018, ECF No. 6–3. The ITC Administrative Law Judge construed an additional term based on the prosecution history of the '319 Patent and in harmony with the patent's other claims:

Term/Phrase	**ITC Construction**
"motor drive unit"	"unit where a driven motor resides"

ITC ALJ Determ. at 124–28. The court construes the terms similarly here.

Plaintiff proffered Mr. Stewart Lipoff as an expert witness at the hearing. Mr. Lipoff possesses two bachelors' degrees in electrical engineering and in engineering physics, and two masters' degrees in electrical engineering and in business administration. *See* Conf. Tr. at 63:2–63:7. He also has educational certificates and approximately fifty years of career experience, including experience with embedded control systems. *See id.* at 63:8–64:6. Mr. Lipoff testified as to the plain, ordinary usage of the term "conductor" to a person of ordinary skill in the art, as well as its consistent usage within the '319 Patent. *See id.* at 79:18–80:9. Mr. Lipoff defined the term "conductor" as "a metallic set of wires that are capable of conveying digital data." *Id.* at 80:3–80:4. Mr. Lipoff represented further that, although not part of

the construction, a conductor intrinsically is capable of carrying electric power, which serves to provide power to the product in the '319 Patent. *See id.* at 80:5–80:9. The court interprets "conductor" to mean a metallic wire or set of wires.

IPRB represented the claim language on a limitation-by-limitation basis as follows:

Limitation	Claim Language
A	an improved garage door opener comprising
B	a motor drive unit for opening and closing a garage door,
C	said motor drive unit having a controller and
D	a wall console,
E	said wall console having a controller,
F	said controller of said motor drive unit being connected to the controller of the wall console by means of a digital data bus.

See HQ H295697 at 5. Limitations A–E were not contested in the IPRB's review process. *See id.* at 24–25. One World argues that IPRB misapplied Limitation F in the first ruling letter, which then informed IPRB's second letter denying One World's protest.

Limitation F requires that the motor drive unit's controller be connected to the wall console's controller by means of a "digital data bus," or "conductors or group of conductors which conveys digital data." The court finds that "conductor" within Limitation F refers to a metallic wire or set of wires. Based on the definition of "conductor" to a person of ordinary skill in the art, Limitation F requires that the motor drive unit's controller be connected to the wall console's controller by a physical wire or set of wires.[4]

The IPRB construed the '319 Patent to encompass a device that combines wired and wireless communication links. *See* HQ H295697 at 27–28; HQ H300129 at 35. The court finds that the IPRB's position is inconsistent with a reading of the terms "digital data bus" and "conductor," which requires a physical wire or set of wires. The court concludes that the IPRB's interpretation has no merit.[5]

To interpret the term "digital data bus" and Limitation F otherwise potentially renders Claims 1 and 9 invalid in light of Doppelt (Chamberlain's U.K. Patent Application G.B. 2,312,540) and other patents

[4] The PTAB noted that "a wireless transmitter cannot be the wall console of the '319 Patent because a wireless radio frequency link is not a digital data bus." *See* PTAB Op. at 80 n.28.

[5] The PTAB found a similar argument advanced by Chamberlain unpersuasive. *See* PTAB Op. at 82 ("Patent Owner admits the claims of the '319 [P]atent require a wall console that communicates with the motor drive unit over a *wired* communications link.") (citing Chamberlain's brief in the ITC's 1016 Investigation).

(*e.g.*, Jacobs, U.S. Patent No. US 5,467,266). By statute, an invention is unpatentable due to prior art if "the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention." 35 U.S.C. § 102(a)(1). An ambiguous claim should be construed in such a way as to preserve its validity. *See Ruckus Wireless, Inc. v. Innovative Wireless Sols., LLC*, 824 F.3d 999, 1004 (Fed. Cir. 2016); *Phillips*, 415 F.3d at 1327.

The ITC Administrative Law Judge found in the ITC's 1016 Investigation that the combination of the Doppelt and Jacobs patents discloses every limitation recited in Claims 1 and 9, but found that One World had not proven the claims to be unpatentable by clear and convincing evidence. *See* ITC ALJ Determ. at 170–71, 188. On the contrary, the PTAB found that One World demonstrated that the combined teachings of Doppelt, Jacobs, and applicant admitted prior art account for each of the limitations required by Claims 1 and 9. *See* PTAB Op. at 49.

The court construes Limitation F as encompassing only wired connections between the motor drive unit's controller and the wall controller. To the extent that the IPRB found otherwise, the court concludes that the IPRB's determination was incorrect.

b. Application of the Claims to the Redesigned GDO

The court applies the limitations of Claims 1 and 9, as interpreted above, to the Redesigned GDO. *See Tessera*, 646 F.3d at 1364. To find that the Redesigned GDO infringes the independent claims of the '319 Patent, the court must find each and every limitation of the claims embodied in the Redesigned GDO. *See V–Formation*, 401 F.3d at 1312; *Atlantic Thermoplastics*, 970 F.2d at 846.

There is no dispute that the Redesigned GDO contains Limitations A–E. The Redesigned GDO is garage door opener that contains: a motor drive unit that opens and closes a garage door (the "head unit"), a controller attached to the motor drive unit, and a wall console that also has a controller. *See* HQ H295697 at 24–25. The Redesigned GDO does not contain Limitation F because the controller in the head unit communicates with the wall console's controller through a wireless connection, whereas Limitation F contemplates a wired connection specifically. To the extent that the wires connecting the head unit's controller to the head unit constitute a part-wired, part-wireless connection, Limitation F is not implicated because it is not a completely wired connection.

Because the Redesigned GDO does not contain all limitations of the '319 Patent—in other words, the head unit's controller does not com-

municate with the wall console by means of a “digital data bus,” or wired connection—the court concludes that the Redesigned GDO does not infringe the ’319 Patent. The court’s findings are consistent with the recent PTAB Final Written Decision issued in October 2018. In concluding otherwise, IPRB improperly determined that the Redesigned GDO fell within the scope of the ITC’s Limited Exclusion Order and excluded the entry of the Redesigned GDO. The court concludes that One World has shown a likelihood of success on the merits of this action.

C. Balance of Hardships

When evaluating a request for a preliminary injunction, it is the court’s responsibility to balance the hardships on each of the Parties. *See Winter*, 555 U.S. at 20. One World points to its allegations of irreparable harm in support of this factor. *See* Pl.’s Mem. 32. Defendants contend that the Government has an interest in the administration and enforcement of customs law, including the ITC’s Limited Exclusion Order. *See* Defs.’ Opp’n 34; Defs.’ Mem. 33. The court finds that the balance of hardships does not tip in favor of either Party.

D. Public Interest

Plaintiff must also address whether the grant of a preliminary injunction serves the public interest. *See Winter*, 555 U.S. at 20. Defendants argue that the public interest is best served by the Government’s protection and enforcement of intellectual property rights. *See* Defs.’ Opp’n 35–36; Defs.’ Mem. 34. One World acknowledges this interest in protecting intellectual property rights, but counters that the “public is not served by enforcing a patent beyond its metes and bounds.” Pl.’s Mem. 33. One World argues that patent law promotes innovation by encouraging companies to “design around patents.” *Id.* The court finds that this public interest factor does not tip in favor of either Party.

The court concludes that the balance of hardships and public interest are neutral between the Parties, but finds that Plaintiff has demonstrated credible irreparable harm and a likelihood of success on the merits. Plaintiff’s motion for a preliminary injunction is granted.

CONCLUSION

For the aforementioned reasons, the court concludes that subject matter jurisdiction over this action does not exist under 28 U.S.C. § 1581(h). Defendant’s partial motion to dismiss is granted. The court exercises subject matter jurisdiction solely under 28 U.S.C. § 1581(a).

Because jury trials are not permitted for cases brought under 28 U.S.C. § 1581(a), the court grants Defendants' motion to strike Plaintiff's request for a jury trial.

Entities are statutorily prohibited under 28 U.S.C. § 2631(j)(1)(A) from intervening in actions brought under 28 U.S.C. § 1581(a). The court denies the motions to intervene filed by the ITC and Chamberlain.

The court finds that Plaintiff has made the requisite showing for a preliminary injunction. Plaintiff has proffered sufficient evidence of irreparable harm based on credible witness testimony that its relationship with its exclusive distributor, The Home Depot, will be permanently damaged absent a preliminary injunction. Plaintiff has proven that it is likely to succeed on the merits of the action. Pursuant to an evaluation of Claims 1 and 9 of the '319 Patent, the court concludes that One World's Redesigned GDO does not infringe the '319 Patent because the '319 Patent is limited to wired connections only. The court finds that the IPRB's determination that the '319 Patent encompasses a part-wired and part-wireless connection was incorrect, and Customs improperly excluded One World's Redesigned GDO from entry into the United States. The court grants Plaintiff's motion for a preliminary injunction.

An order will issue accordingly.

Dated: December 14, 2018
New York, New York

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

Slip Op. 18–176

QINGDAO QIHANG TYRE CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 16–00075

[Sustaining decisions in a determination issued in response to court order in a review of an antidumping duty order on off-the-road tires from the People's Republic of China]

Dated: December 21, 2018

Ned H. Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for plaintiffs Qingdao Qihang Tyre Co., Ltd. and Qingdao Free Trade Zone Full-World International Trading Co., Ltd. With him on the brief were *Brandon M. Petelin* and *Jordan C. Kahn*.

Richard P. Ferrin, Drinker Biddle & Reath, LLP, of Washington, D.C., for plaintiffs Trelleborg Wheel Systems (Xingtai) Co., Ltd., Xuzhou Xugong Tyres Co., Ltd., Xuzhou Hanbang Tyre Co., Ltd., and Armour Rubber Co. Ltd. With him on the brief was *Douglas J. Heffner*.

R. Kevin Williams, Clark Hill PLC, of Chicago, Ill., for plaintiff Weihai Zhongwei Rubber Co., Ltd.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION

Stanceu, Chief Judge:

Plaintiffs contested an administrative determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), issued to conclude a periodic review of an antidumping duty order on off-the-road ("OTR") tires from the People's Republic of China ("China" or the "PRC").[1]

Before the court is the determination (the "Remand Redetermination") Commerce issued in response to this court's opinion and order in *Qingdao Qihang Tyre Co. v. United States*, 42 CIT __, 308 F. Supp. 3d 1329 (2018) ("*Qingdao Qihang*"). *See Final Results of Redeterm. Pursuant to Court Remand* (July 24, 2018), ECF No. 74 ("*Remand Redeterm.*"). The Remand Redetermination: (1) under protest, recalculates export price ("EP") and constructed export price ("CEP") for the mandatory respondents to eliminate its previous downward adjustments for Chinese irrecoverable value-added tax ("VAT"); (2) redetermines a surrogate value for inputs of reclaimed rubber production inputs; and (3) recalculates the surrogate value for foreign inland freight. *Remand Redeterm.* 2. It then recalculates the margins for the two mandatory respondents and the reviewed, but not individually examined, "separate rate respondents." *Id.* at 21. The court sustains the three decisions, and the redetermined margins, to which no party objects.

I. BACKGROUND

The background of this consolidated action is set forth in the court's prior Opinion and Order, which is summarized and supplemented herein. *See Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1333–34.

[1] Consolidated under the lead case, *Qingdao Qihang Tyre Co. v. United States*, Court No. 16–00075, are *Qingdao Free Trade Zone Full-World Int'l Trading Co. v. United States*, Court No. 16–00076; *Trelleborg Wheel Systems (Xingtai) Co. v. United States*, Court No. 16–00077; *Xuzhou Xugong Tyres Co. v. United States*, Court No. 16–00079; and *Weihai Zhongwei Rubber Co. v. United States*, Court No. 16–00084. *See* Order (Aug. 31, 2016), ECF No. 24.

A. The Agency Decision Contested in this Litigation

The contested administrative decision ("Final Results"), which concluded the sixth periodic administrative review of certain pneumatic off-the-road tires from China, was published as *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 Fed. Reg. 23,272 (Int'l Trade Admin. Apr. 20, 2016) ("*Final Results*"). Incorporated by reference in the Final Results is a final "Issues and Decision Memorandum" containing explanatory discussion. *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2013–2014* (Int'l Trade Admin. Apr. 12, 2016) (P.R. Doc. 334), *available at* https://enforcement.trade.gov/frn/summary/prc/2016–09165–1.pdf (last visited Dec. 18, 2018) ("*Final I&D Mem.*").

B. The Parties in this Consolidated Case

The plaintiffs in this litigation include the two mandatory respondents in the sixth review, Xuzhou Xugong Tyres Co., Ltd., Armour Rubber Co. Ltd., and Xuzhou Hanbang Tyre Co., Ltd. (collectively, "Xugong"), which Commerce treated as a single entity for purposes of the review, and Qingdao Qihang Tyre Co., Ltd. ("Qihang"). The other plaintiffs are the following reviewed, but not individually examined, separate rate respondents: Qingdao Free Trade Zone Full-World International Trading Co., Ltd., Trelleborg Wheel Systems (Xingtai) Co., Ltd., and Weihai Zhongwei Rubber Co., Ltd.[2]

C. Procedural History

Commerce issued an antidumping duty order (the "Order") on certain off-the-road tires from China (the "subject merchandise") in 2008. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Int'l Trade Admin. Sept. 4, 2008). Commerce initiated the review at issue in this litigation, which was the sixth administrative review of the Order, on October 30, 2014. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 64,565 (Int'l Trade Admin. Oct. 30, 2014). The sixth admin-

[2] Titan Tire Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC were defendant-intervenors in this litigation, *see* Order (May 31, 2016), ECF No. 18, but withdrew on September 29, 2017. *See*Order (Sept. 29, 2017), ECF No. 66.

istrative review pertained to entries of subject merchandise made during the period of review of September 1, 2013 through August 31, 2014. *Final Results*, 81 Fed. Reg. at 23,272.

Commerce published the Final Results on April 20, 2016. *Id.* In the Final Results, Commerce assigned individually-determined weighted-average dumping margins to Xugong and Qihang. *Id.* at 23,273. Having selected these exporters/producers of OTR tires as "mandatory" respondents, i.e., respondents it intended to examine individually, Commerce assigned a weighted-average dumping margin of 65.33% to Xugong and a weighted-average dumping margin of 79.86% to Qihang in the Final Results. *Id.* Commerce assigned a weighted average of these two margins, 70.55%, to respondents that it did not select for individual examination but that Commerce found to have qualified for a "separate rate" based on demonstrated independence from the government of China. *Id.*

The Department submitted the Remand Redetermination to the court on July 24, 2018. *Remand Redeterm*. Plaintiffs collectively filed comments on the Remand Redetermination on August 10, 2018. All Plaintiffs' Comments on Remand Redetermination (Aug. 10, 2018), ECF No. 76 ("Pls.' Comments"). The United States filed a reply to plaintiffs' comments on August 24, 2018. Defendant's Response to Comments on Remand Redetermination (Aug. 24, 2018), ECF No. 78 ("Def.'s Reply"). The plaintiffs in this litigation submitted a single set of comments in support of the decisions made in the Remand Redetermination. Pls.' Comments 1. Defendant United States also supports the Remand Redetermination. Def.'s Reply 1.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012),[3] pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended* 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty administrative review. In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

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[3] Citations to the United States Code are to the 2012 edition.

B. The Court's Rulings in Qingdao Qihang

In *Qingdao Qihang*, the court directed Commerce to submit a redetermination that addresses the following three decisions in the Final Results, each of which the court held unlawful: (1) downward adjustments Commerce made to the prices of Xugong and Qihang that are used to determine EP and CEP, to account for Chinese irrecoverable VAT, *Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1335–47; (2) the surrogate value for the reclaimed rubber manufacturing input, which Commerce based on Global Trade Atlas import data from Thailand, *id.*, 42 CIT at __, 308 F. Supp. 3d at 1347–49; and (3) the surrogate value Commerce obtained from the World Bank's *Doing Business 2015: Thailand* report for valuing foreign inland freight, *id.*, 42 CIT at __, 308 F. Supp. 3d at 1349–52.

C. The Department's Remand Redetermination

In the Remand Redetermination, Commerce, under protest, recalculated EP and CEP for Xugong's and Qihang's sales without making downward adjustments for Chinese irrecoverable VAT. *Remand Redeterm.* 8. As a justification for its protest, Commerce stated that "[w]e respectfully disagree with the Court's finding that Commerce impermissibly construed section 772(c)(2)(B) of the Act [19 U.S.C. § 1677a(c)(2)(B)] with respect to irrevocable [*sic*] VAT, and maintain that our current practice, as described *supra*, is consistent with the statute and thus in accordance with law." *Id.* As part of the description of the current practice, Commerce stated that "[i]n the *Final Results*, we determined that adjusting for irrecoverable VAT, which equates to an export tax, is consistent with section 772(c)(2)(B) of the Act, as it reduces the gross U.S. price charged to the customer (which would otherwise include the unrefunded VAT in the amount charged to the U.S. customer) to a net price received." *Id.* at 5. Commerce added that "[m]oreover, this deduction is consistent with Commerce's longstanding policy that dumping margin calculations be tax-neutral." *Id.*

The court sustains the Department's decision to correct its calculations of EP and CEP by removing its downward adjustments for "irrecoverable VAT." While sustaining this decision, the court does not sustain or otherwise approve the reasoning Commerce included in the Remand Redetermination in an attempt to convince the court that the decision on VAT in *Qingdao Qihang* was incorrect.

As *Qingdao Qihang* explained, the VAT at issue in this case is not the type of tax described by 19 U.S.C. § 1677a(c)(2)(B), which addresses an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United

States." The record in this case does not support the notion that China imposed an export tax, or anything resembling one, on the subject merchandise.

The tax at issue here is a domestic value-added tax that, as Commerce itself does not dispute, is included in the prices of certain materials used in producing subject merchandise. *See Final I&D Mem.* at 22. This "input" VAT is included in the price of materials used to make OTR tires, and the record does not demonstrate that it is incurred only on production for export sales. *See Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1337 ("The questionnaire responses of both mandatory respondents constitute record evidence that the VAT incurred by these respondents resulted from purchases of some of the material inputs used in OTR tire production." (citations omitted)). That some of this value-added tax might not be fully refunded upon subsequent exportation of the finished good does not convert this value-added tax to an export tax, duty, or other charge imposed on the exportation of the good. There is no evidentiary support in the record for the proposition that irrecoverable VAT does not occur on domestic sales. Nevertheless, Commerce appears to presume, without evidentiary support, that Chinese irrecoverable VAT "amounts to an export tax, duty, or other charge imposed on exported merchandise *that is not imposed on domestic sales*." *Id.*, 42 CIT at __, 308 F. Supp. 3d at 1343 n.8 (emphasis in *Qingdao Qihang*) (quoting *Final I&D Mem.* at 22); *see Jiangsu Senmao Bamboo and Wood Indus. Co., Ltd. v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1308, 1344 (2018).

As *Qingdao Qihang* also explained, Congress was familiar with the concepts of recoverable VAT and, necessarily, of irrecoverable VAT, and addressed them in provisions of the Tariff Act other than 19 U.S.C. § 1677a(c)(2)(B). Simply stated, recoverable VAT, in certain circumstances (not present here), may reduce a dumping margin. But Congress did not intend that VAT, whether or not recoverable, would ever *increase* a dumping margin. In § 1677a(c)(2)(B), Congress addressed export taxes, duties, and other charges imposed on the exportation of the good, not value-added taxes, which Congress addressed elsewhere in the statute, using distinctly different language. Further, *Qingdao Qihang* explained why the Department's "tax-neutral" rationale is misguided. *See Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1342–44.

Reconsidering its surrogate values for reclaimed rubber, Commerce determined that Romanian import price data, obtained from the Global Trade Atlas, constituted the best available information. *Id.* at 11–13. Commerce also redetermined its surrogate value for foreign

inland freight, using the World Bank's *Doing Business 2016: Thailand* report in place of the 2015 version of that report that Commerce used in the Final Results. *Id.* at 17–20.

The changes made from the Final Results lowered Qihang's dumping margin from 79.86% to 13.93% and Xugong's dumping margin from 65.33% to 23.45%. *Id.* at 21. Because the margin in the Final Results for separate rate respondents not individually examined was the weighted average of the dumping margins calculated for Qihang and Xugong, the Department recalculated that margin in the Remand Redetermination to 20.03%. *Id.* These decisions comply with the court's decision in *Qingdao Qihang*, are supported by the record evidence, and are in accordance with law.

III. CONCLUSION

For the reasons discussed above, the court sustains the Remand Redetermination. Judgment will enter accordingly.

Dated: December 21, 2018
New York, New York

/s/Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE

Slip Op. 18–177

ARBED AMERICAS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 15–00095

[On cross-motions for judgment on challenge to denial of protest over rate of antidumping duties assessed by U.S. Customs and Border Protection, judgment for the plaintiff.]

Decided: December 21, 2018

Robert S. LaRussa, *Lisa S. Raisner*, and *Neil H. Koslowe*, Sherman & Sterling LLP, of Washington, DC, for the plaintiff.

Hardeep K. Josan, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. Also on the brief were *Chad A. Readler*, Acting Assistant Attorney General and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

Opinion

Musgrave, Senior Judge:

The parties cross-move for summary judgment pursuant to USCIT R. 56.3 on whether six entries of stainless steel plate in coils ("SSPC") from Belgium were deemed liquidated by operation of law. Also before the court is the plaintiff's motion for oral argument, but in view of the

quality of the briefing on the matter, oral presentation is unnecessary. That motion can therefore be, and hereby is, denied, and for the following reasons, judgment will enter in favor of the plaintiff.

I. *Background*

The entries at issue are among numerous other SSPC entries subject to antidumping("AD") duty and countervailing ("CVD") duty orders. The SSPC was produced by ALZ, N.V. and was imported from Belgium by the plaintiff Arbed Americas LLC ("Arbed") in the latter half of 1999. In 2001, the U.S. Department of Commerce, International Trade Administration ("Commerce") published the final results of the administrative reviews of the AD and CVD duty orders for the periods of review ("PORs") that cover the entries in this case. *See Stainless Steel Plate in Coils from Belgium*, 66 Fed. Reg. 45007 (Aug. 27, 2001) (final admin. results of CVD order); 66 Fed. Reg. 56272 (Nov. 7, 2001) (final admin. results of AD order). Those results were challenged here, and preliminary injunctions ("PIs") were issued to enjoin, pending litigation, liquidation of SSPC from Belgium that had been produced or exported by ALZ, N.V. and entered during PORs relevant to those proceedings. *See* Compl. ¶7; Ans. ¶7; *see also Allegheny Ludlum Corp. v. United States*, Court No. 01–01091; *ALZ, N.V. v. United States*, Court No. 01–00834. Thus, pursuant to those PIs, in 2002 and 2003 Commerce issued blanket instructions to U.S. Customs and Border Protection ("Customs") not to liquidate any SSPC from Belgium that had been produced or exported by ALZ, N.V. and entered during the PORs until further liquidation instructions were provided. *See* Message Nos. 2178204 (June 27, 2002), 2283201 (Oct. 10, 2002), 3351206 (Dec. 17, 2003), attached to Def's Br. as Ex. A. Those instructions encompassed the entries at bar.

In 2004 and 2005, Commerce issued further liquidation instructions to Customs pertaining to such entries of SSPC. *See* Message Nos. 4083201 (Mar. 23, 2004), 5189204 (July 8, 2005), 5199201 (July 18, 2005), attached to Def's Br. in Ex. B. Regarding the AD order, Commerce instructed Customs, in relevant part, to liquidate entries of SSPC from Belgium exported by ALZ, N.V. at a rate of 24.43%. *See* Message Nos. 4083201 (Mar. 23, 2004) and 5199201 (July 18, 2005), attached to Def's Br. in Ex. B. Regarding the CVD order, Commerce instructed Customs, in relevant part, to liquidate entries of SSPC from Belgium exported by ALZ, N.V. at a rate of 0.97%. *See* Message No. 5189204 (July 8, 2005), attached to Def's Br. in Ex. B.

In 2005, those liquidation instructions, of message numbers 5189204 and 5199201, were challenged here. Compl. ¶7; Ans. ¶7. *See Ugine and ALZ Belgium, N.V., Arcelor Stainless USA, LLC, and Arcelor Trading USA, LLC v. United States*, Court No. 05–00444 ("the

Arcelor case"). The plaintiffs of the *Areclor* case requested entry of a PI against liquidation of 211 entries relevant to their case, *see* Court No. 05–00444, ECF No. 5 (July 22, 2005). Because Arbed was not a party thereto, the list of entries attached to the PI request did not encompass Arbed's entries.

This court initially denied the *Arcelor* case PI request. *See* Compl. ¶9; Ans. ¶9; Court No. 05–00444, ECF No. 20 (Aug. 17, 2005). On appeal thereof, the U.S. Court of Appeals for the Federal Circuit penultimately granted the PI requested at that level, pursuant to which Commerce instructed Customs "until further notice" not to implement the liquidation instructions issued in the above-mentioned message numbers 5189204 and 5199201. *See* Message Nos. 05252201 (Sep. 9, 2005) and 5300205 (Oct. 27, 2005), attached to Def's Br. as Ex. C. The Federal Circuit ultimately, on June 15, 2006, reversed the denial of the PI requested in Court No. 05–00444, the case was remanded for entry of a PI here, and on August 29, 2006, this court issued a PI enjoining The United States, Commerce, and Customs "from making or permitting liquidation of any of the unliquidated entries listed herein, and from taking any actions on any of the protests of entries listed herein" ("Order"). Court No. 05–00444, ECF No. 44 (Aug. 29, 2006). The Order listed the 211 entries of SSPC that were at issue in the *Arcelor* case and to which the Order applied. None of Arbed's six entries (at issue in the matter at hand) was included in the list of entries subject to the Order.

On August 31, 2006, Commerce sent Customs message number 6243201 implementing the Order. In this message, Commerce noted that the court had issued a PI in connection with the *Arcelor* case; that it had been "served with the above referenced injunction on 08/30/2006;" and that it and Customs had been enjoined "from taking any actions on any of the protests on entries listed in the injunction" and from "liquidation of the entries listed below", further instructing Customs that it should "not make or permit liquidation of any of the unliquidated entries listed herein" and "not take any actions on any protests of entries listed herein" and specifically listing the 211 entries of SSPC that were at issue in the *Arcelor* case and to which the Order and Commerce's instructions applied. In other words, message number 6243201 mirrored the Order. Again: none of Arbed's six entries was included among the 211 entries listed therein.

Customs did not, at that or any other previous time, affirmatively proceed to liquidate Arbed's six entries.

On October 1, 2007, the *Arcelor* case decided that Commerce's challenged liquidation instructions, which limited Commerce's relevant determination (that SSPC hot rolled in Germany and not fur-

ther cold rolled in Belgium was not subject to the AD or CVD Order for SSPC from Belgium) to post-May 1, 2002 entries of SSPC from Belgium, were arbitrary and capricious, which the Federal Circuit affirmed on January 7, 2009.

As a result, in 2010 Commerce issued liquidation instructions to Customs for the AD and CVD duty orders. *See* Message Nos. 0291310 (Oct. 18, 2010) and 0309303 (Nov. 05, 2010), attached to Def's Br. as Ex. E. Regarding the AD order, Commerce instructed Customs to implement the instructions in message number 5199201 dated 07/18/2005 (which were a correction to Message No. 4083201 dated 3/23/2004) and to liquidate all entries of SSPC from Belgium exported by ALZ, N.V. at an AD rate of 24.43 percent. *See* Message No. 0291310 (Oct. 18, 2010), attached to Def's Br. in Ex. E. Regarding the CVD order, Commerce instructed Customs to implement the instructions in message number 5183804 dated 07/08/2005, and to liquidate all entries of SSPC from Belgium exported by ALZ, N.V. at a CVD rate of 0.97 percent. *See* Message No. 0309303 (Nov. 05, 2010), attached to Def's Br. in Ex. E.

Pursuant thereto, Customs liquidated the entries at issue on January 21, 2011 at an AD rate of 24.43% and a CVD rate of 0.97%. *See* Pl. Br. at Attach. 18. Arbed protested, arguing that the duty rates paid at entry were the proper rates, and that under 19 U.S.C. § 1504(d) its six entries were deemed liquidated six months after August 31, 2006 when Customs received Commerce's message number 6243201 concerning this court's Order in the *Arcelor* case, which applied only to the 211 SSPC entries listed in that Order and not to Arbed's entries. *See* Protest No. 1401–11–100205 (April 19, 2011). Arbed requested reliquidation of its six entries at the appropriate AD rate and reversal of the billing and interest associated with the liquidation of the entries on January 21, 2011. *See id*.

Customs denied the protest in accordance with Headquarters Ruling H169018 (Sep. 09, 2014). *See id*.

II. *Jurisdiction and Standard of Review*

Jurisdiction is properly invoked here pursuant to 28 U.S.C. §1581(a) on the claim of a denial of a customs duty protest under section 515 of the Tariff Act of 1930, 19 U.S.C. §1515. *See* Compl. ¶¶ 1,3.

The material facts are not in dispute: suspension of liquidation was removed in 2006 but the parties disagree as to whether Customs received notice that suspension had been removed in 2006 or in 2010. The question being one of law, disposition via summary judgment is

appropriate. *See* USCIT Rule 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. *Discussion*

A. Legal Context

The Customs Courts Act of 1970 merged all decisions regarding an entry, *e.g.*, value, quantity, classification, amount of customs duties, *et cetera*, into a single action: the "liquidation." *See* 19 U.S.C. §1500. Liquidation is treated as the "final" decision(s) of Customs on a particular entry and forms the basis of a protest thereof. *See* 19 U.S.C. §1514(a) (all administrative decisions will become "final and conclusive upon all persons" — including the United States and any officer thereof — unless a protest against "liquidation" is filed or a civil action commenced here to contest the denial of a protest); *see, e.g.*, *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008). Of particular interest here, an entry must be liquidated within one year after the date the merchandise is entered for consumption unless the time for doing so is extended administratively or suspended by a statute or court order. *See* 19 U.S.C. §1504. If neither extended nor suspended, and if Customs does not affirmatively act to liquidate, the entry

> shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

19 U.S.C. §1504(a)(1). And notwithstanding the final sentence above,[1] Customs' regulations provide that it will post notice of a deemed

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[1] Prior to 1978, there was no time limit on liquidations, which left importers and sureties with uncertain liability for prolonged periods of time. *See, e.g.*, *Dart Export Corp. v. United States*, 43 CCPA 64, C.A.D. 610 (1956), *cert. denied*, 352 U.S. 824 (1956) (claim of retroactive assessment after four year delay in liquidation constituted deprivation of property without due process). Congress sought to remedy this situation by adding section 504, the deemed liquidation provision, to the Tariff Statute of 1930 through passage of the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410 §209, 92 Stat. 888, 902 (codified as amended at 19 U.S.C. §1504) ("1978 provision"). A significant point of contention between Customs and private industry during the House hearings was the absence of any notice requirement for deemed liquidations. *See* Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 before the Subcomm. on Trade of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 56, 117, 276, 375, 451 (1977). When the matter was taken up by the Senate Finance Committee, the Committee specifically amended to "require Customs to provide notice of liquidation in cases where an entry is deemed liquidated." S. Rep. 95–778, 31–32, 1978 U.S.C.C.A.N. 2211, 2242–43. But, for whatever reason, the 1978 provision as passed explicitly states notice of deemed liquidation "need not be given", which one commentator has interpreted as "strongly impl[ying] that since deemed liquidation was expected to occur at the importer's actual asserted rate, lack of notice would not prejudice his rights." Lawrence M. Segan, *Deemed Liquidation: Whose Rate is This Anyway*, 10 Fordham Int'l L. J. 689, 702 (1987).

liquidation electronically on its website and also endeavor to provide courtesy notice. *See* 19 C.F.R. §§ 159.9, 159.11, 159.10(c)(3).

The Federal Circuit has held that in order for deemed liquidation to occur by operation of law, three elements must be met: "(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Fujitsu General America, Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002) ("*Fujitsu*") (finding that in order to have sufficient notice under the statute, there must be "an unambiguous and public starting point for the six-month liquidation period"), quoting *International Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002) ("*International Trading*"). The provision pertaining to those requirements, 19 U.S.C. §1504(d), is as follows:

> [W]hen a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months *after receiving notice of the removal from* the Department of Commerce, other agency, or *a court with jurisdiction over the entry*. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record or (in the case of a drawback entry or claim) at the drawback amount asserted by the drawback claimant.

19 U.S.C. §1504(d) (italics added). Although this provision does not define the nature of the "notice" of the removal of a liquidation suspension that Customs must receive to trigger the six-month period for liquidation, the issue has been addressed by this court and the Federal Circuit.

In *International Trading*, 281 F.3d at 1275–1277, the Federal Circuit held that, for purposes of §1504(d), Customs "receiv[ed] notice" from Commerce that the statutory suspension of the liquidation of entries of shop towels from Bangladesh had been removed on the date Commerce published the final results of its administrative review of the antidumping order on those towels in the Federal Register. *International Trading* noted that the date of publication provided an "unambiguous and public starting point" for the six-month liquidation period. *Id*. at 1275. It also pointed out that the date of publication in the Federal Register "does not give the government the ability to

postpone indefinitely the removal of suspension of liquidation," and avoids "messy factual disputes" about when and what kind of notice Customs received that would force the courts to "referee debates" on those questions. *Id*.

In *Fujitsu*, 283 F.3d at 1380, the Federal Circuit also affirmed this court's decision that, for purposes of §1504(d), Customs "receiv[ed] notice" that a statutory suspension of the liquidation of entries of television sets from Japan was removed on the date Commerce published a notice in the Federal Register of the Federal Circuit's final decision remanding to this court the question of the appropriate dumping margin for those television sets. Commerce did not give liquidation instructions to Customs in that notice, but the Federal Circuit, like this court, held that that did not matter. Relying on its decision in *International Trade*, the Federal Circuit concluded that the suspension of liquidation was removed "when the litigation came to an end," and Commerce's published notice of that fact provided "an unambiguous and public starting point for the six-month liquidation period." *Fujitsu*, 283 F.3d at 1381, quoting *International Trade*, 281 F.3d at 1275.

In *NEC Solutions (America), Inc. v. United States*, 27 CIT 968, 976–77, 277 F. Supp. 2d 1340, 1347–1348 (2003) ("*NEC*"), *aff'd*, 411 F.3d 1340 (Fed. Cir. 2005), this court also gave concrete meaning to the Federal Circuit's requirement that notice received by Customs be "unambiguous". In *NEC*, the plaintiff, a manufacturer and importer of television sets from Japan, claimed it was entitled to a refund of AD duties because Customs failed to liquidate related entries within six months of receiving notice from Commerce that a court-ordered suspension of liquidation had been removed. The notice in that case was an e-mail from Commerce to Customs, dated June 23, 2000, which indicated there "should be no unliquidated entries" of television receivers from Japan held by Customs for AD purposes except for television receivers from a manufacturer other than NEC as to which Commerce "continues to be enjoined." 27 CIT at 976, 277 F. Supp. 2d at 1347. NEC contended that its entries should have been deemed liquidated under § 1504(d) six months later. The government argued that, under § 1504(d), Commerce's e-mail was not valid notice to Customs of the removal of the suspension with regard to NEC for three reasons: (i) the e-mail did not expressly notify Customs that the liquidation suspension had been removed for the entries in question; (ii) the e-mail did not provide the precise duty rate to be applied; and (iii) Commerce did not intend the e-mail to be notice of the removal of the suspension. According to the government, because Customs has a "'merely ministerial role in liquidating antidumping duties'" and

"'merely follows Commerce's instructions,'" it could not have known from reading the e-mail that the liquidation suspension had been removed. 27 CIT at 974, 277 F. Supp. 2d at 1345, citing *Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994).

All the government's arguments were rejected. With regard to the government's first argument, the court observed:

> To anyone reasonably familiar with customs law, the juxtaposition [in the e-mail] of the mandate "there should be no unliquidated entries" with the exception for certain goods for which a Commerce liquidation order "continues to be enjoined" could only mean that there are no remaining suspensions, court-ordered or otherwise, on subject entries, except for those identified.

27 CIT at 977, 277 F. Supp 2d at 1348. The court then found that, reviewing the e-mail "as a whole," it was clear that "a reasonable Customs official, with knowledge in these matters, would have read the message to provide unambiguously that any suspension of liquidation on NEC's entries had been removed." *Id*. On that basis, the court held the notice was "unambiguous." The court summarily rejected the government's other arguments. It held that, under the Federal Circuit's decisions in *International Trading* and *Fujitsu*, the e-mail constituted sufficient notice even though it did not specifically mention suspension or the applicable duty rate. 27 CIT at 975, 277 F. Supp. 2d at 1346. And it held that Commerce's intention in sending the e-mail was "irrelevant." 27 CIT at 977, 277 F. Supp 2d at 1348. The Federal Circuit agreed with this court's reasoning and holding. 411 F.3d at 1345–1346.

This court reaffirmed and extended *NEC* in *American International Chemical, Inc. v. United States*, 29 CIT 735, 387 F. Supp. 2d 1258 (2005). The plaintiff in that case, America International Chemical ("AIC"), challenged the reliquidations by Customs of four consumption entries of potassium permanganate from Spain made in 1986. AIC had asserted AD duties at the rate of zero at the time the entries were made, based on a prior administrative review by Commerce that found no dumping margin to exist for potassium permanganate from Spain. In 1987, however, Commerce conducted another administrative review of covered consumption entries of potassium permanganate from Spain entered at any time during 1986. On June 8, 1988, Commerce published the final results of that review, in which it determined that the AD duty margin that would apply to this product was 16.6 percent. The foreign manufacturer challenged that determination here, and the court issued an injunction suspending liquida-

tion of entries made in 1986, including those by AIC. After a series of remands, the court sustained Commerce's final determination that the AD rate should be 5.53.

On the date an appeal from the court's decision became time-barred, the decision sustaining Commerce's determination became final, the judicial injunction automatically dissolved, and the liquidation suspension was removed. Thus, on February 2, 2000, Commerce sent Customs an e-mail addressing entries of potassium permanganate from Spain dating back to 1984. This e-mail said that the records at Commerce indicated there "should be no unliquidated entries of potassium permanganate from Spain . . . held by Customs for antidumping purposes during the period 01/19/1984 through 12/31/1999." 29 CIT at 738, 387 F. Supp. 2d at 1262. Nonetheless, Commerce subsequently issued liquidation instructions to Customs to assess antidumping duties at a rate of 16.6 percent, which it later revised to 5.53 percent, on AIC's entries of potassium permanganate in 1986. Customs followed those instructions and ultimately reliquidated the duties on plaintiff's entries at 5.53 percent in 2002.

AIC timely protested the four reliquidations, arguing that under §1504(d) its four entries were liquidated as a matter of law at the zero rate of antidumping duty six months after Customs received Commerce's e-mail of February 2, 2000, without liquidating those entries. Customs denied the protests and plaintiff brought suit in this court, making the same argument it had made to Customs. The government countered that the e-mail of February 2, 2000 did not constitute valid notice to Customs under §1504(d) for reasons echoing those it unsuccessfully advanced in the *NEC* case. Specifically, the government argued that: (i) the e-mail did not state that suspension of liquidation was removed for any entry made during the relevant period; (ii) the e-mail did not state that judicial review was completed; and (iii) the e-mail did not inform Customs of the amount of antidumping duty to be assessed against the entries.

The court treated the government's arguments as one argument, *i.e.*, that the e-mail was not unambiguous, and it rejected that argument. The court found that the statement in the e-mail, *i.e.*, that there "'should be no unliquidated entries of potassium permanganate from Spain. . . . held by Customs for antidumping purposes'" during the relevant period, "cannot be read in any manner consistent with the possibility that suspension of liquidation of the subject entries had *not* been removed." 29 CIT at 746, 387 F. Supp. 2d at 1268 (emphasis in original). Applying the "reasonable and knowledgeable

Customs official" standard articulated in *NEC*, the court stated that "[a] 'reasonable Customs official, with knowledge in these matters' could not interpret that statement to mean that liquidation continued to be suspended." *Id.*, citing *NEC*, 277 F. Supp. 2d at 1348. The court concluded that this e-mail, taken "'as a whole,'" was as clear as the e-mail in *NEC* that the liquidation suspension was no longer in effect. 29 CIT at 746–47, 387 F. Supp. 2d at 1268–69.

Two other decisions of the court are also noteworthy.

In *United States v. Great American Insurance Co. of NY*, 35 CIT 1130, 791 F. Supp. 2d 1337 (2011), the court rejected the government's argument that a published "notice of rescission" from Commerce did not constitute valid notice under §1504(d) of the removal of an administrative liquidation suspension because it was silent as to whether the suspension was removed. "Language explicitly stating that a suspension is removed is not required to remove a suspension of liquidation." 35 CIT at 1156, 791 F. Supp. 2d at 1364.

And in *United States v. American Home Assurance Co.*, 40 CIT ___, 151 F. Supp. 3d 1328 (2016), the court repeated that point over the government's opposition. The case upholds that the standard for the sufficiency of the notice required by § 1504(d) is whether a reasonable and knowledgeable Customs official would understand the notice to mean that a liquidation suspension had been removed. "[E]xplicit language stating that a suspension has been lifted is not required to remove a suspension of liquidation so long as 'a reasonable Customs official, with knowledge in these matters, would have read the message to provide unambiguously that any suspension of liquidation on [the importer's] entries has been removed.'" 40 CIT at ___, 151 F. Supp. 3d at 1341, quoting *NEC*, 277 F. Supp. 2d at 1348.

B. Analysis

Arbed argues that its entries of SSPC from Belgium in 1999 were liquidated under §1504(d) six months after Customs received two notices of the removal of the suspension of liquidation and that all three conditions for a deemed liquidation were satisfied: (i) the suspension of liquidation imposed by the injunction pending appeal issued by the Federal Circuit in the *Arcelor* case had been removed; (ii) Customs received valid notice of the removal of the suspension from Commerce in its message number 6243201 and from the court, when Customs was served with the Order in the *Arcelor* case; and (iii) Customs did not liquidate Arbed's entries within six months after it received those notices. Arbed contends that because it is undisputed that CBP did not liquidate Arbed's entries until January 21, 2011, the only contested questions in this case are whether the liquidation

suspension imposed by the temporary injunction and injunction pending appeal issued by the Federal Circuit was removed, and whether CBP received valid notice of that removal. Arbed's answer to both questions is: yes.

First, Arbed explains, the injunction pending appeal issued by the Federal Circuit in the *Arcelor* case, which suspended liquidation of all entries of SSPC from Belgium, dissolved automatically when the Federal Circuit's mandate in the *Arcelor* case was issued on August 7, 2006. *Atlas Copco, Inc. v. EPA*, 642 F.2d 458, 470 (D.C. Cir. 1979) ("a stay issued pursuant to Federal Appellate Rule 8(a) dissolves automatically upon resolution of the appeal"); *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) (an "injunction pending the appeal expires by its own terms upon disposition of the appeal"). *See also NEC*, 277 F. Supp. 2d at 1342 ("the injunction suspending liquidation of Plaintiff's entries . . . was lifted when the decision became final"). It was precisely because the Federal Circuit's injunction pending appeal in the *Arcelor* case dissolved automatically on August 7, 2006 that on the same day Arcelor moved in this court for and obtained a PI to enjoin liquidation of its 211 entries of SSPC from Belgium.

Second, Commerce message number 6243201 gave unambiguous and public notice to Customs on August 31, 2006, that suspension of the liquidation of Arbed's six entries imposed by the Federal Circuit's injunctive orders had been removed. Message 6243201 was based on the CIT's PI of August 29, 2006, which emphasized that the PI enjoined exclusively the "liquidation of entries listed in the injunction" and enjoined Commerce and Customs "from taking any actions on any of the protests on entries listed in the injunction." The message instructed Customs in clear words: "Do not make or permit liquidation of any of the unliquidated entries *listed herein*." *Id*. (emphasis added). And for good measure, it listed each and every one of the 211 entries of SSPC to which the CIT's PI applied. None of Arbed's six entries was included in that list.

The court agrees that message number 6243201 is unambiguous, although that is not the only notice that is unambiguous and relevant here. Under the "reasonable and knowledgeable Customs official" standard adopted by the court and the Federal Circuit in *NEC* (and followed in *American International Chemical* and *American Home Assurance*), a reasonable CBP official knowledgeable in these matters could not have read message number 6243201 other than to apply this court's PI suspending liquidation of entries of SSPC from Belgium precisely to the 221 entries listed in that Message, and to

remove the Federal Circuit's suspension of liquidation as to all other entries of SSPC from Belgium, including Arbed's six entries.

As mentioned, Customs did not affirmatively act to post notice of deemed liquidation of Arbed's six entries. In denying Arbed's protest, Customs noted that Commerce had instructed it on September 9, 2005 and again on October 27, 2005 not to implement the liquidation instructions Commerce had issued on July 8 and July 18, 2006 until further notice. Customs said it "has a merely ministerial role in liquidating duties" and that, "[a]s such, C[ustoms] was unable to liquidate until receiving further notice." Letter from Myles B. Harmon, Director, Commercial and Trade Facilitation Division, to Suzanne McGrann, Assistant Port Director, Trade Compliance, U.S. Customs and Border Protection, p. 5 (Sep. 9, 2014). Customs said that neither the CIT's PI in the *Arcelor* case dated August 29, 2006, nor Commerce message number 6243201, "reference the Federal Circuit case, its outcome, or the ending of its stay of liquidation," and "[n]either contains language instructing C[ustoms] to liquidate any entries." *Id*. Thus, Customs' position is that it did not receive such express instructions from Commerce until 2010, when Commerce directed Customs to liquidate the instructions it had given on July 8 and July 18, 2006.

Such contentions, however, essentially repeat arguments already advanced by the government that the court and the Federal Circuit have considered and rejected. In *NEC*, for example, the court rejected the argument that Customs' "'mere[ ] ministerial role in liquidating antidumping duties'" excused its failure to read an unambiguous message from Commerce appropriately. 27 CIT at 974, 976–77, 277 F.Supp. 2d at1345, 1347. The court has repeatedly stated that, "[l]anguage explicitly stating that a suspension is removed is not required to remove a suspension of liquidation" under §1504(d). *American Home Assurance*, 39 CIT at ___, 151 F. Supp. 3d at 1341, quoting *Great American Insurance*, 35 CIT at ___, 791 F. Supp. 2d at 1364. *See also NEC*, 27 CIT at 975, 277 F. Supp. 2d at 1346 (the Federal Circuit "held that publication of notice of the decision in that case met the requirements of §1504(d) despite the fact that neither the court decision nor Commerce's Federal Register notice specifically mentioned suspension"), referencing *Fujitsu*, 283 F.3d at 1383; *American International Chemical*, 29 CIT at 746–78, 387 F. Supp. 2d at 1268–1269 (discussing appellate endorsement of the concept of public notice in the context of §1504(d)). And in *Fujitsu*, the Federal Circuit rejected the government's argument that the absence of liquidation instructions in a notice was fatal to the validity of a notice under §1504(e).

Fujitsu, 283 F.3d at 1381. These decisions reflect the fact that Customs' "ministerial role" does not mean Customs is without the capacity to comprehend clear notice from Commerce or relevant judicial orders, *see* 19 U.S.C. §1504(d), and/or to take action without a specific directive to that effect from Commerce or the courts.

The defendant's arguments focus solely on the "clarity" of the August 2006 instructions from Commerce, arguing that they are ambiguous and that the first and only "unambiguous and public" notice to Customs that the suspension of liquidation for the entries at issue was removed occurred in 2010, when Commerce issued Message No. 291310 (Oct. 18, 2010) for the AD order and Message No. 0309303 (Nov. 05, 2010) for the CVD order. *See* Def. Br. at 10 and Ex. E. But these arguments do not address the valid notice Customs also received from the court regarding the removal of the suspension of liquidation. As indicated, under §1504(d), valid notice to Customs may come not only from Commerce but also from "a court with jurisdiction over the entry." This court has such jurisdiction, and the Clerk of this Court certified that on August 29, 2006 it served this court's Order in the *Arcelor* case on Customs. This court's orders are not "pretend" orders (*i.e*, without effect unless "further" implemented or directed by Commerce) and Arcelor's counsel also served a copy of that Order on Customs on August 30, 2006. The Order plainly limited the continuing injunction on liquidation to the 211 listed entries, and it just as plainly excluded Arbed's six entries from that injunction by implication. In other words, the notice Customs received from this court plainly was valid notice under §1504(d).

In sum, as Arbed contends, all the conditions for deemed liquidation in 2006 were satisfied in this case. The entries covered by Protest No. 1401–11–100205 liquidated in 2006 by operation of law under 19 U.S.C. §1504(d), and the fact that Customs did not publically acknowledge that fact by posting notice to that effect on its website pursuant to its regulations is of no moment.

In passing, the court notes that Arbed contends the correct date of liquidation was August 7, 2006 upon issuance of the Federal Circuit's mandate in the *Arcelor* case. However, the court must abide by *Cemex, S.A. v. United States*, 384 F.3d 1314 (Fed. Cir. 2004), as argued by the defendant. *See*, *e.g.*, *Omni U.S.A., Inc. v. United States*, 11 CIT 287, 288 (1987). The relevant date was therefore September 13, 2006, when the 90-day period for petitioning the Supreme Court for certiorari from the Federal Circuit's decision of June 15, 2006 expired.

IV. *Conclusion*

In view of the foregoing, Customs' affirmative liquidation of the entries at issue, pursuant to Commerce's 2010 liquidation instruc-

tions, was *ultra vires*, without legal effect. Judgment must therefore be entered for the plaintiff.

So ordered.

Dated: December 21, 2018
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 18–178

ICCS USA CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 17–00108
PUBLIC VERSION

[Granting Defendant's motion for summary judgment; denying Plaintiff's cross-motion for summary judgment.]

Dated: December 26, 2018

Elon A. Pollack and *Matthew R. Leviton*, Stein Shostak Pollack & O'Hara, of Los Angeles, CA, for Plaintiff.

Jamie L. Shookman, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Yelena Slepak*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Barnett, Judge:

Before the court are cross motions for summary judgment. Confidential Def.'s Mot. for Summ. J., and Mem. in Supp. of Def.'s Mot. for Summ. J. ("Def.'s MSJ"), ECF No. 26;[1] Pl.'s Cross-Mot. for Summ. J., and Resp. to Def.'s Mot. for Summ. J. ("Pl.'s XMSJ"), ECF No. 46–2. Plaintiff ICCS USA Corporation ("Plaintiff" or "ICCS") contests the denial of a protest challenging U.S. Customs and Border Protection's ("Customs" or "CBP") decision to issue a Notice to Redeliver (referred to as the "redelivery notice") for the goods in the subject entry,[2] which notice was premised on Customs' determination that the goods—individual butane gas canisters—contained a counterfeit certification

[1] The court references confidential memoranda and exhibits, unless stated otherwise.

[2] This action involves a single entry of butane gas canisters. Def.'s Statement of Undisputed Material Facts ("DSOF") ¶¶ 1–2, ECF No. 19–1; Pl.'s Statement in Resp. to Def.'s Statement of Undisputed Material Facts ("Pl.'s Resp. to DSOF") ¶¶ 1–2, ECF No. 46–1. The entry at issue is M42–1293732–8. Summons, ECF No. 1. ICCS contests the denial of protest number 4601–17–102119. *Id.*

mark in violation of 19 U.S.C § 1526(e).[3] *See* Compl. ¶ 3, ECF No. 7; Pl.'s XMSJ at 1, 4; Pl.'s Reply to Def.'s Opp'n to Pl.'s Cross-Mot. for Summ. J. ("Pl.'s Reply") at 1–3, ECF No. 54. The United States ("Defendant" or "the Government") contends that Customs correctly issued the redelivery notice because the goods displayed a counterfeit certification mark. *See generally* Def.'s MSJ. Plaintiff asserts that Customs improperly issued the redelivery notice because Plaintiff had authorization to display the mark. *See generally* Pl.'s XMSJ; Pl.'s Reply. For the reasons discussed below, Defendant's motion for summary judgment will be granted; Plaintiff's cross-motion for summary judgment will be denied.

BACKGROUND

1. Material Facts Not Genuinely in Dispute

The party moving for summary judgment must show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." United States Court of International Trade ("USCIT") Rule 56(a). Parties filed cross motions for summary judgment and submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. *See* DSOF; Pl.'s Resp. to DSOF; Pl.'s Statement of Undisputed Facts ("PSOF"), ECF No. 46–3; Confidential Def.'s Resp. to Pl.'s Rule 56.3 Statement of Material Facts to Which There is no Genuine Dispute ("Def.'s Resp. to PSOF"), ECF No. 49–1. Upon review of the parties' facts (and supporting exhibits), the court finds the following undisputed and material facts.[4]

ICCS is a corporation with a principal place of business in Los Angeles, California. Compl. ¶ 1; Answer ¶ 1, ECF No. 14. On January 19, 2017, ICCS imported 56,616 individual butane gas canisters that displayed a "PREMIUM" brand label. DSOF ¶¶ 2–3; Pl.'s Resp. to DSOF ¶¶ 2–3; PSOF ¶¶ 6–7; Def.'s Resp. to PSOF ¶¶ 6–7. The

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[3] Section 1526(e) incorporates by reference the Lanham Act's definition of counterfeit mark and states:

> [a]ny such merchandise bearing a counterfeit mark (within the meaning of [15 U.S.C. § 1127]) imported into the United States in violation of the provisions of [15 U.S.C. § 1124], shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws.

19 U.S.C. § 1526(e). The Lanham Act defines "counterfeit" as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127. "The term 'mark' includes any trademark, service mark, collective mark, or certification mark." *Id.*

[4] For purposes of this discussion, citations are provided to the relevant paragraph number of the undisputed facts and response, and internal citations generally have been omitted. Citations to the record are provided when a fact is admitted based on lack of knowledge, or to the extent the fact is supported by the proponent's cited documents. Citations to the record are also provided when a fact, though not admitted by both Parties, is uncontroverted by record evidence.

PREMIUM label was affixed on the outside of the butane gas canisters. PSOF ¶ 8; Def.'s Resp. to PSOF ¶ 8. At the time of importation, the canisters displayed a registered certification mark owned by Underwriters Laboratory ("UL").[5] DSOF ¶ 2; Pl.'s Resp. to DSOF ¶ 2. The certification mark consists of "UL" in a circle. *See* Def.'s Ex. 1, ECF No. 19–2 (photographs of the of the subject goods); Confidential Def.'s Ex. 10 at 1, ECF No. 26–1.

One Jung Can Mtf. Co. Ltd. ("OJC") manufactured the subject butane gas canisters. PSOF ¶ 2; Def.'s Resp. to PSOF ¶ 2. In October 2001, UL tested OJC's "MEGA-1" model of butane gas canisters and authorized OJC to display UL's certification mark on them. PSOF ¶ 3; Def.'s Resp. to PSOF ¶ 3; Confidential Pl.'s Ex. 2 at UL000069–72 (Report by UL issued on October 2001), ECF No. 47. As of February 2017, OJC had maintained authorization to display UL's certification mark on its MEGA1 model of butane gas canisters. PSOF ¶ 4; Def.'s Resp. to PSOF ¶ 4; *see also* Confidential Pl.'s Ex. 7 (Letter from Katie Kim, Customer Relationship Management, UL Korea Inc., to Kevin Yoo, ICCS, regarding status of multiple listing relationship between OJC and ICCS, accompanying Pl.'s Protest) ("Kim Letter"), ECF No. 47.

In October 2015, UL issued to ICCS a "Quotation" for "multiple listing services." *See* Pl.'s Ex. 12 at UL000007–08, ECF No. 59. A multiple listing allows products certified by one company (referred to as the "basic applicant," which in this case is OJC) to be produced for marketing under the name of another company (referred to as the "multiple listee," which in this case is ICCS). Service Terms ¶ 1; Kim Letter. The Quotation incorporated by reference a Global Services Agreement ("GSA") and the Service Terms. Pl.'s Ex. 12 at UL000008; *see generally* Service Terms; Pl.'s Ex. 13 (GSA), ECF No. 59.[6] ICCS signed the Quotation on October 7, 2015. *See* Pl.'s Ex. 12 at UL000009. The acceptance of the written Quotation established a Multiple Listing Services Agreement (otherwise referred to as "contract") between multiple listee ICCS and UL. *See* GSA ¶¶ 1–2. The

[5] UL "is a testing laboratory that examines and tests various products for compliance with safety standards." *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1328–29 (Fed. Cir. 2006). When UL determines that a manufacturer's products comply with applicable standards and requirements, it authorizes the manufacturer to affix UL's certification marks. *See* Def.'s Ex. 9 at 1, ECF No. 19–2; Pl.'s Ex. 4 (Multiple Listing, Recognition, Verification, and Classification Services Service Terms) ("Service Terms") ¶ 1, ECF No. 59; *see also* *Acadia Tech.,* 458 F.3d at 1329.

[6] The Service Terms refer to "Client" which, according to the GSA, refers to ICCS. *See* Service Terms at UL000015; GSA at UL000019.

Service Terms[7] and the GSA form the contract between ICCS and UL. *Id.*¶ 2.

UL maintains an Online Certifications Directory (otherwise referred to as "online directory"), which allows the public to "Verify a UL Listing, Classification, or Recognition." Def.'s MSJ at 3 n.4; Pl.'s XMSJ at 6; *see also* Confidential Pl.'s Ex. 9, ECF No. 47. The information that appears on UL's online directory is identical to the information that appears on a "Multiple Listing Correlation Sheet," which is an internal document within UL that is shared with UL's clients. Confidential Pl.'s Ex. 9; *see generally* Confidential Pl.'s Ex. 6 at UL000187 (Multiple Listing Correlation Sheet), ECF No. 47. Before February 8, 2017 (including on the date of entry), UL's Online Certification Directory listed only one model of butane gas canister under ICCS's name: "US BUTANE." Def.'s Ex. 2, ECF No. 19–2 (screenshot of UL's Online Certifications Directory). On February 8, 2017 (after the date of entry), UL updated both the Multiple Listing Correlation Sheet and its online directory to include additional models, including the PREMIUM model, of butane gas canister for ICCS. *See* Def.'s Ex. 3, ECF No. 19–2 (screenshot of UL's Online Certifications Directory); Confidential Pl.'s Exhibit 6 at UL000187 (Multiple Listing Correlation Sheet, revised on Feb. 8, 2017).

At the time of importation, CBP placed a manifest hold on the merchandise, which suspended its release from CBP's custody. DSOF ¶ 4; Pl.'s Resp. to DSOF ¶ 4. On January 30, 2017, CBP removed the manifest hold and released the merchandise from its custody. DSOF ¶ 4; Pl.'s Resp. to DSOF ¶ 4. On February 23, 2017, CBP issued ICCS the redelivery notice, stating that ICCS was in violation of 19 U.S.C § 1526(e). DSOF ¶ 8; Pl.'s Resp. to DSOF ¶ 8. ICCS redelivered to CBP 29,008 of the 56,616 canisters, which CBP seized on April 19, 2017. DSOF ¶¶ 9–10; Pl.'s Resp. to DSOF ¶¶9–10; *see also* PSOF ¶¶ 13–14; Def.'s Resp. to PSOF ¶¶ 13–14.

On May 1, 2017, CBP informed ICCS that the seized merchandise was subject to forfeiture pursuant to 19 U.S.C. § 1526(e) and provided notice of the seizure to UL. DSOF ¶10; Pl.'s Resp. to DSOF ¶ 10. On July 13, 2017, CBP issued ICCS a Notice of Penalty or Liquidated Damages Incurred and Demand for Payment with respect to the 27,608 canisters that ICCS did not redeliver. DSOF ¶ 11; Pl.'s Resp. to DSOF ¶ 11; *see also* PSOF ¶15; Def.'s Resp. to PSOF ¶ 15. CBP assessed damages against ICCS in the amount of $41,412.00. DSOF

[7] The Service Terms incorporate by reference a Dual Authorization Form, which is also part of the contract. *See* Service Terms ¶ 5(b); Confidential Pl.'s Ex. 14, ECF No. 47 (Dual Authorization Form).

¶11; Pl.'s Resp. to DSOF ¶ 11; *see also* PSOF ¶15; Def.'s Resp. to PSOF ¶ 15.

ICCS filed a protest against CBP's demand for redelivery on April 6, 2017. DSOF ¶12; Pl.'s Resp. to DSOF ¶ 12; *see also* PSOF ¶ 16; Def.'s Resp. to PSOF ¶ 16. In its protest, ICCS claimed that the redelivery notice was unlawful because ICCS had a multiple listing relationship with UL and, therefore, had UL's authorization to import the goods bearing the mark. Confidential Pl.'s Ex. 7. ICCS provided Customs with the Multiple Listing Correlation Sheet, which had been revised on February 8, 2017 to include the PREMIUM model. *Id.*

ICCS's protest was deemed denied on May 8, 2017.[8] Def.'s Ex. 11, ECF No. 19–2. CBP did not review ICCS's contract terms with UL when it analyzed the certification mark on the goods. Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17. On May 26, 2017, UL asserted its position to CBP that its certification marks "are not retroactive." Confidential Pl.'s Ex. 8 at CBP000002, ECF No. 47.

2. Procedural History

Plaintiff filed this action on May 11, 2017. *See* Summons. Plaintiff's complaint alleges that Customs issued an improper redelivery notice because both ICCS and OJC had valid license agreements with UL to display UL's certification mark. Compl. ¶ 10. The Government filed its answer on November 9, 2017 and, shortly thereafter, filed a motion for summary judgment. *See* Answer; Def.'s MSJ . With permission from the court, Plaintiff conducted limited discovery, after which it filed its response and cross-motion for summary judgment. *See* Order (Jan. 12, 2018), ECF No. 32; Pl.'s XMSJ.

JURISDICTION

The single entry at issue consisted of 56,616 butane gas canisters, 29,008 of which the Government seized on April 19, 2017. DSOF ¶¶ 1–2, 9–10; Pl.'s Resp. to DSOF ¶¶ 1–2, 9–10. Plaintiff's complaint alleges that the court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(a)[9] and the parties appear to agree that this action only concerns the 27,608 butane gas canisters that

[8] Defendant avers that CBP denied the protest on May 26, 2017, citing Defendant's Exhibit 11. DSOF ¶ 12; Pl.'s Resp. to ¶ 12. While Exhibit 11 includes May 26, 2017 as the date of denial, it cites 19 U.S.C. § 1499(c)(5)(B) and 19 C.F.R. § 174.21(b) as the basis for the denial. Those provisions state that protests relating to exclusions are treated as denied after 30 days. Consequently, the effective date of denial is May 8, 2017.

[9] Plaintiff's jurisdiction allegation is uncontroverted. See Compl. ¶ 3; Answer ¶ 3.

Customs did not seize.[10] *See* Def.'s MSJ at 4–5; Pl.'s Reply at 6, 13. It is undisputed that Customs seized 29,008 butane gas canisters and provided notice of that seizure to ICCS prior to Plaintiff's commencement of this lawsuit. DSOF ¶¶ 9–10; Pl.'s Resp. to DSOF ¶¶ 9–10. Pursuant to 28 U.S.C. § 1356, the court's jurisdiction does not extend to the 29,008 seized butane gas canisters.

Sections 514 and 515 of the Tariff Act of 1930 set forth the mechanism for protesting Customs' redelivery decisions. *See* 19 U.S.C. §§ 1514, 1515. The Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). This includes a challenge to the denial of a protest concerning "a demand for redelivery [of merchandise] to customs custody under any provision of the customs laws."[11] 19 U.S.C. § 1514(a)(4); *see also Xerox Corp. v. United States*, 423 F.3d 1356, 1365 (Fed. Cir. 2005) ("[T]he existence of a protestable decision of the type enumerated in 19 U.S.C. § 1514(a) is a condition precedent for jurisdiction to lie in the Court of International Trade under section 1581(a)."). Because Plaintiff availed itself of the remedies in 19 U.S.C. §§ 1514 and 1515 in challenging the redelivery of the butane gas canisters that Customs did not seize, the court has jurisdiction over the challenge to the denial of its protest. *See* 28 U.S.C. § 1581(a).

LEGAL STANDARD

Summary judgment is proper when "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The court must view the evidence in the light most favorable to the nonmovant and may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986); *Netscape Comm.'s Corp. v. Konrad*, 295 F.3d at 1315, 1319 (Fed. Cir. 2002). When both parties move for summary judgment, the court generally must evaluate each party's motion on its own merits and draw all reasonable inferences against the party whose motion is under consideration. *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000).

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[10] "It is well established" that the Court of International Trade "lacks jurisdiction under § 1581(a) to review a seizure of goods by Customs." *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 692, 437 F. Supp. 2d 1335, 1340 (2006). Pursuant to 28 U.S.C. § 1356, jurisdiction over seized merchandise lies with the district court.

[11] An exception exists for determinations appealable under 19 U.S.C. § 1337, which is not relevant here. *See* 19 U.S.C. §§ 1337, 1514(a)(4).

STANDARD OF REVIEW

The court reviews denial of protest claims arising under 19 U.S.C. § 1515 *de novo*, and "make[s] its determinations upon the basis of the record made before [it]." 28 U.S.C. § 2640(a)(1).

Defendant asks the court not to review the terms of the Multiple Listing Services Agreement between ICCS and UL, contending that the court "need not and should not decide substantive issues of trademark law [to] determine whether CBP properly denied [this] protest" because the proper forum to decide those issues is in district court. *See* Mem. of Law in Opp'n to Pl.'s Cross-Mot. for Summ. J. and in Further Supp. of Def.'s Mot. for Summ. J. ("Def.'s Resp.") at 1–6, ECF No. 49. In essence, the Government asks the court only to determine whether Customs procedurally complied with its regulations when making its demand for redelivery. *See id*. at 4–5 (the court's inquiry is limited to determining whether "evidence supports a finding that CBP had a valid reason to suspect that UL's mark was being infringed") (citing 19 C.F.R. §§ 133.21(b)(1), 133.26, 141.113(d)).

Plaintiff maintains that the court is not limited to procedural questions but must reach the substantive legal issues underlying the redelivery notice to determine whether CBP properly denied ICCS's protest. Pl.'s Reply at 3–10. Plaintiff argues that the court must analyze the terms of the Multiple Listing Services Agreement to determine whether ICCS had authorization to display UL's certification mark on the goods at issue and, thus, whether Customs' decision to deny the protest was proper. Pl.'s XMSJ at 2.

Each of the Court of International Trade cases declining jurisdiction upon which the Government relies are inapposite because they concerned seized merchandise and, thus, jurisdiction was proper in district court. *See* Def.'s Resp. at 5 (citing *Int'l Maven, Inc. v. McCauley,* 12 CIT 55, 58–59, 678 F. Supp. 300, 303 (1988); *H & H Wholesale Servs.,* 30 CIT at 701, 437 F. Supp. 2d at 1348; *Tempco Mktg. v. United States,* 21 CIT 191, 193, 957 F. Supp. 1276, 1279 (1997); *Genii Trading Co. v. United States,* 21 CIT 195, 197 (1997); *CDCOM (U.S.A.) Int'l, Inc. v. United States*, 21 CIT 435, 439, 963 F. Supp. 1214, 1218 (1997)). As noted, this action concerns only the canisters that CBP did not seize.

CBP issued the redelivery notice on the basis that the merchandise contained a counterfeit certification mark, in violation of 19 U.S.C. § 1526(e). Generally, Customs' decisions "including the legality of all orders and findings entering into the same, as to . . . a demand for redelivery" are "final and conclusive . . . unless a protest is filed" or "a civil action contesting the denial of a protest" is commenced in this court. 19 U.S.C. § 1514(a)(4). As explained above, Plaintiff availed

itself of the protest remedy, commenced this action challenging the denial of that protest, and this court has jurisdiction to review the denial of the protest. *See* 28 U.S.C. § 1581(a).

Here, the question of whether CBP properly denied ICCS's protest turns on whether the goods at the time of importation displayed a counterfeit certification mark. That the underlying substantive issue could also fall within the jurisdiction of a district court (in another type of case) does not preclude this court from reaching the issue in this case. *See CBB Grp., Inc. v. United States*, 35 CIT __, 783 F. Supp. 2d 1248, 125051, 1256 (2011) (addressing the court's ability to reach an issue of copyright law); *cf. Lois Jeans & Jackets, U.S.A., Inc. v. United States*, 5 CIT 238, 241, 244, 566 F. Supp. 1523, 1528 (1983) (declining to reach an issue of trademark law that was then before a district court while asserting jurisdiction over the protest claim).

Here, the court has exclusive jurisdiction over Plaintiff's challenge to the denial of its protest. *See* 28 U.S.C. § 1581(a). Moreover, because the determination of whether the notice of redelivery was proper and whether the merchandise displayed a counterfeit UL certification mark are the same, the court may reach the underlying issues associated with ICCS's use of the certification mark pursuant to the *de novo* standard of review.[12]

LEGAL FRAMEWORK

Generally, when imports that should not have been admitted into the commerce of the United States have been released, Customs demands the return of such imports to its custody. *See* 19 C.F.R. §§ 133.26,[13] 141.113(d).[14] In this case, CBP issued the redelivery notice on the basis that the goods contained a counterfeit certification mark, in violation of 19 U.S.C. § 1526(e). In relevant part, 19 U.S.C. § 1526(e) provides that:

> [a]ny [merchandise of foreign manufacture] bearing a counterfeit mark (within the meaning of [15 U.S.C. § 1127]) imported into the United States in violation of the provisions of [15 U.S.C.

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[12] If the court is to determine that the denial of ICCS's protest was proper because ICCS displayed a counterfeit mark, it necessarily must view all the evidence on the record before it, including the Multiple Listing Service Agreement. *See* 28 U.S.C. § 2640(a)(1).

[13] "If it is determined that merchandise which has been released from CBP custody is subject to the restrictions of § 133.21, § 133.22 or § 133.23 of this subpart, an authorized CBP official shall promptly make demand for the redelivery of the merchandise . . . ." 19 C.F.R. § 133.26

[14] 19 C.F.R. § 141.113(d) provides:

> If at any time after entry an authorized CBP official finds that any merchandise contained in an importation is not entitled to admission into the commerce of the United States for any reason not enumerated in paragraph (a), (b), or (c) of this section, an authorized CBP official shall promptly demand the return to CBP custody of any such merchandise which has been released.

> § 1124[15]], shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws.

19 U.S.C. § 1526(e).[16] "A 'counterfeit' is a spurious mark which is identical with, or substantially indistinguishable from, a registered [certification] mark." 15 U.S.C. § 1127; *see also* 19 C.F.R. § 133.21(a) (similar). A "spurious" mark is one that "false." Webster's Third New Int'l Dictionary of the English Language Unabridged (2002) ("Webster's") at 2212; *see also Computer Towers*, 152 F. Supp. 2d at 1198.

> The term "certification mark" means any word, name, symbol, or device, or any combination thereof—
> (1) used by a person other than its owner, or
> (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

15 U.S.C. § 1127. Counterfeit certification marks, such as those owned by UL, "falsely imply that the merchandise has been tested and approved for safety." *Computer Towers*, 152 F. Supp. 2d at 1197.

DISCUSSION

1. Parties' Contentions

Defendant avers that it is entitled to summary judgment because, at the time of entry, ICCS lacked authorization from UL to display UL's certification mark on the PREMIUM model of butane canisters. Def.'s MSJ at 8. Relying on the Online Certifications Directory, Defendant contends that ICCS had authorization to display UL's certification mark only on the US BUTANE model of gas containers, and ICCS received permission to use UL's mark on the PREMIUM model after the date of entry. *Id.* at 9. Defendant asserts that UL did not consent to the retroactive use of its certification mark. Def.'s MSJ at

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[15] Section 1124 forbids any article of imported merchandise that copies or simulates a registered certification mark from entry into the United States. *See* 15 U.S.C. § 1124; *United States v. 10,510 Packaged Computer Towers, More or Less ("Computer Towers")*, 152 F. Supp. 2d 1189, 1196 (N.D. Cal. 2001) (holding that 15 U.S.C. § 1124 covers certification marks). "Merchandise bearing a 'counterfeit mark' is [] a subset of merchandise that merely 'copies or simulates' a registered mark. . . . [T]he provisions of sections 1526(e) and 1124, read together, relate only to marks that are 'counterfeit.'" *Sakar Int'l, Inc. v. United States*, 516 F.3d 1340, 1346 n.5 (Fed. Cir. 2008) (internal citations omitted).

[16] As discussed *supra*, the court is not considering the validity of the seizure of merchandise; however, this provision is relevant to the basis for CBP's redelivery notice.

6–7, 10–11. Defendant also relies on statements by a UL employee that UL has a "strict zero-tolerance policy," and a "long-standing non-negotiable position . . . [to] not consent to the importation, exportation, obliteration, or removal of unauthorized UL certification marks on products and/or packaging seized by law enforcement for trademark infringement." *Id.* at 10–11 (quoting Def.'s Ex. 9 at 2). This policy, according to UL, is "uniformly applied and [] considered reasonable and necessary in order to protect the integrity of [its] registered marks." Def.'s Ex. 9 at 2.

Plaintiff contends that the Government relies on "extrinsic evidence," which is "not dispositive" of the issue in this case. Pl.'s XMSJ at 7. Plaintiff argues that its contract with UL permitted it to affix the certification mark on any brand of butane gas canisters if they were the same physical product as OCJ's MEGA-1 butane gas canister that UL certified in 2001. *See id.* at 3, 8–9.[17] Plaintiff admits that UL did not update ICCS's multiple listing to include the PREMIUM model until February 8, 2017, *id.* at 14, but maintains that "[u]pdating the listing is simply a record keeping requirement" and failure to comply with it did not render the goods counterfeit, *id.* at 10. Plaintiff avers that the PREMIUM brand label "is purely cosmetic," *id.*at 3, and any changes to OJC's MEGA-1 brand product were "superficial and do not violate UL's trademark rights," *id.* at 9.

2. Analysis

"A 'counterfeit' is a spurious mark which is identical with, or substantially indistinguishable from, a registered [certification] mark." 15 U.S.C. § 1127. The parties do not dispute that the mark displayed on the butane gas canisters on the date of entry was identical to the registered certification mark owned by UL. The only question, therefore, is whether the mark was "spurious." *See id.* Plaintiff argues that the mark was not spurious because its contract with UL provided ICCS authorization to display the mark on the PREMIUM model of butane gas canisters. *See, e.g.*, Pl.'s XMSJ at 19.

The GSA, which forms part of the contract between ICCS and UL, has a choice of law provision, providing that Illinois law governs disputes between contracting parties. GSA ¶ 22. When a contract is governed by Illinois law, the court's initial task is to determine whether the contract terms are ambiguous. *See United States v. 4500 Audek Model No. 5601 AM/FM Clock Radios* ("*Audek Model Clock Radios*"), 220 F.3d 539, 542 (7th Cir. 2000). "Whether a contract is

[17] Elsewhere in its brief, however, Plaintiff argues that "[t]he Service Terms do not address [the] issue" of whether UL "must provide express authorization for each particular brand of butane canister before ICCS may lawfully display the UL certification mark on the product." Pl.'s XMSJ at 13.

ambiguous is a question of law, and ambiguity can be found only if the language of the contract is reasonably or fairly susceptible of more than one construction." *Id.* at 543 n.6 (internal quotation marks and citation omitted). When the contract terms are unambiguous, "the court must decide the contract's meaning as a matter of law." *Id.* at 542.

ICCS entered into a contract with UL in October 2015.[18] Pursuant to this contract, OJC was the "basic applicant" and ICCS was the "multiple listee." Kim Letter; *see also* Service Terms ¶ 1. The Service Terms, which are part of the contract, explain that the scope of service was to authorize OJC to affix UL's certification mark on the "basic product" marked with ICCS's label, instead of OJC's label. Service Terms ¶ 1. The Service Terms refer to ICCS as "a third-party company whose label is applied to a [UL] certified product" and "is included in [UL's] Online Certification Directory." *See id.* ¶ 2 (defining "multiple listee"). When ICCS entered into a contract with UL, it registered only the US BUTANE model. Kim Letter; Def's Ex. 2 (screenshot of UL's Online Certifications Directory showing only the US BUTANE model). As discussed below, the Service Terms contemplate the addition of other models to ICCS's multiple listing, but only after approval from UL.

The Service Terms authorize the designation of a "multiple listing manager" to submit "multiple listing requests" to UL on behalf ICCS. Service Terms ¶ 4(a). The Service Terms define "multiple listing requests" as when OJC and ICCS "[a]dd, [d]elete, or [r]evise products . . . within an existing [m]ultiple [l]isting [r]elationship." *Id.* ¶ 2. When making a multiple listing request, the multiple listing manager must inform UL, in writing, "of the basic product" and must also "*specify* [ICCS's] company name, the name of the product(s), and

[18] The Service Terms detail the steps for the establishment of a multiple listing relationship. As it pertains to ICCS, the first step was for the manufacturer (OJC) to establish a listing relationship with UL with respect to its "basic products," which allowed OJC to affix UL's mark on products marked with OJC's name. Service Terms ¶ 1; *see also id.* ¶ 2 (defining "[b]asic products" as "devices, equipment, materials, or systems submitted" to UL for assessment and determination as to the product's eligibility for UL's services). Here, "basic products" refers to ICCS's MEGA-1 model of butane gas canisters. *See* PSOF ¶ 3; Def.'s Resp. to PSOF ¶ 3 (undisputed fact that UL tested "MEGA-1" model of butane gas canisters in 2001); Kim Letter (stating [[ ]]); Confidential Pl.'s Ex. 9 at UL0000346 (stating that [[ ]]); Confidential Pl.'s Ex. 6 at UL000187 (Multiple Listing Correlation Sheet showing [[ ]]). The second step required UL to "publish[] a Listing, Recognition, Verification, or Classification on behalf of [OJC]". Service Terms ¶ 1. In the third step, UL authorized OJC to affix UL's certification mark on the basic product marked with ICCS's label, instead of OJC's label. *Id.*

identifying catalog, *model* or other product designations *for which the Service is desired*."[19] *Id.* ¶ 4(b) (emphasis added).

The Service Terms provide guidance on the types of products eligible for a multiple listing request. It states that the products "shall not differ from the basic product(s) other than in color, trim, company identification, product designation, or other features *that UL . . . deems to be superficial*."[20] *Id.* ¶ 6(a) (emphasis added). When UL determines that this requirement has been satisfied, it "will *add a Multiple Listing,* Recognition, Verification, or Classification *Correlation Sheet . . . to authorize [OJC] to use the [certification mark] on the product* and publish the Multiple Listing, Multiple Recognition, Multiple Verification, or Multiple Classification in such form, manner, and classification as UL . . . may determine, after [ICCS] executes the GSA."[21] *Id.* ¶ 7(a) (emphasis added). The Service Terms further explain that "[t]he Multiple Listing Correlation Sheet will identify and set forth requirements for the product and *will specify* the [certification mark that] may be used *only on* or in connection with the product . . . ." *Id.* ¶ 7(b) (emphasis added).

The events that took place in this case, albeit with some occurring after the date of importation, are consistent with the steps outlined in the Service Terms. In October 2015, ICCS designated Kevin Yoo as its authorized multiple listing manager. *See* Confidential Pl.'s Ex. 14 at UL000024–25; *see also* Service Terms ¶ 5(b) (incorporating by reference the Dual Authorization Form). Only after ICCS imported the goods in question did Mr. Yoo submit a multiple listing request to UL and include the PREMIUM model in the request. *See* Confidential Pl.'s Ex. 6 at UL000109. On February 8, 2017, UL updated its Multiple Listing Correlation Sheet to include the PREMIUM model.[22] *Id.* at UL000187.

Contrary to Plaintiff's assertion that "[t]he Service Terms do not address [the] issue" of whether UL "must provide express authorization for each particular brand of butane canister before ICCS may

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[19] As is evident from this sentence, the first provision requires identifying information regarding the basic product; the second provision requires identifying information on the multiple listee's "model . . . for which the Service is desired." *Id.* ¶ 4(b).

[20] Plaintiff claims this clause gave ICCS authorization to display the mark on any brand of the basic products if the branding is deemed superficial. Pl.'s XMSJ at 9. However, the provision provides that UL determines whether the branding is superficial, not ICCS. *See* Service Terms ¶ 6(a).

[21] Plaintiff claims that this clause applies only to OJC and is silent on ICCS's authorization to use the mark. Pl.'s XMSJ at 12–13. Plaintiff's interpretation is inconsistent with paragraph 1 of the Service Terms, which provides that the multiple listing service authorizes OJC to affix UL's certification mark on the basic product marked with ICCS's label, instead of OJC's label. *See* Service Terms ¶ 1.

[22] On February 10, 2017, UL issued a Certificate of Compliance stating that [[ ]]. Confidential Pl.'s Ex. 6 at UL000114.

lawfully display the UL certification mark on the product," Pl.'s XMSJ at 13, the Service Terms, as discussed above, clearly do address the issue. UL only adds a new model to the Multiple Listing Correlation Sheet after ICCS submits a multiple listing *request* and *UL determines* that the model is eligible for a multiple listing service because any differences in the new model's features are superficial from the basic (MEGA-1) product. Here, UL did not update the Multiple Listing Correlation sheet until after the date of importation. Both the Service Terms and the GSA expressly forbid ICCS from using UL's certification marks "on any goods or their containers or packaging," "[e]xcept as otherwise expressly authorized." Service Terms ¶ 8; *see also* GSA ¶ 8 (similar). Because ICCS did not have express authorization to display UL's certification mark on the PREMIUM model on the date of importation, and because UL's authorization that occurred after the date of importation was not retroactive, the certification mark was spurious and, therefore, counterfeit.[23] *Cf. Audek Model Clock Radios*, 220 F.3d at 534–44 (interpreting a contract under Illinois law and holding that manufacturer of clock radios did not have authorization to affix UL's certification mark on the radios imported from China when the agreement only listed a location in Chicago, Illinois); *Computer Towers*, 152 F. Supp. 2d at 1198–99 (holding that a mark was spurious when "its placement on the packages and boxes [of a computer tower] falsely suggest[ed] that [UL had] inspected and certified the entire computer tower" but UL had certified only "the power supply *housed within* the computer tower").

Plaintiff avers that the PREMIUM brand label "is purely cosmetic" and only "for marketing purposes." Pl.'s XMSJ at 3 (citing Confidential Pl.'s Ex. 5, ECF No. 47); PSOF ¶ 8 (citing Confidential Pl.'s Ex. 5; Def.'s Ex. 1). First, the cited exhibits are photographs depicting the PREMIUM model butane gas canisters. These photographs do not establish that the label is purely cosmetic or only for marketing purposes. Second, as stated above, the contract does not give ICCS authorization to display the certification mark on any model that ICCS deems "cosmetic"; rather, ICCS must request the addition of new models to the multiple listing service by submitting a Multiple Listing Request Form. UL will add the product to the service "[i]f the product(s) is found to be eligible . . . ." Service Terms ¶ 7(a).

Plaintiff also avers that UL deemed the PREMIUM label as "superficial," which means that ICCS did not violate its contract with UL. PSOF ¶ 10; Pl.'s Reply at 9. While it can be inferred that UL

[23] Indeed, UL's final determination on its Mark Verification Report is consistent with this conclusion. Confidential Def.'s Ex. 10 at 2 (concluding that the BUTANE model goods at issue were "[[ ]]).

deemed any differences between the US BUTANE and PREMIUM models to be "superficial" on February 8, 2018, UL did not make that judgment prior to the importation date and nothing authorized ICCS to display the mark on the date of importation without UL's authorization. *See* Service Terms ¶ 8; GSA ¶ 8. Therefore, Plaintiff's superficiality argument must fail. To the extent that Plaintiff's briefs may be read to suggest that Plaintiff is making distinct, additional arguments, the court finds them inapposite to the issue before it.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted; Plaintiff's cross-motion for summary judgment is denied. Judgment will be entered accordingly.

Dated: December 26, 2018
New York, New York

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

Slip Op. 18–179

SHENZHEN XINBODA INDUSTRIAL CO., LTD., Plaintiff, and QINGDAO TIANTAIXING FOODS CO., LTD., et al., Consolidated Plaintiffs, and JINXIANG HEJIA CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00116

[Sustaining the U.S. Department of Commerce's selection of Romania as the primary surrogate country and Romanian pricing data as the surrogate value for raw garlic. Remanding the U.S. Department of Commerce's addition of delivery costs to the surrogate value for raw garlic and calculation of Plaintiff's movement expenses.]

Dated: December 26, 2018

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff and Plaintiff-Intervenors.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Natan P.L. Tubman*, Attorney, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey, *John M. Herrmann*, *Joshua R. Morey*, and *Heather N. Doherty*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or the "agency") redetermination upon re-

mand in this case. *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 69–1.

Plaintiff Shenzhen Xinboda Industrial Co., Ltd. ("Plaintiff" or "Xinboda") initiated this action[1] challenging Commerce's final results in the 20th administrative review ("AR 20") of the antidumping duty order on fresh garlic from the People's Republic of China ("PRC" or "China").[2] *See* Summons, ECF No. 1; *Fresh Garlic From the People's Republic of China*, 81 Fed. Reg. 39,897 (Dep't Commerce June 20, 2016) (final results and final rescission of the 20th antidumping duty admin. review; 2013–2014) ("*Final Results*"), ECF No. 30–4, and accompanying Issues and Decision Mem., A-570–831 (June 10, 2016) ("I&D Mem."), ECF No. 30–5.[3] Specifically, Xinboda, a mandatory respondent in this review, challenged Commerce's (1) rejection of surrogate country information demonstrating Mexico's economic comparability to China; (2) selection of Romania as the primary surrogate country; and (3) calculation of movement expenses. *See* Pl. Shenzhen Xinboda Industrial Co., Ltd.'s Mot. for J. on the Agency R., ECF No. 39, and Pl. Shenzhen Xinboda Industrial Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R. ("Xinboda's 56.2 Br."), ECF No. 39–2; I&D Mem. at 1. On December 18, 2017, the court remanded Commerce's rejection of surrogate country information and deferred consideration of Plaintiff's additional challenges pending the results of Commerce's remand redetermination. *See Shenzhen Xinboda Indus. Co. Ltd. v. United States*, Slip Op. 17–160, 2017 WL 6502727 (CIT Dec. 5, 2017).[4]

[1] This action represents three consolidated challenges. *See* Order (Sept. 15, 2016), ECF No. 33 (consolidating Court Nos. 16–00114, 16–00116, and 16–00125 into lead Court No. 16–00116).

[2] The period of review is November 1, 2013, through October 31, 2014. *Final Results*, 81 Fed. Reg. at 39,897.

[3] The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 30–1, and a Confidential Administrative Record ("CR"), ECF No. 30–2. Parties submitted joint appendices containing record documents cited in their Rule 56.2 briefs. *See* Public J.A. ("PJA"), ECF Nos. 55 (Tabs 1-26), 55–1 (Tabs 27–57); Confidential J.A. ("CJA"), ECF Nos. 54 (Tabs 1–26), 54–1 (Tabs 27–57). The administrative record associated with the Remand Results is contained in a Public Remand Record ("RR"), ECF No. 72–1. Plaintiff submitted joint appendices containing record documents cited in Parties' Remand briefs. *See* Public J.A. to Remand Proceeding ("PRJA"), ECF No. 79; Confidential Suppl. J.A. ("Suppl. CRJA"), ECF No. 85; Public Suppl. J.A. ("Suppl. PRJA"), ECF No. 86.

[4] Consolidated Plaintiffs Shenzhen Yuting Foodstuff Co., Ltd. and Shenzhen Bainong Co., Ltd., and Plaintiff-Intervenors Jinxiang Hejia Co., Ltd., Jinxiang Feiteng Import & Export Co., Ltd. joined Xinboda's Rule 56.2 arguments. *See* Mem. of Law in Supp. of Co-Plaintiffs' Mots. for J. Upon the Agency R. ("Consol. Pl.'s 56.2 Br.") at 9, ECF No. 40. Consolidated Plaintiff Qingdao Tiantaixing Foods Co., Ltd. ("QTF") filed a separate motion. *See* Confidential Mot. of Pl. Qingdao Tiantaixing Foods Co., Ltd. for J. on the Agency R., ECF No. 37. Because *Xinboda* sustained Commerce's determination vis-à-vis Consolidated Plaintiff QTF, 2017 WL 6502727, at *20, the Remand Results pertain solely to Xinboda's challenges to the *Final Results*. *Xinboda* presents additional background information on this case, familiarity with which is presumed.

On March 9, 2018, Commerce filed its Remand Results.[5] On remand, Commerce, under protest,[6] permitted Xinboda to submit factual information regarding Mexico's economic comparability to China. Remand Results at 1. Upon consideration of this information and Mexican surrogate value data, Commerce affirmed its selection of Romania as the primary surrogate country. *Id.* at 1, 31.

Xinboda filed comments opposing the Remand Results. *See* Pl. Shenzhen Xinboda Industrial Co., Ltd. Comments in Opp'n to U.S. Dep't of Commerce's Remand Redetermination ("Xinboda's Remand Opp'n"), ECF No. 84.[7] Defendant United States ("Defendant" or the "Government") and Defendant-Intervenors[8] filed comments in support of the Remand Results. *See* Def.'s Resp. to Comments on Remand Results ("Def.'s Remand Reply"), ECF No. 78; Def.-Ints.' Comments in Supp. of the U.S. Dep't of Commerce's Redetermination Pursuant to Remand ("Def.-Ints.' Remand Reply"), ECF No. 77.

For the reasons discussed herein, Commerce's selection of Romania as the primary surrogate country and selection of Romanian pricing data as the surrogate value for raw garlic are sustained. However, the court remands for further consideration Commerce's addition of transportation costs to the surrogate value for raw garlic and calculation of Xinboda's brokerage and handling and inland freight expenses.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[9] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for

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[5] Thereafter, on August 9, 2018, the action was assigned to this judge. Order of Reassignment, ECF No. 80.

[6] By making the determination under protest, Commerce preserves its right to appeal. *See Meridian Prods. v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)).

[7] Plaintiff-Intervenors joined Xinboda's comments in opposition. *See* Pl.-Ints. Jinxiang Hejia Co., Ltd., and Jinxiang Feiteng Imp. & Exp. Co., Ltd. Comments in Opp'n to U.S. Department of Commerce's Remand Redetermination, ECF No. 74.

[8] Defendant-Intervenors include the Fresh Garlic Producers Association ("FGPA") and its individual members: Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. *See* Consent Mot. to Intervene as of Right at 1, ECF No. 22. FGPA is a trade association whose members—the afore-mentioned companies—are domestic producers of the domestic like product. *Id.* at 2. Defendant-Intervenors were Petitioners in the underlying proceeding. *See* I&D Mem. at 2.

[9] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2012 edition, unless otherwise stated.

compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014) (internal quotation marks omitted).

DISCUSSION

I. Surrogate Country Selection

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production[10] in a surrogate country, *see id.* § 1677b(c)(1), and those values are referred to as "surrogate values." Commerce may also rely on surrogate values, when appropriate, to adjust the export price or constructed export price to account for costs incurred in "bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." *Id.* § 1677a(c)(2)(A); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT ___, ___, 182 F. Supp. 3d 1350, 1368 (2016) (noting Commerce's use of a surrogate value to calculate international movement expenses). In selecting surrogate values, Commerce must use "the best available information" that is, "to the extent possible," from a market economy country or countries that are economically comparable to the non-market economy country and "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(1), (4).

Commerce generally values all factors of production in a single surrogate country.[11] Commerce has adopted a four-step approach to selecting a primary surrogate country. *See* Import Admin., U.S. Dep't of Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), http://enforcement.trade.gov/policy/bull04–1.html (last visited Dec. 18, 2018) (hereinafter "Policy Bulletin 04.1"). Pursuant to Policy Bulletin 04.1,

> (1) the Office of Policy ("OP") assembles a list of potential surrogate countries that are at a comparable level of economic development to the [non-market economy] country; (2) Com-

[10] The factors of production include, but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

[11] *See* 19 C.F.R. § 351.408(c)(2) (excepting labor). *But see Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011) (expressing a preference to value labor based on industry-specific labor rates from the primary surrogate country).

> merce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

Jiaxing Brother Fastener Co., Ltd. v. United States, 822 F.3d 1289, 1293 (Fed. Cir. 2016) (citation omitted); *see also* Policy Bulletin 04.1.

On remand, Commerce reopened the administrative record, invited Xinboda to resubmit information regarding Mexico's economic comparability to China, and set deadlines for parties to rebut, clarify, or correct the information contained therein. Remand Results at 4; *see also* Refiling Resubmission of Sept. 17, 2015 Additional Surrogate Country List and Surrogate Country Comments (Jan. 3, 2018) ("Xinboda's SC Comments"), RR 6, PRJA Tab 10, Suppl. CRJA Tab 2, Suppl. PRJA Tab 2; Rebuttal to Xinboda'[s] Resubmitted Sept. 17, 2015 Additional Surrogate Country List and Surrogate Country Comments (Jan. 10, 2018) ("Xinboda's Remand Rebuttal"), RR 8–10, PRJA Tab 12; Pet'rs' Submission of Rebuttal Factual Information (Jan. 10, 2018) ("Pet'rs' Remand Rebuttal "), RR 11–16, PRJA Tab 13, Suppl. CRJA Tab 1, Suppl. PRJA Tab 1. Upon review of this information, Commerce determined that Mexico and Romania are both at the same level of economic development as the PRC and significant producers of comparable merchandise. *See* Remand Results at 8–9, 11.[12] Pursuant to Policy Bulletin 04.1, Commerce's inquiry thus turned to which country provided the best factors data. *Id.* at 11.

To determine the best source of factors data, Commerce considers the degree to which the data is publicly available, contemporaneous with the period of review, tax and duty exclusive, representative of a broad-market average, and product-specific. *Id.* at 11–12; *see also*19 C.F.R. § 351.408(c)(1), (4). Commerce's analysis of this issue is confined to the record built by interested parties. *See QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Moreover, when selecting from among multiple sources, Commerce's inquiry may be a relative exercise and will rarely involve perfect data sets. When "Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable." *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1273, 641 F. Supp. 2d 1362, 1377 (2009). Applying the aforementioned criteria, Commerce weighed the information on the record and determined that the Romanian data was the best available information.

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[12] These findings are unchallenged.

A careful review of the Remand Results indicates that Commerce's selection of Romania over Mexico was a close call. Publicly available data was available from both countries. *See* Remand Results at 12, 15, 30. Although roughly contemporaneous data was available from Mexico, Commerce considered the monthly data from Romania to be more contemporaneous than the annual data from Mexico, which would be impacted by months outside the period of review. *Id.* at 17. Data from both countries was also considered tax and duty exclusive. *See id.* at 12–13, 15, 27. Commerce expressly found that Romanian data represented a broad market average but made no such finding with respect to Mexico. *See id.* at 30. Commerce drew distinctions, however, regarding the specificity of the Romanian and Mexican data to the size and price of the raw garlic input.

As to size, Commerce found that the record lacked substantial evidence to conclude that "Mexic[an] garlic bulbs are identical or more comparable to" Chinese garlic bulbs. *Id.* at 30. Commerce explained that most of Xinboda's evidence on Mexican garlic was "completely unintelligible," and the intelligible articles, or parts thereof, failed to support Xinboda's arguments regarding the comparability of Mexican garlic to Chinese garlic. *Id.* at 21–22.[13] In contrast, Commerce found that substantial evidence supported a finding that Romanian garlic bulbs are "similar in size to the input garlic bulbs." *Id.* at 30 & n.126 (quoting I&D Mem. at 10).

As to price, Commerce first considered whether Mexican or Romanian data reflected the level of trade at which Xinboda's processor, Excelink, purchased raw garlic. *See id.* at 26–27. Reiterating its finding in the underlying review that Excelink did not pay "farmgate" prices, Commerce found that Excelink's prices included costs for processing the garlic,[14] off-site storage during the non-harvesting months, and transportation from the farmer to Excelink in the harvest season or from rented storage to Excelink in the non-harvesting months. *Id.* at 26–27. Accordingly, Commerce concluded that Romanian wholesale pricing data better reflected Xinboda's purchasing experience than Mexican farmgate prices. *Id.* at 27, 30. Commerce also rejected arguments that Romanian garlic prices are distorted by tariff quotas imposed by the European Union ("EU"), and that Mexican garlic prices are distorted by phytosanitary measures excluding Chinese garlic from Mexico. *Id.* at 29, 30–31.

[13] Commerce did not make affirmative findings regarding the size of Mexican garlic relative to Chinese garlic; rather, Commerce emphasized Xinboda's failure to build a record from which it could make the findings urged by Xinboda. *See* Remand Results at 21–22, 30.

[14] Excelink's suppliers processed the garlic by "drying [it], cutting the root balls, cutting the stems, removing the dirt, bagging, and storing the garlic." *Id.* at 27.

In view of these distinctions, Commerce selected Romania as the primary surrogate country, *id.* at 31, and used pricing data reported by the National Institute of Statistics Romania ("NISR") to value Xinboda's raw garlic, I&D Mem. at 13; Remand Results at 26–27. Xinboda challenges Commerce's determination that Romania offered the best available information on the record, focusing on Commerce's findings regarding size, purchasing experience, and distortion in Romanian prices. *See generally* Xinboda's Remand Opp'n.

From the outset, Xinboda misstates and misapplies the court's inquiry. Xinboda insists that substantial evidence supports the use of Mexican data. *See* Xinboda's Remand Opp'n at 1–18, 21–29, 31–32. The court's inquiry, however, is whether substantial evidence supports Commerce's use of Romanian data; if so, such use will not be precluded even if substantial evidence also supports the use of Mexican data. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933, 936 (Fed. Cir. 1984) (the possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence). Although Commerce's inquiry is directed to which country offers the best available information, the court's inquiry is not the same. Instead, the court considers whether substantial evidence supports the agency's determination. *See Zhejiang DunAn Hetian Metal Co., Ltd. v. United States,* 652 F.3d 1333, 1341 (Fed. Cir. 2011) (the court is "not to evaluate whether the information Commerce used was the best available, but [] whether a reasonable mind could conclude that Commerce chose the best available information"). In so doing, the court is conscious of its role not to "reweigh the evidence or [] reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)). Thus, if Commerce's determination is "reasonable given the circumstances presented by the whole record," it will be sustained. *Changzhou Hawd Flooring Co., Ltd. v. United States*, 42 CIT ___, ___, 324 F. Supp. 3d 1317, 1321 (2018) (internal quotation marks and citations omitted). The court addresses Xinboda's specific contentions with the standard of review firmly in mind.

A. The Comparability of Mexican Garlic to Chinese Garlic

Xinboda first contends that Commerce unreasonably accorded more weight to Petitioners' articles discussing Romanian garlic than it did to Xinboda's articles discussing Mexican garlic; the record contained more information establishing the size of Mexican garlic bulbs than it did establishing the size of Romanian garlic bulbs; and Commerce

should have informed Xinboda that certain articles it previously accepted were unintelligible or insufficiently translated. Xinboda's Remand Opp'n at 1–4. Defendant and Defendant-Intervenors contend that Commerce relied on the Romanian articles because Xinboda's articles were unintelligible, insufficiently translated, or otherwise failed to establish that Mexican garlic bulbs are more comparable to Chinese garlic bulbs. Def.'s Remand Reply at 10–11; Def.-Ints.' Remand Reply at 7.

As noted, the burden of creating an adequate record before Commerce lies with interested parties. *See QVD Food Co.*, 658 F.3d at 1324. Although Commerce's regulations require parties to submit English translations of documents written in a foreign language, *see* Remand Results at 21 & n.100 (citing 19 C.F.R. § 351.303(e)), most of the information Xinboda submitted was either in Spanish or poorly translated using an online translation generator, *see id.* at 21–22 (explaining that, of the 68 pages submitted in the underlying administrative review and the additional 214 pages submitted on the record of the remand proceeding, just 16 pages were in English or legibly translated); Xinboda's Remand Opp'n at 3 (acknowledging that its use of an online translation generator resulted in overlapping text and mistranslated words).[15] The two fully legible articles consisted of: (1) J.Z. Castellanos, et al., *Garlic Productivity and Profitability as Affected by Seed Clove Size, Planting Density and Planting Method*, 39 HortScience 1272 (2004) ("*Garlic Productivity and Profitability*"), *see* Remand Results at 21 n.99 (citing Xinboda's SV Submission, Ex. SV-6, ECF pp. 167–172);[16] Xinboda's Remand Rebuttal, Ex. 3, ECF pp. 289–194);[17] and (2) MC Macias Luis Martin Valdez et al., Guide to Cultivate Garlic in Aguascalientes: Producers Brochure No. 21 ("*Gar-*

[15] Xinboda attributes its failure to properly translate the articles to the limited time allowed for the submission of rebuttal information. Xinboda's Remand Opp'n at 4. However, the court notes that translation issues pervaded Xinboda's initial surrogate value submission, *see generally* Resubmission of Surrogate Value Submissions (Nov. 24, 2015) ("Xinboda's SV Submission"), Ex. SV-6, PR 387–89, PRJA Tab 6, indicating that this was not an isolated instance. Xinboda's assertion that it "did not try to obtain more formal translations of the articles [submitted] in the original review because [Commerce] never said they were indiscernible" erroneously places the burden on Commerce to seek corrections to Xinboda's surrogate values submission. *See* Xinboda's Remand Opp'n at 4 n.4; 19 C.F.R. § 351.303(e). It also overlooks the fact that Commerce had no occasion to consider Xinboda's initial surrogate value submission because the agency did not then consider Mexico to be a potential surrogate country. *See* I&D Mem. at 7–8.

[16] For ease of reference, the court cites to the ECF page numbers stamped on the documents electronically filed with the court, rather than the PDF page numbers cited by the parties.

[17] *Garlic Productivity and Profitability* discusses "the influence of seed clove size, planting density and planting method on yield, bulb size and . . . profitability of [fresh] garlic." Xinboda's Remand Rebuttal, Ex. 3, ECF p. 289. The experiments discussed in the article relied solely upon the "Tacatzcaro" variety of garlic, and, as Commerce noted, relied on data from 1998 to 2000. *Id.*; Remand Results at 21 n.99.

lic in Aguascalientes"), *see* Remand Results at 21 n.99 (citing Xinboda's Remand Rebuttal, Ex. 3, ECF pp.295–302).[18]

The deficient translations notwithstanding, Commerce addressed Xinboda's core arguments regarding the comparability of Mexican garlic to the subject merchandise. *See* Remand Results at 18 (referencing Xinboda's arguments regarding the relationship between Mexican commercial garlic classifications and bulb size); *id.* at 22–23 (addressing the arguments). Commerce first explained that the "main table" discussing garlic size specifications "that Xinboda refer[red] to [is] unintelligible," and appears to reference an international standard. *Id.* at 22 & n.104 (citing Xinboda's Remand Rebuttal, Ex. 3, ECF p. 493).[19] Although the translated table is partially legible, *see* Xinboda's Remand Rebuttal, Ex. 3, ECF p. 493, it is contained in an article replete with translation issues, *see id.*, ECF pp. 486–498. More important, as Commerce noted, the table's reference to international standards for garlic classification obviates its relevance to the nature of Mexican garlic. *See id.*, ECF p. 486.[20] Even if the table reflected Mexican garlic sizes, Xinboda has pointed to no record evidence to support its theory that the number of size categories available are correlated to production volumes. *See* Xinboda's Remand Opp'n at 5–6 (asserting that the existence of several categories above size 3 (i.e., sizes 4 to 12), applicable to garlic sized 35 millimeters ("mm") or , with just size 3 applicable to garlic sized less than 35 mm, demonstrates large bulb garlic production).

Commerce further explained that information regarding commercial classifications for garlic contained in *Garlic Productivity and Profitability* referred solely to the Tacatzcaro variety, and the record lacked evidence suggesting that Tacatzcaro garlic was sold in Mexico during the period of review or was "the main type of garlic produced and sold in Mexico." Remand Results at 22 & n.105 (citing Xinboda's

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[18] *Garlic in Aguascalientes* contains recommendations for garlic planting in the Aguascalientes region in terms of land considerations; garlic varieties; seeds; sowing; planting density; irrigation; fertilization; working the land; fighting weeds, pests, and diseases; and harvesting. Xinboda's Remand Rebuttal, Ex. 3, ECF pp. 295–301.

[19] The cited table contains a list of garlic size classifications ranging from 3 to 12, each of which corresponds to a bulb diameter size range. *See id.*, ECF p. 493. 20

[20] It is true, as Xinboda asserts, that the phrase "norma Mexicana" appears in the original Spanish version in roughly the same place as the phrase "International Standard" appears in the English version; however, the reason for any discrepancy, if one exists, is unclear. *See* Xinboda's Remand Opp'n at 6; *compare* Xinboda's Remand Rebuttal, Ex. 3, ECF p. 471, *with* Xinboda's Remand Rebuttal, Ex. 3, ECF p. 486. The article's stated objective and concluding note refer to international and Mexican standards. *See* Xinboda's Remand Rebuttal, Ex. 3, ECF pp. 486, 498. Thus, the article appears to discuss some relationship between the international and Mexican standards for garlic classification; however, the poor quality of the translations prevent a clear understanding of the precise nature of the relationship for purposes of determining the article's relevance to the valuation of garlic in the underlying proceeding.

Remand Rebuttal, Ex. 3, ECF p. 289). Xinboda asserts that the class numbers, commercial classifications, and bulb diameters nevertheless reflect Mexican garlic standards generally and "show that the majority of garlic grown and traded commercially is large bulb garlic." Xinboda's Remand Opp'n at 7. The relevant table lists seven categories of Tacatzcaro garlic,[21] ranging from 5 (bulb diameter of 40–45mm) to 11 (bulb diameter greater than 70mm). *See* Xinboda's Remand Rebuttal, Ex. 3, ECF p. 289 (Table 1). At most, the table suggests that Tacatzcaro garlic is generally large bulb, but, as Commerce noted, the table offered no indication regarding the volume of Tacatzcaro garlic sold in Mexico or the amount of Tacatzcaro garlic produced and sold in relation to Mexico's total garlic production. *See* Remand Results at 22.

In contrast to Xinboda's evidence purporting to establish the size of Mexican garlic, the information Commerce relied upon to substantiate the size of Romanian garlic is legible and fully translated. *See id.* at 23 & n.110 (citing I&D Mem. at 10); Pet'rs' Rebuttal Comments on Surrogate Country Selection (June 11, 2015) ("Pet'rs' Rebuttal SC Comments"), Ex. ROM-1, PR 191–94, PRJA Tab 5, Suppl. CRJA Tab 3, Suppl. PRJA Tab 3.[22] That the record contained more pages ostensibly about some aspect of Mexican garlic than Romanian garlic is of no moment if Commerce cannot read those pages, or most of the content therein.[23]

Xinboda's reliance on 19 U.S.C. § 1677m(d) also fails. Section 1677m(d) states the procedures Commerce must undertake in connection with deficient "response[s] to a request for information." 19 U.S.C. § 1677m(d).[24] Read in context, however, section 1677m(d) applies to a respondent's questionnaire responses, which are distinct

[21] The article also refers to this variety as "Tacatzcuaro." *See, e.g.*, *id.*, ECF p. 289.

[22] Commerce's Issues and Decision Memorandum quotes from Petitioners' summary of a publication discussing Romanian garlic that contains "a table of the most prominent varieties of garlic grown in Romania." I&D Mem. at 10 & n.52 (quoting Pet'rs' Rebuttal SC Comments at 10). Petitioners, in turn, cite to Exhibit ROM-1 appended to their submission. *See* Pet'rs' Rebuttal SC Comments at 10. Exhibit ROM-1 consists of an excerpt of a 2001 publication regarding the growing of vegetables in Romania. *See id.*, Ex. ROM-1 (Nistor T Stan & Neculai C. Munteanu, Growing Vegetables Vol. II 80–86 (2001) ("*Growing Vegetables*") (discussing the cultivation of "common garlic"). For the table listing the varieties of garlic cultivated in Romania, see Pet'rs' Rebuttal SC Comments, Ex. ROM-1, ECF p. 118.

[23] Xinboda's opposition to the Remand Results contains excerpts of the Spanish version of several tables listing garlic varieties and sizes with the English version of the heading appended thereto. *See* Xinboda's Remand Opp'n at 5–11. Further improving upon its translations provided to Commerce, Xinboda also excerpts portions of articles discussing Taiwanese and Perla garlic grown in Mexico. *See* Xinboda's Remand Opp'n at 12; *cf.* Xinboda's Remand Rebuttal, Ex. 3, ECF p. 381. As noted, however, it is not the court's role to reweigh the evidence or reconsider factual questions anew. *See Downhole Pipe & Equip.*, 776 F.3d at 1377.

[24] Pursuant to section 1677m(d), if Commerce

from the voluntary submission of surrogate value data. *See Qingdao Sea-Line Trading Co., Ltd. v. United States*, Slip Op 12–39, 2012 WL 990904, at *7 n.9 (CIT Mar. 21, 2012).[25] Providing Xinboda with additional time to translate the articles would have amounted to an extension of time for the submission of factual information that should have been translated in the first instance. *See* 19 C.F.R. § 351.303(e).

Xinboda next contends that Mexico's exports of fresh garlic to the United States speaks to Mexico's production of large bulb garlic and cites several pieces of evidence in support thereof. Xinboda's Remand Opp'n at 13–15. The Government dismisses this argument, as Commerce did, on the basis that production levels and export amounts are relevant to the significant producer analysis and, even then, the significance of production is not judged against China's production levels. Def.'s Remand Reply at 14; Remand Results at 23. Defendant-Intervenors contend that the size of exported garlic bulbs "is not representative of the size of bulbs that are typically grown and harvested in Mexico." Def.-Ints.' Remand Reply at 9.

It is Commerce's province to weigh the evidence in the first instance, not the court's. *See POSCO v. United States*, 42 CIT ___, ___, 296 F. Supp. 3d 1320, 1349 (2018) (citing *Bowman Transp., Inc. v. Ark.–Best Freight System, Inc.*, 419 U.S. 281, 285–86 (1974)). In view of Commerce's conclusory response to this argument, the court's inquiry is whether the evidence upon which Xinboda relies undermines Commerce's determination to render it unsupported by substantial

> determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews.

19 U.S.C. § 1677m(d). If the resubmission is also deficient or untimely, Commerce may "disregard all or part of the original and subsequent responses," subject to section 1677m(e). *Id.* § 1677m(d)(1)-(2). Section 1677m(e) states that Commerce may not "decline to consider information that is . . . necessary to the determination but does not meet all the applicable requirements" when the information is timely submitted; "the information can be verified"; "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination"; the proponent of the information "has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce]"; and "the information can be used without undue difficulties." *Id.* § 1677m(e)

[25] Although Commerce may *invite* surrogate value data through its setting of a deadline for that information, 19 C.F.R. § 351.301(c)(3), that is not the same as a response to a specific "request for information," *cf. id.* § 351.301(c)(1) (setting deadlines for the submission of factual information responsive to Commerce's questionnaires). The language of 19 U.S.C. § 1677m(e) provides further support for interpreting § 1677m(d) as pertaining to questionnaire responses. Although in a proceeding involving a nonmarket economy Commerce needs surrogate value data to establish normal value, *see* 19 U.S.C. § 1677b(c)(1), the surrogate value data proposed by a particular interested party is not "verified," and it is not "necessary to the determination" because Commerce may simply decide that other, non-deficient, surrogate information is the "best available," *id.* §§ 1677m(e), 1677b(c)(1).

evidence. *See Nippon Steel Corp. v. United States,* 337 F.3d 1373, 1379 (Fed. Cir. 2003) (the court's review must account for "the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence") (internal quotation marks and citation omitted).[26] The court concludes that Commerce's determination is supported by substantial evidence.

Xinboda first points to an excerpted portion of a table contained in an article titled "Garlic Production [Chain]." Xinboda's Remand Opp'n at 13 (citing Xinboda's Remand Rebuttal, Ex. 3, ECF p. 436 (Table 19)); *see also* Xinboda's Remand Rebuttal, Ex. 3, ECF pp. 418–50 (Manuel E. Well Spinosa et al., Foundation Produces [*sic*] Querétaro, Garlic Production Chain) ("*Garlic Production Chain*"). Although the table itself is legible, *Garlic Production Chain* as a whole is replete with mistranslations and other errors, *see* Xinboda's Remand Rebuttal, Ex. 3, ECF pp. 418–50. Table 19 lists the sizes of Mexican garlic exported to the United States and Canada from 1999 to 2002, predating the period of review by roughly 11 years. *See* Xinboda's Remand Rebuttal, Ex. 3, ECF p.436; *Final Results*, 81 Fed. Reg. at 39,897. Xinboda excerpted only part of the table, however, listing Mexican exports of garlic sized giant, extra big, big, extra jumbo, jumbo, and super jumbo. *See* Xinboda's Remand Opp'n at 13. Xinboda omitted the part of the table listing Mexican exports of garlic sized unspecified, super colossal, little, colossal, and medium. *See* Xinboda's Remand Rebuttal, Ex. 3, ECF p. 436. The table does not

[26] In connection with this argument Xinboda also seeks to respond to certain evidence proffered by Petitioners in the underlying proceeding regarding the size of Mexican garlic and Mexico's ability to meet U.S. demands for fresh garlic. Xinboda's Remand Opp'n at 14–15 & nn.7–8 (citations omitted). Xinboda first faults Commerce for "plac[ing] more weight on a privately obtained affidavit from a producer in Guanajuato state" than the articles Xinboda provided, and for crediting certain information contained in the affidavit. *Id.* at 14 n.7 (citing Pet'rs' Remand Rebuttal, Attach. Decl.-1 (Decl. of Javier Usabiaga González)). Commerce's reference to the González Declaration was limited, however, to the observation that it was on the record of the remand proceeding and that the agency had relied on it in the subsequent administrative review of Chinese garlic. *See* Remand Results at 22 & nn.106–07 (citing, *inter alia*, Pet'rs' Remand Rebuttal, Attach. Decl.-1). Commerce did not rely on the González Declaration in *this* segment of the proceeding. *See* Remand Results at 22. Xinboda also asserts that certain "Fresh Plaza" articles supplied by Petitioners concerning the Mexican garlic market are contradicted by other record evidence. *See* Xinboda's Remand Opp'n at 14 & n.8 (citing, *inter alia*, Pet'rs' Remand Rebuttal, Attach. FP-1, FP-3, FP-4, and FP-5). Again, Commerce noted Petitioners' placement of the Fresh Plaza articles on the record but did not rely on them to support specific findings. *See* Remand Results at 15 & n.87. The court may not weigh the relative merits of Petitioners' and Xinboda's evidence in the first instance or sustain the agency's decision on any basis other than the one the agency itself articulated. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962); *POSCO*, 296 F. Supp. 3d at 1349 (citing *Bowman Transp., Inc.*, 419 U.S. at 285–86). In view of these standards, the court does not further address Xinboda's challenges to these exhibits.

state the respective amounts of each garlic size exported. *See id.* Thus, at most, the table indicates that, more than a decade ago, Mexico may have exported garlic in a range of sizes to the United States and Canada.[27]

Xinboda's subsequent argument that Mexico is the largest supplier of garlic to the United States after China is unsupported by the cited evidence. *See* Xinboda's Remand Opp'n at 15 (citing Xinboda's SC Comments, Ex. 2). Xinboda's argument regarding Mexico's supply of fresh garlic to the United States "when the Chinese and domestic crop is out of season" is inapposite to the inquiry into Mexican garlic production generally for purposes of assessing the quality of Mexican surrogate value data.[28] *See* Xinboda's Remand Opp'n at 15–16 (citing Pet'rs' Remand Rebuttal, Attach. ITC-1 at I-11). Thus, Xinboda's appeal to Mexican export data is unavailing.

Xinboda's final contention concerns Petitioners' arguments to Commerce regarding dissimilarities between Mexico's and China's respective climates and similarities between Romania's and China's respective climates. Xinboda's Remand Opp'n at 16–18. Defendant and Defendant-Intervenors do not substantively respond to Xinboda's climate-related discussion. *See* Def.'s Remand Reply at 11, 14–15; Def.-Ints.' Remand Reply at 6–10.

Commerce, for its part, noted Petitioners' arguments but did not rely on them. *See* Remand Results at 15. Xinboda's reliance on certain record evidence to draw connections between Chinese and Mexican garlic growing climates nevertheless fails to undermine Commerce's determination. *See Nippon Steel*, 337 F.3d at 1379 (directing the court to "review the record as a whole"). Xinboda fails to provide support for its asserted linkage between garlic growing and the presence of a cold semi-arid climate. *See* Xinboda's Remand Opp'n at 18. Xinboda further fails to demonstrate that the areas in Mexico exhibiting a cold semi-arid climate are the major garlic growing regions. *Compare* Pet'rs' Remand Rebuttal, Attach. Climate-4 (listing Mexican regions with cold semi-arid climates), *with* Xinboda's Remand Opp'n at 17 (listing major garlic growing regions of Mexico) (citing Xinboda's Remand Rebuttal, Ex. 2).

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[27] Xinboda also points to evidence regarding Mexico's consumption of fresh garlic, which Xinboda asserts requires higher quality garlic, to support the proposition that "Mexico grows large bulb garlic." *See* Xinboda's Remand Opp'n at 13. The assertion, however, fails to link Mexican consumption to large bulb garlic similar to the subject merchandise, particularly in light of evidence suggesting that Mexico grows a range of garlic sizes. *See* Xinboda's Remand Rebuttal, Ex. 3, ECF p. 436 (Table 19).

[28] Xinboda also points to Mexico's supply of garlic to the United States prior to the initial 1994 investigation in the *Fresh Garlic from China* proceeding. Xinboda's Remand Opp'n at 16 (citations omitted). This information has minimal, if any, relevance to Commerce's surrogate country selection in the 2013–2014 administrative review at issue here.

Xinboda's arguments regarding the comparability of Mexican garlic to the subject merchandise do not undermine Commerce's reliance on Romanian data because Commerce addressed these arguments to the extent that they were relevant and supported by legible record evidence, and Xinboda's arguments do not detract from the substantial evidence concerning Romanian garlic size on which Commerce relied.

B. The Comparability of Romanian Garlic to Chinese Garlic

Xinboda challenges Commerce's reliance on the weight of Romanian garlic as set forth in *Growing Vegetables* to draw conclusions about the Romanian garlic size. *See* Xinboda's Remand Opp'n at 18. Xinboda contends that Commerce impermissibly relied on a 2012 online advertisement from a Chinese exporter to establish a weight-to size ratio because the advertisement is outdated and "from a little known exporter." *Id.* at 19. Xinboda further contends that *Growing Vegetables* relies on 1998 data and fails to establish country-wide production of large bulb garlic. *See id.* at 20. Xinboda also contends that Romanian yield size suggests that Romanian garlic is generally not large bulb. *Id.* at 20.

Defendant contends that Commerce's choice between "two imperfect options"—poorly translated or illegible Mexican data and a "single, dated article" requiring a "straightforward inference with respect to a correlated ratio"—is left to the agency's discretion. Def.'s Remand Reply at 10 (citation omitted). Defendant-Intervenors contend that the "conversion of bulb weights . . . to diameters required only a simple calculation," and Xinboda points to no evidence contradicting Commerce's conversion. Def.-Ints.' Remand Reply at 10–11.

The *Growing Vegetables* article upon which Commerce relied to substantiate the size of Romanian garlic contains a table listing the types of garlic cultivated in Romania. *See* Remand Results at 30 & n.126 (citing I&D Mem. at 10); I&D Mem. at 10 & n.52 (citing Pet'rs' Rebuttal SC Comments at 10); Pet'rs' Rebuttal SC Comments at 10 (citing Pet'rs' Rebuttal SC Comments, Attach. ROM-1). In the spring, those varieties are medium-sized and weigh 20 to 30 grams. *See* Pet'rs' Rebuttal SC Comments, Attach. ROM-1, ECF p. 118. In the fall, Romanian garlic consists of one medium-sized variety weighing 25 to 35 grams, and two large-sized varieties weighing 40 to 50 grams and 40 to 60 grams, respectively. *See id.*

To convert weight to size, Commerce used an advertisement from an online marketplace regarding the sale of a 250-gram bag of fresh garlic consisting of four bulbs with 60-centimeter ("cm") diameters. *See* Remand Results at 23–24; Pet'rs' Rebuttal SC Comments, Attach. PRC-1, ECF p. 153. As Commerce explained, the advertisement can

"be used to calculate a general weight ratio[:] . . . 250 grams/4 bulbs = 62.5 grams per bulb," Remand Results at 24; i.e., about one gram per centimeter of the diameter. Absent alternative information on the record, the advertisement was the best available for Commerce to use and Xinboda points to nothing to suggest the conversion is unreasonable.

Xinboda's arguments regarding Romanian garlic size and yield size also fail. Chinese garlic ranges in size from about 1 ½ to 2 ½ inches in diameter, *See* Decision Mem. for the Prelim. Results of the 2013–2014 Antidumping Duty Admin. Review at 22 & nn.137–38 (citations omitted), PR 398, CJA Tab 51, PJA Tab 51, the equivalent of about 3.81cm to 6.35cm in diameter. Applying the weight to size ratio of one gram per centimeter of diameter shows that two of the fall garlic varieties are within the size range of the subject merchandise. *See* Pet'rs' Rebuttal SC Comments, Attach. ROM-1, ECF p. 118. As to yield, record evidence demonstrates that Romanian garlic output can range from 5–6 metric tons ("MT") per hectare to 10–12 MT per hectare, indicating the potential for Romanian garlic to be weighted to the larger varieties in the *Growing Vegetables* table. *See id.*, Attach. ROM-1, ECF p. 120. In sum, Commerce found evidence of large bulb garlic production in Romania, and the record supports that finding.

C. Level of Trade

Xinboda contends that Commerce erred in relying on Romanian wholesale prices to value its garlic because Xinboda purchases garlic on a farmgate basis, and the Mexican pricing data consists of what Xinboda considers to be farmgate prices. *See* Xinboda's Remand Opp'n at 21–29. Xinboda further contends that Commerce's selection of a wholesale price is inconsistent with the agency's practice in prior administrative reviews. *Id.* at 24. Defendant and Defendant-Intervenors contend that this record supports Commerce's determination that Xinboda's garlic price contains post-harvesting charges that are not indicative of farmgate prices. Def.'s Remand Reply at 16–18; Def.-Ints.' Remand Reply at 12–15.

Commerce defined the term "farmgate" as "the purchase price of raw garlic as it is harvested with no further processing or handling, and including no additional charges . . . . [I]t is garlic, immediately following harvest, that has not been sorted, cleaned, processed, stored, transported or in any other way handled or modified." Remand Results at 26 & n.115 (citation omitted). Commerce examined the input for which it was seeking a surrogate value and determined that Xinboda's processor, Excelink, was not making farmgate pur-

chases as Commerce defined the term. *See id.* at 26–27 & nn.11819 (discussing evidence of post-harvest processing, rented cold-storage, and transportation) (citing Suppl. Questionnaire Resp.—Shenzen Xinboda (Sept. 1, 2015) at 4, CR 137–45, PR 304–05, PRJA Tab 7, Suppl. CRJA Tab 4, Suppl. PRJA Tab 4; Second Suppl. Questionnaire Resp.—Shenzhen Xinboda (Nov. 3, 2015) at 3–5, CR 163, PR 365, PRJA Tab 8, Suppl. CRJA Tab 5, Suppl. PRJA Tab 5). Taking this evidence into consideration along with Commerce's use of the intermediate input methodology, Commerce determined that the Romanian pricing data was more comparable than Mexican pricing data. Remand Results at 27; *see also* I&D Mem. at 28–29 (discussing the intermediate input methodology by which Commerce seeks a surrogate value for the price of fresh garlic rather than the factors of production used in producing fresh garlic). Commerce noted that in selecting surrogate values it need not "match the respondent's exact production experience." Remand Results at 27 & n.120 (citing I&D Mem. at 16; *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)). In other words, the surrogate value need not be perfect. Here, while neither the farmgate prices, as Commerce accepted the Mexican pricing data to be, nor the wholesale prices, as Commerce understood the Romanian data to be, may precisely describe the stage of distribution at which Excelink purchases garlic, Commerce's decision to select Romanian wholesale pricing data, which includes certain post-harvesting and storage costs, is supported by substantial evidence. Xinboda's arguments to the contrary are unavailing.

To support the assertion that Excelink purchased garlic on a farmgate basis, Xinboda relies on a different understanding of the term that allows for the inclusion of some processing or storage costs. *See* Xinboda's Remand Opp'n at 27 (citations omitted). Commerce's definition, however, is reasonable and consistent with the definition Commerce used in prior administrative reviews. *See* Issues and Decision Mem. for the Final Results and Rescission, in Part, of the Antidumping Duty Admin. Review of Fresh Garlic from the People's Republic of China, A-570–831 (June 10, 2013) ("AR 17 Decision Mem.") at 14 n.56, *available at* https://enforcement.trade.gov/frn/summary/prc/2013–14329–1.pdf (last visited Dec. 18, 2018); Issues and Decision Mem. for Fresh Garlic from the People's Republic of China: Final Results of the 2009–2010 Admin. Review, A-570–831 (June 4, 2012) ("AR 16 Decision Mem.") at 19–20, *available at* https://enforcement.trade.gov/frn/summary/prc/2012–14152–1.pdf (last visited Dec. 18, 2018).

Specifically, Xinboda points to Commerce's successful defense of its selection of farmgate prices in the 17th administrate review as "the law of the case" requiring Commerce to use farmgate prices in this review. Xinboda's Remand Opp'n at 25. However, the law of the case doctrine applies to issues that have previously been resolved. *See Intergraph Corp. v. Intel Corp*., 253 F.3d 695, 697 (Fed. Cir. 2001) ("[L]aw of the case doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided.'") (quoting *Messenger v. Anderson,* 225 U.S. 436, 444 (1912)). Commerce's selection of pricing data to value Xinboda's raw garlic purchases in *this* period of review has *not* previously been resolved; thus, the law of the case doctrine is inapposite. Further, Commerce's decision in the 17th administrate review illustrates why Commerce may reach different conclusions in separate administrative reviews based on different record facts. *See generally Jiaxing Brother Fastener Co., Ltd.*, 822 F.3d at 1299 ("each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record") (citation omitted). In the 17th administrative review, while Commerce selected a farmgate-approximate price over a price resembling a wholesale price, the agency similarly discussed the fact that Xinboda's garlic was not obtained at farmgate prices, but, as here, included some post-harvest processing. Taking that into consideration, in relation to the surrogate values placed on that record (including the Azadpur sales prices from India, which are not at issue in this review) Commerce made its record-specific determination. AR 17 Decision Mem. at 14–23.

There is one aspect of Commerce's determination, however, that requires further consideration by the agency. In the underlying proceeding, Commerce added transportation costs to the Romanian wholesale prices to account for delivery of the raw garlic "from the farmer or storage facility to Excelink." *See* I&D Mem. at 29 & n.174 (citation omitted). Information placed on the record of the remand proceeding suggests that NISR prices "likely include any *transportation costs*, storage costs, processing or packaging costs, and a profit mark-up." Xinboda Remand Rebuttal, Ex. 4, ECF p. 523 (emphasis added). Thus, while the court sustains Commerce's determination that Romanian prices are more comparable to Excelink's purchasing experience, a remand is required for Commerce to clarify its justification for adding transportation costs to the wholesale prices.

D. Distortion in the Romanian Garlic Market

Xinboda contends that a garlic tariff quota imposed on Chinese garlic imported into Romania after Romania joined the EU in 2007

has distorted Romanian garlic prices. Xinboda's Remand Opp'n at 29–30. Defendant and Defendant-Intervenors contend that Commerce correctly declined to infer that the price increases after Romania joined the EU in 2007 resulted *either* from a tariff quota (as Xinboda had asserted) or from "the removal of unfairly traded garlic imports" (as Petitioners had asserted). Def.'s Remand Reply at 18–19; Def.-Ints.' Remand Reply at 15–16.

On this issue, Commerce explained that the record failed to demonstrate that EU-imposed tariff quotas distorted or otherwise increased Romanian garlic prices. I&D Mem. at 14; *see also* Remand Results at 29 & n.124 (citing I&D Mem. at 11–14). According to Commerce, at most, Xinboda had demonstrated "a temporal correlation" between Romania's accession to the EU and increased prices, not causation. I&D Mem. at 14. Commerce faulted Xinboda for "presum[ing] that such a relationship exist[ed]" absent evidence "quantifying such a relationship." *Id*.

Before the court, Xinboda surmises that "[t]he tariff quota is the only reasonable explanation for the sustained price increase." Xinboda's Remand Opp'n at 30. Upon review of the entirety of the record, substantial evidence supports Commerce's decision not to infer the existence of such a relationship. *See Nippon Steel*, 337 F.3d at 1379.

As of April 1, 2007, the EU imposed tariff quotas on imports of fresh garlic from China, Argentina, and other third countries. *See* Rebuttal Final Surrogate Value Submission (Nov. 12, 2015), Ex. SV-2, ECF pp. 419, 426, PR 371, CJA Tab 42, PJA Tab 42. Pursuant thereto, the first 33,700 MT of garlic imported into the EU from China was subject only to a 9.6 percent *ad valorem* duty; thereafter, any additional garlic was subject to the 9.6 percent *ad valorem* duty plus an additional duty of 1,200 Euros per MT. *See id.*, ECF pp. 419, 425–26 (further providing for tariff quotas of 19,147 MT on garlic imports from Argentina and 6,023 MT on garlic imports from other third countries). In 2014, the tariff quota applicable to China increased to 46,075 MT, while the tariff quotas applicable to Argentina and other third countries remained the same, thereby increasing the quantity of garlic that could be imported into the EU at 9.6 percent duties to more than 70,000 MT. *Id.*, ECF p. 436. In 2007, EU countries collectively imported between 60,000 and 80,000 MT of fresh garlic from other countries, with between 30,000 and 40,000 MT originating in China. *Id.*, ECF p. 419. However, Xinboda provided no evidence indicating that the volume of fresh garlic imported into the EU increased between 2007 and 2014; thus, it is speculative to assume that the above-quota duty had any effect on import quantities, let alone pricing within the EU generally, or Romania specifically, during the period of review.

In light of record evidence indicating that most, if not all, of the fresh garlic imported into the EU was *not* subject to the additional duty of 1,200 Euros, substantial evidence supports Commerce's decision not to infer a causal relationship between EU-imposed tariff quotas and increased Romanian garlic prices. *See* Remand Results at 29; I&D Mem. at 14.

In sum, Commerce's determination that Romanian data better fulfilled the contemporaneity and product-specificity criteria of its factors data analysis is supported by substantial evidence. Accordingly, notwithstanding the need to address the addition of transportation costs to Romanian pricing date, Commerce's selection of Romania as the primary surrogate country is sustained.

II. Movement Expenses

For the *Final Results*, Commerce relied on information contained in the World Bank's *Doing Business 2015: Romania* ("*Doing Business Romania*") report to calculate a surrogate value for brokerage and handling and inland truck freight pursuant to 19 U.S.C. § 1677a(c)(2)(A). I&D Mem. at 30–31; *see also* Pet'rs' Surrogate Value Comments (June 17, 2015) ("Pet'rs' SV Comments"), Ex. 6, PR 275–80, CJA Tab 26, PJA Tab 26 (copy of the report). Specifically, Commerce "calculated a per kilogram brokerage and handling and inland freight [cost] using the price data to export standardized cargo of ten metric tons in a standard 20-foot container as published in *Doing Business Romania*." I&D Mem. at 31. In other words, Commerce used the costs reported in *Doing Business Romania* as the numerator in the equation with a payload weight of 10,000kg (ten MT) as the denominator. *See* Surrogate Values for the Prelim. Results (Nov. 30, 2015) ("Prelim. SV Mem."), Exs. 8, 9, PR 401–02, CJA Tab 53, PJA Tab 53. The calculation of inland freight required additional inquiry into the distance traveled (i.e., cost of inland transportation and handling per kilogram per kilometer). *See id.*, Ex. 8. According to Commerce, "the container payload weight of 10,000kg [is] explicitly stated in the *Doing Business* methodology," and "is one of the assumptions in all *Doing Business* reports." I&D Mem. at 30 & n.184 (citing Pet'rs' SV Comments, Ex. 6).

Xinboda challenges Commerce's use of the 10,000kg denominator. *See* Xinboda's 56.2 Br. at 32–35. Though apparently accepting the 10,000kg denominator weight as an assumption of the report, Xinboda contends that "does not infer that the . . . weight of the container is the basis of the cost." *Id.* at 32. According to Xinboda, record evidence demonstrates that brokerage and handling fees "are based

on an entire container and not the weight of its contents." *Id.* at 33. Xinboda contends that Commerce should, therefore, replace the 10,000kg denominator with "the maximum weight of a container or the average weight of Xinboda's containers." *Id.* at 35; *see also* Pl. Shenzhen Xinboda Indus. Co., Ltd. Reply Br. ("Xinboda's 56.2 Reply") at 18–20, ECF No. 53.

Defendant contends that Commerce's calculations are correct because *Doing Business Romania* provides data relevant to a "standard shipment of goods," which is "a dry-cargo, 20-foot-full container load" that is "assumed to weigh 10,000kg." Confidential Def.'s Resp. to Consol. Pls.' Mots. for J. Upon the Agency R. ("Def.'s 56.2 Resp.") at 5354, ECF No. 47 (citing Pet'rs' SV Comments, Ex. 6 at 2, 69). Defendant-Intervenors similarly contend that because "World Bank survey [respondents] are asked to assume that the payload weight is 10,000kg, the reported costs are based on this assumption" and using a different denominator "would distort the costs." Confidential Def.-Ints.' Resp. in Opp'n to Pls.' Mots. for J. on the Agency R. ("Def.-Ints.' 56.2 Resp.") at 46, ECF No. 46.

Before addressing Xinboda's arguments for alternative denominators, the court must begin by assessing whether Commerce's decision to apply a 10,000kg denominator is supported by substantial evidence and in accordance with law. It is not.

In the Issues and Decision Memorandum, Commerce quoted extensively from its determination in *Certain Nails from the People's Republic of China* as support for its use of the 10,000kg denominator. I&D Mem. at 31 & n.187 (quoting *Certain Nails from the People's Republic of China*, 78 Fed. Reg. 16,651 (Dep't Commerce Mar. 18, 2013) (final results of third antidumping duty admin. review; 2010–2011). The decision memorandum accompanying that determination notes that Commerce calculated brokerage and handling using data supplied by a *Doing Business* report on Thailand. *See* Certain Steel Nails from the People's Republic of China: Issues and Decision Mem. for the Final Results of the Third Antidumping Duty Admin. Review, A-570–909 (Mar. 5, 2013) at 34, *available at* https://enforcement.trade.gov/frn/summary/prc/2013–061731.pdf (last visited Dec. 18, 2018). Therein, Commerce explained that it calculated brokerage and handling "by dividing the total charge by 10 tons which is found under 'Trading Across Borders Methodology: Assumptions about the Business,'" which states, "The traded product travels in a dry cargo, 20 foot, full container load. *It weighs 10 tons*." *Id.* at 34 (emphasis added).

Here, however, the *Doing Business Romania* report Commerce relied upon merely assumes the presence of "a dry-cargo, 20-foot-*full*

container load," Pet'rs' SV Comments, Ex. 6 at 69 (emphasis added); it does not provide *any* assumption regarding the container's weight, *see id.* Commerce's assertion that the 10,000kg payload weight is "*explicitly* stated in the *Doing Business* methodology" is, simply, incorrect, I&D Mem. at 30 (citing Pet'rs' SV Comments, Ex. 6) (emphasis added), and Commerce's assertion that a 10,000kg payload weight "is one of the assumptions in *all Doing Business* reports" is unsupported by the record, *see id.* (emphasis added).

Shipping information supplied by Xinboda suggests that weight or volume is taken into consideration only when shipping less than full container loads. *See* Prelim. Surrogate Values Submission (June 17, 2015), Ex. SV-21, ECF pp.60, 70–72, PR 28185, CJA Tab 27, PJA Tab 27 (international freight forwarders offering rates based solely on the size of the container irrespective of weight); *id.*, Ex. SV-21, ECF pp.61–66 (distinguishing between full container loads (which are based on container size) and less than full container loads (which are based on weight or volume)).[29] While the record therefore supports the inference that the costs reported in *Doing Business Romania* reflect the cost of shipping full container loads, the record does not support the inference that those costs are based on a 10,000kg payload weight. *See* I&D Mem. at 30.[30]Although Commerce must identify a suitable denominator to calculate Xinboda's movement expenses on a per unit basis, without more, Commerce's use of a 10,000kg denominator is arbitrary.[31] *See Changzhou Wujin Fine Chemical Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (providing for review of Commerce's reasoning pursuant to "the arbitrary and capricious (or contrary to law) standard") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48–49 (1983)).[32]

[29] Defendant-Intervenors' attempt to dismiss Xinboda's evidence by pointing to references to rates based on size or weight misses the mark because that information pertains to less than full container loads. *See* Def.-Ints.' 56.2 Resp. at 45 (citing Xinboda's Prelim. SVs, Ex. SV-21, ECF p. 61); Pet'rs' SV Comments, Ex. 6 at 69.

[30] Defendant's assertion that Xinboda has failed to support the use of different denominator weights that "are not mentioned in the *Doing Business [Romania]* report," Def.'s 56.2 Resp. at 56, cannot prevail because the 10,000kg container weight assumption is also not stated in the report.

[31] Commerce summarily asserted that 10,000kg "is a mid-point between the smallest and the greatest weight held in a 20-foot container, which provides reasonable as well as consistent reporting across commodities." I&D Mem. at 31. Assuming a smallest weight of zero (an empty container), and a greatest weight of 28,200kg, *see* Case Br. (Jan. 19, 2016) at 56 n.15, CR 183, PR 419, CJA Tab 56, PJA Tab 56 (citation omitted), 10,000kg is clearly not the mid-point.

[32] Parties dispute the applicability of the court's decision in *Since Hardware (Guangzhou) Co., Ltd. v. United States*, 38 CIT ___, ___, 977 F. Supp. 2d 1347, 1361 (2014), *vacated in part*, 38 CIT ___, 37 F. Supp. 3d 1354 (2014), *aff'd*, 636 F. App'x. 800 (Mem) (Fed. Cir. 2016). *See* Xinboda's 56.2 Br. at 33–34; Xinboda's 56.2 Reply at 19–20; Def.'s 56.2 Resp. at 56; Def.-Ints.' 56.2 Resp. at 45–46. While the precise issue confronting the *Since Hardware*

Accordingly, this issue is remanded to the agency for further consideration.[33]

CONCLUSION & ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are sustained with respect to Commerce's selection of Romania as the primary surrogate country and selection of Romanian pricing data as the surrogate value for raw garlic, as set forth in Discussion Section I; and it is further

ORDERED that Commerce's Remand Results are remanded with respect to Commerce's addition of transportation costs to the surrogate value for raw garlic, as set forth in Discussion Section I.C; and it is further

ORDERED that Commerce's *Final Results* are remanded with respect to Commerce's calculation of Xinboda's movement expenses as set forth in Discussion Section II; and it is further

ORDERED that, in the event Commerce amends the antidumping margin assigned to Xinboda, Commerce reconsider the separate rate assigned to non-mandatory respondents; and it is further

ORDERED that Commerce shall file its remand results on or before April 2, 2019; and it is further

ORDERED that the deadlines provided in USCIT Rule 56.2(h) shall govern thereafter; and it is further

ORDERED that any opposition or supportive comments must not exceed 5,000 words.

Dated: December 26, 2018
New York, New York

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

Slip Op. 18–180

EREĞLI DEMIR VE ÇELIK FABRIKALARI T.A.Ş, Plaintiff, and ÇOLAKOĞLU METALURJI A.S. and ÇOLAKOĞLU DIS TICARET A.S, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., et al., Defendant-Intervenors.

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court differs from the issue confronting the court in this case, the *Since Hardware* opinion is instructive in its observation that costs provided pursuant to a *Doing Business* parameter regarding container size should not be construed as necessarily bearing any relationship to the weight of product in the container, 977 F. Supp. 2d at 1361–62, and it generally supports the court's finding herein that Commerce must point to record evidence to support its chosen denominator. The court will, however, leave it to Commerce on remand to identify a suitable denominator that has support in the record and to explain its reasons for that choice.

[33] On remand, Xinboda is free to renew its arguments regarding alternative denominators.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00218
PUBLIC VERSION

[The U.S. Department of Commerce's Remand Redetermination is remanded with respect to the agency's duty drawback adjustment calculation methodology and sustained with respect to the agency's rejection of international freight corrections.]

Dated: December 27, 2018

Matthew M. Nolan and *Diana D. Quaia*, Arent Fox, LLP, of Washington, DC, for Consolidated Plantiffs Çolakoğlu Metalurji A.S. and Çolakoğlu dis Ticaret A.S.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Brandon J. Custard*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Paul C. Rosenthal, *R. Alan Luberda*, *David C. Smith*, and *Joshua R. Morey*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenor ArcelorMittal USA LLC.

Stephen A. Jones and *Daniel L. Schneiderman*, King & Spalding, LLP, of Washington, DC, for Defendant-Intervenor AK Steel Corporation.

Alan H. Price and *Christopher B. Weld*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Corporation.

Roger B. Schagrin and *Christopher T. Cloutier*, Schagrin Associates, of Washington, DC, for Defendant-Intervenors Steel Dynamics, Inc. and SSAB Enterprises LLC.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Defendant-Intervenor United States Steel Corporation.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or the "agency") redetermination upon court-ordered remand. *See* Confidential Final Results of Redetermination Pursuant to Remand ("Remand Redetermination"), ECF No. 105.

Plaintiff Ereğli Demir ve Çelik Fabrikalari T.A.Ş. ("Erdemir") and Consolidated Plaintiffs Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. (together, "Çolakoğlu") each challenged certain aspects of Commerce's final determination in the sales at less than fair value investigation of certain hot-rolled steel flat products from the Republic of Turkey. *See Certain Hot-Rolled Steel Flat Products from the Republic of Turkey*, 81 Fed. Reg. 53,428 (Dep't Commerce Aug. 12, 2016) (final determination of sales at less than fair value; 2014–2015) ("*Final Determination*"), ECF No. 41–1, and accompanying Issues and Decision Mem., A-489–826 (Aug. 4, 2016), ECF No. 41–3, as amended by *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom*, 81 Fed. Reg. 67,962 (Dep't Commerce Oct. 3, 2016) (am. final affirmative antidumping determina-

tions for Australia, the Republic of Korea, and the Republic of Turkey and antidumping duty orders), ECF No. 41–2;[1] Summons, ECF No. 1 (Erdemir); Summons, ECF No. 1, Court No. 16–00232 (Çolakoğlu); Order (Jan. 1, 2017), ECF No. 45 (consolidating Court Nos. 16–00218 and 16–00232 under lead Court No. 16–00218).[2] Erdemir challenged Commerce's determinations regarding its home market and U.S. dates of sale. *See* Pl.'s Mem. in Supp. of Mot. of Pl. Ereğli Demir ve Çelik Fabrikalari T.A.Ş., for J. Upon the Agency R. Pursuant to Rule 56.2, ECF No. 52–1. Çolakoğlu challenged Commerce's determinations regarding duty drawback, indirect selling expenses, corrections to international ocean freight expenses, cost-averaging methodology, and treatment of excess heat as a co-product. *See* Confidential Pls. Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2, ECF No. 53–1.

On March 22, 2018, the court remanded Commerce's *Final Determination* with respect to Erdemir's home market date of sale; the denial of Çolakoğlu's duty drawback adjustment; and the rejection of Çolakoğlu's corrections to its international freight expenses. *See Ereğli Demir ve Çelik Fabrikalari T.A.S v. United States ("Erdemir")*, 42 CIT , 308 F. Supp. 3d 1297 (2018).[3] The court sustained Commerce's Final Determination in all other respects. *See id.* at 1304.

On July 20, 2018, Commerce filed its Remand Redetermination. Therein, Commerce revised its date of sale determination for Erdemir's home market sales; granted Çolakoğlu's duty drawback adjustment; and provided additional evidence and explanation supporting its rejection of Çolakoğlu's corrections to international freight expenses. *See* Remand Redetermination at 1, 5–24.

Çolakoğlu filed comments opposing Commerce's method of calculating its duty drawback adjustment and continued rejection of its freight expense corrections. *See* Confidential Consol. Pls. Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S.'s Comments on Re-

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[1] The administrative record filed in connection with the *Final Determination* is divided into a Public Administrative Record ("PR"), ECF No. 41–4, and a Confidential Administrative Record ("CR"), ECF No. 41–5. The administrative record filed in connection with the Remand Redetermination is likewise divided into a Public Remand Record ("PRR"), ECF No. 107–2, and a Confidential Remand Record ("CRR"), ECF No. 107–3. Çolakoğlu filed joint appendices containing record documents filed in Parties' remand briefs. *See* Non-Confidential J.A. to Comments and Reply Comments on Remand ("PRJA"), ECF No. 117; Confidential J.A. to Comments and Reply Comments on Remand ("CRJA"), ECF No. 116. The court references the confidential versions of the relevant record documents and briefs, if applicable, throughout this opinion.

[2] The relevant period of investigation ("POI") is July 1, 2014, to June 30, 2015. *Final Determination*, 81 Fed. Reg. at 53,428.

[3] *Erdemir* presents background information on this case, familiarity with which is presumed.

mand Redetermination ("Çolakoğlu's Comments"), ECF No. 108.Defendant United States ("Defendant" or the "Government") and Defendant-Intervenors filed comments in support of the Remand Results. *See* Confidential Def.'s Resp. to Comments on Remand Redetermination ("Def.'s Resp."), ECF No. 111; Def.-Ints.' Comments in Supp. of Remand Results ("Def.-Ints.' Resp."), ECF No. 110.[4]

For the reasons discussed herein, Commerce's duty drawback adjustment is remanded for further consideration. Commerce's rejection of Çolakoğlu's corrections to international freight expenses is sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[5] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (quoting *Xinjiamei Furniture (Zhangzhou) Co., Ltd. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014) (internal quotation marks omitted).

DISCUSSION

I. Duty Drawback

A. Legal Framework

To determine whether the subject merchandise is being sold at less than fair value, Commerce compares the export price ("EP") or constructed export price ("CEP")[6] of the subject merchandise to its normal value ("NV"). *See generally* 19 U.S.C. § 1673 *et seq*. Generally, an antidumping duty is the amount by which the normal value of a product—generally, its price in the exporting country—exceeds export price, as adjusted. *See id*. § 1673. One of the adjustments Commerce makes to export price pursuant to 19 U.S.C. § 1677a(c) is known as the "duty drawback adjustment." Specifically, Commerce

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[4] Defendant-Intervenors did not oppose Commerce's home market date of sale redetermination favorable to Erdemir. Accordingly, this opinion addresses issues relevant solely to Çolakoğlu.

[5] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2012 edition, unless otherwise stated.

[6] U.S. price may consist of an export price or a constructed export price. Because the distinctions between export price and constructed export price are not at issue in this case, the court will refer only to export price. Such references, however, may be understood as including constructed export price.

will increase 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." *Id.* § 1677a(c)(1)(B).

This statutory duty drawback adjustment is intended to prevent the dumping margin from being distorted by import taxes that are imposed on raw materials used to produce subject merchandise, but which are rebated or exempted from payment when the subject merchandise is exported to the United States. *See Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011); *Wheatland Tube Co. v. United States*, 30 CIT 42, 60, 414 F. Supp. 2d 1271, 1286 (2006), *rev'd on other grounds*, 495 F.3d 1355 (Fed. Cir. 2007). The adjustment accounts for the fact that producers are subject to the import duty when merchandise is sold in the home market, "which increases home market sales prices and thereby increases [normal value]." *Saha Thai*, 635 F.3d at 1338. The statute increases constructed export price "to the level it likely would be absent the duty drawback" to prevent the absence of import duties from generating or increasing any dumping margin. *Id.*

Commerce has developed a two-prong test to determine whether a respondent is entitled to a duty drawback adjustment: "first, . . . that the exemption from import duties is linked to the exportation of subject merchandise; and second, that there were sufficient import duties incurred on the imported raw material to account for the amount of duty drawback received upon the exports of the subject merchandise." Remand Redetermination at 6; *see also Saha Thai*, 635 F.3d at 1340 (affirming the lawfulness of Commerce's two-prong test).

On remand, Commerce determined that Çolakoğlu had demonstrated its entitlement to the duty drawback adjustment. Remand Redetermination at 10–11.[7] At issue, however, is Commerce's method of calculating the adjustment.

B. Commerce's Calculation Methodology

Until recently, Commerce calculated the duty drawback adjustment to U.S. price (referred to as the sales-side adjustment) by dividing rebated or exempted duties by total exports and adding the resultant per unit duty burden to EP/CEP. *See Rebar Trade Action Coalition v. United States* ("RTAC I"), Slip Op. 15–130, 2015 WL 7573326, at *4 (CIT Nov. 23, 2015) (granting Commerce's request for a voluntary

[7] Pursuant to Turkish law, Çolakoğlu may be exempted from the payment of import duties (or receive a refund of duties paid) on certain inputs used in the production of (exported) subject merchandise. See Questionnaire Resp. of Çolakoğlu to Suppl. Sec. D of the U.S. Dep't of Commerce Antidumping Duty Questionnaire (Feb. 8, 2016), Ex. SD-32, CR 248–67, PR 218–20, CRJA Tab 4, PRJA Tab 4.

remand to reconsider the sales-side adjustment methodology as set forth in the Issues and Decision Mem. for the Final Negative Determination in the Less than Fair Value Investigation of Steel Concrete Reinforcing Bar from Turkey, A-489–818 (Sept. 8, 2014) ("Rebar from Turkey Mem.")).

When producers participate in a duty exemption program, Commerce also makes a corresponding upward adjustment to the cost of production ("COP") and constructed value ("CV") (referred to as the cost-side adjustment)[8] to account for the cost of the unpaid import duties for which the producer remains liable until the merchandise containing the dutiable input(s) is exported and the exemption program requirements are satisfied. *See Saha Thai*, 635 F.3d at 1341–44. In affirming Commerce's inclusion of implied duty costs in its calculations, the *Saha Thai* court reasoned that the purpose of the statutory increase to EP/CEP "is to account for the fact that the import duty costs are reflected in . . . home market sales prices[] but not . . . sales prices in the United States[]." *Id.* at 1342. Thus, "[i]t would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties." Id. Accordingly, "[u]nder the 'matching principle,' EP, COP, and CV should be increased together, or not at all."[9] Id. at 1342–43.[10]

In 2016, on remand pursuant to *RTAC I*, Commerce modified its sales-side adjustment by allocating exempted duties over total production instead of exports. *See Rebar Trade Action Coalition v. United States* ("*RTAC II*"), Slip Op. 16–88, 2016 WL 5122639, at *3 (CIT Sept. 21, 2016); Final Results of Redetermination Pursuant to Court Remand, A-489–818 (Apr. 7, 2016), *available at* http://ia.ita.doc.gov/remands/15–130.pdf (last visited Dec. 19, 2018) ("Rebar from Turkey Remand Mem."). Commerce developed this methodology in response to arguments by domestic producers regarding distortions in the margin calculations that may arise when the respondent uses fungible inputs both from foreign sources, which incur import duties, and domestic sources, which do not. *See RTAC II*, 2016 WL 5122639, at *3–4. Commerce claimed that adhering to its prior methodology gen-

[8] Commerce calculates normal value using sales in the home market that are at or above the cost of production. 19 U.S.C. § 1677b(b)(1). When there are no such sales, Commerce calculates normal value "based on the constructed value of the merchandise." *Id*. The cost of production includes "the cost of materials and of fabrication or other processing" used in manufacturing; "selling, general, and administrative expenses"; and the cost of packaging. *Id*. § 1677b(b)(3). Constructed value includes similar expenses and an amount for profit. *Id*. § 1677b(e).

[9] The "matching principle" is "the basic accounting practice whereby expenses are matched with benefits derived from them." *Saha Thai*, 635 F.3d at 1342 (citation omitted).

[10] Çolakoğlu does not challenge Commerce's application of the cost-side adjustment.

erated "distortions" in the margin calculations because the larger denominator on the cost-side resulted in a smaller adjustment to normal value than U.S. price. *Id*. at *3 (citing Rebar from Turkey Remand Mem. at 16). Thus, according to Commerce, equalizing the denominators used in each adjustment "ensure[d] that the amount added to both sides of the comparison of EP or CEP with NV is equitable, *i.e*., duty neutral[,] meeting the purpose of the adjustment as expressed in *Saha Thai*." Id. at *4 (citing Rebar from Turkey Remand Mem. at 18).

In subsequent administrative proceedings involving respondents that source inputs from foreign and domestic suppliers, including Çolakoğlu here, Commerce has applied its modified sales-side adjustment. *See* Remand Redetermination at 12, 20–23; *cf*. Issues and Decision Mem. for the Final Determination of the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from India, A-533–863 (May 24, 2016) at 7–11, *available at* https://enforcement.trade.gov/frn/summary/india/2016–12986–1.pdf (last visited Dec. 19, 2018); Issues and Decision Mem. for the Final Results of Antidumping Duty Admin. Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2014–2015, A–489–501 (Dec. 12, 2016) at 5–6, *available at* https://enforcement.trade.gov/frn/summary/turkey/2016–30541–1.pdf (last visited Dec. 19, 2018). In the underlying proceeding, Commerce divided Çolakoğlu's exempted duties by the POI total cost of manufacturing subject hot-rolled steel products to derive a drawback ratio. Remand Redetermination at 21; Am. Final Calculation Mem. for Çolakoğlu (June 28, 2018) ("Çolakoğlu Calc. Mem.") at 3, CRR 11, PRR 6, CRJA Tab 20, PRJA Tab 20. Commerce applied that ratio to the CONNUM-specific cost of manufacturing "to calculate the amount of imputed import duties" to be added to Çolakoğlu's cost of production. Remand Redetermination at 21; Çolakoğlu Calc. Mem. at 3.[11] Commerce subsequently capped Çolakoğlu's upward adjustment to export price "by the amount of the import duties included in the [cost of production]." Remand Redetermination at 21; Çolakoğlu Calc. Mem. at 3–4. In so doing, Commerce reiterated the need for an "equitable, i.e., duty neutral" comparison of export price with normal value to maintain consistency "with the purpose of the adjustments as affirmed in *Saha Thai*." Remand Redetermination at 12 & n.56 (citing *Saha Thai*, 635 F.3d at 1344).[12]

[11] "A 'CONNUM' is a control number assigned to materially-identical products to distinguish them from non-identical, i.e., similar, products." *Erdemir*, 308 F. Supp. 3d at 1321 n.34 (citation omitted).

[12] Commerce asserted that it granted the duty drawback adjustment "consistent with [its] practice." Remand Redetermination at 11 & n.54 (citing Rebar from Turkey Mem. at

In response to Çolakoğlu's argument that 19 U.S.C. § 1677a(c)(1)(B) requires Commerce to allocate exempted duties over total exports regardless of the source of the inputs, Commerce noted the statute's lack of an explicit allocation methodology and its corresponding discretion in that regard. *Id.* at 21–22. Commerce further noted that, pursuant to its "normal costing methodology, the cost to produce a given product is [] the same, regardless of whether the product is sold domestically or is exported." *Id.* at 22.

C. Parties' Contentions

Çolakoğlu contends that Commerce's modified sales-side adjustment is unlawful because it attributes some of the adjustment to home market sales, in contravention of the statutory linkage between the adjustment and exported merchandise, and lessens the full upward adjustment to which it is entitled. Çolakoğlu's Comments at 4–6, 10. Çolakoğlu further contends that Commerce's reliance on *Saha Thai* to support the modified sales-side adjustment as ensuring a "duty neutral" approach is misplaced. *Id.* at 8–9.

The Government contends that Commerce's calculation of the duty drawback adjustment represents a permissible construction of the statute, which is silent on the issue of allocation. Def.'s Resp. at 9–10, 12. According to the Government, "[h]ad Congress intended to limit Commerce's discretion in performing the EP/CEP duty drawback calculation, . . . the statute would provide that for each unit of subject merchandise exported, the EP/CEP shall be increased by the amount of duty rebated or not collected on that unit." *Id.* at 10. While recognizing that *Saha Thai* "does not address allocation," the Government contends that the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") "endorsed the concept of a 'matching principle,' which would ensure [duty] neutrality by requiring equal adjustments to both the NV and EP/CEP sides of the equation." *Id.* at 11 (citing *Saha Thai*, 635 F.3d at 1342–43). The Government further contends that "Çolakoğlu ignores the distortions" to the margin calculations that occur "when respondents use a mix of foreign and domestic [inputs]." *Id.* at 13; see also id. at 9 ("Çolakoğlu suggests that it is statutorily entitled to a distorted margin calculation.").

Defendant-Intervenors likewise contend that the statute is silent as to how Commerce should calculate the adjustment and contend that examination of the statue's purpose and context confirms that the agency's interpretation is reasonable. Def.-Int.'s Resp. at 6.

Comment 1, accompanying *Steel Concrete Reinforcing Bar from Turkey*, 79 Fed. Reg. 54,965 (Dep't Commerce Sept. 15, 2014) (final neg. determination of sales at less than fair value and final determination of critical circumstances)). As noted, however, Commerce applied its original sales-side adjustment in that determination. *See RTAC I*, 2015 WL 7573326, at *4.

Defendant-Intervenors further contend that "granting a full upward adjustment to EP/CEP . . . would result in an inequitable comparison [with] normal value." Id. at 7.[13]

D. Commerce's Methodology is Remanded

Commerce relies on the purported statutory silence regarding the way it must calculate the duty drawback adjustment to support its discretionary decision to allocate exempted duties over total production. *See* Remand Redetermination at 21; *cf*. Def.'s Resp. at 9–10, 12; Def.-Int.'s Resp. at 6. The court's review of Commerce's interpretation and implementation of a statutory scheme is guided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1329 (Fed. Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id*. (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id*. (quoting *Chevron*, 467 U.S. at 842–43). Only "if the statute is silent or ambiguous," must the court determine whether the agency's action "is based on a permissible construction of the statute." *Id*. (quoting *Chevron*, 467 U.S. at 843).

The court has thrice rejected Commerce's allocation of foregone duties over total production as inconsistent with the statutory linkage between those duties and exported merchandise. *See Toscelik Profil ve Sac Endustrisi A.§. v. United States*, 42 CIT___, ___, 321 F. Supp. 3d 1270, 1275–78 (2018) (Commerce's adjustment "fails to adequately connect the adjustment to duties forgiven 'by reason of' the products' exportation to the United States"); *Uttam Galva Steels Limited v. United States*, 42 CIT___, ___, 311 F. Supp. 3d 1345, 1355 (2018) (same); *RTAC II*, 2016 WL 5122639 at *4 (the duty drawback adjustment, "being causally related to exportation, not production, is allocable only to the exports to which it relates"). The court agrees that Commerce's modified sales-side adjustment contravenes the plain language of the statute.[14]

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[13] Defendant-Intervenors also support their argument by way of reference to certain aspects of the Turkish duty drawback regime. *See* Def.-Int.'s Resp. at 6–7. Commerce, however, did not discuss or rely on these provisions to support its determination. Accordingly, the court does not address them. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (barring the court from accepting "post hoc rationalizations for agency action," and noting that it may only sustain the agency's decision "on the same basis articulated in the order by the agency itself").

[14] While these opinions are not binding on this court, *see Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989), the court may nevertheless consult the reasoning contained therein to the extent that it is persuasive.

As noted, section 1677a(c)(1)(B) requires Commerce to increase "export price and 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) (emphasis added). Congress, thus, clearly intended the adjustment to capture the amount of duties Çolakoğlu would have paid on its export sales but for the exportation of that merchandise. Allocating Çolakoğlu's exempted duties over total production "contravenes the plain language of 19 U.S.C. § 1677a(c)(1)(B)" because it attributes some of the drawback to domestic sales, which do not earn drawback, and fails to adjust export price by the amount of the import duties exempted by reason of exportation. *See Tosçelik*, 321 F. Supp. 3d at 1278. In other words, instead of calculating the amount of the adjustment on the basis of duties foregone solely in relation to the exported merchandise eligible for drawback, as the statute requires, Commerce has calculated an amount that is based on the distribution of some of the exempted duties to domestic sales, which is contrary to the statute's plain language.

Even if the statute was ambiguous, as Commerce contends, by lacking a more explicit methodology, Commerce must "exercise [] its gap-filling authority" in a "reasonable" manner. *See Apex Frozen Foods*, 862 F.3d at 1330 (citing *Chevron*, 467 U.S. at 843–44). Commerce's exercise of any discretionary authority it has in this regard was unreasonable because it substantively departed from the guidance Congress *did* provide by decoupling the amount of the adjustment from duties forgiven solely on exported merchandise. *See Ningbo Dafa Chem. Fiber Co., Ltd. v. United States*, 580 F.3d 1247, 1253 (Fed. Cir. 2009) (an agency's statutory interpretation is unreasonable when it is "manifestly contrary" to the statutory terms) (citation omitted).[15]

Commerce's—and, by extension, the Government's—reliance on *Saha Thai* is also misplaced. *See* Remand Redetermination at 12;

[15] While Commerce regularly uses the term "distortion" to describe the margin effect of using only exports as the denominator, Commerce's assertion is unaccompanied by any analysis to demonstrate the alleged distortion. The court might infer that the use of the term implies an assumption that the cost of the domestically-sourced input approximates the import duty-*exclusive* cost of the foreign-sourced input. Commerce has not, however, provided any support for this assumption. It stands to reason, moreover, that a domestic supplier of a particular input that incurs duties when imported from a foreign supplier would price its product at a level competitive with the duty-*inclusive* cost of the imported input. In such a scenario, it is difficult to understand the margin effect of a proper duty drawback adjustment as distortive.

Def.'s Resp. at 11. In *Saha Thai*, the Federal Circuit approved Commerce's decision to utilize the cost-side adjustment in conjunction with its original sales-side adjustment to ensure that normal value and U.S. price are compared on a mutually-duty-inclusive basis. *See* 635 F.3d at 1342 (finding that Commerce "reasonably decided" to accompany an increase to EP with a "corresponding increase to COP and CV" because "[i]t would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties"); *see also id.* at 1342–43 ("Under the 'matching principle,' EP, COP, and CV should be increased together, or not at all."). The Federal Circuit never stated or otherwise inferred that the adjustments to EP/CEP and normal value must be "equal," Def.'s Resp. at 11, in order to render the comparison between U.S. price and normal value "duty neutral," Remand Redetermination at 12. Commerce's interpretation of the Federal Circuit's discussion of duty inclusivity to espouse such a position, which would neutralize the duty drawback adjustment, goes further than the opinion supports and is inconsistent with the purpose of the statute. Accordingly, this issue is remanded to the agency to revise its calculation of the duty drawback adjustment using exports as the denominator rather than total production.[16]

II. Corrections to International Freight Expenses

A. Commerce's Redetermination

On remand, Commerce reopened the record and requested additional information from Çolakoğlu in order to re-evaluate whether its corrections constituted "minor corrections to its reported international freight expenses." *Id.* at 13 & n.63 (citation omitted). Çolakoğlu responded that although it had initially "reported the gross amount of the international freight charges, . . . in preparation for verification, [it] . . . noted that certain international freight invoices had been

[16] Çolakoğlu urges the court to constrain Commerce on remand from implementing a methodology utilized in the remand redetermination pursuant to *Uttam Galva*, 311 F. Supp. 3d at 1355. *See* Çolakoglu's Comments at 10–12 & Attach. 1. Defendant and Defendant-Intervenors oppose the request. See Def.'s Resp. at 14–15; Def.-Int.'s Resp. at 8–9. Çolakoğlu's request is premature in that it seeks the court's opinion on a methodology that Commerce might not apply on remand and without the benefit of Commerce's reasoning to justify, if possible, such an adjustment. Such an opinion would, moreover, amount to an impermissible advisory opinion because the court would be opining on matters outside the scope of the instant case and controversy. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Verson, A Div. of Allied Prods. Corp. v. United States*, 22 CIT 151, 153–54, 5 F. Supp. 2d 963, 966 (1998) ("[A] federal court does not have the power to render an advisory opinion on a question simply because [it] may have to face the same question in the future.") (internal quotation marks and citations omitted). Accordingly, the court declines Çolakoğlu's request.

discounted." *Id.* at 14 & n.64 (citing Çolakoğlu's Resp. to Dep't's Suppl. Questionnaire (June 1, 2018) ("Çolakoğlu's Suppl. QR"), CRR 1–9, PRR 4, CRJA Tab 18, PRJA Tab 18). Çolakoğlu identified the number of international freight invoices containing discounts and the corresponding decrease in freight expenses, the number of affected U.S. sales, and the volume of affected subject merchandise. *Id.* at 14.[17]

Commerce determined that Çolakoğlu's corrections did not meet the criteria for the type of information the agency accepts at verification, *to wit*, (1) information, the need for which "was not evident previously"; (2) information that "makes minor corrections to information already on the record"; or (3) "information [that] corroborates, supports, or clarifies" existing record information. *Id.* at 14 & n.68 (citation omitted). Commerce based its determination that the corrections were not minor on the number of affected sales, the "amount of new factual information" required to review the corrections, and that implementation of the corrections would require Commerce "to ascertain which of the . . . corrected invoices affected each of the . . . POI sales."[18] *Id.* at 14–15, 24. With regard to the first and third criteria, Commerce explained that "the need for information regarding Çolakoglu's international freight expenses was apparent when [it] submitted its initial . . . questionnaire response," and the "corrections do not corroborate, support, or clarify" existing information but, rather, should have been included in the initial questionnaire response. *Id.* at 14–15. Commerce stated that it "applied the same standard to each correction presented by Çolakoğlu at verification," regardless of whether the correction would increase or decrease the margin. *Id.* at 24.

B. Parties' Contentions

Çolakoğlu contends that the international freight corrections were minor because the discounts represented a small percentage of its total freight costs and total U.S. sales.[19] Çolakoğlu's Comments at

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[17] Specifically, Çolakoğlu explained that [[ ]] out of [[ ]] international ocean freight invoices contained discounts that decreased Çolakoğlu's reported expenses from [[ ]] U.S. dollars to [[ ]] U.S. dollars, and those discounts affected [[ ]] out of [[ ]] U.S. sales for the period of investigation, which corresponded to [[ ]] out of [[ ]] metric tons of subject merchandise. Remand Redetermination at 14 & nn.65–67 (citing Çolakoğlu's Suppl. QR at 8–9).

[18] Commerce noted that "more than 50 [percent] of the invoices individually contained mistakes," affecting more than [[ ]] percent of U.S. sales. *Id.* at 14–15. Making those corrections would require Commerce to match each of the [[ ]] corrected invoices to "each of the [[ ]] POI sales." *Id.* at 24.

[19] The discounts represented [[ ]] percent of Çolakoğlu's total freight costs and [[ ]] percent of total U.S. sales value. Çolakoğlu's Comments at 13 & nn.4–5 (setting forth the equations resulting in the aforementioned percentages) (citations omitted).

13.[20] Defendant contends that incorporating the corrections would have required Commerce to trace discounts omitted from certain invoices to the affected sales and, thus, Commerce correctly concluded the corrections were not minor. Def.'s Resp. at 15–16. Defendant-Intervenors contend that Çolakoğlu's questionnaire responses on remand demonstrate that the corrections were not minor. Def.-Ints.' Resp. at 10.

C. Commerce's Redetermination is Sustained

In determining whether Commerce's decision is supported by substantial evidence, the court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004). Although Çolakoğlu seeks to direct the court to the minimal sums representing the discounts as a percentage of Çolakoğlu's total freight costs and total U.S. sales, *see supra* note 19, the court's standard of review asks whether the basis for Commerce's decision—the number of affected sales and the need to trace discounts contained in particular invoices to those sales—represents substantial evidence that the corrections were not minor. "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)). It "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). Commerce's determination is supported by substantial evidence.

Çolakoğlu reported its international freight expenses "on a transaction specific basis" for direct U.S. sales and sales made through Medtrade, Inc ("Medtrade"). Çolakoğlu's Suppl. QR at 7. Several invoices applicable to each type of sale contained varying discounts. *See id.*[21] Making the corrections would have required Commerce to match each affected transaction to particular invoices and their respective discounts. *See* Remand Redetermination at 14–15, 24. The number of affected sales and variations in the discounts affecting those sales provide substantial evidentiary support for Commerce's

[20] Çolakoğlu also implies that Commerce's refusal to accept the corrections was unreasonable and arbitrary because the agency accepted corrections that increased Çolakoğlu's dumping margin yet refused to accept a correction that would reduce the margin. *Id.* at 13. Çolakoğlu fails, however, to point to record evidence supporting this speculative assertion.

[21] [[ ]] invoices pertaining to direct sales and [[ ]] invoices pertaining to Medtrade sales contained discounts. Çolakoğlu's Suppl. QR at 8. For direct sales, the discounts ranged from [[ ]] U.S. dollars per metric ton. *Id.* For Medtrade sales, the discounts ranged from [[ ]] U.S. dollars per metric ton. *Id.*

decision that the corrections were not minor. Accordingly, Commerce's redetermination on this issue is sustained.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Redetermination is remanded for reconsideration regarding the agency's calculation of Çolakoğlu's duty drawback adjustment, as set forth in Section I; it is further

ORDERED that Commerce's Remand Redetermination is sustained with respect to the agency's rejection of Çolakoğlu's international freight corrections, as set forth in Section II; it is further

ORDERED that Commerce shall file its second remand redetermination on or before April 3, 2019; it is further

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

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

Dated: December 27, 2018
New York, New York

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

Slip Op. 18–181

HAIXING JINGMEI CHEMICAL PRODUCTS SALES CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 17–00084
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's Remand Results rescinding the new shipper review of Haixing Jingmei Chemical Products Sales Co., Ltd.]

Dated: December 27, 2018

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff. With them on the brief was *Judith L. Holdsworth*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Natan P. Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Peggy A. Clarke, Law Offices of Peggy A. Clarke, of Washington, DC, for Defendant-Intervenor.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or the "agency") redetermination upon remand. *See* Confidential Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 46. Plaintiff, Haixing Jingmei Chemical Products Sales Co., Ltd. ("Plaintiff" or "Jingmei") initiated this action challenging Commerce's final decision to rescind the new shipper review of the countervailing duty order on calcium hypochlorite from the People's Republic of China ("PRC" or "China"). *See Calcium Hypochlorite from the People's Republic of China*, 82 Fed. Reg. 15,494 (Dep't Commerce Mar. 29, 2017) (final decision to rescind the countervailing duty new shipper review of Haixing Jingmei Chemical Products Sales Co., Ltd.) ("*Final Rescission*"), ECF No. 18–2, and accompanying Issues and Decision Mem., C-570–009 (Mar. 23, 2017) ("I&D Mem."), ECF No. 18–3.[1] Plaintiff argued that Commerce's rescission of the new shipper review due to purportedly insufficient information to conduct the *bona fide* analysis of Plaintiff's sale during the period of review ("POR") was unsupported by substantial evidence and contrary to law.[2] *See* Confidential Pl. Haixing Jingmei Chemical Products Sales Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R. ("Pl.'s Br.") at 1, 12–29, ECF No. 23; Pl. Haixing Jingmei Chemical Products Sales Co., Ltd. Reply Br. at 6–12, ECF No. 32. Plaintiff also argued that the agency's decision to rescind the review amounted to an adverse inference against Jingmei, a cooperating party. Pl.'s Br. at 35–36.

On April 10, 2018, the court remanded the *Final Results*, holding that Commerce's rescission due to insufficient information to conduct

[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 18–5, and a Confidential Administrative Record ("CR"), ECF No. 18–4. Parties submitted joint appendices containing all record documents cited in their United States Court of International Trade Rule 56.2 briefs. *See* Public J.A. ("PJA"), ECF No. 34; Confidential J.A. ("CJA"), ECF Nos. 33 (apps. 1–12), 33–1 (apps. 13–23). The administrative record associated with the Remand Results is contained in a Public Remand Record ("PRR"), ECF No. 48–2, and a Confidential Remand Record ("CRR"), ECF No. 48–3. Parties submitted supplemental joint appendices containing record documents cited in their Remand briefs. *See* Public Suppl. J.A. ("PSJA"), ECF No. 58; Confidential Suppl. J.A. ("CSJA"), ECF No. 57. References are to the confidential versions of the relevant record documents unless stated otherwise.

[2] There was only one reviewable sale of subject merchandise to the United States during the POR. Remand Results at 2–3. The sale involved Haixing Eno Chemical Co., Ltd. ("Eno"), as producer, and Jingmei as seller. *Id.* at 3. Jingmei sold the calcium hypochlorite to [[ ]], a [[ ]] based reseller of swimming pool supplies—denoted here for confidentiality purposes as Company X— who then sold the merchandise to [[ ]], a U.S. customer—denoted here for confidentiality purposes as Company Y. *Id.*

the statutory *bona fide* analysis of Plaintiff's sale was not supported by substantial evidence when considering the agency's statutory authority to use facts available, with or without an adverse inference, to fill any asserted gaps in the record. *See Haixing Jingmei Chem. Prod. Sales Co. Ltd., v. United States ("Haixing CVD I")*, 42 CIT __, 308 F. Supp. 3d 1366 (2018).[3] The court ordered Commerce "to determine whether Plaintiff's sale during the period of review was *bona fide*," *id.* at 1373, such that the court could better "evaluate whether that redetermination is supported by substantial evidence and otherwise in accordance with law," *id.* at 1372 (quoting *Haixing Jingmei Chem. Prod. Sales Co. Ltd., v. United States* ("*Haixing AD I*"), 41 CIT ___, ___ 277 F. Supp. 3d 1375, 1383 (2017)).

In its Remand Results, Commerce used partial facts available with an adverse inference (sometimes referred to as "adverse facts available" or "AFA") to determine whether Jingmei's sale was indicative of a *bona fide* transaction. Remand Results at 8–9, 13–14, 30; 60–63. Specifically, Commerce used adverse inferences only in analyzing whether the sale price was indicative of a *bona fide* transaction and whether the subject merchandise was resold at a profit. *Id.* at 13–14, 30. Based on the totality of the circumstances, Commerce concluded that Jingmei's sale was not *bona fide* and, therefore, rescission of the new shipper review was appropriate. *Id.* at 1–2. Jingmei now challenges Commerce's Remand Results as unsupported by substantial evidence. *See* Confidential Pl. Haixing Jingmei Chem. Prods. Sales Co., Ltd. Comments in Opp'n to U.S. Dep't of Commerce's Remand Redetermination ("Pl.'s Opp'n Cmts"), ECF No. 49. The United States ("Defendant" or the "Government") and Defendant-Intervenor, Arch Chemicals Inc., support Commerce's redetermination. *See* Confidential Def.'s Resp. to Pl.'s Comments on the Dep't of Commerce's Remand Results ("Def.'s Supp. Cmts"), ECF No. 55; Confidential Def-Int. Arch Chems., Inc. Reply to Pl.'s Comments in Opp'n to U.S. Dep't of Commerce's Remand Redetermination, ECF No. 53 ("Def.-Int.'s Supp. Cmts"). For the following reasons, the court sustains the Remand Results.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[4]

[3] The court's opinion in *Haixing CVD I,* 308 F. Supp. 3d 1366, presents further background information on this case, familiarity with which is presumed.

[4] Citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. §§ 1675 and 1677e, however, are to the unofficial U.S. Code Annotated 2016 edition, which reflects amendments to section 1675 pursuant to the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125,

and 28 U.S.C. § 1581(c) (2012). The court will uphold an agency's determination that is supported by substantial evidence on the record and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (citation and internal quotation marks omitted).

DISCUSSION

I. Legal Framework

a. New Shipper Reviews

Pursuant to 19 U.S.C. § 1675(a)(2)(B)(i), when Commerce receives a request from a new exporter or producer who did not export merchandise subject to a countervailing duty order to the United States during the period of investigation, and is not affiliated with any exporter or producer that did export, Commerce must conduct a review to establish an individual countervailing duty rate for that exporter or producer. Commerce must determine an individual countervailing duty rate based solely on *bona fide* sales to the United States during the period of review. *See* 19 U.S.C. § 1675(a)(2)(B)(iv). Commerce determines whether a sale is *bona fide* by considering, "depending on the circumstances surrounding such sales," the following factors:

> (I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor the administering authority determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.

19 U.S.C. § 1675(a)(2)(B)(iv).

In the absence of "an entry and sale to an unaffiliated customer in the United States of subject merchandise," Commerce may rescind the review. 19 C.F.R. § 351.214(f)(2)(i). A sale that Commerce "determines not to be a *bona fide* sale is, for purposes of [§ 351.214(f)(2)], not a sale at all." *Shijiazhuang Goodman Trading Co., Ltd. v. United States*, 40 CIT ___, ___, 172 F. Supp. 3d 1363, 1373 (2016). Thus, if Commerce excludes all subject sales as non-*bona fide*, it "necessarily must end the review, as no data will remain on the export price side

§ 433, 130 Stat. 122 (2016), and amendments to section 1677e pursuant to the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015).

of Commerce's [countervailing] duty calculation." *Tianjin Tiancheng Pharm. Co., Ltd. v. United States ("TTPC")*, 29 CIT 256, 259, 366 F. Supp. 2d 1246, 1249 (2005).

b. Facts Available with an Adverse Inference

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a).[5] Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent 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 State* s, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

II. Commerce's Findings in the Remand Results

In the Remand Results, Commerce conducted the *bona fide* analysis of the sale subject to the review by evaluating the factors enumerated in 19 U.S.C. § 1675(a)(2)(B)(iv). Remand Results at 7–34. Commerce explained that, following receipt of Jingmei's initial questionnaire responses, the agency determined it needed additional information from Jingmei, Company X, and Company Y to analyze the *bona fide* factors outlined in the statute. *Id.* at 6. Commerce issued four supplemental questionnaires requesting information it deemed necessary to conduct its analysis. *Id.* Commerce found that, in certain circumstances, Jingmei, Company X, and Company Y failed to cooperate to the best of their abilities in responding to Commerce's information requests. *Id.* at 8, 60–63. Using the available record information and relying, in part, on adverse inferences, Commerce made the following findings and offered the following explanations.

a. Price of the Sales

Commerce found that the price factor of section 1675(a)(2)(B)(iv)(I) weighed against a finding that Jingmei's sale was *bona fide*. *Id.* at 14.

[5] Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e(a).

The agency explained that it typically examines the sale price to determine whether it was "based on normal commercial considerations" and is indicative of a "company's typical sales activity." *Id.* at 9 & n.41 (citing, *inter alia*, *TTPC*, 29 CIT at 260, 366 F. Supp. 2d at 1250). In analyzing this factor, Commerce could not determine the amount of payment, whether payment was made, and if so, by whom. *Id.* at 13.

Commerce initially received a commercial invoice listing the sales price for the sale.[6] *Id.* at 10 & n.48 (citing Entry of Appearance and Req. for New Shipper Review (Nov. 20, 2015) ("NSR Request"), Ex. 2, CR 1, PR 1, CJA 4, PJA 4). Commerce made a supplemental request to Jingmei seeking the sales ledger and accounting voucher recording the sale; in response, Jingmei submitted the requested documents, but they were insufficiently translated. *Id.* at 10 & nn.49–50 (citing First Suppl. Questionnaire Resp. (July 22, 2016) ("First Suppl. QR") at 2–3 & Ex. SQ1–1, CR 16–18, PR 30, CSJA 11, PSJA 11). Commerce made a second supplemental request for fully translated documents, to which Jingmei responded by providing the fully translated sales ledger and accounting voucher; however, the documents lacked any identifying information to tie the entry in the sales ledger to the sale at issue. *Id.* at 10 & nn.52–54 (citing Second Suppl. Questionnaire Resp. (Aug. 24, 2016) ("Second Suppl. QR") at 1–2 & Ex. SQ2–1, CR 21–25, PR 34, CJA 13, PJA 13).[7] Jingmei also submitted payment remittance documentation that Commerce deemed insufficient because it lacked details necessary to tie the documents to the commercial invoice, sales ledger, or accounting voucher. *Id.* at 11 & n.59 (citing Second Suppl. QR, Ex. SQ2–3).

In an effort to examine both sides of the transaction, Commerce also issued a supplemental questionnaire to Company X requesting a detailed, step-by-step, explanation of its payment process for the merchandise, including payment documentation. *Id.* at 11–12 & nn.61–62 (citing First Suppl. QR at 10). Company X did not, however, provide a detailed explanation[8] and provided proof-of-payment documentation that appeared to be a non-final transaction and lacking

[6] Commerce compared the reported average unit value ("AUV") of Jingmei's sale to the AUV for all other entries of subject merchandise from China during the POR, as reflected in U.S. Customs and Border Protection's data, and determined that the reported value of Jingmei's sale was [[ ]] than the average entered value. Remand Results at 9–10.

[7] Additionally, the sales ledger showed a booking date that was [[ ]] than the date Jingmei claimed it received payment for this sale. *Id.* at 11 & n.56 (citing Second Suppl. QR, Exs. SQ2–1, SQ2–3).

[8] Company X responded generally, stating that it "arranged payment based on the sales terms as agreed in the purchase order or the commercial invoices on a transaction specific basis." *Id.* at 12 & n.63 (quoting First Suppl. QR at 10).

sufficient details to conclusively support payment.[9] *Id.* at 12 & nn.63–64 (citing First Suppl. QR at 10 & Ex. SQ1–6). Following another supplemental questionnaire seeking clarification of how the documentation was linked to Jingmei and Company X, Company X claimed that the document was a bank confirmation of its wired payment to Jingmei. *See id.* at 12 & nn.66–67 (citing Second Suppl. QR at 9). Nevertheless, Commerce could not confirm the payment.[10]

Commerce further explained that it twice requested an accounts payable ledger or other accounting entries documenting Company X's purchases of subject merchandise from Jingmei during the POR. *Id.* at 12–13 & nn.68, 72 (citing Second Suppl. QR at 10; Third Suppl. Questionnaire Resp. (Sept. 28, 2016) ("Third Suppl. QR") at 6, CR 27–28, PR 38, CSJA 15, PSJA 15). Company X, however, provided only a "kind of payment ledger," explaining that it did "not maintain an accounts payable ledger." *Id.* at 13 & nn.69–70 (citing Second Suppl. QR at 10 & Ex. SQ2–13; Fourth Suppl. Questionnaire Resp., Part 1 (Nov. 14, 2016) ("Fourth Suppl. QR, Pt. 1") at 7, CR 32, PR 45, CSJA 17, PSJA 17); *see also id.* at 13 & n.73 (citing Third Suppl. QR at 6) (Company X's third supplemental response referring to the previously submitted ledger). Company X's version of a payment ledger "combine[d] multiple, unidentified invoices into each entry," and lacked reference to any identifiers—such as expense type, invoice number, or supplier name—that would tie the sale at issue with any of the ledger entries. *Id.* at 13 & n.71 (citing Second Suppl. QR at 2 & Ex. SQ2–13).[11]

Commerce determined that Jingmei and Company X failed to act to the best of their abilities when responding to Commerce's requests for information "because they did not provide information that they . . . could obtain, e.g., evidence of payment." *Id.* at 14. A final payment transaction and a fully-translated ledger that can reasonably be tied to the record is the type of reliable documentation that Commerce

[9] The documentation was a [[ ]] from a [[ ]] that did not identify the [[ ]], *id.* at 12 & n.65 (citation omitted); it was dated August 26, 2015 and was titled "Importer's Wire Transfer Sheets," First Suppl. QR, Ex. SQ1–6 (wire transfer sheet).

[10] Company X stated that "since [the wire transfer sheet] was a response to Company X's instruction, it [was] not necessary to identify the [[ ]]." Second Suppl. QR at 9. Company X submitted a payment credit notice, dated August 27, 2015, from Jingmei's bank that identified Company X as the [[ ]] and Jingmei as the beneficiary. *Id.*, Ex. SQ2–3. Commerce found the credit notice to be insufficient because "[t]here [was] no reference information or invoice number . . . to link the payment to the commercial invoice, and it [could not] be tied to Jingmei's sales revenue ledger or accounting voucher." Remand Results at 47 & nn.260–61 (citing Second Suppl. QR, Ex. SQ2–3).

[11] Commerce also observed that Company X's claimed payment date did not correspond to the date of entry in its payment ledger. *Id.* at 48 & n.267 (citing First Suppl. QR, Ex. SQ1–6 (wire transfer sheet); Second Suppl. QR, Ex. SQ2–13 (payment ledger entries); *see also* Second Suppl. QR at 10 & Ex. SQ2–10 (tying "payment #5" in the payment ledger to the sale under review).

expects companies to be able to provide. *Id.* at 14, 62. Thus, Commerce found that Jingmei and Company X demonstrated less than full cooperation in this review. *Id.* at 62–63. "As adverse facts available, [Commerce found] that the lack of reliable record information raise[d] concerns that the price may not be indicative of future sales by Jingmei and weigh[ed] against finding the sale *bona fide*." *Id.* at 14.

b. Whether the Sale was Made in Commercial Quantities

Commerce explained that although an aberrational quantity may not be sufficient, by itself, to warrant a finding that a sale is not *bona fide*, when considered together with the totality of the circumstances of the sale, an aberrational quantity may inform the agency's overall decision. *Id.* at 14. Here, Commerce first compared the quantity of Jingmei's sale with the average quantity of other entries of subject merchandise from China during the POR. *Id.* at 14–15. The results of that comparison,[12] in conjunction with the totality of circumstances surrounding the sale, led Commerce to conclude that the quantity factor weighed against a finding that the sale was *bona fide*. *Id.* at 15.

c. Timing of the Sale

Commerce next analyzed the timing factor of section 1675(a)(2)(B)(iv)(III) and determined that Company X's timing of payment to Jingmei suggested that the sale was not *bona fide*. *See id.* at 15–18. Commerce examined the payment terms for the sale and noted that Company X's payment was late. *Id.* at 17; *see also id.* at 50–52. Commerce explained that although late payment alone may not indicate that a sale is not *bona fide*, the tardiness of the payment combined with other unusual characteristics surrounding this sale indicated that the sale was not *bona fide*.[13] *Id.* at 17, 50–51.

d. Expenses Arising from the Sale

Pursuant to section 1675(a)(2)(B)(iv)(IV), Commerce considered the expenses related to Jingmei's sale, and whether those expenses were consistent with the terms of sale, to determine whether they conformed to Jingmei's typical sales practice. *Id.* at 1827; *see also id.* at 53–57. Commerce explained that, to conduct its analysis, it required

[12] Commerce reviewed proprietary data concerning other U.S. entries of subject merchandise from China during the POR that it obtained from CBP, and determined that the quantity of Jingmei's sale was [[ ]] than the average quantity of those other imports. Remand Results at 14–15.

[13] The payment was late by somewhere between [[ ]] and [[ ]] days late, depending on how one interprets the payment terms. *Id.* at 17. There was no record evidence to indicate that Jingmei [[ ]] or any explanation from Jingmei as to why it [[ ]]. *Id.* at 17, 50.

documentation supporting the amount and payment of each expense and documentation linking the expense payment to both the sale under review and the paying company's books and records. *Id.* at 18. Commerce requested information from Jingmei, Company X, and Company Y to confirm the sale terms and Jingmei's claims regarding the allocation and payment of expenses. *Id.*

Regarding movement expenses, Commerce initially requested supporting documentation to confirm Jingmei's claim that Company X shipped the merchandise from Eno's facilities. *Id.* at 19 & n.110 (citing First Suppl. QR at 3–4). Jingmei failed to provide the documentation. *Id.* & 19 & n.111 (citing First Suppl. QR at 3–4). Commerce then requested that Jingmei explain and support with documentation each movement expense incurred from the time the merchandise left Eno's factory to the time Company Y received the merchandise. *Id.* & 19 & n.112 (citing Second Suppl. QR at 5). Jingmei stated that Company X was responsible for paying foreign inland freight and export brokerage and handling, and that Company Y was responsible for paying ocean freight and U.S. inland freight. Second Suppl. QR at 5; *see also* Remand Results at 19 & n.112 (citation omitted). Commerce found, however, that the documentation that Jingmei submitted did "not conclusively support [Company X's] and [Company Y's] purported payment of such expenses." Remand Results at 19. Commerce explained that the brokerage and handling invoice that Jingmei submitted to document its claims regarding Company X's payment of the expenses lacked reference to an invoice number or any other identifier to tie the invoice to the sale under review. *Id.* at 19 & n.114 (citing First Suppl. Resp., Ex. SQ1–3). The ocean freight invoice that Jingmei submitted to document its claim that Company Y paid this expense was issued not to Company Y, but to a different company.[14] *Id.* at 20 & n.116 (citing Second Suppl. QR, Ex. SQ2–6).

Commerce issued supplemental questionnaires to Company X and Company Y requesting that they provide copies of ledgers where each company booked its payments of the movement expenses. *Id.* at 20 & n.118 (citing, *inter alia*, Third Suppl. QR at 6–8). Both companies submitted ledgers that "purportedly combine[d] multiple, unidentified invoices into each entry, and lack[ed] reference to any identifiers, such as detailed expense type, invoice number, or supplier name, that would tie the entries to [Company X's] and [Company Y's] payment of

[14] Commerce noted Jingmei's explanation that the owner of Company Y previously owned the company to which the invoice was issued and Jingmei's claim that the shipping company made an error when it issued the invoice to the wrong company. *Id.* at 20 & n.117 (citing Second Suppl. QR at 5).

its movement expenses."[15] *Id.* at 20 & n.119 (citation omitted); *see also* Third Suppl. QR at 6–7, 8–9 & Exs. SQ3–8, SQ3–12. Additionally, Commerce noted other issues and inconsistencies specifically relating to the documentation that Company Y submitted. Remand Results at 21 & nn.121–24 (citing Third Suppl. QR, Ex. SQ3–12). In a final supplemental questionnaire to Company Y, Commerce requested a reconciliation of Company Y's freight expenses to its tax returns. *Id.* at 23 & n.136 (citing, *inter alia*, Fourth Suppl. QR, Pt. 2 at 6). Company Y submitted the first page of its tax return but failed to submit the supporting tax forms and worksheets corresponding to the line items referenced on that page.[16] *Id.* at 23–24 & n. 137 (citing Fourth Suppl. QR, Pt. 2 at 6 & Ex. SQ4–11).

With respect to the import duty, Jingmei claimed that Company X paid this expense. *Id.* at 24 & n.138 (citing Second Suppl. QR at 5). Commerce instructed Company X to submit documentation—including an accounting voucher, expense ledger, and bank statement—demonstrating payment of this expense. *Id.* at 24 & n.139 (citing Third Suppl. QR at 7). The information that Company X provided did not substantiate Jingmei's claim. *Id.* at 24 & n.140 (citing Third Suppl. QR at 7 & Ex. SQ310). Company X provided payment documentation that Commerce deemed insufficient and a general payment ledger that lacked any identifying information to tie the ledger entry to the purported payment.[17] *Id.*

Commerce further found that Jingmei's reporting of the sales terms was inconsistent with what was provided in China's customs declaration documents.[18] *See id.* at 26 & n.145 (citing Second Suppl. QR, Ex. SQ2–3). Commerce found that Jingmei's explanation for the inconsistency, which suggested that Jingmei had no other option but to report the sale term inconsistently in the PRC's customs declaration

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[15] The companies submitted worksheets, which they claimed would reconcile the "multiple payments" in the ledger entries; however, Commerce found the worksheets to be equally deficient because other than providing "Payment # 1," "Payment # 2" and a numeric amount associated with each "Payment," they lacked reference to any identifiers that would enable Commerce to tie the payments to record documentation. *Id.* at 20–21 & n.120 (citing Third Suppl. QR, Exs. SQ3–8, SQ3–12).

[16] Company Y provided a worksheet purporting to show how the expense tied to the reported [[ ]] line item on its tax returns, but Commerce found the worksheet unsupported by "objective, reliable documentation." *Id.* at 21 & n.137 (citing Fourth Suppl. QR, Pt. 2 at 6 & Ex. SQ4–11).

[17] The payment documentation was insufficient because it was comprised of [[ ]] that did not [[ ]] and appeared to be a non-final transaction. *Id.* at 24 & n.140 (citing Third Suppl. QR at 7 & Ex. SQ3–10).

[18] In its questionnaire response, Jingmei reported that the sales to Company X were [[ ]]; in the PRC customs declaration documents, Jingmei reported the sales terms were [[ ]]. Second Suppl. QR at 3 & Ex. SQ2–3.

documents, was unsupported by record evidence. *See id.* at 26 & n.146 (citing Second Suppl. QR at 3). Moreover, the terms of the sale under review were different than all of Jingmei's other sales.[19] For all these reasons,[20] Commerce determined that this factor weighed against a finding that the sale was *bona fide*. *See id.* at 26–27.

e. Whether the Merchandise was Resold at a Profit

The agency explained that when conducting new shipper reviews, it "requires parties to provide detailed information on the importer's purchases and ongoing commercial operations to analyze whether the subject merchandise was resold at a profit." *Id.* at 27 & n.150 (citing *Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory v. United States*, 37 CIT ___, ___, 920 F. Supp. 2d 1350, 1359–60 (2013)). The parties' failure to provide that information in a timely manner "indicates that the sale is non-*bona fide*." *Id.* at 27 & n.151 (citing *Foshan*, 920 F. Supp. 2d at 1360).

With respect to Company Y's disposition of the merchandise in the United States, Commerce initially requested documentation demonstrating resale of the subject merchandise, but Company Y provided sample invoices and payment documentation that accounted for less than 20 percent of the subject merchandise. *See id.* at 28–29 & nn.153–54 (citing First Suppl. QR at 15 & Ex. SQ1–8). Company Y did not offer any explanation or documentation to account for the disposition of the remaining merchandise. *Id.* Commerce then requested that Company Y provide a complete list of the subject merchandise it sold during the POR, including the customer's name, date of sale, quantity, and price. *Id.* at 29 & n.155 (citing Second Suppl. QR at 12).

[19] "Jingmei's sales to [Company X] were its only sales of calcium hypochlorite during the POR that it made on [[ ]] terms, and its only sales of calcium hypochlorite where [[ ]]." Remand Results at 26 & n.148 (citing Third Suppl. QR, Ex. SQ3–2).

[20] Another unsubstantiated expense was [[ ]]. *Id.* at 21. Jingmei reported that the U.S. Environmental Protection Agency ("EPA") required certification for the subject merchandise; it also provided an image of the EPA label that Jingmei used for shipping. Third Suppl. QR at 1; Remand Results at 23. Jingmei claimed that Company Y purchased the [[ ]] for the sale under review. Remand Results at 21 & n.125 (citing First Suppl. QR at 3). Commerce requested Company Y to provide accounting records showing the purchase of the [[ ]] and images of the [[ ]], including a "clear image of the labels affixed to each." *Id.* at 21–22 & n.126 (citing Third Suppl. QR at 8–9). Company Y submitted a handwritten accounting ledger and a "payment summary" worksheet, both of which lacked reference to any identifying information (such as invoice number, supplier name, etc.), which impeded Commerce's ability to tie Company Y's purported payment of the [[ ]] expenses to its accounting documentation. *Id.* at 22. Further, Company Y provided images of a [[ ]], which showed the contents to be [[ ]], whereas the product purportedly sold in the [[ ]] was reported to Commerce as [[ ]]. *Id.* at 22 & nn.127–129 (citing Third Suppl. QR, Ex. SQ3–13; First Suppl. QR at 15 & Ex. SQ1–8). Additionally, the EPA label that Company Y submitted differed from the one Jingmei provided. *Id.* at 23 & nn.134135 (citing Fourth Suppl. QR, Pt. 1 at 3 & Ex. SQ4–2; Fourth Suppl. QR, Pt. 2 at 5–6).

In response, Company Y provided a list of *all* its sales of calcium hypochlorite during the POR, without distinguishing subject merchandise or Jingmei's product. *Id.*at 29 & n.156 (citing Second Suppl. QR, Ex. SQ2–14). Commerce made a supplemental request for supporting documentation related to certain invoice numbers on that list. *Id.* at 29 & n.157 (citing Third Suppl. QR at 9). Company Y provided the requested invoices; however, they did not appear to be related to the subject merchandise. *Id.* at 29 & n.158 (citing Third Suppl. QR, Ex. SQ3–14). Based on the information that Company Y submitted, Commerce was unable to determine the price at which Company Y resold the merchandise and substantiate payment for the resale of all the merchandise. *Id.* at 29.

Because the record lacked sufficient documentation supporting the sales price and sales-related expenses—which would affect the profit analysis—as well as the resale price, Commerce considered facts available with an adverse inference. *Id.* at 27, 30. Commerce determined that Jingmei, Company X, and Company Y failed to act to the best of their ability because they did not provide information that they should have been able to obtain, "e.g., evidence of payment of sales price and resale of the subject merchandise in the United States, despite multiple requests." *Id.* at 30. That, in addition to Company Y's failure to distinguish between subject and non-subject merchandise in its list of resales, led the agency to conclude that the parties were not fully cooperative. *Id.* at 30, 62–63.

f. Whether the Sales Were Made on an Arms-Length Basis

In conducting its analysis pursuant to section 1675(a)(2)(B)(iv)(VI), Commerce stated that it considered the relationship between Jingmei, Company X, and Company Y; evidence of price negotiations; the terms of sale, and other circumstances surrounding the sale. *Id.* at 31. The unusual circumstances surrounding the sale indicated that the sale did not appear to be in accordance with Jingmei's normal sales practice and further indicated that Jingmei did not demonstrate that the sale was made at arm's length.[21] *Id.* Commerce found that this factor weighed against a finding that the sale was *bona fide*. *Id.*; *see also id.* at 59.

[21] Pursuant to the sales terms, Company Y supplied Eno with [[ ]] delivered directly to Eno's factory, and did so before Company X submitted a purchase order to Jingmei. *Id.* at 31 & nn.160–62 (citing First Suppl. QR at 15 & Ex. SQ1–2; NSR Request, Ex. 2). Jingmei's sales to Company X were its only sales of calcium hypochlorite where the [[ ]]; Company Y's purchase of calcium hypochlorite from Jingmei was the only reported purchase through Company X for which Company Y [[ ]]. *Id.* at 59 (citing Third Suppl. QR, Exs. SQ3–2, SQ3–9).

g. Additional Factors

In addition to the foregoing, Commerce cited other factors—the discrepancy in packaging labels,[22] the circumstances surrounding the packaging purchase,[23] and gross weight discrepancies in shipping documents[24]—as suggestive that the sales were not bona fide. *Id.* at 32–34.

III. Commerce's Remand Results are Sustained

The court ordered Commerce to determine whether Jingmei's sale was *bona fide* and explained that, only then, would the court be able to evaluate whether the redetermination is supported by substantial evidence and otherwise in accordance with law." *Haixing CVD I*, 308 F. Supp. 3d at 1372–73. As detailed above, on remand, Commerce conducted its *bona fide* analysis by evaluating the statutory factors outlined in 19 U.S.C. § 1675(a)(2)(B)(iv) and, therefore, has complied with the court's remand order. Plaintiff makes three overarching challenges to Commerce's redetermination, which concern the agency's: (1) use of adverse inferences, (2) authority to request accounting documentation from Jingmei's customer and downstream customer, and (3) analysis of the record evidence. *See generally* Pl.'s Opp'n Cmts.

a. Commerce's Use of Adverse Inferences

Plaintiff first argues that, in applying an adverse inference, Commerce "create[d] a fiction that Jingmei is somehow related to its customers," Pl.'s Opp'n Cmts at 5, and violated 19 U.S.C. § 1677e(b) by attributing the failure of Company X and Company Y to Jingmei, a cooperating party, rather than finding that Jingmei itself failed to cooperate. *id.* at 6–17. Defendant and Defendant-Intervenor disagree with Plaintiff's characterization of Commerce's findings and argue that substantial evidence supports Commerce's decision to use adverse inferences in evaluating the price and resale factors, and the decision was in accordance with law. *See* Def.'s Supp. Cmts 13–17; Def.-Int.'s Supp. Cmts at 9–12. Plaintiff's challenges to Commerce's use of adverse inferences are unconvincing.

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[22] *See supra* note 20.

[23] *See supra* note 21.

[24] Commerce noted a discrepancy between the weight recorded on the commercial invoice, [[ ]], and the weight recorded on the entry summary, [[ ]]. Remand Results at 33 & n.173 (citing Second Suppl. QR, Exs. SQ2–3 and SQ2–12). When asked about this discrepancy, Company X stated that it was not aware of why the broker reported the difference, and attributed the difference to "a kind of typographical error." *Id.* at 33–34 (citing Second Suppl. QR at 10). Commerce found that "[t]he weight discrepancy, and the parties' inability to explain the reasoning for it, further contribute to the totality of our analysis, which weighs against finding the sale *bona fide*." *Id.* at 34.

Plaintiff mischaracterizes Commerce's adverse facts available determination as premised on a finding of affiliation between Jingmei, Company X, and Company Y. To the contrary, Commerce explained that it based its non-*bona fide* sales determination on a finding that Jingmei, its customer, and the downstream customer failed to cooperate to the best of their abilities, including by failing to establish that the sale in question occurred at arm's length. *See* Remand Results at 8–9, 13–14, 30, 60–63. Commerce explained that it issued four supplemental questionnaires to obtain necessary information to conduct the *bona fide* analysis. *Id.* at 6. The first supplemental questionnaire warned the parties that "[f]ailure to provide requested information may affect the [agency's] determination as to the *bona fide* nature of the sales subject to this review." First Suppl. QR at 7. Nonetheless, with respect to the price factor, Jingmei and Company X did not provide the information in the manner requested, and with respect to the resale factor, Company Y failed to provide information in the manner requested. Remand Results at 14, 30, 62–63; *supra* Discussion Section II.a., e. Under these circumstances, Commerce reasonably determined that Jingmei, Company X, and Company Y failed to "put forth [their] maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382.

Plaintiff relies on *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT ___, ___, 815 F. Supp. 2d 1311, 1323 (2012) and *SKF USA Inc. v. United States*, 33 CIT 1866, 1875–1877, 675 F. Supp. 2d 1264, 1274–1275 (2009) for the proposition that the agency "cannot punish cooperating parties," which Jingmei claims to be. Pl.'s Opp'n Cmts. at 12–13. In contrast to *Shantou Red Garden*, 815 F. Supp. 2d at 1318–19, Commerce here communicated its information requests to Jingmei and found that Jingmei failed to cooperate to the best of its ability in responding to those requests. Similarly, in contrast to *SKF USA Inc.*, 33 CIT at 1878, 675 F. Supp. 2d at 1274–75, Commerce found that Jingmei itself failed to cooperate to the best of its ability. Commerce used the adverse inferences in interpreting the available record information pertinent to the price and resale factors of section 1675(a)(2)(B)(iv)(I),(V) as weighing against a finding that Jingmei's sale was *bona fide*. Therefore, Plaintiff's reliance on *Shantou Red Garden* and *SKF USA Inc.* is misplaced.

Moreover, the court has recently found that Commerce's use of an adverse inference to fill gaps in the information provided by Jingmei, Company X, and Company Y in the new shipper review of the antidumping duty order on calcium hypochlorite from the PRC was reasonable. *Haixing Jingmei Chem. Prod. Sales Co. v. United States*

("Haixing AD II"), Slip Op. 18–129, 2018 WL 4859522, at *8–9 (CIT Sept. 26, 2018). Therein, the court explained that "the U.S. Court of Appeals for the Federal Circuit [has] held that Commerce is not barred, under appropriate circumstances, 'from drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party.'" *Id.* at *9 (quoting *Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1236 (Fed. Cir. 2014)). Pursuant to *Mueller*, "Commerce may rely on inducement or deterrence considerations in determining a weighted-average dumping margin for a cooperating party [if] 'the application of those policies is reasonable on the particular facts and the predominant interest in accuracy is properly taken into account.'" *Id.* (quoting *Mueller*, 753 F.3d at 1233). Distinct from the *Mueller* case, both here and in *Haixing AD II*, neither Jingmei, nor Company X or Company Y was a cooperating party, "and Commerce did not articulate that it was relying on an inducement rationale to reach its AFA determination." *Id.* Commerce, however, noted Company X's status as the importer purportedly responsible for paying the import duties, Remand Results at 24, Jingmei's and Company X's buyer-seller relationship, *id.* at 9, and the agency's need for accurate and reliable information in making its *bona fide* determinations, *see e.g., id.* at 42–43. Thus, Commerce was guided by the principles articulated in *Mueller*, and the court finds that Commerce was permitted to rely on adverse inferences in interpreting the available information on the record.

b. Commerce's Authority to Request Accounting Documentation from Jingmei's Customer and Downstream Customer

Plaintiff asserts that Commerce's justification for requesting the accounting documentation from Company X and Company Y was premised on a finding that the companies are affiliated with Jingmei. Pl.'s Opp'n Cmts at 15. Plaintiff argues that this justification is "unacceptable," *id.* at 15, and that the statutory provision addressing new shipper reviews does not require accounting documentation from a respondent's downstream customers, *id.* at 18.

Plaintiff misinterprets Commerce's justification for requesting the documentation from Company X and Company Y. Commerce considered it necessary to request accounting documentation from these companies to fill gaps in the record or to substantiate the purported sale terms, confirm payment of the price and expenses, and determine

whether the merchandise was resold at a profit.[25] *See supra* Discussion Section II. The relevant statute concerning new shipper reviews "requires Commerce to examine the companies on both sides of the transaction to ensure that the sales in question are *bona fide*." *Haixing AD II*, 2018 WL 4859522, at *9. Notably, although the statute requires a determination that the sale is *bona fide*, it does not mandate what type of documents Commerce must review to make that determination or limit the sources from which Commerce may request information. *See* 19 U.S.C. § 1675(a)(2)(B)(iv). The court has stated that Commerce's analysis of the *bona fide* nature of a sale is dependent on the facts specific to that sale. *Haixing AD II*, 2018 WL 4859522, at *9. Here, considering the allocation of shipping, customs, packaging, and other expenses among the three parties, it was incumbent upon Commerce to seek downstream accounting information to properly determine the price at which the goods were sold and whether the resale by Company Y was at a profit. Jingmei was unable to supply this necessary information. Therefore, Commerce reasonably requested information from Company X and Company Y to complete its *bona fide* analysis.[26]

c. Commerce's Analysis of the Record Evidence

Plaintiff argues that the record demonstrates that its U.S. sale was *bona fide*. Pl.'s Opp'n Cmts. at 1–2, 17 (citing, *inter alia*, Pl.'s Br. at 14–15, 20–29, 33–34). Plaintiff characterizes Commerce's analysis of record documentation as "replete with errors," *id.* at 23 (capitalization omitted), challenging specifically the agency's analysis concerning the price, payment of expenses, and weight discrepancies, *id.* at 23–25. With respect to resale of the merchandise, Plaintiff contends that "the record contains substantial evidence that Company Y resold the merchandise at a profit." *Id.* at 20 (capitalization omitted). It maintains that the *bona fide* analysis does not require that the ultimate customer resell all the merchandise for the sale to be considered *bona fide*. *Id.* at 23.

At the outset, Jingmei fails to frame its case within the court's standard of review. The standard of review is whether the agency's

[25] Commerce stated "it is not clear from the record that Jingmei, [Company X], and [Company Y] are unaffiliated"; however, this was in the context of explaining why it was *particularly* necessary to have the supporting accounting documentation to evaluate both sides of the transaction and the purported expenses incurred. *Id.* at 45–46.

[26] Plaintiff's remaining arguments challenging the authority upon which Commerce relied for the proposition that the agency sometimes requests supporting accounting documentation from the respondent's customers or downstream customers when conducting the *bona fide* analysis in a new shipper review, *see* Pl.'s Opp'n Cmts at 15 16, 18–20, were fully addressed and rejected in *Haixing AD II*, 2018 WL 4859522, at *9 n.16. The court incorporates that analysis herein.

determination is supported by substantial evidence on the record, not whether Jingmei's version of events is supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). In determining whether substantial evidence supports Commerce's determination, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting A*tl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, that a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (internal quotation marks and citation omitted).

Here, Plaintiff reasserts the arguments that it made to Commerce, which Commerce rejected with detailed and well-reasoned explanations.[27] *Compare* Pl.'s Opp'n Cmts. at 17–18, 20–21, 23–25 *with* Remand Results at 35–59. The record evidence upon which Commerce relied supports Commerce's findings with respect to the individual factors outlined in the statute. *See supra* Discussion Section II; Remand Results at 35–59. Moreover, substantial evidence supports the agency's conclusion that the totality of circumstances indicates that Jingmei's sale was not *bona fide*. *See TTPC*, 29 CIT at 275, 366 F. Supp. 2d at 1263 (agreeing with Commerce that "the *bona fide* analysis involves consideration of the totality of the circumstances regarding the sale"); *see also Changzhou Hawd Flooring Co., Ltd. v. United States*, 42 CIT ___, ___, 324 F. Supp. 3d 1317, 1321 (2018) (if Commerce's determination is "reasonable given the circumstances presented by the whole record," it will be sustained) (internal quotation marks and citations omitted).

CONCLUSION

For the foregoing reasons, the court finds that the Remand Results comply with the court's remand order. Further, substantial evidence

[27] The court notes that Commerce did not specifically address Plaintiff's claim that Commerce erred in referring to an inconsistency in the gross weight of the shipment, when in fact it referenced the net weight. *See* Pl.'s Opp'n Cmts. at 24–25. Nevertheless, Commerce clearly identified a weight discrepancy in the shipping documents and the discrepancy remained unresolved. *See* Remand Results at 33–34, 59.

supports Commerce's finding that Jingmei's sale was not *bona fide*; therefore, rescission of the new shipper review was appropriate. Judgment will enter accordingly.

Dated: December 27, 2018
New York, New York

Mark A. Barnett
JUDGE

Slip Op. 18–182

ZHEJIANG ZHAOFENG MECHANICAL and ELECTRONIC CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00004

[Remanding the U.S. Department of Commerce's determination that Plaintiff was ineligible for separate rate status in the 2015–2016 administrative review of tapered roller bearings and parts thereof from the People's Republic of China.]

Dated: December 27, 2018

Adams C. Lee, Harris Bricken McVay, LLP, of Seattle, WA, argued for Plaintiff Zhejiang Zhaofeng Mechanical and Electronic Co., Ltd.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *James H. Ahrens II*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

William A. Fennell, Stewart and Stewart, of Washington, D.C., argued for Defendant-Intervenor The Timken Company. With him on the brief was *Terence P. Stewart*. *Geert M. De Prest*, *Jennifer M. Smith*, *Lane S. Hurewitz*, *Nicholas J. Birch*, and *Patrick J. McDonough* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises out of an administrative review of the antidumping duty order on tapered roller bearings from the People's Republic of China ("China"). *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China*, 83 Fed. Reg. 1,238 (Dep't Commerce Jan. 10, 2018) (final results of antidumping duty administrative review, and rescission of new shipper review; 2015–2016) ("*Final Results*"). Before the court is a Rule 56.2 motion for judgment on the agency record filed by Plaintiff Zhejiang Zhaofeng Mechanical and Electronic Co., Ltd. ("Plaintiff" or "Zhaofeng") contesting the decision of the U.S. Department of Commerce ("Commerce" or "DOC") to revoke Plaintiff's separate rate status. *See* Pl.'s Rule 56.2 Mot. J. Agency R., June 29, 2018, ECF No. 30

(“Pl.’s Mot.”); *see also* Mem. P. & A. Supp. Pl. Zhejiang Zhaofeng’s Rule 56.2 Mot. J. Agency R., June 29, 2018, ECF No. 32 (“Pl.’s Mem.”). For the following reasons, the court concludes that Commerce’s determination is unsupported by substantial evidence and not in accordance with the law. Plaintiff’s Rule 56.2 motion is granted.

PROCEDURAL HISTORY

Defendant-Intervenor the Timken Company (“Timken”) petitioned Commerce for an administrative review of the antidumping duty order on tapered roller bearings from China. *See* Petitioner’s (Timken’s) Pre-Preliminary Comments, PD 181, bar code 3576832–01 (May 31, 2017); *see also Tapered Roller Bearings and Parts Theoreof, Finished or Unfinished, From the People’s Republic of China*, 52 Fed. Reg. 22,667 (Dep’t Commerce June 15, 1987) (antidumping duty order). Commerce initiated an administrative review covering June 1, 2015 through May 31, 2016 for sales of subject merchandise by Chinese producers and exporters. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 53,121 (Dep’t Commerce Aug. 11, 2016) (initiation notice). Commerce selected Zhaofeng as a replacement mandatory respondent in the administrative review. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China*, 82 Fed. Reg. 31,301 (Dep’t Commerce July 6, 2017) (prelim. results and prelim. rescission of new shipper review; 2015–2016) (“*Preliminary Results*”).

Prior to its selection as a mandatory respondent, Zhaofeng submitted a timely separate rate certification to Commerce from a previous administrative review for tapered roller bearings from China. *See* Zhaofeng Section A Response, PD 65–67, bar code 3523271–01 (Nov. 17, 2016). Between November 2016 and April 2017, Zhaofeng submitted timely responses to questionnaires issued by Commerce. *See* Preliminary Results Decision Memo at 3–4, PD 185, bar code 3587281–01 (June 29, 2017) (“Prelim. IDM”).

Commerce conducted on-site verification of Zhaofeng’s submissions in May 2017, including information on separate rates and sales. *See* DOC Zhaofeng Verification Report, PD 187, bar code 3588002–01 (June 29, 2017). Commerce noted that Zhaofeng’s responses contained no significant omissions, errors, or other issues of concern. *See id.* After verification, Commerce became aware of irregularities in Zhaofeng’s submissions when Timken submitted comments identifying discrepancies in a certain verification exhibit. *See* Petitioner’s (Timken’s) Pre-Preliminary Comments at 1–3, PD 181, bar code 3576832–01 (May 31, 2017).

Commerce published its Preliminary Results on July 6, 2017. *See Preliminary Results*, 82 Fed. Reg. at 31,301. Commerce concluded that Zhaofeng failed to provide a complete and accurate U.S. sales database despite having possessed the records necessary, and it determined that the application of partial AFA was appropriate and warranted. *See* Prelim. IDM at 14–15. Separately, Commerce found no evidence of Chinese government ownership of Zhaofeng and that it was otherwise entitled to a separate rate in the review. *See id.* at 10.

Zhaofeng submitted an administrative case brief pursuant to Commerce's Preliminary Results. *See* Zhaofeng DOC Case Brief, PD 194, bar code 3604752–01 (Aug. 7, 2017). In its administrative brief, Zhaofeng noted that the sales listing worksheet provided in the verification exhibit in question incorrectly identified certain model numbers, but stated that the worksheet was not part of its official financial record. *See id.* at 3–4. Zhaofeng argued that the irregularities in its submissions were the result of clerical error, and even so, it did not misreport sales of subject merchandise during the period of review because the verification exhibit involved unreported sales of non-subject merchandise. *See id.* at 2–4. In response to Zhaofeng's assertion that the examination of the invoice would resolve the matter, Commerce requested the entry package pertaining to the disputed sales from U.S. Customs and Border Protection ("CBP") and received the requested documents, including the associated invoice. *See* DOC Memo to File: Entry Documents - CBP, PD 202, bar code 3617066–01 (Sept. 7, 2017). Upon reviewing the CBP entry documents, Commerce found further discrepancies in Zhaofeng's submissions. *See* Final Results Issues & Decisions Memorandum at 7, PD 219, bar code 3657729–01 (Jan. 2, 2018) ("Final IDM").

Commerce issued its Final Results on January 10, 2018. *See Final Results*, 83 Fed. Reg. at 1,238. In light of the extent and nature of the discrepancies between Zhaofeng's verification materials, U.S. sales listings, and CBP entry documents, Commerce determined that Zhaofeng's submissions were "unreliable in its entirety" and that it could not rely on Zhaofeng's separate rate certification. *See id.* at 1,239; Final IDM at 6–10. Commerce found that Zhaofeng had failed to rebut the presumption that it is subject to government control and concluded that Zhaofeng should be assessed at the single, China-wide entity rate of 92.84 percent. *See Final Results*, 83 Fed. Reg. at 1,239; Final IDM at 10.

Zhaofeng brought this action on January 25, 2018. *See* Summons, Jan. 25, 2018, ECF No. 1; Complaint, Jan. 25, 2018, ECF No. 2. Zhaofeng filed a Rule 56.2 motion for judgment on the agency record, contesting Commerce's rejection of Zhaofeng's separate rate status.

See Pl.'s Mot. Defendant filed a response to Zhaofeng's Rule 56.2 motion. *See* Def.'s Resp. Opp'n Pl.'s Rule 56.2 Mot. J. Agency R., Sept. 14, 2018, ECF No. 35 ("Def.'s Resp."). Defendant-Intervenor Timken submitted a response in opposition to Plaintiff's Rule 56.2 motion. *See* Def.-Intervenor Timken's Opp'n Rule 56.2 Mot. J. Agency R., Sept. 17, 2018, ECF No. 40. Zhaofeng submitted a reply brief. *See* Pl. Zhejiang Zhaofeng's Reply Resp. United States & Timken Zhejiang Zhaofeng's Rule 56.2 Mot. J. Agency R., Oct. 19, 2018, ECF No. 43 ("Pl.'s Reply"). The court held oral argument on December 4, 2018. *See* Oral Argument, Dec. 4, 2018, ECF No. 54.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012), and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

The single issue before the court is whether Commerce's determination that Zhaofeng was not eligible for a separate rate and subsequent assignment of the China-wide entity rate to Zhaofeng was supported by substantial evidence and in accordance with the law. Plaintiff contests Commerce's denial of its separate rate status as opposed to applying adverse facts available ("AFA") for Commerce's perceived deficiencies in Zhaofeng's sales information. *See* Pl.'s Mem. 12–14.

Pursuant to the Tariff Act, Commerce has the authority to determine if a country is a nonmarket economy. *See* 19 U.S.C. § 1677(18); *see also Sigma Corp. v. United States*, 117 F.3d 1401, 1404–06 (Fed. Cir. 1997). In proceedings involving a nonmarket economy, such as China, there is a rebuttable presumption that all companies within the country are subject to government control and should be assigned a single, country-wide antidumping duty rate. *See Sigma Corp*, 117 F.3d at 1405. An exporter will receive the country-wide rate by default unless it affirmatively demonstrates that it enjoys both *de jure* and *de facto* independence from the government and receives a separate rate status. *See id.* The burden of rebutting the presumption of government control rests with the exporter. *See id.* at 1406. The *de jure* criteria are: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of

companies. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT __, __, 925 F. Supp. 2d 1315, 1320 n. 21 (2013); *see also Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) (final determination of sales at less than fair value). The *de facto* criteria are: (1) whether the export prices are set by or are subject to the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Ad Hoc Shrimp Trade Comm.*, 925 F. Supp. 2d at 1320 n. 21; *see also Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585, 22,587 (Dep't Commerce May 2, 1994) (notice of final determination of sales at less than fair value).

Commerce may not disregard a respondent's separate rate information as "tainted" just because there were deficiencies in the respondent's sales or factors of production data. *See Shenzen Xinboda Indus. Co., Ltd. v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1305, 1316 (2016) (citing *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT 1398, 1418 (2011)); *see also Fresh Garlic Producers Ass'n v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1313, 1328 (2015) ("Commerce cannot ignore a party's separate rate information solely because it selects total AFA due to defects related to sales data.").

Defendant United States contends that Commerce's decision to deny Zhaofeng separate rate status is in accordance with the law because the U.S. Court of Appeals for the Federal Circuit "affirmed Commerce's finding that an exporter's misrepresentations could impeach the entire credibility of its submissions, including its separate rate certification, even where the misrepresentations themselves did not directly relate to *de facto* control" in *Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339 (Fed. Cir. 2015). Def.'s Resp. 16. Defendant relies on the language in *Ad Hoc Shrimp* that the "misrepresentations may reasonably be inferred to pervade the data in the record *beyond that which Commerce has positively confirmed as misrepresented*." Def.'s Resp. 17 (quoting *Ad Hoc Shrimp*, 802 F.3d at 1347, and adding emphasis). The court disagrees with Defendant's overbroad interpretation of the *Ad Hoc Shrimp* case. The U.S. Court of Appeals for the Federal Circuit upheld Commerce's denial of sepa-

rate rate status in *Ad Hoc Shrimp* because the respondent's deficiencies and inconsistencies specifically related to whether the company at issue had affiliates in nonmarket economy countries, which related to the ownership and control of the company at issue. *See Ad Hoc Shrimp*, 802 F.3d at 1358. The company's corporate structure in *Ad Hoc Shrimp* directly implicated the *de facto* criteria for separate rate status. The language on which Defendant relies for the proposition that the "misrepresentations may reasonably be inferred to pervade the data in the record" appears in the section regarding Commerce's AFA determination and cannot be imported into the separate rate analysis. *See id.* at 1357. In the instant case, Zhaofeng's misrepresentations relate only to the reporting of sales data. *See Final IDM* at 6. Because Zhaofeng's misrepresentations do not speak directly to Zhaofeng's corporate structure or to the *de facto* control of the company, the misrepresentations cannot and should not be inferred to pervade the separate rate analysis. The court concludes that Defendant's attempts to analogize this case with *Ad Hoc Shrimp* are unpersuasive.

The separate rate analysis is separate and distinct from the selection of an AFA rate. *Shenzen Xinboda*, 40 CIT at __, 180 F. Supp. 3d at 1315; *see also Nat'l Nail Corp. v. United States*, 42 CIT __, __, 279 F. Supp. 3d 1372, 1379 (2018) (stating that Commerce cannot assign the China-wide rate based on the finding that a company's responses regarding factors of production and sales data were unreliable when there is nothing on the record to suggest that the company was untruthful when answering questions relating to government control).[1] Section 1677e provides that if necessary information is not available on the record or if a respondent fails to provide such information by the deadline for submission of the information or in the form and manner requested, then the agency shall use the facts otherwise available in reaching its determination. 19 U.S.C. § 1677e(a)(1), (a)(2)(B). Commerce has the authority to determine if a country is a non-market economy pursuant to a completely different statutory provision. *See id.* § 1677(18). Commerce's practice of determining separate rate eligibility is derived from section 1677. Commerce developed its practice of determining separate rate eligibility based on *de facto* and *de jure* independence criteria. *See Sigma Corp*, 117 F.3d at 1405. Because the AFA analysis and separate rate analy-

[1] Defendant argues that *Shenzen Xinboda* and *National Nail Corporation* are distinguishable because the two cases do not comport with *Ad Hoc Shrimp*. *See* Def.'s Resp. 18–19 & n. 3. As discussed above, the court disagrees with Defendant's reading of *Ad Hoc Shrimp* and reiterates that the proposition that "misrepresentations may reasonably be inferred to pervade the data in the record" appears in the section regarding Commerce's AFA determination and cannot be imported into the separate rate analysis. *See Ad Hoc Shrimp*, 802 F.3d at 1357.

sis are distinct statutory evaluations, the two analyses cannot be conflated. The court concludes that Commerce's decision to deny Zhaofeng separate rate status is not in accordance with the law.

Defendant contends that Commerce's decision to deny Zhaofeng's separate rate status was supported by substantial evidence because of multiple instances of misreporting and misconduct by Zhaofeng stemming from Zhaofeng's March 2016 quantity and value reconciliation and its U.S. sales listing. *See* Def's Resp. 13. Commerce did not adequately explain how this misconduct related to its separate rate analysis in the underlying administrative review. Commerce stated that Zhaofeng cannot meet the *de facto* criteria because "under Commerce's *de facto* separate rates analysis, *all* of the *de facto* criteria can be, in some way or another, supported (or refuted) by data recorded in the company's accounting system." Final IDM at 9. Commerce explained that Zhaofeng's accounting system also affected the *de jure* criteria. *See id.* at 9–10. This is an overly broad conclusion. Because it is not clear which of the *de facto* and *de jure* criteria are affected by Zhaofeng's misreporting in its March 2016 quantity and value reconciliation report, the court concludes that Commerce's decision to deny Zhaofeng separate rate status is not supported by substantial evidence.

CONCLUSION

For the aforementioned reasons, the court concludes that Commerce's decision to deny Zhaofeng separate rate status is not in accordance with the law and not supported by substantial evidence. The court remands the *Final Results* for redetermination on the issue of Zhaofeng's separate rate consistent with this opinion. Accordingly, it is hereby

ORDERED that Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record is granted; and it is further

ORDERED that Commerce shall file its remand redetermination on or before March 28, 2019; and it is further

ORDERED that Commerce shall file the administrative record on remand on or before April 11, 2019; and it is further

ORDERED that the Parties shall file any comments on the remand redetermination on or before May 13, 2019; and it is further

ORDERED that the Parties shall file replies to the comments on or before June 12, 2019; and it is further

ORDERED that the joint appendix shall be filed on or before June 26, 2019.

Dated: December 27, 2018
New York, New York

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

Slip Op. 19–1

NEXTEEL CO., LTD., Plaintiff, HYUNDAI STEEL COMPANY, HUSTEEL CO., LTD., AJU BESTEEL CO., LTD., MAVERICK TUBE CORPORATION, and SEAH STEEL CORPORATION, Consolidated Plaintiffs, and ILJIN STEEL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00091
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the 2014–2015 administrative review of the antidumping duty order of oil country tubular goods from the Republic of Korea.]

Dated: January 2, 2019

Henry D. Almond and *Michael T. Shor*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., argued for Plaintiff NEXTEEL Co., Ltd. and Consolidated Plaintiff Hyundai Steel Company. With them on the brief were *Jaehong D. Park*, *Daniel R. Wilson*, *Kang W. Lee*, and *Sylvia Y.C. Chen*. *Leslie C. Bailey* also appeared.

Donald B. Cameron and *Eugene Degnan*, Morris, Manning & Martin, LLP, of Washington, D.C., argued for Consolidated Plaintiff Husteel Co., Ltd. With them on the brief were *Brady W. Mills*, *Julie C. Mendoza*, *Mary S. Hodgins*, and *Rudi W. Planert*.

Robert E. DeFrancesco, III and *Joshua Turner*, Wiley Rein, LLP, of Washington, D.C., argued for Consolidated Plaintiff and Defendant-Intervenor Maverick Tube Corporation. With them on the brief were *Alan H. Price*, *Cynthia C. Galvez*, *Jeffrey O. Frank*, *John Lin*, and *Maureen E. Thorson*.

Hardeep K. Josan, Attorney, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. Of counsel on the brief was *Mykhaylo A. Gryzlov*, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

Jeffrey M. Winton and *Amrietha Nellan*, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., argued for Consolidated Plaintiff SeAH Steel Corporation.

Jarrod M. Goldfeder and *Robert G. Gosselink*, Trade Pacific, PLLC, of Washington, D.C., appeared for Consolidated Plaintiff AJU Besteel Co., Ltd.

Joel D. Kaufman and *Richard O. Cunningham*, Steptoe & Johnson LLP, of Washington, D.C., appeared for Plaintiff Intervenor ILJIN Steel Corporation.

Roger B. Schagrin, *Christopher T. Cloutier*, *Elizabeth J. Drake*, *John W. Bohn*, and *Paul W. Jameson*, Schagrin Associates, of Washington, D.C., appeared for Defendant-Intervenor TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., appeared for Defendant-Intervenor United States Steel Corporation. Formerly on the brief were *Jeffrey D. Gerrish* and *Luke A. Meisner*, Skadden Arps Slate Meagher & Flom, LLP, of Washington, D.C.

OPINION AND ORDER

Choe-Groves, Judge:

This is a case of first impression, involving the first time that the U.S. Department of Commerce ("Department" or "Commerce") found the existence of a particular market situation in an administrative

review under The Trade Preferences Extension Act of 2015 ("TPEA"). Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL"), Consolidated Plaintiffs Husteel Co., Ltd. ("Husteel"), Hyundai Steel Company ("Hyundai"), SeAH Steel Corporation ("SeAH"), AJU Besteel Co., Ltd. ("AJU Besteel"), and Maverick Tube Corporation ("Maverick") (collectively, "Consolidated Plaintiffs"), and Plaintiff-Intervenor ILJIN Steel Corporation ("ILJIN") bring this consolidated action contesting Commerce's final results in the 2014–2015 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea ("Korea"). *See Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of antidumping duty administrative review; 2014–2015), *as amended*, 82 Fed. Reg. 31,750 (Dep't Commerce July 10, 2017) (amended final results of antidumping duty administrative review; 2014–2015) (collectively, "*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the 2014–2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, A-580–870, (Apr. 10, 2017), *available at* https://enforcement.trade.gov/frn/summary/korea-south/2017–07684–1.pdf (last visited Dec. 19, 2018) ("Final IDM"). Before the court are seven Rule 56.2 motions for judgment on the agency record filed by the Parties. For the reasons discussed below, the court sustains in part and remands in part Commerce's *Final Results*.

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce's decision to apply a particular market situation adjustment to NEXTEEL's reported costs of production is supported by substantial evidence and in accordance with the law;
2. Whether Commerce's decision to adjust NEXTEEL's input costs based on a separate proceeding is supported by substantial evidence and in accordance with the law;
3. Whether Commerce's dumping margin calculation for non-examined companies is supported by substantial evidence and in accordance with the law;
4. Whether Commerce's constructed value profit rate calculations is supported by substantial evidence and in accordance with the law;
5. Whether Commerce's determination that NEXTEEL is affiliated with POSCO and POSCO Daewoo is supported by substantial evidence;

6. Whether Commerce's use of the differential pricing analysis is supported by substantial evidence and in accordance with the law;
7. Whether Commerce's classification of proprietary SeAH products is supported by substantial evidence;
8. Whether Commerce's decision to cap the adjustment for freight revenue on SeAH's U.S. sales is in accordance with the law;
9. Whether Commerce's decision to not make an adjustment for SeAH's ocean freight costs incurred on third-country sales is supported by substantial evidence;
10. Whether Commerce's deduction of general and administrative expenses as U.S. selling expenses is supported by substantial evidence;
11. Whether Commerce's adjustment to SeAH's reported costs when calculating cost of production is in accordance with the law;
12. Whether Commerce's decision to not apply adverse facts available ("AFA") to SeAH is supported by substantial evidence;
13. Whether Commerce's decision to not adjust SeAH's packing expenses is supported by substantial evidence; and
14. Whether Commerce's decision to not adjust SeAH's reported scrap and by-product data is supported by substantial evidence.

BACKGROUND

Commerce published an antidumping duty order covering oil country tubular goods from Korea on September 10, 2014. *See Certain Oil Country Tubular Goods From India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders; and Certain Oil Country Tubular Goods From the Socialist Republic of Vietnam: Amended Final Determination of Sales at Less Than Fair Value*, 79 Fed. Reg. 53,691 (Dep't Commerce Sept. 10, 2014). Commerce issued an order allowing for administrative review requests of the antidumping duty order on September 1, 2015. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 80 Fed. Reg. 52,741 (Dep't Commerce Sept. 1, 2015); *see also* Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Certain Oil Country Tubular Goods from the Republic of Korea at 1, A-580–870, (Oct. 5, 2016), *available at* https://enforcement.trade.gov/frn/summary/korea-south/2016–24800–1.pdf (last visited Dec. 19, 2018) ("Prelim. IDM"). ILJIN, Hyundai, NEXTEEL, SeAH, Husteel, and AJU Besteel requested an

administrative review of the antidumping duty order. *See* Prelim. IDM at 1–2. Maverick Tube Corporation ("Maverick"), Energex Tube, a division of JMC Steel Group, TMK IPSCO, Vallourec Star L.P., Welded Tube USA Inc., and United States Steel Corporation submitted a petition for a review of various companies on September 29, 2015. *See id.* at 2. Commerce initiated an administrative review for the period covering July 18, 2014 through August 31, 2015. *See id.* at 1; *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 69,193 (Nov. 9, 2015). Commerce selected the two exporters or producers accounting for the largest volume of oil country tubular goods from Korea during the period of review, which were NEXTEEL and SeAH. *See* Prelim. IDM at 2.

Commerce released the preliminary results on October 14, 2016. *See* Certain Oil Country Tubular Goods From the Republic of Korea, 81 Fed. Reg. 71,074 (Dep't Commerce Oct. 14, 2016) (preliminary results of the antidumping duty administrative review; 2014–2015) ("*Preliminary Results*"). Commerce calculated a preliminary weighted-average dumping margin of 8.04 percent for NEXTEEL, 3.80 percent for SeAH, and 5.92 percent for non-examined companies. *See id.* at 71,075.

Maverick alleged that four[1] particular market situations existed in Korea with respect to hot-rolled coil, which is the largest input used to produce oil country tubular goods. Maverick asserted the following:

(1) The costs and prices of Korean hot-rolled coil were distorted due to subsidies provided by the Government of Korea. Maverick pointed to the final determination in the countervailing duty investigation of Korean hot-rolled steel flat products to support its allegation. *See* Department's Memorandum Pertaining to Maverick's Particular Market Situation Allegations at 2, PD 531, bar code 3545522–01 (Feb. 22, 2017) ("Particular Market Situation Mem.").

(2) The Korean market has been flooded with imports of cheaper, unfairly-traded Chinese hot-rolled flat products over the last three years, placing downward pressure on Korean domestic hot-rolled coil prices and causing price distortions. *See id.*

(3) There existed "strategic alliances" between selected oil country tubular goods producers and two major hot-rolled coil suppliers in Korea, POSCO and Hyundai, in that

[1] Maverick initially alleged the existence of three particular market situations, but later added a fourth to the record. *See* Department's Memorandum Pertaining to Maverick's Particular Market Situation Allegations at 1–2, PD 531, bar code 3545522–01 (Feb. 22, 2017) ("Particular Market Situation Mem.").

POSCO and Hyundai allegedly provided favorable hot-rolled coil prices to certain oil country tubular goods producers while charging market prices to others not part of these alliances. *See id.*

(4) The cost of electricity is influenced by the Government of Korea's alleged "pervasive intervention" in the production and distribution of electricity. Once again, Maverick relied on the final determination in the separate countervailing duty investigation of Korean hot-rolled steel flat products to support its allegation. *See id.* at 2–3.

Commerce released a memorandum on February 22, 2017, in which it addressed and rejected each allegation of a particular market situation individually. *See id.* Commerce concluded that there was insufficient evidence to support finding a particular market situation in the administrative review. See id. at 14–18.

Commerce placed on the record a letter from Peter Navarro, Director of the National Trade Council, on March 8, 2017. *See* Memorandum to the File: E-mail from Peter Navarro, "Recommendation for Action," Dated Mar. 2, 2017, PD 538, bar code 3549705–01 (Mar. 8, 2017). The letter stated that Tenaris S.A., a multinational pipe-producing company headquartered in Luxembourg, had completed an oil country tubular goods facility in Houston, Texas, and low dumping margins in the oil country tubular goods administrative review "would be particularly damaging" to the company. *Id.* at 2. Director Navarro noted that a minimum thirty-six percent margin would assist Tenaris, and that Commerce should utilize the particular market situation adjustment to meet that margin. *See id.*

Commerce published the final results on April 17, 2017. *See Certain Oil Country Tubular Goods From the Republic of Korea*, 82 Fed. Reg. at 18,105. In the final results, Commerce reversed its prior position and found the existence of a particular market situation, stating that it "reconsidered these four allegations as a whole, based on their cumulative effect on the Korean [oil country tubular goods] market through the cost of [oil country tubular goods] inputs." Final IDM at 40. Commerce "refocused the analysis on the totality of the conditions in the Korean market" and found "that the allegations represent, instead, facets of a single particular market situation." *Id.* Commerce assigned a weighted-average dumping margin of 24.92 percent to NEXTEEL, 2.76 percent to SeAH, and 13.84 percent to non-examined companies. *See Certain Oil Country Tubular Goods From the Republic of Korea*, 82 Fed. Reg. at 18,106. Commerce considered subsequent ministerial error allegations, which changed NEXTEEL's weighted-

average dumping margin to 29.76 percent. *See Certain Oil Country Tubular Goods From the Republic of Korea*, 82 Fed. Reg. at 31,751. The final weighted-average dumping margin for non-examined companies was 16.26 percent. *See id.*

Plaintiff and Consolidated Plaintiffs initiated six separate actions against Defendant ("Government"), which the court consolidated. *See* Order, Aug. 18, 2017, ECF No. 72. Plaintiff, Consolidated Plaintiffs, and Plaintiff-Intervenor filed seven Rule 56.2 motions for judgment on the agency record, challenging various aspects of Commerce's *Final Results*. *See* Pl.-Intervenor Rule 56.2 Mot. J. Agency R., Oct. 12, 2017, ECF No. 76; Br. Pl.-Intervenor ILJIN Steel Corp. Supp. Mot. J. Agency R., Oct. 12, 2017, ECF No. 77; Mot. Pl. SeAH Steel Corp. J. Agency R., Oct. 12, 2017, ECF No. 80; Br. SeAH Steel Corp. Supp. Rule 56.2 Mot. J. Agency R., Oct. 12, 2017, ECF No. 79 ("SeAH Br."); Rule 56.2 Mot. J. Agency R. Consolidated Pl. Hyundai Steel Co., Oct. 12, 2017, ECF No. 82; Mem. Supp. Consolidated Pl. Hyundai Steel Co.'s Rule 56.2 Mot. J. Agency R., Oct. 12, 2017, ECF No. 82–1 ("Hyundai Br."); Pl.-Intervenor Husteel Co., Ltd.'s Mot. J. Agency R., Oct. 12, 2017, ECF No. 83; Pl.-Intervenor Husteel Co., Ltd.'s Br. Supp. Mot. J. Agency R., Oct. 12, 2017, ECF No. 83–1; Consolidated Pl.'s Rule 56.2 Mot. J. Agency R., Oct. 12, 2017, ECF No. 84; Mem. Supp. Mot. Consolidated Pl., AJU Besteel Co., Ltd., J. Agency R., Oct. 12, 2017, ECF No. 84–1; Rule 56.2 Mot. J. Agency R., Pl. NEXTEEL Co., Ltd., Oct. 13, 2017, ECF No. 87; Mem. Supp. Pl. NEXTEEL Co., Ltd.'s Rule 56.2 Mot. J. Agency R., Oct. 13, 2017, ECF No. 87–1 ("NEXTEEL Br."); Consolidated Pl. Maverick Tube Corp.'s Rule 56.2 Mot. J. Agency R., Oct. 13, 2017, ECF No. 89; Mem. Consolidated Pl. Maverick Tube Corp. Supp. Mot. J. Agency R., Oct. 13, 2017, ECF No. 89 ("Maverick Br."). The court held oral argument on October 18, 2018. *See* Oral Argument, Oct. 18, 2018, ECF No. 136; *see also* Transcript of Oral Argument, Nov. 5, 2018, ECF No. 137 ("Oral Arg. Tr.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[2] and 28 U.S.C. § 1581(c), which grant the court the authority to review actions contesting the final results of an administrative review of an antidumping duty order. The court will uphold Commerce's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record, or otherwise not in

[2] All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code. All further citations to the U.S. Code are to the 2012 edition, with exceptions. All further citations to 19 U.S.C. § 1677b(e) are to the 2015 version, as amended pursuant to The Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). All citations to the Code of Federal Regulations are to the 2017 edition.

accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

ANALYSIS

I. Particular Market Situation Adjustment

For the first time under Section 504 of the TPEA, Commerce found the existence of a particular market situation in this case.

Maverick alleged the existence of four particular market situations in the administrative review. Commerce found initially that none of the four alleged particular market situations existed based on the evidence on the record. Commerce reversed its position in the *Final Results*, stating that the four allegations "as a whole, based on their cumulative effect on the Korean [oil country tubular goods] market through the cost of [oil country tubular goods] inputs," created the existence of a single particular market situation.

NEXTEEL, Hyundai, Husteel, SeAH, AJU Besteel, and ILJIN contest Commerce's finding of a particular market situation in the *Final Results*. NEXTEEL argues that a finding of a particular market situation is reserved for "extreme circumstances," and that Commerce's application here is inconsistent with the statute and Commerce's previous applications of a particular market situation under 19 U.S.C. § 1677b(a)(1)(C)(iii). *See* NEXTEEL Br. 14–15. Maverick, TMK IPSCO, Vallourec Star, L.P., Welded Tube USA Inc., and United States Steel Corporation argue that Commerce properly found the existence of one particular market situation. *See* Maverick Br. 11–31. The Government fails to defend Commerce's finding, both in its briefing and at oral argument, and instead requests a voluntary remand. *See* Def. Resp. 64–65; Oral Arg. Tr. at 52:11–54:8. For the following reasons, the court denies the Government's request for a voluntary remand and concludes that Commerce's finding of a particular market situation is unsupported by substantial evidence.

A. The Government's Request for a Voluntary Remand

The Government contends that a voluntary remand is appropriate to "further consider and address certain arguments that were not directly addressed in the underlying decision" without confessing error. Def. Resp. 65; *see also SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001). The Government's request is contested. *See* Reply Br. Pl.-Intervenor ILJIN Steel Corp. Supp. Mot. J. Agency R. 10, Mar. 6, 2018, ECF No. 108; Pl.-Intervenor Husteel Co., Ltd.'s Reply Br. Supp. Mot. J. Agency R. 2–7, Mar. 6, 2018, ECF No.

109; Consolidated Pl. Hyundai Steel Co.'s Reply Br. Supp. Mot. J. Agency R. 4, Mar. 6, 2018, ECF No. 110; Pl. NEXTEEL Co., Ltd.'s Reply Br. Supp. Mot. J. Agency R. 1–7, Mar. 6, 2018, ECF No. 112; Reply Br. SeAH Steel Corp. 1–4, Mar. 6, 2018, ECF No. 113 ("SeAH Reply"); Reply Br. Consolidated Pl. AJU Besteel Co., Ltd. 2, Mar. 6, 2018, ECF No. 114.

The court has discretion in deciding requests for voluntary remand on the basis of further agency consideration and may deny the request if it is frivolous or made in bad faith. *SKF USA, Inc.*, 254 F.3d at 1029. Vague and unsupported requests for remand are insufficient. *Corus Staal BV v. U.S. Dep't of Commerce*, 27 CIT 388, 391–95, 259 F. Supp. 2d 1253, 1257–60 (2003); *see also Corus Staal BV v. United States*, 29 CIT 777, 781–83, 387 F. Supp. 2d 1291, 1296–97 (2005) ("The Government must give due regard to finality and cannot simply ask for a do-over any time it wishes."). An agency is not allowed to proffer an ad hoc rationalization for its actions. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The Government's request here is vague, overly broad, and does not specify what arguments were "not directly addressed" in Commerce's *Final Results*. Apparently the Government is seeking a "do-over" with respect to the particular market situation issue. Accordingly, the court denies the Government's request for a voluntary remand.

In addition, it is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived. *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013); *see also JBF RAK LLC v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1343, 1356 (2014), *aff'd*, 790 F.3d 1358 (Fed. Cir. 2015). The Government has not put forth any substantive arguments regarding Commerce's finding of a particular market situation. The court concludes that the Government has waived its right to argue the issue on the merits.

B. Commerce's Finding of a Particular Market Situation

Under the Tariff Act of 1930, as amended, Commerce conducts antidumping duty investigations and determines whether goods are being sold at less-than-fair value. *See* 19 U.S.C. § 1673. If the Department finds that subject merchandise is being sold at less-than-fair value, and if the U.S. International Trade Commission finds that these less-than-fair value imports materially injure a domestic industry, the Department issues an antidumping duty order imposing antidumping duties equivalent to "the amount by which the normal value exceeds the export price (or the constructed export price) for the

merchandise." *Id.* Generally, export price is defined as the price at which the subject merchandise is first sold in the United States, whereas the normal value represents the price at which the subject merchandise is sold in the exporting country. *See id.* §§ 1677a(a), 1677b(b)(i). If Commerce cannot determine the normal value of the subject merchandise based on price, then the statute authorizes Commerce to calculate a constructed value. *Id.* § 1677b(a)(4). The constructed value shall be an amount equal to the sum of, for instance, "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade." *Id.* § 1677b(e)(1).

Section 504 of the TPEA amended the Tariff Act to allow Commerce to consider certain sales and transactions to be outside of the ordinary course of trade when "the particular market situation prevents a proper comparison with the export price or constructed export price." 19 U.S.C. § 1677(15). When calculating constructed value under the revised version of the statute, if Commerce finds the existence of a particular market situation "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." 19 U.S.C. § 1677b(e).

The legislative history of the TPEA reflects a desire to give Commerce the ability to choose the appropriate methodology when a particular market situation exists. One Senate Report stated that modifications to the Tariff Act under the TPEA "provide that where a particular market situation exists that distorts pricing or cost in a foreign producer's home market, the Department of Commerce has *flexibility* in calculating a duty that is not based on distorted pricing or costs." S. Rep. No. 114–45, at 37 (2015) (emphasis added). In a hearing before the House of Representatives, Senator Patrick Meehan noted that under the TPEA, Commerce would be "empowered . . . to disregard prices or costs of inputs that foreign producers purchase if the Department of Commerce has reason to believe or suspects that the inputs in question have been subsidized or dumped" in the interest of creating an accurate record and protecting domestic workers. 166 Cong. Rec. H4690 (daily ed. June 25, 2015) (statement of Sen. Meehan).

Commerce has the ability to choose the appropriate methodology so long as it comports with its statutory mandate and provides a reasoned explanation. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 48–49 (1993) ("*State Farm*"); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). The statute's language and legislative history permit Commerce's chosen methodology in this investigation, which was to consider allegations of a particular market situation based on the cumulative effect and the totality of the conditions in the foreign market. The court concludes that Commerce's particular market situation approach was reasonable in theory.

C. Record Evidence

Commerce failed, however, to substantiate its finding of one particular market situation with evidence on the record. Commerce explained in a nineteen-page memorandum how the voluminous information on the record showed that Maverick's four allegations were unfounded. *See* Particular Market Situation Mem. After the issuance of Commerce's memorandum and before the issuance of its *Final Results*, Commerce did not receive any new evidence regarding conditions in the Korean market. Commerce did not explain adequately how the same record supported both its previous conclusion of no particular market situation and its subsequent finding of a single particular market situation. *Compare* Particular Market Situation Mem. at 14–18 *with* Final IDM at 40–44. The Government did not defend Commerce's *Final Results* at oral argument or in its briefs, choosing instead to refrain from making any argument at all with respect to the particular market situation.

First, Maverick alleged that the Korean Government subsidized the production of hot-rolled coil and submitted documents from Commerce's countervailing duty investigation on hot-rolled coil in support of its contention. The Department noted that "Maverick did not identify any specific findings in these documents or evidence from that proceeding that would lead the Department to find that a particular market situation exists," but instead "merely referred to these documents to assert that the Department made a final affirmative subsidy determination and to reference the resulting [countervailing duty] rates." Particular Market Situation Mem. at 14. Commerce found Maverick's evidence unpersuasive and concluded, "The record does not contain evidence that the Government of Korea has introduced policies or mandates with regard to [hot-rolled coil] that distort the cost to produce the subject merchandise for either NEXTEEL or SeAH." *Id.* at 15.

Second, Maverick asserted that a particular market situation exists because an influx of Chinese hot-rolled flat products into the Korean market caused the price of Korean hot-rolled coil products to fall

dramatically. *Id.* Commerce acknowledged a rise in exports of steel products (including hot-rolled coil) from China, but found that Maverick had not demonstrated that the trend was unique to Korea. *See id.* ("The potential broad effect on prices creates a situation outside the scope of a particular market situation, as the impact of Chinese exports in the Korean market are also reflected in other markets across the world."). Commerce determined that there was no record evidence of specific price distortions in the Korean market as a result of Chinese imports, and no record evidence to support a finding of a particular market situation with respect to NEXTEEL and SeAH. *See id.* at 15–16.

Third, Maverick alleged that "strategic alliances" between Korean hot-rolled coil suppliers and oil country tubular goods producers resulted in favorable pricing and therefore constituted a particular market situation. *See id.* at 16. Maverick provided an affidavit in support of its allegation, which Commerce discounted because it pertained to discussions that occurred before the period of review and did not contain information about specific agreements. *See id.* Maverick also pointed to the fact that NEXTEEL and SeAH purchased hot-rolled coil from POSCO during the period of review as indicative of a "strategic alliance." *See id.* at 17. Commerce did not find this evidence persuasive because POSCO is a major supplier of hot-rolled coil in Korea and because NEXTEEL and SeAH also purchased hot-rolled coil from other suppliers. *See id.* Commerce determined that the record did not support Maverick's allegation of a particular market situation.

Fourth, Maverick alleged that a particular market situation existed due to the Korean Government's "pervasive intervention" in the electricity market that distorted the price of electricity, citing Commerce's final determination in the countervailing duty investigation of hot-rolled steel flat products from Korea.[3] *See id.* at 17. Commerce found

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[3] Commerce found in the countervailing duty investigation of hot-rolled steel flat products from Korea that the Government of Korea's provision of electricity was not for less than adequate remuneration, and the determination was upheld by this Court. *See POSCO v. United States*, Slip Op. 18–117, 2018 WL 4352100 (Sept. 11, 2018). Commerce has made similar findings regarding the Government of Korea's provision of electricity in countervailing duty investigations for other steel products, which have also been upheld by this Court. *See, e.g.*, *POSCO v. United States*, Slip Op. 18–169, 2018 WL 6436440 (Dec. 6, 2018) (sustaining in part Commerce's investigation of certain carbon and alloy steel cut-to-length plate from Korea); *POSCO v. United States*, 42 CIT at __, 296 F. Supp. 3d 1320 (sustaining in part Commerce's countervailing duty investigation of cold-rolled steel flat products from Korea); *Nucor Corp. v. United States*, 42 CIT __, 286 F. Supp. 3d 1364 (2018), *appeal docketed*, No. 18- 1787 (Fed. Cir. Apr. 6, 2018) (sustaining Commerce's countervailing duty investigation of certain corrosion-resistant steel products from Korea); *Maverick Tube Corp. v. United States*, 41 CIT __, 273 F. Supp. 3d 1293 (2017), *appeal docketed*, No. 18–1351 (Fed. Cir. Dec. 28, 2017) (sustaining Commerce's countervailing duty investigation of welded line pipe from Korea).

that the record showed government involvement in Korea's electricity sector, but "there is no evidence to suggest that electricity prices charged to producers of either [hot-rolled coil] or [oil country tubular goods] Korea do not reasonably reflect the cost of production for the electricity or are otherwise anomalous." *Id.* at 18. Commerce declined to find the existence of a particular market situation in Korea based on the electricity sector.

Commerce found that the record did not support any of Maverick's four allegations of a particular market situation in Korea. The court finds it unreasonable that Commerce reversed its position and subsequently found a particular market situation based on the same evidence. It does not stand to reason that individually, the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion. The court concludes that Commerce's determination of the existence of one particular market situation in Korea is unsupported by substantial evidence. Commerce is instructed to reverse the finding of a particular market situation and recalculate the dumping margin for the mandatory respondents and non-examined companies.

II. Adjustment to NEXTEEL's Input Costs Based on a Separate Proceeding

As a result of its finding of a particular market situation, Commerce adjusted NEXTEEL's input costs based on a separate administrative proceeding: *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep't Commerce Aug. 12, 2016) (final affirmative determination), *as amended*, 81 Fed. Reg. 67,960 (Dep't Commerce Oct. 3, 2016) (amended final affirmative countervailing duty determination and countervailing duty order). Commerce calculated the respondent's countervailing duty rate based on an application of total AFA in that proceeding. NEXTEEL argues that, in applying this countervailing duty rate, Commerce applied AFA to NEXTEEL without any of the procedural safeguards or requisite findings on the record.

Because the court directs Commerce to reverse its finding of a particular market situation and recalculate the dumping margins, the court does not address this issue at this time.

III. Dumping Margin Calculation for Non-Examined Companies

As discussed *supra*, Commerce calculated NEXTEEL's dumping margin based on the AFA rate in a separate administrative proceeding. NEXTEEL's dumping margin, in turn, formed the basis for the all-others rate, which applies to Hyundai, Husteel, and AJU Besteel.

Hyundai, Husteel, and AJU Besteel argue that Commerce's application of a total AFA rate derived from a separate proceeding was inappropriate, unfairly prejudiced non-examined companies, and is contrary to law. *See* Hyundai Br. 8–9 (citing *Albemarle Corp. v. United States*, 821 F.3d 1345, 1354 (Fed. Cir. 2016)). In applying the total AFA rate, the Parties argue that Commerce *de facto* applied AFA to the non-examined companies without making the necessary findings, and thus the rate for non-examined companies is not supported by substantial evidence on the record. *See id.*

Because the court directs Commerce to reverse its finding of a particular market situation and recalculate the dumping margins, it does not address this issue at this time.

IV. Constructed Value Profit Rate Calculations

When Commerce is required to calculate a constructed value for a respondent, the statute requires Commerce to utilize the respondent's actual selling expenses and profits from the home market or a third-country market. 19 U.S.C. § 1677b(e)(2)(A). If that data is unavailable, the statute provides Commerce with three alternatives:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

Id. § 1677b(e)(B).

In calculating NEXTEEL's constructed value, Commerce determined that NEXTEEL did not have a viable home or third-country market during the period of review for the purposes of calculating constructed value profits and selling expenses. *See* Final IDM at 9. When evaluating the statutory alternatives, Commerce found that subsection (i) was unreliable because other steel products produced by NEXTEEL were not in the same general category of products as oil country tubular goods. *See id.* at 11. Subsection (ii) was unavailable because no sales of oil country tubular goods existed in the home market, Korea. *See id.* Commerce chose subsection (iii). *See id.* Of the four sources of information on the record identified by Commerce, Commerce chose to calculate SeAH's constructed value profit by utilizing profit data associated with SeAH's Canadian market sales, costs, selling, and general expenses. *See id.*

NEXTEEL argues that Commerce's use of SeAH's data is inappropriate because of an existing antidumping duty case in Canada regarding oil country tubular goods from Korea. *See* NEXTEEL Br. 37. Although there is a preference for not using "dumped third country prices to calculate" normal value, there was no evidence of a formal finding of dumping in the Canadian investigation. *See Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 341, 201 F. Supp. 2d 1267, 1277 (2002) (sustaining Commerce's decision to rely on data derived from allegedly dumped merchandise in third-country sales). Commerce "subjected SeAH's Canadian market sales to the cost test, and only those sales that were above the cost of production (*i.e.*, made in the ordinary course of trade) were used in constructing the aggregate [constructed value] profit and selling expenses." Final IDM at 13. Commerce attempted to make adjustments for possible distortions and to utilize the best available information on the record to calculate NEXTEEL's constructed value profit. The court finds that Commerce's use of SeAH's Canadian market sales was reasonable.

NEXTEEL contends that Commerce should have instead considered other sources on the record, including the 2014 financial statements of Korean pipe producer Hyundai HYSCO, a producer of oil country tubular goods in the instant administrative review and other steel pipe products. *See* NEXTEEL Br. 38. Commerce evaluated information placed on the record and concluded that using data from other Korean pipe producers was inappropriate because those products were not in the same general category of products as the merchandise subject to the administrative review. *See* Final IDM at 12. In comparing Hyundai HYSCO's data to SeAH's, Commerce found that SeAH's data was more precise and therefore preferable. *See id.* The court concludes that Commerce's decision to utilize SeAH's Canadian

market sales data to calculate NEXTEEL's constructed value profit rate is supported by substantial evidence and in accordance with the law.

V. NEXTEEL's Alleged Affiliation with POSCO and POSCO Daewoo

Commerce determined that NEXTEEL and POSCO, which is NEXTEEL's supplier of steel coil, were affiliated within the meaning of 19 U.S.C. § 1677(33)(G). *See* Final IDM at 126–27. Commerce found that NEXTEEL and POSCO Daewoo, which is wholly-owned by POSCO, were affiliated within the meaning of 19 U.S.C. § 1677(33)(F). *See id.* NEXTEEL sources hot-rolled coil from POSCO and sells oil country tubular goods to POSCO Daewoo. *See id.* at 127. Commerce cited its own regulation, 19 C.F.R. § 351.102, and explained, "POSCO is involved in both the production and sales sides of NEXTEEL's operations involving subject merchandise," which "creates a unique situation where POSCO is operationally in a position to exercise restraint or direction over NEXTEEL in a manner that affects the pricing, production, and sale of" oil country tubular goods. *Id.* The potential to exercise control is sufficient; Commerce need not find actual control. *See id.*

The statute defines "affiliated persons" as follows:

> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.
>
> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. § 1677(33). When determining whether control over another person exists within the meaning of the statute, Commerce will consider the following factors, among others:

> Corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. [Commerce] will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. [Commerce] will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

19 C.F.R. § 351.102(b)(3).

NEXTEEL contends that Commerce's finding was premised on its prior decision in the initial antidumping duty investigation. *See* NEXTEEL Br. 40. NEXTEEL argues that Commerce should have reevaluated its position in light of differing facts; specifically, that NEXTEEL sourced fewer hot-rolled coils from POSCO and sold fewer oil country tubular goods to POSCO Daewoo compared to other suppliers and customers.[4] *See id.* at 41. "Despite changes to the percentages of NEXTEEL's purchases from, and sales to, POSCO and POSCO's affiliates," Commerce found that the numbers still represented a majority of NEXTEEL's sourcing and sales. Final IDM at 127. Commerce determined, based on the data, that POSCO and POSCO Daewoo were in a position to control NEXTEEL in a way that extended beyond a close supplier relationship. *See id.* It was reasonable for Commerce to find that NEXTEEL is affiliated with POSCO and POSCO Daewoo based on NEXTEEL's souring and sales information, and the court concludes that Commerce's determination is supported by substantial evidence.

VI. Differential Pricing Analysis

Commerce ordinarily uses an average-to-average comparison ("A-to-A") of normal values to export prices for comparable merchandise in an investigation when calculating a dumping margin. *See* 19 U.S.C. § 1677f-1(d)(1)(A); 19 C.F.R. § 351.414(c)(1). Commerce can depart from using the A-to-A methodology and instead compare the weighted average of normal values to the export prices of individual transactions for comparable merchandise ("A-to-T") when (1) Commerce finds a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time and (2) Commerce explains why such differences cannot be taken into account using the A-to-A methodology. *See* 19 U.S.C. § 1677f1(d)(1)(B)(i)-(ii). Commerce has adopted the same basis for applying its A-to-T methodology in administrative reviews. *See JBF RAK LLC*, 790 F.3d at 1364 ("Commerce's decision to apply its average-to-transaction comparison methodology in the context of an administrative review is reasonable."). Commerce applied differential

[4] In the initial investigation, NEXTEEL sourced [[ ]] percent of its hot-rolled coils from POSCO, and [[ ]] percent of NEXTEEL's U.S. sales of oil country tubular goods were made through POSCO Daewoo (which was, at that time, known as Daewoo International, or DWI). *See* NEXTEEL's Supplemental Section C Response at 3, Exhibit SC-5, CD 171, bar code 3476956–01 (June 9, 2016). In the 2014–2015 administrative review, NEXTEEL reported that POSCO provided [[ ]] percent of its hot-rolled coil supply and that it sold [[ ]] percent of its oil country tubular goods to POSCO Daewoo. *See id.* at 4, Exhibit SC-4.

pricing analysis in this case when applying its A-to-T methodology. *See Final IDM* at 18.

Commerce determines whether a pattern of significant price differences exists among purchasers, regions, or periods of time with its two-stage differential pricing analysis. *See* Prelim. IDM at 8–9. First, Commerce applies what it refers to as the "Cohen's d test" which measures the degree of price disparity between two groups of sales. *See id.* at 8. Commerce calculates the number of standard deviations by which the weighted-average net prices of U.S. sales for a particular purchaser, region, or time period (the "test group") differ from the weighted-average net prices of all other U.S. sales of comparable merchandise (the "comparison group"). *See id.* The result of this calculation is a coefficient. *See id.* The Cohen's d coefficient is used to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise. *See id.* A group of sales with a coefficient equal to or greater than 0.8 "passes" the test and signifies to Commerce that a significant pattern of price differences exists within that group of sales. *See id.* at 8–9. Commerce then applies the "ratio test" to measure the extent of significant price differences. *See id.* at 9. If the value of sales that pass the Cohen's d test account for 66 percent or more of the value of total sales, that indicates to Commerce that the pattern of significant price differences warrants application of the A-to-T method to all sales. *See id.* If the value of sales that pass the Cohen's d test is more than 33 percent and less than 66 percent of the value of all sales, Commerce takes a hybrid approach, applying the A-to-T method to the sales that passed its Cohen's d test and applying the A-to-A method to all other sales. *See id.* Commerce will apply the A-to-A method to all sales if 33 percent or less of a respondent's total sales pass its Cohen's d test. *See id.* If both the Cohen's d test and ratio test demonstrate that the A-to-T methodology should be considered, Commerce applies its "meaningful difference" test, pursuant to which Commerce evaluates whether the difference between the weighted-average dumping margins calculated by the A-to-A method is meaningfully different than the weighted-average dumping margins calculated by the A-to-T method. *See id.*

A. Commerce's Use of Numerical Thresholds Throughout the Differential Pricing Analysis

The Court of Appeals for the Federal Circuit and this Court have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. *See e.g.*, *Apex Frozen Foods Private Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1313–35

(2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017); *Apex Frozen Foods Private Ltd. v. United States*, 208 F. Supp. 3d. 1398 (2017); *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1303 (2016). Commerce's use of the differential pricing analysis was not subject to the notice and comment requirements of the Administrative Procedure Act. *See Apex Frozen Foods Private Ltd.*, 40 CIT __, __, 144 F. Supp. 3d at 1321.

SeAH contends that record evidence does not support Commerce's use of the differential pricing analysis here. *See* SeAH Br. 2–3. Specifically, SeAH argues that Commerce must explain why its differential pricing analysis application and why any of the numerical thresholds used during the analysis are appropriate in the context of each specific case. *See* SeAH Br. 11. SeAH cites *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 10 CIT 301, 634 F. Supp. 419 (1986) ("*Carlisle Tire*"), and *Washington Red Raspberry Commission v. United States*, 859 F.2d 898 (Fed. Cir. 1988) ("*Wash. Red. Raspberry Comm'n*"), as support for the proposition that Commerce can only apply mathematical assumptions and numerical thresholds that have not been adopted in accordance with the Administrative Procedure Act if the record contains substantial evidence supporting the application. *See* SeAH Br. 12–13. Both cases concerned only Commerce's application of the 0.5 percent *de minimis* standard in antidumping investigations and can be distinguished from the instant case. *See Wash. Red Raspberry Comm'n*, 859 F.2d at 902; *Carlisle Tire*, 10 CIT at 302, 634 F. Supp. at 421. The *de minimis* standard needed to be promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act. *See Carlisle Tire*, 10 CIT at 305, 634 F.Supp. at 423. That is not true of Commerce's differential pricing analysis. *See Apex Frozen Foods Private Ltd.*, 40 CIT at __, 144 F. Supp. 3d at 1321 ("Commerce's shift from the *Nails* test to the differential pricing analysis is not subject to notice and comment requirements.") Because there is not support for SeAH's argument that Commerce can only apply mathematical assumptions and numerical thresholds that have not been adopted in accordance with the Administrative Procedure Act if the record contains substantial evidence supporting the application, the court need not disturb Commerce's practice.

B. Commerce's Use of the Cohen's d Test

The Court gives Commerce deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature." *See Fujitsu Gen. Ltd.*, 88 F.3d at 1039. When Commerce applies

the Cohen's d test, all of the respondent's sales are analyzed. *See* Prelim. IDM at 8. Sampling technique, sample size, and statistical significance are not relevant considerations in the context of analyzing all sales. *See Tri Union Frozen Prods.*, 40 CIT at __, 163 F. Supp. 3d at 1302.

SeAH contends that Commerce's use of the Cohen's d test is contrary to well-recognized statistical principles. *See* SeAH Br. 13–15. Specifically, SeAH argues that the Cohen's d test can only be used when comparing random samples drawn from normal distributions with roughly equal variance containing a sufficient number of data points. *See id.* at 13. During the review, Commerce explained that "the U.S. sales data which SeAH has reported to the Department constitutes a population . . . . As such, sample size, sample distribution, and the statistical significance of the sample are not relevant to the Department's analysis." Final IDM at 24. Commerce explained its use of the Cohen's d test in this case and did not need to consider sample size, sample distribution, and the statistical significance of the sample, and therefore the court finds that Commerce's approach is supported by substantial evidence on the record.

C. The "Ratio Test" Thresholds

The thresholds in the ratio test have previously been upheld by this Court as reasonable and in accordance with the law. *See e.g.*, *U.S. Steel Corp. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1300, 1311 (2017) (Commerce "has reasonably explained why its ratio test is reasonable and not arbitrarily applied."). If Commerce's rationale for adopting such thresholds is reasonably explained, the standard of review does not require that Commerce explain the statistical calculations and methodologies that allowed it to arrive at such thresholds. *See U.S. Steel Corp. v. United States*, 40 CIT __, __ 179 F. Supp. 3d 1114, 1126 (2016) (citing *State Farm*, 463 U.S. at 48–49).

SeAH contends that Commerce failed to provide any evidence or reasonable explanation to support the 33 and 66 percent thresholds used in the "ratio test" portion of the differential pricing analysis. *See* SeAH Br. 16–17. Commerce explained that "when a third or less of a respondent's U.S. sales are not at prices that differ significantly, then these significantly different prices are not extensive enough to satisfy the first requirement of the statute," which requires Commerce to find a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or period of time. *See* Final IDM at 25. Commerce explained further that "when two thirds or more of a respondent's sales are at prices that differ significantly, then

the extent of these sales is so pervasive that it would not permit the Department to separate the effect of the sales where prices differ significantly from those where prices do not differ significantly." *Id.* When Commerce "finds that between one third and two thirds of U.S. sales are at prices that differ significantly, then there exists a pattern of prices that differ significantly, and that the effect of this pattern can reasonably be separated from the sales whose prices do not differ significantly." *Id.* As in *United States Steel Corporation*, the court can discern that Commerce developed its ratio test to identify the existence and extent to which there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time. *See U.S. Steel Corp.*, 40 CIT at __, 179 F. Supp. 3d at 1127. The court finds that Commerce's use of the 33 and 66 percent thresholds in the ratio test is supported by evidence on the record.

D. Commerce's Explanation of Why the Alleged Pattern Could Not Be Taken into Account by the A-to-A Comparison

The Court of Appeals for the Federal Circuit has held that Commerce's use of the "meaningful difference analysis," through which Commerce evaluates whether the difference between the weighted-average dumping margins calculated by the A-to-A method is "meaningfully" different than the weighted-average dumping margins calculated by the A-to-T method, is reasonable. *See Apex Frozen Foods Private Ltd.*, 862 F.3d at 1347–48.

SeAH contends that Commerce failed to satisfy its statutory burden of explaining why the alleged pattern of price differences could not be taken into account by the normal A-to-A comparison. *See* SeAH Br. 18–21. Specifically, SeAH argues that Commerce is required to explain how substantial evidence on the record provides a factual basis for concluding that the results of the A-to-T calculation are more accurate than the results of the A-to-A calculation in this specific case. *See id.* at 19. In the *Final Results*, Commerce explained that the comparison of the results using the A-to-T method versus the A-to-A method sheds light on whether use of the A-to-A method can account for SeAH's significant prices differences. *See* Final IDM at 26. Because Commerce's meaningful difference analysis is reasonable and Commerce explained that the A-to-A method could not account for the significant price differences in SeAH's pricing behavior, the court finds that Commerce's use of the A-to-T method is supported by evidence on the record.

VII. Classification of Proprietary SeAH Products

Commerce's initial questionnaire in the investigation asked SeAH to report a separate reporting code for proprietary grades of oil country tubular goods that are not listed in the API Specification 5CT. SeAH informed Commerce that it sold three proprietary grades of oil country tubular goods in the United States during the period of review that had "the same tensile strength required by the N-80 specification but is not heat treated (by normalization or by quenching-and-tempering) in the manner required by the N-80 norms." SeAH's Initial Section B–E Response at 8 n.4, PD 140, bar code 3454399–02 (Mar. 31, 2016). In the *Preliminary Results* and in the *Final Results*, Commerce combined SeAH's reported code 075 with code 080, which represented products meeting Commerce's N-80 specification. *See* Final IDM 96–97. Commerce found that because SeAH's proprietary oil country tubular goods shared the same mechanical properties as goods coded under 080 (*i.e.*, tensile and hardness requirements), the two goods should be grouped together. *See id.* at 96. "Any differences between these grades were already captured in other product characteristics." *Id.*

SeAH argues that Commerce's grouping of its proprietary oil country tubular goods into code 080 was improper because its proprietary product does not meet the heat treatment specification required for N-80 goods. *See* SeAH Br. 28–32; *see also* SeAH's Initial Section A Response, App. A-10, CD 68, bar code 3450296–12 (Mar. 18, 2016) (API 5CT specification for heat treatment, stating that grade N-80 goods "shall be normalised or, at the manufacturer's option, shall be normalised and tempered."). The Government contends that "heat treatment is not a 'physical characteristic' of a product but rather a 'production process' feature." Def. Resp. 35. The Government urges the court to sustain Commerce's finding as reasonable because while SeAH's proprietary oil country tubular goods differ from grade N-80 goods with respect to heat treatment, "they are the same with regard to critical performance properties." *Id.*

Despite the Government's arguments, Commerce failed to distinguish meaningfully between a product's physical characteristics and production process in the *Final Results*. The API 5CT specification implies that heat treatment influences a product's specifications and classification under the N-80 grade. Commerce did not address evidence on the record adequately in making its determination. The court concludes that Commerce's decision to classify SeAH's proprietary oil country tubular goods as code 080 is unsupported by substantial evidence on the record and remands the issue for further consideration consistent with this opinion.

VIII. Cap on Adjustment for Freight Revenue on SeAH's U.S. Sales

When calculating SeAH's constructed export price, Commerce offset freight charges and applied a cap on freight revenue for invoices where freight was separately billed. *See* Final IDM at 97. SeAH contends that Commerce's decision to do so is contrary to law because Commerce does not have the authority to deduct freight costs that are not included in the merchandise cost. *See* SeAH Br. 5. SeAH contests also Commerce's decision to apply a cap for freight revenues but not for losses in export price. *See id.* at 5–6.

Under 19 U.S.C. § 1677a(c)(2)(A), "[t]he 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." *See* 19 U.S.C. § 1677a(c)(2)(A). Export price or constructed export price is the price at which the subject merchandise is first sold in the United States, as opposed to the sale price in the exporter's home country. *See* 19 U.S.C. §§ 1677a(a), 1677b(a)(1)(B)(i).

Commerce uses adjustments when calculating export price or constructed export price "to create a fair, 'apples-to-apples' comparison between U.S. price and foreign market value." *Fla. Citrus Mut. v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (quoting *Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995)). Such adjustments prevent exporters from improperly inflating the export price of a good by charging a customer for freight more than the exporter's actual freight expenses. *See Dongguan Sunrise Furniture Co. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1216, 1248–49 (2012). Commerce reasonably adjusts its price calculation using net freight revenue. *See id.* at __, 865 F. Supp. 2d at 1248. It is reasonable for Commerce not to consider freight revenue as part of the price of the subject merchandise in accordance with the statutory language. *See id.* at __, 865 F. Supp. 2d at 1248–49.

SeAH contends that Commerce's treatment of freight revenue below the cap as part of the U.S. price in its calculations, and freight revenue above the cap as not part of the U.S. price in its calculations, is inconsistent with the statute. *See* SeAH Br. 35; SeAH Reply 15. SeAH argues that under the language of section 1677a(c)(2)(A), when Commerce deducted the actual freight costs for sales with separately-invoiced freight charges it must have found that those costs were

"included in" the "price used to establish export price and constructed export price," otherwise Commerce would not have been permitted to adjust them. *See* SeAH Br. 34. This is an incorrect reading of the statute. Section 1677a requires Commerce to make adjustments when calculating export price or constructed export price "to create a fair, 'apples-to-apples' comparison between U.S. price and foreign market value." *Fla. Citrus Mut.*, 550 F.3d at 1110. A proper comparison between the U.S. price and foreign market value would not include a profit earned from freight rather than from the sale of the subject merchandise. The court concludes that Commerce's treatment of freight revenue is in accordance with the law.

IX. Adjustment for SeAH's Ocean Freight Costs on Third-Country Sales

SeAH's shipments to one Canadian customer were made in containers, while shipments to other Canadian customers and United States customers were made in bulk. *See* Final IDM at 100. The per-unit international freight rates for the container shipments were higher than the per-unit rates for bulk shipments. *Id.* Commerce adjusted SeAH's Canadian international freight expenses "to account for the difference between the reported per-unit rates for containerized and bulk shipments." *See id.* at 60, 78, 100. SeAH disputes the amount of the adjustment, arguing that Commerce erred by using the average ocean freight for bulk shipments from the Canadian sales price for container shipments, as opposed to the actual cost for ocean freight incurred by SeAH on Canadian sales made using containers. *See* SeAH Br. 36–38.

The statute directs Commerce to make adjustments when calculating normal value. Commerce shall reduce the price by an amount "attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser." *See* 19 U.S.C. § 1677b(a)(6)(B)(ii). Commerce may adjust for moving expenses. *See* 19 C.F.R. § 351.401(e)(1).

SeAH contends that Commerce did not explain why it was appropriate for Commerce to place the per-unit rates for Canadian containerized shipments on par with the per-unit rates for Canadian bulk shipments. *See* SeAH Br. 36–37. In the *Final Results*, Commerce explained that it did so to "*account for the difference* between the reported per-unit rates for containerized and bulk shipments." Final IDM at 60, 78, 100 (emphasis added). Commerce must reduce its price calculation by an amount attributable to any additional costs, charges, and expenses. Commerce thus needed to account for the significant price difference between reported freight costs for one

Canadian customer and SeAH's other Canadian customers. Because Commerce explained that it made the adjustment to account for the difference between the container and bulk shipments, the court finds that Commerce's adjustment is supported by substantial evidence.

X. Deduction of General and Administrative Expenses as U.S. Selling Expenses

Commerce allocated the general and administrative ("G&A") expenses related to resold United States products for SeAH's U.S. affiliate Pusan Pipe America Inc. ("PPA"). *See id.* at 87. SeAH contends that PPA's administrative activities related to the overall activities of the company and thus are not all selling expenses that can be deducted.[5] *See* SeAH Br. 38–39.

When calculating a constructed value, Commerce must include selling, general, and administrative expenses. *See* 19 U.S.C. § 1677b(e)(B)(i)–(iii). G&A expenses are generally understood to mean expenses that relate to the activities of the company as a whole rather than to the production process. *Torrington Co. v. United States*, 25 CIT 395, 431, 146 F. Supp. 2d 845, 885 (2001). The court affords Commerce deference in developing a methodology for including G&A expenses in the constructed value calculation because it is a determination involving complex economic and accounting decisions of a technical nature. *See Fujitsu Gen. Ltd.*, 88 F.3d at 1039; *see also Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1161, 1166 (2017). Commerce still must explain cogently why it has exercised its discretion in a given manner. *See State Farm*, 463 U.S. at 48–49.

Commerce explained that "[b]ecause PPA's G&A activities support the general activities of the company as a whole, including its sales and further manufacturing functions of all products," it applied the "G&A ratio to the total cost of further manufactured products . . . as well as to the cost of all resold products." Final IDM at 87–88. This explanation does not clarify why Commerce deducted PPA's G&A expenses for resold products, nor does it clarify how Commerce de-

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[5] The Government argues that "SeAH's elaborate multi-page arguments presented to the Court are different from the scant one-paragraph argument on this issue it presented to the agency," and that the "sole issue before the agency was whether Commerce's treatment of G&A expenses was in line with its practice, which Commerce addressed." Def. Resp. 41. To the extent SeAH presents new arguments before the court, the Government contends that the court should disregard them for SeAH's failure to exhaust its administrative remedies.

Section 2637(d) provides that the court shall, where appropriate, require the exhaustion of administrative remedies. 28 U.S.C. § 2637(d). The exhaustion requirement is discretionary. *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986). SeAH exhausted its administrative remedies through its submission of a case brief in the administrative proceeding. *See* Rebuttal Brief of SeAH Steel Corporation at 50–51, PD 526, bar code 3544500–01 (Feb. 16, 2017).

termined that it would apply all of PPA's G&A expenses to resold products. The court concludes that Commerce's decision to deduct G&A expenses in the *Final Results* is unsupported by substantial evidence on the record and remands on this issue for clarification or reconsideration of Commerce's methodology.

XI. Adjustment to SeAH's Reported Costs for Cost of Production

SeAH reported varying raw material costs because the price of hot-rolled coil declined substantially during the period of review. *See* SeAH Br. 42–43. Commerce adjusted SeAH's reported costs for cost of production by applying facts available and assigning a single weighted-average cost for hot-rolled coil for each product grade code during the period of review in the *Final Results*. *See* Final IDM at 102–04. SeAH argues that the adjustment was improper because it introduced distortions into Commerce's separate calculation as to whether SeAH's comparison market sales were made at below-cost prices. *See* SeAH Br. 43.

Cost of production is calculated based on the records of the exporter or producer of the merchandise. 19 U.S.C. § 1677b(f)(1)(A). The statute requires that the records: (1) must be kept in accordance with the generally accepted accounting principles of the exporting country, and (2) reasonably reflect the costs associated with the production and sale of the merchandise. *Id.* In other words, the statute provides that as a general rule, an agency may either accept financial records kept according to generally accepted accounting principles in the country of exportation or reject the records if accepting them would distort the company's true costs. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1377 (Fed. Cir. 2001) (citing *Thai Pineapple Pub. Co., Ltd. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206 (Fed. Cir. 1995)). Commerce is directed to consider all available evidence on the proper allocation of costs. 19 U.S.C. § 1677b(f)(1)(A).

Physical characteristics are a prime consideration when Commerce conducts its analysis. *Thai Plastic Bags Indus. Co., Ltd. v. United States*, 746 F.3d 1358, 1368 (Fed. Cir. 2014). If factors beyond the physical characteristics influence the costs, however, Commerce will normally adjust the reported costs in order to reflect the costs that are based only on the physical characteristics. *See id.* Commerce interprets the proper allocation of adjustment to costs. *Id.*

Commerce adjusted SeAH's reported costs because it found that while SeAH's normal books and records were kept in accordance with Korean generally accepted accounting principles, the hot-rolled coil costs in SeAH's normal books and records "did not reasonably reflect

the actual production costs of the merchandise because the differences in [hot-rolled coil] costs between products were unrelated to the product *[sic]* physical characteristics." Final IDM at 104. Commerce addressed SeAH's concern and stated that the adjustment ensured "that the product-specific costs . . . used for the sales-below-cost test, [constructed value], and [difference-in-merchandise] adjustment accurately reflect the precise physical characteristics of the products whose sales prices are used" in Commerce's dumping calculations. *Id.* The law permits Commerce to make adjustments to reported costs of production so that the costs reflect differences only in the product's physical characteristics. The court concludes that Commerce's decision to adjust SeAH's reported costs for cost of production is in accordance with the law.

XII. Adverse Facts Available

Maverick contests Commerce's decision not to apply total AFA to SeAH with respect to the following areas: (1) sales of couplings, (2) sales of non-prime products, (3) reported hot-rolled coil costs, (4) inventory movement schedules, (5) international freight expenses, (6) transaction-specific reporting for certain movement expenses, (7) payment terms for Canadian sales, (8) warehousing expenses, (9) warranty expenses, (10) inventory movement schedules for by-products and scrap, (11) costs to repair damaged products, (12) unconsolidated financial statements, and (13) inputs from affiliated parties. Commerce declined to apply AFA to the first twelve areas and applied partial AFA with respect to SeAH's inputs from affiliated parties. *See* Final IDM at 49–74.

Section 776 of the Tariff Act provides that if necessary information is not available on the record or if a respondent fails to provide such information by the deadline for submission of the information or in the form and manner requested, then the agency shall use the facts otherwise available in reaching its determination. 19 U.S.C. § 1677e(a)(1), (a)(2)(B). If the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the agency, then the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. *Id.* § 1677e(b)(1)(A). Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record when making an adverse inference. *See id.* § 1677e(b)(2); 19 C.F.R. § 351.308(c) (2015). 19 U.S.C. § 1677e grants the Department discre-

tion to decide whether to apply AFA in each case. *See* 19 U.S.C. § 1677e. When Commerce can independently fill in gaps in the record, adverse inferences are not appropriate. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

Commerce addressed SeAH's cooperation and compliance regarding each of the thirteen areas in its *Final Results* and provided adequate support for its decision not to apply total AFA to each area. *See* Final IDM at 49 (sales of couplings), 51 (sales of non-prime products), 52 (reported hot-rolled coil costs), 54–55 (inputs from affiliated parties), 56 (inventory movement schedules), 58–60 (international freight expenses), 61–63 (transaction-specific reporting for certain movement expenses), 64–65 (payment terms for Canadian sales), 67 (warehousing expenses), 72 (warranty expenses), 72–73 (inventory movement schedules for by-products and scrap), 73 (costs to repair damaged products), 74 (unconsolidated financial statements). Commerce reasonably decided not to apply total AFA to SeAH based on SeAH's cooperation in each of the thirteen areas. The court concludes that Commerce's decision not to apply total adverse facts available to SeAH is supported by substantial evidence.

XIII. Adjustment to SeAH's Packing Expenses

Commerce declined to make adjustments to SeAH's reported packing expenses in the *Final Results*. *See id.* at 82. Maverick argues that Commerce erred in not making adjustments for perceived distortions in SeAH's packing expenses. *See* Maverick Br. 18–20. Maverick contends that Commerce's decision is unsupported by substantial evidence on the record because it failed to explain adequately the large differences in SeAH's reported packing expenses and SeAH's different types of packing between SeAH's U.S. and Canadian sales. *See id.*

Contrary to Maverick's contentions, Commerce's acceptance of SeAH's packing expenses was not devoid of support entirely. Commerce did not find that SeAH's packing costs were distorted after an examination of SeAH's Canadian database. *See* Final IDM at 82. SeAH explained, and SeAH's sales database confirmed, that most of SeAH's Canadian sales were threaded and coupled during the period of review, whereas SeAH's U.S. sales were not. *See id.* Threaded and coupled oil country tubular goods "required protective caps to avoided damage to the threaded ends." *Id.* "Because plain-end [oil country tubular goods] did not require protective caps, the costs to pack [oil country tubular goods] for export to the United States were, on average, less than the costs to pack [oil country tubular goods] for export to Canada." *Id.* The record shows that Commerce examined SeAH's packing expenses and sales databases and reasonably concluded,

based on the record, that an adjustment to SeAH's packing expenses was unnecessary. The court concludes that Commerce's decision to not make adjustments to SeAH's packing expenses is supported by substantial evidence on the record.

XIV. Adjustment to SeAH's Reported Scrap and By-Product Data

SeAH reported generating three types of by-products: off-grade pipe, defective pipe, and steel scrap. Commerce accepted SeAH's claimed scrap offset in the *Final Results*. *See id.* at 88–89.

Maverick argues that Commerce erred in not making adjustments for inconsistencies in SeAH's reported scrap and by-product data.[6] *See* Maverick Br. 21. Maverick contests further that SeAH failed to "fully address adjustments" made in the questionnaire responses, "explain differences between scrap types, prepare separate inventory movement schedules for each type of scrap, and fully explain how [it] calculated its scrap offset." *Id.* Maverick contends that Commerce failed to address its concerns, and that Commerce's decision to not make adjustments was unreasonable and is unsupported by substantial evidence on the record.

Maverick raised its concerns in the administrative review. At Commerce's request, SeAH provided a monthly inventory movement schedule for each type of scrap code for the period of review, as well as an explanation of how generated scrap was valued and how generated scrap and scrap sales were recorded in SeAH's normal books and records. *See* Final IDM at 72. Commerce reviewed the value of each type of scrap offset used in the calculation of certain control numbers. *See* Final IDM at 89; *see also* Memorandum from Ji Young Oh to Neal M. Halper re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – SeAH Steel Corp., Ltd. at 2, PD 477, bar code 3512499–01 (Oct. 6, 2016). Commerce compared the scrap offset values used for those control numbers to the scrap inventory movement schedule maintained in SeAH's normal books and records during the period of review. *See* Final IDM at 89. Commerce determined that the reported scrap offset values were based on the quantity and value of each type of scrap code generated during the period of review and found SeAH's reported scrap offset calculation methodology to be reasonable. *See id.* Commerce addressed Maverick's specific concerns in the administrative review. Maverick's arguments regarding Commerce's findings on the reported scrap offset

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[6] Specifically, Maverick argues that SeAH's cost buildups, as reported in its questionnaire responses, refer to [[ ]]. *See* Mem. Consolidated Pl. Maverick Tube Corp. Supp. Mot. J. Agency R. 21, Oct. 13, 2017, ECF No. 88 (confidential brief).

issue would require an impermissible reweighing of the evidence. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (citing *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)). The court concludes that Commerce's adjustment to SeAH's reported scrap and by-product data is supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. Commerce's finding of a particular market situation is unsupported by substantial evidence;
2. Commerce's decision to adjust NEXTEEL's input costs based on a separate proceeding is remanded for further consideration
3. Commerce's dumping margin calculation for non-examined companies is remanded for further consideration;
4. Commerce's calculation of NEXTEEL's constructed value profit is supported by substantial evidence and in accordance with the law;
5. Commerce's finding that NEXTEEL is affiliated with POSCO and POSCO Daewoo is supported by substantial evidence;
6. Commerce's use of its differential pricing analysis is supported by substantial evidence and in accordance with the law;
7. Commerce's classification of proprietary SeAH products is unsupported by substantial evidence;
8. Commerce's decision to cap the adjustment for freight revenue on SeAH's U.S. sales is in accordance with the law;
9. Commerce's decision to not make an adjustment for SeAH's ocean freight costs incurred on third-country sales is supported by substantial evidence;
10. Commerce's decision to deduct SeAH's general and administrative expenses as U.S. selling expenses is unsupported by substantial evidence;
11. Commerce's decision to adjust SeAH's reported costs when calculating cost of production is in accordance with the law;
12. Commerce's decision to not apply total AFA to SeAH is supported by substantial evidence;
13. Commerce's decision to not adjust SeAH's packing expenses is supported by substantial evidence; and
14. Commerce's adjustment to SeAH's reported scrap and by-product data is supported by substantial evidence.

Accordingly, it is hereby

ORDERED that the Rule 56.2 motions for judgment on the agency record filed by NEXTEEL, Husteel, Hyundai, SeAH, AJU Besteel, and ILJIN are granted in part; and it is further

ORDERED that the Rule 56.2 motion for judgment on the agency record filed by Maverick is denied; and it is further

ORDERED that the *Final Results* are remanded to Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination on or before April 2, 2019; and it is further

ORDERED that Commerce shall file the administrative record on remand on or before April 16, 2019; and it is further

ORDERED that the Parties shall file comments on the remand redetermination on or before May 2, 2019; and it is further

ORDERED that the Parties shall file replies to the comments on or before June 3, 2019; and it is further

ORDERED that the joint appendix shall be filed on or before June 17, 2019.

Dated: January 2, 2019
New York, New York

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

Slip Op. 19–2

STUPP CORPORATION et al., Plaintiffs and Consolidated Plaintiffs, and MAVERICK TUBE CORPORATION et al., Plaintiff-Intervenor and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SEAH STEEL CORPORATION et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00334
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the less than fair value investigation of imports of welded line pipe from the Republic of Korea.]

Dated: January 8, 2019

Paul Wright Jameson, Schagrin Associates, of Washington, DC, argued for plaintiffs, consolidated plaintiff intervenors, and consolidated defendant intervenors Stupp Corporation, a Division of Stupp Bros., Inc., TMK IPSCO, and Welspun Tubular LLC USA. With him on the brief was *Roger Brian Schagrin*.

Robert Edward DeFrancesco, III, Wiley Rein, LLP, of Washington, DC, argued for plaintiff intervenor, consolidated plaintiff, and consolidated defendant intervenor Maverick Tube Corporation. With him on the brief were *Alan Hayden Price* and *Adam Milan Teslik*.

Elizabeth Anne Speck, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her

on the brief were *Claudia Burke*, Assistant Director, *Jeanne E. Davidson*, Director, and *Chad A. Readler*, Acting Assistant Attorney General. Of Counsel on the brief was *Reza Karamloo*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey Michael Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, argued for defendant intervenor, consolidated plaintiff, and consolidated defendant intervenor SeAH Steel Corporation.

Henry David Almond and *Jaehong David Park*, Arnold & Porter LLP, of Washington, DC, argued for defendant intervenor and consolidated defendant intervenor Hyundai Steel Company. With them on the brief was *Sylvia Yun Chu Chen*.

OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the court on several motions for judgment on the agency record filed respectively by Stupp Corporation, a division of Stupp Bros., Inc., TMK IPSCO, and Welspun Tubular LLC USA (collectively "Stupp et al."), SeAH Steel Corporation ("SeAH"), and Maverick Tube Corporation ("Maverick").[1] *See* Pls. [Stupp et al.'s] Mot. J. R. Pursuant Rule 56.2, July 5, 2016, ECF No. 39; Mot. Pl. SeAH [ ] J. Agency R., July 5, 2016, ECF No. 40; Pl.-Intervenor [Maverick]'s Rule 56.2 Mot. J. Agency R., July 5, 2016, ECF No. 41. These parties challenge various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the less than fair value ("LTFV") investigation of imports of welded line pipe from the Republic of Korea ("Korea") for the period October 1, 2013, through September 30, 2014, which resulted in an antidumping duty order ("ADD"). *See* [Stupp et al.'s] Mem. Supp. Mot. J. [Agency] R. Pursuant USCIT Rule 56.2 at 4–27, July 5, 2016, ECF No. 39 ("Stupp et al. Br."); Br. SeAH [ ] Supp. Rule 56.2 Mot. J. Agency R. at 26–50, July 5, 2016, ECF No. 40 ("SeAH's Br."); Mem. Pl.-Intervenor Maverick [ ] Supp. Mot. J. Agency R. at 12–43, July 6, 2016, ECF No. 44 ("Maverick's Br."); *see Welded Line Pipe From [Korea]*, 80 Fed. Reg. 61,366 (Dep't Commerce Oct. 13, 2015) (final determination of sales at [LTFV]), as amended by *Welded Line Pipe From [Korea]*, 80 Fed. Reg. 69,637 (Dep't Commerce Nov. 10, 2015) (amended final determination of sales at [LTFV]) ("*Amended Final Determination*") and accompanying Issues & Decision Mem. for the Final Affirmative Determination in the [LTFV] Investigation of Welded Line Pipe from [Korea], A-580–876, (Oct. 5, 2015), ECF No. 30–3 ("Final Decision Memo"); *Welded Line Pipe From [Korea] and the Republic of Turkey [("Turkey")]*, 80 Fed. Reg. 75,056, 75,057 (Dep't

[1] On April 28, 2016, the following actions, Stupp Corp. v. United States, Ct. No. 15–00334 (USCIT filed Dec. 30, 2015), SeAH Steel Corp. v. United States, Ct. No. 15–00336 (USCIT filed Dec. 30. 2015), and Maverick Tube Corp. v. United States, Ct. No. 15–00337 (USCIT filed Dec. 30. 2015) were consolidated. Order [Granting Joint Mot. Consolidate], Apr. 28, 2016, ECF No. 34.

Commerce Dec. 1, 2015) ([ADD] orders). On September 28, 2018, this consolidated action was reassigned to Judge Claire R. Kelly by the Chief Judge pursuant to 28 U.S.C. § 253(c) (2012) and Rule 77(e)(4) of the Rules of the U.S. Court of International Trade. *See* Order of Reassignment, Sept. 28, 2018, ECF No. 107.

SeAH challenges as contrary to law and unsupported by substantial evidence Commerce's (i) decision to reject portions of its September 1, 2015 case brief, *see* SeAH's Br. at 36–42; (ii) differential pricing analysis, *see id.* at 26–36, 42–45; and (iii) calculation of credit expenses on its back-to-back sales. *See id.* 46–50. Stupp et al. challenge as arbitrary and capricious and unsupported by substantial evidence Commerce's treatment of Hyundai HYSCO's ("HYSCO")[2] and SeAH's pipe for purposes of product matching. *See* Stupp et al. Br. at 4–27. Maverick challenges Commerce's decision to include certain local sales in HYSCO's home market sales database as contrary to law and unsupported by substantial evidence, *see* Maverick's Br. at 12–35, and Commerce's decision to reject Maverick's supplemental case brief as an abuse of discretion. *See id.* at 35–43.

For the reasons that follow, the court sustains Commerce's (1) differential pricing analysis; (2) rejection of portions of SeAH's case brief that contained untimely new factual information; (3) calculation of credit expenses on SeAH's back-to-back sales; and (4) treatment of grades B and X42 pipe as separate grades for purposes of product matching. The court, however, remands Commerce's decision to include certain local sales in HYSCO's home market sales database for further explanation or reconsideration consistent with this opinion. The court also finds that Commerce abused its discretion by rejecting Maverick's supplemental case brief.

BACKGROUND

On November 14, 2014, in response to petitions filed by domestic producers of welded line pipe, Commerce initiated an ADD investigation of welded line pipe from Korea. *See Welded Line Pipe From [Korea] and [Turkey]*, 79 Fed. Reg. 68,213, 68,213 (Dep't Commerce Nov. 14, 2014) (initiation of [LTFV] investigations) ("*Initiation*"). On December 5, 2014, Commerce selected HYSCO and SeAH for indi-

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[2] Prior to the issuance of the final determination, HYSCO completed a merger with the Hyundai Steel Company and no longer uses the HYSCO name. *See* Final Decision Memo at 1 n.1. Commerce, however, continued to use the HYSCO name to refer to respondent for the purposes of this investigation. This court does the same.

vidual examination as mandatory respondents. *See* Resp't Selection for [ADD] Investigation of Welded Line Pipe from [Korea] at 4–5, PD 49, bar code 3245872–01 (Dec. 5, 2014).[3]

Commerce published its preliminary determination on May 22, 2015. *See generally Welded Line Pipe From [Korea]*, 80 Fed. Reg. 29,620 (Dep't Commerce May 22, 2015) (preliminary determination of sales at [LTFV] and postponement of final determination) ("*Prelim. Determination*") and accompanying Decision Mem. for the Prelim. Determination in the [ADD] Investigation of Welded Line Pipe from [Korea], A 580–876, PD 305, bar code 3277027–01 (May 14, 2015) ("Prelim. Decision Memo"). Commerce applied the Average-to-Average ("A-to-A") methodology to all of SeAH's U.S. sales, explaining that although 40.61% of the sales passed Commerce's Cohen's d test, the A-to-A methodology could account for the price differences identified.[4] Prelim. Decision Memo at 9. Commerce preliminarily calculated weighted-average dumping margins of 2.52% for HYSCO, 2.67% for SeAH, and 2.60% for the all-others. *Prelim. Determination*, 80 Fed. Reg. at 29,620.

On September 1, 2015, SeAH filed a case brief with the agency challenging certain aspects of the agency's preliminary determination. [SeAH's] Case Br., PD 377–79, bar codes 3301610–01–03 (Sept. 1, 2015) ("SeAH's Rejected Case Br."). On September 3, 2015, Commerce determined that portions of SeAH's case brief contained "untimely factual information," as defined by 19 C.F.R. § 351.102(b)(21)(iv),(v) (2014),[5] rejected the brief, and allowed SeAH an opportunity to file a redacted version, which SeAH did. [Letter from Commerce Rejecting SeAH's Sept. 1, 2015 Case Br.] at 1–2, PD 384, bar code 3302027–01 (Sept. 3, 2015) ("Letter Rejecting SeAH's Case Br."). On September 9, 2015, Commerce rejected Maverick's supplemental case brief in whole, explaining that the brief addressed issues beyond the scope for comment Commerce established. [Letter from

[3] On March 14, 2016, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 30–5–6. All further references to administrative record documents in this opinion will be to the numbers assigned to the documents by Commerce in the indices.

[4] Commerce applied its differential pricing analysis and determined that 77.11% of HYSCO's U.S. sales passed its Cohen's d test, that the A-to-A methodology could not account for the price differences identified, and that application of the Average-to-Transaction ("A-to-T") methodology to all of HYSCO's U.S. sales was appropriate to calculate HYSCO's weighted-average dumping margin. Prelim. Decision Memo at 8. No party challenges before this court the results of Commerce's application of the differential pricing analysis to HYSCO's U.S. sales.

[5] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

Commerce Rejecting Maverick's Suppl. Br.] at 1, PD 407, bar code 3303866–01 (Sept. 9, 2015) ("Letter Rejecting Maverick's Suppl. Case Br.").

Commerce published its final determination on October 5, 2015, and later amended the determination to account for a ministerial error. In contrast to the preliminary determination, for the final determination, Commerce found that a lesser percentage, 39.72%, of SeAH's U.S. sales passed Commerce's Cohen's d test, that the A-to-A methodology could not account for the price differences identified, and that the mixed methodology should be applied to SeAH's U.S. sales.[6] *See* Final Decision Memo at 4. Commerce calculated weighted-average dumping margins of 6.23% for HYSCO, 2.53% for SeAH, and 4.38% for the all-others. *See Amended Final Determination*, 80 Fed. Reg. at 69,638.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[7] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an investigation 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).

DISCUSSION

I. Commerce's Rejection of Portions of SeAH's Case Brief

SeAH challenges Commerce's rejection of portions of its case brief as contrary to law. *See* SeAH's Br. at 36–42; *see also* Letter Rejecting SeAH's Case Br. Specifically, SeAH argues that the rejected materials do not fall within the regulatory definition of factual information, *see* SeAH's Br. at 37–40, and that Commerce abandoned its commitment to allow continuing comment on its differential pricing analysis. *See id.* at 40–42. Defendant argues that Commerce's determination is in accordance with law and is reasonable. *See* Def.'s Mem. Opp'n Rule 56.2 Mots. J. Agency R. at 35–39, Nov. 14, 2016, ECF No. 66 ("Def.'s Resp. Br."). For the reasons that follow, the court sustains Commerce's determination.

Given the breadth of 19 C.F.R. § 351.102(b)(21)(iv)–(v), Commerce's decision to reject SeAH's submissions for containing untimely filed

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[6] Commerce continued to find that the A-to-T methodology should be applied to all of HYSCO's U.S. sales. *See* Final Decision Memo at 4.

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

new factual information is in accordance with law and reasonable. Factual information includes "[e]vidence, including statements of fact, documents and data . . . submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department." 19 C.F.R. § 351.102(b)(21)(iv)–(v).[8] Factual information may include more specific analysis, statistical references, and mathematical formulas presented as part of an expert report, *see Apex Frozen Foods Private Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1337–41 (2016) ("*Apex I*"), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017) ("*Apex II*"), as well as print and online academic materials and self-calculated dumping margins based on record evidence. *See Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1287–88, 1290–92 (2016),[9] *aff'd*, 741 F. App'x 801 (Fed. Cir. 2018) (per curiam).[10] The timeliness of a submission is determined by the type of factual information proffered. *See* 19 C.F.R. § 351.301(c). A party submitting factual information described in 19 C.F.R. § 351.102(b)(21)(v) must do so either 30-days before the preliminary determination or 14-days before verification, whichever date occurs earlier, and must include with its submission an explanation of why the information is not encompassed in the categories of 19 C.F.R. § 351.102(b)(21)(i)–(iv) and a "detailed narrative" about the information submitted and its relevancy. *See* 19 C.F.R. § 351.301(c)(5).

[8] The regulation defines "factual information" as

> (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 § 351.408(c) or to measure the adequacy of remuneration under § 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 C.F.R. § 351.102(b)(21)(i)–(v).

[9] SeAH argues that *Apex I* and *Tri Union* are distinguishable because the respondents in both of those cases admitted that their information constituted new factual information. SeAH's Br. at 41 n.73. SeAH's argument is unpersuasive because the *Apex I* and *Tri Union* courts did not rely upon the respondents' admission to determine that the rejected information constituted new and untimely factual information.

[10] Commerce modified the definition of factual information since *Apex I* and *Tri Union* were decided. The change is not so significant as to affect the applicability of the reasoning offered in those cases to this court's analysis. *See generally Apex I*, 40 CIT at __, 144 F. Supp. 3d at 1337–39, 1338 n.28; *Tri Union*, 40 CIT at __, 163 F. Supp. 3d at 1286 n.20, 1286–87.

In its case brief to the agency, SeAH relied on citations to academic articles and texts and the following documents:

> the output of running its U.S. sales data through the "Univariate" process in the SAS computer software that Commerce uses to run the [Differential Pricing Analysis] and its margin-calculation programs, (2) a data file that was based on the U.S. sales data SeAH had previously submitted, but in which the actual sales prices had been replaced by ten sets of purely random numbers, (3) a copy of the computer program that had been used to insert the random numbers into the data file, (4) a summary of the results of running these random numbers through the [Differential Pricing Analysis], and (5) a statement by the computer consultant that had prepared the data file and run it through the [Differential Pricing Analysis], explaining what she had done.

SeAH's Br. at 36–37. In its rejection letter, Commerce explained that SeAH's case brief included new factual information pursuant to either 19 C.F.R. § 351.102(b)(21)(iv) or (v), that SeAH did not satisfy the explanation requirement of 19 C.F.R. § 351.301(c)(5), and that even if SeAH's submission was proper, it was untimely under 19 C.F.R. § 351.301(c)(5) and should have been filed by April 14, 2015.[11] *See* Letter Rejecting SeAH's Case Br. at 1. The regulation defines factual information as "statements of fact, documents and data" submitted "to rebut[.]" 19 C.F.R. § 351.102(b)(21)(iv)–(v). To create the two databases, SeAH manipulated existing record evidence. As a result, the databases yielded new outputs. It was logical for Commerce to consider these new outputs as data intended to rebut existing record evidence. *See Tri Union*, 40 CIT at __, 163 F. Supp. 3d at 1287–88. Likewise, the academic materials SeAH cites provide expert analysis in support of SeAH's challenge to Commerce's differential pricing analysis. *See PSC VSMPO–Avisma Corp. v. United States*, 688 F.3d 751, 760–61 (Fed. Cir. 2012); *Tri Union*, 40 CIT at __, 163 F. Supp. 3d at 1290–91. Accordingly, Commerce reasonably determined that

[11] Commerce revised the relevant regulations in April of 2013. *See generally Definition of Factual Information & Time Limits for Submission of Factual Info.*, 78 Fed. Reg. 21,246 (Dep't Commerce Apr. 10, 2013). The revised regulations "apply to all segments initiated on or after [May 10, 2013]." *Id.* at 21,246. This investigation was initiated on November 14, 2014, and therefore, the revised regulations apply. *See generally Initiation*, 79 Fed. Reg. at 68,213. Defendant erroneously cites to the April 1, 2013 edition of the regulations as the version applicable to this investigation. *See* Def.'s Resp. Br. at 37.

SeAH's submissions provide statements of fact and data to rebut the application of Commerce's differential pricing analysis and constitute factual information.[12]

SeAH argues that in rejecting portions of its case brief, Commerce abandoned its commitment to allow continuing comment on its differential pricing analysis. *See* SeAH's Br. at 40–42. As this court explained in *Tri Union*

> Commerce has announced to the public that it plans to further refine its approach as it gains more and more experience. *See Differential Pricing Analysis: Request for Comments*, 79 Fed. Reg. 26,720, 26,722 (Dep't Commerce May 9, 2014) [ ]. However, Commerce's willingness to further develop its differential pricing analysis is not an invitation to submit factual information at any time in the proceeding and does not mean that the deadlines to submit factual information to the record no longer apply. Interested parties were afforded an opportunity to submit factual information to the record and comment on Commerce's practice during the proceeding. While Commerce has made clear that it is open to comments during the proceeding to inform its practice, it is not an abuse of discretion for Commerce to require that those comments be made in accordance with Commerce's regulatory procedures.

Tri Union, 40 CIT at __, 163 F. Supp. 3d at 1293. SeAH had notice and the opportunity to submit relevant factual information within the applicable deadlines.

II. Application of Commerce's Differential Pricing Analysis

SeAH challenges Commerce's differential pricing analysis as contrary to law and unsupported by substantial evidence. *See* SeAH's Br. at 26–36, 42–45. Specifically, SeAH argues that (i) no evidence supports Commerce's use of the differential pricing analysis, *see id.* at 26–32; (ii) Commerce's application of Cohen's d is contrary to accepted statistical principles and misunderstands the limits placed on Co-

[12] SeAH attempts to characterize its submission as containing documents similar to documents previously accepted by Commerce to argue that Commerce is treating similar information differently. *See* SeAH's Br. at 41–42. Whether a submission contains new factual information is a context specific inquiry. Here, Commerce reasonably explained that SeAH's submission used record evidence to derive conclusions that were not previously on the record. *See* Letter Rejecting SeAH's Case Br. at 1. SeAH also argues that Commerce, in promulgating the relevant regulation, acknowledged that parties may support their arguments with "information [available] in the public realm." *See* [SeAH's] Reply Br. at 16–17, Jan. 19, 2017, ECF No. 85 (quoting *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 27,332 (Dep't Commerce May 19, 1997) ("*Notice of Final Rules 1997*")). In fact, Commerce's statement is a response to comments on the proposed regulation stating that parties "may draw on information in the public realm to highlight any perceived inaccuracies in a report." *Notice of Final Rules 1997*, 62 Fed. Reg. at 27,332. Here, SeAH relied on the rejected information to advance new arguments, not to highlight inaccuracies.

hen's d by academia, *id.* at 33–36; (iii) Commerce did not explain why the A-to-A method could not account for the identified pattern, as required by 19 U.S.C. § 1677f-1(d)(1)(B), *see id.* 42– 45; and (iv) international law prohibits Commerce's use of zeroing. *Id.* at 45. Defendant argues that Commerce's application of the differential pricing analysis is in accordance with law and is supported by substantial evidence. *See* Def.'s Resp. Br. at 39–55. For the following reasons, Commerce's application of the differential pricing analysis is in accordance with law and supported by substantial evidence and is sustained.

In investigations, Commerce ordinarily uses the A-to-A methodology to calculate dumping margins.[13] *See* 19 U.S.C. § 1677f-1(d)(1)(A); 19 C.F.R. § 351.414(c)(i). However, Commerce may use the alternative A-to-T methodology to calculate weighted-average dumping margins where: (i) Commerce finds a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) Commerce explains why such differences cannot be taken into account using the standard A-to-A methodology. 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). The statute is silent as to how Commerce is to determine whether a pattern of significant price differences exists. However, the Statement of Administrative Action ("SAA"), which is "an authoritative expression by the United States concerning the interpretation and application" of the Uruguay Rounds Agreement Act, provides guidance. 19 U.S.C. § 3512(d). In relevant part, the SAA states that

> the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions. . . . New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time pe-

[13] Under the A-to-A methodology, Commerce compares the weighted-average of the normal value of the merchandise to the weighted-average of the export prices (or constructed export prices) for comparable merchandise. *See id.* Although the transaction-to-transaction methodology ("T-to-T"), which is "a comparison of the normal values of individual transactions to the export prices of individual transactions," is also a statutorily preferred method (under 19 U.S.C. § 1677f1(d)(1)(A)(ii)), Commerce's regulations provide that T-to-T will be employed only in rare cases, "such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2).

> riods, *i.e.*, where targeted dumping may be occurring. Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison. In addition, the Administration intends that in determining whether a pattern of significant price differences exist. Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103 316, vol. 1, at 842–43 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4177–78.

The statute affords Commerce discretion in determining whether a pattern of significant price differences exists. *See Fujitsu General Ltd.*, 88 F.3d 1034, 1039 (Fed. Cir. 1996); *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995). Commerce's methodological choice must be reasonable and its conclusions supported by substantial evidence. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."); *see Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) ("As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.")

Commerce determines whether a pattern of significant price differences exists among purchasers, regions, or periods of time with its differential pricing analysis. *See* Prelim. Decision Memo at 7; Final Decision Memo at 11. First, Commerce applies what it refers to as the "Cohen's d test," which measures the degree of price disparity between two groups of sales. *See* Final Decision Memo at 11. Commerce calculates the number of standard deviations by which the weighted-average net prices of U.S. sales for a particular purchaser, region, or time period (the "test group") differ from the weighted-average net prices of all other U.S. sales of comparable merchandise (the "com-

parison group").[14] *See id.* The result of this calculation is a coefficient. *See id.* To arrive at the coefficient, Commerce divides the difference in the means of the net prices of the test group and comparison group by the pooled standard deviation.[15] *See id.* The coefficient is the number of standard deviations by which the weighted-average of the comparison group and the test group differ.[16] *See* Prelim. Decision Memo at 7. A group of sales with a coefficient equal to or greater than 0.8 is said to "pass" Commerce's Cohen's d test, which signifies to Commerce that a significant pattern of price differences exists within that group of sales. *See id.* Commerce then relies on the "ratio test" to measure whether the extent of significant price differences identified are sufficient to satisfy the statutory pattern requirement. *See id.*; Final Decision Memo at 10. The "ratio test" compares the combined value of sales that passed the Cohen's d test with the value of all sales. *See* Prelim. Decision Memo at 7–8. If the value of sales that passed the test accounts for 66% or more of a respondent's total sales, Commerce applies the A-to-T method to all sales. *See id.* at 7. However, if the value of sales that passed the Cohen's d test is less than 66%, but more than 33%, Commerce takes a hybrid approach, applying the A-to-T method to the sales that passed its Cohen's d test and applying the A-to-A method to all other sales. *See id.* Alternatively, if 33% or less of a respondent's total sales passed Commerce's Cohen's d test, Commerce will apply the A-to-A method to all sales. *Id.* at 8. Finally, Commerce applies the "meaningful difference" test to determine whether the A-to-A method can account for the price differences identified. *Id.* If it cannot, Commerce concludes that there is a

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[14] As Commerce explained,

> Purchasers are based on the customer codes reported by [respondents]. Regions are defined using the reported destination code (*i.e.*, zip code) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the [period of investigation] being examined based upon the reported date of sale. For purposes of analyzing sales transactions by customer, region and time period, comparable merchandise is considered using the product control number and any characteristics of the sales, other than purchaser, region, and time period, that the Department uses in making comparisons between [export price] or [constructed export price] and [normal value] for the individual dumping margins.

Prelim. Decision Memo at 7. To calculate a coefficient for a particular test group (all sales of the comparable merchandise to a specific purchaser, region, or time period), the test group and comparison group (all other sales of the comparable merchandise) must each have at least two observations and the sales quantity for the comparison group must account for at least five percent of the total sales quantity of the comparable merchandise. *See id.*

[15] The pooled standard deviation is derived using the simple average of the variances in the net prices within the test and comparison groups. *See* Final Decision Memo at 11.

[16] Commerce quantifies the extent of the differences by one of three thresholds: "small," "medium," or "large." Prelim. Decision Memo at 7. A coefficient falling in the "large" threshold is equal to or greater than 0.8. *Id.*

meaningful difference between the results and applies the A-to-T method.[17] *Id.*

Commerce's differential pricing analysis, as applied, constitutes a reasonable methodology for identifying patterns of prices that differ significantly. *See Apex I*, 144 F. Supp. 3d at 1322–35; *Apex Frozen Foods Private Ltd. v. United States*, 41 CIT __, __, 208 F. Supp. 3d 1398, 1410–17 (2017) ("*Apex III*"); *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1297–1310 (2016).[18] SeAH argues that Commerce's use of Cohen's d contravenes statistical principles and ignores academic guidance on how Cohen's d should be applied. *See* SeAH's Br. at 33–35. Specifically, it argues that Cohen's d can only be applied when specific conditions are met,[19] but which Commerce does not require.[20] *Id.* at 35–36. SeAH's argument fails. The relevant inquiry is not whether Commerce applies its differential pricing analysis in accord with experts' guidance on the use of Cohen's d, but whether Commerce's methodology is lawful and is a reasonable way of effectuating the goals of the statute. As the court explained in *Soc Trang*,

> [t]he fact that Commerce has adopted a methodology based upon a statistical tool known as Cohen's d, and chooses to refer to this methodology as Cohen's d, does not diminish the discretion granted to Commerce by Congress. Congress has granted Commerce the discretion to construct a methodology to determine if there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time.

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[17] A difference is meaningful if:

> 1) there is a 25 percent relative change in the weighted-average dumping margin between the average-to-average method and the appropriate alternative method where both rates are above the de minimis threshold, or 2) the resulting weighted-average dumping margin moves across the de minimis threshold.

Prelim. Decision Memo at 8.

[18] SeAH argues that because Commerce's differential pricing analysis is not the result of formal rule making, Commerce must justify its use on a case-by-case basis. *See* SeAH's Br. at 26–32. Commerce has explained the reasonableness of the specific thresholds it employs in its differential pricing analysis. *See* Final Decision Memo at 22–25. The reasonableness of the steps underlying the analysis, as applied by Commerce, has been addressed by this Court and upheld by the U.S. Court of Appeals for the Federal Circuit. *See Apex II*, 862 F.3d at 1345–51; *Apex III*, 41 CIT at __, 208 F. Supp. 3d at 1410–17; *Tri Union*, 40 CIT at __, 163 F. Supp. 3d at 1297–1310, *aff'd*, 741 F. App'x 801 (Fed. Cir. 2018) (per curiam).

[19] SeAH argues that by not requiring normal distribution, equal variances, and equal samples sizes between the databases being compared, Commerce does not account for sampling errors. SeAH's Br. at 33–35.

[20] SeAH argues that Commerce lacks a sufficient number of data points to conduct its differential pricing analysis. *See* SeAH's Br. at 35–36. SeAH's argument is based on extra record evidence which Commerce reasonably rejected as untimely new factual information.

Soc Trang Seafood Joint Stock Co. v. United States, 42 CIT __, __, 321 F. Supp. 3d 1329, 1339 n.13 (2018). SeAH does not explain why Commerce's present application of the differential pricing analysis is either unlawful or is unreasonable.

SeAH also argues that Commerce did not explain why the A-to-A methodology could not account for the pattern of price differences identified. *See* SeAH's Br. at 42–45. Instead, SeAH contends that Commerce assumes, without explanation, that the A-to-T methodology is inherently more accurate in identifying masked dumping than the A-to-A methodology. *Id.* at 43. SeAH argues that the assumption is faulty because a meaningful difference in the results of the two methodologies can be explained by the use of zeroing in A-to-T, but not A-to-A. *Id.* Pursuant to 19 U.S.C. § 1677f-1(d)(1)(B), before employing the A-to-T methodology, Commerce must explain why the price "differences cannot be taken into account using" either the A-to-A or the transaction to transaction methodologies. 19 U.S.C. § 1677f-1(d)(1)(B). In *Apex I*, the court explained that although the statutory language and accompanying legislative history suggests that the A-to-A methodology will, more likely than not, "account for the price differences identified pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(i)[,]" that language was written "when zeroing under A-A was allowed and indeed the norm in investigations." *Apex I*, 40 CIT at __, 144 F. Supp. 3d at 1333 n.24 (citing 19 U.S.C. § 1677f-1(d)(1)(B)(ii); SAA at 843, 1994 U.S.C.C.A.N. at 4178–79). The A-to-A methodology was able to account for significant price differences, and in the rare cases it did not, "an explanation would more easily present itself." *Id.* However, zeroing is no longer utilized in the A-to-A methodology, *see generally Antidumping Proceedings*, 71 Fed. Reg. 77,722, 77,723 (Dep't Commerce Dec. 27, 2006) (calculation of the weighted-average dumping margin during an antidumping investigation; final modification), and now provides offsets for negative dumping, "which may mask [ ] price differences rather than account for [them]." *Apex I*, 40 CIT at __, 144 F. Supp. 3d at 1333 n.24. Accordingly, to fulfill the explanation requirement, "Commerce must draw a connection between the differences and the efficacy of A-A as compared to A-T." *Id.* Here, Commerce observed that absent zeroing the yields of the A-to-T and Ato-A methodologies would be "identical" and render the statutory language meaningless. *See* Final Decision Memo at 14. Commerce then presumed, in comparing the weighted-average dumping margins, that the move of the margin across the di minimis threshold represented a meaningful difference. *Id.* at 4. It is reasonably discernable from Commerce's explanation that the A-to-A methodology could not and was not equipped to uncover the masked dumping that

the A-to-T methodology revealed. Commerce's explanation for why the A-to-A methodology cannot account for the pattern of significant price differences is therefore a reasonable interpretation of the statute in light of the circumstances.[21]

SeAH also argues that Commerce's use of zeroing in its differential pricing analysis contravenes the United States' obligations under the World Trade Organization's ("WTO") Antidumping Agreement. *See* SeAH's Br. at 45 (relying on the holding of a 2016 WTO panel report). WTO reports do not carry the force of law and the relevant statutory scheme provides a method for implementation of the reports into U.S. law. *Corus Staal BV v. Dep't of Commerce*, 395 F. 3d 1343, 1347–49 (Fed. Cir. 2005); 19 U.S.C. §§ 3533, 3538(b)(4). The WTO report upon which SeAH relies does not affect this proceeding.

III. Commerce's Calculation of Credit Expenses on SeAH's Back-to-Back Sales

SeAH challenges Commerce's calculation of credit expenses on SeAH's back-to-back sales as contrary to law. *See* SeAH's Br. at 46–50. Specifically, SeAH argues that Commerce has consistently interpreted 19 U.S.C. § 1677a(d)(1) as precluding the deduction of selling expenses incurred outside of the United States from the constructed export price ("CEP"). *See id.* at 48–50. Defendant argues that Commerce calculated credit expenses in a manner that was consistent with its past practice. *See* Def.'s Resp. Br. at 55–58. For the reasons that follow, Commerce's calculation of credit expenses on SeAH's back-to-back sales is in accordance with law.

Constructed export price is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise . . . , as adjusted by subsections (c) and (d) [of this section]." 19 U.S.C. § 1677a(b). Constructed export price shall be adjusted or reduced by, for example, "credit expenses" which are "expenses that result from, and bear a direct relationship to, the sale[.]" 19 U.S.C. § 1677a(d)(1)(B).

Commerce interprets "credit expense" as "the interest expense incurred (or interest revenue foregone) between shipment of merchan-

[21] SeAH also argues that *Apex II*, which affirmed *Apex I*, can be distinguished because the Court of Appeals did not hold that comparing the results of the A-to-A methodology to those of the A-to-T methodology reveals that a meaningful difference exists, but only that the difference in the results can "inform" Commerce's decision. *See* Resp. Pl. [SeAH] to Def.'s Notice Suppl. Auth. at 3–8, Aug. 4, 2017, ECF No. 102. SeAH misreads *Apex II*. *Apex II* found Commerce's explanation for its meaningful difference analysis to be reasonable, and further based its rationale on the reasoning provided in *Apex I* that explained why it is reasonably discernable from Commerce's explanation that the results of the A-to-T methodology, when compared to those of the A-to-A methodology, can unmask dumped sales. *Apex II*, 862 F.3d at 1346 (citing *Apex I*, 40 CIT at __, 144 F. Supp. 3d at 1333 n.24).

dise to a customer and receipt of payment from the customer." Final Decision Memo at 75–76 (quoting Issues & Decisions for the Final Results of the First Admin. Review of the [ADD] Order on Carbon & Certain Alloy Steel Wire Rod from Trinidad & Tobago at Cmt. 6, A-274–804, (Mar. 8, 2005), *available at* http://ia.ita.doc.gov/frn/summary/trinidad/E5–1128–1.pdf (last visited Oct. 29, 2018) ("Wire Rod from Trinidad & Tobago IDM")). Imputed credit expense is tied to creditworthiness and credit risk. *See* Issues & Decisions for the Final Results of the Fifth Admin. Review [of Certain Hot-Rolled Carbon Steel Flat Prods. from India] at Cmt. 22, A-533–820, (May 30, 2008), *available at* http://ia.ita.doc.gov/frn/summary/india/E8–12603-1.pdf (last visited Oct. 31, 2018) (explaining that the basis of Commerce's practice for how credit expenses are calculated is the fact "that producers are not entitled to payment for finished goods until they ship the merchandise and issue the commercial invoice."). Accordingly, where goods are made to order and are directly shipped to an unaffiliated U.S. customer, it is reasonable for Commerce to demarcate the date of shipment as the date when the credit risk attaches and the date of payment as the date until which the credit risk is borne.[22]

In the final determination, Commerce explains that SeAH's merchandise did not enter its U.S. affiliate's inventory and was instead sold directly to unaffiliated U.S. customers. *See* Final Decision Memo at 76. Accordingly, Commerce calculated SeAH's imputed credit expenses beginning from the date of shipment to the first unaffiliated customer and to the date of receipt of payment, and deducted the resulting amount from the CEP.[23] *See id.*

Commerce correctly notes that SeAH's attempt to fragment accrual of imputed credit expenses based on the location of the subject merchandise, i.e., when the merchandise is in transit, "conflates inventory carrying costs with imputed credit expenses." Final Decision Memo at 76. Constructed export price may be reduced by inventory carrying costs which Commerce interprets as "interest expenses incurred (or interest revenue for[e]gone) between the time the merchandise leaves the production line at the factory to the time the

[22] When merchandise does not enter a U.S. affiliate's inventory, the credit period commences when the merchandise leaves the port and terminates upon payment. Wire Rod from Trinidad & Tobago IDM at Cmt. 6.

[23] SeAH contends that there are two types of sales at issue—one, where the subject merchandise enters the U.S. affiliate's inventory and is then sold to an unaffiliated U.S. customer, and another where the subject merchandise is picked up directly by the unaffiliated U.S. customer at the port. *See* SeAH's Br. at 46. It is irrelevant that SeAH's U.S. affiliate took title to the goods upon their arrival in the United States and afterwards transferred the goods to the U.S. customer, because the goods were always made to order and were not sold out of the U.S. affiliate's inventory. *See* Final Decision Memo at 76.

goods are shipped to the first unaffiliated customer.” *Id.* In calculating inventory carrying costs Commerce excludes time-on-the-water transport costs because such costs are indirect selling expenses related to the sale to the U.S. affiliate and not associated with U.S. economic activity. *See* Issues & Decision Mem. for the Admin. Review of Stainless Steel Butt-Weld Pipe Fittings from Taiwan at 22, A-583–816, (Dec. 10, 2003), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/03–31021–1.pdf (last visited Oct. 29, 2018). Commerce will not adjust the CEP to account for an expense that is “solely related” to sales to an affiliated U.S. importer. 19 C.F.R. § 351.402(b). It is reasonably discernable from Commerce’s explanation that the cost of carrying inventory does not attach until after the goods actually enter an affiliate’s inventory. Conversely, credit expenses incur while merchandise is en route to the customer and continue to so incur until the customer remits payment. The fact that payment may be remitted while the merchandise is outside of the United States is not relevant to the inquiry of when a party’s credit risk for the merchandise sold terminates. Accordingly, Commerce’s determination is in accordance with law.

IV. Pipe Grade

Stupp et al. challenge as arbitrary and capricious and unsupported by substantial evidence Commerce’s determination that grades B and X42 pipe should not be treated as a single grade for purposes of product matching.[24] *See* Stupp et al. Br. at 3–4, 11–27; *see also* Final Decision Memo at 34. Specifically, Stupp et al. contend that in light of record evidence that SeAH’s and HYSCO’s (collectively “respondents”) line pipe met the grade specifications of both grade B and X42 pipe, Commerce should have conducted its own inquiry and reclassified respondents’ line pipe accordingly. *See* Stupp et al. Br. at 11–24. Defendant argues that Commerce’s determination is supported by substantial evidence. *See* Def.’s Resp. Br. at 11–16. For the reasons that follow, Commerce’s determination is supported by substantial evidence.

[24] Commerce relies on control-numbers (“CONNUMs”) to match products in the home market with those in the U.S. market. A CONNUM is a string of numbers, each of which codes for a specific product characteristic. Product characteristics are unique to the subject merchandise at issue and are selected based on what is commercially meaningful in the U.S. market and has an impact on sale price and cost of production. *See, e.g.*, *Large Residential Washers from the People’s Republic of China*, 81 Fed. Reg. 1,398, 1,399 (Dep’t Commerce Jan. 12, 2016) (initiation of [LTFV] investigation). Welded line pipe has six product characteristics, one of which is grade. Preliminary Decision Memo at 10. Grades B and X42 are among the possible grades for welded line pipe and each is assigned its own identifying code.

To calculate a dumping margin, Commerce compares "the price at which the foreign like product is first sold" in a comparison market with the export price or the constructed export price. *See* 19 U.S.C. § 1677b(a); 19 C.F.R. § 351.401(a). To identify a "foreign like product," Commerce will initially look for an identical product in the home market and match it to U.S. sales of the subject merchandise. 19 U.S.C. § 1677(16)(A). In the absence of an identical product, Commerce looks for similar subject merchandise. 19 U.S.C. § 1677(16)(B)–(C). Commerce uses a "model-match methodology," which is "based on a hierarchy of product characteristics that are commercially significant to the merchandise at issue[,]" to identify similar merchandise. *Maverick Tube Corp. v. United States*, 39 CIT __, __, 107 F. Supp. 3d 1318, 1329 (2015) (citing *JTEKT Corp. v. United States*, 33 CIT 1797, 1805, 675 F. Supp. 2d 1206, 1218 (2009); *Fagersta Stainless AB v. United States* ,32 CIT 889, 893, 577 F. Supp. 2d 1270, 1276 (2008)).

Commerce's determination is supported by substantial evidence. During verification, Commerce did not find any discrepancies between the pipe grade reported in respondents' sales databases and the grade listed on sales documentation memorializing customer orders. *See* Verification of [HYSCO's] Sales Resps. at 10–11, PD 366, bar code 3299563–01 (Aug. 18, 2015) ("HYSCO's Verification Report"); Verification of [SeAH's] Sales Resps. at 8, PD 368, bar code 3300449–01 (Aug. 24, 2015). Commerce acknowledges that respondents' grade B and X42 pipe have similar specifications. Commerce explained, however, that certification requirements for the two grades differ in minimum chemical composition and yield strength, and that the similarities petitioners identified in tensile and yield strengths were based on "a small percentage" of respondents' total period of investigation sales and did not justify recoding the grades.[25] *See* Final Decision Memo at 34–35. Further, Commerce did not find evidence of respondents producing grade X42 pipe and stenciling it grade B pipe to manipulate the model matching methodology.

[25] Stupp et al. argue that SeAH's and HYSCO's mill test certificates represent an adequate sample size and demonstrate that respondents' subject merchandise meets the requirements of both grade B and grade X42 pipe. *See* Stupp et al. Br. at 23–24. However, even if Stupp et al. are correct, the mill test certificates only show that it is possible for specifications for grade B pipe to overlap with those for grade X42 pipe. Stupp et al. have not proffered record evidence demonstrating that the existence of two separate grades is unreasonable and, in fact, agree that the two grades are properly part of Commerce's model matching methodology. *See id.* Instead, their challenge is prospective, i.e., given the similarities in specifications that make up the two grades, a respondent can misreport the grade of its pipe and manipulate the model matching methodology. *Id.* at 17–23. There is no evidence that respondents manipulated the stenciling of the subject merchandise here.

Commerce's determination that grade B and grade X42 pipe are sufficiently different to warrant separate codes is reasonable. The relevant statutory scheme directs Commerce to compare the CEP to the sales price of an identical or similar foreign like product. *See* 19 U.S.C. § 1677b(a); 19 U.S.C. § 1677(16)(A)–(C). If there are no sales of identical products in the home market, Commerce uses its model matching methodology to match products in the U.S. and home market databases that share commercially significant product characteristics. For line pipe, pipe grade is a commercially significant product characteristic. *See* Prelim. Decision Memo at 10. The specifications for grade B pipe are different than those for grade X42 pipe and record evidence does not support collapsing the grades. Accordingly, to identify similar products across the two databases, Commerce must be able to assign different codes to grade B and X42 pipe.

V. Inclusion of Certain "Local Sales" in HYSCO's Home Market Database

Maverick challenges Commerce's decision to include certain "local sales" ("challenged sales") in HYSCO's home market database as not in accordance with law and unsupported by substantial evidence. *See* Maverick's Br. at 12–35. Specifically, Maverick argues that Commerce's determination is not in accordance with law because Commerce assessed HYSCO's actual knowledge, rather than its imputed knowledge, of whether the challenged sales were for export. *See id.* at 13–24. Further, Maverick argues that Commerce's determination is not supported by substantial evidence given the circumstances of the sales.[26] *See id.* at 24–35. Defendant argues that Commerce applied the correct standard, *see* Def.'s Resp. Br. at 17–22, and that substantial evidence supports Commerce's decisions to include HYSCO's local sales in the home market database. *See id.* at 22–28. For the reasons that follow, Commerce's decision is not in accordance with law and is not supported by substantial evidence.

To calculate a dumping margin, Commerce compares a product's export price or CEP in the United States with the normal value of the subject merchandise in the home market. 19 U.S.C. § 1677b(a); 19 C.F.R. § 351.401(a). Normal value is

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordi-

[26] Stupp et al. indicate that they support Maverick's arguments challenging Commerce's determination that HYSCO properly classified the challenged sales. *See* Stupp et al. Br. at 4 n.4.

> nary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price[.]

19 U.S.C. § 1677b(a)(1)(B)(i). The foreign like product is comparable merchandise sold in the home market. 19 U.S.C. § 1677(16). Commerce determines "if the producer knew or had reason to know [that] the goods were for sale to an unrelated U.S. buyer, . . . the producer's sales price will be used as [the] 'purchase price' to be compared with the producer's foreign market value." Trade Agreements Act of 1979, Statement of Administrative Action, H.R. Doc. No. 96–153, Pt. II, at 411 (1979). To determine whether a sale is a home market sale, Commerce objectively assesses whether, given the particular facts and circumstances, a producer would have known that the merchandise will be sold domestically or for export. *See INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 123–25, 957 F. Supp. 251, 263–64 (1997) (inquiring whether a producer "knew or should have known that the merchandise was not for home consumption"), *aff'd*, 108 F.3d 301 (Fed. Cir. 1997), *see also Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1433, 215 F. Supp. 2d 1322, 1330–31 (2000) (inquiring "if the producer 'knew or should have known that the merchandise was . . . for home consumption based upon the particular facts and circumstances of the case.'" (quoting *INA*, 21 CIT at 123–34, 957 F. Supp. at 264)). Commerce's review is not limited to documentation submitted by the producer; it may review petitioner's submissions as well. *INA*, 21 CIT at 124, 957 F. Supp. at 264. Commerce must diligently inquire into allegations of knowledge and render its conclusion based on all relevant facts and circumstances. *See Allegheny Ludlum*, 24 CIT at 1433–35, 215 F. Supp. 2d at 1330–33; *INA*, 21 CIT at 123–25, 957 F. Supp. at 263–65; *Federal-Mogul Corp. v. United States*, 17 CIT 1015, 1019–22 (1993).

Commerce's conclusion that the challenged sales were home market sales fails to address record evidence that the subject merchandise was exported without further processing. Specifically, there is record evidence that the subject merchandise is ready to be used "as is," was sold [[ ]]], given VAT-free treatment, and sold to customers who received shipment at facilities near ports. *See* [Maverick's] Case Br. at 9–13, CD 433, bar code 3301963–01 (Sept. 1, 2015) ("Maverick's Agency Case Br.") (citing [Maverick's] Comments on [ ] HYSCO's Suppl. Sec. D. Questionnaire at 11–14, Exs. 9–22, CD 249–51, bar codes 3282792–01–03 (June 8, 2015) ("Maverick's Comments")). There is also record evidence that at least some of the customers to whom HYSCO made the challenged sales were not distributors, resellers, or owners of facilities with the manufacturing capabilities necessary to further consume the subject merchandise in

the home market. *See* Maverick's Comments at 11–14, Exs. 4, 9–22. This evidence suggests that HYSCO knew or should have known that the challenged sales would be exported without further processing, and therefore must be addressed by Commerce. Although Commerce addresses and explains why evidence that the challenged sales were shipped to ports alone is not dispositive, Final Decision Memo at 47–48 (citing Issues & Decision Mem. for the Sixth [ADD] Administrative Review of Certain Polyester Staple Fiber from [Korea], 72 ITADOC 73,764, (Dec. 3, 2007), at Cmt. 2), Commerce fails to confront the remaining evidence tending to detract from its determination. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

Commerce explains that HYSCO did not or could not have known that the challenged sales would be exported without being further manufactured because HYSCO did not prepare the export licenses and the challenged sales included sales to "at least one customer that may [have] further manufacture[d] HYSCO's welded line pipe prior to export." *See* Final Decision Memo at 45 (citations omitted). Commerce appears to take HYSCO's lack of actual knowledge, combined with the possibility of one of HYSCO's customers further consuming the subject merchandise prior to export, as indicative that HYSCO did not or could not have known that the challenged sales would be further processed. Yet, the sales to this one customer are not among the sales Maverick challenges, *see* [Maverick's] Reply Br. at 6, Jan. 19, 2017, ECF No. 83 (citing HYSCO's Verification Report at 8; Maverick's Agency Case Br. at 9–12), and even if they were, Commerce has not explained why the existence of this one customer implies a lack of knowledge when there is also evidence that another customer, whose sales Maverick does challenge, were exported without being further manufactured. *See id.*; HYSCO's Verification Report at 8.

Commerce and Defendant suggest that any further inquiry as to the disposition of the subject merchandise after it is delivered would create an unreasonable burden on the respondents. Final Decision Memo at 45–46; Def.'s Resp. Br. at 27. The question is not what the respondents must do, but what Commerce must do in assessing what the respondents knew or should have known. *See Allegheny Ludlum*, 24 CIT at 1433–35, 215 F. Supp. 2d at 1330–33; *INA*, 21 CIT at 123–25, 957 F. Supp. at 263–65; *Federal-Mogul Corp. v. United States*, 17 CIT 1015, 1019–22 (1993). Commerce must diligently inquire into what the respondents knew or should have known and account for record evidence that detracts from its determination. Commerce did not do so here.

Further, Commerce could have, but did not, request copies of letters of credit that may have provided details on the challenged sales. Commerce explains that although it has reviewed letters of credit in past proceedings, such letters are not required under Korean law for a local sale to qualify for a VAT exemption and concluded that here such letters would likely not have been in HYSCO's control. *See* Final Decision Memo at 48. Yet, Maverick points to record evidence that at least some of the letters would have been in HYSCO's control. *See* Maverick's Br. at 33–34 (citing HYSCO's Verification Report at 8). In light of such evidence, it is not clear to the court how Commerce could reasonably reach the conclusion it did without at least inquiring about the letters of credit. On remand, Commerce may want to reopen the record to solicit relevant letters of credit or information related to such letters or further explain its determination.

VI. Rejection of Maverick's Supplemental Case Brief

Maverick argues that Commerce abused its discretion when it rejected Maverick's September 8, 2015 supplemental case brief. *See* Maverick's Br. at 35–43. Defendant argues that Commerce's decision was in accordance with law and reasonable because Maverick's supplemental case brief raised issues that could and should have been addressed in its primary case brief to the agency. *See* Def.'s Resp. Br. at 29–33. Defendant also argues that even if the arguments in Maverick's supplemental case brief were timely raised, Commerce's determination regarding what HYSCO knew or should have known about certain local sales included in its home market database is supported by substantial evidence. *See id.* at 33–35. For the reasons that follow, Commerce's decision to reject Maverick's supplemental case brief was an abuse of discretion.

The court reviews Commerce's decision to reject corrective information for abuse of discretion. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (Fed. Cir. 1995); *see also Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT __, __, 815 F. Supp. 2d 1342, 1365 (2012). Although Commerce has the discretion to set and enforce its own deadlines to ensure finality, it may abuse its discretion by rejecting information that would not be burdensome to incorporate and which would increase the accuracy of the calculated dumping margins. *See Grobest*, 36 CIT at __, 815 F. Supp. 2d at 1365; *see also NTN*, 74 F.3d at 1207–08 (holding that Commerce abused its discretion where its decision not to use a "straightforward mathematical adjustment" to correct for certain clerical errors led to "the imposition of many millions of dollars in duties not justified under the statute.").

Commerce's decision was an abuse of discretion. Commerce requested that HYSCO revise its home market and U.S. sales databases using information already on the record and submit the revised databases by August 31, 2015. *See* [Letter from Commerce to HYSCO Requesting Certain Revisions] at 1, Attach., PD 367, bar code 3300336–01 (Aug. 24, 2015) ("Commerce's Letter Requesting Revisions") (explaining that the requested revisions are based on corrections previously presented to Commerce on July 15, 2015, July 29, 2015, and August 5, 2015). Interested parties' case briefs were due on September 1, 2015. Petitioners' request for supplemental and rebuttal briefing states that HYSCO's revisions to the databases would affect "a rather extensive number of sales transactions" and that parties should be allowed to address "issues related to changes made[.]" [Petitioners'] Req. Suppl. Briefing Schedule at 1–2, PD 373, bar code 3301164–01 (Aug. 31, 2015) ("Petitioners' Req."). Commerce granted the request, allowing interested parties to address the "specific revisions made to the respondents' sales databases" and for subsequent rebuttal briefing. *See* Revision to Briefing Schedule, PD 374, bar code 3301243–01 (Aug. 31, 2015) ("Revised Briefing Schedule"). Accordingly, Commerce allowed parties to address the effects of HYSCO incorporating into the databases information that was already on the record.

The language of the revised briefing schedule must be read in light of petitioners' request for supplemental and rebuttal briefing. The revised briefing schedule was established to accommodate petitioners' request to address issues arising out of the revisions HYSCO made to an "extensive" number of sales in its sales databases. *See* Revised Briefing Schedule; Petitioners' Req. By revising the briefing schedule, Commerce implicitly recognized that HYSCO's revisions may affect the sales databases as a whole and that interested parties may not be able to meaningfully address any such effects in their initial case briefs. Commerce also granted an opportunity for rebuttal, which presupposes supplemental briefing offering analysis more meaningful than merely cross-referencing the revisions made and reporting any clerical errors. It does not make sense for Commerce to provide rebuttal to identification of clerical errors. If Commerce wanted parties to review the revised databases for clerical errors, it should have been more specific in setting out the scope.

Commerce contends that Maverick's supplemental brief frequently commented on and cited to evidence that was on the record prior to HYSCO's submission of its revised databases. *See* [Commerce's Rejection of Maverick's Suppl. Case Br.] at 1, n.1, PD 407, bar code 3303866–01 (Sept. 9, 2015). However, in explaining what commen-

tary would have been acceptable, Commerce includes "quantitative analysis commentary based on the specific database revisions[.]" [Commerce's Resp. to Maverick's Req. to Reconsider] at 2, PD 412, bar code 3304271–01 (Sept. 10, 2015). It is reasonable to expect that a revision to one field of a database can have implications for other entries/fields. To meaningfully address the revisions HYSCO made, interested parties must have been able to address how HYSCO's revisions affected the sales reported. Commerce cannot now claim that Maverick exceeded its scope for supplemental briefing by providing analysis on the effect HYSCO's revisions had on the databases. On remand, Commerce must review and place on the record those portions of Maverick's supplemental case brief that address the effect HYSCO's revisions had on the sales databases.

Defendant argues that, even if timely raised, the arguments in Maverick's supplemental case brief do not detract from the reasonableness of Commerce's determination to include certain local sales in HYSCO's home market sales database. *See* Def.'s Resp. Br. at 33–35. As explained above, to determine whether a respondent properly classified a sale as a home market sale Commerce must diligently inquire into what the respondent knew or should have known regarding the ultimate disposition of that sale and address any record evidence that would detract from its determination. Here, Maverick's supplemental case brief advances arguments regarding what HYSCO knew or should have known about the ultimate disposition of the challenged sales. *See id.*; Maverick's Br. at 39–43. To the extent that these arguments arise as a result of the revisions HYSCO made to its sales databases and are relevant to what HYSCO knew or should have known about the challenged sales, Commerce must address them in its remand redetermination.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's decision to reject portions of SeAH's case brief is sustained; and it is further

ORDERED that Commerce's application of the differential pricing analysis is sustained; and it is further

ORDERED that Commerce's calculation of credit expenses on SeAH's back-toback sales is sustained; and it is further

ORDERED that Commerce's decision not to collapse two grade codes for the purposes of model matching is sustained; and it is further

ORDERED that Commerce's decision to include certain local sales in HYSCO's home market sales database is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall review and determine which portions of Maverick's supplemental case brief should be retained, consistent with this opinion, and place those portions on the administrative record; 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 thereafter to file comments on the remand redetermination; and it is further

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

Dated: January 8, 2019
New York, New York

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

Slip Op. 19–3

SHANDONG RONGXIN IMPORT & EXPORT CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 17–00145

[Plaintiff's motion for judgment on the agency record is granted in part and Commerce's *Final Results* are remanded consistent with this opinion.]

Dated: January 8, 2019

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington DC, argued for plaintiff. With him on the brief were *Alexandra H. Salzman*, *Judith L. Holzman* and *J. Kevin Horgan*.

Melissa L. Baker, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brendan Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Katzmann, Judge:

Before this court is the continuing litigation over whether an exporter in a non-market economy has adequately established the independence from governmental control necessary to be assigned a different rate from the countrywide rate. The court once again evaluates the Department of Commerce's ("Commerce") determination in an antidumping duty administrative review of Shandong Rongxin

Import & Export Co., Ltd. ("Rongxin") in *Certain Cased Pencils From China*, 59 Fed. Reg. 66,909 (Dep't Commerce Dec. 28, 1994). Rongxin, an exporter of pencils from the People's Republic of China, challenges Commerce's determination covering the period of review ("POR") from December 1, 2014 to November 30, 2015. *Certain Cased Pencils from China: Final Results*, 82 Fed. Reg. 24,675 (Dep't Commerce May 30, 2017) ("*Final Results*"), and accompanying Issue and Decision Memorandum ("*IDM*"). Specifically, Rongxin contends that Commerce's determination — that the Chinese government exerted, or has the potential to exercise, *de facto* control over Rongxin's day-to-day operations (including the selection of management), resulting in the application of the non-market economy countrywide rate and not the separate, company-specific rate sought by Rongxin — was unsupported by substantial evidence and contrary to law. Rongxin contends that Commerce impermissibly filled alleged gaps in the record without affording it an opportunity to provide information regarding any supposed deficiencies and without considering existing record evidence. Rongxin also argues that it was entitled to a separate rate because it is a mandatory respondent. The court sustains Commerce's *Final Results* in part but remands other aspects of its determination for reconsideration.

BACKGROUND

I. Legal and Regulatory Framework

The antidumping statute empowers Commerce to impose remedial duties on imported goods that are sold in the United States at less-than-fair value if it is determined that a domestic industry is "materially injured, or threated with material injury." *See* 19 U.S.C. § 1673[1]; *Diamond Sawblades Manufacturers Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018) ("*Rongxin III*"). "Sales at less than fair value are those sales for which the 'normal value' (the price a producer charges in its home market) exceeds the 'export price' (the price of the product in the United States)." *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1326 (Fed. Cir. 2017) (quoting *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013)). "Thus the amount of the antidumping duty is 'the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.'" *Rongxin III*, 331 F. Supp. 3d at 1394 (quoting 19 U.S.C. § 1673). Upon the

[1] Subsequent citations to the United States Code are to the official 2012 edition.

request of an interested party, Commerce conducts a yearly administrative review of its antidumping duty determination and recalculates the applicable rate. 19 U.S.C. § 1675(a)(1)–(2); *see also Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010) (citing 19 U.S.C. §§ 1673, 1675(a)); *Rongxin III*, 331 F. Supp. 3d at 1394 (citing 19 U.S.C. § 1675(a)(1)–(2)). Commerce "shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise," 19 U.S.C. § 1677f-1(c)(1), but if it is not practicable to do so, Commerce may instead examine a representative group of mandatory respondents, 19 U.S.C. § 1677f-1(c)(2)[2] .

When a proceeding concerns a non-market economy ("NME") country[3] such as China, "Commerce presumes that all respondents to the proceeding are government-controlled and therefore subject to a single country-wide antidumping duty rate." *Rongxin III*, 331 F. Supp. 3d at 1394 (citing *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1349–50 (Fed. Cir. 2015)); *see also Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). However, respondents may rebut this presumption and thus establish that they are eligible for a separate rate by demonstrating that they are free from both *de jure* (legal) and *de facto* (factual) government control. *Dongtai Peak Honey*, 777 F.3d at 1350; *Rongxin III*, 331 F. Supp. 3d at 1394.

To show that it is free of *de jure* control, a respondent may refer "to legislation and other governmental measures that suggest sufficient company legal freedom." *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1379 (Fed. Cir. 2013). "An exporter can demonstrate the absence of de facto government control by providing evidence that the exporter: (1) sets its prices independently of the government and of other exporters, (2) negotiates its own contracts, (3) selects its management autonomously, and (4) keeps the proceeds of its sales (taxa-

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[2] Specifically, 19 U.S.C. § 1677f-1(c)(2) provides that:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

[3] An NME country is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

tion aside).” *Rongxin III*, 331 F. Supp. 3d at 1394 (citing *AMS Assocs.*, 719 F.3d at 1379).

“When either necessary information is not available on the record or a respondent (1) withholds information that has been requested by Commerce, (2) fails to provide such information by Commerce’s deadlines for submission of the information or in the form and manner requested, (3) significantly impedes an antidumping proceeding, or (4) provides information that cannot be verified, then Commerce shall ‘use the facts otherwise available in reaching the applicable determination.’” *Dillinger France S.A. v. United States*, 42 CIT __, __, Slip Op. No. 18–150 (Oct. 31, 2018) at 4 (quoting 19 U.S.C. § 1677e(a)). The provisions of § 1677e(a) are known as “facts available,” or “neutral facts available,” and the guiding principle for choosing what facts to apply is accuracy in the given case. *See Agro Dutch Industries Ltd. v. United States*, 31 CIT 2047, 2054 (2007) (“However, any gap-filling must later give way to actual information obtained during the course of the proceeding, whether obtained pursuant to section 1677m(d) or received fulfilling the requirements of section 1677m(e).”). This subsection thus gives Commerce a way to fill informational gaps in the administrative record. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003); *Dillinger*, Slip Op. 18–150 at 4. Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available” — in other words, Commerce may apply adverse facts available (“AFA”) — if it “finds 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); *see also Dillinger*, Slip Op. 18–150 at 4. “A respondent’s failure to cooperate to ‘the best of its ability’ is ‘determined by assessing whether [it] has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries.’” *Dillinger*, Slip Op. 18–150 at 4 (quoting *Nippon Steel*, 337 F.3d at 1382). Before applying facts available, however, Commerce must give respondents an opportunity to correct identified deficiencies in the record, “to the extent practicable . . . in light of the time limits established for the completion of investigations or reviews.” 19 U.S.C. § 1677m(d).

II. Factual and Procedural History

In December 1994, Commerce issued an antidumping duty order covering certain cased pencils from China. *Certain Cased Pencils from China*, 59 Fed. Reg. 66,909 (Dep’t Commerce Dec. 28, 1994). In 2002, Commerce established that the countrywide entity rate for

China was 114.9%. *Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review; Certain Cased Pencils from the People's Republic of China*, 67 Fed. Reg. 59,049 (Dep't Commerce Sept. 19, 2002).

On December 1, 2015, Commerce gave notice to interested parties that they could request a review of its previous order regarding certain cased pencils from China. *Opportunity to Request Administrative Review*, 80 Fed. Reg. 75,058 (Dep't Commerce Dec. 1, 2015). In response to the notification, on December 30, 2015, Dixon Ticonderoga Company ("Dixon") requested an administrative review of Rongxin and Wah Yuen Stationery Co. Ltd.[4] P.R. 1. On February 9, 2016, Commerce commenced a review for the POR at issue in the instant case, December 1, 2014 to November 30, 2015. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 6832 (Dep't Commerce Feb. 9, 2016). Rongxin submitted such an application on March 29, 2016. P.R. 24, C.R. 11–13.

Commerce issued a Section A questionnaire to Rongxin on July 1, 2016, wherein it solicited information that would allow it to determine whether Rongxin was owned or controlled by the Chinese government. P.R. 29. On August 5, 2016, Rongxin submitted its Section A response to Commerce. P.R. 36–45, C.R. 14–28.

On November 21, 2016, Commerce issued its preliminary decision denying Rongxin's claim for a separate rate. It found that the majority ownership of Rongxin by Shandong International Trade Group ("SITG"), which was in turn owned by the Commerce Department of Shandong Province, a Chinese government entity, was sufficient to establish *de facto* government control. *Certain Cased Pencils from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission: 2014–2015*, 81 Fed. Reg. 83,201 (Dep't Commerce May 5, 2016). Commerce invited interested parties to file comments, and Rongxin filed its case brief on December 21, 2016. P.R. 72, C.R. 51. In its case brief, Rongxin provided a detailed analysis of its new Articles of Association ("New Articles"), which it argued demonstrated that it was free from Chinese government control. *Id.* Dixon also submitted a rebuttal brief on December 28, 2016, but Commerce initially rejected it because it contained new facts. P.R. 76–79, C.R. 52–53. Dixon then submitted a revised rebuttal brief on January 17, 2017, which Commerce accepted. P.R. 80, C.R. 54.

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[4] Dixon later withdrew its request to review Wah Yuen Stationery Co. Ltd. on May 5, 2016. P.R. 27.

On May 30, 2017, Commerce issued its *Final Results*, which again found *de facto* government control of Rongxin. *Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 2014–2015, 82 Fed. Reg. 24,675 (Dep't Commerce May 30, 2017), and accompanying Issues and Decision Memorandum ("*IDM*"). In support of its conclusion, Commerce noted that for eleven out of the twelve months of the POR, Rongxin was majority owned by SITG. *IDM* at 14. In response to Rongxin's case brief arguments construing the language of the New Articles, Commerce stated that "the provisions of the Articles of Association cited by Rongxin, alone, are insufficient to demonstrate that it operated autonomously from the government in making decisions regarding the selection of management during the POR." *Id.* at 15. Moreover, Commerce found that it could not rely on the New Articles for its analysis for two reasons. *Id.* First, the New Articles provided by Rongxin did not cover the first two months of the POR, and so Commerce filled this gap with the Articles of Association in effect for the administrative review covering the POR from 2012–2013 ("Old Articles"). *Id.*Second, according to Commerce, the record did not "include any evidence to establish that Rongxin's operation in the latter part of the POR, *i.e.*, after the effective date of the Articles of Associations provided by Rongxin, differed from the earlier part" because "the record is devoid of any information showing how the new Articles of Association operate in light of the conflicting scenarios of majority ownership and one vote per shareholder." *Id.* Consequently, as facts available Commerce "rel[ied] on [its] findings in the most recently completed administrative review of Rongxin" and found that "[i]n the absence of information to the contrary . . . the Articles of Association in effect were the same as those in effect during 2012–2013." *Id.* Relying on the Old Articles and its previous interpretation of their language, Commerce determined that Rongxin had not demonstrated an absence of *de facto* Chinese government control. *Id.*

Rongxin filed a complaint in this court on June 13, 2017, alleging that Commerce's determination was unsupported by substantial evidence and contrary to law.[5] Rongxin filed its 56.2 Motion for Judgment on the Agency Record on March 12, 2018. Pl.'s Br., ECF No. 26. The Government filed its response on May 30, 2018. Def.'s Br., ECF Nos. 27–28. Rongxin filed its reply brief on August 2, 2018. Pl.'s Reply, ECF No. 31. Oral argument was held by this court on November 28, 2018. ECF No. 40.

[5] Rongxin also alleged that China's Protocol of Accession to the World Trade Association contained a provision that it could not be treated as an NME once fifteen years had passed from the date of its accession. On November 17, 2017, the parties jointly-stipulated to the dismissal of the second count with prejudice.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(m). The court sustains Commerce's antidumping determinations, findings, and conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Rongxin alleges that Commerce's *Final Results* are unsupported by substantial evidence and contrary to law because Commerce impermissibly applied facts available and privileged its own policy over the requirements of the statute. Specifically, Rongxin alleges that: (1) Commerce could not deny Rongxin a separate rate because Rongxin is a mandatory respondent; (2) any deficiency in the record is due to Commerce's failure to issue supplemental questionnaires pursuant to 19 U.S.C. § 1677m(d); (3) there was no gap in the record for Commerce to fill because Rongxin provided the New Articles, which on their face clearly show how Rongxin operated; and (4) Commerce only considered one of the *de facto* criteria.[6] The court concludes that being a mandatory respondent did not automatically entitle Rongxin to a separate rate and that Commerce was not required to issue supplemental questionnaires pursuant to 19 U.S.C. § 1677m(d). The court also sustains Commerce's use of facts available for the first two months of the POR, but remands for reconsideration Commerce's application of facts available during the time in which the New Articles were in effect.

I. Mandatory Respondent

Rongxin argues that 19 U.S.C. 1677f-1(c) entitles it to a separate rate as a mandatory respondent, regardless of whether its meets Commerce's government control test, and cites *China Mfrs. Alliance, LLC v. United States*, 41 CIT __, __, 205 F. Supp. 3d 1325 (2017) for support. Because "[r]egulations and policy do not supersede statutory provisions," according to Rongxin, "Commerce contravened the statute by failing to adhere to the statute by giving precedence to its government-control policy." Pl.'s Br. at 33.

[6] In its *IDM*, Commerce noted that "[b]ecause we have found that Rongxin did not operate autonomously from the government in making decisions regarding the selection of management, we have not examined whether the Rongxin has established that it operates free of government control with respect to the other three *de facto* factors." *IDM* at 16. Because the court remands Commerce's determination regarding whether Rongxin established that it selected management autonomously, *see infra*, the court does not address the issue of the three remaining *de facto* factors at this time.

Rongxin's arguments that it was automatically entitled to a separate rate as a mandatory respondent and that Commerce's policy contravenes the statute are unpersuasive. When evaluating whether Commerce's interpretation of a statute is permissible, the court first considers whether "Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see also Rongxin III*, 331 F. Supp. 3d at 1405. If so, the court must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. If, however, the statute is "silent or ambiguous" regarding the issue at hand, the court evaluates whether Commerce provided "a permissible construction of the statute." *Id.*; *see also Rongxin III*, F. Supp. 3d at 1405. Because Commerce possesses "special expertise" in antidumping cases, the court "accord[s] substantial deference to its construction of pertinent statutes," *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1351 (Fed. Cir. 2016) (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)), and defers to Commerce's interpretation of its statute as long as that interpretation is reasonable, *Kyocera Solar, Inc. v. United States Int'l Trade Comm'n*, 844 F.3d 1334 (Fed. Cir. 2016). Put another way, if Commerce's methodology is arbitrary and capricious, it is contrary to law and will be set aside. *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012); *see also Rongxin III*, 331 F. Supp. at 1405.

Commerce's government control presumption has been repeatedly upheld by the Federal Circuit and by this court as a permissible interpretation of its statutory authority, including in cases involving mandatory respondents. *See, e.g.*, *Diamond Sawblades*, 866 F.3d at 1311 ("If a company from the NME country rebuts the presumption by showing its independence from state control, it can qualify for a separate rate; if the company fails to rebut the presumption, however, it receives the single state-wide dumping rate."); *see Changzhou Hawd Flooring Co., Ltd. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017) (noting that Commerce "presumes that each Chinese exporter and producer is state-controlled, and thus covered by a single China-wide antidumping-duty rate, but a firm may rebut the presumption"); *Changzhou Wujin Fine Chem.*, 701 F.3d at 1370 (noting that an exporter or producer who fails to rebut the presumption of state control receives "a single state-wide rate" but that the presumption is rebuttable such that "a company that demonstrates sufficient independence from state control may apply to Commerce for a separate rate"); *Rongxin III*, 331 F. Supp. 3d at 1405–07. *China Mfrs. Alliance*, 205 F. Supp. 3d 1325 (2017), cited by Rongxin, is inapposite

and not controlling. In *Diamond Sawblades*, the Federal Circuit clarified that *China Mfrs. Alliance* does not detract from the Federal Circuit's consistent position on the application of Commerce's government control presumption in NME cases. *Diamond Sawblades*, 866 F.3d at 1313 n.6; *see also Rongxin III*, 331 F. Supp. 3d at 1407 (distinguishing *China Mfrs. Alliance*). Therefore, Rongxin is not entitled to a separate rate merely because it is a mandatory respondent, and Commerce's government-presumption methodology is in accordance with law.

II. 1677m(d)

Rongxin contends that "Commerce must bear responsibility for the state of the administrative record" and that it cannot apply facts available or AFA because it did not issue deficiency questionnaires pursuant to 19 U.S.C. § 1677m(d). Pl.'s Br. at 36–37 (citing *Agro Dutch Indus. v. United States*, 31 CIT at 2059 and *China Kingdom Imp. Exp. Co. v. United States*, 31 CIT 1329, 1355, 507 F. Supp. 2d 1337, 1361 (2007)).

This argument is unpersuasive. The burden of creating an adequate record rests with the interested parties, and this case does not present a situation, as alleged by Rongxin, where "a respondent must guess what Commerce needs and answer unlimited unasked questions, for fear that Commerce will use either facts available or adverse facts available." Pl.'s Br. at 39. "Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record." *ABB Inc. v. United States*, 42 CIT __, __, Slip Op. 18–156 (Nov. 13, 2018) at 27 (citing *Nan Ya Plastics Corp. Ltd. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir. 2016); *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Here, Commerce clearly requested the Articles of Association applicable to the POR. Rongxin only provided Articles of Association applicable to part of the POR, despite knowing that the New Articles came into effect partway through the POR. Rongxin's answer to Commerce's question appeared complete, and Commerce did not discover until late in the review that the Articles provided did not cover the entire POR. *See ABB Inc.*, Slip Op. 18–156 at 27–28 (noting that 19 U.S.C. § 1677m(d) did not apply because Commerce did not discover the deficiency until it had the opportunity to delve into the company's sales documents). Under these circumstances, "Commerce is not obligated to issue a supplemental questionnaire to the effect of, 'Are you sure?'" *Id.* at 27.

Rongxin's citations to *Agro Dutch* and *China Kingdom* are also unpersuasive. As an initial matter, subsequent cases from the Federal Circuit and this court have clarified that respondents are primarily responsible for the state of the record. *See Nan Ya Plastics*, 810 F.3d at 1337; *QVD Food Co.*, 658 F.3d at 1324; *ABB Inc.*, Slip. Op. 18–156 at 26–28. Moreover, the cases Rongxin cites are distinguishable. In *Agro Dutch*, 31 CIT 2047 (2007), Commerce issued a supplemental questionnaire pursuant to § 1677m(d), then stated that because the various questionnaire responses were inconsistent, Agro Dutch had misled Commerce. *Id.* at 2055. The court determined that this conduct amounted to an improper use of § 1677m(d), and that Commerce's initial request for information was vague. *Id.* Here, Commerce did not misuse a questionnaire pursuant to § 1677m(d), and its initial request for information was not vague. In *China Kingdom*, 507 F. Supp. 2d 1337 (2007), the respondent discovered the deficiency and tried to correct it one day into verification and well prior to the preliminary determination, but Commerce rejected it. By contrast, in this case, Rongxin, which knew when its Articles of Association came into effect, did not alert Commerce to the deficiency and at no time attempted to remedy this deficiency. Thus, the court cannot say that Commerce failed to comply with 19 U.S.C. § 1677m(d).[7]

III. FA

Rongxin argues that Commerce's use of the Old Articles pursuant to facts available was unsupported by substantial evidence and contrary to law. Specifically, Rongxin alleges that the use of the Old Articles was actually AFA, rather than neutral facts available, and that Commerce manufactured a gap to fill in the record by disregarding the New Articles. The Government contends that Commerce's determination was appropriate because it applied neutral facts available, there was a gap to fill in the record because the New Articles were not effective until two months into the POR, and no evidence on the record showed how the New Articles operated in practice. The court determines that Commerce's application of neutral facts available to the first two months of the POR was supported by substantial evi-

[7] The Government argues that 19 U.S.C. § 1677m(d) applies only to AFA, not neutral facts available, and cites *Ningbo Dafa Chemical Fiber Co., Ltd. v. United States*, 580 F.3d 1247, 1252 (Fed. Cir. 2009) for support. In that case, however, it was "not contest[ed] that Commerce complied with § 1677m(d)," *id.* at 1252 n.2, which instead indicates that 19 U.S.C. § 1677m(d) applies. Moreover, the wording of § 1677m(d) does not limit its application to only adverse facts available, but rather speaks to the use of facts available generally. *See* § 1677m(d). Other case law also states that § 1677m(d) applies to both neutral and adverse facts available. *See, e.g.*, *ABB Inc.*, Slip. Op. 18–156 at 26 ("Commerce's authority to use other sources of information, however—including its authority to use an adverse inference—is subject to 19 U.S.C. § 1677m(d)) (citing 19 U.S.C. § 1677e(a),(b)).

dence and in accordance with law, but that Commerce failed to adequately justify using the Old Articles for the portion of the POR where the New Articles were effective.

Substantial evidence is "more than a mere scintilla," but "less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004). "A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

As discussed above, Commerce may use facts available to fill gaps in the administrative record. 19 U.S.C. § 1677e(a), (b). Commerce may also resort to AFA, but only when a respondent's failure to cooperate to the best of its ability caused the gap being filled. *See* 19 U.S.C. § 1677e(b); *Nippon Steel*, 337 F.3d at 1382. When applying AFA, Commerce may draw on (1) the petition for the investigation, (2) a final determination in the investigation, (3) any previous review under § 1675, or (4) any information placed on the record. 19 U.S.C. § 1677e(b).

In the *IDM*, Commerce explained its use of the Old Articles pursuant to neutral facts available as follows:

> Rongxin argues that the record rebuts the presumption that it does not operate free of government control because it operated autonomously from the government in making decisions regarding the selection of management. Specifically, it asserts that SITG was entitled to only one vote as a shareholder of Rongxin, has the ability to nominate only one candidate for election to the board of directors, and further, that a majority of votes is required to pass a resolution. We find, however, that the provisions of the Articles of Association cited by Rongxin, alone, are insufficient to demonstrate that it operated autonomously from the government in making decisions regarding the selection of management during the POR. Crucially, the effective date of the Articles of Association falls just over two months after the beginning of the POR, and the record is devoid of any information showing how the new Articles of Association operate in light of the conflicting scenarios of majority ownership and one vote per

> shareholder. As such, the record does not provide the necessary information that is required for the Department to determine whether Rongxin actually operated independently of the government . . .
>
> Although Rongxin asserts that the new Articles of Association in effect during the remainder of the POR establish that it operated free of government control in the selection of management, we find that this evidence, alone, is not dispositive. The record does not include any evidence to establish that Rongxin's operation in the latter part of the POR, i.e., after the effective date of the Articles of Associations provided by Rongxin, differed from the earlier part. Consequently, Rongxin has not rebutted the presumption of government control, and thus, we continue to find that for the remainder of the POR (other than the last month) the government, exercises, or has the potential to exercise, control over Rongxin's day-to-day operations, including the selection of management.

IDM at 14–15.

In this case, Commerce's use of the Old Articles for the two-month gap at the beginning of the POR was supported by substantial evidence and in accordance with law. Rongxin contends that any use of the Old Articles is necessarily AFA, because Commerce relied on a previous administrative review as the source of these articles. Pl.'s Br. at 25–26. However, the statute does not prescribe what sources Commerce may use when applying neutral facts available, let alone proscribe Commerce from using those listed in 19 U.S.C. § 1677e(b). Moreover, it was entirely reasonable for Commerce to rely upon a set of Articles of Association drawn from the previous administrative review because, logically, the Old Articles likely continued to apply until the New Articles came into effect two months into the POR. Indeed, at no point does Rongxin dispute that the Old Articles were actually those in effect for the first two months of the POR.

Commerce's decision to replace the New Articles with the Old Articles, however, was unsupported by substantial evidence and contrary to law. As previously discussed, Commerce may only use facts available when there is a gap in the record to fill. Here, once the New Articles came into effect, there was no longer an evidentiary gap to fill. The Government and Commerce characterize the New Articles as creating an operational gap because "the record is devoid of any information showing how the new Articles of Association operate in light of the conflicting scenarios of majority ownership and one vote per shareholder" and "[t]he record does not include any evidence to

establish that Rongxin's operation in the latter part of the POR, i.e., after the effective date of the Articles of Associations provided by Rongxin, differed from the earlier part." *IDM* at 14–15. However, the New Articles themselves provide evidence on how they operate, and Commerce pointed to no record evidence that suggested the New Articles were somehow inoperative or that Rongxin operated inconsistently with the New Articles after their effective date. Because Commerce identified no record information that supported its conclusion and ignored evidence to the contrary, its decision was not supported by substantial evidence. *See CS Wind Vietnam Co.*, 832 F.3d at 1373; *Suramerica*, 44 F.3d at 985 (quoting *Universal Camera Corp.*, 340 U.S. at 487).

Moreover, in previous reviews involving Rongxin, Commerce based its *de facto* analysis extensively on a detailed evaluation of the Old Articles without requiring extrinsic evidence of how the Old Articles operated. *See Rongxin III*, 331 F. Supp. 3d at 1398–1401, 1403–04 (detailing Commerce's reliance on the Old Articles when evaluating whether Rongxin had established *de facto* independence from Chinese government control). In contrast, here, Commerce undertook no analysis of the New Articles, and did not explain in the *IDM* why it treated two such similar scenarios differently. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.") (internal quotation and citation omitted); *Huzhou Muyun Wood Co. v. United States*, 42 CIT __, __, 324 F. Supp. 3d 1364, 1375 (2018), *as amended* (July 27, 2018).

CONCLUSION

The court remands to Commerce for reconsideration, consistent with this opinion, of whether Rongxin has established *de facto* independence from the Chinese government such that it is entitled to a separate rate. The court expresses no opinion on the outcome. Commerce may, in its discretion, reopen the record. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the court and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: January 8, 2019
New York, New York

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

Slip Op. 19–4

UNITED STATES, Plaintiff, v. SELECTA CORPORATION, LLC d/b/a/ DICKIES MEDICAL UNIFORMS, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 11–00089

[Granting plaintiff's motion for a judgment by default]

Dated: January 11, 2019

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for plaintiff. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Judith M. Ubando*, Attorney, Office of Associate Chief Counsel, U.S. Customs and Border Protection, of Houston, TX.

OPINION

Plaintiff moves for entry of a judgment by default ("default judgment") in an action brought to recover a civil penalty under section 592 of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1592 (2000).[1] Pl.'s Renewed Mot. for Default J. (Oct. 1, 2018), ECF Nos. 24 (conf.), 26 (public) ("Pl.'s Mot."). The court grants a default judgment for a penalty in the amount plaintiff seeks, plus post-judgment interest as provided by law, and costs.

I. BACKGROUND

Plaintiff's amended complaint seeks $51,102, plus post-judgment interest and costs, stemming from administrative penalty procedures conducted by Customs and Border Protection ("Customs") against defendant Selecta Corporation, LLC ("Selecta"). Am. Compl. (July 19, 2016), ECF No. 21. Plaintiff filed proof of service of the amended complaint on Selecta's Chief Executive Officer. Proof of Service (Aug. 23, 2016), ECF No. 23. In response to an inquiry by a representative of the Clerk of the Court, plaintiff informed the office of the Clerk of its intention to file a motion (i.e., an application) for a judgment by default by July 2018 and later indicated that its motion would be filed on October 1, 2018.

Plaintiff's application for a default judgment, like its amended complaint, seeks $51,102, plus post-judgment interest and costs. Pl.'s Mot. Plaintiff has not filed an affidavit or other submission addressing a failure on the part of Selecta to plead or otherwise defend. *See* USCIT R. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and

[1] Further citations to the Tariff Act are to the relevant portions of the 2000 edition of the United States Code.

that failure is shown by affidavit or otherwise, the clerk must enter the party's default."). Because no entry of default had been entered with respect to the amended complaint, the court, on January 4, 2019, directed the Clerk of the Court to enter defendant's default in this case. Order (Jan. 4, 2019), ECF No. 28. Default was entered on January 8, 2019. Entry of Default (Jan. 8, 2019), ECF No. 29.

II. DISCUSSION

The court will proceed to rule on plaintiff's application for a default judgment. In doing so, the court will presume as true all well-pled facts as set forth in the amended complaint. *See Taser Int'l, Inc. v. Phazzer Elecs., Inc.*, Appeal No. 2017–2637, at 13, 2018 WL 5309940, at *6 (Fed. Cir. Oct. 26, 2018) (unpublished) (citing *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005)).

The amended complaint alleges that Selecta, through prior disclosures made on April 1 and October 30, 2009, admitted to having misclassified and undervalued certain imported merchandise on 1295 entries of certain wearing apparel, principally medical scrubs and lab coats, that it made through twelve ports of entry during the period between April 17, 2004 and April 17, 2009. Am. Compl. ¶¶ 4–6. Selecta calculated a loss of revenue to the government of $834,879.98. *Id.*¶¶ 7, 12. Selecta tendered this amount on October 30, 2009 and, on April 5, 2010, tendered an additional $4,814.40 determined by Customs to remain owing on the entries subject to the prior disclosures. *Id.* ¶¶ 15, 17, 19. Customs determined that Selecta had satisfied the requirements for a prior disclosure, impliedly accepting that the total tendered amount of $839,694.38 represented the total loss of revenue. *Id.*¶¶ 17–18.

In 2010, Customs issued a pre-penalty notice of its intention to seek a penalty of $51,102, based on a degree of culpability of negligence and calculated as the amount of interest on the previously underpaid duties and fees, *id.* ¶ 20, and subsequently issued a notice of a penalty claim in that amount, *id.*¶ 21. Selecta did not respond to the penalty claim and has not tendered any amount in addition to its earlier tenders. *Id.*

Plaintiff alleges that Selecta's violations of section 592(a) of the Tariff Act occurred due to negligence. *Id.* ¶ 23. In an action brought under section 592(e) to recover a civil penalty, the United States has the burden of establishing that the acts or omissions constituting a violation of section 592 occurred, and once that burden is met, the defendant has the burden of showing that they did not occur due to negligence. 19 U.S.C. § 1592(e)(4). The amended complaint alleges that material false statements occurred, and, moreover, alleges that

the occurrence of the material false statements made upon entry of the merchandise were admitted in Selecta's prior disclosure submissions. Am. Compl. ¶¶ 12, 19. Defendant has made no showing that the false statements were not the result of negligence on its part.

Under 19 U.S.C. § 1592(c)(4)(B), upon a valid prior disclosure, the maximum penalty for a negligent violation is the interest, computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of Title 26, U.S. Code, on the amount of lawful duties, taxes, and fees of which the United States was deprived. Customs determined that amount, computed from the dates of liquidation of the entries until payment by Selecta, as $51,102. Am. Compl. ¶ 18. Plaintiff alleges that this amount "represents the interest computed on the underpaid duties and fees, totaling $839,894.38." *Id.*¶ 24.

The amount of a penalty is determined by the court *de novo*. 19 U.S.C. § 1592(e)(1). The court may consider various factors, including aggravating and mitigating factors, in determining the amount of penalty, up to the statutory maximum amount. In this case, while the statute characterizes the interest amount calculated according to 19 U.S.C. § 1592(c)(4)(B) as a maximum "penalty," the interest plaintiff seeks is only the amount that would make the government whole for the unpaid duties and fees accruing from the dates of liquidation up until the dates of the tenders, made on October 30, 2009 and on April 5, 2010.

Defendant having failed to respond in any way since the issuance of the penalty claim and throughout the pendency of this litigation before the court, the court has no basis to conclude that the penalty the government seeks, calculated as the amount of the interest from the dates of liquidation to the dates of payment, would be inequitable. Based on the government's loss of the use of funds, the court concludes that the imposition of the penalty sought by plaintiff is, rather, the appropriate disposition of this action.

III. CONCLUSION

For the reasons set forth above, the court will enter judgment for plaintiff for a civil penalty in the amount of $51,102, plus post-judgment interest as provided by law, and costs.

Dated: January 11, 2019
New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU
CHIEF JUDGE

Slip Op. 19–5

MERIDIAN PRODUCTS LLC, Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13–00246

[Ordering further agency proceedings in compliance with a mandate of the United States Court of Appeals for the Federal Circuit]

Dated: January 14, 2019

Daniel J. Cannistra, Crowell & Moring, LLP, of Washington, D.C., for plaintiff. With him on the brief was *Alexander Schaefer*.

Donald Harrison, Gibson, Dunn & Crutcher, LLP, of Washington, D.C., for plaintiff-intervenor.

Aimee Lee, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Jessica M. Link*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor.

OPINION AND ORDER

Stanceu, Chief Judge:

This litigation arose from a challenge to an administrative determination by the International Trade Administration, United States Department of Commerce (“Commerce” or the “Department”), that certain imported appliance door handles fall within the scope of antidumping and countervailing duty orders on certain aluminum extrusions from the People’s Republic of China.

Before the court is the mandate issued by the United States Court of Appeals for the Federal Circuit (“Court of Appeals”) in *Meridian Prods. v. United States*, 890 F.3d 1272 (Fed. Cir. 2018) (“*Meridian III*”). CAFC Mandate in Appeal # 16–2657 (June 28, 2018), ECF No. 82. *Meridian III* reversed the judgment entered by the court in *Meridian Prods. v. United States*, 40 CIT __, 180 F. Supp. 3d 1283 (2016) (“*Meridian II*”) and remanded the case to the Court of International Trade for further proceedings. As directed by the Court of Appeals, the court issues this Opinion and Order to instruct Commerce on the issuance of a new administrative determination.

I. BACKGROUND

The background of this litigation is described in the prior opinions of the court and the opinion of the Court of Appeals. *See Meridian Prods. v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1306, 1308–09

(2015) ("*Meridian I*"); *Meridian II*, 40 CIT at __, 180 F. Supp. 3d at 1284–85; *Meridian III*, 890 F.3d at 1274–77. As discussed in those opinions, plaintiff Meridian Products LLC ("Meridian") submitted a request to Commerce for a scope ruling (the "Scope Ruling Request") on January 11, 2013 on three types of Meridian's imported kitchen appliance door handles, identified as "Type A," "Type B," and "Type C" handles. *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1308 (citing *Letter Requesting a Scope Ruling Regarding Kitchen Appliance Door Handles*, C-570–968, A-570–967 (Jan. 11, 2013) (Admin. R. Doc. No. 1), ECF No. 39 App. 2 ("*Scope Ruling Request*")). Commerce issued its decision, the "Final Scope Ruling," on June 21, 2013, in which Commerce interpreted the scope of antidumping and countervailing duty orders (the "Orders")[1] to include all three handle types. *Final Scope Ruling on Meridian Kitchen Appliance Door Handles,* C-570–968, A-570–967 (June 21, 2013) (Admin. R. Doc. No. 34), ECF No. 25–1 ("*Final Scope Ruling*"). The Type A and Type C handles, which are one-piece appliance door handles fabricated from a single aluminum extrusion, are no longer at issue in this litigation, *Meridian I* having sustained the Department's decisions in the Final Scope Ruling placing them within the scope of the Orders and *Meridian III* having been limited to the issue raised by the Type B handles. *See Meridian III*, 890 F.3d at 1276 (citing *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1310–12). This Opinion and Order, therefore, addresses only the Type B handles, which do not consist entirely of an aluminum extrusion.

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), which grants this Court jurisdiction over civil actions brought under section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012). In reviewing the contested scope ruling, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

The "Type B" handle consists of a component fabricated from an aluminum extrusion, two plastic "end caps," and two screws, each of

[1] The scope language in both orders is essentially the same. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650–51 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653–54 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

which attaches a plastic end cap to the aluminum component. *See Final Scope Ruling* 2. The Scope Ruling Request described a Type B handle as "an assembly of the middle handle bar extrusion piece plus two plastic injection-molded end caps at each end." *Scope Ruling Request* 2.

In *Meridian I*, the court held that Type B handles were not described by the general scope language of the Orders, i.e., the scope language apart from the several specific exclusions. *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1314, 1318. The court concluded that this language, under which an extrusion "is a shape or form produced by an extrusion process," did not, as a general matter, describe an assembly, opining that "no scope language in the Orders is so open-ended as to sweep into the scope all assembled goods that contain one or more aluminum extrusions as parts." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1312 (internal citations omitted). While the scope language contains a provision—the "subassemblies" provision—that places within the scope of the Orders aluminum extrusion components of some assembled articles, the subassemblies provision is expressly limited to "partially assembled merchandise." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The subassemblies provision states that, except for a good satisfying a specific exclusion (the "finished goods kit" exclusion),[2] "[t]he scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Under this "subassemblies" provision, the scope includes only the components within an assembly that are aluminum extrusions and thus "does not include the non-aluminum extrusion components of subassemblies." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. *Meridian I* reasoned that this provision, in any event, did not describe the Type B handles, which the Scope Ruling Request stated were imported in assembled form and which Commerce found to be ready for use as is at the time of importation. *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1313 (citing *Final Scope Ruling* 13).

[2] The "finished goods kit" exclusion reads as follows:

> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc*. in the packaging with an aluminum extrusion product.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Meridian I also opined that even were the Type B handles described by the general scope language, they would be placed outside the Orders by the "finished merchandise" exclusion. *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1315–16. This exclusion applies to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Concluding that "the Department's determination . . . is not based on reasonable interpretations of the general scope language and the finished merchandise exclusion," *Meridian I* remanded the Final Scope Ruling to Commerce for reconsideration. *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1316, 1318.

In its determination upon remand (the "Remand Redetermination"), Commerce asserted that its Final Scope Ruling was correct but, to comply with the court's decision in *Meridian I*, decided under protest that the Type B door handles were not included in the scope of the Orders. *See Final Results of Redetermination Pursuant to Court Remand* 1, 7–15 (Mar. 23, 2016) (Remand Admin. R. Doc. No. 4), ECF No. 67. The court affirmed the Department's determination that Type B handles were not included in the scope of the Orders. *Meridian II*, 40 CIT at __, 180 F. Supp. 3d at 1292. Following this decision, the Aluminum Extrusions Fair Trade Committee, defendant-intervenor in this case, appealed the judgment in *Meridian II* to the Court of Appeals.

In *Meridian III*, the Court of Appeals held that *Meridian I* was incorrect in concluding that the Type B handles were not described by the general scope language of the Orders. *Meridian III*, 890 F.3d at 1280–81. *Meridian III* ruled that Commerce permissibly decided that that the presence of the plastic end caps did not remove the Type B handles from the scope because Commerce acted reasonably, and in accord with record evidence, in concluding that these end caps were "fasteners." *Meridian III*, 890 F.3d at 1278–80. The Court of Appeals disagreed with the reasoning in *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1313, that because the only scope language references to fasteners were in the subassemblies provision and the finished goods kit exclusion, Commerce had erred in disregarding the presence of the plastic end caps—on the ground that they were "fasteners"—in concluding that the Type B handles fell within the general scope language. The Court of Appeals opined that "[a]lthough a description of fasteners only appears in the 'finished goods kit' scope exclusion, the

'finished goods kit' language informs what may constitute a fastener in the context of the scope of the antidumping duty order as a whole." *Id.* at 1279. *Meridian III* also held that Commerce correctly had concluded in the Final Scope Ruling that the Type B handles were not excluded from the Orders by operation of the finished goods kit exclusion. *Id.* at 1281.

Although it reversed the holding in *Meridian I* as to the general scope language and, accordingly, vacated the judgment in *Meridian II* sustaining the Remand Redetermination, *Meridian III* did not hold that the Final Scope Ruling necessarily was in accordance with law. Specifically, the Court of Appeals did not sustain the Department's determination in the Final Scope Ruling that the finished merchandise exclusion did not apply to the Type B handles. As the Court of Appeals explained: "Because it is unclear from the record before Commerce and the statements made by Meridian's counsel in its reply brief and at oral argument before this court whether the Type B handles are fully and permanently assembled at the time of entry, we remand for Commerce to clarify this point." *Id.* at 1281–82 (footnote omitted).

The uncertainty the Court of Appeals identified as to whether the Type B handles are imported in assembled or unassembled form is understandable, in particular because the Final Scope Ruling itself can be read to be inconsistent on this issue. At one place in the document, Commerce stated that "the record is undisputed that the aluminum extrusion parts are not fully and permanently assembled with non-aluminum extrusion parts at the time of entry." *Final Scope Ruling* 13. Because Commerce made this statement in describing "Meridian's products," *id.*, it is possible, but not certain, that Commerce intended to describe not only the Types A and C handles, which consist entirely of a fabricated aluminum extrusion, but also the Type B handles, which do not. Nevertheless, in the next paragraph Commerce, again referring to all three types, referred to "the fact that the products at issue are ready for use 'as is' at the time of importation." *Id.* This statement indicates that Commerce may have considered the Type B handles to have been imported in assembled form. The Court of Appeals was aware of this inconsistency as it appeared in the Final Scope Ruling, and elsewhere in the record, and expressly cited the statement in the Scope Ruling Request describing a Type B handle as "an assembly of the middle handle bar extrusion piece plus two plastic injection molded end caps at each end." *Meridian III*, 890 F.3d at 1281 n.8 (internal quotation marks and citation omitted).

The finding in the Final Scope Ruling that "the aluminum extrusion parts are not fully and permanently assembled with non-aluminum

extrusion parts at the time of entry" was the reason Commerce gave for concluding that Meridian's handles, including the Type B handles, did not qualify for the finished merchandise exclusion. *Final Scope Ruling* 13. As the Court of Appeals implicitly recognized, this rationale cannot suffice if the Type B handles are fully and permanently assembled at the time of entry. Accordingly, *Meridian III* directed that "[i]f Commerce determines that the Type B handles are imported unassembled, then its original scope ruling controls and the inquiry ends" and that "[i]f Commerce determines the Type B handles are imported fully and permanently assembled, then we direct Commerce to address the question of whether the Type B handles are excluded from the scope of the antidumping and countervailing duty order as 'finished merchandise.'" *Meridian III*, 890 F.3d at 1282. The court addresses each of these possibilities below.

Should Commerce determine, based on substantial record evidence, that the Type B handles are entered in fully assembled form, then it must determine the applicability of the finished merchandise exclusion to the Type B handles in conformity with *Meridian III* (as that decision requires), but it also must do so in conformity with another decision of the Court of Appeals. A precedential decision, issued the day after *Meridian III*, interpreted the scope language of these same Orders in considering an appliance door handle that is highly similar to the Type B handle. In this subsequent opinion, the Court of Appeals held that "[w]ith respect to the exclusions from the Order's scope . . . the exception for fasteners unambiguously applies only to the finished goods kit exclusion and not to the finished merchandise exclusion." *Whirlpool Corp. v. United States*, 890 F.3d 1302, 1311 (Fed. Cir. 2018) ("*Whirlpool*"); *but see Whirlpool Corp. v. United States*, 890 F.3d 1302, 1312–13 (Reyna, J. dissenting). *Whirlpool* did not overturn *Meridian III*, and the court accordingly interprets the two appellate decisions consistently. The fasteners exception in the finished goods kit exclusion "informs what may constitute a fastener in the context of the scope of the antidumping duty order as a whole" when the question is whether a good falls within the general scope language, i.e., the language apart from the specific exclusions. *Meridian III*, 890 F.3d at 1279. But the fasteners exception properly may not be construed to limit the applicability of the finished merchandise exclusion. *Whirlpool*, 890 F.3d at 1311. Therefore, in order to comply with the holding of *Whirlpool*, Commerce may not reach a determination that the finished merchandise exclusion is inapplicable on the ground that some or all of the non-aluminum-extrusion components of a Type B handle are considered by Commerce to fall within the

meaning of the term “fasteners.” *See Whirlpool*, 890 F.3d at 1311 & n.4. Rather, as required by the express terms of the finished merchandise exclusion, Commerce must determine that the Type B handles are not within the scope of the Orders if they are found to be “finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Should Commerce validly determine, based on substantial record evidence, that the Type B handles are entered in unassembled form, the “original scope ruling controls.” *Meridian III*, 890 F.3d at 1282. But in that event, another issue requires clarification. The court considers the Final Scope Ruling to be unclear as to whether Commerce would consider the entire unassembled Type B handle, or only the extruded aluminum center component, to be merchandise that is subject to the Orders. If Commerce concludes that the Type B handles are entered in unassembled form, it must clarify this point in its new redetermination and in doing so must address the scope language providing that “[t]he scope does not include the non-aluminum extrusion components of subassemblies or subject kits.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

The same lack of clarity would affect the Final Scope Ruling even if the Type B handle were considered to be in assembled form at the time of entry yet somehow still be considered by Commerce to be within the scope of the Orders. Should Commerce decide in its new redetermination that the Type B handle is in assembled form at the time of entry yet is still within the scope of the Orders, Commerce in explaining such a decision would need to clarify whether it is the extruded aluminum component or the entire handle that Commerce considers to fall within the scope.

III. CONCLUSION AND ORDER

In conformity with the mandate of the Court of Appeals, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Department’s March 2016 Remand Redetermination be, and hereby is, vacated; it is further

ORDERED that Commerce shall file, within ninety (90) days of the date of this Opinion and Order, a new determination upon remand (“Second Remand Redetermination”) that determines, according to substantial evidence on the administrative record, whether Meridian’s Type B handles are fully and permanently assembled at the time of entry; it is further

ORDERED that if Commerce determines, based on substantial evidence on the administrative record, that the Type B handles are fully and permanently assembled at the time of entry, it shall determine whether the Type B handles qualify for the "finished merchandise" exclusion, shall do so consistently with the holdings of *Meridian III* and *Whirlpool*, and shall provide an explanation of its reasoning; it is further

ORDERED that if Commerce determines, based on substantial evidence on the administrative record, that the Type B handles are in unassembled form at the time of entry, or if it otherwise determines that the Type B handles are within the scope of the Orders, it shall determine whether the Type B handles in the entirety, or only their extruded aluminum components, are within the scope of the Orders; it is further

ORDERED that plaintiff, plaintiff-intervenor, and defendant-intervenor may file comments on the Second Remand Redetermination within thirty (30) days from the date on which the Second Remand Redetermination is filed; and it is further

ORDERED that defendant may file a response to the comments within fifteen (15) days from the date on which the last comment is filed.

Dated: January 14, 2019
New York, New York

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

Slip Op. 19–6

WHIRLPOOL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00199

[Ordering further administrative proceedings in compliance with a mandate of the United States Court of Appeals for the Federal Circuit]

Dated: January 14, 2019

Donald Harrison, Gibson, Dunn & Crutcher, LLP, of Washington, D.C., for plaintiff.

Aimee Lee, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Jessica M. Link*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor.

OPINION AND ORDER

Stanceu, Chief Judge:

This litigation arose from a challenge to a decision (the "Final Scope Ruling") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") interpreting the scope of an antidumping duty order and a countervailing duty order on certain aluminum extrusions from the People's Republic of China ("China").

Before the court is the mandate issued by the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *Whirlpool Corp. v. United States*, 890 F.3d 1302 (Fed. Cir. 2018) ("*Whirlpool III*"). CAFC Mandate in Appeal # 17–1117 (Sept. 12, 2018), ECF No. 70. *Whirlpool III* affirmed in part, reversed in part, and vacated in part the judgment in *Whirlpool Corp. v. United States*, 40 CIT __, 182 F. Supp. 3d 1307 (2016) ("*Whirlpool II*"). *Whirlpool III*, 890 F.3d at 1311–12. This Opinion and Order instructs Commerce regarding further administrative proceedings, as directed by the Court of Appeals.

I. BACKGROUND

Background on this litigation is described in the court's prior opinions and is summarized briefly herein. *See Whirlpool Corp. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1296, 1298–99 (2016) ("*Whirlpool I*"); *Whirlpool II*, 40 CIT at __, 182 F. Supp. 3d at 1308–09; *Whirlpool III*, 890 F.3d at 1305–07.

Plaintiff Whirlpool Corporation ("Whirlpool") commenced this litigation in 2014 to contest the Final Scope Ruling, in which Commerce construed the scope of antidumping and countervailing duty orders (the "Orders")[1] on aluminum extrusions from China to include two types of Whirlpool's imported door handles for kitchen appliances: "assembled" handles and "one-piece" handles. *See Final Scope Ruling on Kitchen Appliance Door Handles*, A-570–967, C-570–968 (Aug. 4, 2014) (Admin. R. Doc. No. 11), ECF No. 20–1 ("*Final Scope Ruling*"). In *Whirlpool I*, the court sustained the Department's determination that the one-piece handles, each of which is fabricated from a single aluminum extrusion, were within the scope of the Orders and remanded to Commerce the Department's decision placing within the scope the other type of handles, which are five-piece assemblies con-

[1] The scope language in both Orders is essentially the same. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

sisting of a component fabricated from an aluminum extrusion and two plastic end caps fastened to the aluminum component with two screws. *Whirlpool I*, 40 CIT at __, 144 F. Supp. 3d at 1301–08. Only the assembled appliance door handles remain at issue in this litigation.

Commerce issued a determination in response to *Whirlpool I* (the "Remand Redetermination") that, under protest, placed the assembled appliance door handles outside the scope of the Orders, a decision the court sustained in *Whirlpool II*. *Results of Redetermination Pursuant to Court Remand* (Apr. 15, 2016) (Remand Admin. R. Doc. No. 3), ECF No. 51 ("*Remand Redetermination*"). On appeal, the Court of Appeals held that the court's decision in *Whirlpool I* erred in its interpretation of certain of the scope language of the Orders but upheld the decision in certain other respects. *Whirlpool III*, 890 F.3d at 1309, 1311–12. The Court of Appeals directed this Court to order Commerce to conduct further proceedings consistent with its opinion.

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), which grants this Court jurisdiction over civil actions brought under section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012). In reviewing the contested scope ruling, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

The assembled handles at issue in this case "are 38 models of assembled kitchen appliance door handles, 32 of which are made for specific models of refrigerators, four are made for specific ranges, one is made for a dishwasher, and one is made for an electric oven." *Whirlpool I*, 40 CIT at __, 144 F. Supp. 3d at 1299 (citing *Letter Requesting a Scope Ruling Regarding Kitchen Appliance Door Handles With End Caps* Attach. 1 (Dec. 20, 2013) (Admin. R. Doc. No. 1), ECF No. 38 ("*Assembled Handle Request*")). According to Whirlpool's scope ruling request for the assembled handles, each handle has within the assembly a single component that is fabricated from an aluminum extrusion. Also common to each handle in Whirlpool's scope ruling request is the presence of plastic end caps that are attached to the aluminum component by screws. *See Assembled Handle Request* 7, 16–17. According to the request, an "assembled handle," as imported, consists of an assembly of five components: a

component fabricated from an aluminum extrusion, two plastic end caps, and two screws, each of which attaches an end cap to the aluminum component. *See id.* at 7, Attach. 1, Attach. 2. The request added that the assembled handles "are fully manufactured, assembled and completed, with no further processing of the handle required." *Id.* at 7. Citing this request, Commerce found in the Final Scope Ruling that:

> The handles at issue consist of alloy 6 series aluminum extrusions. The non-aluminum components consist of plastic end caps that are attached by metal screws to the handle and the surface of the kitchen appliance door. The handles are ready for attachment to the refrigerator door upon importation.

Final Scope Ruling 5 (footnote omitted).

Whirlpool I concluded that Commerce, in placing the assembled handles inside the scope, unreasonably construed the "general" scope language, i.e., the scope language apart from several specific exclusions. The court noted that the general scope language provides that the Orders apply to "aluminum extrusions which are shapes and forms, produced by an extrusion process." *Whirlpool I*, 40 CIT at __, 144 F. Supp. 3d at 1302 (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653). The court reasoned that "[i]t is not reasonable to interpret the scope language to place within the Orders, as a general matter, *any* assembled good containing an aluminum extrusion, as defined therein." *Id.* The court addressed a provision in the scope language (the "subassemblies" provision) that places within the scope "aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below."[2] *Id.* (quoting *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654). Under the subassemblies provision, an assembled good is not placed within the scope in the entirety. To the contrary, "[t]he scope does not include the non-aluminum extrusion components of subassemblies or subject kits." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Commerce did not engage in an analysis of the subassemblies

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[2] The reference to "finished goods 'kit'" is to the following exclusion in the scope language:

> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc*. in the packaging with an aluminum extrusion product.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

provision in the Final Scope Ruling and did not construe or rely upon the subassemblies provision in placing the assembled handles within the scope of the Orders. Commerce found that the plastic end caps were "analogous to washers" and therefore were "fasteners," further reasoning that "the handles at issue fall inside the language of the scope that includes 'aluminum extrusions which are shapes and forms, produced by an extrusion process.'" *Final Scope Ruling* 18 (footnote omitted).

Noting that "Commerce did not rely on the 'subassemblies' provision in the general scope language" in concluding that the assembled handles were subject merchandise, the court opined that "[t]his is understandable, as the provision expressly applies to 'partially assembled merchandise.'" *Whirlpool I*, 40 CIT at __, 144 F. Supp. 3d at 1303. The court added that "[t]he uncontradicted record evidence is that the assembled handles are imported in a form in which they require no further assembly or processing prior to their intended use." *Id.*, 40 CIT at __, 144 F. Supp. 3d at 1303. The court quoted language in the Final Scope Ruling in which Commerce had found, with respect to Whirlpool's assembled handles for refrigerator doors, that these handles "are ready for attachment to the refrigerator door upon importation." *Id.*, 40 CIT at __, 144 F. Supp. 3d at 1303 (quoting *Final Scope Ruling* 5).

The Final Scope Ruling concluded, additionally, that the assembled handles did not qualify for the "finished merchandise exclusion" set forth in the scope language of the Orders. *Final Scope Ruling* 17–20. The finished merchandise exclusion places outside the scope of the Orders "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Addressing the finished merchandise exclusion, *Whirlpool I* opined that "Commerce presents no convincing reason why the plain language of this exclusion, which appears to describe the assembled handles, would not be dispositive were the general scope language presumed to describe these goods." *Whirlpool I*, 40 CIT at __, 144 F. Supp. 3d at 1304. The court rejected the Department's reasoning that an assembled handle does not qualify for the finished merchandise exclusion because it consists solely of an aluminum extrusion and "fasteners" (which Commerce, in a conclusion the court considered unreasonable, considered the plastic end caps to be). The court

pointed out that "[i]n setting forth the finished merchandise exclusion in the scope language of the Orders, Commerce made no mention of an exception for fasteners." *Id.*, 40 CIT at __, 144 F. Supp. 3d at 1304. *Whirlpool I* rejected the Department's reliance on a previous scope ruling (Final Scope Ruling on J.A. Hancock, Inc.'s Geodesic Structures (July 17, 2012)), which the court ruled inapposite because it involved a disassembled good. *Id.*, 40 CIT at __, 144 F. Supp. 3d at 1304. According to the analysis in *Whirlpool I*, even if the end caps were considered to be fasteners, "the scope language of the Orders could not reasonably be interpreted to include the assembled kitchen appliance door handles at issue in this case." *Id.*, 40 CIT at __, 144 F. Supp. 3d at 1305.

In response to *Whirlpool I*, Commerce determined, under protest, that Whirlpool's assembled handles were outside the scope of the Orders, *Remand Redetermination*, and the court sustained this decision, *Whirlpool II*, 40 CIT at __, 182 F. Supp. 3d at 1313, 1316. The Aluminum Extrusions Fair Trade Committee, defendant-intervenor in this case, appealed the judgment entered in *Whirlpool II* to sustain the Remand Redetermination. In *Whirlpool III*, the Court of Appeals vacated those portions of *Whirlpool I* holding that the general scope language of the Orders did not describe Whirlpool's assembled handles and instructed this Court to vacate the Department's April 2016 Remand Redetermination and reinstate the portion of the August 2014 Final Scope Ruling concluding that the assembled handles fall within the general scope language. *Whirlpool III*, 890 F.3d at 1309, 1311.

In *Whirlpool III*, the Court of Appeals stated that "[t]he general scope language unambiguously includes aluminum extrusions that are part of an assembly." *Id.* at 1309. "The Orders explicitly include aluminum extrusions 'that are assembled after importation' in addition to 'aluminum extrusion components that are attached (e.g. by welding or fasteners) to form subassemblies.'" *Id.* (quoting *AD Order*, 76 Fed. Reg. at 30,650–51).

Although rejecting *Whirlpool I*'s conclusion that the general scope language did not describe the assembled handles, *Whirlpool III* affirmed certain other conclusions in that opinion and order. The Court of Appeals ruled, as did *Whirlpool I*, that the Department's decision that the finished merchandise exclusion did not apply to the assembled handles rested on a misinterpretation of the scope language. Specifically, Commerce erred in construing the "fasteners exception," which the scope language specified for the finished goods kit exclusion, to apply also to the finished merchandise exclusion. The Court of Appeals held, accordingly, that the scope language did not permit

Commerce to conclude, as it did in the Final Scope Ruling, that the assembled handles failed to qualify for the finished merchandise exclusion on the ground that the parts in the assembly that were not aluminum extrusions were "fasteners." *Whirlpool III*, 890 F.3d at 1310. Having held the Department's interpretation of the finished merchandise exclusion to be impermissible, the Court of Appeals directed that "[o]n remand, Commerce will be given an opportunity to arrive at a legally permissible interpretation of the finished merchandise exclusion and Whirlpool's assembled handles should be reassessed in light of that interpretation." *Id.* at 1311 (citing *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 783 (Fed. Cir. 1995) *as corrected on reh'g* (Sept. 1, 1995)).

The court directs Commerce to reach a new determination in conformance with the opinion of the Court of Appeals in *Whirlpool III*. Specifically, Commerce must determine whether Whirlpool's assembled handles, in the form in which they are entered, constitute "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654; *see Whirlpool III*, 890 F.3d at 1311. As required by the holding of *Whirlpool III*, Commerce is precluded from reaching a determination that the finished merchandise exclusion is inapplicable on the ground that some or all of the non-aluminum-extrusion components in the five-piece assembly comprising an assembled handle are considered by Commerce to fall within the meaning of the term "fasteners." *See Whirlpool III*, 890 F.3d at 1311 & n.4.

Should Commerce determine that the assembled handles are within the scope of the Orders despite the finished merchandise exclusion, it must explain its reasoning and also must clarify whether it is concluding that the handles in their entirety, or only the extruded aluminum components therein, are within the scope of the Orders and provide reasons for that conclusion. In doing so, it must address the scope language providing that "[t]he scope does not include the non-aluminum extrusion components of subassemblies." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. *See Whirlpool III*, 890 F.3d at 1309 (noting that the Orders explicitly include, *inter alia*, "aluminum extrusions that are attached (e.g., by welding or fasteners) to form subassemblies.").

III. CONCLUSION AND ORDER

In compliance with the opinion and mandate of the Court of Appeals in *Whirlpool III*, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Department's Remand Redetermination (Apr. 15, 2016) be, and hereby is, vacated; it is further

ORDERED that the portions of the Department's Final Scope Ruling (Aug. 4, 2014) concluding that Whirlpool's assembled handles are described by the general scope language of the Orders be, and hereby are, reinstated; it is further

ORDERED that the remaining portions of the Department's Final Scope Ruling (Aug. 4, 2014) be, and hereby are, vacated; it is further

ORDERED that Commerce shall file, within ninety (90) days of the date of this Opinion and Order, a new determination upon remand ("Second Remand Redetermination") that, in conformance with the requirements of *Whirlpool III* and this Opinion and Order, reaches a new determination of whether Whirlpool's assembled handles qualify for the "finished merchandise" exclusion that is set forth in the scope language in the Orders; it is further

ORDERED that if Commerce decides that the assembled handles are subject merchandise, it must clarify whether the entire assembly, or only the extruded aluminum component, is within the scope of the Orders; it is further

ORDERED that plaintiff and defendant-intervenor may file comments on the Second Remand Redetermination within thirty (30) days from the date on which the remand redetermination is filed; and it is further

ORDERED that defendant may file a response to the comments within fifteen (15) days from the date on which the last comment is filed.

Dated: January 14, 2019
New York, New York

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

Slip Op. 19–7

CHINA MANUFACTURERS ALLIANCE, LLC and DOUBLE COIN HOLDINGS LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 15–00124

[Sustaining in part, and remanding in part, a determination in response to court order in litigation contesting the final results of an administrative review of an antidumping duty order on pneumatic off-the-road tires from the People's Republic of China]

Dated: January 16, 2019

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs China Manufacturers Alliance, LLC and Double Coin Holdings Ltd. With him on the brief were *James P. Durling*, *Matthew P. McCullough*, and *Tung A. Nguyen*.

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. With him on the brief were *Brandon M. Petelin*, *Dharmendra N. Choudhary*, *Andrew T. Schutz*, and *Jordan C. Kahn*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *James H. Ahrens II*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Stanceu, Chief Judge:

Before the court is a decision (the "Remand Redetermination") the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in ongoing litigation contesting a determination by Commerce in an antidumping duty proceeding. *Final Results of Redetermination Pursuant to Ct. Remand* (June 21, 2017), ECF No. 200 ("*Remand Redetermination*"). Commerce issued the Remand Redetermination in response to the court's Opinion and Order of February 6, 2017. *China Mfrs. Alliance, LLC v. United States*, 41 CIT __, 205 F. Supp. 3d 1325 (2017) ("*CMA I*"). Also before the court is defendant's motion for a partial remand, which defendant bases on an intervening decision of the Court of Appeals for the Federal Circuit ("Court of Appeals"), *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304 (Fed. Cir. 2017) ("*Diamond Sawblades*"). Def.'s Mot. for Partial Voluntary Remand (Aug. 28, 2017), ECF No. 218 ("Def.'s Mot. for Remand"). The court sustains in part, and remands in part, the Remand Redetermination and denies defendant's motion for a partial remand.

I. BACKGROUND

The background of this consolidated action is set forth in the court's prior Opinion and Order, which is summarized and supplemented herein. *See CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1329–32.

A. The Agency Decision Contested in this Litigation

The contested administrative decision, which concluded the fifth periodic administrative review of certain pneumatic off-the-road tires from the People's Republic of China ("China" or the "PRC"), was

published as *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 26,230 (Int'l Trade Admin. May 7, 2015) ("*Amended Final Results*"). The Amended Final Results were issued to correct a ministerial error made in the Department's decision published as *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 20,197 (Int'l Trade Admin. Apr. 15, 2015) ("*Final Results*"). The Final Results incorporated by reference the *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2012–2013* (Apr. 8, 2015) (Pub. Doc. 293), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–08673–1.pdf (last visited Jan. 9, 2019) ("*Final I&D Mem.*").

B. The Parties in this Consolidated Case

China Manufacturing Alliance, LLC ("CMA") and Double Coin Holdings Ltd. ("Double Coin Holdings") (collectively, "Double Coin") are plaintiffs in this consolidated case.[1] CMA is a U.S. importer of subject merchandise produced and exported by Double Coin Holdings and its affiliated entities.[2] Compl. ¶ 2 (Apr. 28, 2015), ECF No. 6. A second group of plaintiffs consists of Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (collectively, "GTC"). GTC is a producer and exporter of subject merchandise. Compl. ¶ 3, *Guizhou Tyre Co. v. United States*, No. 15–00128 (May 1, 2015), ECF No. 6. Double Coin and GTC were the mandatory respondents in the fifth review and the only two respondents individually examined by Commerce. *Final Results*, 80 Fed. Reg. at 20,197. Also a plaintiff, and a defendant-intervenor, is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the "USW").[3] Order (May 13, 2015), ECF No. 17. The USW was a petitioner in the investigation

[1] Consolidated under *China Mfrs. Alliance, LLC v. United States*, Consol. Ct. No. 15–00124, are *Guizhou Tyre Co. v. United States*, Ct. No. 15–00128, and *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union, AFL-CIO, CLC v. United States*, Ct. No. 15–00136. Order (July 17, 2015), ECF No. 24.

[2] Commerce decided that Double Coin Holdings and two companies affiliated with it, Double Coin Group Jiangsu Tyre Co., Ltd. and Double Coin Group Shanghai Donghai Tyre Co., Ltd., should be treated as a single entity ("collapsed") for purposes of the review. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 20,197, 20,198 (Int'l Trade Admin. Apr. 15, 2015) ("*Final Results*"). This decision is not challenged in this litigation.

[3] Titan Tire Corporation, a U.S. producer of off-the-road tires and former defendant-intervenor, has withdrawn from this litigation. Order (May 16, 2018), ECF No. 224.

that gave rise to the underlying antidumping duty order and participated in this administrative review as an interested party. Comp. ¶ 3, *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union, AFL-CIO, CLC v. United States*, No. 15–00136 (May 6, 2015), ECF No. 6.

C. Procedural History

Commerce issued the antidumping duty order on off-the-road tires from China in 2008. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Int'l Trade Admin. Sept. 4, 2008). On November 8, 2013, Commerce initiated the subject review, which covered entries made during the period of September 1, 2012 through August 31, 2013 (the "Period of Review" or "POR"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 67,104 (Int'l Trade Admin. Nov. 8, 2013) ("*Initiation Notice*").

Commerce issued the Final Results on April 15, 2015. *Final Results*, 80 Fed. Reg. 20,197. Following a ministerial error allegation, Commerce issued the Amended Final Results, which assigned GTC a weighted-average dumping margin of 11.41%.[4] *Amended Final Results*, 80 Fed. Reg. at 26,231. Commerce assigned to Double Coin the antidumping duty rate of 105.31%, which was the rate Commerce assigned to the "PRC-wide entity," concluding that Double Coin had not established its independence from the government of the PRC. This rate was unchanged from the Final Results. *Id*.

Following the court's decision in *CMA I*, Commerce submitted the Remand Redetermination on June 21, 2017. Under protest, the Remand Redetermination changed the final weighted-average dumping margin for Double Coin from 105.31% to 0.14% (a *de minimis* margin). *Remand Redetermination* 39–40. The Remand Redetermination changed the final weighted average margin for GTC from 11.41% to 11.33%. *Id.*

GTC and the USW each filed comments on the Remand Redetermination.[5] Consol. Pl. GTC's Comments on Final Results of Redetermination Pursuant to Ct. Order (July 21, 2017), ECF No. 208 ("GTC's Comments"); Titan Tire Corp. and USW Comments on the Dept. of Commerce's Redetermination Pursuant to Ct. Remand (July 21, 2017), ECF No. 207 ("USW's Comments"). Before filing a response to

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[4] The Final Results had assigned GTC a weighted-average dumping margin of 11.34%. *Final Results*, 80 Fed. Reg. at 20,199.

[5] Double Coin did not file comments on the remand redetermination.

these comments, defendant filed its motion for a partial remand, under which Commerce would revisit the issue of Double Coin's margin in light of *Diamond Sawblades*, which was issued after the court's Opinion and Order in *CMA I*. Def.'s Mot. for Remand. On September 1, 2017, defendant filed its response to the parties' comments on the Remand Redetermination. Def.'s Resp. to Comments on Remand Results, ECF No. 221 ("Def.'s Reply"). Double Coin opposed defendant's motion for a partial remand. Double Coin and CMA's Opp'n to Def.'s Mot. for Partial Voluntary Remand (Sept. 18, 2017), ECF No. 222 ("Double Coin's Opp'n"). On October 5, 2017, defendant filed a reply in support of its motion for a partial remand. Def.'s Reply in Support of its Mot. for Partial Voluntary Remand (Oct. 5, 2017), ECF No. 223.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended* 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty administrative review. In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. The Department's Remand Redetermination

In *CMA I*, the court directed Commerce to submit a redetermination addressing the following four decisions in the Amended Final Results, which the court had ruled were contrary to law: (1) the 105.31% antidumping duty rate assigned to Double Coin, *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1334–41; (2) downward adjustments Commerce made to GTC's export price ("EP") and constructed export price ("CEP") to account for Chinese irrecoverable value-added tax ("VAT"), *id.*, 41 CIT at __, 205 F. Supp. 3d at 1344–51; (3) the calculation of surrogate values for GTC's brokerage and handling costs and ocean freight costs, *id.*, 41 CIT at __, 205 F. Supp. 3d at 1356–58; and (4) the Department's decision not to make an inflation adjustment in calculating a surrogate value for GTC's domestic warehousing costs, *id.*, 41 CIT at __, 205 F. Supp. 3d at 1358–59.

In the Remand Redetermination, Commerce, under protest and indicating its disagreement with the court's decision, assigned Double Coin a 0.14% *de minimis* margin to replace the previous margin of

105.31%, which Commerce assigned in the fifth review. *Remand Redetermination* 21, 39–40; *see also Amended Final Results*, 80 Fed. Reg. 26,231.

The downward adjustment from 11.41% to 11.33% that the Remand Redetermination made to GTC's margin resulted from two changes from the Amended Final Results. On the surrogate values for GTC's brokerage and handling costs and ocean freight costs, Commerce concluded that its surrogate value determinations for brokerage and handling costs and ocean freight overlapped, such that "Shanghai Port Charges" were double counted, but it rejected GTC's argument that other charges were double counted as well. *Remand Redetermination* 12–18. Commerce also changed its calculation of its surrogate value for GTC's warehousing costs by including an inflation adjustment. *Id.* at 19. On the VAT issue, Commerce made no change to its methodology, again reducing GTC's starting prices for EP and CEP by 8% of the FOB value of GTC's exported subject merchandise, upon a finding that GTC had failed to demonstrate that it had not incurred "irrecoverable VAT" in these amounts. *Id.* at 12.

C. Positions Taken by the Parties on the Remand Redetermination

Double Coin did not comment on the Remand Redetermination. GTC opposes the Department's decision to maintain the deductions from EP and CEP starting prices it had made for irrecoverable VAT, GTC's Comments 5–13, and, on the brokerage and handling and ocean freight costs, argues that charges in addition to the Shanghai Port Charges were double counted due to the Department's method of determining a surrogate value, *id.* at 13–16. The USW supports the Department's maintaining the deductions for VAT, USW's Comments 3–7, supports the decision that only the Shanghai Port Charge was double counted, *id.* at 7–8, and opposes the decision to assign Double Coin the 0.14% margin, arguing instead that the rate for the PRC-wide entity should have been maintained at 210.48%, which was the rate for the PRC-wide entity prior to the fifth review, and that this rate should have been assigned to Double Coin, *id.* at 8–12. Defendant United States supports the Remand Redetermination on all issues except for the issue of Double Coin's margin, Def.'s Reply 9, which it addresses in its partial remand motion, *see* Def.'s Mot. for Remand.

D. Decisions in the Remand Redetermination to which No Party Objects

In the Final Results, Commerce determined a surrogate value for GTC's domestic warehousing expenses using a price quote from an

Indonesian warehousing and logistics provider. *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1358; *see Petitioners' Initial Surrogate Value Comments*, Attach. 18 (Apr. 14, 2014) (Pub. Doc. 108), ECF No. 86–43 (warehousing price quote from GIC Logistics Group). The price quote on which Commerce relied was undated, but the website from which it originated was accessed more than seven months after the close of the POR. *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1359. Before the court, GTC argued that Commerce should have adjusted this price quote for inflation. *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1358–59. In *CMA I*, the court held that Commerce failed to support adequately its decision not to make an inflation adjustment and directed Commerce to "provide a more thorough analysis of the issue that is grounded in whatever relevant evidence exists on the record." *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1359. In the Remand Redetermination, Commerce concluded that the record lacked specific information demonstrating that the price quote was contemporaneous with the POR and adjusted the price quote using the Producer Price Index of the International Monetary Fund. *Remand Redetermination* 19.

Because no party objects to the Department's decision to make an inflation adjustment to GTC's warehouse costs, and because that decision complies with the court's opinion and order in *CMA I*, the court sustains that decision. For the same reasons, the court sustains the Department's decision that the Shanghai Port Charges were double counted in the Department's calculation of a surrogate value for GTC's brokerage and handling and ocean freight expenses.

E. Issues Remaining in this Litigation

Two issues remain undecided with respect to GTC's margin: (1) whether the deductions from EP and CEP starting prices for Chinese value-added tax were lawful, and (2) whether charges other than the Shanghai Port Charges were double counted in the Department's calculation of a surrogate value for brokerage and handling and international freight expenses. Only one issue remains undecided with respect to Double Coin: whether the court should permit Commerce to reconsider the 0.14% *de minimis* margin it assigned to Double Coin in the Remand Redetermination, due to the decision of the Court of Appeals in *Diamond Sawblades*. The court addresses these three issues below.

1. Commerce Unlawfully Made Deductions from GTC's EP and CEP Starting Prices for Value-Added Tax

In calculating export price or constructed export price of the subject merchandise, Commerce is directed by the Tariff Act to make certain

additions to, and deductions from, the starting prices used for determining the "U.S. price," i.e., either the export price or the constructed export price, of the subject merchandise. Some of these adjustments are made to achieve a "tax neutral" comparison between U.S. price and normal value. Among the upward tax-related adjustments, which reduce a dumping margin, are upward adjustments in U.S. price to account for import duties imposed by the country of exportation that have been rebated (i.e., duty drawback), or not collected, by reason of the exportation of the merchandise to the United States. *See* Section 772(c)(1)(B) of the Tariff Act, 19 U.S.C. § 1677a(c)(1)(B). Such duties are added to the U.S. price to allow a tax-neutral comparison with the home market price of the foreign like product, which presumably includes import duties, such as duties on materials used in production in the exporting country. If the import duties are "irrecoverable," i.e., not rebated or avoided by reason of the exportation, the duties presumably are included in the U.S. price, and no upward adjustment or downward adjustment is made, the price comparison already being tax-neutral. As explained below, the Tariff Act treats domestic value-added taxes of an exporting country in a way similar to its treatment of import duties imposed by an exporting country; i.e., a dumping margin potentially may be reduced for value-added taxes imposed on a finished good, or the materials used to produce it, if those taxes are refunded or avoided due to the exportation of the good. But under the statutory scheme, a domestic value-added tax, whether or not refunded or avoided by reason of the exportation of the finished good, does not increase a dumping margin.

In contrast, a downward adjustment, which increases a dumping margin, generally is made to the U.S. price under the "export tax" provision, to adjust for an export tax, duty, or other charge imposed on the exportation of the subject merchandise to the United States, if included in the U.S. price. Section 772(c)(2)(B) of the Tariff Act, 19 U.S.C. § 1677a(c)(2)(B). A tax subject to this provision is presumed to be present in the price of the exported subject merchandise but, by definition, is not present in the price of the foreign like product in the home market. *Id.* The plain meaning of the provision illustrates this point. Section 772(c)(2)(B) directs Commerce to reduce the price used to establish EP and CEP by "the amount, if included in such price, of any *export* tax, duty, or other charge imposed by the exporting country *on the exportation of the subject merchandise* to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title."[6] 19 U.S.C. § 1677a(c)(2)(B) (emphasis added).

[6] The "export taxes, duties, or other charges" described in section 1677(6)(C) are those which are "levied on the export of merchandise to the United States specifically intended to offset

In contrast, a domestic value-added tax *is* presumed to be included in the price of the subject merchandise *and also* in the price of the foreign like product. Therefore, the Tariff Act does not make a downward adjustment in U.S. price for a domestic value-added tax, as no such adjustment is necessary or appropriate to achieve tax-neutrality.

Even though 19 U.S.C. § 1677a(c)(2)(B), by its plain meaning, does not address taxes such as import duties or value-added taxes incurred by producers in the exporting country, Commerce resorted to this provision in the Final Results to make downward, i.e. margin-increasing, adjustments to the prices used for determining the U.S. price, i.e., the export price or constructed export price, of GTC's subject merchandise. Commerce made these downward adjustments for irrecoverable value-added taxes included in the prices of materials used to make GTC's subject merchandise. *Final I&D Mem.* at 28. Commerce erroneously reasoned that "irrecoverable" VAT, by which it meant VAT not rebated by reason of exportation of the finished good, "amounts to" an "export tax, duty or other charge imposed on exportation of the subject merchandise to the United States" within the meaning of that term as used in 19 U.S.C. § 1677a(c)(2)(B). *Id.* (internal quotation marks omitted) (footnote omitted).

There is no record evidence in this case demonstrating that China imposed on the subject merchandise an export tax or anything resembling one. The record shows that the PRC value-added tax is incurred by an OTR tire producer in the PRC by the inclusion of this tax in the prices of materials used in domestic production, regardless of whether the finished tire is sold for domestic consumption or export. It also shows that at least some of that tax is rebated, refunded, or avoided if the tire is sold for export. The fact that a domestic value-added tax incurred on materials used in producing OTR tires in China might not be fully refunded by reason of exportation of the finished tire does not convert any unrefunded portion of such a tax from a domestic value-added tax into an export tax. In other words, irrecoverable VAT is still VAT, not an export tax. When reduced to its basics, the rationale Commerce adopted in the Final Results appears to have been that irrecoverable value-added tax, which is a domestic tax incurred on materials used in production in the exporting country, somehow becomes an export tax simply because it is irrecoverable.

In the Remand Redetermination, Commerce decided that its deductions from GTC's U.S. prices, as effected in the Final Results, were correct and should be maintained in the Remand Redetermination.

the countervailable subsidy received." 19 U.S.C. § 1677(6)(C). The countervailable subsidy offset exception has not been invoked in this case.

Remand Redetermination 12. This decision is contrary to the record evidence and the intent Congress expressed in the Tariff Act. Whether recoverable or not, a domestic value-added tax is not properly the subject of a downward, margin-increasing adjustment under 19 U.S.C. § 1677a(c)(2)(B).

In contesting the Final Results, GTC claimed, *inter alia*, that the Department's deductions from U.S. price were unauthorized by the plain language of the statute. *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1344–45. Continuing to pursue this claim, GTC objects that the Remand Redetermination "does not affirmatively answer the threshold question presented by this Court; that is, whether the VAT adjustment is consistent with the statutory authorization to deduct from EP/CEP 'a tax, duty, or other charge . . . so imposed in relation to the subject merchandise.'" GTC's Comments 7 (quoting *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1346).

CMA I did not decide the question of whether any EP and CEP deduction for Chinese VAT is authorized by 19 U.S.C. § 1677a(c)(2)(B) because Commerce impermissibly resorted only to a presumption, rather than an actual finding, that a charge, of whatever character, in an amount equal to 8% of the export value was imposed and was specific to GTC's merchandise.[7] *Id.* at 1349. "That is why the court need not reach the question of whether any unrefunded VAT charge that Commerce might have found to have been incurred would have qualified as an 'export' tax, duty or other charge within the meaning of the statute." *Id.*

After *CMA I* was decided and the parties filed their comments on the Remand Redetermination, another decision of this Court answered the statutory interpretation question *CMA I* did not reach. In *Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1338–47, this Court analyzed the plain meaning, statutory history, and legislative history of 19 U.S.C. § 1677a(c)(2)(B). *Qingdao Qihang* concluded that Congress, in enacting that and related provisions in the Tariff Act, intended that a domestic value-added tax imposed by an exporting country on subject merchandise or the materials used to produce it, whether or not "recoverable" by reason of exportation of the subject merchandise, would not increase a dumping margin.[8] Moreover, the

[7] Contrary to the Department's conclusions, in neither the Final Results nor in the Remand Redetermination did Commerce reach a finding supported by substantial evidence that GTC incurred irrecoverable VAT in the amount of 8% of the export value of the subject merchandise. But as the court explains in the Opinion and Order, the Department's decision to make deductions in U.S. price for irrecoverable VAT was unlawful regardless of the Department's erroneous presumption as to how much VAT was irrecoverable.

[8] Prior decisions of this Court had sustained as reasonable the Department's interpretation of 19 U.S.C. § 1677a(c)(2)(B) to apply to irrecoverable VAT. *See Qingdao Qihang Tyre Co. v. United States*, 42 CIT __, 308 F. Supp. 3d 1329, 1346 ("*Qingdao Qihang*") (citing other

opinion explained that the application of § 1677a(c)(2)(B) does not depend on whether or not the exporting country is treated by Commerce as a nonmarket economy country, as are China and Vietnam.

The *Qingdao Qihang* opinion noted that Congress, when enacting 19 U.S.C. § 1677a(c) and its related provisions, addressed the precise question of how a domestic tax such as a value-added tax, imposed by the exporting country directly upon an exported good or the components used to produce that good, would affect a dumping margin. The court pointed out that Congress intended that VAT avoided or refunded by reason of exportation of the subject merchandise, i.e., "recoverable" VAT, would have the potential to reduce a dumping margin. It explained that prior to the enactment of the Uruguay Round Agreements Act ("URAA"), the Tariff Act contained a provision that potentially increased U.S. price by the amount of recoverable VAT, thereby reducing a dumping margin, while the export tax provision, in the ordinary instance, would increase a dumping margin. *Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1340–41. The former increased U.S. price (and thereby reduced a dumping margin) by "the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." 19 U.S.C. § 1677a(d)(1)(C) (1982). The provision generally was understood to apply to recoverable value-added tax imposed by the country of exportation. *See Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1576–78 (Fed. Cir. 1995). *Qingdao Qihang* reasoned that Congress had to have been aware of the difference between an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise," which it addressed in one paragraph of the provision on U.S. price, and a recoverable domestic tax such as a VAT, which it addressed in a separate paragraph of that provision, with the opposite result. *Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1338–39. It noted that Congress used distinctly different language in the export tax provision than it used in the provision addressing recoverable domestic taxes (such as VAT taxes) that are imposed by the exporting country directly on the exported subject merchandise or the materials used to produce it. *Id.* Congress, therefore, could not have intended that a VAT tax imposed directly

decisions of this Court). *Qingdao Qihang* opined that in these prior decisions, the issue of whether the Department's interpretation was consistent with statutory purpose and legislative history does not appear to have been argued, as it was not addressed in the various opinions.

upon an exported good or the components thereof, which it addressed in the domestic tax provision, would also fall within the scope of the export tax provision.

The *Qingdao Qihang* opinion further explained that after enactment of the URAA, the statute converted the upward adjustment to U.S. price for recoverable VAT to a downward adjustment in normal value, whether determined by price in the comparison market or by constructed value, thereby again providing that recoverable VAT, in the ordinary instance, would lower a dumping margin. *Id.*, 41 CIT at __, 308 F. Supp. 3d at 1339–44. The opinion went on to discuss that under the URAA, goods exported from NME countries do not get the benefit of the lowering of the margin for recoverable VAT because normal value in those proceedings ordinarily is determined by the special procedures of 19 U.S.C. § 1677b(c), not by home market price or by constructed value. *Id.*, 41 CIT at __, 308 F. Supp. 3d at 1344–46. But as the opinion also discussed, nothing in the Tariff Act, either before or after amendment by the URAA, reasonably can be interpreted to *increase* a dumping margin for VAT, whether "recoverable" or "irrecoverable," and the legislative history is contrary to any such interpretation. *Id. Qingdao Qihang* also concluded that the Department's interpretation of 19 U.S.C. § 1677a(c)(2)(B) is contrary to the statutory scheme and the clearly expressed intent of Congress, regardless of whether the good is exported from a nonmarket economy country such as the PRC. The opinion explained that in 19 U.S.C. § 1677a(c)(2)(B), which pertains to U.S. price, not normal value, Congress made no distinction between market economy and nonmarket economy countries. *Id.*, 41 CIT at __, 308 F. Supp. 3d at 1344–45.

In *Jiangsu Senmao Bamboo and Wood Indus. Co. v. United States*, 42 CIT __, 322 F. Supp. 3d 1308 (Ct. Int'l Trade 2018) ("*Senmao*"), this Court considered specifically the question of whether record evidence supported the finding of Commerce in that review that Chinese irrecoverable VAT "amounts to a tax, duty or other charge imposed on exports that is not imposed on domestic sales." *Senmao*, 42 CIT at __, 322 F. Supp. 3d at 1342. *Senmao* concluded that this finding, which was critical to the Department's rationale, was directly contradicted by the evidence on the administrative record of the review at issue in that case. That record contained detailed information about the workings of the PRC VAT scheme as applied to a respondent in the review, Jiangsu Senmao Bamboo and Wood Indus. Co., Ltd. ("Senmao"). The court concluded that Commerce erroneously presumed that China irrecoverable VAT was not incurred on domestic sales of the good. *Senmao*, 42 CIT at __, 322 F. Supp. 3d at 1344 ("Commerce lacked evidentiary support for its finding that under the PRC's VAT system

a producer of exported merchandise such as Senmao did not incur irrecoverable input VAT on domestic sales."). The record in that case showed that potential liability for Chinese "output" VAT affected both domestic sales and sales for export, with the export sales incurring output VAT at a preferentially lower rate. *Id.* The record also showed that the taxpayer applied the total value of input VAT incurred on all materials used (whether used in production for domestic sale or for export) against the potential combined liability for output VAT on domestic sales.[9] *Id.*, 42 CIT at __, 322 F. Supp. 3d at 1343.

The finding the court ruled unsupported by record evidence in *Senmao* was also made in the review at issue in this case. Commerce stated in the Final Issues and Decision Memorandum as follows:

> In a typical VAT system, companies do not incur any VAT expense; they receive on export a full rebate of the VAT they pay on purchases of inputs used in the production of exports ("input VAT"), and, in the case of domestic sales, the company can credit the VAT they pay on input purchases for those sales against the VAT they collect from customers. That stands in contrast to the PRC's VAT regime, where some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded. This amounts to a tax, duty, or other charge imposed on exports *that is not imposed on domestic sales*.

Final I&D Mem. at 28 (emphasis added) (footnotes omitted). The Issues and Decision Memorandum cited no factual basis for its finding that Chinese irrecoverable VAT "amounts to" a tax, duty, or other charge imposed on exports "that is not imposed on domestic sales," and the Remand Redetermination is also defective in this respect. There is no record evidence that could support such a finding, and it is hard to imagine that there could be such evidence. If all value-added tax incurred on domestic sales were "recoverable," then it would appear that the taxation scheme would produce no revenue for the government on domestic sales, defeating the purpose of a VAT.

The Remand Redetermination relies on a finding that "[i]n this case, the record demonstrates that the Chinese VAT system can

[9] In this case, unlike in *Jiangsu Senmao Bamboo and Wood Indus. Co. v. United States*, 42 CIT __, 322 F. Supp. 3d 1308 (Ct. Int'l Trade 2018), there is no record evidence that sales of the subject merchandise incurred output VAT. GTC argues that the record evidence shows that the output VAT rate on exported OTR tires is zero. GTC's Mem. in Support of Mot. for J. on the Agency R. 8 (Sept. 24, 2015), ECF No. 36. Regardless, the important point is that in this case, no record evidence demonstrates that OTR tires sold in the Chinese domestic market receive preferential value-added tax treatment of *any* kind over OTR tires sold for export. The record evidence in this case, as in the review at issue in *Senmao*, shows that the opposite is true: sales for exportation from China are treated more favorably than domestic sales under the PRC VAT scheme.

result in companies [*sic*] having un-refunded or irrecoverable VAT, in which some portion of the VAT that a company pays on purchases of inputs used in the production of exports of subject merchandise is not refunded," *Remand Redetermination* 9. This reliance is misplaced. A value-added tax that a domestic producer incurs on its domestic sales but does not avoid entirely on its export sales is not the same as a tax, duty, or charge imposed on the exportation of the good. In the Remand Redetermination, as in the Final Results, the Department's illogical rationale appears to be that for purposes of 19 U.S.C. § 1677a(c)(2)(B), irrecoverable Chinese VAT is an "export tax, duty, or other charge" that is "imposed by the exporting country on the exportation" of the good simply because it is irrecoverable. See *id.* at 28. Commerce emphasizes the term "charge" as used in the statutory phrase "export tax, duty, or other charge," noting the lack of a statutory definition, and claims entitlement to "deference" for its "reasonable" interpretation. *Id.* at 8–9 ("'[E]xport tax, duty, or other charges' includes 'a cost that arises as the result of export sales,' consistent with other cases interpreting the word 'charges.'") (footnote omitted). But the question of whether Chinese value-added tax is a "tax" or, alternatively, some form of "other charge" is not the question posed by this case. To the contrary, the question is whether the Department's statutory interpretation is reasonable. Because it contravenes the plain meaning, statutory history, and legislative history of § 1677a(c)(2)(B), it is not. An agency interpretation that disregards the clearly expressed intent of Congress is not a reasonable one.

In summary, Congress had a specific intent with respect to VAT imposed by an exporting country on subject merchandise or the materials used to produce it. Congress did not intend that irrecoverable VAT, i.e., VAT that was not refunded or avoided by reason of exportation of the good, would increase a dumping margin (although it did intend that *recoverable* VAT, in some circumstances not present here, could reduce a dumping margin). In addition, Commerce erred in finding, without any evidentiary support, that Chinese irrecoverable VAT is a tax not imposed on the domestic good. In its redetermination in response to this Opinion and Order, Commerce must take the appropriate corrective action to remove from the calculation of GTC's margin its downward EP and CEP adjustments for VAT.

2. The Department's Finding that Only One Cost Category of B&H and Freight Costs Was Double Counted Is Not Supported by Substantial Evidence on the Record

The statute directs Commerce to reduce U.S. price (i.e., the starting prices for determining EP or CEP) 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." 19 U.S.C. § 1677a(c)(2)(A).

For GTC's export brokerage and handling costs paid in RMB or provided by a Chinese freight carrier in the Final Results, Commerce used a surrogate value of 0.0455 USD per kilogram that it obtained from information pertaining to Indonesia, its chosen surrogate country. This information was published by the World Bank as *Doing Business 2014: Indonesia* ("*Doing Business Indonesia*"). *See Petitioners' Initial Surrogate Value Comments*, Attach. 17 (Apr. 14, 2014) (Pub. Docs. 107–108), ECF Nos. 86–42, 86–43 ("*Petitioners' Initial SV Comments*") (placing on the administrative record portions of *Doing Business Indonesia*); *Surrogate Value Comments for GTC*, Ex. 11 (Apr. 14, 2014) (Pub. Doc. 111), ECF No. 90–1 ("*SV Comments for GTC*") (same).

Commerce obtained the surrogate value of 4.55 cents per kilogram for export brokerage and handling by adding three cost categories shown in *Doing Business Indonesia* for "trading a standard shipment of goods by ocean transport" from Indonesia. These costs were: "documents preparation" of $165, "Customs clearance and technical control" of $125, and "Ports and terminal handling" of $165. *See CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1357. Commerce presumed (and GTC does not contest) that a "standard shipment" of goods would consist of a standard, fully-loaded oceangoing cargo container of 10,000 kilograms. *See Petitioners' Initial SV Comments*, Attach. 17 (Apr. 14, 2014) (methodology for *Doing Business Indonesia*). To calculate the per-kilogram surrogate value, Commerce divided the sum of the costs, $455, by this kilogram quantity.

To value GTC's trans-Pacific ocean freight from China to the United States, Commerce calculated an average of monthly per-container shipping price quotes to both the east and west coasts of the United States using information published online by Descartes Systems Group Inc. ("Descartes") and provided to the record by GTC. *Final Results Surrogate Value Mem.* 2 (Apr. 8, 2015) (Pub. Doc. 294), ECF No. 107–6 ("*Final Surrogate Value Mem.*"); *Preliminary Results Surrogate Value Mem.* 15–16 (Sept. 30, 2014) (Pub. Doc. 265), ECF No. 108–1 ("*Prelim. Surrogate Value Mem.*"); *see SV Comments for GTC*, Ex. 8. Commerce converted the per-container costs to per-kilogram costs using an average kilograms-per-container factor obtained from GTC's proprietary information. *Prelim. Surrogate Value Mem.* 15–16. Commerce also included in its deduction under 19 U.S.C. §

1677a(c)(2)(A) an amount for U.S. domestic inland freight for those sales in which GTC paid shipping charges all the way to the customer. *Final Surrogate Value Mem*. 2. Commerce obtained this U.S. inland freight amount from "price lists from Descartes for delivery from ports on the East and West coasts, averaged the cost of delivery per container from the price list, and applied the same average proprietary kilograms-percontainer factors as we did for the ocean freight." *Prelim. Surrogate Value Mem.* 16 (footnote omitted).

Before Commerce and again before the court, GTC claimed that Commerce double counted some costs by including them both in the brokerage and handling surrogate value and in the ocean freight costs, thereby overstating the CEP deduction required by 19 U.S.C. § 1677a(c)(2)(A). *See* GTC's Comments 6–10. The costs in question were listed for one or more of the Descartes ocean freight quotes and described as surcharges separate from the cost item for ocean freight itself. *CMA I* directed Commerce to reconsider its conclusion in the Final Results that double counting did not occur and also directed Commerce to "address specifically each of the charges in the Descartes quotes that GTC identifies as charges that overlap with the charges Commerce obtained from the *Doing Business* report." *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1358. Noting that Commerce did not address adequately "the specific question" of the double counting raised by GTC, the court stated:

> As an example, one of the three cost elements in the Department's calculation of the $455 brokerage and handling cost from that [*Doing Business*] report is "Documents preparation" at $165. Commerce did not address the specific question of whether this charge overlapped with the item identified on certain of the Descartes quotes as "Documentation Charges" of $45 and the item listed on one of the quotes as "Doc. Handling Charges" of $60. As another example, Commerce also included in the $455 total a charge for "Ports and terminal handling" at $165. Commerce does not explain its reasoning for its apparent conclusion that this had no overlap with "Shanghai Port Charges" of $66, which is listed on one of the Descartes quotes.

Id.

In a draft version of the remand redetermination, Commerce considered the following eight cost categories for possible double counting with the *Doing Business* report:

(1) "Documentation charges," (2) "Traffic Metigation {sic} fee," (3) "AMS Charge," (4) "Clean Truck Fee," (5) Chassis Usage Charges," (6) "Shanghai Port Charges," (7) "International Ship & Port Security

charges," and (8) "ISD Handling Charge." *See Draft Results of Redetermination Pursuant to Court Remand* 11 (May 4, 2017) (Remand Pub. Doc. 1), ECF No. 210–5 ("*Draft Remand Redetermination*"). Commerce concluded in the draft results that of the eight costs, all but two—cost (3), "AMS Charge," and cost (5), "Chassis Usage Charges"—were double counted, having "appeared in both ocean freight and shipping and handling charges." *Id.* at 12. Commerce removed the other six costs from the ocean freight cost calculation. Commerce reasoned that the "AMS Charge" referred to the cost of providing manifest information to U.S. Customs and Border Protection through the Automated Manifest System ("AMS") and, accordingly, "are necessarily charged by the freight forwarder and not a port charge covered by *Doing Business.*" *Id.* at 12–13. Commerce found that a "Chassis Usage Charge" is "the additional charge for renting the chassis to support and transport full container loads transported via ocean freight at the destination" and therefore "not port charges covered by *Doing Business.*" *Id.* at 13 (footnote omitted).

After admitting new factual information to the record, Commerce decided in the Remand Redetermination that only cost (6), the "Shanghai Port Surcharge," is within the costs reported in *Doing Business* and therefore double counted. The effect of this change was to increase the 11.24% margin for GTC determined in the draft remand redetermination to 11.33%. *Compare Draft Remand Redetermination* 16–17, *with Remand Redetermination* 39–40.

Commerce, relying on information submitted during the remand proceeding by the petitioner, concluded that four of the costs in question were related to activities in the United States occurring after ocean transport and therefore were not included in the brokerage and handling costs covered by the *Doing Business* report. These were cost (2), the Traffic Mitigation Fee, cost (3), the Chassis Usage Charges, cost (5), ISD Handling Charges, and cost (7), the "Clean Truck Fee." *See Remand Redetermination* 15–17. Commerce found that the Chassis Usage Charges were "additional charges for renting the chassis to support and transport full container loads transported via ocean freight at the destination." *Id.* at 16 (footnote omitted). It concluded that the ISD handling Charges "are not related to on-ocean services, but rather are charged by the U.S. Consumer Product Safety Commission (CPSC) for inspection of cargo entering the United States" and therefore are "not covered by *Doing Business.*" *Id.* (footnote omitted). Commerce added that the Traffic Mitigation Fee and Clean Truck Fee "are not expenses related to on-ocean services, but, rather, are post-ocean pass-through fees specific to the ports of Los Angeles and Long Beach." *Id.* (footnote omitted).

In commenting on the Department's draft remand redetermination, GTC objected that the costs Commerce associated with post-ocean transport are more appropriately valued under U.S. inland truck freight, *see Remand Redetermination* 35–36, and GTC renews that objection before the court, GTC's Comments 15–16. GTC argues that "Commerce refused to exclude costs that it found related to services undertaken in the United States based on a technicality: 'the scope of the remand permits the Department only the discretion to evaluate fees potentially double counted with the surrogate for PRC brokerage and handling.'" *Id.* at 15 (*quoting Remand Redetermination* 37 n.174). The Remand Redetermination also gave a second reason for rejecting the argument that the costs Commerce associated with post-ocean transport were not double counted: "Regardless, the use of a 'fully loaded' international freight SV [surrogate value] renders this question moot." *Remand Redetermination* 37 n.174. The court finds both of these reasons unconvincing.

Commerce was not precluded by *CMA I* from considering whether alleged double counting occurred between the brokerage and handling surrogate value and the ocean freight costs. Commerce reopened the record during the remand proceeding, accepted new information during that proceeding and, following its issuance of its draft for comment by the parties, changed its position on most of the costs it determined to have been double counted in the draft, based on the new record information. Because the Department's latest decision on double counting raises a new issue, GTC must be given the opportunity to object to the Department's new determination on double counting, which stemmed from the new information Commerce admitted to the record. Accordingly, Commerce must consider GTC's objection that four cost categories (i.e., cost (2), the "Traffic Mitigation Fee," cost (3), the "Chassis Usage Charges," cost (5), "ISD Handling Charges," and cost (7), the "Clean Truck Fee") appear to overlap with domestic transportation costs that would be included in the prices reflected by the Descartes price lists Commerce used to calculate GTC's U.S. inland freight costs. *See Prelim. Surrogate Value Mem.* 16, Attach. X (explaining that Commerce added U.S. inland freight costs—based on the Descartes price lists—to ocean freight costs to calculate "a total freight value for shipments entering through both East and West coast ports"). Commerce has not reached a valid determination that the cost categories GTC identified as double counted are separate from charges incurred during inland transportation in the United States, and it cannot be permitted to avoid this obligation by citing what it narrowly considered to be the scope of the court's order in *CMA I*.

The second reason Commerce gave—that the Department's international freight surrogate value was a "fully loaded" cost—is not adequately demonstrated. *See Remand Redetermination* 12–13, 17. Commerce stated that the "international freight surrogate value did not encompass only ocean freight, but also all post-exportation expenses incurred to deliver the merchandise to the unaffiliated customer (*i.e.*, ocean freight, U.S. inland freight charges, U.S. brokerage and handling expenses, etc.) – a 'fully-loaded' transportation charge." *Remand Redetermination* 12–13 (footnote omitted). But in its Remand Redetermination, Commerce failed to explain why certain "ocean freight" charges identified in the Descartes quotes were not accounted for again in the "U.S. inland freight" charges, which were derived from separate Descartes price lists. *See id.* Specifically, Commerce found that the "'Automated Manifest System (AMS) Charge,' 'Chassis Usage Charges,' 'ISPS- Int'l Ship and Port Security Charges,' 'ISD Handling Charges,' 'Traffic Mitigation Fee,' 'CTF- Clean Truck Fee,' and 'Documentation Charges' are unique to ocean freight *or* activities at the U.S. destination." *Id.* at 15 (emphasis added). If any of these "ocean freight" costs also are encompassed by the "U.S. inland freight" costs, it would appear that they were double counted in the Department's "fully loaded transportation charge" calculation. *See id.* at 12–13.

Commerce engaged in a complex calculation, and used multiple sources of data, to determine the transportation-related and logistics-related costs for deduction under 19 U.S.C. § 1677a(c)(2)(A). That provision requires Commerce to determine the "additional costs, charges, or expenses . . . 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." 19 U.S.C. § 1677a(c)(2)(A). It must do so as accurately as possible based on the record information. On remand, therefore, Commerce must review and reconsider all aspects of its determination that only one cost identified by GTC was double counted and may not rely on its narrow conception of the scope of the court's previous order of remand to refuse to consider whether costs were double counted. In summary, Commerce must ensure that no costs are double counted either as between (1) brokerage and handling (based on the *Doing Business* report) and ocean freight (based on the Descartes quotes), or (2) ocean freight (based on the Descartes quotes) and U.S. inland freight (based on the Descartes price lists).

3. The Court Denies Defendant's Motion for a Partial Remand

Commerce selected Double Coin for individual examination as a mandatory respondent, the other mandatory respondent having been

GTC. *Respondent Selection Mem.* 7 (Dec. 13, 2013) (Pub. Doc. 27) (Conf. Doc. 6), ECF No. 85–12. Commerce based its choice on import data showing Double Coin to be one of the two largest exporters of subject merchandise into the United States during the POR. *Id.*

The sales and production data Double Coin submitted during the fifth review enabled Commerce to calculate for Double Coin an individually-determined margin of 0.14%. *Final Results*, 80 Fed. Reg. at 20,199. Rather than assign this margin to Double Coin, either individually or to the PRC-wide entity of which it considered Double Coin to be a part, Commerce assigned the PRC-wide entity (and therefore Double Coin) a rate of 105.31%. *Id.* Commerce calculated this rate as "a simple average of the previously assigned PRC-wide rate (210.48 percent) and Double Coin's calculated margin (0.14%)." *Id.* (footnotes omitted); *see Amended Final Results*, 80 Fed. Reg. at 26,231. The pre-existing 210.48% PRC-wide rate was the rate Commerce applied to the PRC-wide entity in the investigation, which Commerce did not change in any of the periodic reviews of the antidumping duty order prior to the fifth review. *See Final I&D Mem.* at 12–13. Commerce included Double Coin in the PRC-wide entity because it concluded that Double Coin "failed to demonstrate absence of *de facto* government control over export activities due to the fact that its controlling shareholder is wholly-owned by the State-owned Assets Supervision and Administration Commission of the State Council and the significant level of control this majority shareholder wields over the respondent's Board of Directors." *Final Results*, 80 Fed. Reg. at 20,199 (footnote omitted).

a. The Adjudication of Double Coin's Claim in CMA I

In support of its claim challenging the 105.31% rate, Double Coin made several arguments before the Court of International Trade, including that Double Coin demonstrated the absence of *de facto* control by the PRC government. The court did not reach this argument in *CMA I*, granting relief on Double Coin's claim on other grounds. The court ruled that in the particular circumstance presented by this case, the statute required Commerce to assign Double Coin "an individual weighted average dumping margin." *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1334–41. The particular circumstance included the facts that Commerce selected Double Coin for individual examination and that all parties, including Double Coin, fully cooperated in the review. The court concluded that the *de minimis* margin of 0.14% calculated for Double Coin qualified as an "individual weighted average dumping margin" within the meaning of 19 U.S.C.

§ 1677f-1(c)(1), but the rate of 105.31% that Commerce assigned to Double Coin, which was determined by averaging the individual margin with the existing PRC-wide rate of 210.48%, did not. *See* 19 U.S.C. § 1677f-1(c)(1) (stating the general rule that Commerce "shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise").

The court reasoned, first, that Commerce had discretion under 19 U.S.C. §§ 1675(a) and 1677f-1(c)(2) *not* to examine Double Coin individually and, had it exercised that authority, could have assigned Double Coin a rate other than an individual margin. *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1335. The court noted that Commerce intentionally decided not to exercise that discretion and instead designated Double Coin (but not the rest of the PRC-wide entity) for individual examination under 19 U.S.C. § 1677f-1(c)(1), thereby placing itself under the statutory obligation to assign Double Coin an individual weighted-average dumping margin. *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1334–35.

Second, the court concluded that although Commerce has authority under 19 U.S.C. § 1677e(a) to use "facts otherwise available" in "reaching the applicable determination," it could not validly use that authority here, Commerce having found Double Coin's submitted information sufficient for calculation of an individual weighted average margin. *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1336–37. Mentioning that 19 U.S.C. § 1677e(a) may be invoked when "necessary information is not available on the record," 19 U.S.C. § 1677e(a)(1), the court concluded that Commerce did not make a valid finding that "necessary information" was unavailable. *Id.* The court noted that Commerce said it lacked "complete information" with which to establish a new rate for the PRC-wide entity, i.e., information on the portion of the PRC-wide entity not constituted by Double Coin. *Id.* The court concluded, nevertheless, that Commerce had no need for such information because it expressly had declined to designate the non-Double Coin portion of the PRC-wide entity for individual examination. *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1336–41.

Third, the court concluded that even had it been permissible for Commerce to use facts otherwise available, Commerce could not permissibly use its "adverse inference" authority of 19 U.S.C. § 1677e(b) to apply the 105.31% rate, which was based in part on "adverse facts available" ("AFA"). *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1338. The court reasoned that Commerce found Double Coin to have fully cooperated and did not find the PRC-wide entity, or any portion of it, to be an uncooperative respondent in the review. *Id.*

Seeing no statutory exception allowing Commerce to assign anything other than an individual dumping margin to Double Coin, the court directed Commerce "to assign the 0.14% *de minimis* margin to Double Coin because it is the only possible result that, on the record of the fifth administrative review, could comply with all statutory requirements." *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1344.

b. Defendant's Motion for a Partial Remand and Double Coin's Opposition

In the Remand Redetermination, Commerce assigned Double Coin a 0.14% *de minimis* margin. *Remand Redetermination* 19–21. It did so "under respectful protest," noting that it disagreed with the "rationale and holding" of *CMA I*. *Id.* at 21. After Commerce submitted the Remand Redetermination to the court, defendant filed its motion for a partial remand "so that Commerce can revisit the issue of Double Coin's margin in light of *Diamond Sawblades.*" Def.'s Mot. for Remand 2 (citing *Diamond Sawblades*, 866 F.3d at 1313 n.6). Defendant's motion directs the court's attention, in particular, to footnote 6 of the *Diamond Sawblades* opinion. Responding to an argument that appellant Advanced Technology & Materials ("ATM") had based on *CMA I*, the footnote expressed disapproval of the analysis in *CMA I.* In the footnote, the Court of Appeals stated as follows:

> The CIT's analysis in *China Manufacturers Alliance* suffers from the same deficiencies as ATM's arguments in this appeal. The analysis does not properly apply our precedent upholding Commerce's use of the PRC-wide entity rate for companies that fail to rebut the presumption of government control and is incompatible with the underlying NME presumption. *See Transcom* [*, Inc. v. United States*], 294 F. 3d [1371] at 1381. Accordingly, we do not find the CIT's decision in *China Manufacturers Alliance* persuasive.

Diamond Sawblades, 866 F.3d at 1313 n.6. Defendant argues in its motion that the decision of the Court of Appeals in *Diamond Sawblades* constitutes intervening legal authority that Commerce could not have considered when making its decision in the Remand Redetermination to address Double Coin's margin. Def.'s Mot. for Remand 5. Defendant argues, further, that the appellate decision "'may affect the validity of the agency action' of assigning Double Coin, under protest, a *de minimis* margin in its *Remand Redetermination*." *Id.* (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)).

Double Coin opposes the remand motion. It argues, first, that "Commerce cannot at this time seek to change the remand result" in this

situation, in which Commerce assigned Double Coin an individual weighted-average dumping margin as required by the court's order. Double Coin's Opp'n. 1. According to Double Coin, "[b]ecause this Court has already opined on the matter, Commerce must respect and abide by such opinion—until and unless it is changed or vacated." *Id.* at 3. Double Coin adds that granting defendant's motion "would result in inefficient litigation and resolution of this appeal." *Id.* at 4. Double Coin argues, in the alternative, that if the court grants the motion, it also must address the three other arguments it made in contesting the 105.31% rate, i.e., the arguments the court did not reach in granting relief on Double Coin's claim. Those arguments, as recounted in its opposition to the remand motion, were that: (1) Commerce lacked authority to issue a "country-wide" rate such as the PRC-wide rate, being limited by the statute to assigning individual margins and an all-others rate, (2) the Department's presumption of government control in China is no longer valid given the changes in China to the underlying factual basis that previously gave rise to that presumption, and (3) in this case, Double Coin rebutted the presumption of government control. *See id.* at 4–5.

The court will deny the motion for a partial remand. Were the court to grant the motion, upon reconsideration the only rate Commerce reasonably could assign the PRC-wide entity on the record of the fifth review would be the 0.14% rate Commerce assigned Double Coin in the Remand Redetermination. This result obtains under the relevant holding in *Diamond Sawblades*, as discussed below. Because Commerce has requested to reconsider only the rate it assigned Double Coin, and not the 105.31% rate assigned to the entire PRC-wide entity that Commerce left unchanged in the Remand Redetermination, no purpose would be served by granting defendant's motion.

One of the holdings of *Diamond Sawblades* bears directly on this case and is intervening legal authority. *See SKF USA*, 254 F.3d at 1028–29 (explaining that an agency may seek remand in order to consider new legal decisions). *Diamond Sawblades* holds that the Tariff Act allows Commerce to assign the rate it assigns to the PRC-wide entity to a cooperative respondent it selected as a mandatory respondent, provided the respondent fails to rebut the Department's presumption of control by the government of the PRC. *Diamond Sawblades*, 866 F.3d at 1313 & n.6. The analysis by which *CMA I* ordered Commerce to assign Double Coin the calculated individual margin of 0.14% does not conform to the holding in *Diamond Sawblades* because it did not require expressly that the rate to be

assigned to Double Coin be the rate ultimately determined for the PRC-wide entity as a whole.[10] Therefore, in order to rule on defendant's motion, the court reconsiders, in light of the holding in *Diamond Sawblades*, its decision in *CMA I* to require Commerce to assign that margin to Double Coin. In doing so, the court applies the analysis the Court of Appeals applied in *Diamond Sawblades*. Also, solely for purposes of ruling on defendant's motion for a partial remand, the court presumes, but does not decide, that the Department's rebuttable presumption that the export activities of all firms within the PRC are subject to government control is factually supported and that Commerce permissibly found that Double Coin had not rebutted that presumption.

c. Diamond Sawblades Does Not Hold that Commerce May Assign the PRC-Wide Entity an Adverse Inference Rate if the PRC-Wide Entity Did Not Fail to Cooperate in the Review

In ruling on defendant's motion for a partial remand, the court first considers what *Diamond Sawblades* does *not* hold. The Court of Appeals did not hold that Commerce may assign a rate derived, in whole or in part, from an adverse inference rate in an administrative review of an antidumping duty order when no party to the review failed to cooperate for purposes of 19 U.S.C. § 1677e(b).

In *Diamond Sawblades*, which involved the final results of the first review of an antidumping duty order, the Department's remand redetermination assigned the respondent ATM the rate (82.12%) it calculated in the review for the PRC-wide entity. *Diamond Sawblades*, 866 F.3d at 1309. Commerce calculated this rate as a simple average of the individually-determined margin it calculated for ATM, which was 0.15%, and the rate for the PRC-wide entity prior to the review, which was 164.09%. *Id.* On remand, Commerce reached a finding (which the Court of Appeals sustained) that ATM had failed to rebut the Department's presumption of control by the PRC government. *Id.* at 1308. As it did in this case, Commerce concluded that "it did not have the necessary information 'from the remaining unspecified portion of the PRC-wide entity to calculate a margin for the unspecified portion of the PRC-wide entity.'" *Id.* at 1309 (quoting the remand redetermination in that case). Like Double Coin, ATM was a

[10] It should be noted that *CMA I* did not *preclude* Commerce from assigning the 0.14% margin to the PRC-wide entity as well as to Double Coin. No party other than Double Coin challenged the PRC-wide rate in this litigation.

mandatory, fully cooperative respondent in the review. *See id.* at 1311. The Court of Appeals held that "[b]ecause ATM failed to rebut the presumption of government control, Commerce's decision to apply the PRC-wide rate to ATM was not contrary to law." *Id.* at 1312.

The 82.12% rate applied to the mandatory respondent ATM in *Diamond Sawblades* was affected by an adverse inference, having been calculated as a simple average of ATM's individually-determined 0.15% margin in the first review and the 164.09% rate, which was the rate determined for the non-cooperating PRC-wide entity in the immediately-preceding less than-fair-value investigation. *See id.* at 1309. In *Diamond Sawblades*, 21 companies that were part of the PRC-wide entity failed to cooperate in the review, and therefore the PRC-wide entity as a whole could be considered to have failed to cooperate.[11] Such is not the case here. In concluding the fifth review, Commerce stated that Double Coin was a fully cooperative respondent and that "no other part of the [PRC-wide] entity failed to cooperate." *Final I&D Mem.* at 19.

d. Diamond Sawblades Does Not Hold that the "Simple Average" Rate Commerce Assigned to the PRC-Wide Entity in that Case Necessarily Was Reasonable on the Facts of that Case

As the court mentioned above, in the review in *Diamond Sawblades* Commerce calculated the PRC-wide rate of 82.12% as a simple average of the individually-determined margin it calculated for ATM, which was 0.15%, and the rate for the PRC-wide entity prior to the review, which was 164.09%. *Diamond Sawblades*, 866 F.3d at 1309. The Court of Appeals expressly declined to decide whether this method of determining a rate for the PRC-wide entity was reasonable. *Diamond Sawblades*, 866 F.3d at 1309 n.3 ("Neither party challenges Commerce's decision to take a simple average of the two rates as its method for recalculating the PRC-wide entity rate based on the

[11] In the remand redetermination at issue in *Diamond Sawblades*, Commerce stated a finding that "'unlike the less-than-fair-value investigation, no part of the PRC-wide entity failed to cooperate to the best of its ability.'" *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1309 (Fed. Cir. 2017) (internal citation omitted). In the Court of International Trade decision on appeal in that case, which the Court of Appeals affirmed, the Court of International Trade had interpreted that finding to apply only to the cooperation of the mandatory respondent Advanced Technology & Materials ("ATM") and not to that of the PRC-wide entity as a whole. *Id.* The CIT concluded that the record in that case lacked substantial evidence to support a finding that the entire PRC-wide entity cooperated in the review. *Id.* The PRC-wide entity in that case included ATM and 21 other companies, all of which failed to demonstrate independence from government control. While ATM fully cooperated, that was not the case for the other 21 companies. As the Court of Appeals stated, "the PRC-wide entity comprised twenty-one other companies, aside from ATM, that also had failed to demonstrate a lack of government control. The other twenty-one companies *did not cooperate in the first administrative review*." *Id.* at 1309 n.2 (emphasis added).

information it had before it. We therefore do not address the reasonableness of that decision.”).

In this case, Double Coin challenged the PRC-wide rate on numerous grounds that necessarily encompass a challenge to the reasonableness of the method by which Commerce derived it.[12] *See* Double Coin’s Corrected Br. in Support of Mot. for J. on the Agency R. 8–13, 51–59 (Oct. 5, 2015) ECF Nos. 48 (conf.), 49 (public) (“Double Coin’s Br.”).

e. The Only Rate Commerce Reasonably Could Assign to the PRC-Wide Entity Is One Equivalent to the Individual Margin It Calculated for Double Coin

Were the court to grant defendant’s partial remand motion and thereby permit it to determine a new rate that would apply to Double Coin and to the entire PRC-wide entity, it would not be permissible for Commerce to choose the 105.31% rate Commerce assigned to the PRC-wide entity in the Final Results and the Remand Redetermination.[13] Nor could Commerce assign any other rate derived, in whole or in part, from an adverse inference. As discussed previously, Commerce found that every party to the fifth review, including the PRC-wide entity, was a fully cooperating party.

A party to an antidumping duty proceeding ordinarily may be subjected to a rate based in whole or in part on an adverse inference only if that party “failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority” in that proceeding, i.e., the proceeding in which the agency is “reaching the applicable determination under this subtitle.” 19 U.S.C. § 1677e(b). As the Court of Appeals has opined, “applying an adverse rate to cooperating respondents undercuts the cooperation-promoting goal of the AFA statute.” *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1378 (Fed. Cir. 2012).[14]

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[12] The Court of Appeals also noted in *Diamond Sawblades* that the plaintiff did “not challenge Commerce’s ability to apply a PRC-wide entity rate under the statutory framework.” *Diamond Sawblades*, 866 F.3d at 1310 n.4. Double Coin brings that challenge in this case.

[13] Because Double Coin is the only party to this litigation that challenged the PRC-wide rate, and because Double Coin received a rate more favorable than the existing 105.31% PRC-wide rate on remand, Commerce permissibly did not change the PRC-wide rate in the Remand Redetermination. As noted herein, defendant does not seek to change the PRC-wide rate in its motion for a voluntary remand.

[14] The Court of Appeals has recognized a circumstance in which Commerce, applying 19 U.S.C. § 1677e, may rely on policies of deterrence “as part of a margin determination for a cooperating party” to ensure that another party does not benefit from its own noncompliance, so long as Commerce does not confine itself to a deterrence rationale and also considers accuracy. *Mueller Com. De Mex., S. De R.L. De C.V. v. United States*, 753 F.3d 1227, 1233 (Fed. Cir. 2014). This case does not present a factual situation analogous to that of *Mueller*.

Nor could it plausibly be argued that a rate only partially derived from an adverse inference would not suffer from this defect. *See id.* ("Commerce misses the point when it argues that the appellant cannot complain because it does not bear an AFA rate directly, but only a separate rate derived from the AFA rate, which is only half as adverse.").

The next question, then, is what rate Commerce could assign to the PRC-wide entity that is *not* derived, in whole or in part, from an adverse inference. A rate equal to the 0.14% margin Commerce calculated in the Final Results for Double Coin clearly qualifies under that criterion, as it used the actual data for Double Coin, which fully cooperated in the review, but the court must consider whether any rate other than that one also would be reasonable on the record of the fifth review.

Commerce has a longstanding practice of assigning a single rate to all exporters and producers of subject merchandise in a nonmarket economy country that do not rebut its presumption of government control, and it followed that practice in the fifth review. *See Final I&D Mem.* at 10–11. Generally, the Department's practice has been to base the PRC-wide rate directly or, as in the Final Results and in the review at issue in *Diamond Sawblades*, indirectly, on an adverse inference rate (typically, a "total AFA" rate). The facts of the fifth review, in which there was no uncooperative party, require Commerce, in order to comply with the limitations in 19 U.S.C. § 1677e(b), to depart from its prior practice of deriving the PRC-wide rate from an adverse inference rate.

In this litigation, Double Coin claims that the Department's practice of issuing a single, "country-wide" rate to the PRC-wide entity is contrary to the Tariff Act. It argued in its Rule 56.2 motion, and argues again in opposition to defendant's motion for a partial remand, that the statute provides for only two types of antidumping duty rates: individual weighted-average dumping margins, which are assigned to exporters and producers that are individually investigated or examined, and an "all-others" rate that applies to all exporters and producers not individually investigated or examined. Double Coin's Br. 8; *see* Double Coin's Opp'n 3–4. A recent decision of the Court of International Trade agreed with that argument. *Thuan An Production Trading and Service Co. v. United States*, 42 CIT __, 2018 WL 5794540, at *4–6 (Nov. 5, 2018) ("*Thuan An*") (holding that the Vietnam-wide rate Commerce assigned in an administrative review of an antidumping duty order "cannot stand" under the Tariff Act if it "is something other than one of the two statutorily authorized rates, i.e., it is not an individual rate or an all-others rate"). This Court

reasoned in *Thuan An* that these are the only two types of rates the statute, in 19 U.S.C. § 1673d(c)(1)(B)(i)(I)-(II), authorizes for investigations, *id.* at *4–6, and that this principle applies with equal force to reviews, *id.* at *4 n.11 (citing *Albemarle v. United States*, 821 F.3d 1345, 1352 (Fed. Cir. 2016)). The court considers the reasoning of *Thuan An* persuasive. Moreover, the Tariff Act provides for the assignment of dumping margins (whether or not they are individual margins) to exporters and producers of the subject merchandise, not countries (although state-owned enterprises may be exporters or producers). *See* 19 U.S.C. §§ 1673b(d)(1)(A) (preliminary determinations in investigations); 1673d(c)(1)(B)(i)(I)-(II) (final determinations in investigations); 1677f-1(c) (determination of dumping margins in investigations and reviews).

In this case, an "all others" rate could not be assigned to the PRC-wide entity so long as that entity includes Double Coin. An all-others rate applies to respondents in an investigation that are *not* selected for individual examination, *see* 19 U.S.C. § 1673d(c)(1)(B)(i)(I)-(II), and this principle also applies to reviews, *see Albemarle*, 821 F.3d at 1352. In the fifth review, Commerce designated Double Coin as a mandatory respondent (although declining to so designate the remainder of the entity).[15] Therefore, under the holding, and the reasoning, this Court adopted in *Thuan An*, any rate Commerce could apply to the PRC-wide entity must be an individual weighted-average dumping margin.

Two individual weighted-average dumping margins are available for assignment in the fifth review: the rate that will be assigned to GTC (which has not yet been determined in this litigation), and the 0.14% rate that Commerce already determined based on Double Coin's data.[16] Because Commerce included Double Coin, but not GTC, in the PRC-wide entity, the 0.14% rate is, in that respect, representative of the entity, and therefore it would be reasonable for Commerce to assign the PRC-wide entity Double Coin's individual rate. That is not the case with the margin to be determined for GTC, which Commerce found not to be part of the PRC-wide entity.

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[15] Designating only part of an entity as a mandatory respondent would seem inconsistent with the Department's treating the PRC-wide entity as a "single" entity in which all exporters within the entity are "subject to government control and influence," *Final I&D Mem.* at 10, 13. Regardless, in this case the court need not decide if the designation of only part of an entity for individual examination under 19 U.S.C. §§ 1673d(c)(1)(B)(i)(I)-(II) and 1677f-1(c) is statutorily permissible.

[16] A PRC-wide rate based on "total AFA" arguably could be characterized as an individual rate that is assigned to a single entity, the PRC-wide entity, even though it is not based on examination of individual sales or entries. But as the court has discussed, it would not be permissible for Commerce to assign an AFA-based rate to the PRC-wide entity in this case.

The holding of *Thuan An* is one reason for the court's conclusion that only the 0.14% rate could be assigned to the PRC-wide entity. But there is another reason as well: *Thuan An* aside, the 0.14% rate is the only rate that reasonably could be applied to the PRC-wide entity according to the particular facts of the fifth review, whether or not the court holds that the rate to be assigned to the PRC-wide entity is required by statute to be an individual rate. Commerce explained that the PRC-wide entity consisted of Double Coin and any other exporter "that has not established its eligibility for a separate rate" by demonstrating independence from "government control and influence." *Final I&D Mem.* at 10. But in the fifth review, no Chinese exporter or producer of OTR tires other than Double Coin was in a position to be determined to be part of the PRC-wide entity, with the result that the record contained no information on any part of the PRC-wide entity except for Double Coin. The administrative record for the fifth review confirms this point.

In the *Initiation Notice*, Commerce announced that it initiated a review of five Chinese producers or exporters of OTR tires: Double Coin, GTC, Hangzhou Zhongce Rubber Co., Ltd. ("Zhongce"), Trelleborg Wheel System (Xingtai) China, Co. Ltd., and Weihai Zhongwei Rubber Co., Ltd. ("Zhongwei"). *Initiation Notice*, 78 Fed. Reg. at 67,108. Double Coin and GTC were the mandatory respondents. *Final Results*, 80 Fed. Reg. at 20,197. Trelleborg was found to have no shipments during the POR and therefore was not a reviewed entity. *Id.* Commerce found that Zhongce and Zhongwei had established independence from the PRC government and were treated as "separate-rate" respondents in the fifth review, i.e., they were respondents that were under review by Commerce but were not individually examined. *Id.*, 80 Fed. Reg. at 20,198. Therefore, only four companies—Double Coin, GTC, Zhongce, and Zhongwei—were reviewed. In the Amended Final Results, Zhongce and Zhongwei each were assigned a rate equal to the margin individually determined for GTC; i.e., they all received the all-others rate applicable to entities separate from the PRC-wide entity. *Amended Final Results*, 80 Fed. Reg. at 26,231. Like the Final Results, the Amended Final Results listed only four rates, each of which it described as a "[w]eighted average dumping margin (percent)": GTC, 11.41%, Zhongce, 11.41%, Zhongwei, 11.41%, and the "PRC-wide entity," in which Commerce included Double Coin, 105.31%. *Id.* (footnote omitted).

Commerce considered the PRC-wide entity to be under review in the proceeding at issue in this case, but it conceded that the only reason for this was that Double Coin was under review:

> Though Double Coin notes that the NME entity is not listed as one of the companies for which review was requested in the *Initiation Notice*, the *Initiation Notice* plainly states that "If one of the above-named companies does not qualify for a separate rate, all other exporters of Certain Pneumatic Off-the-Road Tires {from} the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part. Thus, the Department explicitly put the PRC-wide entity and all other interested parties on notice that the PRC-wide entity would be reviewed if one of the named exporters did not qualify for a separate rate. Thus, pursuant to Double Coin's failure to demonstrate a lack of *de facto* government control, the PRC-wide entity is subject to review.

Final I&D Mem. at 12 (footnote omitted). Although Commerce conceded that that the record contained no information "with respect to the composition of the PRC-wide entity," *id.*, and although Double Coin was the only producer or exporter Commerce identified as a member of the PRC-wide entity, Commerce nevertheless seemed to imply that Double Coin was not the only reviewed exporter or producer the PRC-wide entity included:

> Having not demonstrated the absence of *de facto* control from the government over selection of its management, Double Coin constitutes a part of the PRC-wide entity. Further, the PRC-wide entity *is comprised of producers and exporters that can provide answers to questions*, as evidenced by Double Coin in this review.

Id. at 14 (emphasis added). The record does not support any such implication.

As Double Coin argued in the review, *see id.* at 10, and argues before the court, *see* Double Coin's Br. 54–55, Commerce never requested any information from the government of the PRC or from any part of the PRC-wide entity other than Double Coin. In explaining the Final Results, Commerce did not dispute that in conducting the fifth review it did not request such information. *See Final I&D Mem.* at 14. In its brief in response to this argument in Double Coin's Rule 56.2 motion, defendant does not dispute that in conducting the fifth review Commerce never requested information from the PRC government or from any other exporter or producer Commerce potentially could have deemed to be part of it. *See* Def.'s Response to Mots. for J. on the Admin. R. 39–40 (Dec. 7, 2015), ECF No. 60 ("Def.'s Br."). As a factual matter, only four exporters or producers of OTR tires specifically were included in the fifth review: two were cooperating mandatory respondents and the other two were unexamined respondents (and were

assigned GTC's margin). Therefore, if the PRC-wide entity can be presumed to include any exporters or producers of OTR tires other than Double Coin, they cannot be identified and do not appear in the record of the review.[17]

In opposing Double Coin's Rule 56.2 motion, defendant points out that "Commerce did not preclude a company from participating in this review, nor did it preclude a company from seeking a review of a part of the PRC-wide entity." Def.'s Resp. 39; *see Final I&D Mem.* at 14. This argument does not address the problem posed by the limited record evidence. That one or more additional Chinese exporters or producers *could* have participated in the review, and, had they done so, might have been found to be part of the PRC-wide entity, does not change the record fact that none actually did. As a result, the only record information relevant to determining a rate for the PRC-wide entity was the information pertinent to Double Coin. Commerce acknowledged that the record lacked any information on the non-Double Coin portion of the PRC-wide entity: "[t]he Department must calculate a single rate for the PRC-wide entity, and in this review, we do not have the necessary information, *i.e.*, sales and production data, from the remaining unspecified portion of the PRC-wide entity." *Final I&D Mem.* at 12.

When "necessary information is not available on the record" and there is no failure to cooperate, Commerce may resort to "facts otherwise available" without an adverse inference (to which information Commerce refers as "neutral" facts otherwise available). *See* 19 U.S.C. § 1677e(a). Here, the only information on the record that reasonably could serve as facts otherwise available for determining a rate for the PRC-wide entity is Double Coin's information. While it might be argued that it would be reasonable for Commerce to use information pertinent to GTC for this purpose, this argument would be unconvincing for the reason the court mentioned earlier. While both sets of data pertain to the current (fifth) review, Double Coin's information is representative of the PRC-wide entity while the information of GTC, which Commerce excluded from the PRC-wide entity, is not.

In conclusion, the only rate supported by the record evidence that Commerce reasonably could apply to the PRC-wide entity—and therefore to Double Coin—were the court to grant the requested partial remand, would be one equivalent to the 0.14% margin Commerce already determined for Double Coin in the Remand Redeter-

[17] This is in contrast to the review at issue in *Diamond Sawblades*, in which 21 companies in addition to ATM were specifically included in the PRC-wide entity. *Diamond Sawblades*, 866 F.3d at 1309 n.2.

mination. Because Commerce assigned that rate to Double Coin in the Remand Redetermination and does not seek to reconsider the 105.31% rate it assigned to the PRC-wide entity (except with respect to Double Coin), granting defendant's motion for a partial remand would serve no purpose. The court, therefore, must deny this motion.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court remands to Commerce the decision published as the Final Results of Redetermination Pursuant to Court Remand (June 21, 2017), ECF No. 200 (the "Remand Redetermination") for further consideration in accordance with this Opinion and Order. Upon consideration of the Remand Redetermination, Defendant's Motion for Partial Voluntary Remand (Aug. 28, 2017), ECF No. 218, all comments thereon, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Defendant's Motion for Partial Voluntary Remand, be, and hereby is, denied; it is further

ORDERED that the Department's decision to make an inflation adjustment to GTC's warehouse costs and its determination that the Shanghai Port Charges were double counted in the Department's calculation of GTC's freight and handling expenses, both of which are uncontested, be, and hereby are, sustained; it is further

ORDERED that Commerce shall submit a new determination upon remand ("Second Remand Redetermination") in which it redetermines export price and constructed export price for GTC as directed in this Opinion and Order; it is further

ORDERED that Commerce will submit its Second Remand Redetermination, which shall comply with the directives in this Opinion and Order, within 90 days of the date of this Opinion and Order; it is further

ORDERED that all plaintiffs may file comments on the Second Remand Redetermination no later than 30 days after the filing of the Second Remand Redetermination; and it is further

ORDERED that defendant may file a response to any comments on the Second Remand Redetermination no later than 15 days from the date on which the last comments are filed.

Dated: January 16, 2019
New York, New York

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

Slip Op. 19–8

UNITED STATES, Plaintiff, v. SIX STAR WHOLESALE, INC., Defendant.

Before: Leo M. Gordon, Judge
Court No: 14–00252

[Granting Plaintiff's motion for default judgment.]

Dated: January 18, 2019

Stephen C. Tosini, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Plaintiff United States. With him on the motion were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

OPINION

Gordon, Judge:

Before the court is the motion of Plaintiff United States ("the Government"), pursuant to USCIT Rule 55, for a default judgment against Defendant Six Star Wholesale, Inc. ("Six Star"), for a civil penalty in the amount of $486,456.04, and unpaid duties in the amount of $143,228.02, plus pre- and post-judgment interest and costs. *See* Pl.'s Mot. for Default J., ECF No. 15 ("Pl.'s Mot."). Defendant failed to answer the complaint, respond to Plaintiff's motion for default judgment, or otherwise appear in this action. The court has jurisdiction pursuant to 28 U.S.C. § 1582(1) (2012) for the recovery of a civil penalty and duties under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012) ("§ 592").[1]

For the reasons set forth below, the court grants Plaintiff's motion for a default judgment, and awards the United States the amount of $529,684.06 (unpaid duties of $143,228.02, and civil penalties of $386,456.04). Additionally, the United States is entitled to pre-judgment interest on the unpaid duties, pursuant to 19 U.S.C. § 1677g, post-judgment interest computed in accordance with 28 U.S.C. § 1961, and costs.

I. Background

The United States commenced this action to collect a civil penalty under § 592 for Defendant's alleged negligent misclassification of certain wire hangers and polyethylene retail carrier bags ("PRCBs") (collectively with wire hangers, "subject merchandise") and to recover unpaid duties on the entries of the wire hangers.

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

A. Wire Hangers

From October 2009 to August 2010, Six Star imported 27 entries of wire hangers from China. *See* Declaration of Kemal Safadi ¶ 2, ECF No. 15–1 ("Safadi Decl."). Six Star's customs broker described the wire hangers as "clothing racks" and incorrectly classified them under HTSUS 9403.20.0020 with a 0% duty rate, instead of classifying the subject hangers under HTSUS 7326.20.0020 at a 3.9% duty rate. *Id.* ¶¶ 3, 5. Defendant also filed these entries as type 01 entries rather than as type 03, which is required when imported merchandise is subject to antidumping duties. *Id.* ¶ 7. In reviewing the entries, U.S. Customs and Border Protection ("Customs") found that the three companies that manufactured the subject hangers refer to themselves on their websites as sellers of wire hangers rather than manufacturers of "clothing racks." *Id.* ¶ 8. Customs subsequently issued a pre-penalty notice and penalty claim to which Six Star failed to respond. *Id.* ¶¶ 14, 18. Upon that failure, Customs demanded payment of the duties from Six Star's sureties on the entries of the subject hangers. *Id.* ¶¶ 16–17. The sureties then paid $38,864.06 in duties. *Id.* After deducting this amount from the calculations, the Government now seeks to recover $143,228.02 in lost revenue (unpaid duties) and $364,186.16 in a penalty based on Six Star's negligence. Pl.'s Mot. at 2. To date, Six Star has not paid any duties or penalty. *Id.* at 3–4.

B. Polyethylene Retail Carrier Bag Entries

From October 23, 2009 to July 18, 2010, Six Star imported 14 entries of PRCBs into the United States. Safadi Decl. ¶ 19. Six Star classified the PRCBs under HTSUS 3923.29.0000, dutiable at 3%, instead of classifying the subject PRCBs under HTSUS 3923.21.0085, at the same duty rate. *Id*. Additionally, Customs determined that the subject PRCBs were subject to antidumping duties in that a majority of the PRCBs were manufactured by a company in China with a company-specific antidumping duty rate of 25.69%, with the remaining PRCBs subject to the China-wide rate of 77.57%. *Id.* ¶¶ 20, 22. Customs issued a pre-penalty notice and penalty claim for negligence with a penalty of $122,271.88, as well as a demand for lost revenue of $61,135.94. *Id.* ¶¶ 23, 25. To date, Six Star has not responded administratively nor paid any duties or penalty; however, Six Star's sureties paid the outstanding duties. *Id.* ¶¶ 23, 26, 28–29. The Government now seeks a penalty of $122,271.88 against Six Star, again based on negligence.

II. Legal Framework

Section 592 governs the assessment of a civil penalty for the negligent entry of imported merchandise into the United States. 19 U.S.C. § 1592. "[N]o person, by . . . negligence[,] . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1). "A document, statement, act, or omission is *material* if it has the natural tendency to influence or is capable of influencing . . . . [Customs'] determination of an importer's liability for duty . . . ." 19 C.F.R. Pt. 171, App. B(B) (2009) (emphasis added).

The maximum penalty under § 592 for negligence is the lesser of "(i) the domestic value of the [subject] merchandise, or (ii) two times the lawful duties, taxes, and fees of which the United States is, or may be deprived." 19 U.S.C. § 1592(c)(3). The United States also may recover any unpaid lawful duties regardless of whether a monetary penalty is assessed. *Id.* § 1592(d).

The burden of proof for recovery of a civil penalty for negligence is initially on the United States "to establish the act or omission constituting the violation." *Id.* § 1592(e)(4). The burden then shifts to the alleged violator to prove that "the act or omission did not occur as a result of negligence." *Id.* The alleged violator must "affirmatively demonstrate that it exercised reasonable care under the circumstances." *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2009).

III. Discussion

USCIT Rule 55 provides a two-step process for obtaining judgment when a party fails to plead or otherwise defend—(1) entry of default followed by (2) entry of a default judgment. *See* USCIT R. 55(a), (b); *see also* 10A C. Wright & A. Miller, *Federal Practice & Procedure* § 2682 (4th ed. 2018). Once the clerk of court has entered a default, the party seeking the default then must apply to the court for entry of a default judgment. *See* USCIT R. 55(b)(2).

Six Star failed to enter an appearance, file an answer to Plaintiff's complaint, or otherwise defend this action. The Government moved for entry of default, ECF No. 10, which the court granted, ECF No. 11. The Government then filed its motion for a default judgment.

The mere fact that a defendant is in default does not entitle a plaintiff to a default judgment as a matter of right. *See City of New York v. Adventure Outdoors, Inc.*, 644 F. Supp. 2d 201, 212 (E.D.N.Y. 2009). Therefore, determining whether to grant a motion for a default

judgment lies within the sound discretion of the court. *Id.* In exercising its discretion, the court considers whether (1) denial of the motion will prejudice plaintiff; (2) defendant has a meritorious defense; and (3) defendant's culpable conduct contributed to the default. *See Eastern Elec. Corp. v. Shoemaker Const. Co.*, 657 F. Supp. 2d 545, 551 (E.D. Pa. 2009) (quotation omitted).

On a very basic level, denial of the motion prejudices the Government because Defendant's failure to respond has prevented the Government's collection of lost revenue and penalties. As to the second consideration, Six Star had the opportunity to present a meritorious defense, but chose not to defend this action. Lastly, Six Star's actions (or lack thereof) via its default reflects a conscious disregard for the laws governing the importation of merchandise. Accordingly, the entry of a default judgment is appropriate.

The court now turns to the issues of liability and damages (the amount of the penalty). The entry of a default generally has the effect of establishing liability on the part of the defaulting party. *See Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). When a defendant defaults, it admits all well-pled factual allegations contained in the complaint. Although the factual basis for liability is established by the default, the default does not serve as an admission of the claim of liability. *Id.* Similarly, a party's failure to defend does not operate as an admission of the amount of damages claimed in the complaint. *See Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Founds. Contractors Inc.*, 699 F.3d 230, 234 (2d Cir. 2012). The court will enter a default judgement against Six Star if (1) Plaintiff's allegations in its complaint establish liability as a matter of law, and (2) Plaintiff's claim is for a sum certain or for a sum that can be made certain by computation. USCIT R. 55(b).

A. Liability

As discussed above § 592 prohibits the entry of merchandise by means of "any document or electronically transmitted data or information, written or oral statement, or act, which is material and false" when the person acted with fraud, gross negligence, or negligence. 19 U.S.C § 1592(a)(1)(A)(i). In this action the Government alleges that Six Star made material misstatements on its CF-7501 entry summaries by (1) falsely classifying 27 entries of wire hangers as "clothes racks" and (2) failing to declare that those hangers were subject to antidumping duties. Compl. ¶¶ 6–9; Pl.'s Mot. at 6. The Government further alleges that Six Star misclassified its PRCBs and failed to declare that they were subject to antidumping duties. Compl. ¶¶ 14–16; Pl.'s Mot. at 6. The false information that Six Star submitted

is material because it influenced Customs' collection of the proper amount of duties on the entries of the subject merchandise. Compl. ¶¶ 10, 17. Consequently, Six Star submitted information to Customs that was material and false, thereby establishing liability under § 592 as a matter of law. The well-pled facts in the Government's complaint are sufficient to establish its entitlement to (1) the collection of the unpaid duties on the subject hangers and (2) a monetary penalty based on negligence under § 592 on the entry of both the subject hangers and PRCBs. *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114,137 (2d Cir. 2011).

B. Damages

As for damages, § 592 provides a maximum civil penalty amount for negligent violations, which may not exceed the lesser of the domestic value of the merchandise or two times the lawful duties, taxes, and fees of which the United States is or may be deprived. 19 U.S.C. § 1592(c)(3). The Government alleges that Six Star is liable for a civil penalty of $364,184.16, based on Defendant's negligence in the importation of the subject wire hangers, and for $182,092.08 in unpaid duties on those hangers. Compl. ¶ 13; Pl.'s Mot. at 4. The Government further claims that Six Star is liable for a civil penalty of $122,271.88, based on Defendant's negligence in the entry of the subject PRCBs. *Id.* In total, the Government seeks $143,228.02[2] in unpaid duties and a combined penalty of $486,456.04. *Id.*

Here, the Government seeks the statutory maximum penalty of two times the lawful duties of which the United States is or may be deprived, *i.e.*, $486,456.04, which is less than the domestic value of the subject merchandise, $708,415.02.[3] *See* Compl. ¶¶ 14 and attached worksheet; Safadi Decl. ¶¶ 15, 24. While it may seek the statutory maximum, the Government is not entitled, as a matter of right, to a penalty in that amount. Rather, the court determines the appropriate penalty in its discretion. 19 U.S.C. § 1592(e)(1) (court to decide amount of penalty *de novo*); *United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1368–69 (Fed. Cir. 2008) (citing *United States v. Ford Motor Co.*, 463 F.3d 1267, 1285 (Fed. Cir. 2006)).

The court will not presume that the statutory maximum is the starting point for determining the appropriate amount of the penalty. *See United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1370 (Fed. Cir. 2008) ("Not only do past cases state that nothing requires

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[2] The $143,228.02 is the net of the duties owed, $182,092.08, minus $38,864.06 paid by Six Star's sureties.

[3] The domestic value of the subject hangers is $491,923.08, and of the subject PRCBs is $216,491.94, for a total of $708,415.02. *See* Compl. and attached worksheet; Safadi Decl. ¶¶ 15, 24.

the court to grant Customs' request for the maximum penalty, they also explain that the court should not presume that the maximum is warranted."); *United States v. Complex Mach. Works Co.*, 23 CIT 942, 946, 83 F. Supp. 2d 1307, 1312 (1999) ("[T]he law requires the court to begin its reasoning on a clean slate. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight."). Instead, the court typically "determines the appropriate amount in light of the totality of the evidence supporting a higher or lower penalty." *United States v. Sterling Footwear, Inc.*, 41 CIT ___, ___, 279 F. 3d 1113, 1144 (2017).[4]

The Government predicates much of its claim for the maximum penalty on Defendant's culpability, the gravity of the violation, and the nature and circumstances of the violation—focusing on Six Star's lack of reasonable care in the importation of the subject entries.[5] Pl.'s Mot. at 6–7. Meeting the reasonable care standard requires an importer of record, like Six Star, or an agent acting on its behalf (*e.g.*, a customs broker), to review information regarding the nature and classification of the imported merchandise and information on the underlying transaction, including review of available documentation, to ensure that the merchandise is properly classified and assessed with appropriate duties—including antidumping duties—upon entry. *See* 19 U.S.C. § 1484(a)(1). Additionally, the importer of record is required to certify that the information contained in the relevant entry documents (including attendant invoices) are true and correct. *See* 19 U.S.C. §§ 1484(d)(1), 1485(a).

Here the Government contends that Defendant's entry documents stated that the subject entries contained "clothes racks," classifiable under HTSUS 9403.20.0020, free of duty, rather than as wire hangers, classifiable under HTSUS 7326.20.0020, dutiable at 3.9%. Pl.'s

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[4] The Government argues that Six Star has not sought to mitigate the penalty based on factors set forth in *Complex Machine*, 23 CIT at 949–50, 83 F. Supp. 2d at 1315. Those factors are: (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscience of the court; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require.

[5] The general parameters of what constitutes reasonable care are set forth in 19 C.F.R. Part 171, App. B(D)(6). *See also* H. Rep. No. 103–361 at 120 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670 (identifying possible methods by which one may show reasonable care).

Mot. at 2–3. Similarly, Plaintiff maintains that the entry documents for Six Star's entries of PRCBs stated that the entries were "other" plastic bags classified under HTSUS 3923.29.0000, dutiable at 3%, instead of their proper classification as plastic bags made of polyethylene under HTSUS 3923.21.0085, also dutiable at 3%. *Id.* at 3–4. Plaintiff further argues that in addition to these material misstatements, all of Defendant's entries of both the subject wire hangers and PRCBs were filed as "01" type entries, falsely indicating that no antidumping duties should be assessed. *Id.* at 2, 4; *see also* Safadi Decl. ¶ 7 (noting that "[i]mporters are required to file antidumping entries as type '03' entries"). Assuming these facts as true, even a modicum of effort on the part of Six Star would have uncovered (1) the erroneous descriptions and classification of the subject merchandise, (2) the failure to declare the merchandise subject to antidumping duties in the entry documentation, and (3) the failure to pay the correct amount of duties at the time of entry.

In examining the gravity, and nature and circumstances of Defendant's violation, the court considers whether Six Star's actions were isolated or demonstrated a pattern of disregard for the U.S. import laws. *See United States v. New-Form Mfg. Co.*, 27 CIT 905, 921–22, 277 F. Supp. 2d 1313, 1328–29 (2003) (quoting *Complex Machine* ,83 F. Supp. 2d at 1316–17). It is undisputed that the misclassifications encompassed 27 entries over a 10-month period for the wire hangers and 14 entries for the PRCBs over a contemporaneous 9-month period. Similarly, it is uncontroverted that Defendant (or a customs broker acting on its behalf) failed to declare that the imported hangers and PCRBs were subject to antidumping duties. The record before the court also shows that that Six Star (or its customs broker) disregarded information on the face of the invoices that contradicted its description of the imported merchandise on the subject entries. Pl.'s Mot. at 2, 4.

Problematically for Defendant, the record administratively or before the court is devoid of any information that demonstrates that Six Star (or its customs broker) took any steps to ascertain the correct classification for either the subject wire hangers or PRCBs, declare that the merchandise was subject to antidumping duties, or pay the appropriate duties upon entry. Additionally, the record shows that Defendant failed to respond to Customs' pre-penalty notice or penalty claim regarding the subject merchandise. Because Six Star has defaulted, both at the administrative level and before the court, there is no evidence to demonstrate any "extraordinary cooperation beyond that expected from a person under investigation for a Customs vio-

lation." *United States v. Optrex Am., Inc.*, 32 CIT 620, 640, 560 F. Supp. 2d 1326, 1343 (2008). Accordingly, Defendant has provided no information regarding defenses, claims, or facts that would support mitigation of the penalty amount.

The Government proffers evidence that the total domestic value of the subject entries was $708,415.02. *See* Safadi Decl. ¶¶ 15, 24. The Government also demonstrates that the potential revenue loss from the entries of the subject wire hangers was $182,092.08, and from the subject PRCBs was $61,135.94. *See id.* ¶¶ 14, 22.[6] Two times these amounts is $364,184.16 and $122,271.88, respectively, for a total of $486,456.04. Accordingly, the maximum allowable penalty amount for Six Star's negligent violation of § 592 for the subject entries is $486,456.04, which is less than the statutory cap of the total domestic value—$708,415.02—of the subject merchandise, as provided by § 592(c)(3)(A). Pl.'s Mot. at 7.

Additionally, the Government has provided documentation demonstrating that Customs issued the requisite pre-penalty notice and penalty claim to Six Star regarding the negligent entry of the subject merchandise. *See* Compl. ¶¶ 4, 11–13, 18–19; Safadi Decl. ¶¶ 14, 18, 23, 25. Ultimately, Customs issued a formal demand to Six Star for payment of $182,092.08 in unpaid duties for the subject hangers and a civil penalty of $364,184.16 for the subject hangers and $122,271.88 for the subject PRCBs. *See* Safadi Decl. ¶¶ 18, 23. Customs subsequently demanded payment from Six Star's sureties on the duties owed on the subject merchandise. The sureties then paid $38,864.06 in duties owed on the wire hangers, see *id.* ¶¶ 16–18, as well as the full amount owed in duties on the subject PRCBs, $61,135.94, see *id.* ¶¶ 27–29. As of this date, Six Star has failed to pay the combined civil penalty of $486,456.04 and the balance of $143,228.02 in duties owed on the subject hangers. *See id.* ¶¶ 18, 28.

Given Six Star's actions (or lack thereof), the public interest favors a substantial penalty. "There is a strong public interest in 'the truthful and accurate submission of documentation to Customs and the full and timely payment of duties required on imported merchandise. These are weighty interests, contravention of which necessitates the imposition of a penalty of some substance.'" *United States v. Horizon Prods. Int'l, Inc.*, 41 CIT ___, ___, 229 F. Supp. 3d 1370, 1381 (2017)

[6] $182,092.08 is the total amount of duties owed on the 27 entries of wire hangers. *See* Safadi Decl. ¶ 14. Although $38,864.06 of this amount was paid by Six Star's sureties, *id.* ¶¶ 16–17, only $143,228.02 remains in actual lost revenue. *Id.* 18. Similarly, $61,135.94 is the sum of duties owed on the 14 entries of the subject PRCBs. *Id.* ¶ 22. Since Six Star's sureties paid all the duties, there is no remaining lost revenue. *Id.* ¶ 29. However, the statute authorizes the calculation of a civil penalty based on the amount of the "lawful duties, taxes, and fees of which the United States is or may be deprived." *See* 19 U.S.C. § 592(c)(3)(A)(ii).

(quoting *Complex Mach. Works. Co.*, 39 CIT at ___, 83 F. Supp. 2d at 1317).

While a substantial penalty is warranted, the maximum penalty is not. In exercising its discretion, the court notes that the Government was made partially whole when it received payment of $100,000—approximately 40% of Defendant's total duty liability—from sureties on behalf of Six Star. Though this may weigh in favor of a lesser penalty, the court notes that the Government was deprived of $243,228.02, the total duties due and owing at the time of entry of the subject merchandise. Another countervailing consideration is that Six Star shirked its responsibility, as the importer of record, for payment of all duties, leaving Customs to expend resources to seek and obtain some payment from secondary parties, Six Star's sureties. Based on these considerations and the totality of the circumstances, the court will impose a civil penalty in the amount of $386,456.04—computed by doubling the amount of outstanding duties, $143,228.02, plus one time the duties paid.

Accordingly, the court will enter judgment for the unpaid duties and a civil penalty, plus pre-judgment interest on those unpaid duties.[7] 19 U.S.C. § 1677g(b); *see also United States v. NYCC 1959, Inc.*, 40 CIT ___, ___, 182 F. Supp. 3d 1346, 1349 (2016) (awarding pre-judgment interest on outstanding antidumping duties in penalty action). Under § 1677g(b) pre-judgment interest runs from the date of entry of the subject hangers to the date of payment at a rate of interest provided for in 26 U.S.C. § 6621. *Cf. NYCC 1959*, 40 CIT at ___, 182 F. Supp. 3d at 1349 n.5 (court awarded pre-judgment interest commencing on date of summons based on equitable considerations). Additionally, the court awards the Government post-judgment interest pursuant to 28 U.S.C. § 1961 on the civil penalty, and costs.

IV. Conclusion

For the foregoing reasons, the Government's motion for a default judgment against Six Star for negligent violation of 19 U.S.C. § 1592(a) is granted. The court will enter judgment in the amount of $529,684.06 ($386,456.04 in penalty and $143,228.02 in unpaid duties), plus pre-judgment interest upon the unpaid duties, post-judgment interest, and costs.

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[7] The payment of $38,864.06 by Six Star's sureties extinguished all of the regular import duties and some portion of the antidumping duties, leaving the balance of antidumping duties unpaid. Consequently, pre-judgment interest will be awarded in accordance with the statutory provision applicable to underpayments of antidumping duties, 19 U.S.C. § 1677g(b).

Dated: January 18, 2019
New York, New York

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

Slip Op. 19–9

TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş. and ERBOSAN ERCIYAS BORU SANAYI VE TICARET A.S., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00255

[Commerce's *Final Results* sustained in part; remanded in part.]

Dated: January 18, 2019

David L. Simon, Law Office of David L. Simon of Washington, DC, for Plaintiff Tosçelik Profil ve Sac Endüstrisi A.Ş.

Irene H. Chen, Chen Law Group, LLC of Rockville, MD, for Plaintiff Erbosan Erciyas Boru Sanayi ve Ticaret A.S.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Saad Y. Chalchal*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Roger B. Schagrin and *John W. Bohn*, Schagrin Associates of Washington, DC, for Defendant-Intervenor Wheatland Tube Co.

Opinion and Order

Gordon, Judge:

This action involves the final results of the 2015 administrative review conducted by the U.S. Department of Commerce ("Commerce") of the countervailing duty ("CVD") order on circular welded carbon steel pipes and tubes from Turkey, published as *Welded Carbon Steel Pipes and Tubes from Turkey*, 82 Fed. Reg. 47,479 (Dep't of Commerce, Oct. 12, 2017) (final results admin. review) ("*Final Results*"); *see also* accompanying Issues and Decision Memorandum, C-489–502, (Dep't of Commerce Oct. 4, 2017), *available at* https://enforcement.trade.gov/frn/summary/turkey/ 2017–22069–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court are the motions for judgment on the agency record of Plaintiffs Tosçelik Profil ve Sac Endüstrisi A.Ş. ("Tosçelik") and Erbosan Erciyas Boru Sanayi ve Ticaret A.S. ("Erbosan"). *See* Mot. of Pl. Tosçelik for J. on the Agency R., ECF No. 27[1] ("Tosçelik Br."); Mem. in Supp. of. Pl. Erbosan's Rule 56.2 Mot. for Summ. J., ECF No. 29

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

("Erbosan Br."); *see also* Def.'s Resp. Opp. Pls.' Rule 56.2 Mots. for J. on the Agency R., ECF No. 31 ("Def.'s Resp."); Mem. of Def.-Intervenor Wheatland Tube Co. in Resp. to Pls.' Rule 56.2 Mots. for J. on the Agency R., ECF No. 33; Reply Br. of Pl. Tosçelik, ECF No. 35 ("Tosçelik Reply"); Reply Br. of Erbosan, ECF No. 37 ("Erbosan Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

For the reasons that follow, the court sustains Commerce's determinations for Tosçelik's hot-rolled steel ("HRS") issues, and remands Commerce's determination regarding Erbosan's no shipment certification for further consideration.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2018). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2018).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) governs judicial review of Commerce's interpretation of the anti-

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

dumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Discussion

A. Tosçelik's Domestic Sales of HRS

During the administrative review, Commerce examined whether a public authority in Turkey, Ereğli Demir ve Çelik Fabrikalari T.A.Ş. Esas Sözlesmesi ("Erdemir"), provided Tosçelik with hot-rolled steel ("HRS") for less than adequate remuneration. Commerce's regulation, 19 C.F.R. § 351.511(a)(2), sets forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods or services. *See* 19 C.F.R. § 351.511(a)(2). Under that provision, Commerce will "normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question," which could include "prices stemming from actual transactions between private parties." *Decision Memorandum* at 14 (citing § 351.511(a)(2)). The regulation further specifies that in the comparison Commerce must consider "factors affecting comparability" (*e.g.*, product similarity, quantities sold, whether they are imported or auctioned, etc.). *Id.* Additionally, Commerce's benchmark under § 351.511(a) must include "delivery charges and import duties" so that the comparison price reflects the price "that a firm actually paid or would pay if it imported the product." 19 C.F.R. § 351.511(a)(2)(iv).

In the preliminary results Commerce determined that Tosçelik's reported prices for domestic and imported HRS purchases from private suppliers "can serve as tier one benchmarks." *See* Decision Memorandum accompanying *Circular Welded Carbon Steel Pipes and Tubes from Turkey*, 82 Fed. Reg. 16,994 (Dep't of Commerce Apr. 7, 2017) (Prelim. results) ("*Preliminary Decision Memorandum*"). Accordingly, Commerce "used [Tosçelik's] actual domestic and import prices for HRS to calculate the benefit from [its] purchases of HRS from Erdemir ... during the [period of review ("POR")]." *Id.*

In its administrative case brief Tosçelik argued that Commerce should calculate the benchmark under § 351.511(a)(2)(i) using Tosçelik's domestic sales of HRS (*i.e.*, compare the prices Tosçelik paid to Erdemir for HRS with the prices at which Tosçelik sold HRS to private customers). *See Decision Memorandum* at 14 (summarizing case brief arguments). The petitioner, Wheatland Tube Company, responded that use of Tosçelik's HRS sales data would result in a

circular comparison by trying to determine whether the price Tosçelik paid for HRS from Erdemir was subsidized by comparing that price to a price that was also subsidized. *Id.* at 15.

Commerce sidestepped the issue somewhat by determining that it could not identify the delivery terms among Tosçelik's sales data:

> We do not reach the issue of whether the statute, the Department's regulations, and case precedent allows the Department the option to use respondent's sales of an input to measure the adequacy of remuneration for that input, because as explained below, we determine that our record lacks information regarding the Tosçelik Companies' sales such that they are not useable tier-one benchmarks in this review. . . .
>
> . . .
>
> We have reviewed the Tosçelik Companies' HRS sales data, and find that the Tosçelik Companies' HRS sales data do not specify whether the sales reported are on a delivered or free on board (f.o.b.) basis. Were Tosçelik Companies' sales made on a f.o.b. basis, the Department would be required to adjust those prices under its regulations to achieve an apples-to-apples comparison with its purchased HRS prices. As such, even if we were to find that the Tosçelik Companies' proposed benchmark was permissible under 19 CFR 351.511(a)(2)(i), we would lack the information required to ensure a comparable benchmark, as required under 19 CFR 351.511(a)(iv). Thus, we find that the benchmark proposed by the Tosçelik Companies—*i.e.*, the prices at which the Tosçelik Companies sold HRS to other private parties—is not a viable benchmark on this record.

Decision Memorandum at 15–16. Tosçelik challenges as unreasonable Commerce's finding that Tosçelik's HRS sales data do not specify delivery terms (whether they are on a delivered or free on board ("FOB") basis). Tosçelik Br. at 6–8. Tosçelik argues that its domestic sales of HRS were made on a delivered basis. *Id.* Tosçelik references a worksheet as support, which has three separate columns—one for total weight, one for total value, and one for freight-adjusted value. *Id.* (citing Tosçelik Sales Worksheet, CD[3] 193). According to Tosçelik the presence of the freight-adjusted column confirms that its domestic sales were made on a delivered basis. Tosçelik Br. at 7.

Defendant has a compelling counter-argument. Defendant explains that Tosçelik confirmed that it made some export sales on an FOB

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[3] "CD" refers to a document in the confidential administrative record, which is found in ECF No. 19–4, unless otherwise noted. "PD" refers to a document in the public administrative record, which is found in ECF No. 19–5, unless otherwise noted.

basis, and that Tosçelik reported its export sales in the same format as its domestic sales—one column for total weight, one column for total value, and one for freight-adjusted value—meaning the presence of the freight-adjusted column does not itself confirm Tosçelik's delivery terms as Tosçelik argues. *See* Def.'s Resp at 10. (citing Tosçelik's Case Brief and Tosçelik Sales Worksheet).

In its reply brief Tosçelik acknowledges the weakness of its argument by attempting to introduce a *new* fact that it failed to establish on the administrative record: an alleged "common practice in the Turkish domestic market" of making sales on a delivered basis. *See* Tosçelik Reply at 12. One might infer such a general practice from the limited number of Turkish HRS transactions with clear delivery terms on the administrative record: (1) Tosçelik's purchases of HRS from Erdemir are on a delivered basis, (2) Tosçelik's purchases of HRS from other Turkish producers are on a delivered basis, and (3) Tosçelik's imports of HRS are on a delivered basis. The administrative record, however, does not mandate such an inference, especially because Tosçelik never informed Commerce of the practice. All that a reasonable mind may definitively conclude from the administrative record is that Tosçelik's *purchases* of HRS identify delivery terms whereas Tosçelik's *sales* of HRS do not. It was therefore reasonable, if not correct, for Commerce to conclude that it could not determine the delivery terms of Tosçelik's *sales* of HRS.

B. Tosçelik's Purchases of HRS

Tosçelik argues that Commerce should have excluded from its benchmark calculation certain purchases of HRS that involved a distinct grade of allegedly non-comparable HRS. *See* Tosçelik Br. at 10–19. Tosçelik though did not record the grade of its HRS purchases, and had to acknowledge in its administrative case brief that in another proceeding, *OCTG from Turkey*, Commerce did not consider steel grades in its benchmark analysis because the record did not reflect the grades purchased or the grades in the dataset used for the benchmark. *Decision Memorandum* at 17 (summarizing Tosçelik's arguments in its case brief). Without direct evidence of the grade of its HRS purchases, Tosçelik had to rely on indirect evidence to try and establish that some of its HRS purchases were an alleged non-comparable grade for the benchmark. Tosçelik tried to argue that the alleged grade difference is revealed through (1) disparate pricing within the benchmark database (a higher price and a lower price), and (2) the fact that Tosçelik, as supplier to a major pipeline project, was buying large volumes of higher priced HRS. *Id.* Tosçelik offered an interpretation of its product catalog from which one might infer

the grade differences of its HRS purchases. Commerce was not persuaded and did not exclude the HRS purchases from its benchmark calculation. *Id.* at 17–19.

Not much need be said here other than that the court does not believe the administrative record requires a reasonable mind to draw Tosçelik's hoped-for inference about the non-comparability of its HRS purchases. Tosçelik implicitly concedes the weakness of its opening brief arguments by yet again raising a *new* argument in its reply brief—that Commerce made a similar exclusion for another respondent. Tosçelik Reply at 7–11. Leaving aside the problems of raising arguments for the first time in one's reply brief, the court notes that Tosçelik's argument about the other respondent does not have Tosçelik's intended persuasive effect, quite the opposite. Rather than demonstrating alleged arbitrary treatment of similarly situated parties, Tosçelik instead highlights that the other respondent made a more rigorous and persuasive evidentiary proffer, which earned that other respondent the exclusion of certain noncomparable purchases of HRS from the benchmark. *See id.* The good news for Tosçelik is it now has an approach that it can emulate to better develop the administrative record for future administrative reviews. As for the instant review, the court sustains as reasonable Commerce's treatment of Tosçelik's HRS purchases in the benchmark calculation.

C. Erbosan's No Shipment Certification

Erbosan challenges Commerce's denial of its no shipment certification. Commerce denied the no shipment certification based on U.S. Customs and Border Protection ("CBP") information demonstrating that Erbosan's subject merchandise entered the United States during the POR. The record confirms this fact. *See* Def.'s Resp. at 26 (citing record evidence of entries of Erbosan's subject merchandise). Erbosan argued in its administrative case brief that other than a test shipment, "[i]t made no other shipment itself, and it does not know or have reason to know that any of its domestic or third country customers of subject merchandise subsequently exported or resold Erbosan's merchandise to the United States during the POR. Its understanding is that no such transshipments were made." *See* Erbosan Administrative Case Brief at 4, CD 219. The POR entries of Erbosan's subject merchandise appear to involve exportation to the United States by a third country purchaser of Erbosan's merchandise. In any event, Commerce did not address Erbosan's contention that it did not know or have reason to know of any transshipments of its subject merchandise to the United States during the POR. Commerce simply

concluded "that record evidence contradicts Erbosan's assertions of no shipments, and demonstrates that subject merchandise produced by Erbosan entered the United States during the POR." *Decision Memorandum* at 19. The statute requires Commerce to provide "an explanation of the basis for its determination that addresses relevant arguments made by interested parties." 19 U.S.C. § 1677f(i)(3)(A). The court might infer from Commerce's decision that Erbosan's knowledge (actual or constructive) about any transshipments is simply irrelevant in the CVD context. The Government argues as much in its brief. Def.'s Resp. at 34–35. Erbosan counters that its knowledge matters. Erbosan Reply at 9–12. Commerce should address this issue in the first instance prior to consideration by the court. The court will therefore remand this issue to Commerce to address whether Erbosan's knowledge of U.S. entries of its subject merchandise is relevant in the CVD context.

III. Conclusion

Accordingly, it is hereby

ORDERED that this action is remanded to Commerce to address whether Erbosan's knowledge of U.S. entries of its subject merchandise is relevant in the CVD context; it is further

ORDERED that the *Final Results* are sustained with respect to Commerce's treatment of Tosçelik's HRS issues in calculating the HRS benchmark;

ORDERED that Commerce shall file its remand results within 45 days of the end of the Government shutdown; and it is further

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

Dated: January 18, 2019
New York, New York

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

Slip Op. 19–10

HABAŞ SINAI VE TIBBI GAZLAR ISTIHSAL ENDÜSTRISI, A.Ş., Plaintiff, and ICDAS ÇELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Consolidated Plaintiff, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Consol. Court No. 17–00204
PUBLIC VERSION

[The U.S. Department of Commerce's *Final Determination* is remanded with respect to the agency's duty drawback adjustment and application of partial adverse facts available to Consolidated Plaintiff; the *Final Determination* is sustained in all other respects.]

Dated: January 23, 2019

David L. Simon, Law Office of David L. Simon, of Washington, DC, argued for Plaintiff.

Nancy Noonan, Arent Fox, LLP, of Washington, DC, argued for Consolidated Plaintiff. With her on the brief were *Matthew M. Nolan* and *Leah N. Scarpelli*.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

John R. Shane and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, argued for Defendant-Intervenor. With them on the brief was *Alan H. Price*.

OPINION AND ORDER

Barnett, Judge:

Plaintiff Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. ("Habaş") and Consolidated Plaintiff Icdas Çelik Enerji Tersane ve Ulasim Sanayi A.S. ("Icdas") (together, "Plaintiffs") challenge the U.S. Department of Commerce's ("Commerce" or the "agency") final affirmative determination in the sales at less than fair value investigation of steel concrete reinforcing bar ("rebar") from the Republic of Turkey ("Turkey").[1] *See Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 23,192 (Dep't Commerce May 22, 2017) (final determination of sales at less than fair value) ("*Final Determination*"), ECF No. 17–5, *as amended by Steel Concrete Reinforcing Bar From the Republic of Turkey and Japan*, 82 Fed. Reg. 32,532 (Dep't Commerce July 14, 2017) (am. final affirmative antidumping duty determination for the Republic of Turkey and antidumping duty orders) ("*Am. Final Determination*"), ECF No. 17–7, and accompanying Issues and Decision Mem., A-489–829 (May 15, 2017) ("I&D Mem."), ECF No. 17–6.

Plaintiffs challenge several aspects of the *Final Determination*.[2] *See* Confidential Pl.'s Rule 56.2 Mot. for J. on the Agency R. and Mem. in Supp. of Mot. of Pl. Habaş Sinai ve Tibbi Gazlar Istihsal Endustrisi

[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 17–1, and a Confidential Administrative Record ("CR"), ECF No. 17–2. Parties submitted joint appendices containing all record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 51; Confidential J.A. ("CJA"), ECF No. 50; Suppl. Confidential J.A. ("Suppl. CJA"), ECF No. 56; Suppl. Public J.A. ("Suppl. PJA"), ECF No. 57. The court references the confidential versions of record documents, unless otherwise specified.

[2] Because the *Am. Final Determination* simply corrected ministerial errors, 82 Fed. Reg. at 32,532–33, Plaintiffs direct their challenges to the *Final Determination*.

A.S., for J. on the Agency R. Pursuant to Rule 56.2 ("Habaş's Mem."), ECF No. 22; Confidential Mot. for J. on the Agency R., ECF No. 24, and Confidential Pl. Icdas Çelik Enerji Tersane ve Ulasim Sanayi A.S.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 ("Icdas's Mem."), ECF No. 29. Habaş and Icdas challenge Commerce's calculation of their respective duty drawback adjustments and refusal to use a quarterly cost-averaging methodology in the determination of normal value. *See* Habaş's Mem. at 4–25; Icdas's Mem. at 9–31. Habaş challenges Commerce's selection of the invoice date as the date of sale for its U.S. sales and rejection of its zero-interest short-term loans to calculate imputed credit expenses. Habaş's Mem. at 25–39. Icdas challenges Commerce's use of partial adverse facts available in relation to certain sales for which it could not provide manufacturer codes. Icdas's Mem. at 31–36.[3] Defendant United States ("Defendant" or the "Government") and Defendant-Intervenor Rebar Trade Action Coalition ("Defendant-Intervenor" or "RTAC") urge the court to sustain Commerce's *Final Determination* in full. *See* Confidential Def.'s Resp. to Pls.' Mots. for J. Upon the Agency R. ("Def.'s Resp."), ECF No. 37; Confidential Resp. Br. of Def.-Int. Rebar Trade Action Coalition ("Def.-Int.'s Resp."), ECF No. 40.

For the reasons discussed herein, the court remands Commerce's calculation of Plaintiffs' duty drawback adjustment and application of partial adverse facts available to Icdas. The court sustains the *Final Determination*in all other respects.

BACKGROUND

On October 18, 2016, Commerce initiated this antidumping duty investigation of rebar from Turkey in response to a petition filed by RTAC and the domestic rebar producers that constitute RTAC's individual members. *See Steel Concrete Reinforcing Bar From Japan, Taiwan and the Republic of Turkey*, 81 Fed. Reg. 71,697 (Dep't Commerce Oct. 18, 2016) (initiation of less-than-fair-value investigations), PR 28, PJA Tab 1. Commerce selected Habaş and Icdas as mandatory respondents in the investigation. I&D Mem. at 1. The period of investigation ("POI") ran from July 1, 2015 to June 30, 2016. *Final Determination*, 82 Fed. Reg. at 23,192.

On March 7, 2017, Commerce issued its preliminary determination. *See Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 12,791 (Dep't Commerce Mar. 7, 2017) ("*Prelim. Determination*"), and accompanying Prelim. Decision Mem., A-489–829 (Feb.

[3] At oral argument, Icdas abandoned its challenge to Commerce's rejection of untimely information.

28, 2017) ("Prelim. Mem."), PR 161, PJA Tab 30. Commerce preliminarily calculated a weighted-average dumping margin of 5.29 percent for Habaş and 7.07 percent for Icdas. *Prelim. Determination*, 82 Fed. Reg. at 12,792.

On May 22, 2017, Commerce issued the *Final Determination*. 82 Fed. Reg. at 23,192. Commerce issued an amended final determination on July 14, 2017. *See Am. Final Determination*, 82 Fed. Reg. at 32,532. Therein, Commerce calculated a weighted-average dumping margin of 5.39 percent for Habaş and 9.06 percent for Icdas. *Id.*, 82 Fed. Reg. at 32,533.

On July 31, 2017, Habaş timely commenced this action. *See* Summons, ECF No. 1. On August 11, 2017, Icdas timely commenced a separate action also challenging the *Final Determination*. *See* Summons, ECF No. 1 (Court No. 17–00218). On October 5, 2017, the court consolidated the two actions under lead Court No. 1700204. *See* Order (Oct. 5, 2017), ECF No. 15. The court heard oral argument on November 29, 2018. *See* Docket Entry, ECF No. 58.[4]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[5] and 28 U.S.C. § 1581(c) (2012). The court will uphold an agency determination that is supported by substantial evidence and otherwise 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)). Substantial evidence "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015).

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[4] Additional issue-specific background information is contained in the Discussion.

[5] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, The Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws. Section 502 of the TPEA amended 19 U.S.C. § 1677e, and section 504 amended 19 U.S.C. § 1677b. *See* TPEA §§ 502, 504. These TPEA amendments affect all antidumping duty determinations made on or after August 6, 2015. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep't Commerce Aug 6, 2015). Accordingly, all references to 19 U.S.C. §§ 1677e and 1677b are to the amended version of the statutes.

DISCUSSION

I. Duty Drawback

A. Background

To determine whether the subject merchandise is being sold at less than fair value, Commerce compares the export price ("EP") or constructed export price ("CEP")[6] of the subject merchandise to its normal value ("NV"). *See generally* 19 U.S.C. § 1673 *et seq.* Generally, an antidumping duty is the amount by which the normal value of a product—generally, its price in the exporting country—exceeds export price, as adjusted. *See id.* § 1673. One of the adjustments Commerce makes to export price pursuant to 19 U.S.C. § 1677a(c) is known as the "duty drawback adjustment." Specifically, Commerce will increase 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." *Id.* § 1677a(c)(1)(B).

This statutory duty drawback adjustment is intended to prevent the dumping margin from being increased by import taxes that are imposed on raw materials used to produce subject merchandise, but which are rebated or exempted from payment when the subject merchandise is exported to the United States. *See Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011); *Wheatland Tube Co. v. United States*, 30 CIT 42, 60, 414 F. Supp. 2d 1271, 1286 (2006), *rev'd on other grounds*, 495 F.3d 1355 (Fed. Cir. 2007). The adjustment accounts for the fact that producers are subject to the import duty when merchandise is sold in the home market, "which increases home market sales prices and thereby increases [normal value]." *Saha Thai*, 635 F.3d at 1338. The statute increases constructed export price "to the level it likely would be absent the duty drawback" to prevent the absence of import duties from generating or increasing any dumping margin. *Id.*

Commerce has developed a two-prong test to determine whether a respondent is entitled to a duty drawback adjustment: first, "that the exemption [from import duties] is linked to the exportation of subject merchandise"; and second, "that there [were] sufficient imports of the raw material to account for the duty drawback on the export of subject merchandise." I&D Mem. at 12; *see also Saha Thai*, 635 F.3d at 1340 (affirming the lawfulness of Commerce's two-prong test).

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[6] U.S. price may consist of an export price or a constructed export price. Because the distinctions between export price and constructed export price are not at issue in this case, the court will refer only to export price. Such references, however, may be understood as including constructed export price.

Commerce determined that Plaintiffs had demonstrated their entitlement to the duty drawback adjustment. I&D Mem. at 12.[7] At issue, however, is Commerce's method of calculating the adjustment.

Until recently, Commerce calculated the duty drawback adjustment to U.S. price (referred to as the sales-side adjustment) by dividing rebated or exempted duties by total exports and adding the resultant per unit duty burden to the export price. *See Rebar Trade Action Coalition v. United States* ("*RTAC I*"), Slip Op. 15–130, 2015 WL 7573326, at *4 (CIT Nov. 23, 2015) (granting Commerce's request for a voluntary remand to reconsider the sales-side adjustment methodology as set forth in the Issues and Decision Mem. for the Final Negative Determination in the Less than Fair Value Investigation of Steel Concrete Reinforcing Bar from Turkey, A-489–818 (Sept. 8, 2014) ("Rebar from Turkey Mem.")).

When producers participate in a duty exemption program, Commerce also makes a corresponding upward adjustment to the cost of production ("COP") and constructed value ("CV") (referred to as the cost-side adjustment)[8] to account for the unpaid import duties for which the producer remains liable until the merchandise containing the dutiable input(s) is exported and the exemption program requirements are satisfied. *See Saha Thai*, 635 F.3d at 1341–44. In affirming Commerce's inclusion of implied duty costs in its calculations, the *Saha Thai* court reasoned that the purpose of the statutory increase to export price "is to account for the fact that the import duty costs are reflected in . . . home market sales prices[] but not . . . sales prices in the United States[]." *Id.* at 1342. Thus, "[i]t would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties." *Id.* Accordingly, "[u]nder the 'matching principle,' EP, COP, and CV should be increased together, or not at all."[9] *Id.* at 1342–43.[10]

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[7] Pursuant to Turkish law, Plaintiffs are relieved from the payment of import duties on certain inputs used in the production of (exported) subject merchandise. *See* Sec. C Questionnaire Resp. of Habaş (Jan. 17, 2017) ("Habaş § CQR") at 32–33, CR 69–75, PR 91, CJA Tab 11, PJA Tab 11.

[8] Commerce calculates normal value using sales in the home market that are at or above the cost of production. 19 U.S.C. § 1677b(b)(1). When there are no such sales, Commerce calculates normal value "based on the constructed value of the merchandise." *Id.* The cost of production includes "the cost of materials and of fabrication or other processing" used in manufacturing; "selling, general, and administrative expenses"; and the cost of packaging. *Id.* § 1677b(b)(3). Constructed value includes similar expenses and an amount for profit. *Id.* § 1677b(e).

[9] The "matching principle" is "the basic accounting practice whereby expenses are matched with benefits derived from them." *Saha Thai*, 635 F.3d at 1342 (citation omitted).

[10] Plaintiffs do not challenge Commerce's application of the cost-side adjustment.

In 2016, on remand pursuant to *RTAC I*, Commerce modified its sales-side adjustment by allocating exempted duties over total production rather than exports. *See Rebar Trade Action Coalition v. United States* ("*RTAC II*"), Slip Op. 16–88, 2016 WL 5122639, at *3 (CIT Sept. 21, 2016); Final Results of Redetermination Pursuant to Court Remand, Consol. Ct. No. 14–00268 (Apr. 7, 2016), *available at* http://ia.ita.doc.gov/remands/15–130.pdf (last visited Dec. 19, 2018) ("Rebar from Turkey Remand Mem."). Commerce developed this methodology in response to arguments by domestic producers regarding alleged distortions in the margin calculations that may arise when the respondent uses fungible inputs both from foreign sources, which incur import duties, and domestic sources, which do not. *See RTAC II*, 2016 WL 5122639, at *3–4. Commerce claimed that adhering to its prior methodology generated "distortions" in the margin calculations because the larger denominator on the cost-side resulted in a smaller adjustment to normal value than U.S. price. *Id.* at *3 (citing Rebar from Turkey Remand Mem. at 16). Thus, according to Commerce, equalizing the denominators used in each adjustment "ensure[d] that the amount added to both sides of the comparison of EP or CEP with NV is equitable, *i.e.*, duty neutral[,] meeting the purpose of the adjustment as expressed in *Saha Thai*." *Id.* at *4 (citing Rebar from Turkey Remand Mem. at 18).

In subsequent administrative proceedings involving respondents that source inputs from foreign and domestic suppliers, including Plaintiffs here,[11] Commerce has applied its modified sales-side adjustment. *See* I&D Mem. at 12; Final Results of Redetermination Pursuant to Remand, Consol. Ct. No. 16–00218 (July 7, 2018) at 1112, ECF No. 106; Issues and Decision Mem. for the Final Results of Antidumping Duty Admin. Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2014–2015, A-489–501 (Dec. 12, 2016) at 5–6, *available at* https://enforcement.trade.gov/frn/summary/ turkey/2016–30541–1.pdf (last visited Dec. 19, 2018); Issues and Decision Mem. for the Final Determination of the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from India, A-533–863 (May 24, 2016) at 7–11, *available at* https://enforcement.trade.gov/frn/summary/india /2016–12986–1.pdf (last visited Dec. 19, 2018). In doing so here, Commerce reiterated the need for an "equitable, i.e., duty neutral" comparison of export price with normal value to maintain consistency with "the purpose of the

[11] Habaş and Icdas used imported and domestic inputs. *See* Sec. D Questionnaire Resp. of Habaş (Jan. 17, 2017) ("Habaş § DQR"), Exs. D-12, D-13, CR 69–75, CJA Tab 11; Resp. of Icdas to Sec. D of the Antidumping Duty Questionnaire (Jan. 17, 2017) ("Icdas § DQR"), Exs. D-2, D-12, CR 92, 94, 96, 98, 100–01, 104–23, CJA Tab 9.

adjustment as affirmed in *Saha Thai*." I&D Mem. at 12 (citing *Saha Thai*, 635 F.3d at 1344).[12]

B. Parties' Contentions

Plaintiffs contend that Commerce's modified sales-side adjustment is unlawful because it ignores the statutory linkage between foregone duties and exported subject merchandise and reduces the full upward adjustment to which they are entitled. Habaş's Mem. at 9–15; Icdas's Mem. at 9–17; *see also* Icdas's Mem. at 17–18 (asserting that Commerce's methodology impermissibly attributes duty drawback to domestic sales, which do not qualify for drawback under the Turkish duty drawback scheme). Plaintiffs further contend that Commerce's reliance on *Saha Thai* to support the modified sales-side adjustment as ensuring a "duty neutral" approach is misplaced. Habaş's Mem. at 16; Icdas's Mem. at 21–22. Icdas further contends that Commerce's methodology requires a rulemaking procedure pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Icdas's Mem. at 24–25.

The Government contends that Commerce's calculation of the duty drawback adjustment represents a permissible construction of the statute, which is silent on the issue of allocation. Def.'s Resp. at 15. According to the Government, "[h]ad Congress intended to limit Commerce's discretion in performing the EP/CEP duty drawback calculation, . . . the statute would state that for each unit of subject merchandise exported, the EP/CEP shall be increased by the amount of duty rebated or not collected on that unit." *Id.* at 16. While recognizing that *Saha Thai* "does not address allocation," the Government contends that the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") "endorsed the concept of a 'matching principle,' which would ensure [duty] neutrality by requiring equal adjustments to both the NV and EP/CEP sides of the equation." *Id.* at 17 (citing *Saha Thai*, 635 F.3d at 1338, 1342–43). The Government further contends that Commerce need not conduct a rule-making procedure pursuant to the APA when it changes it practice. *See* Def.'s Resp. at 22–23.

RTAC adopts Defendant's arguments, *see* Def.-Int.'s Resp. at 2, and further contends that Commerce's methodology properly accounts for distortions that may arise when a respondent uses a mix of domestic and imported inputs or "otherwise manages its imports and exports such as to effectively pay no import duties regardless of the market

[12] Commerce asserted that it granted the duty drawback adjustment "consistent with [its] practice." I&D Mem. at 12 & n.48 (citing Rebar from Turkey Mem. at Comment 1). As noted, however, Commerce applied its original sales-side adjustment in that determination. *See* *RTAC I*, 2015 WL 7573326, at *4.

for which its goods are destined," Def.-Int.'s Resp. at 6; *see also id.* at 6–10.

C. Commerce's Methodology is Remanded

The Government relies on the purported statutory silence regarding the way Commerce must calculate the duty drawback adjustment to support Commerce's allocation of exempted duties over total production. The court's review of Commerce's interpretation and implementation of a statutory scheme is guided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1329 (Fed. Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). Only "if the statute is silent or ambiguous," must the court determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843).

Several members of the court, including the undersigned, have previously held that Commerce's allocation of foregone duties over total production is inconsistent with the clear statutory linkage between those duties and exported merchandise. *See Ereğli Demir ve Çelik Fabrikalari T.A.S v. United States* ("*Erdemir II*"), 42 CIT ___, Slip Op. 18–180 at 14–15 (CIT Dec. 27, 2018); *Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States*, 42 CIT ___, ___, 321 F. Supp. 3d 1270, 1275–78 (2018); *Uttam Galva Steels Ltd. v. United States*, 42 CIT ___, ___, 311 F. Supp. 3d 1345, 1355 (2018); *RTAC II*, 2016 WL 5122639 at *4. Commerce offers nothing new meriting a different outcome here.[13]

Section 1677a(c)(1)(B) requires Commerce to increase EP/CEP 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) (emphasis added). Congress, thus, clearly intended the adjustment to capture the amount of duties Plaintiffs would have paid on their export sales but for the exportation of that merchandise. Allocating Plaintiffs' exempted duties over

[13] The law is well-settled that trial courts, such as this court, are not bound by the decisions of other trial court judges. *Algoma Steel Corp. v. United States,* 865 F.2d 240, 243 (Fed. Cir. 1989). The court in *Erdemir II* nevertheless consulted the reasoning contained in the earlier opinions to the extent it was persuasive. *See* Slip Op. 18–180 at 14 n.14. Commerce's explanation of its methodology and the Government's corresponding arguments in this case largely mirror those presented in the agency proceeding and litigation underlying *Erdemir II*. Thus, the court is not persuaded to reach a different conclusion.

total production is contrary to the plain language of section 1677a(c)(1)(B) "because it attributes some of the drawback to domestic sales, which do not earn drawback, and fails to adjust export price by the amount of the import duties exempted by reason of exportation." *Erdemir II*, Slip Op. 18–180 at 14–15; *see also Tosçelik*, 321 F. Supp. 3d at 1278. Thus, instead of calculating the amount of the adjustment based on duties foregone solely in relation to the exported merchandise eligible for drawback, as the statute requires, Commerce has calculated a lesser amount that is based on the distribution of some of the exempted duties to domestic sales, which is contrary to the statute's plain language. *See Erdemir II*, Slip Op. 18–180 at 14–15.

The Government's appeal to agency discretion pursuant to *Chevron* prong two also fails. *See id.* at 15; Def.'s Resp. at 15. Even if the statute was ambiguous for lack of an explicit methodology, Commerce must "exercise [] its gap-filling authority" in a "reasonable" manner. *See Apex Frozen Foods*, 862 F.3d at 1330 (citing *Chevron*, 467 U.S. at 843–44). Commerce's exercise of any discretionary authority it has in this regard was unreasonable because it substantively departed from the guidance Congress *did* provide by decoupling the amount of the adjustment from duties forgiven solely on exported merchandise. *See Ningbo Dafa Chem. Fiber Co., Ltd. v. United States*, 580 F.3d 1247, 1253 (Fed. Cir. 2009) (an agency's statutory interpretation is unreasonable when it is "manifestly contrary" to the statutory terms) (citation omitted).[14]

Commerce's—and, by extension, the Government's—reliance on *Saha Thai* is also misplaced. In *Saha Thai*, the Federal Circuit approved Commerce's decision to utilize the cost-side adjustment in conjunction with its original sales-side adjustment to ensure that normal value and U.S. price are compared on a mutually-duty-inclusive basis. *See* 635 F.3d at 1342 (finding that Commerce "reasonably decided" to accompany an increase to EP with a "corresponding increase to COP and CV" because "[i]t would be illogical to

[14] This court previously observed:

> [w]hile Commerce regularly uses the term "distortion" to describe the margin effect of using only exports as the denominator, Commerce's assertion is unaccompanied by any analysis to demonstrate the alleged distortion. The court might infer that the use of the term implies an assumption that the cost of the domestically-sourced input approximates the import duty-*exclusive* cost of the foreign-sourced input. Commerce has not, however, provided any support for this assumption. It stands to reason, moreover, that a domestic supplier of a particular input that incurs duties when imported from a foreign supplier would price its product at a level competitive with the duty-*inclusive* cost of the imported input. In such a scenario, it is difficult to understand the margin effect of a proper duty drawback adjustment as distortive.

Erdemir II, Slip Op. 18–180 at 15 n.15.

increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties"); *see also id.* at 1342–43 ("Under the 'matching principle,' EP, COP, and CV should be increased together, or not at all."). The Federal Circuit never stated or otherwise inferred that the adjustments to EP/CEP and normal value must be "equal," Def.'s Resp. at 17, in order to render the comparison between U.S. price and normal value "duty neutral," I&D Mem. at 12. An interpretation of the Federal Circuit's discussion of duty inclusivity to espouse such a position, which would neutralize the duty drawback adjustment, goes further than the opinion supports and is inconsistent with the purpose of the statute. Accordingly, this issue is remanded to the agency to revise its calculation of the duty drawback adjustment using exports as the denominator rather than total production.[15]

II. Quarterly Cost Averaging Methodology

A. Background

Commerce calculates the normal value of the subject merchandise based on home market sales that are made "in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce, therefore, disregards sales at prices that are less than the cost of production, *id.* § 1677b(b)(1), because those sales are not made within the ordinary course of trade, *id.* § 1677(15)(A). The cost of production "equal[s] of the sum of . . . the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a *period* which would ordinarily permit the production of that foreign like product in the ordinary course of business." *Id.* § 1677b(b)(3)(A) (emphasis added).

The statute does not define the "period" to be used or the method by which Commerce must calculate the costs of production. *SeAH Steel Corp. v. United States*, 34 CIT 605, 617, 704 F. Supp. 2d 1353, 1363 (2010). Commerce's usual methodology is to rely on "an annual weight-average cost" for the period of investigation. I&D Mem. at 15. Commerce may depart from its usual methodology and rely on quarterly cost-averages when "significant cost changes are evident [and] . . . sales can be accurately linked with the concurrent quarterly costs." *Pastificio Lucio Garofalo, S.p.A. v. United States*, 35 CIT ___, ___, 783 F. Supp. 2d 1230, 1235–36 (2011), *aff'd* 469 F. App'x 901 (Fed. Cir.

[15] Because the court finds that Commerce's modification to its duty drawback calculation methodology is inconsistent with the statute, the court need not reach Icdas's argument that a rule-making procedure was required by the APA.

2012); *see also* I&D Mem. at 15. The significance of any cost changes must be demonstrated before Commerce analyzes the linkage between costs and sales. I&D Mem. at 15. A significant cost change "is defined as a greater than 25 percent change in [cost of manufacturing] between the high and low quarters during the POI . . . ." *Id.* at 15.[16]

In the underlying proceeding, Plaintiffs urged Commerce to conduct its quarterly cost test using changes in the cost of primary inputs or total direct raw material costs ("DIRMAT") instead of the total cost of manufacturing ("TCOM"). *See, e.g.*, Habaş § DQR, Ex. D-3.B at 4–7, CR 69–75, PR 91, CJA Tab 11, PJA Tab 11; Icdas § DQR at D-9, Ex. D-2. Plaintiffs reasoned that its primary input and DIRMAT costs fluctuated by more than 25 percent throughout the POI, Habaş § DQR, Ex. D-3.B at 1; Icdas § DQR at D-9, Ex. D-2, and, in Habaş's case, its prices closely followed changing costs, Verification of the Sales Resp. of Habaş (Apr. 12, 2017) ("Habaş Sales Verification Report") at 5, CR 458, PR 210, CJA Tab 44, PJA Tab 44 (explaining that Habaş sets its prices daily based on the daily market price for steel scrap). Habaş further argued that Commerce's addition of a POI-average transformation cost (consisting of labor and overhead) to quarterly DIRMAT costs "smooths out any quarterly fluctuations" and biases the test against using quarterly costs, particularly when price closely follows cost. *See* I&D Mem. at 13 (summarizing Habaş's argument).[17]

Commerce denied Plaintiffs' request on the basis that neither respondent's quarterly cost of manufacturing fluctuated by more than 25 percent during the POI. Prelim. Mem. at 14; I&D Mem. at 14–16. Noting that its 25 percent threshold is derived from generally accepted international accounting standards, Commerce explained that input cost changes "were not significant enough to impact the reported [T]COM," and its usual methodology "accounts for both the significant changes in the cost of inputs and their impact on the cost of manufacturing." I&D Mem. at 15. Commerce expressed its preference for conducting the quarterly cost test using changes in total cost of manufacturing because the measure "accounts for all production

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[16] Commerce conducts this analysis "on a CONNUM-specific basis." Def.'s Resp. at 26; *see also* I&D Mem. at 16. "A 'CONNUM' is a control number assigned to materially-identical products to distinguish them from non-identical, i.e., similar, products." *Ereğli Demir ve Çelik Fabrikalari T.A.S v. United States*, 42 CIT ___, ___, 308 F. Supp. 3d 1297, 1321 n.34 (2018) (citation omitted).

[17] Habaş did not, however, urge the agency to use quarterly transformation costs when conducting its quarterly cost test. *See* Habaş Case Br. (Apr. 19, 2017) at 20, CR 161, PR 212, CJA Tab 45, PJA Tab 45. Rather, Habaş argued that Commerce should instead conduct the test solely on the basis of DIRMAT. *See id.*

costs" that "impact pricing." *Id.* at 16 ("[U]sing [T]COM is more meaningful as it is the total cost of manufacturing that prices must be set to recover, not just material costs."). According to Commerce, because "material costs as a percentage of [T]COM may vary significantly from product to product, using [T]COM as the denominator in our significant cost change test results in a more consistent test." *Id.* Thus, Commerce "disagree[d] with Habaş that a bias here creates mismatches between sales and costs when price follows cost closely. To the contrary, by keeping the test linked to [T]COM we prevent mismatches." *Id.*

B. Parties' Contentions

Plaintiffs contend that Commerce abused its discretion by refusing to conduct its quarterly cost test using changes in raw material costs. Habaş's Mem. at 17–24; Reply Br. of Pl. Habaş ("Habaş's Reply") at 9–13, ECF No. 45; Icdas's Mem. at 30–31; Reply Br. of Pl. Icdas to Def. and Def.-Ints.' Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Icdas's Reply") at 10–11, ECF No. 46.[18] Habaş contends that Commerce's preference for using total cost of manufacturing on the basis that total production costs impact pricing ignores record evidence that "Habaş sets its prices *daily* based on the *daily change in scrap price*" Habaş's Mem. at 19. Habaş reiterates that Commerce's addition of POI-average transformation costs (labor and overhead) to quarterly DIRMAT costs "intrinsically dilutes any [T]COM fluctuations," particularly for products with a low DIRMAT to TCOM ratio. *Id.* at 20 (asserting that the resulting bias leads to "disparate treatment" of respondents that are similarly situated with respect to significant input cost changes); *see also id.* at 21 (noting that Commerce's test is more likely to deny the use of quarterly costs to respondents with products reflecting a low DIRMAT to TCOM ratio). Icdas contends that Commerce's 25 percent threshold is "too rigid." Icdas's Mem. at 28. In sum, according to Plaintiffs, Commerce's methodology results in the exclusion of more sales from the calculation of normal value as below the cost of production and a distorted dumping

[18] Though invoking the court's substantial evidence review, *see* Habaş's Mem. at 24; Icdas's Mem. at 25; Icdas's Reply at 9, Plaintiffs do not dispute the evidentiary basis for Commerce's finding that changes in their respective quarterly total costs of manufacturing did not meet Commerce's 25 percent threshold, *see* I&D Mem. at 16. Rather, Plaintiffs assert that Commerce's TCOM-based test is unreasonable *given the specific facts of this case*. *See, e.g.* Habaş's Mem. at 19 (Commerce's preference for using total cost of manufacturing is "counterfactual on this record" where input costs drive changes in price); Icdas's Mem. at 31 (changing the test would produce a "more accurate[] and fair" result when "key inputs fluctuated widely"). Plaintiffs, thus, challenge Commerce's methodology, which is a legal question.

margin. *See* Habaş's Mem. at 23–24; Habaş's Reply at 11–12; Icdas's Mem. at 28.

The Government contends that the court should defer to Commerce's methodology because it accounts for significant input cost changes, which may be moderated by "countervailing trends in other types of costs," ensures consistent and predictable policy, and adheres to international accounting standards. Def.'s Resp. at 27–28. RTAC contends that Commerce's test does not result in disparate treatment of similarly situated respondents but instead reflects "each producer's actual overall cost experience." Def.-Int.'s Resp. at 11. RTAC further contends that Plaintiffs' DIRMAT-based test could result in Commerce's use of quarterly costs even when "an input represented a small fraction of overall manufacturing costs." *Id*. at 12.

C. Commerce's Determination is Sustained

The absence of a statutory definition of the period or methodology to be used when calculating the cost of production for the sales below cost test provides Commerce with broad discretion in this regard. *See SeAH Steel Corp*., 34 CIT at 617, 704 F. Supp. 2d at 1363. In assessing the agency's methodology, the court "ask[s] whether Commerce's exercise of its gap-filling authority and its explanation are reasonable." *Apex Frozen Foods*, 862 F.3d at 1330 (citing *Chevron*, 467 U.S. at 843–44).

From the outset, Plaintiffs do not deny that their cost data fail to meet the agency's test based on the total cost of manufacturing. Instead, they suggest that Commerce abused its discretion by using that test when a different test would have supported a different result. In order to challenge Commerce's methodology for conducting its cost test, Plaintiffs must show that the agency's methodology was unreasonable. *See Whirlpool Corp. v. United States*, Slip Op. 13–155, 2013 WL 6980820, at *11 (CIT Dec. 26, 2013) (citation omitted). Plaintiffs' challenge fails in that regard. The fact that Plaintiffs' alternative methodology would have achieved a different result is insufficient to suggest that Commerce's methodology, consistently applied for at least a decade and rooted in International Financial Reporting Standards, is unreasonable. *See* I&D Mem. at 15 and nn.57–58. As Commerce explained, its test examines, in the first instance, the total cost of manufacture because "it accounts for all production costs, the total of which impact pricing." *Id.* at 16. The fact that Plaintiffs, in this case, may alter their pricing based on price changes for direct materials does not change the reasonableness of Commerce's total cost of manufacturing approach.

Habaş's argument that Commerce's "methodology results in disparate treatment of respondents that are in the same position" with respect to changing input costs based solely on differing DIRMAT to TCOM ratios is misplaced. *See* Habaş's Mem. at 20; Habaş's Reply at 12. The existence of different DIRMAT to TCOM ratios means, quite simply, that respondents are not similarly situated. The higher the DIRMAT to TCOM ratio the greater the likelihood that changes in DIRMAT will be reflected by changes in TCOM. As Commerce explained, Plaintiffs' changing raw material costs "were just not significant enough to impact the reported [T]COM." I&D Mem. at 15. This is not arbitrary, but instead reflects "each producer's actual overall cost experience." Def.-Int.'s Resp. at 11.

Icdas's argument that Commerce's 25 percent threshold is "too rigid" also fails. *See* Icdas's Mem. at 28. Commerce pointed to generally accepted International Financial Reporting Standards to support its use of the 25 percent threshold and explained that it "is high enough to ensure that [it] do[es] not move away from [the agency's] normal practice without good cause and forgo the benefits of using an annual average cost, but allows for a change in methodology when significantly changing input costs are clearly affecting [its] annual average cost calculations." I&D Mem. at 15 (citation omitted). Determining the most appropriate threshold for departing from the agency's usual methodology is the "type of line-drawing exercise" properly left to the agency's discretion. *Baoding Yude Chemical Industry Co., Ltd. v. United States*,25 CIT 1118, 1126, 170 F. Supp. 2d 1335, 1343 (2001). Without more, the court sees no reason to disturb the agency's exercise of that discretion. Accordingly, Commerce's determination on this issue is sustained.

III. Habaş's U.S. Date of Sale

A. Background

The antidumping duty statute does not provide a methodology for determining the "time of sale" for purposes of Commerce's comparison between export price and normal value when determining whether goods are being sold at less than fair value. *See* 19 U.S.C. § 1677b(a)(1)(A) (noting that normal value is to be determined "at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price"). However, the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act defines "date of sale" for the purposes of currency conversion as the "date when the material terms of sale are established." Uruguay Round Agreements Act, Statement of Admin-

istrative Action, H.R. Doc. No. 103–316, vol. 1, at 810 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4153.[19]

Consistent with the SAA, Commerce's regulations prescribe that "[i]n identifying the date of sale of the subject merchandise . . ., the [agency] normally will use the date of invoice" unless it "is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." 19 C.F.R. § 351.401(i); *see also* Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,349 (Dep't Commerce May 19, 1997) (final rule) ("Preamble") ("If [Commerce] is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, [Commerce] will use that alternative date as the date of sale"). In other words, Commerce's date of sale regulation establishes a "rebuttable presumption" in favor of the invoice date unless the proponent of a different date produces satisfactory evidence that the material terms of sale were established on that alternate date. *Çolakoğlu Metalurji A.S. v. United States*, 29 CIT 1238, 1240, 394 F. Supp. 2d 1379, 1380 (2005).[20]

In its initial questionnaire responses, Habaş reported the invoice date as the date of sale. *See* Sec. A Questionnaire Resp. of Habaş (Dec. 19, 2016) ("Habaş § AQR") at 15–16, CR 25–25, PR 66–68, CJA Tab 5, PJA Tab 5; Sec. C Questionnaire Resp. of Habaş (Jan. 17, 2017) ("Habaş § CQR") at 15, CR 69–75, PR 91, CJA Tab 11, PJA Tab 11. Habaş further informed Commerce that, "[f]or U.S. sales, the parties may amend orders and letters of credit to change price, quantity, product mix, or delivery shipment date," and "there may be multiple such amendments for a given order." Habaş § AQR at 18. Commerce issued a supplemental questionnaire requesting Habaş to report all U.S. sales that were invoiced or negotiated to agreement during the period of investigation, observing that Habaş's U.S. sales process "indicate[d] that the essential terms of sale are reached upon conclusion of the purchase order and/or contract negotiations." Suppl. Sec. A Questionnaire Resp. of Habaş (Jan. 25, 2016) ("Habaş Suppl. § AQR") at 2, CR 144–46, PR 103, CJA Tab 14, PJA Tab 14. In response to Commerce's request for examples of sales for which material con-

[19] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[20] Material terms of sale include price, quantity, and delivery and payment terms. *See, e.g.*, *Sahaviriya Steel Industries Public Co. Ltd. v. United States,* 34 CIT 709, 727, 714 F. Supp. 2d 1263, 1280 (2010), *aff'd*, 649 F.3d 1371 (Fed. Cir. 2011) (citations omitted). Commerce also has viewed the specification of an aggregate quantity tolerance level as a material term. *See id.*

tract terms changed between the contract date and invoice date, Habaş stated that it was unable to locate any sales "where the shipment was not within the terms and tolerances of the contract." *Id.*

Commerce preliminary determined to use the invoice date as the U.S. date of sale. *See* I&D Mem. at 19. At verification, Commerce afforded Habaş latitude to "[d]emonstrate that the date of invoice/ date of shipment is the appropriate [U.S.] date of sale." Verification Outline (Feb. 24, 2017) at 7, CR 339, PR 155, CJA Tab 26, PJA Tab 26. Commerce examined four U.S. sales during Habaş's sales verification. Habaş Case Br. at 22.

Habaş subsequently urged Commerce to select the contract date for its U.S. date of sale. *Id.* at 20–24. Habaş pointed to evidence demonstrating that all four verified sales shipped in accordance with contractual quantity tolerances, prices, and delivery dates. *See id.* at 22–23.

For the *Final Determination*, Commerce continued to use the invoice date as the U.S. date of sale. I&D Mem. at 18. In so doing, Commerce relied on Habaş's initial questionnaire responses, Habaş's failure to clarify those responses, and the possibility of amendments to material terms. *Id.* at 18–19. Commerce further found that although changes to the material terms of the verified sales were within contractual tolerances, those sales represented "only [a] few out of the numerous U.S. sales," and, thus, "an insufficient basis on which to . . . change the date of sale determination." *Id.* at 19.

B. Parties' Contentions

Habaş contends that Commerce's selection of the invoice date lacks substantial evidence because the record does not contain evidence of changes to the material terms of Habaş's U.S. sales between the contract date and the invoice date. Habaş's Mem. at 30–32. The Government contends that Commerce properly relied on the invoice date because the possibility of contract amendments establishes that material terms of sale were not final until invoicing. Def.'s Resp. at 29, 32. RTAC contends that Habaş failed to timely notify Commerce of its request to use the contract date or build the factual record supporting that request. Def.-Int.'s Resp. at 13–14.

C. Commerce's Determination is Sustained

Commerce's determination must be assessed in view of the allocation of the burden on Habaş to overcome the presumptive use of invoice date. That is, the precise question before the court is whether substantial evidence supports Commerce's determination that Habaş

failed to present "satisfactory evidence that the material terms of sale are finally established on [the contract] date." Preamble, 62 Fed. Reg. at 27,349. A decision regarding the sufficiency of the evidence presented to the agency "lies primarily within Commerce's discretion." *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1292 (Fed. Cir. 2008). Upon review of the record as a whole, Commerce's decision is supported by substantial evidence.

By waiting until the factual record had closed and verification completed to argue for the use of contract date, Habaş constrained Commerce's ability to fully test Habaş's claim that material terms were set on that date. Although the record contained Habaş's assertion that it was unable to identify sales for which material terms had changed before invoicing, Habaş Suppl. § AQR at 2, Habaş did not provide Commerce with supporting documentation or clarify its prior statement regarding the potential for changes to material terms of sale, *see id.*; Habaş § AQR at 17–18. Habaş also did not indicate any changes in its position regarding the date of sale in its supplemental questionnaire response or at verification, which would have alerted Commerce to the potential need for supporting documentation. *See* Habaş Suppl. § AQR at 2; Verification Outline at 1–2 (noting that Commerce "reserve[s] the right to request any additional information or materials necessary for a complete verification," and Commerce may accept new information at verification when "the need for that information was not evident previously"). In view of the foregoing, Commerce reasonably declined to find that the evidence gathered at verification provided satisfactory evidence supporting Habaş's last-minute request for the use of contract date as the date of sale for all U.S. sales. *See* I&D Mem. at 19.

Habaş's dilatory argument for the use of contract date distinguishes this case from those upon which Habaş seeks to rely. Habaş's Mem. at 26 (citing *Habaş Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 33 CIT 695, 737–38, 625 F. Supp. 2d 1339, 1374–75, (2009); *Nakornthai Strip Mill Public Co. Ltd. v. United States*, 33 CIT 326, 336–38, 614 F. Supp. 2d 1323, 1333–34 (2009)). Although Habaş cites to the court's post-remand opinions, a careful review of the preceding opinions reveals that each plaintiff advocated for the use of contract date early in the proceeding. *See Habaş Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 31 CIT 1793, 1795 (2007); *Nakornthai Strip Mill Public Co. Ltd. v. United States*, 32 CIT 553, 556, 558 F. Supp. 2d 1319, 1322 (2008). The *Habaş Sinai* court therefore found that Commerce was within its discretion to rely

on a single sample sale to select the contract date when, unlike here, it had the opportunity to seek additional documentation if necessary. *See* 33 CIT at 738, 625 F. Supp. 2d at 1375 (noting that "Commerce found no indicia [in the sample sale] which prompted the agency to require . . . further documentation"). The *Nakornthai* court looked for evidence of significant changes to material contract terms when assessing whether Commerce properly denied the plaintiff's prompt request for contract date, because, when faced with such a request, Commerce typically disregards insignificant changes. *See* 33 CIT at 336, 614 F. Supp. 2d at 1333. Here, however, Commerce's determination did not turn solely upon the degree to which Habaş's sales reflected any changes to material terms, but on Habaş's request for the use of invoice date throughout the fact gathering stage of the proceeding and concomitant representations regarding the potential for multiple contract amendments. I&D Mem. at 18–19.

In sum, Habaş had the burden of "remov[ing] any doubt about when material terms are firmly and finally set." *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 41 CIT ___, ___, 256 F. Supp. 3d 1260, 1263 (2017). Commerce's determination that Habaş's supplemental questionnaire response and the evidence gathered at verified failed to fulfill that burden is supported by substantial evidence. Accordingly, Commerce's date of sale determination is sustained.

IV. Habaş's Zero-Interest Short Term Loans

A. Background

Commerce may adjust normal value to account for "the amount of any difference (or lack thereof) between the export price or constructed export price and [normal value]" that Commerce determines is "wholly or partly due to . . . differences in the circumstances of sale." 19 U.S.C. § 1677b(a)(6)(C)(iii). One such adjustment pertains to credit expenses. *Hornos Electricos de Venezuela v. United States*, 27 CIT 1522, 1538, 285 F. Supp. 2d 1353, 1368 (2003); *see generally* Import Admin. Policy Bulletin 98.2: Imputed Credit Expenses and Interest Rates (Feb. 23, 1998) ("Policy Bulletin 98.2") at 3, *available at* https://enforcement.trade.gov/policy/bull98–2.htm (last visited Dec. 18, 2018). "[T]o account for differences in credit terms," Commerce "imputes a U.S. credit expense and a foreign credit expense on each sale." Policy Bulletin 98.2 at 1. Commerce "measures the credit expense on a sale by the amount of interest that the sale revenue would have earned between date of shipment and date of payment." *Id.* Credit expenses "must be imputed on the basis of usual and reasonable

commercial behavior." *Id.* (quoting *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460–61 (Fed. Cir. 1990)).[21]

For home market sales transactions, Habaş reported that "[it] did note incur an imputed credit expense during the POI as its only short-term [Turkish Lira] loans in the period were at zero-interest." Sec. B Questionnaire Resp. of Habaş (Jan. 17, 2017) ("Habaş § BQR") at 31, CR 69, PR 91, Suppl. CJA Tab 3, Suppl. PJA Tab 3. Elsewhere, Habaş noted that its reporting of zero-interest short-term loans was consistent with Commerce's prior use of such loans to impute credit expenses. Suppl. Secs. A-D Questionnaire Resp. of Habaş (Feb. 13, 2017) at 6 & n.1, CR 249–53, PR 145, CJA Tab 23, PJA Tab 23 (citations omitted).

The domestic producers challenged Habaş's short-term interest rate, pointing to Commerce's practice of allowing *negative* credit expenses when "the date of payment occurs before the date of shipment" because "the seller receives the benefit of the time value of money, resulting in revenue or income." Pre-Prelim. Comments Regarding Habaş (Feb. 17, 2017) ("Pet'r's Comments") at 16 & n.52, CR 337, PR 153, CJA Tab 25, PJA Tab 25 (citing *Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia,* 70 Fed. Reg. 13,456 (Dep't Commerce Mar. 21, 2005) (notice of final determination of sales at less than fair value)).[22] Arguing that Habaş's short-term interest rate "does not reflect commercial reality in Turkey," the domestic producers sought to persuade Commerce to instead use "[p]ublicly available information from the Central Bank of the Republic of Turkey [("CBRT")]," which showed that short-term lending rates in Turkey during the period of investigation ranged from 9.0 percent to 10.75 percent, with an average rate of 10.42 percent (the "CBRT rate"). *Id.* at 16–17 & n.54 (citing *id.*, Ex. 2).[23]

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[21] By its terms, Policy Bulletin 98.2 provides guidance when a respondent "has *no* short-term borrowings in the currency of its foreign market transactions." Policy Bulletin 98.2 at 4 (emphasis added). However, Commerce elected to consider the criteria enumerated therein for purposes of determining the interest rate with which to calculate Habaş's credit expenses. *See* I&D Mem. at 22–23 & n.83 (citing Policy Bulletin 98.2).

[22] In the accompanying decision memorandum, Commerce explained that when "the customer pays before the time of shipment, the seller receives the benefit of the time value of money"; thus, "setting negative credit expenses to zero would not accurately reflect normal business practice and would in fact, distort the final margin calculations." Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Bottle Grade Polyethylene Terephthalate (PET) Resin from Indonesia, A-560–817 (March 14, 2005) at 13, *available at* https://enforcement.trade.gov/frn/summary/indonesia/E5–1222–1.pdf (last accessed Dec. 14, 2018). Commerce pointed to additional proceedings in which negative credit expenses were included in its margin calculations. *Id.* (citations omitted).

[23] Exhibit 2 consists of data "obtained through Haver Analytics, at http://www.haver. com." Pet'r's Comments at 17 n.54; *see also id.*, Ex. 2. According to the domestic producers, "Haver Analytics is the premier provider of time series data for the global strategy and research

Agreeing with the domestic producers, Commerce preliminarily recalculated Habaş's home market credit expenses using the CBRT rate on the basis that the rate conforms with commercial reality. Prelim. Determination Margin Calculation for Habaş (Feb. 28, 2017) at 1–2, CR 342, PR 165, CJA Tab 33, PJA Tab 33. Commerce applied the interest rate to Habaş's reported "customer-specific average age of receivables." *Id.* at 2 & n.4 (citing Habaş § BQR at 19–21).[24]

Commerce affirmed its imputed credit expense calculation for the *Final Determination*. *See* I&D Mem. at 22–23. Pointing to evidence of prepayment,[25] Commerce explained that Habaş benefitted from that prepayment "for longer periods than what it paid (zero-interest) on its [short-term] borrowings." Final Determination Margin Calculation for Habaş (May 15, 2017) ("Habaş Final Calc. Mem.") at 4–5, CR 467, PR 223, CJA Tab 50, PJA Tab 50.[26] Commerce determined that the CBRT rate afforded a "more comparable" measure of the time value of Habaş's prepaid sales and was consistent with the non-zero-interest rate reported in Habaş's financial statement in connection with short-term trade receivables[27] and Icdas's reported rate. *Id.* at 5; I&D Mem. at 23.

B. Parties' Contentions

Habaş contends that Commerce's determination is unsupported by substantial evidence and not in accordance with law. Habaş's Mem. at 37–39. Habaş assails Commerce's reliance on the CBRT data supplied by Haver Analytics because it is not "a primary source" and does not represent commercial rates. *Id.* at 37–38. Habaş further asserts that neither Icdas's reported rates nor its earned interest rate on trade receivables are relevant to assessing the commerciality of its short-term interest rate. *Id.* at 39; Habaş's Reply at 18. Habaş also contends that Commerce has previously included zero-interest loans in its credit expense calculations. *See* Habaş's Mem. at 38 (citations omitted); Habaş's Reply at 19–20 (citing Issues and Decision Mem. for the Final Aff. Determination in the Less-Than-Fair-Value Investigation of Welded Line Pipe from the Republic of Turkey, A-489–822 (Oct. 5,

community" and "maintains 200+ databases from over 1350 government and private sources." *Id.* at 17 n.54.

[24] Habaş tracks its receivables on a customer-specific, not transaction-specific, basis. *See* Habaş § BQR at 19. Habaş reported negative receivables for most customers, indicating that those customers maintained positive payment balances with Habaş. *See id.*, Ex. B-6.

[25] Habaş received prepayment "for the [[ ]] of its home market sales," ranging from [[ ]] to [[ ]] days in advance. Habaş Final Calc. Mem. at 4.

[26] When sales are prepaid, Commerce uses "the same formula as . . . when payment is made [after] shipment"; however, "the formula generates addition of a negative credit expense." *Id*. at 3.

[27] Habaş's financial statement indicated that [[ ]] on trade receivables. Habaş § AQR, Ex. A-11 at 32.

2015) ("Line Pipe from Turkey Mem.") at Comment 13, 80 ITADOC 61632; Issues and Decision Mem. for the Final Results of the Antidumping Duty Admin. Review: Certain Welded Carbon Steel Pipe and Tube from Turkey, A-489–501 (Dec. 2, 2011) ("Steel Pipe from Turkey Mem.") at Comment 10, 76 ITADOC 76939).

The Government contends that substantial evidence supports Commerce's determination and Habaş points to no evidence rebutting the accuracy of the CBRT rate. Def.'s Resp. at 35–36. RTAC contends that similarities between the CBRT rate, Icdas's rate, and the interest rate reported in Habaş's financial statement "support[] the overall reasonableness of [Commerce's] decision" to reject Habaş's reported rate. Def.-Int.'s Resp. at 16. RTAC further contends that Commerce "reasonably declined to treat [] advance prepayment as worthless." *Id.*

C. Commerce's Determination is Sustained

From the outset, Habaş misstates Commerce's basis for rejecting its zero-interest short-term rates. Habaş asserts that Commerce rejected its rates as "non-commercial" and, thus, seeks to persuade the court that its loans are indeed commercial. *See* Habaş Mem. at 38–39; Habaş's Reply at 17. Commerce, however, never stated that Habaş's loans were non-commercial; rather, Commerce found that Habaş's short-term interest rate associated with those loans was not "reasonable or representative of usual commercial behavior" when considering the appropriate rate with which to impute revenue derived from prepayment. I&D Mem. at 23; *see also* Habaş Final Calc. Mem. at 5. The issue confronting Commerce concerned the proper interest rate with which to calculate the *benefit* inuring to Habaş from the advance payment, not the *loss* occasioned by delayed payment. *See* Habaş Final Calc. Mem. at 4–5. Because longer lending periods are associated with higher interest rates, *see id.* at 4, Commerce determined that applying a zero-interest rate to Habaş's negative receivables would not capture the benefit derived therefrom, *id.* at 5, and, thus, the rate was not "reasonable or representative of usual commercial behavior," I&D Mem. at 23.

Habaş fails to persuade the court that Commerce should effectively treat prepayment as worthless. Habaş's reliance on Commerce's prior inclusion of zero-interest loans in its credit expense calculations is misplaced because the cited determinations do not involve instances of prepayment. *See* Line Pipe from Turkey Mem. at 30–31; Steel Pipe from Turkey Mem. at 28–29. Indeed, Habaş wholly fails to address that crucial distinction even though it underpinned Commerce's de-

cision here. *See* Habaş's Final Calc. Mem. at 3–5. Instead, Habaş challenges Commerce's evidentiary foundation. Those challenges lack merit.

Habaş argues that the source of the CBRT rate is not demonstrably reliable and is not a commercial rate. *See, e.g.* Habaş's Mem. at 37–38. Habaş points to no evidence, however, specifically undermining the source's reliability. While the CBRT rate may not represent a commercial rate, it is consistent with other rates on the record. *See* I&D Mem. at 23 & n.54 (citing Habaş § AQR, Ex. A-11 at 32); Habaş Final Calc. Mem. at 5. Moreover, Habaş failed to offer Commerce any alternative rates other than its zero-interest short-term rate. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (the burden of creating an adequate record before Commerce lies with interested parties).

Habaş also argues that Icdas's "non-zero interest rates [do] not controvert the commercial nature of Habaş's overnight loans" Habaş's Reply at 17; *see also* Habaş's Mem. at 39. As discussed above, Habaş's argument is misdirected. Commerce did not base its decision on the commerciality of Habaş's loans (or lack therof); rather, Commerce compared Habaş's rate to other rates on the record and found that Habaş's rate was not commercially reasonable given its negative receivables. I&D Mem. at 23; *cf.* Habaş Final Calc. Mem. at 5.

Habaş further argues that the interest rate in its financial statement "is simply a figure plugged by Habaş's auditors" and "has no bearing on the actual rates at which Habaş borrowed money in the POI." Habaş's Reply at 18. Habaş points to no evidence indicating that the interest rate in its financial statement does not, in fact, represent the interest earned on short-term trade receivables or provide a convincing reason as to why Commerce erred in considering this rate as supportive of its selection of the CBRT rate to determine Habaş's home market credit expense.

In sum, Commerce reasonably determined that the consistency between the CBRT rate, Icdas's rates, and Habaş's earned interest rate merited rejecting Habaş's zero-interest short-term borrowing rate as a means of imputing its credit expenses. *See* I&D Mem. at 23. Accordingly, Commerce's use of the CBRT rate to calculate Habaş's imputed credit expenses is sustained.

V. Use of Partial Adverse Facts Available

A. Background

When an interested party "withholds information" requested by Commerce, "significantly impedes a proceeding," "fails to provide [] information by the deadlines for submission of the information," or

provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce shall use the "facts otherwise available" in making its determination. 19 U.S.C. § 1677e(a)(2). Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(c),[28] (d),[29] and (e).[30]

Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.*, § 1677e(b)(1)(A).[31] "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent 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).[32] Before applying an adverse inference, Commerce must demonstrate "that the respondent['s] . . . failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its

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[28] Subsection (c) provides, *inter alia*, that when an interested party informs Commerce promptly after receiving a request for information "that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms," then Commerce "shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." 19 U.S.C. § 1677m(c)(1).

[29] Subsection (d) provides the procedures Commerce must follow when a party files a deficient submission. Pursuant thereto, if Commerce finds that "a response to a request for information" is deficient, "[it] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews." *Id.*, § 1677m(d). If any subsequent response is also deficient or untimely, Commerce, subject to subsection (e), may "disregard all or part of the original and subsequent responses." *Id.*

[30] Pursuant to subsection (e), Commerce

> shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements ... if—
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
> (5) the information can be used without undue difficulties.

Id., § 1677m(e).

[31] Use of the facts available with an adverse inference may be referred to as "adverse facts available" or "AFA."

[32] *Nippon Steel* predates the TPEA. However, the relevant statutory language discussed in that case remains unchanged. *Compare* 19 U.S.C. § 1677e(b)(2012), *with* 19 U.S.C. § 1677e(b)(1)(2015).

records." *Id.* at 1382–83. "An adverse inference may not be drawn merely from a failure to respond." *Id.* at 1383. Rather, Commerce may apply an adverse inference when "it is reasonable for Commerce to expect that more forthcoming responses should have been made." *Id.*

In its section A questionnaire response, Icdas informed Commerce that it sold subject merchandise in the home market directly and through several affiliated resellers. Sec. A Questionnaire Resp. of Icdas (Dec. 19, 2016) ("Icdas § AQR") at A-12, CR 33, PR 69, CJA Tab 4, PJA Tab 4. In response to Commerce's request that Icdas report the manufacturer of merchandise sold directly and through its affiliates, Icdas stated, *inter alia*:

> For sales made by affiliated resellers . . . ICDAS has identified almost all the transactions whether the foreign like product sold is produced by ICDAS or other unaffiliated manufacturers. In a few cases Icdas was unable to verify that Icdas was the producer. For the transactions that are not identified, ICDAS leaves this field as blank. However, considering the magnitude of the ICDAS sales to its affiliated resellers, and the fact that ICDAS rarely purchases from other manufacturers, ICDAS assumes that these sales are also manufactured by ICDAS.

Sec. B Questionnaire Resp. of Icdas (Jan. 17, 2017) ("Icdas § BQR") at B-48, CR 124, PR 109, CJA Tab 10, PJA Tab 10.

Commerce issued a supplemental questionnaire requesting Icdas to remedy the deficient response by "provid[ing] the manufacture code for the . . . home market transactions that reported no manufacturer code." Suppl. Questionnaire for Secs. B, C and D (Feb. 1, 2017) at 4, CR 182, PR 115, CJA Tab 15, PJA Tab 15. Commerce further requested Icdas to "explain the likelihood that you did not produce these products." *Id.* at 4. Icdas responded:

> Affiliated resellers normally purchase subject merchandise from Icdas. For the back-to-back sales[33], all the affiliated resellers are able to identify the manufacturer of subject merchandise. For the rest of the sales, even if the subject merchandise is kept in the inventories for an hour, affiliated resellers [do] not track the manufacturers. Therefore[,] neither Icdas nor the relevant affiliated resellers have this information.

Suppl. Secs. B-C and 2nd Suppl. Sec. D Questionnaire Resp. of Icdas (Feb. 13, 2017) ("Icdas Suppl. § B-C-D QR") at 13, CR 273, PR 146,

[33] [The Federal Circuit has described "back-to-back" sales as when a foreign producer sells subject merchandise to an affiliated exporter, who then sells it to a U.S. affiliate, who then sells it to an unaffiliated U.S. purchaser. *See AK Steel Corp. v. United States*, 226 F.3d 1361, 1365 (Fed. Cir. 2000).]

CJA Tab 22, PJA Tab 22. Icdas provided Commerce with "percentages for each affiliated resellers' quantities sold to third parties by manufacturer," and "a summary of Icdas'[s] sales to its affiliates." *Id.* According to Icdas, that information indicated that its affiliates purchase "a very insignificant amount of resales . . . from other manufacturers" and, thus, it believed that the transactions missing manufacturer codes most likely involved merchandise produced by Icdas. *Id.* According to Icdas, Commerce could therefore consider Icdas as the manufacturer for those transactions. *Id.*; *see also id.*, Ex. SB-26 (sales quantities of affiliated resellers by manufacturer).

For the *Final Determination*, Commerce concluded that "Icdas provided incomplete information with respect to the manufacturer of certain sales made by its home market affiliates," and, thus, determined to use facts available. I&D Mem. at 4–6. Commerce further found that an adverse inference was warranted when selecting from among the available facts. *See id.* Commerce explained that the identity of the manufacturer of rebar sold by Icdas's affiliates "is critical to the [agency's] dumping analysis" and "is the type of information that a large steel manufacturer such as Icdas should be reasonably able to provide." *Id.* at 30. To support this finding, Commerce pointed to Icdas's mill test certificates that identify the manufacturer of the rebar and the waybills included in Icdas's home markets sales that "identify the Icdas mill where the rebar at issue was manufactured." *See id.* at 6 & nn.18–19 (citations omitted); *id.* at 30. According to Commerce, "had [Icdas] made the appropriate effort" to obtain the missing manufacturer codes "using the records over which it maintained control," it "would have been able to provide this information." *Id.* at 6. Commerce concluded that "Icdas did not act to the best of its ability" and applied partial adverse facts available to Icdas's downstream home market sales missing the manufacturer code. *Id.*; *see also id.* at 29–31. For those sales, Commerce "assigned the highest non-aberrational net price from Icdas'[s] downstream home market sales." *Id.* at 6, 31.

B. Parties' Contentions

Icdas contends that Commerce's use of partial adverse facts available lacks substantial evidence and is contrary to law. Icdas's Mem. at 31. Icdas asserts that it reported all the information it had regarding the manufacturer of its affiliates' resales but cannot "report information that it does not have." *Id.* at 36. Icdas further contends that use of adverse facts available is inappropriate when cooperative respondents are "unable to provide the information requested" and "offer[] a reasonable approximation or alternative." Icdas's Reply at 12 (citing, *inter alia*, *Husteel Co. v. United States*,39 CIT ___, ___, 98 F. Supp. 3d

1315, 1361 (2015)) (internal quotation marks omitted); *see also* Icdas's Mem. at 33.

The Government contends that Commerce correctly applied an adverse inference when selecting from among the facts available because Icdas's failure to report all the manufacturer codes reflected "inadequate recordkeeping." Def.'s Resp. at 37. The Government also contends that Commerce complied with predicate statutory requirements set forth in 19 U.S.C. §1677m(d) and (e) before applying an adverse inference. *Id.* at 40–41. The Government further contends that Icdas's reliance on *Husteel* is misplaced because the identity of the manufacturer "cannot be derived from other data." *Id.* at 41.

RTAC contends that the requested information could have been obtained "through a review of mill test reports or other documentation associated with the sales," which "would [not] have required a particularly intense effort on Icdas's part." Def.-Int.'s Resp. at 17.

C. Commerce's Determination is Remanded

Commerce's use of adverse facts available is circumscribed by statutory procedural requirements and must be accompanied by specific factual findings. Here, Commerce's use of adverse facts available failed to comply with all statutory requirements and the agency's conclusion that Icdas failed to act to the best of its ability lacks substantial evidence.

As noted, section 1677m(c)(1) requires a respondent to promptly inform Commerce when it cannot comply with a request for information and suggest an alternative form for supplying that information. 19 U.S.C. § 1677m(c)(1). Icdas complied with that requirement when it explained that its affiliated resellers do not track the manufacturer of rebar sold in non-back-to-back sales and suggested, with supporting documentation, why Commerce could consider Icdas the manufacturer for those sales. *Compare Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360–61 (Fed. Cir. 2017) (respondent "never triggered" section 1677m(c)(1) when it "never claimed that it was unable to provide [the requested information]"), *with World Finer Foods, Inc. v. United States*, 24 CIT 541, 543–44 (2000) (producer triggered section 1677m(c)(1) when it informed Commerce that financial constraints prevented it from fully responding to questionnaire and offered to supply limited information). The statute, thus, required Commerce to consider Icdas's ability "to submit the information in the requested form and manner" and whether to "modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." 19 U.S.C. § 1677m(c)(1); *see also World Finer Foods*, 24 CIT at 543–44 (Commerce erred in resorting to AFA

without complying with section 1677m(c)(1)); *cf. Husteel*, 98 F. Supp. 3d at 1361 (Commerce properly declined to use AFA when the respondent "made an effort to provide its best estimate of the information Commerce had asked [it] to report").

Commerce did not comply with this requirement and instead resorted to use of AFA. Commerce's finding that Icdas could have undertaken additional efforts to obtain mill test certificates and waybills purportedly kept by its affiliates to identify the missing manufacturer codes, *see* I&D Mem. at 30–31, is contradicted by Icdas's statement that, for *non-back-to-back sales*, its affiliated resellers "[d]o not track the [identity of the] manufacturers" and, thus, do not "have this information," Icdas Suppl. § B-C-D QR at 13. Commerce's determination was, therefore, procedurally lacking, and its finding that Icdas failed to "act to the best of its ability" by failing to produce information at its disposal lacks substantial evidence.[34] *See* I&D Mem. at 6.

The Government's assertion that Commerce's determination is supported by evidence of Icdas's "inadequate recordkeeping" fails because Commerce did not base its use of AFA on such a finding. Here, Commerce's use of AFA is predicated on Icdas's purported failure to cooperate by not putting forth its maximum efforts to investigate and obtain the manufacturer codes from its records. I&D Mem. at 6, 30–31. The court may not sustain the agency's decision on a basis other than the one "articulated . . . by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). For these reasons, Commerce's use of partial adverse facts available is remanded for reconsideration.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Determination* is remanded for reconsideration regarding the agency's calculation of Plaintiffs' duty drawback adjustment, as set forth in Discussion Section I; it is further

ORDERED that Commerce's *Final Determination* is remanded with respect to the agency's use of partial adverse facts available to Icdas, as set forth in Discussion Section V; it is further

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[34] For this reason, Commerce's reliance on its prior decision in *CTL Plate from France* lacks merit. *See* I&D Mem. at 30 & n.118 (citing Issues and Decision Mem. for the Final Aff. Determination in the Less-Than-Fair-Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from France, A-427–828 (Apr. 4, 2017), 82 ITADOC 16363 ("CTL Plate from France Mem.") at 46). There, Commerce found that a respondent failed to act to the best of its ability to identify the manufacturer of affiliated downstream sales using information it possessed. CTL Plate from France Mem. at 46 & n.147 (citation omitted). Here, Commerce's finding that Icdas's affiliates possessed information that Icdas could have obtained with more effort is unsupported.

ORDERED that Commerce's *Final Determination* is sustained in all other respects; it is further

ORDERED that Commerce shall file its remand redetermination on or before 90 days from the restoration of appropriations; it is further

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

ORDERED that any comments or responsive comments must not exceed 6,000 words.

Dated: January 23, 2019
New York, New York

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

Slip Op. 19–11

FORMER EMPLOYEES OF HONEYWELL INTERNATIONAL, INC., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00279

[Labor's *Remand Results* and negative determination regarding Plaintiffs' eligibility for benefits remanded.]

Dated: January 23, 2019

Steven D. Schwinn, Professor of Law, The John Marshall Law School, of Chicago, Illinois, for Plaintiffs Former Employees of Honeywell International, Inc.

Ashley Akers, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Tecla A. Murphy*, Attorney Advisor, Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, of Washington, DC.

OPINION and ORDER

Gordon, Judge:

This action involves the final negative determination of the U.S. Department of Labor ("Labor") denying the eligibility of certain Former Employees of Honeywell International, Inc. ("Plaintiffs") for benefits under the Trade Adjustment Assistance ("TAA") program as provided under Section 222 of the Trade Act of 1974, as amended by the Trade Act of 2002, 19 U.S.C. § 2271 *et seq.* (2012).[1] Before the court is Labor's Notice of Negative Determination on Remand that reaffirmed Labor's initial negative determination in this matter. *See* Order Granting Unopposed Motion to Remand, ECF No. 10; Notice of

[1] Further citations to the Trade Act of 1974, as amended by the Trade Act of 2002, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

Negative Determination on Remand, ECF No. 13 ("*Remand Results*"). Plaintiffs, through their representative, Ms. Nancy Cenci, challenge the *Remand Results* and request another remand to Labor for further explanation and reconsideration. *See* Pls.' Cmts. Indicating Dissatisfaction with the Dept's Remand Results, ECF No. 21 ("Pls.' Cmts."); *see also* Def.'s Resp. to Pls.' Cmts. on Labor's Remand Redetermination, ECF No. 24 ("Def.'s Resp."); Pls.' Reply to Def.'s Resp. to Pls.' Cmts. on Labor's Remand Redetermination, ECF No. 25 ("Pls.' Reply"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(d)(1) (2012) and 19 U.S.C. § 2395(a).

I. Background

On April 14, 2017, a representative of the New York State Department of Labor filed a Petition for TAA on behalf of displaced workers from Honeywell International, Inc., including Ms. Cenci. *See* Petition, CD[2] 1. Labor conducted an investigation and issued a Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance on July 3, 2017. *See* Initial Investigative Report, CD 15; Initial Negative Determination, CD 16. In reaching its determination, Labor explained that the "first criterion" for TAA eligibility pursuant to 19 U.S.C. § 2272(a)(1) "requires that a significant number or proportion of the workers in the workers' firm must have become totally or partially separated or be threatened with total or partial separation." *See* Initial Negative Determination, CD 16.

Labor reviewed the information on the record from its investigation and concluded:

> With respect to Section 222(a) and Section 222(b) of the Act, the investigation revealed that Criterion (1) has not been met because a significant number or proportion of the workers in Honeywell-Procurement have not become totally or partially separated, nor are they threatened to become totally or partially separated. 29 CFR 90 states "Significant number or proportion of the workers means . . . At least three workers in a firm (or appropriate subdivision thereof) with a work force fewer than 50 workers." Fewer than three workers of Honeywell-Procurement[3] was totally or partially separated or threatened to become totally or partially separated.

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[2] "CD" refers to a document contained in the confidential administrative record, which is found in ECF No. 15, unless otherwise noted.

[3] [Labor identified "Honeywell International, Inc., Home and Building Technology Division, Honeywell Security and Fire Group, Integrated Supply Chain Unit, Procurement Function" ("Honeywell-Procurement") as the "appropriate subdivision" for purposes of its investigation into Plaintiffs' TAA eligibility. Plaintiffs' challenge to the reasonableness of Labor's selection of Honeywell-Procurement as the "appropriate subdivision" as defined under the statute and Labor's implementing regulation is discussed *infra*.]

Initial Negative Determination, CD 16. On August 8, 2017, Ms. Cenci, acting *pro se*, submitted a request for administrative reconsideration stating that Labor's determination that "fewer than three workers of Honeywell Procurement w[ere] totally or partially separated" was inaccurate. *See* Letter Requesting Reconsideration, CD 19. Ms. Cenci explained that two other employees were "let go in December 2015." *Id.* On October 17, 2017, Labor issued a negative determination on the request for reconsideration after concluding that Ms. Cenci failed to supply facts not previously considered or provide additional documentation revealing there was either a mistake in the factual determination or a misinterpretation of the law. *See* Reconsideration Investigative Report, CD 20; Notice of Negative Determination Regarding Application for Reconsideration, CD 21. Ms. Cenci then brought suit challenging Labor's determination.

Subsequently, the court granted Labor's Unopposed Motion to remand this action for further investigation. *See* Order Granting Unopposed Motion for Remand, ECF No. 10 (Feb. 22, 2018). Labor's investigation on remand established that in 2015 there were "5 Procurement employees in Melville, NY; 1 Manager and 4 Employees." *See* Email from Bob Walker, Senior Human Resources Manager, Honeywell, addressed to Jacquelyn Mendelsohn, Program Analyst, USDOL/OTAA (Apr. 11, 2018), CD 37. As a result of the December 2015 termination of employment for two employees, "[i]n 2016 there were 3 Procurement employees in Melville, NY; 1 Manager and 2 employees." *Id.* By March 2017, only the manager remained employed at Honeywell-Procurement in Melville as Ms. Cenci and the other remaining employee were also let go. *Id.* The April 11th email provided additional detail and corroboration for the information contained in the initial petition for TAA which stated, "[i]n 2003, the Honeywell location in Melville employed 25 people in the Sourcing Department. By 2007 and 2008, Honeywell started terminating Buyers and Expediters and outsourcing these positions to Mexico. By 2009, the Sourcing Department in Melville had shrunk to 10 people, and by June of 2016, the entire department was terminated and outsourced to Mexico." *See* Petition, CD 1. Labor ultimately denied certification again on remand, reaffirming its original conclusion that Plaintiffs were not eligible for TAA under the relevant sections of 19 U.S.C. § 2272 because "a significant number or proportion of the workers of Honeywell-Procurement did not become totally or partially separated, nor were a significant number or proportion of such workers threatened to become totally or partially separated" within the one year time period prior to the submission of the petition. *See Remand Results* at 5–9; *see also* Remand Investigative Report, CD 43.

II. Standard of Review

The court upholds Labor's denial of trade adjustment assistance unless it is unsupported by substantial evidence on the record. 19 U.S.C. § 2395(b). This standard in essence requires the court to consider whether the agency's determination is reasonable given the administrative record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). On legal issues the court upholds the agency's determination if it is "in accordance with law." *See Lady Kim T. Inc. v. United States Sec'y of Agric.*, 30 CIT 1948, 1948, 469 F. Supp. 2d 1262, 1263 (2006) (*citing Former Employees of Elec. Data Sys. Corp.* v. *U.S. Sec'y of Labor*, 28 CIT 2074, 350 F. Supp. 2d 1282, 1286 (2004)).

III. Discussion

The statute provides that Plaintiffs' eligibility for TAA requires Labor to find that "a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated." 19 U.S.C. § 2272(a)(1); *see also* 19 U.S.C. § 2272(b)(1) (same). The term "firm" is defined in the statute to mean either an entire firm or "an appropriate subdivision thereof," but other key terms (*i.e.*, "appropriate subdivision" and "significant number or proportion of the workers") lack statutory definitions. *See* 19 U.S.C. § 2319. Labor has a regulation, 29 C.F.R. § 90.2, that provides definitions for these terms that are undefined in the statute. The negative eligibility determination at issue hinges on Labor's finding that "a significant number or proportion of the workers of Honeywell-Procurement did not become totally or partially separated, nor were a significant number or proportion of such workers threatened to become totally or partially separated as defined under 29 CFR 90.2." *See Remand Results* at 8. Plaintiffs present various arguments challenging different aspects of Labor's decision, but Plaintiffs' fundamental contention is that Labor acted unreasonably in finding that a "significant number or proportion" of workers were not separated from Honeywell-Procurement. *See generally* Pls.' Cmts.

29 C.F.R. § 90.2 defines "significant number or proportion of the workers" as follows:

> (a) In most cases the total or partial separations, or both, in a firm or appropriate subdivision thereof, are the equivalent to a total unemployment of five percent (5 percent) of the workers or 50 workers, whichever is less; or

> (b) At least three workers in a firm (or appropriate subdivision thereof) with a work force of fewer than 50 workers would ordinarily have to be affected.

29 C.F.R. § 90.2. Labor cited this regulatory definition as the basis for its determination that Plaintiffs are not eligible for TAA. *See Remand Results* at 2 (“Looking at the one year period prior to the petition date, only two workers from Honeywell-Procurement were separated from employment. For purposes of TAA, 29 CFR 90.2, defines ‘significant number or proportion of the workers’, which ... is ‘ordinarily’ ‘[a]t least three workers’....”). Curiously, despite acknowledging that the regulation only provides that three workers must “*ordinarily*” be separated from a firm or subdivision to support a finding that a “significant number or proportion of workers” were separated, Labor failed to consider whether Plaintiffs’ situation was “extraordinary” (for purposes of determining a “significant number or proportion of workers”) given that Honeywell-Procurement was comprised of only three employees during the relevant time period. *See Remand Results* at 8–9 (emphasis added).

The parties’ briefing focuses on the reasonableness of Labor’s selection of Honeywell-Procurement as the “appropriate subdivision” for analyzing Plaintiffs’ eligibility for TAA. *See* Pls.’ Cmts. at 4–11; Def.’s Resp. at 8–11; Pls.’ Reply at 2–9. Labor’s regulation defines the term “appropriate subdivision,” but the definition provides limited guidance as to what makes a firm’s subdivision the “appropriate” selection by Labor for a TAA eligibility investigation. *See* 29 C.F.R. § 90.2 (“*Appropriate subdivision* means an establishment in a multi-establishment firm which produces the domestic articles in question or a distinct part or section of an establishment (whether or not the firm has more than one establishment) where the articles are produced. The term *appropriate subdivision* includes auxiliary facilities operated in conjunction with (whether or not physically separate from) production facilities.”). The record demonstrates that Labor sought in its investigation (throughout the initial, reconsideration, and remand phases) to identify the appropriate subdivision of Honeywell. For instance, as part of its consideration on remand Labor issued targeted inquiries to Honeywell to confirm that Honeywell-Procurement was the “appropriate subdivision.” *See, e.g.*, Emails between Labor and Honeywell, CD 35–37 (Labor inquiries to Honeywell representative regarding firm organization and appropriate subdivision identification). Ultimately, Labor selected (and reaffirmed its selection of) Honeywell-Procurement as the “appropriate subdivision.”

Plaintiffs challenge Labor's subdivision selection arguing that the use of the "Honeywell-Procurement subdivision was wholly arbitrary, and worse, the Department failed to explain it." Pls.' Cmts. at 8. Plaintiffs point to emails on the record indicating Labor's confusion in identifying the appropriate subdivision, and specifically highlight that Labor appears to have conflated, without explanation, "Honeywell-Procurement" and the broader alternative subdivision of "NPI Sourcing" or the "sourcing department." *Id.* Plaintiffs note that the original petition and some of Ms. Cenci's emails to Labor identify the appropriate subdivision as the "sourcing department" and identify in the record an organizational chart for the "sourcing department" indicating the employment of more than three workers. *See id.* at 10 (citing Email to Labor Containing Org. Chart, CD 41). The Government responds that Plaintiffs' argument is "merely one of semantics" and that there is no substantive difference between "Honeywell-Procurement" and the alternative "sourcing department" subdivision. *See* Def.'s Resp. at 9. Notably, however, the Government acknowledges that Labor utterly failed to explain that it found "Honeywell-Procurement" and the "sourcing department" to be interchangeable names for the selected "appropriate subdivision." *Id.* at 10. Nevertheless, the Government maintains that the basis for Labor's selection of "Honeywell-Procurement" as the "appropriate subdivision" was reasonably discernable from the *Remand Results* and supported by substantial evidence. *Id.* at 11.

Plaintiffs emphasize that the Trade Act of 1974 and its subsequent amendments are intended to provide an expansive TAA program that favors broad eligibility for affected workers. *See* Pls.' Cmts. at 6. The parties do not argue that either the statute or its legislative history provide any guidance about the meaning of the term "appropriate subdivision." Nevertheless, Plaintiffs argue that Labor should be guided by the "general remedial purpose" of the statute in selecting an "appropriate subdivision." *See* Pls.' Br. at 6–7 (*citing Int'l Union United Automobile, Aerospace and Agriculture Implement Workers of Am., UAW v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978)); *see also* Pls.' Reply at 4–7. The court agrees. Moreover, the court agrees that Labor must also interpret and apply its regulation in a manner "that best effectuates the purposes of the Trade Act in light of the circumstances of the individual case" with "reference to the general remedial purpose of the worker adjustment assistance provisions." *See Int'l Union*, 584 F.2d at 396–97; *see also* Pls.' Reply at 8–9 (arguing that Labor's determination is contrary to guidance in *Int'l Union* and similar precedent).

Here, Labor concluded in its investigation that Honeywell-Procurement, a subdivision of a subdivision of Honeywell International, Inc., was the "appropriate subdivision" for evaluation of Plaintiffs' eligibility for TAA even though Honeywell-Procurement consisted of only three employees during the relevant period of consideration based on the April 2017 petition. *See Remand Results* 1, 8–10; *see also*, Initial Investigative Report, CD 15 (stating that Honeywell-Procurement group is the "subject of the investigation"); Reconsideration Investigative Report, CD 20 (same); Remand Investigative Report, CD 43 (same). With Honeywell-Procurement as the appropriate subdivision (consisting of three workers), Labor denied Plaintiffs' application because only two workers were separated in the applicable time period. *See Remand Results* at 8–9. The court understands that, under its regulation, Labor "ordinarily" looks for at least three workers to have been separated from an appropriate subdivision. *See* 29 C.F.R. § 90.2. The court is wondering, however, whether the selection of a three-person subdivision is really an "ordinary" situation for evaluating the separation of a "significant number or proportion of the workers" when the regulation speaks in terms of *50* persons or less. *See id.* Given the statute's broad remedial purpose, the court is having trouble sustaining as reasonable Labor's reliance on its three-person minimum requirement when applied to a subdivision consisting of only three employees. Accordingly, the court remands the *Remand Results* so that Labor may reconsider whether requiring separation of at least three workers from a subdivision consisting of only three employees is an ordinary situation that fulfills the statute's remedial purpose. Labor may revisit its determination that Honeywell-Procurement is an appropriate subdivision as well.

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the *Remand Results* are remanded for Labor to reconsider its regulation as applied in this matter where the selected subdivision consists of only three employees, and to possibly also reconsider its determination that Honeywell-Procurement is an appropriate subdivision; it is further

ORDERED that Labor shall file its remand results on or before March 29, 2019; and it is further

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

Dated: January 23, 2019
New York, New York

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

Slip Op. 19–13

CLEARON CORP. and OCCIDENTAL CHEMICAL CORP., Plaintiffs, v. UNITED STATES, Defendant, and HEZE HUAYI CHEMICAL CO., LTD., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 17–00171

[United States Department of Commerce's final results are sustained in part and remanded.]

Dated: January 25, 2019

James R. Cannon, Jr., Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Plaintiffs. With him on the brief was *Ulrika K. Swanson*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Catherine Miller*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *Alexandra H. Salzman*, *J. Kevin Horgan*, and *Judith L. Holdsworth*.

OPINION and ORDER

Eaton, Judge:

Two motions for judgment on the agency record are before the court in this consolidated action.[1] Each motion challenges the final results in the United States Department of Commerce's ("Commerce" or the "Department") first administrative review of the countervailing duty order on chlorinated isocyanurates[2] from the People's Republic of China. *Chlorinated Isocyanurates From the People's Rep. of China*, 82 Fed. Reg. 27,466 (Dep't Commerce June 15, 2017) and accompanying Dec. Mem. (June 9, 2017), P.R. 117 ("Final DM") (collectively, the "Final Results").

[1] On September 28, 2017, *Heze Huayi Chemical Co. v. United States*, Court No. 17–00185 was consolidated under the lead case, Court No. 17–00171. *See* Order dated Sept. 28, 2017, ECF No. 25.

[2] Chlorinated isocyanurates are "derivatives of cyanuric acid, described as chlorinated s-triazine triones." *Chlorinated Isocyanurates From the People's Rep. of China*, 82 Fed. Reg. 27,466 (Dep't Commerce June 15, 2017) and accompanying Dec. Mem. (June 9, 2017), P.R. 117, at 2.

The first motion is that of Defendant-Intervenor (and Consolidated Plaintiff) Heze Huayi Chemical Co., Ltd. ("Heze").[3] Heze disputes Commerce's decision to use adverse facts available to determine that the Export Buyer's Credit Program administered by China's state-owned Export-Import Bank ("China ExIm") was countervailable and that Heze used and benefitted from the program. *See* Heze's Mem. Supp. Mot. J. Agency R., ECF No. 27–1 ("Heze's Br."); *see also* Heze's Resp. Br., ECF No. 33; Heze's Reply Br., ECF No. 34.

The second motion was filed by Plaintiffs Clearon Corp. and Occidental Chemical Corp. (collectively, "Clearon").[4] Clearon challenges Commerce's selection of 0.87 percent as the adverse facts available rate for the Export Buyer's Credit Program under the Department's adverse facts available hierarchy method used in reviews. *See* Pls.' Mem. Supp. Mot. J. Admin. R., ECF No. 28–1 ("Clearon's Br."); *see also* Pls.' Resp. Br., ECF No. 31; Pls.' Reply Br., ECF No. 35.

Defendant the United States ("Defendant"), on behalf of Commerce, opposes both motions and urges the court to sustain the Final Results. *See* Def.'s Resp. Pls.' Mots. J. Agency R., ECF No. 32 ("Def.'s Br.").

The court has jurisdiction under 28 U.S.C. § 1581(c) (2012).

Because Commerce's decision to use adverse facts available is neither supported by substantial evidence nor in accordance with law, it is remanded. If, on remand, Commerce continues to determine that Heze used and benefitted from the Export Buyer's Credit Program, and the court sustains that determination, the Department may continue to use the 0.87 percent rate because it is supported by substantial evidence and otherwise is in accordance with law.

BACKGROUND

China ExIm administers loan programs to support the export of Chinese goods and services. Two of these programs are the Export Buyer's Credit Program and the Export Seller's Credit Program.

I. Export Buyer's Credit Program

In order to promote exports, the Export Buyer's Credit Program provides credit at preferential rates to foreign purchasers of goods exported by Chinese companies. *See* Government of China's Third Suppl. Quest. Resp. (Feb. 8, 2017), P.R. 98, Ex. S3–3 at Art. 2 (Rules

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[3] Heze, a Chinese producer and exporter of subject merchandise, and a mandatory respondent in the subject review, is the plaintiff in Court No. 17–00185 and the defendant-intervenor in this consolidated action. *See* Order dated Aug. 11, 2017, ECF No. 19.

[4] Clearon Corp. and Occidental Chemical Corp. are U.S. producers of subject merchandise and petitioners in the underlying review. They are Plaintiffs in the lead case, Consolidated Court No. 17–00171.

Governing Export Buyers' Credit, dated Nov. 20, 2000) (English trans.) (China ExIm extends "mid- to long-term credit loans issued to foreign borrowers used for importers to make payments to Chinese exporters for goods, thereby promoting the export of Chinese goods and technical services."); *see also SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1362, 1363 (2017) (noting rates are "preferential" under the Export Buyer's Credit Program).

II. Export Seller's Credit Program

The Export Seller's Credit Program provides below-market-rate loans to producers and marketers of Chinese products in order to encourage exports. *See Chlorinated Isocyanurates From the People's Rep. of China*, 79 Fed. Reg. 56,560 (Dep't Commerce Sept. 22, 2014) (final affirmative countervailing duty determination) and accompanying Issues and Dec. Mem. (Sept. 8, 2014), bar code 3227120–01 ("Investigation Final IDM") at 14 (China ExIm extends to sellers of Chinese exports "a loan with a large amount, long maturity, and preferential interest rate."). Like the Export Buyer's Credit Program, the purpose of the Export Seller's Credit Program is "to [provide] support [for] the export of [Chinese] products and improve their competitiveness in the international market." Investigation Final IDM at 14.

III. The Countervailing Duty Investigation of Chlorinated Isocyanurates

The countervailability of the export buyer's and seller's credit programs arose in the original investigation of chlorinated isocyanurates from China, the only prior segment of this proceeding. During the investigation, the Department found that the Export Buyer's Credit Program was not used by the relevant customers of either of the mandatory respondents in the investigation, Hebei Jiheng Chemical Co. Ltd. ("Jiheng") and Juancheng Kangtai Chemical Co. Ltd. This finding was based on declarations of non-use in which the respondents' customers "certified that they did not receive any financing from China ExIm." Investigation Final IDM at 15. Commerce found that it was able to partially verify these statements. Thus, the Department did not countervail the Export Buyer's Credit Program during the original investigation.

As to the Export Seller's Credit Program, however, Commerce determined that the program was countervailable. The record showed that mandatory respondent "Jiheng reported that it had outstanding financing under the export seller's program during the [period of investigation]." Investigation Final IDM at 14. Moreover, the Depart-

ment observed that, in a separate proceeding, *Citric Acid and Certain Citrate Salts From the People's Republic of China*, it had countervailed the program. *See* Investigation Final IDM at 14 (citing *Citric Acid and Certain Citrate Salts From the People's Rep. of China*, 74 Fed. Reg. 16,836 (Dep't Commerce Apr. 13, 2009)). Thus, in the investigation, Commerce used the subsidy rate calculated in *Citric Acid* for the Export Seller's Credit Program, *i.e.*, 0.87 percent, to calculate the countervailing duty rate for Jiheng, finding no basis in the record not to employ it. *See* Investigation Final IDM at 14–15.

IV. The Subject Review

On January 7, 2016, Commerce, at the request of Clearon and Heze, among others, initiated the first administrative review. *See Initiation of Antidumping of Countervailing Duty Admin. Revs.*, 81 Fed. Reg. 736, 737 (Dep't Commerce Jan. 7, 2016); *see also* Clearon's Req. for Admin. Rev. (Nov. 30, 2015), P.R. 3; Heze's Req. for Admin. Rev. (Nov. 6, 2015), P.R. 1. The period of review was February 4, 2014, through December 31, 2014 ("POR"). Heze and Jiheng were selected as mandatory respondents. *See Chlorinated Isocyanurates From the People's Rep. of China*, 81 Fed. Reg. 89,896 (Dep't Commerce Dec. 13, 2016) (preliminary results) and accompanying Prelim. Dec. Mem. (Dec. 5, 2016), P.R. 80 ("Prelim. Dec. Mem.").

Commerce issued multiple countervailing duty questionnaires to Heze and the Government of China ("GOC"), seeking information about China ExIm's export buyer's and seller's credit programs, including internal China ExIm guidelines that were adopted in 2013, *i.e.*, after the period of investigation (which covered calendar year 2012) and before the POR, in connection with amendments to the Export Buyer's Credit Program.

Heze maintained in its questionnaire responses that it did not benefit, directly or indirectly, from either the Export Buyer's Credit Program or the Export Seller's Credit Program during the POR. Further, it asserted that none of its relevant customers used the Export Buyer's Credit Program during the POR, and filed three customer declarations certifying their non-use of the program. *See* Heze's Sec. III Quest. Resp. (May 16, 2016), C.R. 17–22 at 10–11. Ultimately, Heze would submit a total of forty-four declarations of non-use by its U.S. and non-U.S. customers during the course of the review proceeding. *See* Heze's Third Suppl. Quest. Resp. (Feb. 15, 2017), C.R. 83, Ex. SQ3–1.

For its part, the GOC also stated that Heze had not received buyer's or seller's credit during the POR. *See* GOC's Initial Countervailing Duty Quest. Resp. (May 16, 2016), P.R. 30 at 7. Echoing Heze's claims

regarding its customers' non-use of buyer's credits, the GOC stated that "[n]one of the [mandatory] respondent's customers used Export Buyer's Credits."[5] GOC's Third Suppl. Quest. Resp. at 2. In response to the Department's request for the 2013 internal guidelines, the GOC declined to provide them, stating that China ExIm's "2013 guidelines are internal to the bank, non-public, and not available for release." GOC Third Suppl. Quest. Resp., Ex. S3–1 at 3.

Based on the responses of Heze and the GOC, the Department made a preliminary finding that Heze did not use the Export Seller's Credit Program during the POR. *See* Prelim. Dec. Mem. at 16. With respect to the Export Buyer's Credit Program, however, Commerce continued to seek more information from the GOC about the operation of the program, and how it may have changed because of the 2013 amendments, and stated that it would publish its findings on the use of this program in a post-preliminary results memorandum. *See* Prelim. Dec. Mem. at 17. For Commerce, understanding the 2013 amendments was necessary "to fully analyze whether the current program is run in the same manner" as it was in the past. Post-Prelim. Results Dec. Mem. (May 31, 2017), P.R. 112 ("Post-Prelim. Mem.") at 4 (stating China ExIm is "the primary entity that possesses the supporting information and documentation that are necessary for the Department to fully understand the operation of the program which is prerequisite to the Department's ability *to verify the accuracy of the respondents' claimed nonuse of the Export Buyers Credit program*.") (emphasis added).

Commerce then issued additional supplemental questionnaires in which it first asked the GOC to provide "a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit program." Post-Prelim. Mem. at 4. Instead of providing this information, however, the GOC stated that it was "unable to provide the information requested because China Ex-Im [had] determined that none of the respondent companies' customers received Export Buyer's Credits or otherwise used this program during the POR." Post-Prelim. Mem. at 4–5. Thereafter, the Department told the GOC that it was not requesting a list of partner/corresponding banks involved in disbursement of funds under the

[5] The GOC described the way it determined that none of the mandatory respondents' customers, including Heze's, used the Export Buyer's Credit Program:

> To make this determination, China Ex-Im (1) obtained a list of all US customers of each respondent, (2) logged into its credit record database that contains users of its Export Buyer's and Seller's Credit Programs, (3) entered the name of each customer on the respondents' lists into the database, (4) ensured that the customer names were entered correctly, (5) reviewed the outcome of the database search in the database, and confirmed that no credit was issued to any company on the list.

GOC's Third Suppl. Quest. Resp. at 2.

Export Buyer's Credit Program *to the specific respondent companies*, "but rather [it was] requesting a list of the partner/corresponding banks involved in disbursement of funds under the Export Buyers Credit program *to all companies that participated in this program*." Post-Prelim. Mem. at 5. In response, the GOC again stated that "none of the respondents' U.S. customers used this program," and did not provide the requested list. Post-Prelim. Mem. at 5. At no point, including in the Post-Preliminary Memorandum, did Commerce say why it needed this information or connect its request with respondents, respondents' products, or their customers.

In addition, Commerce asked the GOC for information on "the interest rates established during the POR for [the Export Buyer's Credit Program] for all types of financing provided by China Ex-Im, all loan terms and all denominations." Post-Prelim. Mem. at 5. The GOC failed to provide this information, too. According to Commerce:

> Instead of providing the requested information, the GOC stated the question was "Not applicable" because none of the respondents' U.S. customers used this program. We again requested this information from the GOC, clarifying that the Department was not requesting that the GOC provide respondent-specific information, but was requesting information on the interest rates established during the POR for every type of financing that all companies received under this program. Instead of providing the information requested, the GOC again noted no respondents['] U.S. customers used this program.

Post-Prelim. Mem. at 5. As with its initial questions, while Commerce made more specific what information it sought, it at no point in the proceedings said why it wanted this information or tied its request to the respondents, their products, or their customers.

Finally, Commerce asked the GOC for "original and translated copies of any laws, regulations or other governing documents" cited by the GOC in its questionnaire responses that were pertinent to the elimination, in 2013, of a minimum contract amount of $2 million. Commerce stated:

> [R]ecord information indicates that for a business contract to be supported by the Export Buyers Credit, the contract amount must be more than two million U.S. dollars. Information on the record indicates that the GOC revised this program in 2013 to eliminate this minimum requirement. We requested that the GOC provide original and translated copies of any laws, regulations or other governing documents cited by the GOC in response to our question on this program.

Post-Prelim. Mem. at 5. In response, the GOC stated that the $2 million threshold requirement appeared for the first time in the 2000 Rules Governing Export Buyers' Credit, and that China ExIm "confirmed to the GOC that, although the Export-Import Bank adopted in 2013 certain internal guidelines, those internal guidelines do not formally repeal or replace the provisions of [the 2000 rules] . . . which remain in effect." GOC Third Suppl. Quest. Resp., Ex. S3–1 at 3. In other words, for the GOC, the $2 million requirement was not changed by the 2013 amendments. Although for Commerce the information on 2013 program revisions (including the internal guidelines) was "necessary for the Department to analyze how the program functions," it at no point said why, or explained how, this information was pertinent to the respondents, their products, or their customers. *See* Post-Prelim. Mem. at 6.

V. Commerce's Facts Otherwise Available and Adverse Inference Determinations

In the Post-Preliminary Memorandum, Commerce found that the GOC withheld information that Commerce requested and significantly impeded the proceeding. This conclusion was based on Commerce's claim that, without the requested information, Heze's claims that its customers did not use the Export Buyer's Credit Program were not verifiable. Therefore, Commerce determined that to fill the gaps in the record the use of facts otherwise available was warranted pursuant to 19 U.S.C. § 1677e(a) (2012).[6] *See* Post-Prelim. Mem. at 6.

Also, Commerce found that the GOC, as the primary possessor of the requested information, did not cooperate to the best of its ability, and, therefore, drew the adverse inference, pursuant to 19 U.S.C. § 1677e(b),[7] that Heze used and benefitted from the Export Buyer's Credit Program, despite its claims of non-use, the certifications of non-use from its customers, and the GOC's statements that neither Heze nor its customers used the program.[8] Post-Prelim. Mem. at 6;

[6] The statute provides that Commerce shall use facts available "[i]f . . . 'necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]" or "significantly impedes a proceeding . . . ." 19 U.S.C. § 1677e(a)(1)-(2)(A), (C).

[7] Where Commerce determines that the use of facts available is warranted, it must make the requisite additional finding that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information" before it may use an adverse inference "in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

[8] Commerce stated:

> [T]he GOC has not provided information that would permit us to make a determination as to whether [the export Buyer's Credit Program] constitutes a financial contribution and whether this program is specific. Because the GOC has not cooperated to the best of its ability in response to the Department's specific information requests, we

see also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (discussing the two-step analysis that applies to the use of facts available and adverse inferences under 19 U.S.C. § 1677e).

In the Final Results, Commerce applied facts available to the Export Buyer's Credit Program because the GOC withheld information that the Department insisted it needed to fully analyze the program and verify the accuracy of Heze's claims of non-use, *i.e.*, (1) whether China ExIm uses third-party banks to disburse/settle export buyer's credits; (2) the interest rates the bank used during the POR; and (3) whether the bank limits the provision of export buyer's credits to business contracts exceeding $2 million. *See* Final DM at 6 ("Without this information, we were unable to analyze fully how the Export Buyer's Credits flow to/from foreign buyers and the China Ex-Im . . . .").

Additionally, Commerce continued to apply an adverse inference to the facts available asserting that the GOC possessed the information that the Department requested, and by withholding the information, the GOC failed to act to the best of its ability. *See* Final DM at 6. Therefore, applying adverse facts available, Commerce determined that Heze "used and benefited from [the Export Buyer's Credit] program, despite [its] claims of non-use and certifications of non-use from [its] customers." Final DM at 6. In other words, even though there was record evidence indicating that Heze had not used or benefitted from the Export Buyer's Credit Program, and no record evidence that indicated that it had used or benefitted from the program, Commerce, employing adverse facts available, determined that

> determine, as [adverse facts available], that this program constitutes a financial contribution and meets the specificity requirements of the [countervailing duty statute].
>
> Specifically, the GOC has not provided information with respect to (1) whether it uses third-party banks to disburse/settle Export Buyer's Credits, (2) the interest rates it used during the POR, and (3) whether the China Ex-Im limits the provision of Export Buyer's Credits to business contracts exceeding USD 2 million. Such information is critical to understanding how Export Buyers Credits flow to/from foreign buyers and the China Ex-Im. The nature of the GOC's responses to the Department's information requests indicates that any further attempts to request this necessary information again from the GOC would be futile. Absent the requested information, the GOC's and the respondents' claims of non-use of this program are not verifiable. Therefore, we preliminarily find that the GOC has not cooperated to the best of its ability and, as [adverse facts available], find that Jiheng and [Heze] used and benefited from this program, despite the claims of non-use and certifications of non-use from the respondent's customers. Although the Department has accepted certifications of non-use from the respondents' customers to determine countervailability in prior reviews, as discussed above, [the Export Buyer's Credit Program] was apparently amended in 2013. To fully analyze whether the current program is run in the same manner, as we've discussed in other proceedings, the Department must review the amendments to the program. Because the GOC has not provided the requisite information regarding the program's amendments, the Department was unable to do so.

Post-Prelim. Mem. at 6 (footnotes omitted).

Heze had used and benefitted from the program. *See* Post-Prelim. Mem. at 6 ("Absent the requested information, the GOC's and the respondents' claims of non-use of this program are not verifiable."); *see also* Final DM at 13 ("Absent the requested information, the GOC's claims that the respondent companies did not use this program are not reliable. Moreover, without a full and complete understanding of the involvement of third-party banks, the respondent companies' (and their customers') claims are also not reliable.").[9]

To select an adverse facts available rate for the Export Buyer's Credit Program, the Department applied its adverse facts available hierarchy method used in reviews.[10] Final DM at 5. Commerce has employed a hierarchical method in an effort to satisfy the statute's "same or similar program" injunction. *See* 19 U.S.C. § 1677e(d)(1)(A)(i)-(ii) (Supp. III 2015) (providing that Commerce, when selecting a rate from among adverse facts available in countervailing duty cases, may "use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country," or another proceeding that Commerce finds reasonable); *see also Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, Slip Op. 18–166 at 13 (Nov. 30, 2018)

[9] In full text, Commerce stated:

> As explained in the Post-Preliminary Results, the Department continues to find that the information on the record does not support finding non-use of the Export Buyer's Credit Program, as the GOC and Heze have argued. In prior proceedings in which we have examined this program, we have found that the China Ex-Im, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for the Department to fully understand the operation of the program which is prerequisite to the Department's ability to verify the accuracy of the respondents' claimed non-use of the program. As we noted in the Post-Preliminary Results, the GOC has not provided the requested information and documentation necessary for the Department to develop a complete understanding of this program, *i.e.*, the use of third-party banks to disburse/settle Export Buyer's Credits, information on the interest rates China Ex-Im established during the POR, and information on the size of the business contracts for which Export Buyer's Credits are applicable. Such information is critical to understanding how Export Buyer's Credits flow to and from foreign buyers and China Ex-Im. Absent the requested information, the GOC's claims that the respondent companies did not use this program are not reliable. Moreover, without a full and complete understanding of the involvement of third-party banks, the respondent companies' (and their customers') claims are also not reliable. . . .
>
> In this case, we have information on the record regarding the 2013 revisions to the program and the involvement of third-party banks. When we asked the GOC to explain how these revisions affected the operation of the program, especially *vis-a-vis* eligibility for borrowing and approved lending institutions, the GOC was not responsive.

Final DM at 13.

[10] Commerce has used a hierarchical method to select an adverse facts available rate in past reviews, pursuant to 19 U.S.C. § 1677e(b). *See, e.g.*, *Certain Frozen Warmwater Shrimp From the People's Rep. of China*, 78 Fed. Reg. 50,391 (Dep't Commerce Aug. 19, 2013) and accompanying Issues and Dec. Mem., Cmt. 16 ("[P]ursuant to [19 U.S.C. § 1677e(b)], we have applied our [countervailing duty adverse facts available] methodology and assigned a net subsidy rate of 10.54 percent *ad valorem* to the [respondent companies] under [the Export Buyer's Credit] program.").

("Commerce has developed a methodology by which to determine the appropriate [adverse facts available] rate in accordance with the governing statute."). Applying this method, Commerce determined that the Export Seller's Credit Program qualified as a "similar program" within a segment of the same proceeding. Accordingly, it selected 0.87 percent—the highest non-*de minimis* rate calculated for a cooperating respondent in the investigation (Jiheng) that was found to have used and benefitted from the Export Seller's Credit Program. *See* Final DM at 14.

When calculating the countervailing duty rate for Heze, Commerce included the subsidy rate of 0.87 percent as a part of its calculation (*i.e.*, as an adverse facts available rate for the Export Buyer's Credit Program). Heze received a net countervailing duty rate of 1.91 percent. *See Chlorinated Isocyanurates From the People's Rep. of China*, 82 Fed. Reg. at 27,467. This litigation followed.

LEGAL FRAMEWORK

Under the countervailing duty statute, if Commerce determines that a foreign government or public entity "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," a duty will be imposed in an amount equal to the net countervailable subsidy. 19 U.S.C. § 1671(a) (2012); *see also Delverde, SrL v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000) ("The Tariff Act provides that before Commerce imposes a countervailing duty on merchandise imported into the United States, it must determine that a government is providing, directly or indirectly, a countervailable subsidy with respect *to the manufacture, production, or export of that merchandise*.") (emphasis added). This "remedial measure . . . provides relief to domestic manufacturers by imposing duties upon imports of comparable foreign products that have the benefit of a subsidy from the foreign government." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014) (citation omitted). The statute applies equally when the imported merchandise is from a nonmarket economy country. *See* 19 U.S.C. § 1671(f)(1); *see also TMK IPSCO v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1306, 1313 (2017) ("Commerce generally must impose countervailing duties on merchandise from a non-market economy . . . country if Commerce makes the findings necessary to countervail a subsidy more generally under the statute.").

A subsidy is countervailable when (1) a foreign government provides a financial contribution (2) to a specific industry and (3) a recipient within the industry receives a benefit as a result of that contribution. *See* 19 U.S.C. § 1677(5)(B). The statute expands upon each of these three factors. First, "financial contribution" means, in pertinent part, "the direct transfer of funds, such as . . . loans." 19 U.S.C. § 1677(5)(D)(i). Second, to be actionable a subsidy must be specific within the meaning of paragraph (5A).[11] Third, in the case of

[11] Paragraph § 1677(5A) provides that "[a] subsidy is specific if it is an export subsidy described in subparagraph (B) or an import substitution subsidy described in subparagraph (C), or if it is determined to be specific pursuant to subparagraph (D)." 19 U.S.C. § 1677(5A)(A). These subparagraphs provide:

(B) Export subsidy An export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.

(C) Import substitution subsidy An import substitution subsidy is a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions.

(D) Domestic subsidy In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C)) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:

(i) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law.

(ii) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not specific as a matter of law, if—

(I) eligibility is automatic,

(II) the criteria or conditions for eligibility are strictly followed, and

(III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification.

For purposes of this clause, the term "objective criteria or conditions" means criteria or conditions that are neutral and that do not favor one enterprise or industry over another.

(iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:

(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.

(II) An enterprise or industry is a predominant user of the subsidy.

(III) An enterprise or industry receives a disproportionately large amount of the subsidy.

(IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

(iv) Where a subsidy is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy, the subsidy is specific.

For purposes of this paragraph and paragraph (5B), any reference to an enterprise or industry is a reference to a foreign enterprise or foreign industry and includes a group of such enterprises or industries.

19 U.S.C. § 1677(5A).

government loans, a "benefit" is conferred "if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." 19 U.S.C. § 1677(5)(E)(ii); 19 C.F.R. § 351.505(a) (2016) (same).

To analyze these three factors, "Commerce often requires information from the foreign government allegedly providing the subsidy." *Fine Furniture*, 748 F.3d at 1369–70 (citing *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1070, 721 F. Supp. 2d 1285, 1296–97 (2010), *rev'd on other grounds,* 678 F.3d 1268 (Fed. Cir. 2012)). This is because "normally, [foreign] governments 'are in the best position to provide information regarding the administration of their alleged subsidy programs, including eligible recipients.'" *Id.* at 1370 (quoting *Essar Steel*, 34 CIT at 1070, 721 F. Supp. 2d at 1297). "Additionally, Commerce sometimes requires information from a foreign government to determine whether a particular respondent received a benefit from an alleged subsidy . . . ." *Id.*

Where the Department lacks the information it needs to make a countervailing duty determination, it must use "facts otherwise available." 19 U.S.C. § 1677e(a). If Commerce determines that the use of facts otherwise available is warranted, and makes the additional finding that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it may use an adverse inference "in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

A foreign government may be found to be a non-cooperating party. *See Fine Furniture*, 748 F.3d at 1371 ("[O]n its face, the statute authorizes Commerce to apply adverse inferences when an interested party, including foreign government, fails to provide requested information."). Under such circumstances, the application of adverse facts available "may adversely impact a cooperating party, although Commerce should seek to avoid such impact if relevant information exists elsewhere on the record." *Archer Daniels Midland Co. v. United States*, 37 CIT __, __, 917 F. Supp. 2d 1331, 1342 (2013) (citation omitted). When making an adverse inference, Commerce may rely upon information derived from the petition, a final determination in the investigation, any previous review or determination, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2)(A)-(D).

In determining a rate from adverse facts available in a countervailing duty case, the statute provides that Commerce may:

> (i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or

> (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that [Commerce] considers reasonable to use . . . .

19 U.S.C. § 1677e(d)(1)(A) (Supp. III 2015). Further, Commerce may "apply any of the countervailable subsidy rates . . . specified [in § 1677e(d)(1)], including the highest rate . . ., based on the evaluation by [Commerce] of the situation that resulted in [Commerce] using an adverse inference in selecting among the facts otherwise available." *Id.* § 1677e(d)(2). Where the rate is from a separate segment of the same proceeding, corroboration is not required. *See id.* § 1677e(c)(2) ("[Commerce] . . . shall not be required to corroborate any . . . countervailing duty applied in a separate segment of the same proceeding.").

DISCUSSION

This consolidated case presents two main questions: (1) Defendant-Intervenor Heze questions whether the use of adverse facts available by Commerce to determine that Heze used and benefitted from the Export Buyer's Credit Program, despite evidence on the record that neither Heze nor its customers used the program during the POR, is in accordance with law and supported by substantial evidence on the record; and (2) Plaintiffs Clearon question whether Commerce's selection of the Export Seller's Credit Program's 0.87 percent rate as adverse facts available for the Export Buyer's Credit Program is supported by substantial evidence.

I. Commerce's Use of Adverse Facts Available Is Neither Supported by Substantial Evidence Nor in Accordance with Law

In the pertinent decision memoranda, Commerce stated that the use of facts available was warranted because the GOC withheld necessary information, *i.e.*, information "that would permit [Commerce] to make a determination as to whether [the Export Buyer's Credit Program] constitutes a financial contribution and whether this program is specific." Post-Prelim. Mem. at 6; Final DM at 6. For Commerce, this information included (1) whether China ExIm uses third-party banks to disburse/settle export buyer's credits, (2) the interest rates it used during the POR, and (3) whether China ExIm limits the provision of export buyer's credits to business contracts exceeding $2 million.[12] *See* Post-Prelim. Mem. at 6; Final DM at 6.

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[12] The role of third-party banks in the disbursement of credits under the Export Buyer's Credit Program was also the subject of inquiry in the proceedings under review in *Guizhou Tyre Co. v. United States*, 42 CIT __, Slip Op. 18–140 (Oct. 17, 2018) and *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, Slip Op. 18–166 (Nov. 30, 2018).

For Commerce, the GOC was "the primary entity that possesses the supporting information and documentation that are necessary for the Department to fully understand the operation of the program" and determine if it was run in the same manner as it was prior to the suspected 2013 amendments. *See* Post-Prelim. Mem. at 4.

According to Commerce, the information it requested would have provided it with a complete understanding of how the Export Buyer's Credit Program operated, which was necessary, in its view, to verify claims that neither Heze nor its customers *used* the program. *See* Final DM at 13 (finding that the requested information was "necessary for the Department to fully understand the operation of the program which is prerequisite to the Department's ability to verify the accuracy of the respondents' claimed non-use of the program."). Moreover, the Department found that without the requested information, such claims of non-use were unreliable. *See* Final DM at 13 ("Absent the requested information, the GOC's claims that the respondent companies did not use this program are not reliable," and "without a full and complete understanding of the involvement of third-party banks, the respondent companies' (and their customers') claims are also not reliable."). Beyond this rather broad statement, though, the Department does not tie its inquiries to Heze, its products, or its customers.

In addition, Commerce applied an adverse inference, finding that the GOC failed to act to the best of its ability to provide the information that Commerce asked for about the Export Credit Buyer's Program and its operation. *See* Final DM at 6. Although the record evidence of non-use indicated otherwise, Commerce nevertheless drew the adverse inference that Heze "used and benefitted from this program, despite the claims of non-use and certifications of non-use from [Heze's] customers." Post-Prelim. Mem. at 6; Final DM at 6. Thus, as adverse facts available, Commerce determined that the Export Buyer's Credit Program constituted a financial contribution to Heze and met the specificity requirements of the statute, and that Heze benefitted from the program. *See* Post-Prelim. Mem. at 6; Final DM at 6.

Heze argues that Commerce's decision to use adverse facts available was unreasonable. First, for Heze, resort to facts available was unlawful because the record contained sufficient information for the Department to analyze the operation of the Export Buyer's Credit Program—in particular, statements by the GOC that the 2013 amendments to the program did not repeal or replace the then-existing rules that governed that program. With respect to the internal guidelines of China ExIm that were revised in 2013, Heze ac-

knowledges that the GOC refused to release these guidelines but claims that, since record evidence showed that none of its buyers used the program, the information was unnecessary. *See* Heze's Reply Br. 1–2.

Thus, Heze insists that based on its questionnaire responses, especially the certifications of its customers, "[t]he record evidence overwhelmingly demonstrates that [Heze] did not use or benefit from [the Export Buyer's Credit Program]." Heze's Br. 5. In other words, Heze placed on the record a total of forty-four customer declarations[13] each of which certified the customer "has not financed any purchases from Heze . . . through the use of the Import-Export Bank of China's export buyer's credit program"; and "has never used the Import Export Bank of China's financing (*i.e.*, 'Buyer's Credit program') in any way"—statements that the GOC echoed in its questionnaire responses. *See* Heze's Sec. III Quest. Resp., Ex. 9; Heze's Third Suppl. Quest. Resp., Ex. SQ3–1, SQ3–2; GOC's Third Suppl. Quest. Resp. at 2 ("None of the [mandatory] respondent's customers used Export Buyer's Credits.").

Heze also maintains that the responses provided by the GOC indicate that Heze and its customers "must be aware of whether they used and benefitted from the program." Heze's Br. 5. Specifically, Heze points to the GOC's statements that China ExIm conducts post-loan verification activities that require "consistent and active" engagement by the exporter. *See* Heze's Br. 6 ("It is inconceivable that [Heze] would not be aware that it was a beneficiary of the Ex-Im Bank's Buyer's Credit Program under these circumstances."). In other words, because of the way the program operates in practice, Heze and its customers would have direct knowledge that they used or benefitted from the program.

Further, Heze argues that pursuant to 19 U.S.C. § 1677m(e),[14] "the Department must use the record information necessary to the determination even when it does not meet all of the Department's requirements." Heze's Br. 7 (citing § 1677m(e)(1)-(5)). Accordingly, for Heze,

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[13] Heze certified that these were all of its U.S. and non-U.S. customers during the POR. *See* Heze's Sec. III Quest. Resp. at 11.

[14] This provision of the statute provides that Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce] or the Commission, if" five conditions are met, *i.e.*, that

> (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] . . . with respect to the information, and (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

"the record evidence simply does not support the Department's assessment that respondents used or benefitted from the China Ex-Im Export Buyer's Credit Program," and Commerce could have conducted verification to prove it. Heze's Br. 6–7.

The court finds that Commerce's use of adverse facts available is neither supported by substantial evidence nor in accordance with law. Under the plain language of the statute, Commerce must resort to facts available only when "*necessary* information is not available on the record," or an interested party withholds information or significantly impedes a proceeding. 19 U.S.C. § 1677e(a)(1)-(2)(A), (C) (emphasis added). Here, Heze and the GOC provided a good deal of evidence that Heze's U.S. and non-U.S. customers did not use the Export Buyer's Credit Program—evidence that, in accordance with the Department's past practice, was sufficient to demonstrate non-use. Nonetheless, Commerce claims that it was lawful to employ adverse facts available because the GOC failed to provide information in its possession with respect to "(1) whether it uses third-party banks to disburse/settle Export Buyer's Credits, (2) the interest rates it used during the POR, and (3) whether . . . China ExIm limits the provision of export buyer's credits to business contracts exceeding USD 2 million." Post-Prelim. Mem. at 6. Defendant maintains that the Department could use adverse facts available because "the lack of information impeded Commerce's ability to analyze [the Export Buyer's Credit Program] and verify respondents' claims of non-use." Def.'s Br. 15. The problem with this argument, however, is that Commerce failed to adequately answer the question why—why was the requested information necessary for Commerce to make its determination under these facts?

This Court has looked at similar requests by Commerce on three occasions. In the first case, *Changzhou Trina Solar Energy Co. v. United States*, as here, Commerce sought information as to the respondents' use, directly or indirectly, of the Export Buyer's Credit Program. 40 CIT __, 195 F. Supp. 3d 1334 (2016) ("*Changzhou I*"). When Commerce sought permission to search China ExIm's electronic databases and records itself to verify the claimed non-use of the program during verification in China, the request was denied. *Id.*, 40 CIT at __, 195 F. Supp. 3d at 1354 (internal citation omitted) ("In response to Commerce's query regarding this program, the GOC stated that it had confirmed with PRC Ex–Im and the Respondents that no U.S. customer of any of the Respondents had used the Export Buyer's Credit Program during the [period of investigation]. But

when Commerce sought to verify this information, during the verification procedure in China, the GOC refused to permit Commerce to access the PRC Ex–Im's records."). Under those circumstances, the *Changzhou I* Court sustained Commerce's use of adverse facts available in finding that the respondents' purchasers had used the Export Buyer's Credit Program. *Id*. at 1355.

In the case of *Guizhou Tyre Co. v. United States*, Commerce had determined to use adverse facts available after the GOC refused to answer questions concerning third-party banks—questions similar to those asked here that the GOC would not answer. 42 CIT __, Slip Op. 18–140 at 9 (Oct. 17, 2018). The *Guizhou* Court found that the GOC's refusal was "immaterial" based on the evidence of non-use submitted by respondents—evidence similar to the certifications of non-use placed on the record here. The Court stated: "While the Department did note that information as to the functioning of the Program was missing, this finding was rendered immaterial by responses from both Guizhou and the GOC as to the Program's use. This defect proves fatal to Commerce's imposition of [adverse facts available]." *Id*., 42 CIT at __, Slip Op. 18–140 at 7 ("Crucially missing from [Commerce's] assessment is an initial finding . . . that material information was missing from the record."). In other words, Commerce had not adequately explained why it needed the information to verify respondents' questionnaire responses. Therefore, the Court remanded, ordering that "the Department reconsider its decision to apply [adverse facts available] as to China's Export Import Bank Buyer's Credit Program, taking into account the GOC's evidence of non-use." *Id*., 42 CIT at __, Slip Op. 18–140 at 25.

Finally, in the recent case of *Changzhou Trina Solar Energy Co. v. United States*, when faced with similar questionnaire responses and the application of adverse facts available, the Court found:

> In this case, Commerce claims its ability to verify the certifications was stymied by a lack of understanding of if and how third party banks were involved in the distribution of loans. Commerce, however, did not explain why the GOC's failure to explain this program was necessary to assess claims of non-use and why other information accessible to respondents was insufficient to fill whatever gap was left by the GOC's refusal to provide internal [China ExIm] bank records. Further, Commerce did not explain how an adverse inference regarding the operation of the [Export Buyer's Credit Program] logically leads to a finding that respondents used the program. The use of facts available allows Commerce to render . . . detailed reasoning for why documentation from the GOC was necessary. Here, Commerce provided

> reasoning as to why the GOC's failure to respond adequately made it impossible for it to understand fully the operation of the [program], but it failed to show *why* a full understanding of the [program's] operation was necessary to verify non-use certifications.

42 CIT __, __, Slip Op. 18–166 at 10 (Nov. 30, 2018) ("*Changzhou II*") (internal citations omitted) (emphasis added).

Changzhou I is distinguishable on its facts from this case, and *Guizhou* and *Changzhou II* are instructive as to the correct result here. *Changzhou I* is different because there, (1) Commerce actually went to China to verify the questionnaire responses but was denied access to China ExIm's records, and (2) Commerce provided at least a plausible reason for needing the information it requested. In particular, the Court found reasonable Commerce's explanation as to why the denial of access to China ExIm's records made it impossible to verify whether any of Changzhou's purchasers participated in the program. That is, without an understanding of an exporter's role in its customer's application for a loan under the Export Buyer's Credit Program, conducting a verification of that exporter's books and records would be useless because Commerce would not know what it was looking for, or what might be missing. *See Changzhou I*, 40 CIT at __, 195 F. Supp. 3d at 1355. In *Guizhou* and *Changzhou II*, on the other hand, the record contained evidence of non-use that was similar to the declarations of non-use placed on the record in this case—evidence that Commerce itself had found sufficient in the past. Also, in neither case did Commerce explain why it needed the missing information.

It is important to keep in mind that a determination concerning the presence or absence of a subsidy revolves around whether "the manufacture, production, or export" of particular "merchandise" has been subsidized. 19 U.S.C. § 1671(a)(1). Thus, a determination as to whether the use of facts available or adverse facts available is lawful depends on whether the information missing from the record relates to the "manufacture, production, or export" of that "merchandise." If it does not, the information is not "necessary" and so the application of neither facts available nor adverse facts available is lawful. *See* 19 U.S.C. § 1677e(a)(1) (authorizing the use of facts available if "necessary information is not available on the record"), (b) (authorizing use of adverse inferences).

Here, in its explanation of its decision to use adverse facts available, Commerce has failed to say how the information it sought relating to: (1) whether China ExIm uses third-party banks to disburse/settle export buyer's credits; (2) the interest rates the bank

used during the POR; (3) whether the bank limits the provision of export buyer's credits to business contracts exceeding $2 million; and (4) suspected amendments to the internal procedures for the Export Buyer's Credit Program, is necessary to make a determination of whether the manufacture, production, or export of Heze's merchandise has been subsidized. While Commerce is, no doubt, curious as to all of the inner workings of many Chinese programs, mere curiosity is not enough. Commerce must either provide an adequate answer as to why the information it seeks "to fully understand the operation of the program" is necessary to fill a gap as to Heze's products and their sale, or rely on the information it has on the record.

As to Commerce's claim that it needed the information to verify Heze's questionnaire responses, here, too, the Department has failed to say why. The questions Commerce asked do not seem designed to elicit information that would tend to prove or disprove the record evidence establishing that Heze's purchasers did not use the program. That is, Heze's questionnaire responses and the forty-four declarations of non-use by its U.S. and non-U.S. customers stated that Heze did not directly or indirectly use or benefit from the Export Buyer's Credit Program. Additionally, the GOC's statements support Heze's claims of non-use. As in *Changzhou II*, here "Commerce provided reasoning as to why the GOC's failure to respond adequately made it impossible for it to understand fully the operation of the [program], but it failed to show why a full understanding of the [program's] operation was necessary to verify non-use certifications." *Changzhou II*, 42 CIT at __, Slip Op. 18–166 at 10.

Therefore, Commerce's use of facts available cannot be sustained because the Department has failed to show that the information it seeks is necessary to its determination. Thus, Commerce, by failing to tie its facts available determination (and therefore its adverse facts available determination) to Heze, its products, or its customers, did not comply with the statute. Nor did Commerce support with substantial evidence its necessary conclusion that there were gaps in the record evidence that could only be filled with the GOC's responses to its questionnaires.

II. Commerce's Use of the 0.87 Percent Rate as Adverse Facts Available for the Export Buyer's Credit Program Is Supported by Substantial Evidence

In the Final Results, Commerce selected the 0.87 percent subsidy rate as the adverse facts available rate for the Export Buyer's Credit Program. *See* Final DM at 14. In making this selection, Commerce applied its judicially-approved adverse facts available hierarchy method used in reviews:

> To select an [adverse facts available] subsidy rate, Commerce first attempts to apply the highest, above *de minimis* subsidy rate calculated for the identical program from any segment of the proceeding. *Absent a calculated above de minimis subsidy rate from an identical program, the Department then seeks a subsidy rate calculated for a similar program.* Absent such a rate, the Department then resorts to the third step in its hierarchy, an above *de minimis* calculated subsidy rate for any program from any [countervailing duty] proceeding involving the country in which the subject merchandise is produced, so long as the producer of the subject merchandise or the industry to which it belongs could have used the program for which the rates were calculated.

Essar Steel Ltd. v. United States, 37 CIT __, __, 908 F. Supp. 2d 1306, 1310 (2013), *aff'd* 753 F.3d 1368 (Fed. Cir. 2014) (citations omitted; emphasis added). Applying the second step of this method, Commerce found that the Export Seller's Credit Program qualified as a "similar" program within any segment of the same proceeding, *i.e.*, the investigation segment, and that the highest non-*de minimis* rate calculated for a cooperating respondent for the Export Seller's Credit Program was 0.87 percent.

Clearon does not challenge Commerce's method as inconsistent with the statute. Rather, it questions Commerce's selection of the 0.87 percent rate on substantial evidence grounds. First, noting that Commerce preliminarily selected the rate of 10.54 percent, it argues that, in comparison, the 0.87 percent rate selected in the Final Results is not sufficiently adverse to incent the GOC to cooperate in future proceedings (*i.e.*, to deter non-cooperation). *See* Clearon's Br. 15. For Clearon, "Commerce precedent establishes that the 0.87 percent rate applied here is not a deterrent. In fact, the [GOC] has routinely failed to provide information requested by the Department regarding the Export Buyer's Credit program, *even in cases in which Commerce assigned 10.54 percent as the [adverse facts available] rate*." Clearon's Br. 15. Therefore, Clearon maintains that "the application of a lower rate [than 10.54 percent] will not provide any meaningful incentive to the [GOC] . . . ." Clearon's Br. 15.

Second, Clearon contends that Commerce has failed to explain adequately its conclusion that the Export Seller's Credit Program and the Export Buyer's Credit Program are, in fact, similar. Clearon argues that "[t]he only similarity between these programs . . . is that both programs are export credits. Fundamentally, credits paid to the seller are different from credits paid to buyers, which here not only include direct purchasers but may also include other 'importers' and

even lending institutions." Clearon's Br. 18–19. Also, Clearon maintains that since the GOC failed to provide information about both the Export Seller's Credit Program and the Export Buyer's Credit Program, Commerce had no evidentiary basis to conclude that the two programs were similar. *See* Clearon's Br. 20–21.

If, on remand, Commerce continues to find that Heze used and benefitted from the Export Buyer's Credit Program, and the court sustains that determination, the Department may continue to use the 0.87 percent rate. Notwithstanding Clearon's arguments against the 0.87 percent rate, Commerce's selection of this rate is supported by substantial evidence, for the following reasons.

First, Clearon has not shown that the 0.87 percent rate here is unreasonably low to deter future non-cooperation. Clearon cites this Court's decision in *RZBC Group Shareholding Co. v. United States*, upholding 10.54 percent as the adverse facts available rate for the Export Buyer's Credit Program. 41 CIT __, __, 222 F. Supp. 3d 1196 (2017). There, the Court sustained Commerce's corroboration of the 10.54 percent rate, which was based on secondary information, *i.e.*, the rate that Commerce had assigned to a comparable lending program in a separate proceeding: *Coated Paper From the People's Republic of China*.[15] Whether or not a rate was corroborated, however, has little to do with its deterrent effect. Moreover, whether a rate is sufficient to encourage cooperation in the future is based on Commerce's consideration of the facts. For example, even if the 0.87 percent rate might appear low in comparison to the 10.54 percent rate, its inclusion in the calculation of Heze's rate increased its rate by approximately 100 percent to 1.91 percent.

Moreover, the record supports Commerce's finding that the Export Buyer's Credit Program and the Export Seller's Credit Program are "similar," for purposes of its adverse facts available hierarchy method. While not of ideal clarity, Commerce's reasoning is discernable from the Final DM:

> Regarding the rate to be applied to [the Export Buyer's Credit Program], upon consideration of post-preliminary comments, we agree with the GOC and Heze that the rate for the Export Seller's Credit Program from the investigation qualifies as a

[15] By corroborating the 10.54 percent rate from *Coated Paper*, Commerce complied with the requirement in subsection 1677e(c) that Commerce corroborate "secondary information" that it relies on to arrive at the rate, *i.e.*, information that was not obtained during the course of the review. *See* 19 U.S.C. § 1677e(c)(1). It is worth noting that the Commerce decision under review in *RZBC* predated the Trade Preferences Extension Act of 2015, which created an exception to the corroboration requirement where a countervailing duty is applied in a separate segment of the same proceeding. *See* 19 U.S.C. § 1677e(c)(2) ("[Commerce] . . . shall not be required to corroborate any . . . countervailing duty applied in a separate segment of the same proceeding.").

> similar program within any segment of the same proceeding according to step two of the [adverse facts available] hierarchy for reviews. On this basis, we have adjusted the [adverse facts available] rate to 0.87 percent *ad valorem*, the rate calculated for Jiheng for the Export Seller's Credit Program in the investigation, for these final results.

Final DM at 14. Among the arguments in the post-preliminary comments was that the Export Seller's Credit Program "is the counterpart of the Export Buyer's Credit program," in that "[b]oth are administered by the China Ex-Im Bank with the same goal of supporting the export of Chinese products and improving their competitiveness in international markets, and the Department analyzes the loans together." Heze's Comments on Post-Prelim. Results (June 2, 2017), P.R. 114 at 10–11 (citing Final DM at 14, Heading 3 titled "Export Seller's and Buyer's Credits from Export-Import Bank of China."); *see also SolarWorld Americas, Inc. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1372, 1377–78 n.8 (finding "Commerce's logic in considering the programs similar [was] reasonably discernible because both loan programs perform similar functions in support of Chinese industry by offering lower interest rates on loans than would otherwise be available to these companies."). It is worth noting that while Clearon maintains that the credits paid to export sellers are "different" than credits paid to export buyers, it does not put forth any evidence showing that the programs are entirely dissimilar. Nor does it argue that the programs have aims other than supporting the export of Chinese goods and services or that subsidies of similar amounts could be deemed to achieve each program's goals. Rather, Clearon contends that "[t]he only similarity" between the Export Seller's Credit Program and the Export Buyer's Credit Program "is that both programs are export credits." Clearon's Br. 18. Even if that were the case, on this record, it was not unreasonable for Commerce to conclude that this similarity was enough to justify finding that the two programs were similar for purposes of applying its adverse facts available rate selection method.

CONCLUSION and ORDER

Based on the foregoing, it is hereby

ORDERED that the Final Results are sustained in part and remanded; it is further

ORDERED that, on remand, Commerce issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, Commerce shall explain how the information it sought as to (1) whether China ExIm uses third-party banks to disburse/settle export buyer's credits; (2) the interest rates the bank used during the POR; (3) whether the bank limits the provision of export buyer's credits to business contracts exceeding $2 million; and (4) suspected amendments to the internal procedures for the Export Buyer's Credit Program, is necessary to make a determination of whether the "manufacture, production, or export" of Heze's merchandise has been subsidized, pursuant to 19 U.S.C. § 1671(a). In doing so, Commerce shall tie its inquiries to Heze, its products, and/or its customers; it is further

ORDERED that Commerce must either provide an adequate answer relating to why the information it seeks "to fully understand the operation of the program" fills a gap as to Heze's products and their sale, or rely on the information it has on the record; it is further

ORDERED that Commerce comply with the statute by tying its facts available and adverse facts available determinations to Heze, its products, or its customers; it is further

ORDERED that Commerce support with substantial evidence its necessary conclusion that there were gaps in the record evidence that could only be filled with the GOC's responses to its questionnaires; and it is further

ORDERED that the remand results shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: January 25, 2019
New York, New York

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

Slip Op. 19–15

MACLEAN POWER, L.L.C., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 17–00265

[Commerce's scope ruling remanded to exclude plaintiff's pole line hardware from scope of antidumping duty order.]

Dated: January 30, 2019

Lawrence R. Pilon and *Thomas M. Keating*, Hodes Keating & Pilon, of Chicago, Ill., for Plaintiff MacLean Power, L.L.C.

Eric J. Singley, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington D.C., for the defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Direc-

tor. Of counsel on the brief was *Caroline D. Bisk*, Attorney, U.S. Department of Commerce, of Washington, D.C.

OPINION

Restani, Judge:

This action challenges a final scope ruling issued by the United States Department of Commerce, International Trade Administration ("Commerce") regarding MacLean Power, L.L.C. ("MacLean")'s pole line hardware. MacLean moves for judgment on the administrative record, seeking a holding that Commerce's determination that its pole line hardware fall within the antidumping order on certain helical spring lock washers ("HSLWs") from the People's Republic of China ("PRC") is unsupported by substantial record evidence or otherwise not in accordance with the law. *See* Mem. L. Supp. Pl. MacLean Power, L.C.C.'s Rule 56.2 Mo. J. Agency Record, Doc. No. 26–1 ("MacLean Br."). Accordingly, MacLean seeks opposes MacLean's motion. For the following reasons, MacLean's motion is granted.

BACKGROUND

On November 23, 1993, Commerce published an antidumping duty order covering certain HSLWs from the PRC. *See Antidumping Duty Order: Certain Helical Spring Lock Washers from the PRC*, 58 Fed. Reg. 53,914 (Dep't Commerce Oct. 19, 1993); *Amended Final Determination and Amended Antidumping Duty Order: Certain Helical Spring Lock Washers from the PRC*, 58 Fed. Reg. 61,859 (Dep't Commerce Nov. 23, 1993) (the "Order"). Commerce defined the scope of certain HSLWs as follows:

> [C]ertain HSLWs are circular washers of carbon steel, of carbon alloy steel, or of stainless steel, heat-treated or non heat-treated, plated or non-plated, with ends that are off-line. HSLWs are designed to: (1) Function as a spring to compensate for developed looseness between the component parts of a fastened assembly; (2) distribute the load over a larger area for screws or bolts; and (3) provide a hardened bearing surface. The scope does not include internal or external tooth washers, nor does it include spring lock washers made of other metals, such as copper. The lock washers subject to this investigation are currently classifiable under subheading 7318.21.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

58 Fed. Reg. at 61,859. The Order does not mention HSLWs imported as assembled into other merchandise or as a part of a set or kit containing multiple items.

On October 11, 2016, MacLean Power, L.L.C. ("MacLean"), a manufacturer of products used by utilities for building transmission and distribution lines and substations, filed a request with Commerce for a scope ruling that its various pole line hardware products, which contain HSLWs as component parts, were outside of the scope of the Order. *Scope ruling request of MacLean Power, L.L.C., Pole Line Hardware Helical Spring Lock Washers from PRC (A-570–822)*, P.D. 1 (Oct. 11, 2016) ("Scope Ruling Request"). MacLean's pole line hardware products include clamps and line post studs used "to attach, support, and secure the cables, wires, and related components that carry power, telephone, internet, and cable television signals in above- ground pole-based systems [(i.e., utility poles)]." Scope Ruling Request at 3. The clamps are combinations of steel clamping cups or jaws, attached to bolts or studs that are fastened with HSLWs and nuts. *See id.* at 3–6. The line studs include steel pins that attach to a HSLW, a square or hex nut, and a locknut.[1] *Id.* at 7. In each of MacLean's pole line hardware products, the HSLWs form only one part of a multi-part assembled good. MacLean imports and sells its pole line hardware as assembled. *See MacLean Power's Resp. to the Department's 03/15/2017 Req. for Additional Information,* A-570–822, P.D. 12 at Ex. AA (May 11, 2017). No comments on the Scope Ruling Request were filed by interested parties.

Commerce issued a final scope ruling on October 5, 2017, concluding that MacLean's HSLWs, as a component of pole line hardware, fell within the scope of the Order. *Final Scope* Ruling On MacLean Power, L.L.C.'s Pole Line Hardware Products, A-570–822, P.D. 18 at 8–10 (Oct. 5, 2017) ("Scope Ruling"). Commerce asserts it used its "discretion to determine that [the pole line hardware was] a set of related products [that were] merely a combination of subject and non-subject merchandise, and not a unique product." *Id.* at 10. Thus, Commerce further asserted, "[b]ecause the [HSLWs] [were] included in a mixed media item that includes a mixture of potentially subject merchandise and non-subject merchandise," it used the mixed media analysis outlined in Mid Continent Nail Corp. v. United States, 725 F.3d 1295 (Fed. Cir. 2013). Id. at 7. In accordance with the purportedly applicable analysis for "mixed media" items articulated in Mid Continent, Commerce first found that the HSLWs were subject merchandise "as

[1] Images of the pole line hardware as submitted to Commerce are available in an appendix to this opinion. *See* Scope Ruling Request at 3–7.

outlined in the literal terms of the [Order].” *Id.* at 9. Commerce then determined that the inclusion of HSLWs into pole line hardware should not exclude them from the scope of the Order. *Id.* Commerce found “no basis in the language of the order” or “other scope-related sources” to exclude HSLWs when incorporated into pole line hardware. *Id.* at 9–10.

MacLean challenges Commerce’s determination that the imported pole line hardware constituted a mixed media product. MacLean argues that Commerce’s characterization of its imported goods as “mixed media” is unsupported both by record evidence and Commerce’s prior mixed media determinations. MacLean Br. at 19–24. MacLean contends that the Department’s reliance on *Mid Continent* is misplaced because the HSLWs included in MacLean’s pole line hardware are components of a unique good as opposed to mixed media items, and therefore a mixed media approach like that taken in *Mid Continent* is inapplicable. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court has authority to review “whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order.” 19 U.S.C. § 1516a(a)(2)(B)(vi). Commerce’s final scope determination will be upheld 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).

DISCUSSION

I. Legal Framework

After an antidumping duty order is published, importers may seek “‘scope rulings’ that clarify the scope of an order . . . with respect to particular products.” 19 C.F.R. § 351.225(a), (c). In making a typical scope determination, Commerce follows a sequential analysis. Commerce must first analyze the language of the antidumping order itself and determine if the product is Cir. 2002) (stating that the language of an order is the “cornerstone of [a court’s] analysis” of an order’s scope). If the language of the order is ambiguous regarding the product at issue, Commerce next considers the (k)(1) factors, which include “[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission.” 19 C.F.R. § 351.225(k)(1). If these sources are sufficient to determine that the product falls within the scope of the order, a final scope ruling is

issued. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). However, if the sources in (k)(1) are not dispositive, Commerce must consider the additional (k)(2) factors, which are "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 352.225(k)(2).

Although courts grant significant deference to Commerce's interpretation of its own orders, Commerce "cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *See Duferco Steel*, 296 F.3d at 1095 (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2011)). Moreover, "orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Id.* at 1089.

II. MacLean's Pole Line Hardware

Commerce incorrectly determined that the HSLWs in MacLean's pole line hardware fall within the scope of the Order because the HSLWs were neither imported alone nor as part of a set or kit, but rather as unique assembled products. An antidumping duty order reflects a determination by Commerce that a "subject merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673d(a)(1); *See also Duferco Steel*, 296 F.3d at 1096 ("Commerce's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order."). The term "subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, [or] an order." 19 U.S.C. § 1677(25). Thus, Commerce is required to determine whether the product as imported falls under the "class or kind of merchandise" encompassed by the language of the order. *See Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990).

It is an ancient principle of "customs law that '[i]n order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported.'" *Ford Motor Co. v. United States*, 254 F. Supp. 3d 1297, 1317 (CIT 2017) (quoting *Worthington v. Robbins*, 139 U.S. 337, 341 (1891)). While the issue before the court is not one of classification, the duty to consider

the merchandise in the condition in which it is imported applies to additional unfair trade duties. It is the merchandise as imported that is judged in relation to the term of the order, which for these purposes substitutes for tariff classification terms.

MacLean's pole line hardware, although it contains HSLWs, is imported as distinct assembled products for use in the attachment of cables and wires onto utility poles. Commerce provides no support for its failure to treat the pole line hardware as unique manufactured products. Commerce did not decide whether the pole line hardware, as assembled, falls under the class or kind of merchandise contemplated in the language of the Order. It did not analyze the components of the pole line hardware to determine whether they were parts of sets or separate dutiable items. Had it done so, the outcome would have been different.

Here, the language of the Order covered HSLWs imported individually and makes no mention of the importation of HSLWs as assembled as a component of a larger product. *See* 58 Fed. Reg. at 61,859. The Order gives further guidance by stating that the subject HSLWs "are currently classifiable under subheadings 7318.21.0000, 7318.21.0030, and 7318.21.0090 of the [Harmonized Tariff Schedule of the United States ("HTSUS")]."[2] Scope Ruling at 2. Those *eo nomine* designations refer plainly to "spring washers and other lock washers." *See* HTSUS 7318.21.00. Moreover, at the time of the Order, the HTSUS contained a subheading, not referenced in the Order, for "Bolts and bolts and their nuts or washers entered or exported in the same shipement." *See* HTSUS 7318.15.20. At minimum, this indicates an awareness that HSLWs may be attached to their bolts, along with nuts or other hardware components, suggesting that the language of the order was not intended to include washers entered as assembled with threaded fasteners, such as bolts. Indeed, as MacLean argues, Commerce did not provide an explanation as to why the pole line hardware would be distinguished from "all manner of other manufactured goods that are held together with threaded fasteners secured by HSLWs." See MacLean Br. at 19. The Order covers washers, not assembled items that include washers, whether those assemblies are pole line hardware, refrigerators, automobiles, or airplanes. Accordingly, Commerce failed to support by substantial evidence the determination that the pole line hardware were not unique products.

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[2] HTSUS Heading 7318 provides for "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotter, cotter pins, washers (including spring washers) and similar articles, or iron or steel." *See* HTSUS 7318.

In reaching its erroneous conclusion, Commerce treated the washers as part of a kit or set, such that the "two-part" analysis outlined in *Mid Continent* would be applicable.[3] The scope ruling in *Mid Continent* concerned sets or kits of subject and non-subject merchandise "packaged and imported together." 725 F.3d at 1298. That court built its reasoning on Commerce's prior treatment of similarly packaged goods. *See, e.g., Final Scope Ruling: Antidumping Duty Order on Certain Tissue Paper from the PRC*, A-570–894 (Sept. 19, 2008) ("Walgreen Scope Ruling") (tissue paper packaged in gift bag sets and gift bag wrap kits); *Final Scope Ruling-Antidumping Duty Order on Certain Cased Pencils from the PRC—Request by Fiskars Brands, Inc.*, A-570–827 (June 3, 2005) (a pencil attached to a drawing compass); *Final Scope Ruling-Antidumping Duty Order on Certain Cased Pencils from the PRC—Request by Target Corporation*, A-570–827 (Mar. 4, 2005) (pencils in a portable plastic case that also included markers, crayons, and paper).

Here, however, *Mid Continent* and the "mixed media" cases are not instructive because the pole line hardware, as discussed above, are assembled items composed of HSLWs and other hardware to create a unique product.[4] This multipart assembly into a distinct product with a specific purpose distinguishes the pole line hardware from the tool box in *Mid Continent* and from other mixed media items. Commerce unconvincingly attempts to equate MacLean's pole line hardware with the household tool kits. It asserted that a "mixed media" analysis was appropriate because:

> [a]s in *Mid Continent*, here, the HSLWs were unmodified and clearly remain HSLWs in appearance; likewise, the nails at issue in *Mid Continent* were unmodified and remained nails in appearance. Neither product was welded or adhere in any way to non-subject merchandise. In fact the HSLWs are easily separated from non-subject merchandise; likewise, the nails were also easy to separate from the non-subject merchandise.

[3] Commerce put the cart before the horse. It began a "mixed media" analysis by drawing language from *Mid Continent* that such an analysis is applicable where a "potentially subject merchandise is included in a mixed media item that includes a mixture of potentially subject merchandise and non-subject merchandise." Scope Ruling at 7 (quoting *Mid Continent*, 725 F.3d at 1302). That language is not useful for deciding what the imported item is, as it presupposes that the product in question is appropriately considered a "mixed media" item. Before applying the various guidance in *Mid Continent*, Commerce was first required to address the pole line hardware as imported in its assembled condition.

[4] In upholding the determination that tissue paper was within the scope of the order, the Court of Appeals for the Federal Circuit in *Walgreen Co. v. United States* observed that "the components of the gift bag sets did not interact in any way or otherwise represent a unique product." 620 F.3d 1350, 1356 (Fed. Cir. 2010). Commerce considered the gift bag items "to be individual items simply packaged together" and "could be used independently of one another and at different times." Walgreen Scope Ruling at 11.

Scope Ruling at 8. Although Commerce found the HSLWs, like the tool box nails, to be "unmodified," "not welded or adhered" and "easily separated" from the rest of the hardware, it failed to address the fact that, unlike the nails in *Mid Continent*, the HSLWs are assembled into clamps and studs, interact with the other parts of the clamps and studs, and are not sold for use independent of the other component pieces.[5] *See* Scope Ruling Request at 3–7, 12–13. Moreover, the HSLWs subject to the Order are designed to function as a spring to compensate for looseness in a fastened assembly, distribute load for screws and bolts, and provide a hardened bearing surface. Scope Ruling at 2. Thus, by definition, they will not be found modified, welded, or adhered in any way to non-subject merchandise. Commerce's use of such factors to find the pole line hardware analogous to tool kits was unreasonable. A tool box retains its essential character when it excludes nails, as do the nails by themselves. But the HSLWs at issue here are not alleged to be imported for use in anything other than the pole line hardware.[6] The pole line hardware cannot perform their intended functions without the HSLWs, or the remainder of their components functioning together. Because the pole line hardware products cannot reasonably be considered HSLWs themselves or sets or kits containing HSLWs, their HSLWs do not fall under the scope of the Order.[7]

CONCLUSION

For the foregoing reasons, MacLean's motion for judgment on the agency record is GRANTED. The matter is remanded for Commerce to issue a determination that the HSLWs incorporated into MacLean's pole line hardware are excluded from the scope of the Order. Commerce shall file its remand redetermination with the court on or before 45 days of the issuance of this opinion. As there is no new

[5] Nothing in the record suggests some economic rationale for treating these products disassembled when they are imported assembled.

[6] If an interested party believes that the products containing HSLWs are actually intended for another purpose, then anti-circumvention statutes may provide remedies for the risks that component pieces are imported as assembled only to avoid anti-dumping or countervailing duty orders. *See* 16 U.S.C. § 1677j. Additionally, interested parties can file a petition for an antidumping investigation and order that includes broader terms, including HSLWs as assembled into larger hardware, if those are the items being sold at less their fair value. *See* 19 U.S.C. § 1673a.

[7] No party has alleged that there is a conflict between the scope language and any of the (k)(1) sources. In fact, the International Trade Commission determination makes it clear that the corresponding domestic industry makes helical spring lock washers. *Certain Helical Spring Lockwashers from the [PRC] and Taiwan*, USITC Pub. No. 2526, Inv. Nos. 731-TA-624 & 625 (Preliminary) (October 1992) at I-9.

action possible that could require further briefing, the court does not set a further schedule, but will enter judgment upon receipt of the conforming determination.

Dated: January 30, 2019
New York, New York

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

Slip Op. 19–16

SHENZHEN XINBODA INDUSTRIAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Defendant-Intervenors.

Court No. 11–00267

[Sustaining Second Remand Results]

Dated: January 30, 2019

Gregory S. Menegaz, *Judith L. Holdsworth*, *Alexandra H. Salzman*, and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, D.C., appeared for Plaintiff.

Richard P. Schroeder, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., appeared for Defendant, joined by *Chad A. Readler*, Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch. Of counsel was *Emma T. Hunter*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington, D.C., appeared for Defendant-Intervenors, joined by *John M. Herrmann*.

OPINION

RIDGWAY, Judge:

Plaintiff Shenzhen Xinboda Industrial Co., Ltd. ("Xinboda") – a Chinese exporter of fresh garlic – commenced this action to contest the Final Determination in the U.S. Department of Commerce's fifteenth administrative review of the antidumping duty order covering fresh garlic from the People's Republic of China. *See* Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, in Part, of the 2008–2009 Antidumping Duty Administrative Review, 76 Fed. Reg. 37, 321 (June 27, 2011) ("Final Determination"); Issues and Decision Memorandum for the Final Results of the 15th Administrative Review of Fresh Garlic from the People's Republic of China (June 20, 2011) (AR Pub. Doc. No. 176) ("Issues & Decision Memorandum"); *see generally Shenzhen Xinboda Industrial Co. v. United States*, 38 CIT ____, 976 F. Supp 2d 1333 (2014) ("*Shenzhen Xinboda I*"); *Shenzhen Xinboda Industrial Co. v. United States*, 41

CIT ____, 279 F. Supp. 3d 1265 (2017) ("*Shenzhen Xinboda II*").[1] In its Complaint, Xinboda challenged Commerce's decisions in its Final Determination as to the surrogate financial statements used to derive surrogate financial ratios, the surrogate value for labor (*i.e.*, the surrogate wage rate), and the surrogate value for fresh whole raw garlic bulbs, as well as the agency's application of its "zeroing" methodology in calculating Xinboda's dumping margin. *See generally* Complaint; *see also Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp 2d at 1345–46.

Ruling on Xinboda's Motion for Judgment on the Agency Record, *Shenzhen Xinboda I* remanded this matter to Commerce for further consideration of all four issues, including a voluntary remand on the surrogate value for labor. *See generally Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp 2d at 1388. *Shenzhen Xinboda II* sustained Commerce's remand determination as to the surrogate value for labor and the agency's application of zeroing, but remanded the matter for a second time to permit Commerce to further consider the surrogate value for garlic bulbs and the selection of financial statements. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1265 *et seq*.; Final Results of Redetermination Pursuant to Remand (SAR Pub. Doc. No. 7) ("First Remand Results").

Now pending are Commerce's Second Remand Results, which have been filed under protest as to the surrogate value for garlic bulbs. *See generally* Final Results of Redetermination Pursuant to Remand ("Second Remand Results"). Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[2] For the reasons set forth below, the Second Remand Results must be sustained.

[1] Because this action has been remanded to Commerce twice, there are three administrative records – the initial administrative record (comprised of the information on which the agency's Final Determination was based) ("AR"), the supplemental administrative record compiled during the course of the first remand ("SAR"), and the second supplemental administrative record compiled during the most recent (second) remand ("SSAR").

Each of the three administrative records includes confidential (*i.e.*, business proprietary) information. Therefore, there are two versions of each of the records – a public version and a confidential version. The public versions of all three records consist of copies of all public documents in the record, as well as public versions of confidential documents with all confidential information redacted. The confidential versions consist of complete, unredacted copies of documents on the record that include confidential information. The number of the public version of a document is different than the number of the confidential version of the same document.

All citations to the three administrative records herein are to the public versions. These public documents are cited as "AR Pub. Doc. No. ____," "SAR Pub. Doc. No. ____," and "SSAR Pub. Doc. No. ____," respectively.

[2] Except as otherwise indicated, all citations to statutes herein are to the 2006 edition of the United States Code. Similarly, the pertinent statutory text remained the same at all relevant times, except as otherwise indicated.

I. *Background*

Shenzhen Xinboda I set forth the relevant statutory scheme, including statutory citations and other pertinent authorities. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp 2d at 1338–45. That explanation, together with other relevant background, was summarized in *Shenzhen Xinboda II*, in the interests of convenience and completeness. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1269–76. The discussion below is largely limited to the two issues addressed in the Second Remand Results – the surrogate value for garlic bulbs and the selection of surrogate financial statements.

Commerce's Surrogate Value for Garlic Bulbs. In the course of the underlying administrative review, Commerce compiled voluminous information on Xinboda and its operations, particularly the company's exports of garlic to the U.S. from China. Commerce similarly compiled detailed information on Zhenzhou Dadi Garlic Industry Co., Ltd. ("Dadi"), the affiliated processor/producer that supplied Xinboda with garlic products that Dadi produced from the fresh whole raw garlic bulbs that Dadi purchased from local Chinese garlic farmers. Dadi processed the whole raw garlic bulbs that it purchased – which had diameters of between 50 mm and 65 mm – into whole garlic bulbs and peeled garlic cloves for Xinboda. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1271.

To produce whole fresh garlic, Chinese garlic farmers delivered to Dadi whole raw garlic bulbs, sorted by size, in large mesh bags. Dadi workers sitting at tables in a simple warehouse then rub off the outer skins of the whole raw garlic bulbs (to give the bulbs a clean white appearance), cut or trim the roots and stems, place the bulbs into small mesh bags (typically holding three to five bulbs, depending on the customer), and affix the customer's labels to seal the bags. Bags are then packed into cartons, ready for shipping. Dadi's process for the production of peeled garlic cloves is similarly simple and straightforward. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1271.

As a surrogate value for the whole raw garlic bulbs that Chinese farmers delivered to Dadi, Commerce's Final Determination relied on size-specific prices for garlic bulbs sold at a large produce market in India (the surrogate market economy country in this case). Specifically, Commerce used the prices for bulbs sold at the Azadpur Market (located near Delhi), as published in the Azadpur Market Information Bulletin. Commerce rejected the other potential sources of data on the record based on Commerce's determination that those sources do

not specify the size of the garlic bulbs that were priced. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1272.[3]

To value the raw garlic bulbs delivered to Dadi that had a diameter of greater than 55 mm, the Final Determination relied on non-contemporaneous Azadpur Market prices for garlic bulbs classified as “grade S.A.” (or “Super-A”), which Commerce then indexed (inflated) to be contemporaneous with the dates of the period of review. Commerce used non-contemporaneous prices to value this larger-bulb garlic because the Azadpur Market Bulletin ceased publishing prices for grade S.A. garlic some months before the period of review. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1272.

To value the garlic bulbs delivered to Dadi that were somewhat smaller (with a diameter of between 50 mm and 55 mm), the Final Determination averaged the non-contemporaneous but indexed Azadpur Market prices for grade S.A. bulbs (described above) together with contemporaneous Azadpur Market prices for “grade A” garlic (*i.e.*, prices for grade A garlic from within the period of review). *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1272.

Xinboda has contested Commerce’s use of the Azadpur Market prices, asserting three different claims – that Commerce’s calculations are (in effect) tainted by “double-counting” because the garlic bulbs delivered to Dadi are less highly processed than those sold at the Azadpur Market; that the Azadpur Market prices include substantial “intermediary” expenses that Dadi did not incur; and that Commerce should exclude prices for grade S.A. garlic from its calculations because the prices for grade A garlic already include the larger-bulb garlic that was previously sold as grade S.A. Commerce has rejected each of the three claims. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1274–75; First Remand Results at 3–14, 44–47; Issues & Decision Memorandum at 10–15 (Comment 3).

The Selection of Surrogate Financial Statements. Valuing the various direct inputs that are used to produce goods does not capture certain costs that must be factored into prices – specifically, manufacturing/factory overhead, selling, general and administrative expenses (“SG&A”), and profit. Commerce calculates surrogate values for those three items using surrogate financial ratios that it derives from the financial statements of one or more companies that produce

[3] In addition to the Azadpur Market prices, other potential sources of data on the record include the prices for whole raw garlic bulbs included in the financial statements of Garlico Industries, Indian World Trade Atlas import statistics, Indian export statistics, Indian domestic market data from government sources (including data from India’s National Horticultural Board and data from the Indian Spices Board), and data from the Indian Agricultural Marketing Information Network (“AGMARKNET”), a database maintained by India’s Ministry of Agriculture. Xinboda has favored use of the Garlico prices. *See Shenzhen Xinboda II*, 41 CIT at ____ n.5, 279 F. Supp. 3d at 1272 n.5.

the same or comparable merchandise in the surrogate market economy country. In its Final Determination here, Commerce derived Xinboda's surrogate financial ratios from the unconsolidated financial statements of Tata Global Beverages Limited (specifically, Tata Tea), an Indian company that grows, processes, and sells coffee and tea products. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1273.

Because Congress directed Commerce to disregard a company's data (whenever possible) where the agency has "reason to believe or suspect" that the company may have received subsidies, Commerce selected the financial statements of Tata Tea over the other sets of financial statements on the record based on, *inter alia*, Commerce's determination that all but one of the other five had received subsidies that the agency had previously determined to be countervailable. *See* Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R. 3, H.R. Rep. No. 100–576 at 590–91 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24) (stating that, in determining surrogate values for factors of production, "Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices"); *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1273–74. Xinboda maintains that there is evidence on the record that gives "reason to believe or suspect" that Tata Tea "may" have received subsidies, such that its financial statements also should be disregarded. However, Commerce has rejected that position. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1273–74; First Remand Results at 14–21, 48–52; Issues & Decision Memorandum at 18–22 (Comment 6).[4]

Issuance of the Final Determination and Subsequent Proceedings. In its Final Determination, Commerce assigned Xinboda a weighted-average dumping margin of $0.06 per kilogram. *See* Final Determination, 76 Fed. Reg. at 37,326; *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1274.

Xinboda challenged the Final Determination, commencing this litigation and raising four issues in its Complaint – Commerce's selection of financial statements for use in calculating surrogate financial ratios, the surrogate wage rate, the surrogate value for garlic bulbs, and Commerce's application of its "zeroing" methodology in calculat-

[4] In addition to the financial statements of Tata Global/Tata Tea, other financial statements on the record include the statements of Garlico, Limtex (India) Limited, LT Foods Ltd., ADF Foods Ltd., and REI Agro Limited. Xinboda has favored the use of Garlico's financial statements. Although Commerce found no indication that Garlico has received subsidies, Commerce concluded that Garlico's operations are not sufficiently similar to those of Xinboda. *See Shenzhen Xinboda II*, 41 CIT at ____ & n.7, 279 F. Supp. 3d at 1273 & n.7.

ing Xinboda's dumping margin. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1274–75. Ruling on Xinboda's Motion for Judgment on the Agency Record, *Shenzhen Xinboda I* remanded this matter to Commerce for further consideration of all four issues, including a voluntary remand on the surrogate value for labor (*i.e.*, the surrogate wage rate) at Commerce's request. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1275.

In the First Remand Results, Commerce revised Xinboda's dumping margin to $0.02 per kilogram. *See* First Remand Results at 1, 3, 57. Commerce revised the surrogate value for labor to be consistent with the agency's Revised Labor Methodology and based that value exclusively on labor data for India. In addition, the First Remand Results continued to apply Commerce's zeroing methodology, but provided a more expansive explanation of the bases for its application. *See generally Shenzhen Xinboda II*, 41 CIT at ____, ____, 279 F. Supp. 3d at 1275, 1277–78 (discussing surrogate value for labor); *id.* at 1275–76, 1315–17 (discussing zeroing); First Remand Results at 3, 29, 57 (discussing surrogate value for labor); *id.* at 29–44, 55–57 (discussing zeroing). Shenzhen Xinboda II sustained the First Remand Results as to these two issues. *See* Shenzhen *Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1277–78 (discussing surrogate value for labor); *id.* at 1315–17 (discussing zeroing).

As to the surrogate value for garlic bulbs, the First Remand Results continued to rely on the Azadpur Market prices (as in the Final Determination), with one adjustment to Commerce's calculations to account for freight costs for the transportation of garlic from Indian farms to the Azadpur Market. Similarly, the First Remand Results continued to use the financial statements of Tata Tea to derive surrogate financial ratios, with a minor adjustment for the costs associated with tea leaf grown by Tata Tea for its own consumption. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1275, 1278–1305 (discussing surrogate value for garlic bulbs); *id.*, 41 CIT at ____, 279 F. Supp. 3d at 1275, 1305–15 (discussing selection of financial statements); First Remand Results at 3–14, 44–47, 57 (discussing surrogate value for garlic bulbs); *id.* at 14–28, 4852 (discussing selection of financial statements). *Shenzhen Xinboda II* remanded this matter to Commerce once again, to permit Commerce to further consider these two remaining issues. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1278–1305 (analyzing First Remand Results as to surrogate value for garlic bulbs and remanding issue for second time); *id.* at 1305–15 (analyzing First Remand Results as to selection of financial statements and remanding issue for second time).

In the Second Remand Results, Commerce has continued to base the surrogate value for garlic bulbs on the Azadpur Market prices. *See* Second Remand Results at 1–2, 5, 16, 35. However, as detailed below, Commerce has made certain revisions to its calculations, under protest, that are responsive to Xinboda's claims. Specifically, Commerce has made an adjustment to avoid double-counting and account for differences in the condition (the extent of processing) of the garlic bulbs that are delivered to Dadi and the bulbs that are sold at the Azadpur Market. *See id.* at 5, 16–17, 35. Further, Commerce has made an adjustment to account for intermediary expenses that Dadi does not incur, but which are reflected in the prices of garlic bulbs sold at the Azadpur Market. *See id.* In addition, Commerce has excluded prices for grade S.A. garlic bulbs from its calculations, basing its revised surrogate value solely on price data for grade A bulbs. *See id.* at 1–2, 5, 6, 35.

To calculate surrogate financial ratios, the Second Remand Results continue to rely on the financial statements of Tata Tea. *See* Second Remand Results at 2, 5, 28, 36. Commerce explains that the "reason to believe or suspect" standard has been supplanted by a new standard, which – according to Commerce – applies here. *See id.* at 17–20, 22–23, 25–26, 28, 30–33, 36. Commerce further states that the evidence that Xinboda has submitted as proof of potential subsidies is insufficient to cause Commerce to disregard the Tata Tea's statements, no matter which standard applies. *See id.* at 24, 26–28, 33–35, 36.

The Second Remand Results revise Xinboda's dumping margin to $0.00 per kilogram. *See* Second Remand Results at 2, 36.

II. *Standard of Review*

In reviewing a remand determination by Commerce in an antidumping duty case, the agency's determination must be upheld except to the extent that it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017); *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Dongtai Peak Honey Industry Co. v. United States*, 777 F.3d 1343, 1349 (Fed. Cir. 2015) (same).

Moreover, any determination as to the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *see also CS Wind Vietnam Co.*, 832 F.3d at 1373. That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *Dongtai Peak Honey Industry Co.*, 777 F.3d at 1349 (citing *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)).

In addition, a remand determination is reviewed for compliance with the court's remand order. *See*, *e.g.*, *Zhaoqing Tifo New Fibre Co. v. United States*, 42 CIT ____, ____, 2018 WL 6311775 * 10 (2018) ("*Zhaoqing Tifo III*"); *Since Hardware (Guangzhou) Co. v. United States*, 39 CIT ____, ____, 49 F. Supp. 3d 1268, 1272 (2015); *cf. Changzhou Wujin Fine Chemical Factory Co. v. United States*, 701 F.3d 1367, 1374–75 (analyzing on review whether Commerce's remand results were "within the scope of the Court of International Trade's remand order").

Further, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009). Commerce's rationale nevertheless must address the parties' principal arguments; and, more generally, "the path of Commerce's decision must be reasonably discernable" in order to support judicial review. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)); 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties"); *see generally CS Wind Vietnam Co.*, 832 F.3d at 137581 (highlighting agency's "obligation to set forth a comprehensible and satisfactory justification for its [determination] as a reasonable implementation of statutory directives supported by substantial evidence," and analyzing that obligation in depth).

Lastly, under the familiar *Chevron* framework, Commerce's statutory interpretations are reviewed using a two-step analysis, examining first "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). If so, the court "must give effect to the unambiguously expressed intent of Congress." *Id.*, 467 U.S. at 842–43. On the other hand, "if the statute is silent or ambiguous with

respect to the specific issue," the analysis proceeds to the second step, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, 467 U.S. at 843.

III. *Analysis*

As discussed below, the Second Remand Results address the two issues remanded to Commerce in *Shenzhen Xinboda II*–the surrogate value for the garlic bulbs delivered to Dadi and the selection of financial statements for use in deriving surrogate financial ratios.

A. *The Surrogate Value for Fresh Whole Raw Garlic Bulbs*

Shenzhen Xinboda II remanded to Commerce Xinboda's claim contesting Commerce's use of the Azadpur Market price data for grade A and grade S.A. garlic as a surrogate for the raw garlic bulbs that were delivered to Dadi (which then processed them to produce garlic products for Xinboda). *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1278–1305.

The Second Remand Results address each of the three issues that were remanded – *i.e.*, Xinboda's argument that there are significant differences between the condition (stage of processing) of the garlic bulbs delivered to Dadi compared to those sold at the Azadpur Market, and that Commerce's calculations essentially reflect "double counting"; Xinboda's argument that Commerce has not accounted for significant "intermediary expenses" that are reflected in the Azadpur Market prices but which are not incurred by Dadi; and Xinboda's argument that Commerce's use of prices for grade S.A. garlic bulbs is not justified because garlic bulbs of the size previously classified as grade S.A. are included in the price data for garlic bulbs classified as grade A. *See* Second Remand Results at 5, 16–17 (addressing differences in the conditions of the garlic bulbs); *id.* at 5, 17 (addressing "intermediary expenses"); *id.* at 5–6 (addressing use of grade S.A. garlic bulbs in calculating surrogate value for garlic bubs).

In the Second Remand Results, Commerce makes certain adjustments to its calculations in response to each of the three issues. However, Commerce does so under protest. Each of the three issues is reviewed *seriatim* below.

1. *Adjustments to Avoid Double-Counting and to Account For Conditions of Garlic Bulbs*

Shenzhen Xinboda II explained that Commerce's Final Determination, as well as the First Remand Results, relied on the Azadpur Market price data in calculating the surrogate value for fresh whole raw garlic bulbs, essentially equating the condition of the garlic bulbs that are sold at the Azadpur Market with the condition of the garlic

bulbs that are procured by, and delivered to, Dadi. However, as *Shenzhen Xinboda II* noted, that equivalency is squarely at odds with the existing administrative record. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1279–94.

a. *The Condition of the Garlic Bulbs Sold at the Azadpur Market*

Shenzhen Xinboda II explained that neither Commerce nor the Domestic Producers placed on the administrative record any evidence to establish the basic condition of the garlic bulbs sold at the Azadpur Market. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1280–81 & n.15. In the First Remand Results, Commerce candidly admitted that the record is devoid of evidence "indicating the exact nature of the Azadpur surrogate input," apart from the Researcher Declaration proffered by Xinboda. *See*, *e.g.*, *Shenzhen Xinboda II*, 41 CIT at ____ n.12, 279 F. Supp. 3d at 1279 n.12 (quoting First Remand Results at 46–47).

In the Researcher Declaration (the sole record evidence that speaks directly to the condition of the garlic sold at the Azadpur Market), a research consultant based in India attests, under oath, to his first-hand findings and observations based on a visit that he made to the Azadpur Market. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1280–89 (discussing Declaration of Xinboda Research Consultant," "Survey of Garlic Offerings – Azadpur Market, New Delhi ("Researcher Declaration") (Pub. Doc. No. 138)).

According to the Researcher Declaration, the garlic bulbs that are sold at the Azadpur Market are in a "ready to be consumed" condition – *i.e.*, "the outside dirty layers" of the garlic bulbs have already been removed, giving the bulbs "a fresh white appearance"; any "long stems" have already been cut; and the bulbs have been "packaged in a mesh bag" for sale. Researcher Declaration ¶ 9. Neither Commerce nor the Domestic Producers point to any record evidence to the contrary. Nor – on the existing evidentiary record – could they do so. *See*, *e.g.*, *Shenzhen Xinboda II*, 41 CIT at ____ & n.15, 279 F. Supp. 3d at 1281 & n.15.[5] On remand, Commerce could have reopened the ad-

[5] *Shenzhen Xinboda II* emphasized that "this is not a situation where Commerce is confronted with two [different pieces of evidence] that address the same point but take positions that are diametrically opposite," leaving Commerce to weigh their relative merits and decide which is more reliable or probative. *Shenzhen Xinboda II*, 41 CIT at ____ n.17, 279 F. Supp. 3d at 1284 n.17. Rather, here "there is nothing anywhere in the administrative record that contradicts the Researcher Declaration's statements." *Id*.

Fundamental fairness and longstanding agency practice require that the party advocating for the use of a particular surrogate value bear the burden of establishing what that value represents. Here, it is Commerce and the Domestic Producers that have advocated for use of the Azadpur Market prices for garlic. Yet the Domestic Producers have adduced no affirmative evidence as to what the Azadpur Market prices represent – *i.e.*, no affirmative

evidence at all as to the basic condition of the garlic that is sold at the market. *See generally Shenzhen Xinboda II*, 41 CIT at ____ n.15, 279 F. Supp. 3d at 1281 n.15.

Moreover, *Shenzhen Xinboda II* observed that, as a practical matter, apart from any legal obligation to proffer evidence as to the condition of the garlic sold at the Azadpur Market, the Domestic Producers (and Commerce), as the proponents of the Azadpur Market prices, have an obvious incentive to place on the record *affirmative evidence* to refute the statements in the Researcher Declaration, if those statements are in any way incorrect. It is telling that the Domestic Producers (and Commerce) have never done so. *See Shenzhen Xinboda II*, 41 CIT at ____ n.15, 279 F. Supp. 3d at 1281 n.15. Neither Commerce nor the Domestic Producers have ever asserted that the factual statements in the Researcher Declaration are untrue.

Instead, the Domestic Producers (and Commerce) have contented themselves with challenging the reliability of the Researcher Declaration – the only record evidence on point – on technical, evidentiary grounds. *See Shenzhen Xinboda II*, 41 CIT at ____ n.15, 279 F. Supp. 3d at 1281 n.15. It is worth noting that Commerce and the Domestic Producers did not dispute the reliability of the Researcher Declaration in the underlying administrative review. Commerce didn't even mention the Researcher Declaration in the Issues & Decision Memorandum that the agency released with its Final Determination. *See* Issues & Decision Memorandum at 10–15 (discussing surrogate value for garlic bulbs with no reference whatsoever to Researcher Declaration).

Shenzhen Xinboda II undertook a rigorous, point-by-point review of the criticisms of the Researcher Declaration leveled by Commerce and the Domestic Producers, and concluded that the criticisms were "largely without merit" and that Commerce's "sweeping wholesale dismissal" of the Declaration in the First Remand Results was "unwarranted." *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1289; *see generally id.*, 41 CIT at ____, 279 F. Supp. 3d at 128189 (analyzing in detail the criticisms of the Researcher Declaration that Commerce and Domestic Producers have asserted).

Even so, of course, *Shenzhen Xinboda II* did not *require* Commerce to *credit* the Researcher Declaration – except to the extent that the Declaration was the sole record evidence as to the condition of the garlic sold at the Azadpur Market (the surrogate value on which Commerce chose to rely). Following *Shenzhen Xinboda II* (as well as *Shenzhen Xinboda I*), Commerce was entirely free on remand to reopen the administrative record to receive evidence contradicting the statements in the Researcher Declaration, assuming that such evidence exists (and, assuming that its explanation were reasonable, Commerce then could have relied on such new evidence over the statements in the Researcher Declaration). Significantly, however, Commerce elected not to reopen the record.

Lastly, as underscored in *Shenzhen Xinboda II*, Commerce must have substantial record evidence to support its determinations, including the surrogate values on which it chooses to rely. Because the Researcher Declaration is the only evidence on this record that goes to the condition (*i.e.*, the stage of processing) of the garlic sold at the Azadpur Market, it is unlikely that Commerce's use of the Azadpur Market prices as the surrogate value for the garlic bulbs delivered to Dadi could be sustained if the Researcher Declaration were to be disregarded. *See Shenzhen Xinboda II*, 41 CIT at ____ n.24, 279 F. Supp. 3d at 1289 n.24; *see also*, *e.g.*, *Taian Ziyang Food Co. v. United States*, 35 CIT 863, 908, 783 F. Supp. 2d 1292, 1331 (2011) ("*Taian II*") (highlighting, *inter alia*, Commerce obligation to ensure that surrogate value that the agency chooses is "anchored by substantial evidence in the administrative record"); *id.*, 35 CIT at 905 n.40, 783 F. Supp. 2d at 1329 n.40 (quoting *Hebei Metals* for proposition that "Commerce has certain core investigatory duties which cannot be avoided," such that, where the existing administrative record does not provide the requisite support for the surrogate value selected by the agency, that surrogate value cannot be sustained and Commerce must "further develop the record – by, for example, supplementing [it] with data from another source, if necessary"); *Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT 288, 295–96 & n.3, 366 F. Supp. 2d 1264, 1270–71 & n.3 (2005) (rejecting notion that Commerce is permitted to rely on a surrogate value that has "an unexplained relation" to the input (factor of production) for which it serves as a proxy, and ruling that "Commerce was required to obtain adequate evidence for the [surrogate] value it selected"); *Jacobi Carbons AB v. United States*, 42 CIT ____, ____n.27, 313 F. Supp. 3d 1344, 1359 n.27 (2018) (quoting *Taian II* for proposition that

ministrative record to receive evidence to contradict the Researcher Declaration, assuming that such evidence exists. However, Commerce chose not to do so.

b. *The Condition of the Garlic Bulbs Delivered to Dadi*

As outlined above, the sole record evidence concerning the condition (stage of processing) of the garlic bulbs sold at the Azadpur Market indicates that the "the outside dirty layers" of those bulbs have already been removed, leaving the bulbs with "a fresh white appearance," and that any "long stems" have already been cut. *See* Researcher Declaration ¶ 9. As *Shenzhen Xinboda II* explained, the undisputed record evidence establishes that the garlic bulbs that were delivered to Dadi were, by contrast, relatively unprocessed. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1289–94.

Specifically, undisputed record evidence establishes that, *after* garlic bulbs were delivered to Dadi, the workers at Dadi's processing facilities peeled away the garlic bulbs' outer layers, and the workers cut the bulbs' roots and stems. In the agency's Verification Report, Commerce staffers noted their own first-hand, eyewitness observations to that effect: "[Dadi's] production process includes peeling off [the garlic bulbs'] outer skins" and "cutting root[s] and stem[s]." *See* Verification of the Sales and Factors Responses of Shenzhen Xinboda Industrial Co., Ltd. in the Administrative Review of Fresh Garlic from the People's Republic of China at 9 ("Verification Report") (AR Pub. Doc. No. 151).

"Commerce must 'obtain adequate evidence' for its surrogate values"); *Jinan Yipin Corp. v. United States*, 35 CIT 1254, 1299, 800 F. Supp. 2d 1226, 1265 (2011) (ruling that "Commerce is required to support the surrogate value that it selects with substantial evidence," and quoting *Hebei Metals* for proposition that Commerce is obligated "to obtain adequate evidence for the value [the agency] selects"); *id*., 35 CIT at 295 n.93, 800 F. Supp. 2d at 1303 n.93 (quoting *Hebei Metals* for proposition that "Commerce has certain core investigatory duties, which cannot be avoided," and explaining that, accordingly, "if the record in a case is such that none of the data sources on record is sufficient to permit Commerce to *reasonably* rely on it, Commerce is not permitted to choose 'the lesser of the evils'"; quoting *Hebei Metals* as stating that the statute "'does not permit Commerce to choose between two *unreasonable* choices, *i.e.*, two surrogate . . . values that have an unexplained relation' to the input that the agency is valuing") (latter emphasis added); *Taian Ziyang Food Co. v. United States*, 33 CIT 828, 890, 637 F. Supp. 2d 1093, 1147 (2009) ("*Taian I*") (quoting *Hebei Metals* for proposition that "'best available information' standard . . . does not permit Commerce to choose between two unreasonable choices, *i.e.*, two surrogate coal values that have an unexplained relation to the coal used by [the respondent] . . . Commerce [is] required to obtain adequate evidence for the value it selected"); *Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 491, 617 F. Supp. 2d 1281, 1315 (2009) (quoting *Hebei Metals* for proposition that "Commerce [is] required to obtain adequate evidence for the [surrogate] value it selected") (emphasis omitted).

This point was never addressed by Commerce, the Government, or the Domestic Producers.

Neither Commerce nor the Domestic Producers cite any record evidence to controvert the findings in the Verification Report. Nor – on the existing administrative record – could they do so. *See*, *e.g.*, *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1293.[6] On remand, Commerce could have reopened the administrative record to receive evidence to contradict the Verification Report on this point, assuming that such evidence exists. But Commerce elected not to do so.

c. *Commerce's Second Remand Results*

As a matter of basic logic, because Dadi's workers peeled off the outer skins of the garlic bulbs that were delivered to Dadi, and cut their roots and stems, the garlic bulbs delivered to Dadi were – by definition – less highly processed than the garlic bulbs sold at the Azadpur Market. As detailed above, the "long stems" of the garlic bulbs sold at the Azadpur Market already had been cut off and the "outside dirty layers" of the bulbs already had been removed. As such, the undisputed record evidence compels the conclusion that – contrary to Commerce's findings in the Final Determination and in the First Remand Results – the condition of the garlic bulbs delivered to Dadi cannot be equated with the condition of the garlic bulbs sold at the Azadpur Market; Commerce's calculations reflect double-counting; and Commerce cannot use the Azadpur Market prices as the surrogate value for the cost of the garlic bulbs delivered to Dadi, at least not without appropriate adjustments. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1294.

For purposes of the Second Remand Results, Commerce "reviewed the record evidence and adjusted Xinboda's margin to avoid over-counting of processing expenses," ensuring that any expenses relating to "further processing . . . [that are] embedded in the Azadpur bulb prices would not also be added to Xinboda's margin calculation." Second Remand Results at 17. The Second Remand Results state that Commerce has made those adjustments "under respectful protest." *See, e.g., id.* at 1.

[6] As with the record on the condition (stage of processing) of the garlic bulbs sold at the Azadpur Market (*see supra* n.5), so too the record on the condition of the garlic bulbs delivered to Dadi is not a situation where Commerce is confronted with contradictory evidence and must use its expert judgment to decide which evidence to credit as more reliable or more probative. Here, there is nothing in the administrative record that contradicts the Commerce staffers' findings that Dadi's workers strip away the outside layers of the garlic bulbs, and cut the roots and stems, after the garlic bulbs are delivered to Dadi.

Further, quite apart from any legal obligation that they may have had to proffer evidence in support of their position on the condition of the garlic bulbs delivered to Dadi (whatever that position may be), it is also the case that – as a practical matter – the Domestic Producers (and Commerce) have a clear incentive to place on the record evidence to refute the relevant statements in Commerce's Verification Report, if those statements are in any way untrue. They never did so. *See Shenzhen Xinboda II*, 41 CIT at ____ n.15, 279 F. Supp. 3d at 1281 n.15.

To be clear, however, Commerce has nothing to protest. The foregoing analysis comparing the condition of the garlic bulbs sold at the Azadpur Market and the condition of the garlic bulbs delivered to Dadi was spelled out at some length in *Shenzhen Xinboda II* and has not been contested – not by Commerce, not by the Government, and not by the Domestic Producers. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1279–94. Further, no party has pointed to even a scintilla of record evidence to controvert the evidence discussed in the analysis – not in this litigation, not in the course of either of the two remands, and not in the course of the underlying administrative review. To the extent that Commerce or the Domestic Producers believed the existing record evidence to be inaccurate, Commerce could have reopened the administrative record to receive additional evidence; but Commerce never did so.

Moreover, contrary to Commerce's implication, *Shenzhen Xinboda II* did not require Commerce to make any adjustments at all to its calculations,[7] except to the extent that Commerce on remand found such adjustments to be "necessary in order to avoid the double-counting of expenses and to otherwise calculate [Xinboda's] dumping margin as accurately as possible." *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1294; *see also id.*, 41 CIT at ____ n.28, 279 F. Supp. 3d at 1294 n.28 (stating that, "if Commerce continues to rely on the Azadpur Market prices on remand, Commerce must make such further adjustments to those prices *as may be necessary*") (emphasis added).[8] If Commerce had concluded on remand that no such adjust-

[7] Indeed, not only did *Shenzhen Xinboda II* not require Commerce to make any particular adjustments to the Azadpur Market prices, but, in fact, *Shenzhen Xinboda II* did not even require Commerce to use the Azadpur Market prices. *See Shenzhen Xinboda II*, 41 CIT at ____ & n.28, 279 F. Supp. 3d at 1294 & n.28 (remanding to allow the agency to once again "reconsider its selection of a surrogate value" and noting, *inter alia*, that it was at least possible that, on remand, "Commerce [would] select the Garlico prices" as the surrogate value for garlic bulbs); *id.*, 41 CIT at ____, 279 F. Supp. 3d at 1302 (remanding "intermediary expenses" issue and indicating that, on remand, Commerce should "make any necessary adjustments to the Azadpur Market prices (or whatever other surrogate value Commerce may choose)").

On remand, Commerce conceivably could have even reopened the administrative record to receive some new set of data for possible use in calculating the surrogate value for the garlic bulbs at issue. *See generally*, *e.g.*, *Shenzhen Xinboda II*, 41 CIT at ____ , 279 F. Supp. 3d at 1294 (referring to "all *existing* record evidence") (emphasis added); *id.*, 41 CIT at ____ n.28, 279 F. Supp. 3d at 1294 n.28 (noting that, in reevaluating its choice of surrogate value on remand, Commerce should consider not only "the strengths and weaknesses of the data sources on the record," but also "any other data that Commerce may deem appropriate") *id.*, 41 CIT at ____, 279 F. Supp. 3d at 1297 (noting that the proposition that the condition of the garlic bulbs delivered to Dadi was the same as the condition of the garlic bulbs sold at the Azadpur Market had been "debunked, at least for the present and *on the existing record*") (emphasis added).

[8] Commerce can hardly be heard to object to these caveats. It is Commerce's longstanding, well-founded policy to avoid double counting. *See*, *e.g.*, Steel Wire Garment Hangers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,

ments were necessary, Commerce could have set forth in the Second Remand Results its rationale for concluding that its calculations did not reflect double-counting, supporting that explanation with appropriate references to the record. Commerce did not do so.

Instead, based on the Second Remand Results, it appears that Commerce concluded that the adjustments that it made in the course of the second remand are necessary to avoid double-counting and to calculate Xinboda's dumping margin as accurately as possible. As summarized above, and as discussed at length in *Shenzhen Xinboda II*, all record evidence on point – including Commerce's own Verification Report – indicates that the garlic bulbs sold at the Azadpur Market are (to use Commerce's terminology) at "a higher level of trade" (*i.e.*, at a more advanced stage of processing) than the garlic bulbs delivered to Dadi. Accordingly, the adjustments that Commerce made to its calculations on remand to account for differences in the condition of the garlic bulbs delivered to Dadi *versus* the bulbs sold at the Azadpur Market, and to avoid double-counting, are supported by substantial evidence. They therefore must be sustained.

2. *Adjustments to Account for Intermediary Expenses*

In addition to Xinboda's double-counting claim based on the respective conditions of the garlic bulbs at issue (discussed above), Xinboda also contends that the Azadpur Market prices include substantial "intermediary expenses" that Dadi did not incur – *i.e.*, sums that are paid to "middle men" and "intermediaries," including "commission agents, wholesalers and retailers to cover transportation, loading, unloading, storage, overhead, profits, etc." *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1295 (citations omitted). In its Issues & Decision Memorandum, Commerce took note of Xinboda's claim concerning such intermediary expenses. *See* Issues & Decision Memorandum at 15. Inexplicably, however, the Issues & Decision Memorandum asserted that Xinboda had submitted no evidence to back up the claim. *Id*. Quite to the contrary, as *Shenzhen Xinboda I* observed, Xinboda proffered "significant documentation to substanti-

2014–2015, 82 Fed. Reg. 18,115 (April 17, 2017) and accompanying Issues and Decision Memorandum at Comment 2 (justifying Commerce's selection of certain financial statements which included breakouts of energy costs, citing "[*Commerce's*] *practice to avoid double counting*, which could occur when [Commerce] uses surrogate values for a respondent's energy [factors of production] and also uses financial statements that include energy, where the energy cannot be broken out to avoid double counting energy expenses") (emphasis added); *Zhaoqing Tifo New Fibre Co. v. United States*, 39 CIT ____, ____ n.6, 60 F. Supp. 3d 1328, 1333 n.6 (2015) ("*Zhaoqing Tifo I*") (and authorities cited there). And Commerce is obligated to calculate dumping margins as accurately as possible. *See*, *e.g.*, *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993) (explaining that statutory purpose "is to facilitate the determination of dumping margins as accurately as possible")..

ate its claims." *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1350–51.[9]

In reaching its Final Determination, Commerce thus failed even to acknowledge, much less consider, the evidence of intermediary expenses that Xinboda placed on the administrative record. Commerce for the first time addressed Xinboda's evidence in the First Remand Results. *See*, *e.g.*, First Remand Results at 9–11. Again, however, Commerce failed to give the evidence its due. As *Shenzhen Xinboda II* explained, "[r]ather than carefully reviewing and evaluating each of the numerous articles and other pieces of evidence that Xinboda cites . . . , the [First] Remand Results attempt to sweep it all away by cherry-picking several of the articles [submitted by Xinboda] for comment, giving those articles treatment that is superficial at best, and turning a blind eye to everything else." *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1298; *see*, *e.g.*, *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (stating that any determination as to the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn") (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *CS Wind Vietnam Co.*, 832 F.3d at 1373 (similar); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (explaining, *inter alia*, that Commerce's rationale must address the parties' principal arguments and evidence, and, more generally, that "the path of Commerce's decision must be reasonably discernable" in order to support judicial review).

Shenzhen Xinboda II therefore remanded the issue to Commerce once again, instructing Commerce to "rigorously review the proof of intermediary expenses that Xinboda has proffered and . . . [to] make any necessary adjustments to the Azadpur Market prices (or whatever other surrogate value Commerce may choose) so as to exclude all intermediary expenses that do not reflect the experience of Xinboda (including that of Dadi)." *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1302.[10]

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[9] Much of Xinboda's evidence of intermediary expenses is catalogued and briefly discussed in *Shenzhen Xinboda I* and *Shenzhen Xinboda II*. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d. at 1351–52; *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1296.

[10] In full, *Shenzhen Xinboda II* stated: "On remand, Commerce shall rigorously review the proof of intermediary expenses that Xinboda has proffered and shall give full, fair, and balanced consideration to all relevant arguments and record evidence. Commerce shall make any necessary adjustments to the Azadpur Market prices (or whatever other surrogate value Commerce may choose) so as to exclude all intermediary expenses that do not reflect the experience of Xinboda (including that of Dadi) and thus to calculate Xinboda's dumping margin as accurately as possible." *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1302; *see also id.*, 41 CIT at ____ n.38, 279 F. Supp. 3d at 1302 n.38 (stating that "[i]f the evidence demonstrates that intermediary expenses that Dadi does not incur are

In the Second Remand Results, Commerce has adjusted its calculations to "increase[] commission expenses from 7 to 60 percent." Second Remand Results at 17. Commerce's treatment of the issue is cursory at best:

> [W]e have considered the record evidence regarding . . . intermediary expenses, including the Researcher Declaration and the December 29, 2010 article published in The Economic Times. As indicated by this article, "[s]tudies have shown that nearly 60–80% of the price consumers pay goes to commission agents, wholesalers and retailers to cover transportation, loading, unloading, storage, overheads, profits, etc." In addition, the Researcher Declaration indicates that Azadpur Market sellers must pay a market fee. Accordingly, Commerce has increased the commission expenses from 7 to 60 percent to account for the intermediary expenses associated with Indian produce markets.

Second Remand Results at 17. The text quoted above is the sum total of Commerce's analysis.

Although it is not entirely clear, the Second Remand Results seem to indicate that Commerce has adjusted its calculations to reflect intermediary expenses "under respectful protest."[11] Again, however, Commerce has nothing to protest. The evidence of intermediary expenses proffered by Xinboda was summarized in *Shenzhen Xinboda I* and *Shenzhen Xinboda II* and has not been contested on the merits – not by Commerce, not by the Government, and not by the Domestic Producers. No party has pointed to one iota of evidence that contradicts the evidence of administrative expenses adduced by Xinboda – not in this litigation, not in the course of either of the two remands, and not in the course of the underlying administrative review. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1295–1302; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1350–53. To the extent that Commerce or the Domestic Producers believed the existing record evidence to be inaccurate, Commerce could have re-

reflected in the Azadpur Market prices, Commerce must make an appropriate adjustment or select a different data source as the basis for calculating the surrogate value for the garlic bulbs delivered to Dadi").

[11] *See*, *e.g.*, Second Remand Results at 5 (asserting that *Shenzhen Xinboda II* "directed" Commerce to "adjust[] the surrogate bulb value in order to reflect the expenses associated with intermediaries"); *id*. at 35 (stating that Commerce "adjusted Xinboda's margin" to reflect intermediary expenses "*in accordance with*" *Shenzhen Xinboda II*) (emphasis added); *see also id*. at 1–2 (stating generally that "Commerce has, under respectful protest, further considered the surrogate value data on the record for valuing fresh raw garlic bulbs"). *But see* Second Remand Results at 4 (correctly noting that *Shenzhen Xinboda II* required only that Commerce "rigorously review the 'proof' of intermediary expenses proffered by Xinboda and adequately address each piece of record evidence on that point," tacitly acknowledging that no specific changes to its calculations were mandated, other than any adjustments that the agency deemed necessary based on its review of the evidence); *id*. at 16 (same).

opened the administrative record to receive additional evidence (assuming that evidence conflicting with Xinboda's evidence exists). But Commerce never did so.

Moreover, Commerce's implication notwithstanding, *Shenzhen Xinboda II* did not "direct[]" Commerce to "adjust[] the surrogate bulb value in order to reflect the expenses associated with intermediaries." *See* Second Remand Results at 5.[12] At two different places in the Second Remand Results, Commerce accurately states that *Shenzhen Xinboda II* required only that Commerce "rigorously review the 'proof' of intermediary expenses proffered by Xinboda and adequately address each piece of record evidence on that point." Second Remand Results at 4; *see also id*. at 16–17 (same); *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1302. If, on remand, Commerce had concluded that no adjustments to its calculations were necessary – based on a review of *all* of the evidence on intermediary expenses (without taking excerpts out of context and fairly taking into account all evidence (including the evidence contradicting its conclusion) – Commerce could have set forth in the Second Remand Results its rationale for that conclusion, in lieu of making any adjustments. Commerce did not do so. *See*, *e.g.*, *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1302 (remanding "intermediary expenses" issue and indicating that, on remand, Commerce should "make *any necessary adjustments* to the Azadpur Market prices (or whatever other surrogate value Commerce may choose)") (emphasis added).

Instead, based on the Second Remand Results, it appears that Commerce concluded that the adjustments that it made in the course of the second remand are necessary to account for "intermediary expenses associated with Indian produce markets," so as to "calculate Xinboda's dumping margin as accurately as possible." *See* Second Remand Results at 17; *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1302. As summarized above, and as discussed at length in *Shenzhen Xinboda II*, the record evidence on point (virtually all of which is uncontested) strongly supports Xinboda's contention that the garlic bulbs sold at the Azadpur Market reflect significant sums paid to intermediaries, above and beyond any such sums which Dadi pays to its suppliers. Accordingly, the adjustments that Commerce made to its calculations on remand to account for intermediary expenses are supported by substantial evidence and must be sustained.

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[12] As noted above, not only did *Shenzhen Xinboda II* not require Commerce to make any particular adjustments to the Azadpur Market prices, but, in fact, *Shenzhen Xinboda II* did not even require Commerce to use the Azadpur Market prices. *See supra* n.7; *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1302 (remanding "intermediary expenses" issue and indicating that, on remand, Commerce should "make any necessary adjustments to the Azadpur Market prices (or *whatever other surrogate value Commerce may choose*)") (emphasis added).

3. *Adjustments to Exclude Prices for "Super-A" Grade Garlic*

Xinboda's remaining challenge to the surrogate value for the garlic bulbs that were delivered to Dadi contests Commerce's inclusion of pricing data for so-called grade "Super-A" (or "S.A.") bulbs. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1302–05; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1353–56. No party disputes that the garlic bulbs that were delivered to Dadi ranged from 50 mm to 65 mm in diameter. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1271; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1341. No party disputes that, before the period of review, the Azadpur Market price data separately listed prices for larger-sized garlic bulbs (greater than 55 mm in diameter), which were identified on price lists as grade S.A. bulbs. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1272; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343. Similarly, no party disputes that, shortly before the period of review, the Azadpur Market discontinued that listing. *See Shenzhen Xinboda II*, 41 CIT at ____, ____, 279 F. Supp. 3d at 1272, 1303; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343.

Xinboda maintains that the Azadpur Market stopped listing prices for grade S.A. bulbs because the larger-bulb garlic that had been previously classified as grade S.A. was "subsumed" into the grade A classification. Specifically, according to Xinboda, the garlic bulbs that were sold as grade A during the period of review included not only bulbs with a diameter of 40 mm to 55 mm, but also bulbs with a diameter of 55 mm or more (which had been previously sold as grade S.A.). *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1303; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1353.

The Researcher Declaration that Xinboda placed on the administrative record directly supports Xinboda's claim. In the Declaration, the research consultant attests under oath that Azadpur Market vendors were selling garlic bulbs with diameters as great as 65 mm under the classification grade A. *See* Researcher Declaration ¶¶ 6–7; *see generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1303–04; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1354. Because Commerce calculated its surrogate value for garlic bulbs by combining price data for grade A garlic bulbs from the period of review (which Xinboda contends already includes bulbs that previously would have been classified as grade S.A.) together with price

data for grade S.A. bulbs from prior to the period of review,[13] Xinboda argues that larger-bulb garlic is over represented in the surrogate value and that the surrogate value is therefore distorted. *See generally Shenzhen Xinboda II*, 41 CIT at ____, ____, 279 F. Supp. 3d at 1272, 1303; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1353–54.

In the Final Determination, Commerce dismissed Xinboda's concerns, stating that there was no record evidence "which clearly explains *why*" the Azadpur Market data for the period of review does not list prices for grade S.A. garlic bulbs. *See* Issues & Decision Memorandum at 13 (emphasis added). Commerce further stated that, under the circumstances, the agency could not simply "*assume* that grade super-A prices have been subsumed under grade A prices." *See id*. (emphasis added). However, the Final Determination made no mention of the Researcher Declaration. *See id*.

Shenzhen Xinboda I remanded this issue to Commerce, noting that it is "of no real import" exactly *why* the Azadpur Market ceased use of the grade S.A. classification prior to the period of review and, more importantly, that – in light of the Researcher Declaration, the sole record evidence on point – Commerce need not "assume" anything. *See generally Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1354–56. *Shenzhen Xinboda I* pointed out that the Researcher Declaration supports Xinboda's contention that, during the period of review, the garlic bulbs that were classified and sold at the Azadpur Market as grade A bulbs included the larger-bulb garlic that previously would have been classified as grade S.A. *See id*., 38 CIT at ____, 976 F. Supp. 2d at 1355; Researcher Declaration ¶¶ 6–7.

Commerce addressed the Researcher Declaration for the first time in the First Remand Results. Much as the First Remand Results sought to dismiss the Researcher Declaration as "unreliable" evidence that the garlic bulbs sold at the Azadpur Market were more highly processed than the bulbs that were delivered to Dadi, so too the First Remand Results sought to dismiss the Declaration as "unreliable" evidence that the grade A garlic bulbs sold at the Azadpur Market during the period of review included the larger-bulb garlic that had previously been sold as grade S.A. *See* First Remand Results at 12; *compare* First Remand Results at 4–5, 46 (addressing Researcher Declaration as evidence on extent of processing of garlic

[13] Because the Azadpur Market discontinued separately listing prices for grade S.A. garlic bulbs prior to the period of review at issue here, Commerce used non-contemporaneous prices for grade S.A. bulbs (*i.e.*, prices from prior to the period of review) in calculating the surrogate value for garlic bulbs. Commerce "indexed" (inflated) those prices to be contemporaneous with the period of review. *See generally Shenzhen Xinboda II*, 41 CIT at ____, ____, 279 F. Supp. 3d at 1272, 1302–04; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343.

bulbs) *with id.* at 12, 45 (addressing Researcher Declaration as evidence on size of garlic bulbs sold as grade A at Azadpur Market during period of review).

As a possible explanation for the fact that the Azadpur Market price data for the period of review includes no listing for grade S.A. bulbs, Commerce and the Domestic Producers have theorized that, prior to the period of review, Indian farmers had begun to export all larger-bulb garlic instead of selling it domestically through the Azadpur Market and other markets in India's domestic market system. *See* First Remand Results at 13. The First Remand Results concluded that, in calculating the surrogate value for the garlic bulbs that were delivered to Dadi, the Final Determination properly included the separate price data for grade S.A. garlic sold at the Azadpur Market prior to the period of review. *See id.* at 14; *see generally id.* at 12–14, 45.

Shenzhen Xinboda II reiterated that the Researcher Declaration remains the only record evidence that speaks to whether the grade A garlic bulbs sold at the Azadpur Market during the period of review included the larger-bulb garlic that had previously been classified as grade S.A., and, further, noted that Commerce's grounds for dismissing the Declaration out-of-hand were not well-taken. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1303–04; *see also id.*, 41 CIT at ____, 279 F. Supp. 3d at 1280–89 (analyzing Commerce's rationale for dismissing the Researcher Declaration's statements as to the condition (*i.e.*, extent of processing) of the garlic bulbs sold at the Azadpur Market, finding the agency's reasons to be "largely without merit," and concluding that any "sweeping, wholesale dismissal of the Declaration is unwarranted").

Even more to the point, *Shenzhen Xinboda II* emphasized that the First Remand Results include Commerce's striking admission that "there is *no evidence* on the record" to support the hypothesis that separate prices for grade S.A. garlic are missing from the Azadpur Market data for the period of review because – according to Commerce and the Domestic Producers – shortly before the period of review, Indian garlic farmers had begun to export the larger-bulb garlic that had previously been sold as grade S.A. (rather than selling it on the Indian domestic market). *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1304 (quoting First Remand Results at 13 (emphasis added)).[14]

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[14] Again, this is not a situation where the record includes both evidence which would support one position and also evidence which would support the opposite position. In other words, this is not a situation in which there are two conflicting conclusions which could reasonably be drawn from the record and Commerce must use its expertise and must exercise its discretion to decide which evidence to credit. The only record evidence that is on

Shenzhen Xinboda II explained that "Commerce's determinations must be based on actual evidence" and that "[t]heory will not suffice." *Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1304–05.[15] *Shenzhen Xinboda II* therefore remanded the issue of Commerce's use of the Azadpur Market prices for grade S.A. garlic bulbs for a second time, for Commerce's further consideration. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1305.

In the pending Second Remand Results, Commerce has calculated the surrogate value for the garlic bulbs delivered to Dadi using only the Azadpur Market price data for grade A garlic bulbs, excluding the data for grade S.A. bulbs "under respectful protest." *See* Second Remand Results at 1 (stating generally that, in the Second Remand Results, "Commerce has, under respectful protest, further considered the surrogate value data on the record for valuing fresh raw garlic bulbs").[16] Once more, however, there is nothing for Commerce to protest.

Commerce has strained to discount the Researcher Declaration. *See* Second Remand Results at 3–4; *see also* First Remand Results at 12, 45. But the pivotal fact set forth in the Declaration, *i.e.*, that the grade A garlic bulbs sold at the Azadpur Market during the period of review

point here, the Researcher Declaration, supports only one conclusion – that the grade A garlic bulbs sold at the Azadpur Market during the period of review included the larger-bulb garlic which previously would have been classified as grade S.A. There is no record evidence to support the theory, advanced by Commerce and the Domestic Producers, that the larger-bulb garlic which had previously been sold as grade S.A. is not listed in the price data for the Azadpur Market for the period of review because (according to Commerce and the Domestic Producers) the larger-bulb garlic was being exported directly rather than sold through the Indian domestic market system. Nor is there record evidence to indicate, more generally, that the Azadpur Market price data for grade A garlic bulbs during this period of review covered only garlic bulbs with diameters of 40 mm to 55 mm, as Commerce and the Domestic Producers here contend.

[15] The Court of Appeals has stated that "[i]t is well established that speculation does not constitute 'substantial evidence.'" *Novosteel SA v. United States*, 284 F.3d 1261, 1276 (Fed. Cir. 2002). The Court of Appeals continued: "As the Supreme Court noted in *Bowen v. American Hospital Ass'n*, agency deference has not come so far that agency action is upheld whenever it possible to conceive a basis for administrative action." *Id.*; *see also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (noting that Commerce determinations cannot be based on "mere conjecture or supposition").

[16] *See also*, *e.g.*, Second Remand Results at 1–2 (asserting that, "in accordance with" *Shenzhen Xinboda II*, the Second Remand Results "use[] only the Azadpur grade A bulb data" to calculate the surrogate value for garlic bulbs); *id.* at 4–5 (asserting that *Shenzhen Xinboda II*"directed that[[,] if Commerce continued to use Azadpur data" in the Second Remand Results, Commerce was required to "base its calculations exclusively on the . . . grade A bulb prices"); *id.* at 5 (stating that *Shenzhen Xinboda II* "requir[ed]" that Commerce "use exclusively the grade A bub data" if the Second Remand Results "use Azadpur data" in calculating the surrogate value for garlic bulbs); *id.* at 6 (asserting that *Shenzhen Xinboda II* "directed Commerce to exclude the grade S.A. bulb prices from its surrogate value calculation should it continue to rely on the Azadpur market data" in the Second Remand Results); *id.* at 35 (asserting that, in calculating the surrogate value for garlic bulbs, the Second Remand Results "remov[ed] the grade S.A. bulb prices," "[p]er the . . . instructions" in *Shenzhen Xinboda II*).

included the larger-bulb garlic that previously would have been classified as grade S.A., has never been affirmatively refuted – not by Commerce, not by the Government, and not by the Domestic Producers. Notably, no party has pointed to a shred of evidence to controvert the evidence placed on the record by Xinboda – not in this litigation, not in the course of either of the two remands, and not in the course of the underlying administrative review. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1303–05; *Shenzhen Xinboda I*, 38 CIT at ____ & n.27, 976 F. Supp. 2d at 1355 & n.27.

Moreover, Commerce fundamentally mischaracterizes *Shenzhen Xinboda II* to the extent that Commerce asserts that *Shenzhen Xinboda II* mandated that Commerce calculate the surrogate value for garlic bulbs using solely the Azadpur Market data for grade A garlic bulbs. Even Commerce acknowledges, as it must, that *Shenzhen Xinboda II* contemplated that the agency might use one of the data sets on the existing record other than the Azadpur Market prices for purposes of the second remand. *See*, *e.g.*, Second Remand Results at 6–16; *see also Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1305 (implicitly recognizing that, on remand, Commerce might decide to use one of the data sets that is "on the existing record" other than the Azadpur Market prices).[17]And even if Commerce concluded on remand that all of the other data sets on the existing record were inferior to the Azadpur Market price data, as Commerce apparently did, Commerce had options other than using only the Azadpur Market prices for grade A garlic bulbs (excluding the prices for grade S.A. bulbs). For example, Commerce could have reopened the administrative record to seek out some other set of data for its use in calculating the surrogate value for garlic bulbs.[18] But Commerce did not do so.[19]

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[17] As noted above, not only did *Shenzhen Xinboda II* not require Commerce to make any particular adjustments to the Azadpur Market prices, but, in fact, *Shenzhen Xinboda II* did not even require Commerce to use the Azadpur Market prices. *See supra* n.7; *Shenzhen Xinboda II*, 41 CIT at ____ & n.28, 279 F. Supp. 3d at 1294 & n.28 (remanding to allow the agency to once again "reconsider its selection of a surrogate value" and noting, *inter alia*, that it was at least possible that, on remand, "Commerce [would] select the Garlico prices" as the surrogate value for garlic bulbs); *id.*, 41 CIT at ____, 279 F. Supp. 3d at 1302 (remanding "intermediary expenses" issue and indicating that, on remand, Commerce should "make any necessary adjustments to the Azadpur Market prices (or *whatever other surrogate value Commerce may choose*)") (emphasis added).

[18] Presumably Commerce would have sought a set of data that included size-specific prices. *See generally*, *e.g.*, Issues & Decision Memorandum at 11 (stating that "it [is] clear that size and quality are important characteristics" in pricing garlic bulbs, such that "[Commerce's] preference has been to use, whenever possible, prices for the garlic bulb input based on size").

[19] *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1305; *see also*, *e.g.*, *id.*, 41 CIT at ____ n.28, 279 F. Supp. 3d at 1294 n.28 (noting that, in reevaluating its choice of surrogate value on remand, Commerce should consider not only "the data sources on the record," but also "any other data that Commerce may deem appropriate").

Further, even assuming that Commerce decided to continue to rely on the Azadpur Market data (rather than using some other data set), Commerce could have calculated the surrogate value for garlic bulbs using the price data for grade S.A. bulbs (as well as the data for grade A bulbs), provided that the agency supported its use of the grade S.A. data with evidence on the record. In other words, *Shenzhen Xinboda II* required Commerce to exclude the grade S.A. prices from its calculations only if Commerce continued to use the Azadpur Market data and, in addition, only if Commerce relied "on the existing record." *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1305 (ruling that, "if Commerce, *on the existing record*, continues on remand to rely on the Azadpur Market prices . . . , Commerce shall base its calculations exclusively on the . . . prices for bulbs classified as grade A") (emphasis added).

Commerce plainly was not confined to the existing record. To the extent that Commerce or the Domestic Producers believed the Researcher Declaration to be inaccurate – and assuming that such evidence exists – Commerce obviously could have reopened the administrative record to receive evidence that the grade A garlic bulbs sold at the Azadpur Market during the period of review did not include the larger-bulb garlic that the Azadpur Market data had previously listed as grade S.A.[20] Despite two remands, however, Commerce never did so. The record is thus devoid of any evidence to indicate that the Azadpur Market price data for grade A garlic bulbs during this period of review covered only garlic bulbs with diameters of 40 mm to 55 mm, as Commerce and the Domestic Producers contend.[21]

If, on remand, Commerce had reopened the record, and if evidence had been submitted that the grade A garlic bulbs sold at the Azadpur Market during the period of review did not include the larger-bulb

[20] Assuming that it exists, Commerce or the Domestic Producers also could have placed on the record evidence seeking to prove their hypothesis that, at the time of the period of review, Indian garlic famers had begun to export their larger-bulb garlic, rather than selling it on the domestic Indian market. Logically, however, such evidence might not necessarily refute the statement in the Researcher Declaration that the grade A garlic bulbs being sold at the Azadpur Market during the period of review included bulbs that previously would have been classified as grade S.A.

[21] As discussed above, Commerce must have substantial record evidence to support its determinations, including the surrogate values on which it chooses to rely. Because the Researcher Declaration is the only evidence on this administrative record that goes directly to the size of the garlic bulbs sold as grade A bulbs at the Azadpur Market during the period of review (and, specifically, the only evidence that goes directly to whether those bulbs included the larger-sized bulbs previously sold as grade S.A. or whether they included only bulbs with a diameter of 40 mm to 55 mm), it is unlikely that Commerce's use of the Azadpur Market prices for grade S.A. garlic bulbs could be sustained even if the Researcher Declaration were to be disregarded. *See Shenzhen Xinboda II*, 41 CIT at ____ n.24, 279 F. Supp. 3d at 1289 n.24; *see also supra* n.5 (and authorities cited there).

garlic previously sold as grade S.A., Commerce could have cited such evidence and set forth in the Second Remand Results its rationale for including the price data for grade S.A. garlic in calculating the surrogate value for garlic bulbs. But, again, Commerce did not do so.

In remanding this issue to Commerce for a second time, *Shenzhen Xinboda II* stated: "The sole record evidence that is on point [*i.e.*, the Researcher Declaration] substantiates Xinboda's claim that garlic bulbs with a diameter of 55 mm to 65 mm – garlic bulbs that once would have been classified as grade S.A. – were classified and sold as grade A bulbs during the period of review." *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1305. That statement is as true now as it was at the time *Shenzhen Xinboda II* issued. Accordingly, the adjustments that Commerce made on remand to exclude price data for grade S.A. garlic bulbs from its calculation of the surrogate value for garlic bulbs are supported by substantial evidence and must be sustained.

B. *Commerce's Selection of Financial Statements*

In addition to the surrogate value for garlic bulbs (discussed above), *Shenzhen Xinboda II* also remanded to Commerce Xinboda's claim that Commerce erred in using the financial statements of Tata Tea to derive surrogate financial ratios, because, according to Xinboda, there is "reason to believe or suspect" that Tata Tea's financial statements may be tainted by subsidies. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1314–15. Commerce has consistently taken the position that the documentation submitted by Xinboda does not meet the "reason to believe or suspect" standard. *See* Issues & Decision Memorandum at 19–20; First Remand Results at 18–21, 53–55; Second Remand Results at 17–35.

Commerce's treatment of this issue in the Second Remand Results is addressed below.

1. *The Applicable Standard*

Shenzhen Xinboda II reviewed both Commerce's interpretation and its application of the "reason to believe or suspect" standard and concluded that Commerce has given no meaning to the phrase "reason to . . . suspect." The issue of Commerce's selection of financial statements was remanded to allow the agency the opportunity to Commerce to clearly formulate and to fully explain the meaning of the "reason to believe or suspect" standard as set forth by Congress, and to permit Commerce to apply that interpretation to the evidence that Xinboda maintains gives "reason to believe or suspect" that Tata

Tea may have received subsidies. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1314–15; Omnibus Trade & Competitiveness Act of 1988, Conference Report to Accompany H.R. 3, H.R. Rep. No. 100–576 at 590–91 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24.

In the Second Remand Results, Commerce's principal argument is that the "reason to believe or suspect" standard that was applied in the Final Determination and the First Remand Results has been superseded by section 505(b) of the Trade Preferences Extension Act of 2015 ("TPEA"), which establishes a new standard. *See* Second Remand Results at 17–19, 22–23, 26–27, 29–33; Pub. L. No. 114–27, 129 Stat. 362 at 385–86 (2015). Commerce contends that, because the agency issued the Second Remand Results after the effective date set forth in the agency's implementing regulation, the new standard governs the Second Remand Results. *See id*. Second Remand Results at 30–33; Dates of Application of Amendments to the Antidumping & Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Aug. 6, 2015) (stating that Commerce will apply TPEA § 505(b) "to determinations made on or after August 6, 2015). According to Commerce, under the new standard, Commerce properly concluded that the evidence submitted by Xinboda does not require Commerce to disregard Tata Tea's financial statements. *See* Second Remand Results at 17–35.

However, the well-reasoned opinion in *FGPA* squarely rejects the application of a parallel provision of the TPEA to remand determinations in situations such as this, where the Commerce determination that is being litigated predates the new TPEA standard. *See generally Fresh Garlic Producers Ass'n v. United States*, 39 CIT ____, ____, 121 F. Supp. 3d 1313, 1328–33 (2015). In a thoughtful analysis, *FGPA* reasons (1) that the relevant section of the TPEA is not intended to have retroactive effect and (2) that Commerce's application of that section of the TPEA in the remand results in that case would constitute impermissible retroactive application of the new TPEA standard. *See id.*, 39 CIT at ____, 121 F. Supp. 3d at 1329–31 (concluding that "§ 502 [of the TPEA] is not intended to have retroactive effect"); *id.*, 39 CIT at ____, 121 F. Supp. 3d at 1331–33 (concluding that "[t]o apply § 502 on remand would be in effect to apply the law retroactively by applying it to a determination that occurred before the new law became effective"). *FGPA* therefore instructed Commerce not to apply the new standard (set forth in § 502 of the TPEA) to the remand results in that case. *Id.*, 39 CIT at ____, 121 F. Supp. 3d at 1333; *see also Shenzhen Xinboda Industrial Co. v. United States*, 40 CIT ____, ____ n.14, 180 F. Supp. 3d 1305, 1317 n.14 (2016) (hereinafter "*Shen-*

zhen Xinboda Industrial Co.") (same); *Itochu Building Products Co. v. United States*, 41 CIT ____, ____ n.33, 2017 WL 2703810 * 16 n.33 (2017) (same).[22]

The same result must obtain here.[23] As in *FGPA*, Commerce's argument in this case is lacking in merit. The TPEA has no application in this matter, because Commerce reached the determination that is the subject of this litigation prior to the effective date of the TPEA provision in question.

Commerce argues in the alternative that, even if the "reason to believe or suspect" standard applies, the agency correctly determined that the documentation proffered by Xinboda does not meet that standard. *See* Second Remand Results at 19–28. However, as detailed in *Shenzhen Xinboda I* and *Shenzhen Xinboda II*, Commerce's interpretation of the "reason to believe or suspect" standard is fundamentally flawed because it fails to give any meaning to the phrase "reason to . . . suspect" and also ignores other key language in the legislative history. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1305–15; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1372–76.

The Second Remand Results do not respond to the majority of the concerns raised in *Shenzhen Xinboda II* and provide no further explanation of Commerce's interpretation of the "reason to believe or suspect" standard beyond that provided in the First Remand Results. In fact, the Second Remand Results omit some of the arguments that Commerce made in the First Remand Results, and, as to the arguments that are recycled in the Second Remand Results, a number are repeated virtually *verbatim* as they appeared in the First Remand Results.

For example, in the Second Remand Results, Commerce states that, under its interpretation of the "reason to believe or suspect" standard, Commerce excludes a set of financial statements only "[i]f [the financial statements] contain[] a reference to a specific subsidy program [that Commerce has previously] found to be countervailable in a formal CVD [countervailing duty] determination." Second Remand Results at 21–22; *see also* First Remand Results at 18. Commerce reiterates that "[i]f [the financial statements] contain[] only a mere mention that a subsidy was received" and "there is no additional

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[22] Although Commerce filed its remand results in *FGPA*, *Shenzhen Xinboda Industrial Co.*, and *Itochu* under protest, Commerce did not appeal the issue.

[23] It is true that the relevant provision of the TPEA here is section 505, while *FGPA*, *Shenzhen Xinboda Industrial Co*., and *Itochu* all involved section 502. However, there is no apparent reason to differentiate between the two provisions for purposes of a retroactivity analysis. No party here has suggested otherwise.

information as to the specific nature of the subsidy," the financial statements are not excluded from Commerce's consideration. Second Remand Results at 21–22; *see also* First Remand Results at 18. Amplifying its point, Commerce states that it disregards a set of financial statements only (1) "if a specific subsidy program [is] referenced or identified within a company's financial statements" and (2) the financial statements specifically set forth "a dollar amount *received*" and (3) the same subsidy program that is identified in the financial statements previously "ha[s] been determined to be countervailable." Second Remand Results at 22 (emphasis added); *see also* First Remand Results at 18. According to Commerce, "mere mention of a subsidy [in a company's financial statements], without information that the company *actually received the subsidy*" does not suffice to meet even the "reason to . . . suspect" standard and therefore does not suffice to warrant exclusion of those financial statements. Second Remand Results at 22 (emphasis added); *see also* First Remand Results at 18.

In an effort to support its interpretation, Commerce emphasizes that Congress specifically stated that – in determining whether there is "reason to believe or suspect" that a proposed surrogate value reflects dumping or subsidies – Commerce need not conduct an investigation and instead should base its decision on the information generally available to the agency at the time. Second Remand Results at 19; *see also* First Remand Results at 18. Similarly, Commerce emphasizes "Congress' evident concern with expediency and the ability of Commerce to make . . . decisions [as to whether or not to use a particular surrogate value] quickly." Second Remand Results at 21; *see also* First Remand Results at 17. Commerce maintains – in effect – that this language reflects an intent on the part of Congress to have Commerce *err on the side of using a surrogate value* absent essentially definitive proof that the surrogate value actually is in fact tainted by dumping or subsidies.

But this argument does nothing to advance Commerce's cause. As *Shenzhen Xinboda II* explained, the language from the legislative history that Commerce highlights can just as easily be read as a manifestation of Congress' intent that Commerce should *err on the side of disregarding a surrogate value* if there is any evidence that gives even some "reason to . . . *suspect*" that the surrogate value "*may be*" tainted. *See Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at 1313–14. Indeed, *Shenzhen Xinboda II* pointed out that only the latter reading would seem to be consistent with both of Congress' two main goals: (1) avoiding the use of tainted surrogate values (the

paramount goal) and (2) allowing Commerce to make quick determinations without initiating a formal countervailing duty investigation. *Id.*, 41 CIT at ____, 279 F. Supp. 3d at 1314. Nowhere in the Remand Results has Commerce explained how its interpretation (which errs on the side of using a surrogate value absent definitive proof that the surrogate value is in fact tainted) is consistent with Congress' overarching goal of avoiding the use of distorted values in calculating dumping margins. Nor has Commerce otherwise sought to respond to *Shenzhen Xinboda II*'s analysis on this point.

In a related attempt to defend its interpretation of the "reason to believe or suspect" standard, Commerce argues that, in *DuPont Teijin*, the Court "found that it is within Commerce's discretion to accept and use financial statements that mention a subsidy without providing the actual dollar amount received." *See* Second Remand Results at 23–24 (citing *DuPont Teijin Films v.* United States, 37 CIT ____, ____, 896 F. Supp. 2d 1302, 1312–13 (2013)); *see also* First Remand Results. This argument too is unavailing. The question of statutory interpretation that is presented in this case was not presented in *DuPont Teijin*; and, in any event, contrary to Commerce's implication, a court decision cannot override a Congressional mandate in circumstances such as these.

Commerce also argues that its restrictive interpretation of "reason to believe or suspect" is necessitated by policy considerations of administrative convenience. Specifically, Commerce argues that, at least in some cases, the effect of any less stringent interpretation of "reason to believe or suspect" would be that "Commerce would have . . . no financial statements on the record . . . from which to derive surrogate financial ratios." *See* Second Remand Results at 24–25; *see also* First Remand Results a 16–18.[24] This is alarmist hyperbole.[25]

As a factual matter, Commerce itself has previously stated that it relies on financial statements that are tainted by subsidies where it

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[24] Commerce further hypothesizes that, even if a less stringent interpretation of the "reason to believe or suspect" did not result in a total absence of financial statements on which Commerce could rely, Commerce might have to "resort to a less desirable financial statement which may lead to inaccuracies in calculating surrogate financial ratios." *See* Second Remand Results at 24–25. But, again, Congress has mandated that financial statements are to be disregarded where there is even a "reason to . . . suspect" that the statements "may be" tainted. In other words, Congress has already done this calculus. Congress has determined that financial statements are "unreliable" (or at least not to be deemed "reliable") if there is any "reason to . . . suspect" that the statements "may be" tainted. And Congress' decision was driven by its concerns about the need to avoid the very kinds of "inaccuracies" to which Commerce here refers. It is not for Commerce to second-guess Congress on such matters.

[25] *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d at ____ (analyzing Commerce's various administrative convenience arguments and pointing out that administrative convenience was not Commerce's primary concern; rather, Commerce's primary concern was avoiding the use of tainted surrogate values in order to avoid distortion by)..

has no other choice. *See*, *e.g.*, *Tianjin Magnesium Int'l Co. v. United States*, 34 CIT 980, 997–98, 722 F. Supp. 2d 1322, 1340 (2010) (emphasizing that, for purposes of deriving surrogate financial ratios, Commerce generally disregards the financial statements of a company "where there is evidence that the company received countervailable subsidies," but that, nevertheless, "when the circumstances warrant, Commerce has employed financial statements exhibiting receipt of subsidies") (reviewing Issues and Decision Memorandum for the Final Results of the 2006–2007 Administrative Review of Pure Magnesium from the People's Republic of China (Dec. 8, 2008) at Comment 6.C).[26] As such, under Commerce's policy and practice, the assertedly dire predicament that Commerce postulates would not

[26] *See also*, *e.g.*, Issues and Decision Memorandum for the Final Results of the 2006–2007 Administrative Review of Pure Magnesium from the People's Republic of China (Dec. 8, 2008) at Comment 6.C (responding to, *inter alia*, petitioner's point that Commerce "has repeatedly determined that in certain circumstances the financial statements of companies that received countervailable subsidies constitute the best information available" for use in deriving surrogate financial ratios, and citing other instances where Commerce has relied on the financial statements of companies that have received countervailable subsidies; conceding generally that, in calculating surrogate financial ratios, "some" of the financial statements used by Commerce "may contain evidence of subsidization"; acknowledging that Commerce "has used financial statements with some evidence of subsidies when the circumstances of the particular case warranted," citing a specific case as an example; and stating that Commerce has relied on financial statements even though "there is evidence that the company received countervailable subsidies" when there are no other "sufficient reliable and representative data on the record"); *Jiaxing Brother Fastener Co. v. United States*, 34 CIT 1455, 1461, 751 F. Supp. 2d 1345, 1352 (2010) (explaining that "Commerce's established practice is 'to disregard financial statements where [the agency has] reason to suspect that the company has received actionable subsidies," provided that "*there is other usable data on the record*'") (quoting Issues and Decision Memorandum) (emphasis added), *reviewing* Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value in Certain Steel Threaded Rod from the People's Republic of China (Feb. 20, 2009) at Comment 1 n.18 (same as Issues and Decision Memorandum in Pure Magnesium from the People's Republic of China); *Jiaxing Brother*, 34 CIT at 1462, 751 F. Supp. 2d at 1353 (noting that "Commerce's stated practice is to exclude 'financial statements where there is evidence that the company received countervailable subsidies," but only if "'*there are other sufficient reliable and representative data on the record*'") (citation omitted) (emphasis added),

Cf. Issues and Decision Memorandum for the Final Determination of Carbazole Violet Pigment 23 from the People's Republic of China (Nov. 8, 2004) at Comment 1 (relying on set of financial statements, notwithstanding Commerce's affirmative countervailing duty determination), *followed by* Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order (Oct. 18, 2006) at 5–7, *filed in Goldlink Industries Co. v. United States*, Court No. 05–00060 (explaining basis for Commerce's reliance on set of financial statements notwithstanding affirmative countervailing duty determination, concluding that "there is no indication that the financial ratios . . .[were] significantly distorted by the presence of [the] subsidies" in question); Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Steel Concrete Reinforcing Bars from the People's Republic of China (June 22, 2001) at Comment 8 (stating that a company's financial statements may be used to derive surrogate financial ratios even though the company "has been preliminarily determined to be receiving government subsidies" because that fact "does not necessarily mean that its financial ratios are skewed to the point of being unusable").

come to pass.[27] Moreover, as a matter of law, considerations of administrative convenience come into play only where statutory language is ambiguous. There is no ambiguity here. Commerce's argument amounts to an assertion that Congress could not possibly have meant what Congress plainly said. Such a claim is untenable.

Under *Chevron*, where "Congress has directly spoken to the precise question at issue," the court "must give effect to [Congress'] unambiguously expressed intent." *Chevron*, 467 U.S. at 842–43. Here, Congress unambiguously stated that Commerce "shall avoid" surrogate values (including financial statements) not only where there is "reason to believe" that subsidies in fact actually have been received, but also where there is some "reason to . . . *suspect*" that subsidies *may have* been received.

The long and the short of it is that, as detailed at length in *Shenzhen Xinboda II*, Commerce's interpretation (and application) of the "reason to believe or suspect" standard cannot be reconciled with Congress' intent as manifest in the relevant text. *See generally Shenzhen Xinboda II*, 41 CIT at ____, 279 F. Supp. 3d a 1305–15; *see also Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp 2d at 372–76. On the existing record, it is not possible to state specifically what the "reason to believe or suspect" standard means. However, it is possible to state what that standard does not mean. Contrary to Commerce's assertions, the "reason to believe or suspect" standard cannot be read to require Commerce to disregard a company's financial statements (or, for that matter, any other surrogate value) only where the evidence establishes that a subsidy was, in fact, received. To be sustained, any interpretation must give effect to Congress' use of the phrase "reason to . . . suspect" and other similar language. Commerce's interpretation fails to do so.

2. *The Documentation Proffered by Xinboda as Evidence Giving "Reason to Believe or Suspect" That Tata Tea May Have Received Subsidies*

Because – despite multiple opportunities – Commerce still has not provided an interpretation of the "reason to believe or suspect" standard that is consistent with Congress' intent, it is not possible to

[27] In yet another way Commerce overstates the case in implying that a Commerce finding of "reason to . . . suspect" would necessarily result in the exclusion of a set of financial statements. It is at least possible that, where Commerce makes a finding of "reason to . . . suspect" that a set of financial statements is tainted by subsidies, a party advocating for Commerce's use of those statements could rebut the finding by submitting evidence to establish that, in fact, the company did not receive subsidies.

definitively evaluate Commerce's conclusion that the documentation that Xinboda has proffered is not sufficient to meet the "reason to believe or suspect" standard. As discussed below, however, whatever that standard may mean, the documentation that Xinboda has placed on the record must at least arguably give "reason to . . . suspect" that Tata Tea "may have" received subsidies.

To support its claim that there is, at the very least, "reason to . . . suspect" that Tata Tea may have received subsidies, Xinboda submitted to Commerce three sets of documents (including official forms, deeds and letters) which establish that Tata Tea entered into arrangements with three separate Indian banks ("Hypothecation Agreements"). *See* Xinboda Surrogate Value Submission for the Final Results at Exh. 48 (AR Pub. Doc. No. 133), Xinboda's Surrogate Value Rebuttal Submission at Exh. 2 (AR Pub. Doc. No. 138); Xinboda Case Brief (AR Pub. Doc. No. 155) at 66; Pl.'s Brief at 27–28; Pl.'s Comments on Remand Redetermination at 21–25; First Remand Results at 18–20, 49–50; Def.'s Response to Comments Regarding the Remand Redetermination at 24. Each of these arrangements provide for pre-shipment export financing, described as "packing credits." "Packing credits" are loans collateralized (or "hypothecated") by packed finished goods. Xinboda Case Brief (AR Pub. Doc. No. 155) at 66. Such loans are provided to exporters or sellers to finance the acquisition, manufacture or packing of goods before shipment. *See* Commodity Matchbooks from India: Final Affirmative Countervailing Duty Determination, 74 Fed. Reg. 54,547 (Oct. 22, 2009) and accompanying Issues and Decision Memorandum at Section III.A.3. Such "packing credits" have previously been countervailed by Commerce. *See* Issues & Decision Memorandum at Comment 6 n.70.[28] Commerce has conceded that it has found at least one of the specific packing credit programs identified in the Hypothecation Agreements to have been

[28] In Commodity Matchbooks from India, Commerce concluded that "packing credits" are countervailable because "(1) the provision of the export financing constitutes a financial contribution, pursuant to section 771(5)(D)(i) of the Act, as a direct transfer of funds in the form of loans; (2) the provision of the export financing confers benefits on the respondents under section 771(5)(E)(ii) of the Act to the extent that the interest rates provided under these programs are lower than commercially available interest rates; and (3) these programs are specific under sections 771(5A)(A) and (B) of the Act because they are contingent upon export performance." Issues and Decision Memorandum Accompanying Commodity Matchbooks from India: Final Affirmative Countervailing Duty Determination, 74 Fed. Reg. 54,547 (Oct. 22, 2009) at Section IV.A.3. Commerce also noted that the "benefit conferred by the 'packing credits' for pre-shipment financing and discounted trade bills for post-shipment export financing, is the difference between the amount of interest the company paid on the government loans and the amount of interest it would have paid on comparable commercial loans." *Id.*

previously countervailed. *See* First Remand Results at 19 n.50; Second Remand Results at 28 n.98.[29]

Xinboda argues that the Hypothecation Agreements at a minimum provide "reason to . . . suspect" that Tata Tea may have received subsidies in the form of "packing credits." Pl.'s Brief at 27–28. Commerce concedes that the Hypothecation Agreements establish that Tata Tea was "eligible" for "packing credits" during the period of review. However, according to Commerce, mere "eligibility" for subsidies does not suffice to establish "reason to . . suspect" that a company actually received them. First Remand Results at 49–50 (stating that Commerce "concluded that this information [submitted by Xinboda] indicated that Tata Tea was eligible to eventually receive these subsidies but did not indicate that Tata Tea received subsidies during the [period of review]").

Commerce's position is unconvincing, for several reasons. First, Commerce's statement that "eligibility, alone, is not sufficient to meet the 'reason to believe or suspect standard'" is based on an assumption that unless there is direct evidence that a company made use of subsidies to which it was eligible, there is no "reason to... suspect" that company may have benefited from those subsidies. Second Remand Results at 28. This reasoning is in sharp conflict with Commerce's previously stated view that a company "will not leave money on the table" when a benefit is available to the company. *See Gold East Paper (Jiangsu) Co. v. United States*, 39 CIT ____, 61 F. Supp. 3d 1289 (2015), Final Results of Redetermination Pursuant to Court Remand (filed by Commerce in Court No. 10–00371 on July 10, 2015) at 17 (stating that "simply because one company in an unrelated industry...did not use a particular program, it does not mean that as a general matter Thai exporters would not take advantage of available export subsidies"); *see also Shenzhen Xinboda II*, 41 CIT at ____ n.52, 279 F. Supp. 3d at 1311–12 n.52 (noting that "[t]he fact that Commerce will not disregard financial statements absent concrete proof that a subsidy in fact actually 'was received,' including a specification of the precise 'dollar amount received,' would appear to be at least somewhat at odds with the agency's pragmatic presumption (in a related context) that a company that is eligible for a subsidy will take advantage of that subsidy *i.e.*, that a company in a competitive market economy 'will not leave money on the table.'").

Commerce's position that mere "eligibility" is always insufficient to establish "reason to ... suspect" is also inconsistent with common

[29] In the underlying administrative review, Commerce rejected the financial statements of REI Agro and ADF Foods based on the agency's finding that the companies' financial statements reflect receipt of "packing credits." *See* Issues & Decision Memorandum at Comment 6 nn.70, 73.

sense. The word “eligibility” in the context of subsidies is imprecise and could be used to indicate significantly different degrees of proximity that a company has to a particular subsidy. For example, all exporting companies with plants or offices physically located in a special economic zone of a particular country may be *eligible* for subsidies under government regulation. However, a company may also be *eligible* for subsidies as a result of actively entering into a range of specific contracts for the purpose of accessing certain subsidies, and incurring legal fees and placing security over assets to do so. The present situation is the latter, and raises the question of why a company would leave “money on the table” when subsidies are available to it.

Leading on from that point, the second issue with Commerce’s position is that Commerce discounts the fact that Tata Tea clearly took a range of affirmative steps to avail itself of its “eligibility” for “packing credits.” Tata Tea negotiated and entered into a series of binding arrangements, pledging its assets as security with three different banks for the purpose of having access to “packing credits.” The documentation is different for each of these banks (being the State Bank of India, Baroda Bank, and Axis Bank).

In relation to the State Bank of India, Xinboda submitted a “Supplemental Agreement of Hypothecation of Goods and Assets for Increase in Overall Limit” dated December 16, 2008, and a “Letter Regarding the Grant of Individual Limits Within the Overall Limit” dated January 28, 2008. *See* Xinboda Surrogate Value Submission for the Final Results at Exh. 48 (AR Pub. Doc. No. 133). There is also a “Form 8” (an official form filed with the Indian government documenting the “[p]articulars for creation or modification” of a pledge of assets as security) recording the relevant terms of the deed and letter. Xinboda’s Surrogate Value Rebuttal Submission at Exh. 2 (AR Pub. Doc. No. 138). These documents establish that arrangements were in place for Tata Tea to access “pre-shipment . . . credits” up to a limit of “Rs. 50,00,00,000.00 Crores.” There are two earlier “Form 8”s which include the key terms from another arrangement originating with an “Agreement of Hypothecation of Goods and Assets” dated December 14, 1994. These two additional “Form 8”s document a prior arrangement for “Export packing credits.” *See* Xinboda’s Surrogate Value Rebuttal Submission at Exh. 2 (AR Pub. Doc. No. 138).

For Axis Bank, Xinboda submitted a “Deed of Hypothecation of Current Assets (Stock and Book Debts)” dated October 30, 2009, and an associated “Form 8.” *See* Xinboda Surrogate Value Submission for the Final Results at Exh. 48 (AR Pub. Doc. No. 133); Xinboda’s Surrogate Value Rebuttal Submission at Exh. 2 (AR Pub. Doc. No.

138). These documents evidence that Axis Bank provided Tata Tea a "[c]redit facility in the form of . . . Export packing credit / pre shipment credit in foreign currency" in the amount of "Rs. 14,00,00,000/-".

Lastly, as to the Bank of Baroda, Xinboda submitted an "Unattested Deed of Hypothecation" dated October 30, 2009, and an associated "Form 8." *See* Xinboda Surrogate Value Submission for the Final Results at Exh. 48 (Public Doc. No. 133); Xinboda's Surrogate Value Rebuttal Submission at Exh. 2 (Public Doc. No. 138). The "Unattested Deed of Hypothecation" states that "[t]he Bank has, at the request of the Borrower, agreed to grant the Borrower Cash Credit-cum-Packing Credit facility up to the limit of Rs,14,00,00,00,000/-Rs, 14,00,00,000."[30]

As a practical matter, Tata Tea would have had no reason to enter into three separate financing arrangements concerning "packing credits" or to renew and increase its credit limits over time, if the company had not made use of them. *See* Pl.'s Comments on First Remand Results at 24 (stating that "Tata Tea would hardly have continued to pledge and convey its property, incurring bank fees, registration fees, and publication of its credit transactions, if over all of the years from 1995 through 2009, the company never used the credit that it was granted," and arguing that Tata would not have needed to raise its credit limit with the Bank of India from Rs 55 Crore to Rs 105 Crore "if the company had never used the credit that it had previously received").

Commerce has not responded directly to this point, but has made several attempts to water down the significance of the Hypothecation Agreements. Commerce first sought to dismiss the agreements as mere "pledges of security as a prerequisite to Tata Tea receiving packing credits or to increasing the limit of packing credits that are or may become available to Tata Tea." First Remand Results at 19. Commerce analogizes this to an application for a credit card, which "does not automatically guarantee that credit is available to the applicant" and that similarly "completing what is likely one of many

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[30] Commerce raises concerns about the legibility of both the deeds associated with Axis Bank and the Bank of Baroda. *See* First Remand Results at 19 n.50; *id*. at 20 n.52 *id*. at 50 n.126. However, as to Axis Bank, it appears that Commerce is referring to an earlier, illegible version, as the version of the deed filed on February 3, 2011, is clearly legible. *See* Pl.'s Comments on Remand Redetermination at 22; Xinboda's Surrogate Value Rebuttal Submission at Exh. 2 (AR Pub. Doc. No. 138). Further, as to the deeds for Axis Bank and Bank of Baroda, the terms of the deeds are legibly contained in the associated "Form 8"s, making it unclear what information exactly Commerce is concerned is affected by the legibility of the deeds.

steps in the application for 'packing credits' does not guarantee approval or the disbursement of credits." First Remand Results at 19 n.51. Thus, according to Commerce, Tata Tea's affirmative action would have been established only as to an application which does not "guarantee approval or disbursement of credits." *Id*. The short answer to this attempt to minimize the impact of the Hypothecation Agreements is that it is inconsistent with Commerce's own concession that they are more than just applications, rather that they establish that Tata Tea was "eligible" for "packing credits" (*i.e.*, that the applications had been approved). First Remand Results at 49–50.

The third issue with Commerce's position is that there is evidence which appears to provide at least some "reason to . . . suspect" that Tata Tea availed itself of these "packing credits." Commerce maintains that the "packing credits" are not reflected in Tata Tea's financial statements and that there is no other evidence that the "packing credits" were ever received. Issues & Decision Memorandum at 20; Remand Results 19–21, Def.'s Response to Comments Regarding the remand Redetermination at 24.[31] Commerce does concede that "'packing credits' could conceivably be listed" in Tata Tea's financial statements under a section titled "working capital facilities." Regardless, Commerce asserts that there is no way to connect the amounts maintains listed under "working capital facilities" with "packing credits" as "no item in Schedule 3 mentions 'packing credits,' 'export credit,' 'pre-shipment financing,' or anything else indicating the receipt of countervailable subsidies." First Remand Results at 21.

However, the amounts under "working capital facilities" in Tata Tea's financial statements are linked to the Hypothecation Agreements. This is because those amounts are described as "[s]ecured by way of hypothecation of raw materials, finished products, stores and spares, crop, book debts and movable assets other than plant and machinery and furniture." Pl.'s Brief at 28 (citing Tata Annual Report at 73, Exh. 1 to Pet. Surr. Values (AR Pub. Doc. No. 132). This description is consistent with Hypothecation Agreements, all of which hypothecate (*i.e.*, place a charge over) such assets. These amounts appear to correlate with the Hypothecation Agreements because Xinboda has provided all documentation containing secured loans relating to the period of review. That is, there is a closed universe of loan agreements from which the amounts listed under "[s]ecured by way of hypothecation" can come. That closed universe is constituted entirely

[31] Of course, as explained above, the "reason to believe or suspect" standard may be satisfied by evidence that is short of proof of a company's *actual receipt* of a subsidy.

by the Hypothecation Agreements, and all of those agreements provide for "packing credits."[32]

Xinboda's evidence thus connects the amounts in Tata Tea's financial statement described as "[s]ecured by way of hypothecation" with the "packing credits" contained in the Hypothecation Agreements. Pl.'s Comments on First Remand Results at 24–25. It must be noted that the Hypothecation Agreements in fact provide for "packing credits" as well as a variety of other forms of loans. As such, Xinboda's argument that the amounts described in Tata Tea's financial statements under "working capital facilities" relate to the Hypothecation Agreements indicates, at a minimum, that money was received under an agreement that provides for "packing credits" as well as other financial arrangements. Commerce failed to respond to the substance of Xinboda's arguments connecting Tata Tea's financial statements with the Hypothecation Agreements.

In sum, Xinboda has provided significant evidence documenting Tata Tea's access to "packing credits" from a number of Indian financial institution, as well as evidence connecting amounts in the Tata Tea's financial statements with these "packing credits." From a common sense perspective, Xinboda's evidence would appear to give at least some "reason to ... suspect" that Tata Tea may have received subsidies – whatever that standard may mean.

Under different circumstances, the analysis above would warrant a third remand to Commerce as to both Commerce's interpretation of the "reason to believe or suspect" standard and Commerce's application of that standard to the documentation submitted by Xinboda. However, although Xinboda contested Commerce's selection of Tata Tea's financial statements in its comments on the draft of the Second

[32] Xinboda makes this claim through reference to Section 124–145 of India's Companies Act 1956, which required Tata Tea to register all security charges on its book debts, movable assets, and stock-in-trade with the Indian government. *See* Companies Act, No. 1 of 1956, § 124125, India Code. Xinboda argues that the only such agreements registered by Tata Tea with the Indian government are the Hypothecation Agreements, and that consequently the amounts described under "working capital facilities" in Schedule 3 of Tata Tea's financial statements must come from the Hypothecation Agreements. Pl.'s Comments on First Remand Results at 24–25 (arguing "[s]ince Tata Tea was required to register security charges on its book debts, movable assets, and stock-in-trade with the Indian Ministry of Corporate Affairs and the Offices of Registrar of Companies, and Tata Tea's Schedule 3 of its 2009–2010 financial statements clearly indicates that the Company received secured loans, and Xinboda put on the record of this case all of Tata Tea's secured loan agreements relevant for the POR, which were retrieved from India's Ministry of Corporate Affairs and the Offices of Registrar of Companies, and these loan agreements and deeds of hypothecation clearly involve the grant of countervailable export "packing credits" from banks, then the evidence is incontrovertible that Tata Tea received and used a total of Rs 12036.03 Lakhs in 2009 and Rs 17144.50 Lakhs in 2010 in countervailable export "packing credits.").

Remand Results, Xinboda has not pursued the claim in this forum. A third remand therefore is not warranted and there is no reason not to enter judgment in this matter.

IV. *Conclusion*

For the reasons set forth above, the Second Remand Results must be sustained. Judgment will enter accordingly.

Dated: January 30, 2019
New York, New York

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