Slip Op. 19–12

CHANGZHOU TRINA SOLAR ENERGY CO., LTD. ET AL., Plaintiffs and Consolidated Plaintiff, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. AND CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00199
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the administrative review of crystalline silicon photovoltaic products from the People's Republic of China.]

Dated: January 25, 2019

Jonathan Michael Freed, Trade Pacific, PLLC, of Washington, DC, argued for plaintiff, defendant-intervenor, and consolidated defendant-intervenor Changzhou Trina Solar Energy Co., Ltd., and plaintiffs Trina Solar (Changzhou) Science & Technology Co., Ltd. and Trina Solar (U.S.) Inc. With him on the brief was *Robert George Gosselink*.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, DC, argued for consolidated plaintiff and defendant-intervenor SolarWorld Americas, Inc. With him on the brief were Laura El-Sabaawi and Usha Neelakantan.

Justin Reinhart Miller, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Reginald T. Blades, Jr.*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel on the brief was *James Henry Ahrens, II*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the court on motions for judgment on the agency record filed by Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science and Technology Co., Ltd., and Trina Solar (U.S.) Inc. (collectively "Trina") and SolarWorld Americas, Inc. ("SolarWorld").[1] *See* [Trina] Pls.' Rule 56.2 Mot. J. Agency R., Feb. 2, 2018, ECF No. 29; SolarWorld's Mot. J. Agency R., Feb. 2, 2018, ECF No. 30. Trina and SolarWorld challenge various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final de-

[1] Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science and Technology Co., Ltd., and Trina Solar (U.S.) Inc. and SolarWorld Americas, Inc. also appear as defendant-intervenors in this consolidated action.

termination in the administrative review of the antidumping duty ("ADD") order covering certain crystalline silicon photovoltaic products from the People's Republic of China ("PRC").[2] *See* Mem. Supp. Mot. [Trina] J. Agency R. at 4–14, Feb. 2, 2018, ECF No. 29–3 ("Trina Pls.' Br."); Pl. [SolarWorld's] Mem. Supp. Rule 56.2 Mot. J. Agency R. at 10–27, Feb. 5, 2018, ECF No. 33 ("Pl. SolarWorld's Br."); *see also Certain Crystalline Silicon Photovoltaic Prods. from the [PRC]*, 82 Fed. Reg. 32,170 (Dep't Commerce July 12, 2017) (final results of [ADD] administrative review and final determination of no shipments; 2014–2016) ("*Final Results*") and accompanying Issues & Decision Mem. for the Final Results of [ADD] Admin. [Review]: Certain Crystalline Silicon Photovoltaic Prods. from the [PRC]; 2014–2016 at 9–10, A-570–010, (July 5, 2017), ECF No. 19–3 ("Final Decision Memo"); *Certain Crystalline Silicon Photovoltaic Prods. from the [PRC]*, 80 Fed. Reg. 8,592, 8,593–95 (Dep't Commerce Feb. 18, 2015) ([ADD] order).

For the reasons that follow, the court sustains Commerce's selection of surrogate values for aluminum frames, module glass,[3] and financial ratios. The court also sustains Commerce's decisions to include import data with reported quantities of zero in the surrogate value calculations and to deny offsetting respondent's U.S. indirect selling expenses by the debt restructuring income reported by its U.S. sales affiliate. However, the court finds that Commerce's decision not to offset the Ex-Im Bank Export Buyer's Credit Program is contrary to law and Commerce is directed to recalculate Trina's U.S. selling prices to account for the offset on remand.

BACKGROUND

This administrative review covers subject imports entered during the period of July 31, 2014, through January 31, 2016. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 20,324, 20,335 (Dep't Commerce Apr. 7, 2016). Commerce selected Changzhou Trina Solar Energy Co., Ltd./Trina Solar (Changzhou) Science & Technology Co., Ltd. as the sole mandatory

[2] On November 1, 2017, the court consolidated Changzhou Trina Solar Energy Co. Ltd. v. United States, Ct. No. 17–00199 (USCIT filed July 27, 2017) and SolarWorld Americas, Inc. v. United States, Ct. No. 17–00217 (USCIT filed Aug. 11, 2017). Order [Granting Consent Mots. Consolidate], Nov. 1, 2017, ECF No. 24.

[3] The final determination and the parties' briefs use a variety of terms to refer to this input, e.g., module glass, tempered and coated glass, solar glass, and solar module glass. *See, e.g.*, Final Decision Memo at 27–28; Def.'s Resp. Br. at 18; Pl. SolarWorld's Br. at 18. The court refers to the input as "module glass" because it is how Commerce identifies the input in the title of the comment addressing this issue. Final Decision Memo at 27 (Comment titled, "Surrogate Value for Module Glass").

respondent for individual review. *See* Resp't Selection Mem. [for 2014–2016 ADD Admin. Review] at 5, PD 94, bar code 3472551–01 (May 24, 2016).[4] Aside from Commerce's decisions to exclude Trina Solar (U.S.) Inc.'s ("TUS") debt restructuring income from its calculation of respondent's indirect selling expenses and to use a simple average to calculate the financial ratios, Commerce's conclusions regarding the other issues challenged before this Court did not change from the preliminary to the final determination. For the final results, Commerce calculated a weighted-average dumping margin of 9.61% for the sole mandatory respondent. *Final Results*, 82 Fed. Reg. at 32,171.

SolarWorld challenges as not in accordance with law and unsupported by substantial evidence three aspects of Commerce's final determination. *See* Pl. SolarWorld's Br. at 10–27. Specifically, SolarWorld challenges Commerce's selection of surrogate value data sources to value respondent's aluminum frames, *see id.* at 10–18, and module glass, *see id.* at 18–19, and Commerce's selection of Styromatic (Thailand) Co., Ltd.'s ("Styromatic") 2015 financial statements to value respondent's selling, general, and administrative expenses. *See id.* at 20–27.

Trina challenges three other aspects of Commerce's final determination. *See* Trina Pls.' Br. at 4–14. Specifically, Trina challenges as not in accordance with law and unsupported by substantial evidence Commerce's decision not to adjust respondent's net U.S. selling prices by the amount countervailed in a parallel countervailing duty ("CVD") investigation. *See id.* at 4–9. Trina also challenges as unsupported by substantial evidence Commerce's decision to use zero import quantities to calculate surrogate values. *See id.* at 9–11. Finally, Trina challenges as not in accordance with law, unsupported by substantial evidence, and arbitrary Commerce's decision to exclude, as an offset, the debt restructuring income reported by TUS. *See id.* at 11–14. On October 16, 2018, the court held oral argument. Oral Ar., Oct. 16, 2018, ECF No. 56.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[5] and 28 U.S.C. § 1581(c) (2012), which grant

[4] On September 20, 2017, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF No. 19–4–5. Citations to administrative record documents in this opinion will be to the numbers assigned to the individual documents by Commerce in these indices.

[5] 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.

the Court authority to review actions contesting the final determination in an administrative review of an ADD 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. Surrogate Values

SolarWorld challenges Commerce's surrogate value data selections for aluminum frames, module glass, and financial statements to calculate surrogate financial ratios. *See* Pl. SolarWorld's Br. at 10–27. Defendant refutes all these challenges and argues that Commerce's final determination should be sustained in all respects. *See* Def.'s Resp. Br. Opp'n [Trina's & SolarWorld's] Rule 56.2 Mots. J. Agency R. at 12–23, June 7, 2018, ECF No. 38 ("Def.'s Resp. Br."). For the reasons that follow, the court sustains Commerce's surrogate value selections for aluminum frames, module glass, and financial ratios.

A. Legal Framework

In antidumping proceedings involving non-market economies, Commerce generally calculates normal value using the factors of production used to produce the subject merchandise and other costs and expenses. 19 U.S.C. § 1677b(c)(1). Commerce will value respondents' factors of production using the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1)(B). As the term "best available information" is not statutorily defined, Commerce has broad discretion in deciding what constitutes the best available information. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). However, the agency must ground its selection in the overall purpose of the statute, which is to calculate accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007). To the extent possible, Commerce uses factors of production from market economy countries that are: "(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce's regulatory preference is to "value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2016).[6]

[6] Further citations to Title 19 of the Code of Federal Regulations are to the 2016 edition.

Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Econ. Surrogate Country Selection Process*, Policy Bulletin 04.1 (Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited Jan. 18, 2019); Decision Mem. for Prelim. Results of [ADD] Admin. Review: Certain Crystalline Silicon Photovoltaic Prods. from the [PRC]; 2014–2016 at 15, PD 223, bar code 3547659 01 (Feb. 28, 2017) ("Prelim. Decision Memo").

B. Aluminum Frames

SolarWorld challenges Commerce's valuation of respondent's aluminum frames using Thai Harmonized Tariff Schedule ("HTS") subheading 7604.29.90001, covering "Aluminum bars, rods and profiles: Of aluminum alloys: Other," as not in accordance with law and unsupported by substantial evidence. *See* Pl. SolarWorld's Br. at 10–18. Specifically, SolarWorld argues that evidence on this record demonstrates that respondent's frames were processed into a form beyond the simple aluminum extrusions covered by HTS subheading 7604.29.90001. *Id.* at 12–14. Defendant responds that Commerce reasonably concluded that import data under HTS subheading 7604.29.90001 is the best available information to value respondent's non-hollow aluminum profiles. *See* Def.'s Resp. Br. at 12–18. For the reasons that follow, Commerce's determination is sustained.

Commerce's determination that, on this record, import data under HTS 7604.29.90001 constitutes the best available information with which to value respondent's frames is reasonable. In the final determination, Commerce explains that respondent demonstrated that its frames are "non-hollow, aluminum profiles" and that nothing on the record contradicts that characterization. *See* Final Decision Memo at 16–19. It further explains that "profiles" under HTS 7604 include products that are further processed and do not have a uniform cross section across their entire length. *Id.* at 16–17.[7] In support, Commerce highlights the explanatory notes to HTS Chapter 76 that indicate that profiles include products that "have been subsequently

[7] SolarWorld contends that Commerce's determination is not in accordance with law because Commerce construes the word "profile" in HTS 7604 beyond its statutory definition. *See* Pl. SolarWorld's Br. at 10–12, 17–18. Commerce's task is not to classify the solar frame inputs used for customs purposes, but to select the best available data to value the factors in production in question. *See SolarWorld Americas, Inc. v. United States*, 910 F.3d 1216, 1223–24 (Fed. Cir. 2018) ("*SolarWorld I*").

worked after production." *Id.* at 16 (quoting Notes to Chapter 76 of the HTS). Commerce also references the International Trade Commission's ("ITC") definition of aluminum profiles that allows for profiles to be "cast, sintered, and worked after production[,]" to explain that profiles with corners, i.e., not uniform across the entirety of their length, are not necessarily excluded from HTS 7604. *Id.* at 17. Commerce explains that SolarWorld's proposed alternative, HTS subheading 7616.99, is an "other" category and HTS 7616 includes articles dissimilar to aluminum frames such as "nails, tacks, staples, screws, bolts, nuts, screw hooks, rivets, cotters, cotter pins, washers, knitting needles, bodkins, crochet hooks, embroidery stilettos, safety pins, other pins and chains, and cloth, grill and netting of aluminum wire." *Id.* at 18.

Nonetheless, SolarWorld argues that respondent's profiles are finished aluminum goods and can no longer be considered profiles. Pl. SolarWorld's Br. at 12–14. Specifically, SolarWorld claims that evidence on this record demonstrates that respondent's aluminum profiles are no longer extrusions, but aluminum frames that have been so further processed and manufactured as to constitute a product ready for immediate incorporation into solar modules. *See id.*(citing *e.g.*, [Changzhou Trina Solar Energy Co., Ltd. & TUS's] First Suppl. Questionnaire Resp. at Ex. 19, CD 171, bar code 3502007–05 (Aug. 29, 2016); [Changzhou Trina Solar Energy Co., Ltd. & TUS's] Section C & D Questionnaire Resp. at Exs. D-13, D-15, CD 124, bar code 3488926–12 (July 19, 2016); [SolarWorld Americas, Inc.'s] Submission of Info. to Rebut, Clarify, or Correct Info. Pertaining to Surrogate Values at Ex. 4, PD 157, bar code 3500966–01 (Aug. 23, 2016); [Changzhou Trina Solar Energy Co., Ltd. & TUS's] Third Suppl. Questionnaire Resp. at Ex. 6, PD 176, bar code 3534067–01 (Jan. 4, 2017)). In the final determination, Commerce explains that because HTS 7604 does not necessarily cover only unfinished aluminum profiles, the degree of finishing is not dispositive of whether HTS 7604 is the best available information for valuing respondent's frames. *See* Final Decision Memo at 16–17 (incorporating by reference its reasoning from the investigation and prior reviews that because HTS 7604 does not specify whether the profiles are finished or unfinished, HTS 7604 does not necessarily exclude finished aluminum profiles and noting that the ITC's definition for profiles allows for the profiles to be worked on after production). It is reasonably discernable that Commerce did not find that the mechanical features added to Trina's frames were sufficient to make the profiles more similar to the prod-

ucts enumerated in HTS 7616. *See id.* at 18–19.[8] Commerce's determination is supported by substantial evidence.

C. Module Glass

SolarWorld challenges Commerce's valuation of respondent's module glass using Thai HTS subheading 7007.19.90000, covering "toughened (tempered) safety glass, not suitable for incorporation in vehicles, aircraft, spacecraft or vessels; other," as not in accordance with law and unsupported by substantial evidence. *See* Pl. SolarWorld's Br. at 6, 18–19. Specifically, it argues that HTS 7007.19.90000 does not cover tempered glass of "extreme durability" and accordingly undervalues the input. *Id.* Defendant responds that Commerce reasonably concluded that import data under HTS subheading 7007.19.90000 is the best available information to value respondent's module glass. *See* Def.'s Resp. Br. at 18–19. For the reasons that follow, Commerce's determination is sustained.

Commerce reasonably determined that import data under HTS subheading 7007.19.90000 constitutes the best available information with which to value this input. In the final determination, Commerce explains that respondent's characterization of the module glass as "tempered" is supported by record evidence and that HTS subheading 7007.19.90000 plainly covers tempered glass. *See* Final Decision Memo at 29. SolarWorld does not dispute that respondent's module glass is tempered. *See* Pl. SolarWorld's Br. at 18. Instead, it argues that record evidence demonstrates that respondent's module glass was strengthened through various surface treatments, that HTS 7007.19.90000 does not account for such treatments, and that HTS 7007.29.90, which covers "Laminated safety glass; Other; Other," does. *See id.* at 18–19. Relying on an explanatory note from the World Customs Organization, Commerce explains that laminated safety glass is created by sandwiching of multiple layers of glass and plastic. *See* Final Decision Memo at 29–30 (citing [Trina's] Info. for the Department's Consideration in Prelim. Results at Ex. C-2, PD 205–07, bar codes 3539773–01–03 (Jan. 30, 2017)). It further explains that evidence on this record does not support the conclusion that respondent's module glass was made in such a fashion or that the additional processing it underwent "result[ed] in glass comparable to laminated

[8] SolarWorld also argues that Commerce did not accord proper weight to Customs and Border Protection rulings classifying the merchandise in question and did not address the rulings which detract from its determination. *See*Pl. SolarWorld's Br. at 14–17. Commerce reasonably explained why the rulings placed on the record do not undermine its determination that HTS 7604 represents the best available information for valuing respondent's frames, *see* Final Decision Memo at 18, and the court will not reweigh record evidence.

glass[.]" *Id.* at 30. Commerce has explained why record evidence supports its determination and addressed the evidence SolarWorld claims detracts from its determination. Therefore, its determination is reasonable.

D. Financial Ratios

SolarWorld challenges Commerce's reliance on Styromatic's 2015 financial statements to calculate respondent's surrogate financial ratios as contrary to law and unsupported by substantial evidence. *See* Pl. SolarWorld's Br. at 20–27. For the reasons that follow, Commerce's determination is sustained.

As discussed above, Commerce is required to select a surrogate value for each factor of production using "the best available information." 19 U.S.C. § 1677b(c)(1). In selecting a data source to value a respondent's surrogate financial ratios, Commerce's preference is to use financial statements from producers of identical or comparable merchandise. 19 C.F.R. § 351.408(c)(4). Where the record lacks data from a producer of identical merchandise, Commerce prefers statements from a producer of comparable over non-comparable subject merchandise and from companies that did not receive subsidies Commerce found to be countervailable. Final Decision Memo at 37–38 (citing *e.g.*, Certain New Pneumatic Off-the-Road Tires From the [PRC]: Issues & Decision Mem. Final Results 2010–2011 Admin. Review of [ADD] Order at Cmt. 6, A-570–912, (Apr. 9, 2013), *available at* http://ia.ita.doc.gov/frn/summary/prc/2013–08894–1.pdf (last visited Jan. 18, 2019)).

Commerce explains that Styromatic's 2015 financial statements constitute the best available information because these statements are audited, contemporaneous, and from a company in the primary surrogate country that produced comparable merchandise. *See*Final Decision Memo at 36–39; Prelim. Decision Memo at 24. SolarWorld contends that Commerce erred in its selection because the record contained the financial statement of Ekarat Engineering (Public) Co., Ltd.'s ("Ekarat"), a producer of identical merchandise in the primary surrogate country. *See* Pl. SolarWorld's Br. at 20–23. Commerce explains that during the period of review ("POR") Ekarat sold distribution transformers which are not comparable merchandise. Final Decision Memo at 35–36 (citing [SolarWorld's] Submission of Surrogate Values at Ex. 10 at 66, PD 146, bar code 3498792–03–04 (Aug. 15, 2016) ("Ekarat's 2015 Annual Report")). Commerce points to record evidence demonstrating that 99% of Ekarat's revenue was derived

from "sales of distribution transformers and services[.]"[9] *Id.* at 36. Commerce also explains that although Ekarat's financial statement shows that the company produced some solar modules and derived one percent of its revenue from such business, the record did not support a conclusion that Ekarat's experience was comparable to that of a seller or manufacturer of solar modules and cells. *Id.* at 37. SolarWorld presents no evidence that undermines Commerce's determinations. Therefore, Commerce's conclusion is reasonable on this record.

II. Decision Not to Offset the Countervailed Ex-Im Bank Export Buyer's Credit Program

Trina argues that Commerce's decision to deny an offset for the export buyer's credit program that was countervailed in the parallel CVD investigation is contrary to law. *See* Trina Pls.' Br. at 4–9. Defendant responds that Commerce acted in accordance with its practice and should be given deference in interpreting ambiguous statutory language. *See* Def.'s Resp. Br. at 23–27. Commerce's refusal to offset the CVDs imposed is contrary to law because Commerce necessarily determined that the export buyer's credit program was an export subsidy in the parallel CVD investigation.

To impose a CVD, Commerce must find that an exporter benefited from a countervailable subsidy. 19 U.S.C. § 1671(a)(1). A "countervailable subsidy" is a financial contribution, price support, or funding mechanism, provided by an "authority," that confers a benefit to its recipient.[10] 19 U.S.C. § 1677(5)(B). A countervailable subsidy must be

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[9] SolarWorld contends that Commerce's conclusion regarding Ekarat's primary source of revenue is not supported by the record because the page Commerce cites to in support does not discuss revenue. Pl. SolarWorld's Br. at 21. Defendant responds that the cite in the final determination is the result of inadvertent error and that another page of the same report supports Commerce's conclusion. Def.'s Resp. Br. at 22. At oral argument counsel for SolarWorld agreed that the page Defendant cites supports Commerce's conclusion. Oral Arg. at 01:25:20–01:25:25. It is reasonable to presume that Commerce reviewed Ekarat's 2015 Annual Report in its entirety in reaching its final determination.

[10] (5) Countervailable subsidy

(A) In general

Except as provided in paragraph (5B), a countervailable subsidy is a subsidy described in this paragraph which is specific as described in paragraph (5A).

(B) Subsidy described

A subsidy is described in this paragraph in the case in which an authority—

(i) provides a financial contribution,

(ii) provides any form of income or price support within the meaning of Article XVI of the [General Agreement on Tariffs and Trade] 1994, or

(iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, to a person and

specific, meaning it is an (i) import substitution subsidy, (ii) export subsidy, or (iii) domestic subsidy that is specific, in law or fact, to an enterprise or industry within the jurisdiction of the authority providing it. 19 U.S.C. § 1677(5)(A); 19 U.S.C. § 1677(5A)(A)–(D).[11] Thus, to impose a CVD, Commerce must find that an exporter both benefited from a subsidy and that the subsidy was specific. 19 U.S.C. § 1677(5).

During the course of an investigation or review, Commerce may have difficulty accessing and verifying the information it needs to satisfy the statutory elements for imposing a CVD. Subject to 19 U.S.C. § 1677m(d), Commerce shall use facts otherwise available to reach its final determination when "necessary information is not available on the record," a party "withholds information that has been requested by [Commerce]," fails to provide the information timely or in the manner requested, "significantly impedes a proceeding," or provides information Commerce is unable to verify. 19 U.S.C. § 1677e(a). Further, under certain circumstances, such as a party's failure to comply to the best of its ability with a request for informa-

a benefit is thereby conferred. For purposes of this paragraph and paragraphs (5A) and (5B), the term "authority" means a government of a country or any public entity within the territory of the country.

19 U.S.C. § 1677(5)(A)–(B).

[11] In general, a subsidy is countervailable if it "is specific as described in paragraph (5A)." 19 U.S.C. § 1677(5)(A). According to paragraph (5A), "[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). The statute provides the following definitions for such subsidies:

(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. . . .

19 U.S.C. § 1677(5A)(B)–(D).

tion, Commerce may "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). Commerce and parties generally refer to this two-step process by the shorthand "AFA" or "adverse facts available."

Regardless of the shorthand used, AFA is a two-step process that does not obviate the need for Commerce to affirmatively find that the elements of the statute have been satisfied. Accordingly, to impose a CVD, Commerce must find that an exporter benefited from a specific subsidy. 19 U.S.C. § 1671; 19 U.S.C. § 1677(5), (5A). That Commerce resorts to facts available and/or imposes an adverse inference under 19 U.S.C. § 1677e to make those findings, does not mean that the required findings have not been made.

Pursuant to 19 U.S.C. § 1677a(c)(1)(C), where goods are subject to both antidumping and countervailing duties, "[t]he price used to establish export price and constructed export price shall be—(1) increased by . . . (C) the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy[.]" An export subsidy is defined as "a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions." 19 U.S.C. § 1677(5A)(B).

Commerce's decision to deny an offset for the countervailing duties imposed is contrary to law because in the parallel CVD investigation Commerce necessarily found that the export buyer's credit program was an export subsidy. *See [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products From the [PRC]*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative [CVD] determination) and accompanying Issues & Decision Mem. for the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC] at 30, C-570–011, (Dec. 15, 2014) ("CVD Investigation Final Decision Memo") (finding that through the export buyer's credit program the "Export-Import Bank of China (Ex-Im Bank) provides loans at preferential rates for the purchase of exported goods from the PRC") *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–30071–1.pdf (last visited Jan. 18, 2019). It is reasonably discernible from Commerce's description of the export buyer's credit program that Commerce found the program to be specific under the statute because the benefits it provided were contingent upon export. *See* CVD Investigation Final Decision Memo at 30, 91–94. Commerce did not resort to facts available or adverse inferences when describing the export buyer's credit program. Commerce did not describe any aspect of the export buyer's credit program in a manner that could lead to the conclusion that the program was considered anything other than an export subsidy. Further, Com-

merce explicitly states that it is relying on AFA to determine that respondents used the export buyer's credit program, not that the program was specific. *See id.* at 91–94.

Here, Commerce asserts that it denied the offset because in the parallel CVD investigation it did not make a finding as to whether the export buyer's credit program was contingent on export performance and countervailed the program on the basis of AFA. *See*Final Decision Memo at 9–10. Commerce's assertion here contradicts its assertion in the first administrative review of the *CVD Order* where it explicitly states that the "program is specific because it is contingent upon export performance, within the meaning of section 771(5A)(A)–(B) of the [Tariff] Act [of 1930, as amended, 19 U.S.C. § 1677(5A)(A)–(B)]." Issues & Decision Mem. for the Final Results of the [CVD] Admin. Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the [PRC] at 33, C-570–980, (July 7, 2015) *available at* http://ia.ita.doc.gov/frn/summary/prc/2015–17241–1.pdf (last visited Jan. 18, 2019); *see also* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC], 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) ([CVD] order) ("*CVD Order*"). To the extent that Commerce's decision here implicitly disavows the conclusion it reached in the first administrative review and marks the crafting of a new position, that position rests on Commerce's conflation of 19 U.S.C. § 1677e(a) and (b).

Commerce's invocation of AFA implies that instead of using adverse facts to support specific findings, as 19 U.S.C. § 1677e(a) and (b) require, respondents are simply saddled with an adverse result by the combined operation of subsections 1677e(a) and (b). Commerce states that "[its] determination to countervail the program was based on facts otherwise available with an adverse inference, as a result of non-cooperation by the Government of China." Final Decision Memo at 9. That statement conflates subsections 1677e(a) and (b) and obfuscates the findings Commerce had to, and did, make to impose a CVD. Specifically, in the parallel CVD investigation, Commerce based its determination that the respondents used the export buyer's credit program, i.e., that respondents benefited from the specific subsidy, in order to satisfy one of the statutory elements necessary to impose CVDs. *See* CVD Investigation Final Decision Memo at 30, 91–94. The statute does not authorize Commerce to impose CVDs because a party fails to cooperate. Subsections 1677e(a) and (b) allow Commerce to resort to facts available and to apply adverse inferences in making its findings. Neither subsection, however, relieves Commerce from relying on some facts to make the requisite determinations to satisfy

the elements of 19 U.S.C. § 1677(5), (5A).[12] If Commerce could simply declare the statute satisfied without resorting to actual facts, Congress would have had no need to provide potential sources of information for adverse inferences, as it did in 19 U.S.C. § 1677e(b)(2)(A)–(D).[13]

Further, while it is conceivable that Commerce could use subsections 1677e(a) and (b) to make a finding that a particular program is an export subsidy, there is no reasonable reading of Commerce's final decision memorandum for the parallel CVD investigation that Commerce used an adverse inference to make such a finding here. Therefore, Commerce cannot now say that it did not make a finding of an export subsidy, because (i) it had to have made a finding of specificity to satisfy the statute, (ii) it is reasonably discernible that it found that the export buyer's credit program was contingent upon exports, *see* CVD Investigation Final Decision Memo at 30, and (iii) it only invoked an adverse inference to find that the respondents used, i.e., benefited from, the program. *Id.* 90–94.

Defendant's argument that Commerce changed its practice with respect to offsetting CVDs calculated on the basis of AFA also relies upon its conflation of subsections 1677e(a) and (b). *See* Def.'s Resp. Br. at 24–27. Defendant argues that "[i]n past proceedings, Commerce has determined that the term 'export subsidy' within the meaning of 19 U.S.C. § 1677(5A)(B) encompasses certain subsidy programs for which specificity was determined on the basis of AFA."[14] *Id.* at 24. Defendant's argument posits that the term "export subsidy" is am-

[12] Although it is not clear from Commerce's decision, or Defendant's brief, Commerce may be trying to argue that the CVD at issue here was determined to be "specific" more generally by virtue of an adverse inference, i.e., it was not found to be an import substitution subsidy, a domestic subsidy, or an export subsidy. Presumably, Commerce would then argue it could impose a CVD without identifying the particular type of specific subsidy at issue. If this is Commerce's argument, it must fail. First, Commerce's CVD determination does not support that position. More importantly, the statute would not support that position. A subsidy is countervailable if it "is specific as described in paragraph (5A)." 19 U.S.C. § 1677(5)(A). According to paragraph (5A), "[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). Subsection 1677e(a) requires Commerce to identify facts available prior to imposing an adverse inference. Commerce must therefore rely upon facts to demonstrate specificity. Congress, by identifying the types of specificity, cabined the choices available to Commerce. There is no provision for some sort of generalized specificity.

[13] Listing the petition, a final determination in the investigation under 19 U.S.C. § 1677, any previous review under 19 U.S.C. § 1675 or determination under 19 U.S.C. § 1675b, or any other information placed on the record, among the potential sources of information from which Commerce can derive an adverse inference. 19 U.S.C. § 1677e(b)(2)(A)–(D).

[14] Defendant invokes *Jinko Solar Co., Ltd. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1333,1359–61 (2017) as discussing and affirming Commerce's prior practice of interpreting the term "export subsidy" as including "subsidy programs for which specificity was determined on the basis of AFA." Def.'s Resp. Br. at 24. Defendant's characterization of *Jinko* as

biguous and therefore Commerce is free to interpret the term as either including or excluding subsidies determined to be specific as a result of facts available with an adverse inference. *See id.* at 24–26. Again, Defendant starts with the premise that Commerce may impose CVDs simply as an adverse inference. However, Commerce does not impose a CVD as a result of an adverse inference. Commerce derives an adverse inference from a set of facts relevant to the proceeding and those facts may lead to Commerce concluding that the necessary elements of the statute are satisfied and a finding that a CVD is appropriate.

Further, there is no ambiguity with respect to the term "export subsidy" because Congress has defined it. "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." 19 U.S.C. § 1677(5A)(B). That Commerce might have used AFA to find that a subsidy was contingent upon export performance does not render the term ambiguous. Even if one could argue that the term "export subsidy" is ambiguous because it may or may not include subsidies that Commerce cannot verify as contingent upon export,[15] here, Commerce never questioned whether the export buyer's credit program was a subsidy contingent upon export.[16]

affirming Commerce's prior practice with respect to the term "export subsidy" is incorrect. *Jinko* addressed Commerce's practice of offsetting a respondent's ADD cash deposit rate by an export subsidy amount calculated in a parallel CVD investigation on the basis of AFA. *Jinko*specifically referenced the lack of statutory and regulatory guidance on how Commerce should calculate a cash deposit rate, as compared to antidumping administrative reviews where the statute requires that "the price used to establish export price and constructed export price must be increased by "'the amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy.'" *Jinko*, 41 CIT at __, 229 F. Supp. 3d at 1359, n.30 (quoting 19 U.S.C. § 1677a(c)(1)(C)).

[15] If Commerce is unable to verify information, the statute directs Commerce to rely on facts otherwise available. 19 U.S.C. § 1677e(a)(2)(D). Commerce clearly explains that the issue on verification during the CVD investigation was whether respondents used the export buyer's credit program. *See*CVD Investigation Final Decision Memo at 91–94. There is no indication that Commerce could not verify whether the export buyer's credit program was, in law or in fact, continent upon export during the CVD investigation.

[16] Finally, even if Commerce used an adverse inference to determine that the export buyer's credit program was an export subsidy and the term could be construed as ambiguous, Commerce failed to explain why its current practice is a reasonable interpretation of the statute. Where goods are subject to both antidumping duties and countervailing duties, the statute requires Commerce to increase the export or constructed export price by "the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy[.]" 19 U.S.C. § 1677a(c)(1)(C). The statutory language focuses on the purpose of the CVD, i.e., whether it was imposed to offset an export subsidy. If Commerce determines that a program is an export subsidy after resorting to AFA, it would not change the fact that it was imposed for the purpose of offsetting the export subsidy. It is not apparent to the court why a practice of not offsetting a CVD imposed on an export subsidy after a determination based on AFA would be reasonable and Commerce has not explained why it would be reasonable. Defendant contends that Commerce explained the change in its practice in prior determinations and that Trina was on notice of

Given that 19 U.S.C. § 1677a(c)(1)(C) uses the mandatory "shall" to direct Commerce's actions as to offsets when a countervailing duty is imposed and here Commerce imposed such a duty, on remand Commerce must increase Trina's U.S. selling prices by the amount countervailed to offset the export subsidy.

III. The Use of Zero-Quantity Import Data

Trina argues that Commerce erred by including values for import data with reported quantities of zero in the surrogate value calculations. *See* Trina Pls.' Br. at 9–11. Trina emphasizes that there are more zero values than other low-quantity values in the data and that inclusion of these zero-quantity values resulted in distorted surrogate values. *Id.* at 10–11. Defendant argues that it was reasonable for Commerce to determine that the values were reliable because record evidence does not show that the zero-quantities are the result of errors. *See* Def.'s Resp. Br. at 27–29. For the following reasons, Commerce's decision is sustained.

In the final determination, Commerce explains that the zero-quantities in the data are the result of small import quantities being rounded down to zero. *See* Final Decision Memo at 12. Commerce also explains that had the zero-quantities been the result of error, there would be an effect on the reported value, but that here, "there are no imports in the data with a zero value." *Id.* Trina argues that if the zero-quantities were tied to rounding, it would expect the data to contain double the amount of import entries rounded to the quantity of 1 than those rounded to 0. *See* Trina Pls.' Br. at 10–11. As Commerce explains, record evidence does not support the underlying assumption of this argument, i.e., that every 0.5 interval unit of measure will have the same number of imports associated with it as those with zero-quantities. Final Decision Memo at 12.[17] Trina has not shown that Commerce's determination is unreasonable.

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the change starting approximately a year prior to the issuance of the *Final Results*. *See* Def.'s Resp. Br. at 24–27 (citing Decision Mem. for the Prelim. Determination in the [ADD] Investigation of Stainless Steel Sheet & Strip from the [PRC] at 13, A-570–042, (Sept. 9, 2016), *available at* http://ia.ita.doc.gov/frn/summary/prc/2016–22397–1.pdf (last visited Jan. 18, 2019); Circular Welded Carbon-Quality Steel Pipe from Pakistan: Affirmative Prelim. Less Than Fair Value Determination Decision Mem. at 13, A-535–903, (May 31, 2016), *available at* http://ia.ita.doc.gov/frn/summary/pakistan/2016–13481–1.pdf (last visited Jan. 18, 2019)). The determinations Commerce cites in support of its change in practice do not provide an explanation for why the change in practice is reasonable. Each of these determinations simply asserts that a change in practice has occurred.

[17] Trina also argues that the risk of introducing error by including the reported zero-quantities outweighs the possibility that the zero-quantities can be explained by rounding. This argument is not supported by record evidence.

IV. Decision Not to Offset Trina's Net U.S. Selling Expenses by Debt Restructuring Income

Trina challenges Commerce's decision to exclude a debt restructuring line item in calculating TUS's indirect selling expense ratio as not in accordance with law, unsupported by substantial evidence, and arbitrary. *See* Trina Pls.' Br. at 11–14; Pl. Trina's Submission Suppl. Authority Supp. Mot. J. Agency R. at 1–2, Oct. 30, 2018, ECF No. 60 ("Trina Pls.' Suppl. Br."). Defendant argues that Commerce's decision to exclude debt restructuring gains as an offset to respondent's U.S. indirect selling expenses is in accordance with law and supported by substantial evidence. Def.'s Resp. Br. at 29–32; Def.'s Suppl. Br. at 1–3, Nov. 30, 2018, ECF No. 66. For the following reasons, Commerce's determination is sustained.

Commerce's decision to deny the offset was reasonable. The party seeking a favorable adjustment on an expense carries the burden of "demonstrat[ing] to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (explaining that it is the respondent's burden to populate the record with all relevant information). Commerce's practice is to offset only the "current portion of the debt restructuring gain[,]" as to avoid distortions. Final Decision Memo at 26–27 (citing Issues & Decision Mem. for the Final Determination in the [ADD] Investigation of Light-Walled Pipe & Tube from Mexico at 69–70, A-201–832, (Aug. 26, 2004) available at http://ia.ita.doc.gov/frn/summary/mexico/E4–2045–1.pdf (last visited Jan. 18, 2019); Issues & Decision Mem. for [the] Final Results of [ADD] Admin. Review of Certain Preserved Mushroom from India – Feb. 1, 2001, through Jan. 31, 2002 at 19– 21, A-533–813, (July 11, 2003) *available at* http://ia.ita.doc.gov/frn/summary/india/0317627–1.pdf (last visited Jan. 18, 2019); Issues & Decision Mem. for the Final Determination in the [ADD] Investigation of Structural Steel Beams [ ] from South Korea, 65 ITADOC 41,437, (July 5, 2000) at Cmt. 26). Here, TUS's 2015 income statements contained, as a line item, debt restructuring income. Final Decision Memo at 27 (citing Trina's Sec. A Resp. at Ex. A-18, CD 34–110, bar codes 3480957–01–77 (June 24, 2016)). Respondent did not tie the income to the POR by producing, for example, the debt restructuring agreement or placing on the record information that would explain the agreement's terms or information about the maturity of the relevant loans. *See* Final Decision Memo at 26–27. It is reasonable for Commerce to require those seeking an adjustment to tie the offset to a specific POR or period of

investigation ("POI") and it is a respondent's burden to populate the record with the relevant information.

Trina argues that debt restructuring income is a period expense and is properly attributed in its entirety to the period of review during which it is recorded.[18] *See* Trina Pls.' Br. at 12–17; Pl. Trina's Reply Def.'s & Def.-Intervenor's Resps. Trina's Mot. J. Agency R. at 15, July 19, 2018, ECF No. 45 ("Trina's Reply Br."); Trina Pls.' Suppl. Br. at 1–2. Specifically, Trina contends that because Commerce does not parse out indirect expenses into POR and non-POR components and debt restructuring income is an indirect selling expense, Commerce should not have denied respondent's request for an adjustment based on a failure to submit documents linking the debt restructuring income to the POR. *See* Trina Pls.' Suppl. Br. at 1–2 (citing Final Results of Redetermination Pursuant to Court Remand in *Liberty Frozen Foods Pvt. Ltd. v. United States*, 35 CIT __, 791 F. Supp. 2d 1249 (2011) ("*Liberty Remand Results*")). *Liberty Remand Results* addressed how Commerce treats bad debt write-offs within a POR for the purposes of calculating indirect selling expenses. *See generally Liberty Remand Results* at 4–9. Unlike debt restructuring income that can span a prolonged period of time, a bad debt is necessarily tied to a particular fiscal year and therefore Commerce is able to link it to a POR or POI.[19] *Liberty Frozen Foods Pvt. Ltd. v. United States*, 36 CIT __, __, 819 F. Supp. 2d 1346, 1349–50 (2012). The court cannot say Commerce's practice is unreasonable given the nature of debt restructuring income.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's surrogate value selections for valuing respondent's aluminum frames, module glass, and financial ratios are sustained; and it is further

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[18] Trina also contends that the final determinations Commerce cites in support of its practice are incomparable because they address debt restructuring as a financial expense for purposes of calculating the cost of production, and not as part of indirect selling expenses. *See* Trina Pls.' Br. at 12–17; Trina's Reply Br. at 15. It is reasonably discernable that Commerce, to avoid distortions by either overcounting or undercounting, requires parties to demonstrate that the debt restructuring income claimed is tied to a specific POR or POI, notwithstanding what the income offsets.

[19] Trina contends that Commerce's determination is unsupported by substantial evidence because record evidence does not demonstrate that the debt restructuring income was not tied to the relevant POR. Trina Pls.' Br. at 13. Trina's argument misplaces the burden for production of relevant information on Commerce and wrongly presumes that just because debt restructuring income can offset indirect selling expenses it automatically qualifies as an offset. As Commerce explains, although TUS's debt restructuring income "could be considered an offset to indirect selling expenses," Commerce's practice is to require the party seeking the adjustment to substantiate its request by demonstrating that the income is tied to the relevant POR or POI to avoid distortion. Final Decision Memo at 27. The court cannot say that Commerce's practice is unreasonable.

ORDERED that Commerce's decision to include import data with reported quantities of zero in the surrogate value calculations is sustained; and it is further

ORDERED that Commerce's decision to deny an offset for TUS's debt restructuring income is sustained; and it is further

ORDERED that Commerce's decision not to offset the Ex-Im Bank Export Buyer's Credit Program is contrary to law and is remanded to the agency to recalculate Trina's U.S. selling prices; and it is further

ORDERED that Commerce shall file its remand determination 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 determination; and it is further

ORDERED that the parties shall have 30 days thereafter to file a reply to comments on the remand determination.

Dated: January 25, 2019
New York, New York

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

Slip Op. 19–14

AERO RUBBER COMPANY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 15–00174
PUBLIC VERSION

[Denying Defendant's motion to strike.]

Dated: January 29, 2019

William D. Outman, II, of Chevy Chase, Maryland, for Plaintiff, Aero Rubber Company, Inc.

Edward F. Kenny, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office, of New York, New York.

MEMORANDUM AND ORDER

Kelly, Judge:

Before the court is a motion to strike a series of questionnaires and all references to those questionnaires from the record. Mot. to Strike, Apr. 27, 2018, ECF No. 73 ("Def.'s Mot."). Plaintiff, Aero Rubber Company, Inc. ("ARC") filed a response in opposition to the motion. Opp'n Def.'s Mot. to Strike, May 18, 2018, ECF No. 75. For the reasons that follow, the court will disregard the questionnaires, but the motion is denied.

BACKGROUND

This action concerns the classification of an assortment of imported silicone bands that have been molded, contain printed wording or motifs and are larger than wristband size. Compl. ¶ 8, Sept. 15, 2015, ECF No. 8; Mem. Supp. Def.'s Mot. Summary J. at 1, 7, Dec. 22, 2017, ECF No. 45. ARC submitted a collection of questionnaire responses ("the questionnaires") as an exhibit to its memorandum in reply to and further supporting its cross-motion for summary judgment.[1] *See* Pl.'s Ex. 19 (Questionnaires) at 9–77, Apr. 11, 2018, ECF No. 69. ARC prepared the questionnaires during preparation for trial and sent them to a random selection of its customers. Pl.'s Ex. 19 (Decl. and Aff. Paul G. Berlin Sr.) at 2, Apr. 11, 2018, ECF No. 69. The questionnaires ask customers a series of questions regarding the customers' use of

[1] The title of Plaintiff's brief indicates that it also comprises a reply in opposition to Defendant's summary judgment motion. *See* Pl.'s Mem. Reply & Opp'n Def.'s Mot. Summary J. & Supp. Pl.'s Cross-Mot. Summary J., Apr. 11, 2018, ECF No. 66. However, Plaintiff previously responded in opposition to Defendant's summary judgment motion. *See* Pl.'s Mem. Opp'n Def.'s Mot. Summary J. & Supp. Pl.'s Cross-Mot. Summary J., Jan. 29, 2018, ECF No. 53.

the bands and their purpose for ordering bands with printing. *See, e.g.*, Pl.'s Ex. 19 ([[ ]] Questionnaire) at 1–3, July 29, 2015, ECF No. 69. Defendant, the United States, pursuant to United States Court of International Trade ("USCIT") Rule 56(c)(2) and (4), moves to strike all versions of the questionnaires as well as all references to the contents of the questionnaires appearing in ARC's memorandum in reply to and further supporting its cross-motion for summary judgment. Def.'s Mot.; *see also* Pl.'s Mem. Reply & Opp'n Def.'s Mot. Summary J. & Supp. Pl.'s Cross-Mot. Summary J., Apr. 11, 2018, ECF No. 66 (containing references to the questionnaires). Defendant argues that these submissions should be stricken from the record because they are both irrelevant and constitute inadmissible hearsay. Def.'s Mot. at 2.

DISCUSSION

A motion to strike is not the appropriate remedy for an objection pursuant to USCIT Rule 56(c), and Defendant's motion is thus denied. USCIT Rule 12(f), which governs motions to strike, provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Plaintiff submitted the questionnaires not as part of a pleading, but rather as an exhibit to its memorandum in reply to and further supporting its cross-motion for summary judgment. *See* Pl.'s Ex. 19 (Questionnaires) at 9–77, Apr. 11, 2018, ECF No. 69. USCIT Rule 12(f) is thus inapplicable and Defendant's motion to strike is denied.

Moreover, even if the court were to consider Defendant's motion to strike outside the pleading context, Defendant's motion would fail. Although the court possesses broad discretion in deciding motions to strike, *Beker Indus. Corp. v. United States*, 7 CIT 199, 200, 585 F. Supp. 663, 665 (1984), motions to strike are generally not favored and seldomly granted. *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986). Granting such a motion "constitutes an extraordinary remedy" and should happen only "where there has been a flagrant disregard of the rules of court." *Id.* USCIT Rule 1 also guides the analysis, requiring the court to construe, administer, and employ the court's rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Here, no such "flagrant disregard" for the court's rules has occurred, and the court may disregard the questionnaires in deciding the parties' summary judgment motions, avoiding unnecessary cost and delay. USCIT R. 1;

USCIT R. 81(m); *Jimlar Corp.*, 10 CIT at 674, 647 F. Supp. At 935. Striking the described submissions is therefore unnecessary, and Defendant's motion, even if applied outside the pleading context, is unavailing.

Defendant's motion nonetheless contains an evidentiary objection pursuant to USCIT Rule 56(c), arguing that the questionnaires cannot be presented in a form that would be admissible. Rule 56(c)(2) provides that, at the summary judgment stage, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Defendant objects on two grounds, arguing first that the questionnaires are inadmissible because they are irrelevant, and second that they are inadmissible because they constitute hearsay. Def.'s Mot. at 2–4. The court sustains Defendant's relevance objection and does not reach Defendant's hearsay objection.[2]

Irrelevant evidence is not admissible. Fed. R. Evid. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence," and "the fact is of consequence in determining the action." Fed. R. Evid. 401(a) & (b). Here, the questionnaires are irrelevant because they do not pertain to any of the ten bands at issue in this action. The subject of the current action is the proper classification of ten silicone bands, each with unique characteristics. Def.'s Statement of Undisputed Material Facts at ¶ 27, Dec. 26, 2017, ECF No. 52; Pl.'s Statement of Undisputed Material Facts at ¶ 27, Jan. 29, 2018, ECF No. 53; *see also* Mem. Supp. Def.'s Mot. Summary J. at 7–12, Dec. 22, 2017, ECF No. 45; Pl.'s Mem. Opp'n Def.'s Mot. Summary J. & Supp. Pl.'s Cross-Mot. Summary J. at 5–13, Jan. 29, 2018, ECF No. 55. Note 2 to Section VII of the Harmonized Tariff Schedule of the United States ("HTSUS") provides that certain plastic articles that contain printing "not merely incidental to the primary use of the goods" are properly classified under Chapter 49, rather than Chapter 39. The classification analysis must therefore consider the facts pertaining to each individual band in question in order to discern "the primary use of the goods." *Id.* ARC asserts that "[t]he use of the Questionnaires is obviously relevant to the plaintiff's continuing assertion that 'printing is indeed important

[2] Hearsay is an out of court statement offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Hearsay is inadmissible at trial unless otherwise provided for by a federal statute, a Federal Rule of Evidence, or a rule prescribed by the Supreme Court. Fed. R. Evid. 802. The court may nevertheless "consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." *United States v Sterling Footwear, Inc.*, 41 CIT __, __, 279 F. Supp. 3d 1113, 1124–25 (2017) (quoting *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293–94 (11th Cir. 2012) (citation omitted)).

to all of Aero's customers.'" Opp'n Def.'s Mot. Strike at 5, May 18, 2018, ECF No. 75. The wording of Note 2 to Section VII, which is a statutory provision of law, *see* HTSUS, Preface at 1 n.2, USITC Pub. 4833 (2013); *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011), makes clear that the inquiry regarding whether printing is incidental turns on an assessment of the specific merchandise in question, not the feedback of customers who purchased distinct merchandise from the manufacturer. Accordingly, questionnaires providing customer feedback on entirely separate silicone bands do not make any material fact "more or less probable than it would be without the evidence." Fed. R. Evid. 401(a). Defendant's relevance objection is thus sustained, and the court will not consider the questionnaires or the corresponding references to the questionnaires when deciding the parties' motions for summary judgment.

CONCLUSION

The court sustains Defendant's evidentiary objection but denies Defendant's motion to strike. Therefore, in accordance with the foregoing, and upon due deliberation, it is

ORDERED that Defendant's motion is denied.

Dated: January 29, 2019
New York, New York

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

Slip Op. 19–17

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

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

[Remanded for Commerce to reconsider its methodology in determining the all-others rate for the antidumping administrative review at issue.]

Dated: February 1, 2019

Daniel B. Pickard, *Maureen E. Thorson*, and *Stephanie M. Bell*, Wiley, Rein & Fielding, LLP, of Washington, DC, for the plaintiff/defendant intervenor Diamond Sawblades Manufacturers' Coalition.

Gregory S. Menegaz, *James K. Horgan*, and *Alexandra H. Salzman*, deKeiffer & Horgan, PLLC, of Washington, DC, for the consolidated plaintiffs Bosun Tools, Co., Ltd. and Bosun Tools Inc.

Max F. Schutzman, *Andrew B. Schroth*, *Andrew T. Schutz*, *Dharmendra N. Choudhary, Elaine F. Wang*, *Jordan C. Kahn*, and *Ned H. Marshak*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for the defendant-intervenor Weihai Xiangguang Mechanical Industrial Co., Ltd., Ehwa Diamond Industrial Co., Ltd., and General Tool, Inc.

Lizbeth R. Levinson, *Ronald L. Wisla*, and *Brittney R. Powell*, Fox Rothschild LLP, of Washington, DC, for the consolidated plaintiffs Chengdu Huifeng Diamond Tools Co., Ltd., Danyang Huachang Diamond Tools Manufacturing Co., Ltd., Danyang NYCL Tools Manufacturing Co., Ltd., Danyang Weiwang Tools Manufacturing Co., Ltd., Guilin Tebon Superhard Material Co., Ltd., Hangzhou Deer King Industrial and Trading Co., Ltd., Hong Kong Hao Xin International Group Limited, Jiangsu Inter-China Group Corporation, Jiangsu Youhe Tool Manufacturer Co., Ltd., Orient Gain International Limited, Pantos Logistics (HK) Company Limited, Qingyuan Shangtai DiamondTools Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., Rizhao Hein Saw Co., Ltd., Wuhan Wanbang Laser Diamond Tools Co., Zhejiang Wanli Tools Group Co., Ltd., Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., and Jiangsu Fengtai Tools Co., Ltd.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the 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 and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Restani, Judge:

This action is a challenge to the Department of Commerce ("Commerce")'s remand redetermination of the final results of the antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China ("PRC"). Redetermination Pursuant to

Court Remand Order in *Diamond Sawblades Manufacturers' Coalition v. United States*, Consol. Court No. 16–00124, Doc. No. 82 (Aug. 7, 2018) ("Remand Redetermination"). Plaintiffs and Consolidated Plaintiffs oppose Commerce's decision on remand to rescind the administrative review with respect to exporter Weihai Xiangguang Mechanical Industrial Co., Ltd. ("Weihai") and the subsequent use of the rate for the only remaining respondent, Jiangsu Fengtai Diamond Tool Manufacturing Co., Ltd. ("Jiangsu"), as the basis for calculating the all-others rate.[1]

BACKGROUND

The court assumes all parties are familiar with the facts of the case as discussed in *Diamond Sawblades Mfr.'s Coalition v. United States*, 301 F. Supp. 3d 1326 (CIT 2018). For the sake of convenience, the facts relevant to review of Commerce's remand redetermination are summarized below.

This opinion concerns Commerce's fifth periodic review of the antidumping duty order on diamond sawblades and parts thereof from the PRC covering the period of November 1, 2013, to October 31, 2014. 81 Fed. Reg. 38,673 (June 14, 2016) ("Final Results"). In its decision ordering remand, the court directed[2] Commerce to reconsider its decision denying U.S. Importer Robert Bosch Tools Corporation ("Bosch")'s request for withdrawal of its request for review of Weihai.[3] *Diamond Sawblades*, 301 F. Supp. at 1357–59.

In its remand redetermination, Commerce adjusted its freight calculation as instructed by the Court and accepted Bosch's late withdrawal request. Remand Redetermination at 8. As no other requests

[1] The court uses the statutory term "all-others rate," whereas Commerce often refers to the "separate rate" meaning the rate applicable to all unexamined companies, which also are not deemed part of the Chinese government related entity. *See* 19 U.S.C. § 1673d(c)(1)(B)(ii); *see also*, *Thuan An Production Trading and Service Co., Ltd. v. United States*, Slip. Op. 18–152, 2018 WL 5794540, at n. 11 (CIT Nov. 5, 2018) (describing the applicability of the statutory language to administrative reviews).

[2] Relevant to this decision, Commerce requested the court to remand as to the "valuation of self-produced and purchased [Diamond Sawblades ("DSB")] cores in the calculation of Weihai's normal value" and "the margin for the separate rate respondents, as impacted by the foregoing." *Diamond Sawblades*, 301 F. Supp. at 1331. The court also ordered Commerce to more fully address Weihai's arguments concerning the calculation of surrogate truck freight due to an ambiguity regarding whether the term "Bangkok" in a report used by Commerce referred to the Port of Bangkok or the Port of Laem Chabang. *Id.* at 1347–49. On remand, Commerce agreed that the reference was ambiguous and decided to average the distances at issue. Remand Redetermination at 6–8. No party challenges this decision. Because Commerce rescinded the underlying review of Weihai, neither the valuation of Weihai's purchased core issue, nor the calculation of surrogate truck freight as it relates to Weihai's rate were addressed by Commerce on remand. *Id.* at 8.

[3] In this case, the 90-day deadline for withdrawal was March 23, 2015. Bosch did not file its request for withdrawal until April 8, 2015, sixteen days after the deadline and a day after Commerce circulated initial questionnaires. Remand Redetermination at 2–3.

for review of Weihai remained, Commerce rescinded its review of Weihai leaving only a single mandatory respondent–Jiangsu. Jiangsu's rate was then used pursuant to 19 U.S.C. § 1677f-1(c)(2)[4] to set the all-others rate. Because the previous all-others rate had been a weighted average of Weihai and Jiangsu's rate, the final results rate was 29.76% while the remand redetermination rate was 56.67%. Remand Redetermination at 19–20.

Sixteen non-selected separate rate respondents appealed Commerce's decision to rescind Weihai's rate in the calculation of the all-others rate. *See* Consolidated Plaintiffs' Opposition to Commerce's Final Remand Determination, Doc. No. 87 ("Pl. Chengdu Br."). Consolidated Plaintiffs Chengdu ("Chengdu")[5] challenge Commerce's decision on remand to resort to the "reasonableness test" in assessing Bosch's late withdrawal rather than the "extraordinary circumstances test." Pl. Chengdu Br. at 4–8. They argue that the Court of Appeals for the Federal Circuit (CAFC)'s decision in *Glycine*, while factually similar, does not have the same "legal predicate" as Commerce's original determination. *Id.* at 4–5. They argue that Commerce misinterprets how the new regulation 19 C.F.R.§ 351.302(c), adopted since *Glycine*, interacts with the older regulation 19 C.F.R. 351.213(d)(1). *Id.* at 6–7.

Consolidated Plaintiffs Bosun ("Bosun") argue that Commerce's initial selection of only two mandatory respondents and the resulting use of only Jiangsu's rate in setting the all-others rate was unsupported by substantial evidence. Bosun's Comments in Opposition to U.S. Department of Commerce's Remand Redetermination, Doc. No.

[4] An exception to the general rule requiring Commerce to make individual weighted average dumping margin determinations, reads:

> (2) Exception If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) 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. 19 U.S.C. § 1677f-1(c)(2).

[5] Although Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd. and Jiangsu Fengtai Tools Co., Ltd. were consolidated plaintiffs in the initial challenge to this administrative review before the court, they do not oppose Commerce's final remand redetermination. Pl. Chengdu Br. at 1. There are two sets of Consolidated Plaintiffs. One set is made up of the sixteen of eighteen separate rate companies (excluding Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., and Jiangsu Fengtai Tools Co., Ltd.), which the Court will refer to as "Chengdu" after the name of the first-listed of the sixteen companies. The other set of consolidated plaintiffs is made up of two separate rate companies—Bosun Tools, Co., Ltd. and Bosun Tools Inc.—which the court will refer to as "Bosun."

86, 3–7 ("Pl. Bosun Br."). Bosun then proposed several alternatives to using Jiangsu's rate alone, including: use of Weihai's assessed rate despite its review having been rescinded, assigning Bosun its rate from the administrative review immediately prior to the instant review, or calculating an individual rate for Bosun on remand. Pl. Bosun Br. at 8–15. Finally, Bosun argues that an exhaustion bar does not apply as the issue now before the court did not arise until the remand redetermination. *Id.* at 15–17.

In response, the Government and Plaintiffs/Defendant-Intervenors Weihai and Diamond Sawblade Manufacturers' Coalition ("DSMC") argue in support of Commerce's decisions to rescind the review of Weihai and to base the all-others rate on Jiangsu's calculated dumping margin. Defendant's Response to Comments on Remand Redetermination, Doc. No. 89, 5–17 ("Def. Br."); Weihai's Comments in Support of Final Results of Redetermination Pursuant to Court Order, Doc. No 88, 5–9 ("Weihai Br.); Response on Remand of Plaintiff/Defendant-Intervenor DSMC, Doc. No. 90, 6–13 ("DSMC Br."). The Government and Defendant-Intervenors defend Commerce's choice to apply the reasonableness test found in 19 C.F.R. § 351.213(d)(1), instead of the extraordinary circumstances test found in 19 C.F.R.§ 351.302(c), to the withdrawal request as the correct interpretation of its regulations because the former provision concerns the specific instance at hand while the latter is a generally-applicable provision. Def. Br. at 6–8; *see also* Weihai Br. 7–9; DSMC Br. at 7–8. Further, the Government stresses that nothing in 19 C.F.R. § 351.302(c) purports to modify or supersede 19 C.F.R. § 351.213(d)(1). Def. Br. at 8–9. DSMC additionally argues that applying 19 C.F.R.§ 351.302(c) to the instant case would "render[] the final sentence of 19 C.F.R. § 351.213(d)(1) superfluous." DSMC Br. at 7.

The Government argues that Commerce's decision to base the all-others rate on the sole remaining mandatory respondent, Jiangsu, was in accord with its practice and regulations and that Commerce was not required to use Bosun's proposed alternatives. Def. Br. 9–17. Finally, the Government argues that if Bosun wanted an individual examination, it should have sought individual review as a mandatory or voluntary respondent in the underlying administrative review and that any requests for such review now should be rejected. *Id.* at 16–17. DSMC further argues that Bosun failed to exhaust administrative remedies. DSMC Br. at 9–11.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. 1581(c). The court will uphold Commerce's decision in an antidumping review 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. Application of the Reasonableness Test to Withdrawal of Review Requests

The legal landscape of Commerce's choice to apply a reasonableness standard begins with *Glycine & More, Inc., v. United States*. 880 F.3d 1335 (Fed. Cir. 2018). In that case, Baoding Moantong ("Baoding") and GEO Specialty Chemicals Inc. ("GEO") each requested review of an antidumping order on glycine from the PRC. GEO then filed a notice of withdrawal. *Id.* at 1341. Baoding then filed a similar request and a request for extension of time. *Id.* Baoding, however, submitted its notice of withdrawal after the 90-day deadline to withdraw a request for review as established in 19 C.F.R. § 351.213(d)(1).

Commerce denied Baoding's withdrawal pursuant to a 2011 guidance document (which Commerce refers to as a Notice) that stated that such untimely requests would be granted only in "extraordinary circumstances." *Id.* This Notice was not issued through notice and comment rulemaking but was merely an interpretation of 19 C.F.R. § 351.213. *Id.* at 1342, 1345. The CAFC determined that the Notice was an "incompatible departure from the clear meaning of the regulation," which states:

> (d) Rescission of administrative review—
>
> (1) Withdrawal of request for review. The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The *Secretary may extend this time limit if the Secretary decides that it is reasonable* to do so.

19 C.F.R. § 351.213(d)(1)(emphasis added).

Rather than an "extraordinary circumstances test," the CAFC found that the regulation provides Commerce with wide discretion to use a "reasonableness test" in deciding whether to extend a deadline for filing a withdrawal notice. *Glycine*, 880 F.3d at 1345. Thus, the CAFC affirmed this court's decision to remand the issue to Commerce for it to use the reasonableness test. At base, the case stands for the proposition that Commerce cannot "effectively rewrite the substantive meaning of [a regulation] without going through the necessary notice and comment rulemaking." *Id.*

The instant case appears to be very similar to the factual situation in *Glycine*: multiple parties submitted requests for review, all parties withdrew their requests on time save for one who withdrew a few days late, and Commerce similarly denied the withdrawal after applying the extraordinary circumstances test. But here, as Chengdu points out, Commerce initially relied on a regulation passed through notice and comment after *Glycine* that codified the extraordinary circumstances test into section 351.302. *See Diamond Sawblades and Parts Thereof from the People's Republic of China: Denial of a Late Withdrawal of Review Request* A-570–900, P.R. 133 at 3–4 (May 12, 2015). The regulation took effect on October 21, 2013, before the start of this administrative review, and states that "[a]n untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists." 19 C.F.R. § 351.302(c). The notice published alongside the final rule appears to indicate that this regulation applies to all time limits in antidumping and countervailing duty proceedings. 78 Fed. Reg. 57,790, 57,791 (Sept. 20, 2013). Notably, however, the regulation does not specifically mention or modify 19 C.F.R. § 351.213(d).

The parties rely on conflicting canons of statutory interpretation regarding Commerce's choice to apply the reasonableness test found in 19 C.F.R. § 351.213(d). In its brief, Chengdu argues that the two provisions at issue must be read together because subsection 351.302(c) applies to all of section 351. Chengdu Br. at 6–8. By contrast, the Government argues that the more specific regulation–19 C.F.R. § 351.213(d), as it specifically concerns the withdrawal of requests for review–should control. Def. Br. at 7–8.[6]

The court applies the same rules to interpret a regulation as it does to interpret a statute. *See Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). If a regulation is unambiguous, the court enforces the clear terms of the regulation and no attention need be paid to an agency's interpretation. *Id.* If, however, a regulation is ambiguous, then the court defers to an agency's reasonable and well-considered interpretation of its own regulation. *See Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 159 (2012); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal citations omitted).

[6] The court in its first remand decision did not address the potential conflict in regulations but directed a reconsideration of the proper withdrawal standard in the light of *Glycine*. *See Diamond Sawblades*, 301 F. Supp. at 1356–59. On remand, however, Commerce is not applying the reasonableness test under protest, but has now embraced it as the proper test in considering untimely-filed withdrawals of review requests under the more specific regulation 19 C.F.R. § 351.213(d). *See* Remand Redetermination 17–18; Def. Br. at 5–9.

Neither of the regulations at issue clarifies how these two provisions are meant to interact. The Federal Register notices of initiation and the one published alongside the final version of section 351.302 are similarly unavailing. *See* 78 Fed. Reg. 3,367 (Jan. 16, 2013) ("Proposed Rule"); 78 Fed. Reg. 57,790 (Sept. 20, 2013) ("Final Rule"). Without clear guidance, Commerce reasonably decided to apply the regulation it found to be more specific to the issue of a withdrawal of a request for review, 19 C.F.R. § 351.213(d). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (noting that "it is commonplace of statutory construction that the specific governs the general"); *see also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524–26 (1989); *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 444–45 (1987). Additionally, this choice allows Commerce the flexibility to accept a withdrawal prior to conducting a potentially lengthy and resource-intensive review that perhaps no party desires. Commerce's interpretation passes the deferential test established by the Supreme Court. Accordingly, the court sustains Commerce's use of the reasonableness test in addressing untimely withdrawals of requests for review.

The court notes that there is no right not to be subject to review or individual examination. If all parties are content to rely on past rates, Commerce need not conduct a review. *See* 19 U.S.C. § 1675(a). If a review is commenced, permitting withdrawal of previously filed requests for review is purely for the convenience of Commerce and the parties. Commerce need only act with reason. If it decides in the reasonable exercise of its discretion to continue the review or examine particular parties, it may do so whether the parties wish it or not.

II. Whether Commerce's Decision to Rescind Review of Weihai is Supported by Substantial Evidence

As noted above, *Glycine*'s holding does not apply to the initial decision here to use the extraordinary circumstances test. The decision does, however, provide some guidance on what is considered a reasonable withdrawal request that is useful to the court's analysis under the standard now applied. In *Glycine*, the CAFC found that the criteria for determining whether or not it is reasonable to accept a withdrawal "reflects concerns for not wasting departmental resources, for giving parties an opportunity to know the results of prior administrative reviews when applicable, and for not conducting undesired reviews, among other considerations." 880 F.3d at 1340. In this instance, Bosch sought to withdraw its request for review of Weihai shortly after becoming aware that all other parties had withdrawn their requests, the request was made only sixteen days after the time limit lapsed and only a day after receiving the questionnaire,

and Commerce had not yet expended significant resources in conducting the review. Remand Redetermination at 5–6. In other circumstances, these facts might be enough for Commerce to find it reasonable to accept the withdrawal. Here, however, exceptional circumstances make Commerce's decision to rescind Weihai's review, without taking any other action, not reasonable.

This case is *sui generis* for several reasons. On remand Commerce was in the unique position of deciding whether or not to rescind the administrative review of Weihai after it had already completed a full individual examination of Weihai.[7] This is significant, in part, because the resulting rate for Weihai was drastically different from that of the single other selected mandatory respondent, Jiangsu.

This difference should have alerted Commerce that using only Jiangsu's rate in calculating the all-others rate was not likely to result in a rate that reflected a properly selected weighted average rate required to be applied to all other non-examined companies. *See* 19 U.S.C. § 1673d(c)(5).[8] Given the drastic difference between the rates of Jiangsu and Weihai—originally 61.48% and 21.67%, respectively[9] —it was not reasonable for Commerce to rescind the review of Weihai without some other action, such as selecting another mandatory respondent to take its place. *See* Final Results at 38,674. By rescinding Weihai's review Commerce was left with only a single rate that the record showed was not likely representative of an appropriate antidumping duty all-others rate.

Commerce has a duty to calculate a rate to be applied to non-examined parties that is based on some fair sample or large part of the exporter and producer pool. 19 U.S.C. § 1677f 1(c)(2). Because of the peculiarities of this case, Commerce should have known it likely was not making a representative selection and was rather choosing an unreliable rate. Here, the choice to rescind the review of Weihai

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[7] Because Commerce now knows under which standard to assess late withdrawal requests, future cases in which Commerce rescinds a review after having already made a final determination should not occur. Here, however, Commerce cannot ignore evidence that may undermine the purported representativeness of Jiangsu's rate and rely on only that rate in setting the all-others rate.

[8] This section, in relevant part, reads:

> For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title.
> 19 U.S.C. § 1673d(c)(5)(A).

[9] As Bosun also notes, Weihai is the significantly larger exporter of the two which resulted in a weighted average of 29.76% for the all-others rate. Bosun Br. at 8; Diamond Sawblades and Parts Thereof from the PRC: Selection of Respondents for Individual Examination, A-570–900, P.R. 113 at Attach. CBP Data (Apr. 7, 2015).

paired with the decision to not select a substitute mandatory respondent, in the light of the difference in the rates assessed against Weihai and Jiangsu, was not supported by substantial evidence.[10] *See D&L Supply Co. v. U.S.*, 113 F.3d 1220, 1224 (Fed. Cir. 1997) (where circumstances have changed over time, holding that relying "on margins that have been demonstrated to be inaccurate is irrational.").

III. Bosun's Exhaustion of Administrative Remedies

The court is unpersuaded by the failure to exhaust arguments raised by the Government[11] and DSBC. Def. Br. at 16–17; DSMC Br. at 9–11. The relevant statute requires that the court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court concludes that requiring exhaustion in this instance would not have been sensible. Bosun did not have an issue with the selected mandatory respondents, or the resulting all-others rate, until after one of the two mandatory respondent's review was rescinded. To find a failure to exhaust here would require Bosun to predict that a party would object to the inclusion of Weihai after it was already selected as a mandatory respondent; that either Commerce on its own or at the direction of the court would rescind its review; that Commerce would decide not to substitute Weihai with another respondent; and that it would set the all-others rate based solely on Jiangsu's rate. Requiring Bosun to predict that series of events violates basic tenets of notice and fairness.

This case differs from the situation at issue in *Boomerang Tube LLC v. United States*. 856 F.3d 908 (Fed. Cir. 2017). In that case, plaintiffs were on notice prior to the preliminary determination that the concerned data was submitted to Commerce and they had the ability to

[10] Given the relative likelihood that Commerce may have to drop a mandatory respondent's rate when calculating the all-others rate–for example, if the calculated rate is *de minimus* or based entirely on adverse facts pursuant to 19 U.S.C. § 1673d(c)(5)–Commerce's decision to select only two mandatory respondents to review at the onset creates a situation in which this problem is likely to occur. Although a resulting all-others rate based on only a single mandatory respondent may not always be problematic, it increases the likelihood of an unreliable rate and opens Commerce to litigation. *See Soc Trang Seafood Joint Stock Co. v. United States*, 321 F. Supp. 3d 1329, 1346–48 (CIT 2018) (finding that in certain instances determining the all-others rate on the basis of only one mandatory respondent is permissible as "[t]he loss of a respondent does not automatically mean that the resulting all-others rate is not representative.") As noted here, however, the record indicates that the resulting single rate may not be representative of a reasonably accurate dumping margin for all-others.

[11] The Government claims that Commerce is not arguing that Bosun failed to exhaust administrative remedies but that "Bosun's failure to seek individual review as a mandatory or voluntary respondent until its administrative case brief prevented Commerce from acting upon these arguments with the deadlines of the administrative review." Def. Br. at 17. This functionally amounts to a failure to exhaust argument and so the court treats it as such.

object to its potential use. *Id.* at 913. Here, in contrast, it was not until after the final results were issued, the issue was appealed and remanded, and Commerce had made its remand redetermination that Bosun was made aware that Commerce would only be utilizing Jiangsu's rate in determining the all-others rate. Bosun would have had to address the issue long before it was ripe or even knowable. Because that is impractical, the court will not require it.

CONCLUSION

For the foregoing reasons, the court concludes Commerce's decision to use only Jiangsu's rate in setting the all-others rate was not supported by substantial evidence. The court sees nothing in the record to support the choice of Jiangsu's rate as an appropriate all-others rate but does not preclude Commerce from choosing it if it has such evidence. Accordingly, the court remands the matter to Commerce to withdraw the rescission of review as to Weihai;[12] choose a suitable substitute mandatory respondent; or use any other record evidence to devise a fair, equitable, and reasonably accurate all-others rate.[13] If Commerce does not reopen the record, it shall file its remand redetermination with the court within 60 days of this date and all other parties shall have 30 days thereafter to file comments on the remand redetermination. If Commerce decides to reopen the record, it shall advise the court of the schedule needed for its redetermination.

Dated: February 1, 2019
New York, New York

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

[12] If Commerce withdraws its recision of the review as to Weihai, it would be required to make appropriate adjustments in line with the court's previous remand order regarding the valuation of Weihai's self-produced steel cores and the calculation of surrogate truck freight. *See Diamond Sawblades* , 301 F. Supp. at 1330, 1347–49.

[13] The concern here is inaccuracy and therefore unfairness to the non-examined parties. Jiangsu no doubt prefers its competitors to receive the same rate as it does. It is not entitled to such relief. Weihai might have received a very beneficial rate if eliminated from the review but it is not unfair to give it a rate based on its own data. There is the possibility of calculating a rate to be used based on Weihai's data but still permitting it to withdraw from the review. That peculiar remedy has not been considered by Commerce. The court leaves it to Commerce to select the remedy in the first instance bearing in mind fairness to all parties and the need to avoid unintended competitive benefits among the foreign parties.

Slip Op. 19–18

DECKERS CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.

Consolidated
Court No. 02–00730

[Upon classification of additional *Teva*® footwear, summary judgment for the defendant.]

Dated: February 4, 2019

Patrick D. Gill, Rode & Qualey, New York, NY, for the plaintiff.
Marcella Powell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY; *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Amy M. Rubin*, Assistant Director, and *Michael Heydrich*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge:

The above-named, determined plaintiff seeks yet again in this duly-certified test case to rectify errors it believes have occurred in prior decisions of this court and its court of appeals all *sub nom*. *Deckers Corp. v. United States*, 29 CIT 1481, 414 F.Supp.2d 1252 (2005); 31 CIT 1367, *aff'd*, 532 F.3d 1312 (Fed.Cir. 2008)("*Deckers I*"); and 37 CIT ____ (2013), *aff'd*, 752 F.3d 949 (Fed.Cir. 2014), *reh'g en banc denied* (July 9, 2014)("*Deckers II*"). The crux of plaintiff's continuing complaint is U.S. Customs Service classification of its *Teva*® sandals under HTSUS subheading 6404.19.35 (2001), to wit

6404	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials:
	Footwear with outer soles of rubber or plastics:
6404.19	Other:
	Footwear with open toes or open heels;...
6404.19.35	Other:.....

in lieu of its preferred subheading

6404.11	Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like[.]

In depicting an image of plaintiff's sandals at issue in slip opinion 05–159, 29 CIT at 1486, 414 F.Supp.2d at 1256, this court came to conclude that the defendant's motion for summary judgment could not be granted, whereupon a full and fair trial of the matter ensued in a courthouse of the U.S. District Court for the Middle District of California. While plaintiff's presentment there was most impressive

as a matter of fact, it did not prevail as a matter of law, as reported in *Deckers I*, *supra*.

The matter of classification of other *Teva*® styles having been suspended under that test case, the plaintiff removed a number from the CIT suspension calendar to constitute a second test case, which became *Deckers II*, albeit with the same litigated result as the initial action.

I

Not content with those decisions, and given its right per *United States v. Stone & Downer Co*., 274 U.S. 225, 235–26 (1927), still other docketed *Teva*® styles now constitute the foundation of this third test case *sub nom*. *Pretty Rugged, Trail Raptor, Road Raptor, Vector, Terra Fi, Universal Approach,* and *Universal Guide*.

Whatever their names and stylistic nuances[1], the defendant has reacted with another motion for summary judgment, which plaintiff's persistent counsel in a submission dated January 17, 2019 demands "must be resolved before, and if, this case goes to trial." Jurisdiction continues pursuant to 28 U.S.C. §§ 1581(a) and 2631(a).

A

The parties' papers filed herein indicate certain disagreement over the extent which the articles' toes and/or heels are "open" and also disagreement over the extent to which toes and/or heels and/or feet are "enclosed" and "secured", but the salient points of agreement suffice for purposes of summary judgment.

The plaintiff commenced this action to press its position of clear error in *Deckers I* and *Deckers II* in the hope of *en banc* review by the Federal Circuit. It argues such error lies in that court's *ejusdem generis* analysis of the subheading 6404.11, *supra*, in *Deckers I* and that the error has been perpetuated in *Deckers II*. The plaintiff further argues that a trial is necessary because it "seeks to present evidence that will establish clear error in both the factual and legal conclusion in *Deckers I* and *Deckers II*" and that, "[i]f the motion for summary judgment is now granted, Deckers would be denied the opportunity to present its evidence to establish clear error in the prior decision that no footwear can be classified in tariff subheading 6404.11 unless that footwear has a fully enclosed upper". Summarizing, plaintiff's opposition to defendant's motion for summary judgment is that the motion is premature because there are outstanding motions to compel discovery filed by both parties.

[1] Plaintiff's position is that its two *Raptors* are "running shoes" and that the other named styles are "training shoes". *See* complaint, paras. 13 and 14.

In particular, the plaintiff would compel the defendant to expand on the statement of the government's expert witness in *Deckers II* that "some training shoes have openings in the uppers and are used for training shoes" and to identify evidence that the common and commercial meaning of "training shoes" requires in *all* cases that training shoes must have enclosed uppers. Plaintiff's posture does not, however, excuse it with respect to its own lack of response to defendant's motion to compel, pursuant to which the latter seeks elaboration of "all facts" that support allegations in the complaint that the imported merchandise is athletic footwear (running shoes and training shoes), that they are used as such, that it is "understood" in the footwear trade and by users of training shoes that certain types can and do have openings in their uppers, and that open uppers on training shoes are no bar to their use as such, and also seeking discovery of any plaintiff witness.

By rule, a party opposing summary judgment because "it cannot present facts essential to justify its opposition" can ask the court to defer consideration of or to deny the motion while it conducts additional discovery. USCIT Rule 56(d); *Baron Services, Inc. v. Media Weather Innovations LLC*, 717 F.3d 907 (Fed.Cir. 2013). The party requesting relief pursuant to that rule must "state with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials would help him in opposing summary judgment." *Simmons Oil Corp. v. Tesoro Petroleum Corp*., 86 F.3d 1138, 1144 (Fed.Cir. 1996) (addressing parallel Rule 56(d) of the Federal Rules of Civil Procedure and quoting *Krim v. BancTexas Group, Inc*., 989 F.2d 1435, 1143 (5th Cir. 1993)). Failure to comply with that rule can result in denial of the request and an adverse decision on summary judgment. *See, e.g*., *Kallal v. CIBA Vision Corp*., 779 F.3d 443, 447 (7th Cir. 2015).

In the significant length of time purposely afforded this third test case to lie fallow following submission of defendant's reply brief in support of its motion for summary judgment, the plaintiff has not submitted anything to supplement its position, and it has not identified any fact witness in support of its "additional" averments in its opposition to defendant's motion for summary judgment. Plaintiff's sole witness supporting that opposition is its purported expert, Dr. Geoffrey Gray.[2] But, he cannot shed much light on the meaning of

[2] The defendant notes that it would move to preclude Dr. Gray under Federal Rule of Evidence 702 and *Daubert v. Merrill Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), on the ground that the testing he performed was not based on reliable scientific principles and methods and therefore its results did not have indicia of accuracy:

subheading 6404.11, *supra*, as he only tested one style of sandal at issue using a proprietary protocol or testing method that has never been subject to peer review. *See* Def's Ex. 8 ("Gray Dep.") at 27:16–28:9. Dr. Gray did not (and could not) attribute his test results to the remaining styles at issue. "Conclusory expert assertions cannot raise issues of material fact on summary judgment." *Strick v. Dreamworks, LLC*, 516 F.3d 993, 1001 (Fed.Cir. 2008). Moreover, Dr. Gray appears to have cast doubt on the reliability of those test results when he acknowledged that one test of one sample did not yield results that were adequately accurate for inclusion in his database as representative of a training shoe. *See* Def's Ex. 8 at 40:14–41:21.

With regard to the timing of defendant's summary judgment motion, the plaintiff contends that the matters covered by its motion to compel are critical to the way in which it would present its case. The plaintiff, however, has not made any effort to comply with USCIT Rule 56(d), nor has it filed a motion seeking relief under that rule. Additionally, it has not specified the factual information it hopes to obtain through its motion to compel and how that information would raise a genuine issue of fact that would justify a trial. Plaintiff's vague assertion that it needs additional discovery is insufficient to establish that this action is not now ripe for summary judgment.

As similarly intimated in a case concerning "Ugg Boots", *Deckers Corp. v. United States*, 714 F.3d 1363 (Fed.Cir. 2013), the plaintiff herein has been afforded "ample opportunity", via opposition to defendant's summary judgment motion, to submit evidence with respect to interpretation of the term "and the like" in subheading 6404.11, HTSUS, and the operative language of that provision in its opposition to the defendant's summary judgment motion. The plaintiff in that case raised the same "need for trial" argument before the Federal Circuit, which was rejected. That is, the plaintiff therein asserted that the trial court had erred in classifying the imported boots as "footwear of the slip-on type" under subheading 6404.19.35, HTSUS. It argued, among other things, that that court had improperly decided the issue on summary judgment. According to that plaintiff, a

> We also intend to move to preclude Dr. Gray on the grounds that his opinion is irrelevant and inaccurate as applied to the sandals at issue. For example, in his report, Dr. Gray sets forth the criteria that he believes are inherent in training shoes such as stability in the sagittal plane (fore-aft movement). *See* Plaintiff's Expert Report of Dr. Geoffrey Gray ¶10. The evidence in the *Deckers I* trial, however, established that there was insufficient restriction on the fore-aft movement of the foot. During the trial, Deckers' counsel asked Dr. Joseph Hamill, defendant's fact witness, to don a *Teva*® sandal and kick a wall. When Dr. Hamill's foot struck the wall, it slid off of the footbed of the sandal causing injury to his toe.
>
> Def's Reply at 9 n.4.

trial was necessary, as it would have permitted testimony from industry witnesses. The court of appeals, however, affirmed the trial court's decision in all respects.

In doing so, the Federal Circuit reasoned that "[t]here were no genuine issues of material fact regarding the salient characteristics" of the subject boots. 714 F.3d at 1371. The panel then held that the "resolution of the parties' dispute centered on the meaning of the term 'footwear of the slip-on type,' a question of statutory interpretation." *Id*., citing *Bausch & Lomb v. United States*, 148 F.3d 1363, 1365 (Fed.Cir. 1998). According to the appellate decision, the plaintiff "had ample opportunity to submit evidence regarding the common understanding of the term 'footwear of the slip-on type' when it submitted its opposition to the government's motion for summary judgment." *Id*. at 1372. The court noted that the plaintiff did not identify any purported industry witnesses or offer any affidavits or declarations from such witnesses when it was before the trial court. *Id.* "Deckers' unsupported assertion that unnamed industry witnesses would have testified that the footwear industry does not consider a boot to be a 'slip-on' is too speculative to raise any genuine issue of material fact." *Id*.

In a further effort to persuade that trial is necessary herein, the plaintiff argues that if it is not permitted to present evidence at trial, "the result would be to effectively nullify the Supreme Court's holding in *Stone & Downer*." The plaintiff reads too much into that decision; it established the principle that there is no bar to relitigation over the same merchandise by the same parties, but it did not address whether relitgation is to be disposed of by summary judgment or by trial. The plaintiff is permitted to relitigate the classification of its sandals in this court, but in order to obtain trial it must come forward with a genuine issue of material fact.

Towards that end, the plaintiff asserts that trial is necessary because in *Deckers II* the defendant's expert witness "declared under penalty of perjury" that "some training shoes have openings in the uppers and are used as training shoes". "Openings in the uppers", however, do not, necessarily, mean "open uppers", and plaintiff's attempt to portray Dr. Joseph Hamill's statement as inconsistent with *Deckers I* and *Deckers II* is therefore unpersuasive. *See, e.g*., Def's answer, para. 27 (Dr. Hamill's complete statement):

> Some training shoes have openings in the uppers and are used as training shoes if they have the characteristics appropriate for a training shoe. The *Teva Sport Sandals* do not qualify as such as previously described.

In other words, as the defendant contends, shoes that have "openings in the uppers" (*e.g.*, small holes for breathability) can be used as training shoes provided that they have the characteristics of such shoes, including an enclosed upper, and this court concurs that Dr. Hamill's statement cannot be interpreted as inconsistent with *Deckers I* and *Deckers II*.

The appropriate opportunity for the plaintiff to present its interpretation of the HTSUS provision at issue is in opposition to defendant's motion for summary judgment, not at another trial. Plaintiff's motion to compel discovery can therefore be, and it hereby is, denied, and defendant's motion to compel discovery is therefore hereby denied as moot.

B

In affirming the judgment in *Deckers II*, the Federal Circuit held that construction of a customs classification provision by a panel of that court is binding upon both this court and other circuit panels in subsequent classification cases involving the same heading or subheading. 752 F.3d at 966. In that case, the court of appeals made clear that *stare decisis* governs the classification of the subject sandals. "Deckers I provides a binding construction of subheading 6404.11 such that any merchandise classified into that subheading must include 'enclosed uppers.'" 752 F.3d at 959. This court does not have the authority to go beyond that binding legal interpretation in this case unilaterally. *Id*. at 966. "Only through an *en banc* opinion, intervening Supreme Court precedent, or a change in the underlying statute by Congress can we deviate from our prior construction through a showing of clear error." *Id*. The Supreme Court has not issued an intervening decision that implicates the issues in this renewed test case, and Congress has not enacted any relevant legislation. Therefore, plaintiff's only avenue for removing this matter from the ambit of *stare decisis* is through proof of clear error in this court to preserve the issue for potential *en banc* review on appeal.

The plaintiff argues that the *ejusdem generis* analysis of subheading 6404.11 in *Deckers I* was clearly erroneous. According to it, the scope of the term "and the like" in that subheading "may be a legal determination" but "what those essential characteristics are is a factual determination which must be made by the trial court." It contends that this court did not make any factual findings regarding the scope of that tariff term. Based on that proposition, it further contends that the appellate panel made an improper factual finding when it held that the "'evidence adduced at trial established that the

fundamental feature *that the exemplars share* is the design, specifically the enclosed upper . . . [emphasis in original].'" Pl's Opp. at 5. The plaintiff concludes that the Federal Circuit improperly "substituted its own factual findings for the factual findings of the trial court." *Id*.

Plaintiff's argument seems to misconstrue the Federal Circuit's standard of review and the doctrine of *ejusdem generis*, and its papers do not refer to any evidence that would demonstrate that *Deckers I* and *Deckers II* are clearly erroneous. Unlike the record in *Deckers I* and *Deckers II*, the factual record here is skeletal. Plaintiffs' sole identified witness is a purported expert who only tested one style of sandal at issue and admitted that the resultant data were not sufficiently accurate to include in his company's database. Additionally, the expert could not shed any light on the other named exemplars in subheading 6404.11, HTSUS.

Because there are no genuine issues of material fact regarding the nature of the merchandise, this third, arguably repetitive, test case re-presents a purely legal issue, namely, interpretation of the operative language of subheadings 6404.11.80 and 6404.11.90 ("tennis shoes, basketball shoes, gym shoes, training shoes and the like"). In *Deckers I* and *Deckers II*, the issue on appeal was the propriety of affirming Customs' classification of the subject sandals in subheading 6404.19.35, HTSUS. But, the meaning of a tariff provision is a question of law, which the Federal Circuit reviews *de novo*. *E.g*., *Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed.Cir. 1992). No deference is accorded to this court's decisions on appeal regarding the proper scope of a tariff provision. *Id*.

Under the rule of *ejusdem generis* ("of the same kind"), where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to articles of the same kind as the specified articles. In classification cases, the principle of *ejusdem generis* requires that the imported merchandise possess the same essential characteristics or purposes that unite the specific enumerated articles to be classified under the general word or phrase. *E.g*., *Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1292 (Fed.Cir. 2008). To determine the essential characteristic, courts can consider attributes such as the purpose, character, material, design, and texture. *See, e.g*., *United States v. Danmak Trading Co*., 43 CCPA 77 (1956). In accordance with its standard of review, the Federal Circuit interpreted, *de novo*, the tariff term "and the like" in subheading 6404.11, HTSUS.

The plaintiff alleges clear error in *Deckers I*, but it does not cite any

case to support its proposition that *ejusdem generis* analysis requires a factual finding by a trial court, or that the Federal Circuit cannot perform such analysis *de novo*. The interpretation of a statute is a question of law, and *ejusdem generis* is used by courts to assist in answering that question. The court of appeals in *Deckers I* analyzed each of the named exemplars in subheading 6404.11, HTSUS, based on the facts that were in the record made before this court. It then held that an enclosed upper is the unifying characteristic of the exemplars in that subheading. Plaintiff's repeated position does not persuade now that the Federal Circuit's *ejusdem generis* analysis was clearly erroneous or otherwise improper.

C

In short, this matter is ripe for summary judgment. And the defendant is entitled to it as a matter of law.

In classification cases, summary judgment is appropriate when there is no dispute as to the "nature" of the merchandise at issue, and the only issue is the meaning and scope of a tariff provision. *E.g.*, *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1372 (Fed.Cir. 2009); *Intercontinental Marble Corp. v. United States*, 381 F.3d 1169, 1173 (Fed.Cir. 2004); *Bausch & Lomb*, *supra*; *The Pomeroy Collection, Ltd. v. United States*, 35 CIT 761, 763, 783 F.Supp.2d 1257, 1260 (2011). *See also Deckers Corp.*, *supra*, 714 F.3d at 1371. The record evidence here is unequivocal: all of the material facts necessary to determine the classification of the sandals at issue are already before the court.

They continue to be classifiable under subheading 6404.19.35, *supra*, as a matter of law because they have open toes and/or open heels, as considered in the previous *Decker* opinions, and as the parties at bar know. Samples of five of the styles of sandals at issue have been filed with the court, and the defendant has also submitted photographs of all seven at issue. Additionally, the defendant does not dispute the facts that were established at trial in Deckers I and set forth in this court's decision. The articles are therefore classifiable under subheading 6404.19.35, HTSUS.

The record further shows that the subject sandals cannot be classified under subheadings 6404.11.80 or 6404.11.90, HTSUS, as a matter of law, because the Federal Circuit has held that the operative language of those tariff provisions, "tennis shoes, basketball shoes, gym shoes, training shoes and the like", encompasses shoes with enclosed uppers. This court is bound by that court's interpretation, and, undeniably, the sandals at issue do not have enclosed uppers.

The classification of five of the seven styles of sandals at issue were

previously addressed in *Deckers II*. The plaintiff here does not point to any material facts in the record regarding the "nature" of those sandals that would call for a different result or would be in addition to those addressed in Deckers II. Finally, the plaintiff does not show or persuade that there are any material differences with respect to the remaining two styles, which were not at issue in *Deckers II*, that would call for a different result with respect to them. For that matter, as mentioned, in its motions to suspend the instant matter, first under test case No. 02–00674 and then under test case No. 02–00732, the plaintiff represented that the disposition of its merchandise would be facilitated by such suspensions because the test case(s) involved the same class or kind of goods and the same claims, making it clear that the sandals in this instant action entail the same issues of law and fact. Inasmuch as the facts relating to the "nature" of the merchandise are undisputed and are already on the record, all the evidence necessary to determine the proper classification of the sandals at issue is before the court.

II

In sum, the evidence already of record establishes that plaintiff's *Pretty Rugged, Trail Raptor, Road Raptor, Vector, Terra Fi, Universal Approach,* and *Universal Guide* are correctly classifiable under subheading 6404.19.35, HTSUS, and judgment to that effect will therefore enter accordingly.

So ordered.

Dated: February 4, 2019
New York, New York

/s Thomas J. Aquilino, Jr.
SENIOR JUDGE