U.S. Court of International Trade

Slip Op. 19–83

THUAN AN PRODUCTION TRADING AND SERVICE CO., LTD. and GOLDEN QUALITY SEAFOOD CORPORATION, Plaintiff and Consolidated Plaintiff, v. UNITED STATES, Defendant. and CATFISH FARMERS of AMERICA et al., Defendant-Intervenors and Consolidated Defendant Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00056

[Sustaining the U.S. Department of Commerce's redetermination.]

Dated: July 8, 2019

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, for plaintiff Thuan An Production Trading and Service Co., Ltd.

Andrew Brehm Schroth, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Hong Kong, S.A.R., and *Jordan Charles Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, for consolidated plaintiff Golden Quality Seafood Corporation.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel was *Kristen McCannon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jonathan M. Zielinski and *James R. Cannon, Jr.* of Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenors and consolidated defendant-intervenors Catfish Farmers of America; America's Catch; Alabama Catfish Inc.; Consolidated Catfish Companies LLC; Delta Pride Catfish, Inc.; Guidry's Catfish, Inc.; Heartland Catfish Company; Magnolia Processing, Inc.; Simmons Farm Raised Catfish, Inc.

OPINION

Kelly, Judge:

before the court is the U.S. Department of Commerce's ("Commerce" or "the Department") remand redetermination pursuant to the court's decision in *Thuan An Production Trading and Service Co., Ltd. v. United States*, 42 CIT __, 348 F. Supp. 3d 1340 (2018) ("*Thuan An*"). *See* Final Results of Redetermination Pursuant to *Thuan An Production Trading and Service Co., Ltd. v. United States*, Consol. Court No. 17-00056 (November 5, 2018), Apr. 1, 2019, ECF No. 74–1 ("*Remand Results*"). In *Thuan An*, the court remanded Commerce's assignment of the Vietnam-wide rate to Thuan An Production Trading and Service Co., Ltd. ("Tafishco") in the twelfth administrative review of the antidumping duty ("ADD") order covering certain frozen

fish fillets from the Socialist Republic of Vietnam ("Vietnam"). *See Thuan An*, 42 CIT at __, 348 F. Supp. 3d at 1354–55; *see also Certain Frozen Fish Fillets from [Vietnam]*, 82 Fed. Reg. 15,181 (Dep't Commerce Mar. 27, 2017) (final results and partial rescission of [ADD] administrative review; 2014–2015) ("*Final Results*") and accompanying Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Memorandum for the Final Results of the Twelfth [ADD] Administrative Review; 2014–2015, A-552–801, (Mar. 20, 2017), ECF No. 25–2 ("Final Decision Memo"). Specifically, although the court confirmed that "Commerce may apply a statutorily authorized rate" to a nonmarket economy ("NME") entity, the court rejected Commerce's application of something called "a single country-wide rate," *Thuan An*, 42 CIT at __, 348 F. Supp. 3d at 1348 (quoting Def.'s Resp. Pls.' Mots. J. Agency R. at 12, Apr. 20, 2018, ECF No. 55), a rate that is not an individual rate or an all-others rate. *Id.*, 42 CIT at __, 348 F. Supp. 3d at 1347 (citing Def.'s Supplemental Br. Resp. Ct.'s July 25, 2018 Order at 1, Aug. 30, 2018, ECF No. 67 ("Def.'s Supplemental Br.")). The court therefore found Commerce's asserted legal authority for the Vietnam-wide rate contrary to law. On remand, Commerce reconsidered its authority to impose an NME-entity rate and "acknowledges that the NME-entity rate in the underlying investigation was an individually investigated rate." *Remand Results* at 5. Because Commerce complied with the court's order in *Thuan An* and its determination is in accordance with law, the court sustains Commerce's *Remand Results*.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinion ordering remand to Commerce and now recounts the facts relevant to the court's review of the *Remand Results*. *See Thuan An*, 42 CIT at __, 348 F. Supp. 3d at 1343–45. On March 27, 2017, Commerce published the final results of the twelfth administrative review of the ADD order covering certain frozen fish fillets from Vietnam. *See Final Results*, 82 Fed. Reg. 15,181. Commerce determined, *inter alia*, that mandatory respondents Tafishco and Golden Quality Seafood Corporation ("Golden Quality") failed to demonstrate eligibility for a separate rate,[1] and Commerce assigned both

[1] For NME countries, Commerce employs a rebuttable presumption that all companies within the NME are subject to government control and should therefore be assigned a single antidumping rate. *See Certain Frozen Fish Fillets from [Vietnam]*, 81 Fed. Reg. 64,131 (Dep't Commerce Sept. 19, 2016) (preliminary results and partial rescission of the [ADD] administrative review; 2014–2015) ("*Preliminary Results*") and accompanying Certain Frozen Fish Fillets from [Vietnam]: Decision Memorandum for the Preliminary Results of the 2014–2015 [ADD] Administrative Review at 7, A-552–801, (Sept. 6, 2016), available at

respondents the Vietnam-wide rate of $2.39 per kg.[2] Final Decision Memo at 11,15; *see also Final Results*, 82. Fed. Reg. at 15,182.

Tafishco and Golden Quality commenced separate actions pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[3] before this court, which were later consolidated. *See* Summons, Mar. 31, 2017, ECF No. 1; Compl., Apr. 5, 2017, ECF 8; Order, July 26, 2017, ECF No. 28 (consolidating Court No. 17–00056, Court No. 17–00087, and Court No. 17–00088 under Court No. 1700056).[4] Tafishco argued, *inter alia*, that Commerce lacked statutory authority to issue the Vietnam-wide NME rate in the twelfth administrative review. *See* Mem. Law Supp. Pl.[']s Rule 56.2 Mot. J. Agency R. at 3–7, Nov. 16, 2017, ECF No. 42 ("Tafishco's Br."). Tafishco contended that 19 U.S.C. § 1673d only contemplates two types of rates, and that the Vietnam-wide rate applied by Commerce was not a rate authorized by statute. *Id.* Defendant, the United States, argued that the Vietnam-wide rate was lawful because Commerce has authority to establish a third type of rate, i.e., an NME-

https://enforcement.trade.gov/frn/summary/vietnam/2016–22386–1.pdf (last visited July 2, 2019) ("Preliminary Decision Memo"). Commerce considers Vietnam an NME country, and treated it as such for this review. Preliminary Decision Memo at 6. Commerce's policy is to assign all exporters of the subject merchandise in the NME country a single rate, unless the exporter can prove its independence from the government. *Id.* at 7; *see also* 19 C.F.R. § 351.107(d). Here, Commerce found that Tafishco and Golden Quality failed to qualify for a separate rate because they opted not to participate in the review. *See* Preliminary Decision Memo at 1; Final Decision Memo at 11. Although Golden Quality submitted a separate-rate certification, Commerce found that Golden Quality's decision not to participate in the review precluded the granting of a separate rate. *See* Final Decision Memo at 14 (quoting *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 60,356, 60,358 (Dep't Commerce Oct. 6, 2015)).

[2] The current Vietnam-wide entity rate was established in the final results of the tenth administrative review. *See Certain Frozen Fish Fillets from [Vietnam]*, 79 Fed. Reg. 40,059 (Dep't Commerce July 11, 2014) (preliminary results of the [ADD] administrative review; 2012–2013) and accompanying Certain Frozen Fish Fillets from [Vietnam]: Decision Mem. for the Prelim. Results of the 2012–2013 [ADD] Administrative Review at 8–12, A-552–801, (July 2, 2014), *available at* https://enforcement.trade.gov/frn/summary/vietnam/2014–16311–1.pdf (last visited July 2, 2019) ("AR10 Preliminary IDM") (unchanged in final determination). There, Commerce found that the Vietnam-wide entity failed to cooperate to the best of its ability with the investigation and assigned the Vietnam-wide entity a rate based on total adverse facts available ("AFA"). AR10 Preliminary IDM at 8–11. Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b); 19 C.F.R. § 351.308(a)–(c).

[3] 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.

[4] Court No. 17–00087 was later severed and stayed. *See* Memorandum and Order, Nov. 14, 2017, ECF No. 40.

entity rate or country-wide rate, pursuant to 19 C.F.R. § 351.107(d),[5] and that Commerce does not view this country-wide rate as either an individual rate or an all-others rate. *See* Def.'s Supplemental Br. at 2 (citing 19 C.F.R. § 351.107(d) and *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)); *see also* 19 U.S.C. § 1673d(c).

The court remanded the matter, holding that on the legal grounds proffered by the Department, Commerce's assignment of the Vietnam-wide rate to Tafishco was contrary to law. *Thuan An*, 42 CIT at __, 348 F. Supp. 3d at 1347–51, 1354–55. The court explained that because Commerce asserted that the Vietnam-wide rate applied was something other than one of the two statutorily authorized rates, Commerce's determination could not stand. *Id.* at 1347. The court specifically noted that its holding had no effect on Commerce's ability to assign a single dumping margin to all entities in an NME country, so long as the rate assigned is one authorized by statute. *Id.* at 1347–48.

On remand, Commerce maintains that it has statutory authority pursuant to 19 U.S.C. § 1675(a) to assign the Vietnam-wide rate to Tafishco in this review. *Remand Results* at 1. Nonetheless, Commerce now "acknowledges that the NME-entity rate in the underlying investigation was an individually investigated rate." *Id.* at 5. Further, Commerce explains that the Vietnam-wide rate was set in the original antidumping investigation using facts available with an adverse inference, that it was revised in the tenth administrative review when Commerce reviewed the NME entity, and that it was this rate that Commerce applied to Tafishco. *Id.* at 5–6, 8.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review actions contesting the final determination in an administrative review of an ADD order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

[5] 19 C.F.R. § 351.107(d) pertains to "Rates in antidumping proceedings involving [NME] countries," and provides that "[i]n an antidumping proceeding involving imports from a [NME] country, 'rates' may consist of a single dumping margin applicable to all exporters and producers."

DISCUSSION

On remand, Commerce maintains that it has statutory authority to apply the Vietnam-wide rate to Tafishco. *Remand Results* at 1–2. Golden Quality argues that Commerce's remand redetermination does not comply with the court's instruction in *Thuan An* and should thus be remanded because Commerce acknowledges that the Vietnam-wide rate assigned in the twelfth administrative review "was neither an individual rate nor an all others rate," but rather "a rate calculated for the Vietnam-wide entity years ago in the tenth administrative review and carried forward" to the twelfth review. Consol. Pl.'s Comments on Commerce's Remand Redetermination at 1–2, May 1, 2019, ECF No. 77 ("Golden Quality's Comments"). For the reasons that follow, Commerce's *Remand Results* comply with the court's order in *Thuan An*, are in accordance with law, and are thus sustained.

When Commerce makes a final determination that subject merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the International Trade Commission finds that the domestic industry is being injured or threatened with injury as a result of the dumping, Commerce imposes an ADD. *See* 19 U.S.C. § 1673d(c)(2). Upon an affirmative determination of dumping, the statute requires that Commerce "determine the estimated weighted average dumping margin for each exporter or producer individually investigated," and determine an "estimated all-others rate for all exporters and producers not individually investigated." 19 U.S.C. § 1673d(c). The statute thus contemplates two types of rates: rates for producers and exporters individually investigated, and the all-others rate for producers and exporters not individually investigated.

Previously, Commerce had not "stated expressly under what provision . . . the NME entity-wide rate was authorized." *Remand Results* at 5; *see also* Final Decision Memo. Commerce's regulations provide that in ADD proceedings involving an NME country, "'rates' may consist of a single dumping margin applicable to all exporters and producers." 19 C.F.R. § 351.107(d). Commerce assigns all producers and exporters from the NME country a single rate, unless a company demonstrates its independence from the state. *See Remand Results* at 2; *see also Sigma Corp. v. United States*, 117 F.3d 1401, 1405– 06 (Fed. Cir. 1997) (upholding Commerce's application of a rebuttable presumption of state control in NME proceedings).

In this case, when asked specifically by the court whether the rate was either an individually investigated rate or an all-others rate, Defendant answered that Commerce "does not treat the Vietnam-wide rate as an individual rate or as an 'all-others' rate." Def.'s

Supplemental Br. at 1. The court explained in *Thuan An* that although Commerce "has broad authority to interpret the antidumping statute and devise procedures to carry out the statutory mandate," it must reasonably ground its actions in statutory authority. *Thuan An*, 42 CIT at __, 348 F. Supp. at 1351 (quoting *Sigma Corp.*, 117 F.3d at 1405).

On remand, Commerce "acknowledges that the NME-entity rate in the underlying investigation was an individually investigated rate." *Remand Results* at 5. Commerce's explanation complies with the court's order in *Thuan An*. Characterizing the Vietnam-wide rate as an individually investigated rate reasonably grounds Commerce's determination in statutory authority. *See* 19 U.S.C. § 1673d(c). The rate was originally determined in the final determination of Commerce's less than fair value investigation, during which Commerce "individually investigated" the Vietnam entity.[6] *See Certain Frozen Fish Fillets from [Vietnam]*, 68 Fed. Reg. 37,116 (Dep't Commerce June 23, 2003) (notice of final [ADD] determination of sales at less than fair value and affirmative critical circumstances). Commerce later revised the rate in the tenth administrative review after reviewing the Vietnam entity. *See Certain Frozen Fish Fillets from [Vietnam]*, 80 Fed. Reg. 2,394, 2,395 (Dep't Commerce Jan. 16, 2015) (final results of [ADD] administrative review; 2012–2013).[7]

Golden Quality argues that Commerce's explanation does not comply with the court's remand instruction in *Thuan An* because the Vietnam-wide rate was neither an individual rate nor an all-others rate in this review, but instead was calculated for the Vietnam entity in a prior review and "carried forward." Golden Quality's Comments at 1–2.[8] First, Golden Quality misconstrues the court's holding in

[6] Commerce determined the Vietnam-wide rate using facts available with an adverse inference. *See Certain Frozen Fish Fillets from [Vietnam]*, 68 Fed. Reg. 37,116, 37,120 (Dep't Commerce June 23, 2003) (notice of final [ADD] determination of sales at less than fair value and affirmative critical circumstances); *see also* 19 U.S.C. § 1677e.

[7] Under Commerce's former practice, Commerce would review the NME entity in any review where an exporter seeking a separate rate was unable to demonstrate its independence from the NME entity. *See, e.g.*, *Certain Frozen Fish Fillets from [Vietnam]*, 79 Fed. Reg. 40,059 (Dep't Commerce July 11, 2014) (preliminary results of the [ADD] administrative review; 2012–2013) and accompanying Certain Frozen Fish Fillets from [Vietnam]: Decision Mem. for the Prelim. Results of the 2012–2013 [ADD] Administrative Review at 8–12, A-552–801, (July 2, 2014), *available at* https://enforcement.trade.gov/frn/summary/vietnam/2014–16311–1.pdf (last visited July 2, 2019) (unchanged in final determination). Commerce modified its practice on November 4, 2013, and now conducts an administrative review of the NME entity only where it receives a request for review of that entity, or where Commerce elects to self-initiate such a review. *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in [ADD] Proceedings and Conditional Review of the Nonmarket Economy Entity in NME [ADD] Proceedings*, 78 Fed. Reg. 65,963, 65,970 (Dep't Commerce Nov. 4, 2013).

[8] Golden Quality did not challenge the final determination on the grounds that the Vietnam-wide rate was not authorized by statute, nor did it incorporate Tafishco's arguments by

Thuan An. There, Commerce's determination could not be sustained because Commerce failed to reasonably ground its determination in statutory authority. *Thuan An*, 42 CIT at __, 348 F. Supp. 3d at 1347. Commerce viewed the rate as something other than the statutorily authorized individually investigated rate or the all-others rate. Def.'s Supplemental Br. at 1. On remand, Commerce acknowledges that the rate is an individually investigated rate, and Commerce's determination is therefore consistent with the authority granted by Congress. Commerce thus complied with the court's remand instruction.

Second, to the extent Golden Quality argues that Commerce lacks statutory authority to apply an NME-entity rate in an administrative review where the rate was investigated in a prior review or in the original investigation, that argument misses the mark.[9] Golden Quality points to no statute or regulation requiring Commerce to investigate the NME entity in each administrative review, and Commerce "has broad authority to interpret the antidumping statute and devise procedures to carry out the statutory mandate."[10] *Sigma Corp.*, 117

reference. *See* Mem. Law Supp. Consol. Pl. [Golden Quality's] Mot. J. Agency R., Nov. 16, 2017, ECF No. 41 ("Golden Quality's Br."). Instead, Golden Quality challenged Commerce's determination regarding CONNUM-specific reporting. *See* Compl. at 5, Apr. 20, 2017, ECF No. 6 ([Golden Quality] v. United States, Court No. 17–00088); Golden Quality's Br. at 8–20. Tafischo did not submit any comments responding to the *Remand Results*, though Golden Quality did, commenting specifically on the issues raised initially by Tafishco. *See* Golden Quality's Comments at 1–3. Golden Quality argues that the rate Commerce applied is unlawful because Commerce failed to comply with the Court's order, and thus on remand Commerce should assign a new rate to Golden Quality. *Id.* at 3. Notwithstanding the fact that Tafishco argued that Commerce lacked statutory authority to assign the Vietnam-wide rate, Commerce addresses the merits of Golden Quality's comments on remand. *See Remand Results* at 11–14.

[9] In *Thuan An*, Tafishco argued that the Vietnam-wide rate could not be considered an individually investigated rate because "there was never a Department-led review of the Vietnam-wide NME entity, or any of its member companies." Tafishco's Br. at 5. First, to the extent Tafishco intended to argue that Commerce never reviewed the Vietnam entity in any segment of these proceedings, that assertion is untrue. Commerce examined the Vietnam entity in the original investigation, *see Certain Frozen Fish Fillets from [Vietnam]*, 68 Fed. Reg. 37,116, 37,120 (Dep't Commerce June 23, 2003) (notice of final [ADD] determination of sales at less than fair value and affirmative critical circumstances), and again in the tenth administrative review. *See Certain Frozen Fish Fillets from [Vietnam]*, 80 Fed. Reg. 2,394, 2,395 (Dep't Commerce Jan. 16, 2015) (final results of [ADD] administrative review; 2012–2013). Second, to the extent Tafishco intended to argue that Commerce was required by law to review the Vietnam entity in this review in order to assign the Vietnam-wide rate to Tafishco, Tafishco points to no statute or regulation imposing such a requirement. *See* Tafishco's Br. at 5.

[10] Golden Quality cites the court's language in *Thuan An* stating that although 19 U.S.C. § 1673d applies on its face to investigations, the statute "applies with equal force to administrative reviews." Golden Quality's Comments at 3 (quoting *Thuan An*, 348 F. Supp. 3d at 1347 n.11). Golden Quality apparently construes this language to require that a rate be investigated in the current review if it is to be considered "individually investigated." *See* 19 U.S.C. § 1673d(c)(1)(B)(i)(I). The statute, however, does not contain such a requirement, nor was the court's language meant to impose such a requirement on Commerce. The language in question simply acknowledges that Congress contemplated two types of rates in antidumping investigations, and the statute does not grant Commerce authority to create a new kind of rate in administrative reviews.

F.3d at 1405. Indeed, as Commerce explains, its current practice is to review the NME entity only when it receives a request to do so, or when it chooses to self-initiate such a review. *Remand Results* at 3 n.10 (citing *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in [ADD] Proceedings and Conditional Review of the Nonmarket Economy Entity in NME [ADD] Proceedings*, 78 Fed. Reg. 65,963, 65,970 (Dep't Commerce Nov. 4, 2013)). In this review, Commerce received no request to review the Vietnam entity, and thus the Vietnam-wide rate adopted in the tenth review remained in effect. Because Tafishco failed to demonstrate its independence from the government, Commerce lawfully applied the Vietnam-wide rate to Tafishco.[11]

Finally, Tafishco argues that Commerce's assignment of a $2.39 per kg rate to Tafishco is unsupported by substantial evidence because Commerce was obligated to "corroborate the Vietnam-wide rate according to 'its reliability and relevance to the countrywide entity as a whole.'"[12] Tafishco's Br. at 7 (quoting *Peer Bearing Co. v. United States*, 32 CIT 1307, 1313, 587 F. Supp. 2d 1319, 1327 (2008)); *see also* 19 U.S.C. § 1677e(c).[13] However, Commerce is not required to corroborate rates applied in a previous segment of the same proceeding. *See* 19 U.S.C. § 1677e(c)(2) (Commerce "shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding").[14] Here, Commerce determined the rate applied to Tafishco in the eighth administrative re-

[11] Tafishco argued in *Thuan An* that the Vietnam-wide rate cannot be based on "facts available" or "adverse inferences" because 19 U.S.C. § 1677e only applies to the "applicable determinations" listed in the statute, i.e., determinations of individually investigated rates and all-others rates. Tafishco's Br. at 6; *see also* 19 U.S.C. § 1673d(c). Tafishco's argument is unavailing, given Commerce's characterization of the Vietnam-wide rate as an individually investigated rate. Commerce's determination thus falls squarely within the "applicable determinations" referenced by the statute. *See* 19 U.S.C. § 1677e.

[12] Tafishco did not participate in the redetermination. Tafishco made its corroboration argument when it challenged the final determination in *Thuan An*. *See* Tafishco's Br. at 7–12. The court did not reach the argument in *Thuan An*, 42 CIT __, 348 F. Supp. 3d 1340, but reaches it now.

[13] When Commerce makes a determination using facts available with an adverse inference, the statute imposes a corroboration requirement. *See* 19 U.S.C. § 1677e(c). Specifically, section 1677e(c) provides that when Commerce "relies on secondary information rather than on information obtained in the course of an investigation or review," Commerce "shall, to the extent practicable, corroborate that information from independence sources that are reasonably at their disposal."

[14] Commerce in the Final Decision Memo invokes 19 U.S.C. § 1677e(c)(2), as recently amended by the Trade Preferences Extension Act of 2015 ("TPEA"), in support of its determination that it need not corroborate the NME rate. Final Decision Memo at 15–16. Commerce is correct that TPEA provides that rates established in a prior segment of a proceeding need not be corroborated. *See* 19 U.S.C. § 1677e(c)(2). Defendant-Intervenor argues that Commerce was not required to corroborate the Vietnam-wide rate because Commerce made no finding of AFA in this review, and therefore even without TPEA there is no requirement of corroboration. Def.-Intervenors' Resp. Opp'n Pls.' Rule 56.2 Mots. J.

view based on data reported by a respondent, and subsequently applied this rate to the Vietnam entity by application of facts available with an adverse inference in the tenth administrative review. *See Certain Frozen Fish Fillets from [Vietnam]*, 79 Fed. Reg. 40,059 (Dep't Commerce July 11, 2014) (preliminary results of the [ADD] administrative review; 2012–2013) and accompanying Certain Frozen Fish Fillets from [Vietnam]: Decision Mem. for the Prelim. Results of the 2012–2013 [ADD] Administrative Review at 8–12, A-552–801, (July 2, 2014), *available at* https://enforcement.trade.gov/frn/summary/vietnam/2014–16311–1.pdf (last visited July 2, 2019) (unchanged in final determination). Commerce thus applied the rate in a separate segment of these proceedings and was therefore under no obligation to corroborate.

CONCLUSION

For the reasons discussed, Commerce's *Remand Results* comply with the court's order in *Thuan An*, 42 CIT at __, 348 F. Supp. 3d at 1354–55, and are in accordance with law. Therefore, Commerce's *Remand Results* are sustained, and judgment will enter accordingly.

Dated: July 8, 2019
New York, New York

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

Agency R. at 9–11, Apr. 20, 2018, ECF No. 56. As a result of Commerce's change in practice, it no longer conditionally reviews an NME entity; rather, it only reviews the NME entity if it receives a request to do so or elects to conduct a review on its own accord. *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in [ADD] Proceedings and Conditional Review of the Nonmarket Economy Entity in NME [ADD] Proceedings*, 78 Fed. Reg. 65,963, 65,970 (Dep't Commerce Nov. 4, 2013). Here, there was no request to review the NME entity. Commerce assigned respondents the Vietnam-wide rate because they failed to establish eligibility for a separate rate. Final Decision at 11, 15–16. Because Commerce did not review the Vietnam-wide entity, there could be no finding of facts available or adverse inferences, and therefore Commerce had no need to corroborate. 19 U.S.C. § 1677e(c)(1). Regardless of the effect of Commerce's change in practice with respect to reviewing the NME entity, Commerce is correct that section 1677e(c)(2) as amended relieves Commerce of the obligation to corroborate any rate established in a prior segment of the same proceeding.

Slip Op. 19–85

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

Before: Leo M. Gordon, Judge
Court No. 15–00135

[Plaintiff's motion for partial summary judgment denied; Defendant's motion for partial summary judgment granted.]

Dated: July 9, 2019

Philip Yale Simons and *Jerry P. Wiskin*, Simons & Wiskin of South Amboy, NJ for Plaintiff Kent International, Inc.

Monica P. Triana, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

OPINION and ORDER

Gordon, Judge:

Plaintiff Kent International, Inc. ("Kent") challenges the classification by U.S. Customs and Border Protection ("Customs") of Kent's entries of the imported "WeeRide Kangaroo Ltd. Center-Mounted Bicycle-Child Carrier" ("WeeRide Carrier" or "subject merchandise") under the Harmonized Tariff Schedule of the United States ("HTSUS"). Before the court are cross-motions for summary judgment. *See* Pl.'s Mot. for Partial Summ. J., ECF No. 37 ("Pl.'s Br."); Def.'s Cross-Mot. for Partial Summ. J. and Opp. to Pl.'s Mot. for Partial Summ. J., ECF No. 38 ("Def.'s Br."); *see also* Pl.'s Resp. to Def.'s Cross-Mot. for Partial Summ. J., ECF No. 41 ("Pl.'s Resp."); Def.'s Reply in Supp. of Cross-Mot. for Partial Summ. J., ECF No. 42 ("Def.'s Reply"). Customs classified the subject merchandise as "Parts and accessories of vehicles of heading 8711 to 8713: . . . Other: . . . Other" under HTSUS subheading 8714.99.80, at a 10% duty rate. Plaintiff claims that the subject merchandise is properly classified as "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: ... Other seats: Of rubber or plastics: ... Other" under HTSUS subheading 9401.80.40, at a 0% duty rate. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). For the reasons set forth below, Plaintiff's motion for partial summary judgment is denied, and Defendant's cross-motion for partial summary judgment is granted.

I. UNDISPUTED FACTS

The following facts are not in dispute. *See generally* Plaintiff's Statement of Material Facts Not in Dispute, ECF 37–1 ("Pl.'s Facts

Stmt."); Defendant's Response to Plaintiff's Statement of Material Facts, ECF 38–3 ("Def.'s Resp. to Facts"); Defendant's Statement of Undisputed Material Facts, ECF 38–2 ("Def.'s Facts Stmt."); Plaintiff's Response to Defendant's Statement of Undisputed Material Facts, ECF 41–1 ("Pl.'s Resp. to Facts"). The merchandise at issue is Plaintiff's WeeRide Carrier. Def.'s Facts Stmt. ¶ 1; Pl.'s Resp. to Facts at 1. The sole purpose of the WeeRide Carrier is to allow a child to ride on an adult's bicycle, situated between the adult seat and the front handlebars. Def.'s Facts Stmt. ¶¶ 2–3; Pl.'s Resp. to Facts at 2–3. The WeeRide Carrier attaches to a bicycle via a supporting bar, which is attached to the handlebar and seat post of an adult bicycle. Pl.'s Facts Stmt. ¶ 5; Def.'s Facts Stmt. ¶ 6; Def.'s Resp. to Facts at 2. Plaintiff's website identifies the WeeRide Carrier as an "accessory." Def.'s Facts Stmt. ¶ 21; Pl.'s Resp. to Facts at 6.

II. STANDARD OF REVIEW

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. *See Faus Group, Inc. v.* United States, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact. *Id.*

When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). This is such a case, and summary judgment is appropriate. *See Bausch & Lomb*, 148 F.3d at 1365–66.

III. DISCUSSION

Classification disputes under the HTSUS are resolved by reference to the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation. *See Carl Zeiss*, 195 F.3d at 1379. The

GRIs are applied in numerical order. *Id.* Interpretation of the HTSUS begins with the language of the tariff headings, subheadings, their section and chapter notes, and may also be aided by the Explanatory Notes ("ENs") published by the World Customs Organization. *Id.* Under GRI 1, classification is determined by "the terms of the headings and any relevant section or chapter notes." *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005). The HTSUS section and chapter notes "are not optional interpretive rules, but are statutory law . . . ." *Id.* "GRI 1 is paramount. . . . The HTSUS is designed so that most classification questions can be answered by GRI 1 . . . . The headings and relevant notes are to be exhausted before inquiries, such as those of GRI 3, are considered . . . ." *Telebrands Corp. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012).

Under GRI 1, merchandise that is described "in whole by a single classification heading or subheading" is classifiable under that heading or subheading. *CamelBak Prods. LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). If that single classification applies, the succeeding GRIs are inoperative. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

The court construes a tariff term according to its common and commercial meanings, and may rely on lexicographic authorities and its own understanding of the term. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to ENs "accompanying a tariff subheading, which – although not controlling – provide interpretive guidance." *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

The dispute before the court is whether Kent's WeeRide Carrier is properly classified under HTSUS heading 8714 as an accessory to a bicycle or heading 9401 as a seat. The pertinent provisions of Chapters 87 and 94 of the HTSUS are as follows:

> 8714 Parts and accessories of vehicles of headings 8711 to 8713
> ...
> 8714.99 Other: ...
> **8714.99.80** Other
> ...
> 9401 Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: ...
> 9401.80 Other seats: ...
> **9401.80.40** Other

HTSUS subheadings 8714.99.80, 9401.80.40. The subheadings are *eo nomine* provisions meaning they "[d]escribe[ ] an article by a specific name, not by use." *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (citing *CamelBak Prods.*, 649 F.3d at 1364). An *eo nomine* provision covers all forms of the named article absent limiting language or contrary legislative intent. *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995).

Defendant argues that Customs correctly classified the WeeRide Carrier under HTSUS heading 8714 that covers "[p]arts and accessories of vehicles of heading 8711 to 8713," which includes "[b]icycles and other cycles (including delivery tricycles), not motorized . . ." under HTSUS heading 8712. *See* Def.'s Br. at 7–12. Defendant contends that the WeeRide Carrier fits under heading 8714 because it is an "accessory" to a bicycle. *Id.* at 8. Defendant further argues that the subject merchandise is an "accessory" under heading 8714 in that an "accessory" is defined as "something extra; thing added help in a secondary way; . . . a piece of optional equipment for convenience, comfort, appearance, etc." *See id.* at 7–8 (citing *Webster's New World Dictionary* (3d. C. ed. 1988)). Defendant maintains that because the WeeRide Carrier allows a child to ride with an adult on a bicycle, it is an accessory that adds "to the effectiveness and convenience" of a bicycle by allowing two individuals to be transported at one time. *Id.* at 8.

Plaintiff acknowledges that the WeeRide Carrier is *prima facie* classifiable as an accessory to a bicycle under subheading 8714.99.80. *See* Pl.'s Reply at 3. Despite this, it argues that the subject merchandise is also *prima facie* classifiable under subheading 9401.80.40, a provision for seats that is more specific than the subheading for a bicycle accessory. *See* Pl.'s Br. at 10–11. Plaintiff relies on Additional U.S. Rule of Interpretation ("ARI") 1(c) as support for its claim that the subject merchandise is classifiable as a "seat" under heading 9401, rather than as a bicycle "accessory" under heading 8714. Pl.'s Br. at 23. ARI 1(c) provides that "absent special language or context":

> (c) a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for "parts and accessories" shall not prevail over a specific provision for such part or accessory . . .

ARI 1(c).

Plaintiff maintains that there is no special language or context that would require the classification of the WeeRide Carrier as a bicycle accessory rather than the specific provision for "seats" under heading 9401. Pl.'s Br. at 24. Plaintiff further contends that the court must apply the relative specificity analysis under GRI 3(a) to resolve this

classification dispute. *See* Pl.'s Resp. at 3 ("GRI 1 does not determine the classification of the WeeRide seats in issue. . . . GRI 3(a) provides that the most specific provision is preferred over a more general provision."). GRI 3 calls for a relative specificity analysis when two goods are *prima facie* classifiable under two or more headings, and provides that the heading with the most specific description shall be preferred.

Defendant responds that no relative specificity analysis is required as Note 1(h) of Chapter 94 ("Note 1(h)") prevents classification of the subject merchandise under heading 9401. Def.'s Br. at 11. Note 1(h) states that "[t]his Chapter does not cover . . . Articles of heading 8714 . . . ." Defendant argues that Note 1(h) provides "special language or context" that renders ARI 1(c) inapplicable. *Id.* at 8–9. In Defendant's view, because Note 1(h) excludes "[a]rticles of heading 8714," and the subject merchandise is classifiable under that heading, it therefore cannot be classified under heading 9401. *Id.* at 11.

Contrary to Defendant, Plaintiff maintains that Note 1(h) cannot apply to resolve this classification dispute prior to the completion of a relative specificity analysis. *See* Pl.'s Br. 25–29; Pl.'s Resp. 2–4. Plaintiff contends that Note 1(h) to Chapter 94 does not "come into play *unless and until* a relative specificity analysis is performed." Pl.'s Br. at 25–29 (citing *Sharp Microelectronics Technology Inc. v. United States*, 122 F.3d 1446 (Fed. Cir. 1997), *Bauer Nike Hockey USA v. United States*, 393 F.3d 1246 (Fed. Cir. 2004), and a footnote in *ADC Telecommunications, Inc. v. United States*, Court No. 13–00400, 39 CIT ___, 2017 WL 4708021 (Oct. 18, 2017), *aff'd*, 916 F.3d 1013 (2019)).

The court disagrees. While there is ample case law to support the preclusive effect of an exclusionary note under GRI 1, Plaintiff fails to demonstrate that the court must conduct a relative specificity analysis under GRI 3 prior to applying an exclusionary note. As previously noted, under GRI 1, the court relies on headings and chapter notes to classify merchandise. *See Avenues in Leather, Inc.*, 423 F.3d at 1333. If Note 1(h) is applicable, it would exclude the subject merchandise from classification under Chapter 94. *See, e.g., id.*, 423 F.3d at 1333–34 ("Note 1(h) to Chapter 48 states that the Chapter does not cover '[a]rticles of heading 4202 (for example travel goods).' Thus, if the articles are prima facie classifiable under Heading 4202, then applying Note 1(h), the articles are specifically excluded from classification under Heading 4820."); *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed. Cir. 1997) ("Note 2(ij) to chapter 69 states that the chapter does not cover 'Articles of chapter

95.' Accordingly, the issue here is whether the items at issue *prima facie* are classifiable under heading 9505. If so, then pursuant to note 2(ij), chapter 69, the items cannot fall under chapter 69 and must be classified under chapter 95."), *superseded on other grounds as stated in WWRD US, LLC v. United States*, 886 F.3d 1228 (Fed. Cir. 2018).

Plaintiff's reliance on *Sharp* and *Bauer* to avoid the application of Note 1(h) under GRI 1 is misplaced. In *Sharp*, the plaintiff argued that Customs incorrectly classified certain glass cells under HTSUS heading 9013, and contended that the merchandise was properly classified under HTSUS subheading 8473.30.40. 122 F.3d at 1447–48. The Government maintained that the classification dispute should be settled by "Note 1(m) of Section XVI of the HTSUS, which provides that '[t]his section [which includes chapter 84 and thus subheading 8473.30.40] does not cover ... Articles of Chapter 90 [including subheading 9013.80.60].'" *Id.* at 1448. The Federal Circuit held that Note 1(m) alone could not resolve the disputed classification because the precise language of heading 9013 expressly required a relative specificity analysis. *See* 122 F.3d at 1450. *Sharp* is inapplicable here as neither heading 8714 nor 9401 mandate a relative specificity analysis.

In *Bauer*, the court resolved a dispute over hockey pants and whether they were properly classified by Customs under HTSUS subheading 6211.33.00 or by the plaintiff under subheading 9506.99.25. *See* 393 F.3d at 1248. The court noted that Note 1(t) of Section XI to Chapter 62 excluded articles of Chapter 95 from being classified under Chapter 62 and Note 1(e) to Chapter 95 excluded "sports clothing . . . of textiles, of chapter 61 or 62." *Id.*, 393 F.3d at 1252 n.6. Due to these competing and mutually exclusive exclusionary notes, the court used a relative specificity analysis to determine the heading that provided the most specific description of the merchandise. *Id.* at 1252–53. Unlike in *Bauer*, the resolution of the present classification dispute involves only one exclusionary note, *i.e.*, Note 1(h). Accordingly, *Bauer* is inapplicable.

ADC, however, is instructive. In *ADC*, there was a dispute about the classification of the plaintiff's fiber optic telecommunications network equipment as assessed by Customs under subheading 9013.80.90 or as claimed by the plaintiff under subheading 8517.62.00. The plaintiff argued that the merchandise at issue was *prima facie* classifiable under both headings and that the classification must be resolved under GRI 3. *See ADC*, 39 CIT at ___, 2017 WL 4708021 at *6. The Government argued that the court should resolve the classification under GRI 1 "because the plaintiff's optical devices are excluded from

chapter 85 by Note 1(m) to Section XVI (which covers chapter 85, HTSUS), which provides: 'this section does not cover ... [a]rticles of Chapter 90.'" *Id.* (citation omitted). The court agreed that the relative specificity test under GRI 3 was not applicable, stating: "[s]imply put: as to which of chapter 90 and chapter 85 provides the 'more specific' heading on an article's classification, there is no 'comparison' involved, because Note 1(m) renders GRI 3 inapplicable." *Id.* Consequently, the court determined that the merchandise was classified under heading 9013. *Id.*, 39 CIT at ___, 2017 WL 4708021 at *9.

The Court of Appeals affirmed, explaining:

> We start with the language of the heading, looking to the relevant section and chapter notes . . . . HTSUS Heading 8517 covers "[t]elephone sets, including telephones for cellular networks or for other wireless networks" and "other apparatus for the transmission or reception of voice, images or other data . . . ." Chapter 85 of the HTSUS is contained in Section XVI, and Note 1 to Section XVI provides that "[t]his section does not cover . . . (m) [a]rticles of [C]hapter 90." Therefore, because the subject merchandise is classifiable in HTSUS Heading 9013, which is found in Chapter 90, . . ., it is *not* classifiable in Section XVI, in which HTSUS Heading 8517 is found.

916 F.3d at 1023–24.

As in *ADC*, the court here is faced with competing provisions where one heading has a note excluding merchandise classifiable in the competing heading. Accordingly, because the WeeRide Carrier is classifiable under heading 8714, *see supra* Section III.A, the court determines that Note 1(h) excludes the subject merchandise from being classified under heading 9401.[1]

IV. Conclusion

For the foregoing reasons, the court concludes that Customs properly classified the WeeRide Carrier under HTSUS subheading 8714.99.80. Accordingly, Plaintiff's motion for partial summary judgment is denied, and Defendant's cross-motion for partial summary judgment is granted. In view of the court's decision, it is hereby

ORDERED that the parties shall consult regarding Counts 2 and 3 of Plaintiff's Complaint and shall file a proposed scheduling order on or before July 23, 2019 for the disposition of those Counts.

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[1] Because the court concludes that the subject merchandise is properly classified under heading 8714 due to the application of Note 1(h) pursuant to GRI 1, the court does not reach Plaintiff's arguments relying on supplemental authorities that support classification of the subject merchandise under Chapter 94 pursuant to GRI 3. *See* Pl.'s Br. at 12–24 (relying on, *inter alia*, the definition of "furniture" in Note 2 to Chapter 94; the ENs to Chapter 87; and CBP's Informed Compliance Publication on Vehicles, etc.).

Dated: July 9, 2019
New York, New York

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

Slip Op. 19–86

PRIME TIME COMMERCE LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 18–00024

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the administrative review of certain cased pencils from the People's Republic of China.]

Dated: July 9, 2019

Mark Burton Lehnardt and *Lindita Valentina Ciko Torza*, Baker & Hostetler, LLP, of Washington, DC, argued for plaintiff Prime Time Commerce LLC.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. On the brief were *Patricia M. McCarthy*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel on the brief was *Brendan Scott Saslow*, 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 action is before the court on a motion for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the administrative review of the antidumping duty ("ADD") order covering certain cased pencils from the People's Republic of China ("PRC"), filed by Plaintiff, Prime Time Commerce, LLC ("Prime Time"). *See* [Prime Time's] Mot. [ ] J. Agency R., Sept. 18, 2018, ECF No. 20; *see also Certain Cased Pencils From the [PRC]*, 83 Fed. Reg. 3,112 (Dep't Commerce Jan. 23, 2018) (final results of [ADD] admin. review; 2015–2016) ("*Final Results*") and accompanying Issues & Decision Mem.: Certain Cased Pencils from the [PRC]; 2015–2016, A-570–827, (Jan. 16, 2018), ECF No. 12–4 ("Final Decision Memo"); *Certain Cased Pencils From the [PRC]*, 59 Fed. Reg. 66,909 (Dep't Commerce Dec. 28, 1994) ("*ADD Order*"). Prime Time commenced this action pursuant to section 516A(a)(2)(A)(i)(I) and 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I)

and 1516a(a)(2)(B)(iii) (2012).[1] *See* Summons, Feb. 8, 2018, ECF No. 1; Compl., Feb. 8, 2018, ECF No. 4. Prime Time is an importer of the subject merchandise.

Prime Time challenges as contrary to law and unsupported by substantial evidence Commerce's decisions (i) to reject and remove from the record Prime Time's response to a Sections C&D questionnaire issued to Ningbo Homey Union Co., Ltd. ("Homey"), offered as either a questionnaire response or as factual information not elsewhere defined, and the accompanying explanations,[2] *see* Mem. Supp. [Prime Time's] Rule 56.2 Mot. [ ] J. Agency R. at 18–31, Sept. 18, 2018, ECF No. 20–1 ("Prime Time's Br."), (ii) to assign the PRC-wide rate, the highest rate available, as Homey's dumping margin, without considering Prime Time's efforts to populate the record, and (iii) to assign Prime Time the PRC-wide rate, the highest available rate, instead of calculating an importer-specific assessment rate. *Id.* at 17–18, 31–35.

For the reasons that follow, the court sustains Commerce's decision that Prime Time's submission, offered as a questionnaire response pursuant to 19 C.F.R. § 351.301(c)(1) (2017),[3] was an unsolicited questionnaire response. The court, however, concludes that Commerce acted contrary to law when it removed Prime Time's information, submitted as factual information not elsewhere defined under 19 C.F.R. § 351.301(c)(5), and the accompanying narrative of admissibility, from the record. The court further concludes that Commerce's decision not to accept Prime Time's submission as factual information not elsewhere defined is not supported by substantial evidence because Commerce removed from the record the very basis for that determination. On remand, Commerce must place Prime Time's narrative of admissibility and submission on the record. Further, on remand, Commerce must consider Prime Time's submission, as filed under 19 C.F.R. § 351.301(c)(5), in the context of calculating an importer-specific assessment rate for Prime Time's entries. If Commerce is unable to calculate an importer-specific assessment rate on the entries of subject merchandise exported by Homey and imported by Prime Time, Commerce must explain the basis for such a conclu-

[1] 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.

[2] The party filing new factual information must identify the subsection of 19 C.F.R. § 351.102(b)(21) (2017) that best describes the information proffered. 19 C.F.R. § 351.301(b). Further, a party seeking to file the information pursuant to 19 C.F.R. § 351.301(c)(5), must also include a "detailed narrative" of admissibility.

[3] Further citations to Title 19 of the Code of Federal Regulations are to the 2017 edition.

sion. If Commerce invokes its practice as a basis for not calculating such a rate, Commerce should explain why its practice is reasonable in light of 19 C.F.R. § 351.212(b).

BACKGROUND

Commerce initiated this administrative review covering the subject merchandise entered during the period of review, December 1, 2015, through November 30, 2016. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 10,457, 10,459 (Dep't Commerce Feb. 13, 2017) ("*Initiation Notice*"). Of the six companies subject to the *ADD Order*, only Homey and Orient International Holding Shanghai Foreign Trade Co., Ltd. ("Orient"), entered subject merchandise during the period of review. Resp't Selection [Mem.] at 1, PD 23, bar code 3558523–01 (Mar. 30, 2017).[4] Pertinent here, Homey is Prime Time's unaffiliated exporter. *See* Prime Time's Br. at 1; [Prelim.] Decision Mem. for [ ] Certain Cased Pencils from the [PRC] at 2, A-570–827, PD 63, bar code 3614317–01 (Aug. 31, 2017) ("Prelim. Decision Memo"). On March 15, 2017, Homey filed a separate rate application, and following Orient's withdrawal of its request for review, became the sole mandatory respondent. Prelim. Decision Memo at 2; *see also* [Orient's] Withdrawal Req. Review, PD 22, bar code 3553055–01 (Mar. 17, 2017). Homey, following submission of its separate rate application, stopped cooperating with Commerce's requests for information. *See* Prelim. Decision Memo at 2; Final Decision Memo at 5. Prime Time attempted to substitute its responses for Homey's and populate the record with factual information. Prime Time's Br. at 6–7. It also sought to suggest gap filling measures where it was unable to supply the information needed. *Id.*

Prime Time filed a Sections C&D Questionnaire response on behalf of Homey, contending it was admissible under 19 C.F.R. § 351.301(c)(1) or, in the alternative, 19 C.F.R. § 351.301(c)(5). Rejection Letter at 1. Prime Time explained that its submission consisted of new factual information as per 19 C.F.R. § 351.102(b)(21)(i). *Id.* Commerce declined to accept the submission under either 19 C.F.R. § 351.301(c)(1) or (c)(5) and removed it, along with the accompanying explanations, from the record. [Commerce's] Rejection of Unsolicited New Factual Info. Mem., PD 38, bar code 3580223–01 (June 9, 2017) ("Rejection Letter"). Commerce similarly denied Prime Time's August

[4] On March 26, 2018, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 12–2–3. All further references to administrative record documents in this opinion will be to the numbers assigned to the documents by Commerce in the indices.

3, 2017, request for reconsideration. *See* [Prime Time's Req. Reconsideration], PD 60, bar code 3604262–01 (Aug. 3, 2017) ("Reconsideration Req."); Prelim. Decision Memo at 3 n.16.

To the extent that Prime Time's submission sought to satisfy 19 C.F.R. § 351.301(c)(1) by presenting factual information responsive to a questionnaire Commerce sent to Homey, Commerce explained that it rejected the submission as an unsolicited questionnaire response in accordance with 19 C.F.R. § 351.302(d). Rejection Letter at 1. To the extent that Prime Time's submission purported to contain factual information not elsewhere defined per 19 C.F.R. § 351.301(c)(5), Commerce rejected it based on the insufficiency of Prime Time's accompanying narrative of admissibility.[5] *Id.* at 2. Specifically, Commerce explained that increased financial hardship for the importer, arising out of an exporter's and/or producer's failure to cooperate, is a known liability and not grounds for considering the proffered information.[6] *Id.* Further, Commerce explained that it is not its practice to calculate an importer-specific assessment rate unless a margin is calculated for each individually examined exporter. *Id.* Commerce does not state that it is unable to calculate an importer-specific assessment rate given the factual circumstances in this case. *Id.* It likewise does not explain why its practice is reasonable in light of 19 C.F.R. § 351.212(b)'s directive to calculate importer-specific assessment rates whenever Commerce conducts a review of an antidumping duty order. *Id.* Commerce also explained that Prime Time's submission did not meet the requirements of 19 U.S.C. § 1677m(e)[7] to qualify as information that is "necessary to the determination" and which Commerce

[5] Because Commerce rejected Prime Time's submission in its entirety, i.e., the questionnaire response, suggestions for gap filling measures, and all relevant explanations of admissibility, *see* Rejection Letter at 2, the court cannot review Prime Time's explanations or meaningfully assess Commerce's response to it. The court can only describe Commerce's description of Prime Time's submission and accompanying explanations, and Commerce's response.

[6] It is not clear to the court whether Commerce rejected Prime Time's submission under 19 C.F.R. § 351.301(c)(5) because the explanation accompanying it was inadequate, because Commerce determined that it was not required to calculate an importer-specific assessment rate in this case, or some combination of both. In its rejection letter, Commerce, in a stand-alone paragraph, asserts that where a margin is not calculated for each individually examined exporter, its practice is not to calculate an importer-specific assessment rate. Rejection Letter at 2. In the subsequent paragraph, offset by the word "further" and explicitly referencing 19 C.F.R. § 351.301(c)(5), Commerce concludes that undue economic hardship onto the importer is an expected aftereffect of a statutory scheme that seeks to encourage producers and exporters to cooperate. *Id.* Commerce's latter explanation assumes that the importer in question is not entitled to an importer-specific assessment rate. Given that Commerce removed Prime Time's submission in its entirely from the record, the court cannot assess the parameters or reasonableness of Commerce's basis for rejecting the submission.

[7] Pursuant to 19 U.S.C. § 1677m(e), Commerce "shall not decline to consider" information that is "necessary to the determination but does not meet all the applicable requirements," if

must consider. Rejection Letter at 2. Commerce explained that the submission was so incomplete as to not be reliable and could not be used without undue difficulty. *Id.*; *see also* 19 U.S.C. § 1677m(e)(3), (5). Commerce rejected and removed all filings associated with Prime Time's submission from the record. *See* Rejection of Unsolicited Info., PD 39, bar code 3582419–01 (June 9, 2017); [Notice Doc. Rejected & Removed], PD 32, bar code 3570939–01 (May 10, 2017).

In its preliminary determination, Commerce applied the PRC-wide rate of 114.90% rate to all of Homey's entries. *See generally Certain Cased Pencils From the [PRC]*, 82 Fed. Reg. 43,329 (Dep't Commerce Sept. 15, 2017) (preliminary results of [ADD] admin. review, prelim. determination of no shipments, & rescission of review in part; 2015–2016) and accompanying Prelim. Decision Memo at 6. It explained that Homey, as both a separate rate applicant and a mandatory respondent, had to satisfy dual obligations—submit a separate rate application and answer all questionnaires required of it as a mandatory respondent—or become ineligible for separate rate status. Prelim. Decision Memo at 5 (citing *Initiation Notice*, 82 Fed. Reg. at 10,458 (laying out the dual obligations)). Further, Commerce continued to find that Prime Time's submission constituted unsolicited new factual information and that the request for reconsideration did not offer new grounds for reconsideration. Prelim Decision Memo at 3 & n.16; *see also* Reconsideration Req. at 1–2. In its case brief to the agency, Prime Time continued to challenge Commerce's decision to reject and remove the submission and argue that Commerce should calculate an importer-specific assessment rate for Prime Time. [Prime Time's Agency] Case Br. at 3–9, PD 69, bar code 3630073–01 (Oct. 16, 2017).

For the final determination, Commerce continued to find that Homey was part of the PRC-wide entity and ineligible for a separate rate. *Final Results*, 83 Fed. Reg. at 3,113; Final Decision Memo at 7. Commerce also continued to find Prime Time's submission contained unsolicited new factual information and explained that it was not required to calculate an importer-specific assessment rate for Prime Times' entries. *See* Final Decision Memo at 4–6. Oral argument was held on April 30, 2019. Following oral argument, the court directed the parties to file supplemental briefing regarding Commerce's obli-

(1) the information is submitted by the deadline established for its submission,
(2) the information can be verified,
(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
(5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

gation to calculate an importer-specific assessment rate. *See generally* Def.'s Resp. Ct.'s May 13, 2019, Qs., May 23, 2019, ECF No. 34 ("Def.'s Suppl. Br."); Pl.'s Resp. Ct.'s May 13, 2019, Qs., May 23, 2019, ECF No. 35 ("Pl.'s Suppl. Br."); Pl.'s Resp. [Def.'s Suppl. Br.], May 30, 2019, ECF No. 36; Def.'s Resp. [Pl.'s Suppl. Br.], May 30, 2019, ECF No. 37.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Rejection and Removal of Prime Time's Submission

Prime Time challenges as unsupported by substantial evidence and not in accordance with law Commerce's decision to reject and remove from the administrative record Prime Time's response to Commerce's Sections C&D Questionnaire. *See* Prime Time's Br. at 18–31. Defendant responds that Commerce reasonably determined that Prime Time's submission was unsolicited and unacceptable under the relevant regulatory and statutory framework. Def.'s Resp. Br. at 12–21. For the following reasons, Commerce's decision to reject Prime Time's submission, offered as factual information not elsewhere defined under 19 C.F.R. § 351.301(c)(5), is unsupported by substantial evidence and its decision to remove the submission, along with the accompanying narrative of admissibility, from the record is contrary to law.

The court must base its review of Commerce's determination upon the record of the proceeding, which consists of

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A)(i)–(ii). Commerce's regulations require it to maintain "the official record of each segment of the proceeding" that will form the record reviewed by this Court. 19 C.F.R. § 351.104(a)(1). The official record will contain,

> all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. . . . [and] government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the Federal Register, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified.

Id.[8] Commerce, however, is not required to retain on the record copies of untimely filed documents or unsolicited questionnaire responses. 19 C.F.R. § 351.104(a)(2)(iii); *see also* 19 C.F.R. § 351.302(d).

Commerce's regulations define admissible "factual information" and prescribe how parties provide such information to the agency. *See* 19 C.F.R. § 351.102(b)(21) (defining "factual information"); 19 C.F.R. § 351.301 (setting time limits and parameters governing how the various categories of factual information are provided to the agency). Relevant here are 19 C.F.R. § 351.301(c)(1), providing for factual information submitted in response to a questionnaire, and 19 C.F.R.

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[8] Commerce's regulation further recognizes that copies of rejected written argument, factual information, and other material, will be included on the record "solely for the purposes of establishing and documenting the basis for rejecting the document," when the basis of the rejection occurred under any of the following circumstances:

(A) The document, although otherwise timely, contains untimely filed new factual information (see § 351.301(b));

(B) The submitter made a nonconforming request for business proprietary treatment of factual information (see § 351.304);

(C) The Secretary denied a request for business proprietary treatment of factual information (see § 351.304);

(D) The submitter is unwilling to permit the disclosure of business proprietary information under APO (see § 351.304).

19 C.F.R. § 351.104(a)(2)(ii)(A)–(D). It is possible to read this regulation as carving four specific scenarios under which Commerce is required to keep rejected materials on the record. However, because such a reading would preclude judicial review of any other decision Commerce makes to reject factual information, it would be unreasonable. A reasonable reading of 19 C.F.R. § 351.104(a)(2)(ii), in light of 19 U.S.C. § 1516a(b)(2)(A) and 19 C.F.R. § 351.104(a)(1), is that Commerce retains all factual information, unless it is untimely or constitutes an unsolicited questionnaire response. And, in the four enumerated scenarios, it retains the rejected document solely for the purposes of establishing and documenting the basis for the rejection because it is only in those four scenarios that Commerce may categorically reject the documents and not consider the information they contain. Notwithstanding whether Commerce's basis for rejecting the document is categorical or the result of Commerce considering the information within, Commerce must retain the document and explain its decision to reject; anything less would deprive the Court of its power of judicial review. Commerce can only reject and not retain on the record submissions specifically identified in 19 C.F.R. § 351.104(a)(2)(iii), i.e., untimely filed documents or unsolicited questionnaire responses.

§ 351.301(c)(5), providing for factual information not elsewhere defined and requiring the submitter to explain why the information is not encompassed in the categories of 19 C.F.R. § 351.102(b)(21)(i)–(iv) and to provide a "detailed narrative" as to the contents and relevance of the information proffered. *See* 19 C.F.R. § 351.301(c)(5). Further, when Commerce rejects a submission it determines to be an unsolicited questionnaire response, it will, "to the extent practicable," state the basis for the rejection. 19 C.F.R. § 351.302(d)(2).

Pursuant to 19 U.S.C. § 1677m(e), Commerce "shall not decline to consider" information that is "necessary to the determination but does not meet all the applicable requirements," if

> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e)(1)–(5).

Prime Time asserted two alternative bases for its submission, 19 C.F.R. § 351.301(c)(1) (questionnaire response) or 19 C.F.R. § 351.301(c)(5) (factual information not elsewhere defined); both of which Commerce rejected. Rejection Letter at 1–2; Final Decision Memo at 4–5. First, Prime Time asserted that its submission should be accepted as a questionnaire response substituting that of the mandatory respondent's. *See* Reconsideration Req. at 1–2; Prime Time's Br. at 5–6, 18–19. Commerce concluded that Prime Time's submission could not be accepted under 19 C.F.R. § 351.301(c)(1) because it was an unsolicited questionnaire response, *see* 19 C.F.R. § 351.302(d). Rejection Letter at 1–2. Second, Prime Time asserted that its submission provided relevant factual information, as defined by 19 C.F.R. § 351.301(c)(5). *See* Prime Time's Br. at 18–20. Commerce concluded that Prime Time's explanation that it would be exposed to "undue financial hardship" as a result of Commerce assigning it the mandatory respondent's rate, instead of calculating an importer-

specific assessment rate, was insufficient for Commerce to accept the information as factual information not elsewhere defined.[9] Rejection Letter at 2.

Commerce's regulations do not define what it means for a questionnaire response to be "unsolicited," but do provide an example of what is a solicited questionnaire response. Specifically, a questionnaire response filed by a voluntary respondent is solicited. 19 C.F.R. § 351.302(d)(ii); 19 C.F.R. § 351.204(d)(2). Voluntary respondents are subject to the same requirements as mandatory respondents. 19 C.F.R. § 351.204(d)(2). Commerce's regulations, therefore, imply that questionnaires should be answered by respondents. Commerce, as the administrator of the review process, can structure the receipt of factual information and specify the parties who are eligible to respond to its questionnaires. Given that interested parties, like Prime Time, have other avenues to submit factual information, it was reasonable for Commerce to reject the submission under 19 C.F.R § 351.301(c)(1) because it was an unsolicited response provided by a party other than to whom it was originally addressed.[10] Further, in stating the basis for the rejection, Commerce complied with 19 U.S.C. § 1677m(e). Rejection Letter at 2. Commerce explained that Prime Time's submission, as it disclosed information relevant to calculating Homey's dumping margin, was so incomplete as to be unreliable and could not be verified or used without undue difficulties. *Id.* Commerce's decision not to accept the submission on these grounds is reasonable, given that Prime Time's submission could not be verified

[9] As explained above, because Commerce removed Prime Time's submission in its entirety the parameters of why Commerce rejected the submission are not clear to the court.

[10] Prime Time contends that Defendant offers a post-hoc rationalization when it argues that the role of the submitting party in the review determines whether a response is unsolicited. *See* [Prime Time's] Reply Br. Supp. Rule 56.2 Mot. J. Agency R. at 2–3, 4–5, Jan. 11, 2019, ECF No. 25 ("Prime Time's Reply Br.") (citing Def.'s Resp. Br. at 13). Prime Time's argument is unpersuasive. Commerce does distinguish Prime Time from the mandatory respondent and states that it is for the latter, and not for the former, that it would use the proffered information to calculate a dumping margin. *See* Rejection Letter at 1–2 (remarking that Commerce requested the information from Homey, not Prime Time); Prelim. Decision Mem. at 3 n.16 (remarking that basis for rejecting the information remains unchanged); Final Decision Memo at 4 (explaining that because Prime Time's submitted the information, it was unsolicited). It also cites to 19 C.F.R. § 351.302(d), which explicitly states that a questionnaire response filed by a voluntary respondent is not unsolicited. *See id.* Given that a voluntary respondent has all the same obligations as a mandatory respondent, 19 C.F.R. § 351.204(d)(2), it is reasonably discernable that Commerce drew the line between solicited and unsolicited based on the party's role in the review.

Prime Time's contention that, in the final determination, Commerce "abandoned" the justification it provided for rejecting the submission under 19 C.F.R. § 351.301(c)(5) in the Rejection Letter, *see* Prime Time's Reply Br. at. 4–6, is equally unpersuasive. It is reasonably discernable that Commerce, in the final determination, did not re-explain its rationale for why Prime Time's narrative of admissibility was insufficient to satisfy 19 C.F.R. § 351.301(c)(5), given that Prime Time did not raise the challenge in either its request for reconsideration or case brief to the agency.

against Homey's own books and records and would require Commerce to rely information from an amalgamation of sources. Further, because Commerce is not required to retain on the record unsolicited questionnaire responses, Commerce did not act contrary to law by refusing to retain Prime Time's submission as a questionnaire response. 19 C.F.R. § 351.104(a)(2)(iii); *see also* 19 C.F.R. § 351.302(d).

By contrast, Commerce's decision not to accept Prime Time's submission, offered as factual information not elsewhere defined as per 19 C.F.R. § 351.301(c)(5), and to remove it, along with the accompanying narrative of admissibility, from the record must be remanded. First, Commerce acted contrary to law when it removed Prime Time's submission, offered as factual information not elsewhere defined under 19 C.F.R. § 351.301(c)(5), and the accompanying explanation, from the record. The official record includes "all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding." 19 C.F.R. § 351.104(a)(1). Commerce's regulation establishes that only unsolicited questionnaire responses and untimely information will be removed from the record. 19 C.F.R. § 351.104(a)(2)(iii). There is no dispute as to the timeliness of Prime Time's submission. Further, although styled as a questionnaire response, Prime Time contends that the submission provides information relevant to calculating an importer-specific assessment rate for its entries and should therefore be admissible under 19 C.F.R. § 351.301(c)(5). *See* Prime Time's Br. at 23–31. Therefore, Commerce acted contrary to law when it removed the submission and narrative of admissibility from the record.

Second, Commerce's rejection of the submission is unsupported by substantial evidence. Submissions under 19 C.F.R. § 351.301(c)(5) must provide a detailed narrative explaining why the information is relevant and could not be otherwise submitted under 19 C.F.R. § 351.301(c)(1)–(4). Commerce explicitly states that it rejected the submission under 19 C.F.R. § 351.301(c)(5) based on the insufficiency of Prime Time's explanation. Rejection Letter at 2. The court cannot review the reasonableness of Commerce's decision because Commerce removed Prime Time's narrative of admissibility from the record. The court cannot review what it cannot see. On remand, Commerce must place Prime Time's submission and accompanying narrative of admissibility on the record.

Further, and for the reasons provide below, the submission may be necessary to calculate an importer-specific assessment rate for Prime Time's entries. Commerce, in the final determination, did not consider whether the submission satisfied the requirements of 19 U.S.C.

§ 1677m(e) for the purposes of calculating an importer-specific assessment rate. Instead, Commerce's 19 U.S.C. § 1677m(e) analysis, both in the rejection letter and in the final determination, focuses only on whether the information can be used to calculate Homey's margin. Rejection Letter at 2; Final Decision Memo at 4–5. On remand, Commerce must engage in such an analysis.

II. Calculation of an Importer-Specific Assessment Rate

Commerce did not calculate an importer-specific assessment rate for Prime Time's entries. Commerce explains that its practice is not to calculate such a rate unless it calculates a margin for each individually examined exporter. *See* Rejection Letter at 2; Final Decision Memo at 6–7. Commerce's regulation, 19 C.F.R. § 351.212(b)(1), directs it to calculate an importer-specific assessment rate and Commerce does not explain why its practice is reasonable in light of that regulation. Accordingly, Commerce's determination is unsupported by substantial evidence.

Commerce must calculate a dumping margin for each entry of subject merchandise under review. 19 U.S.C. § 1675(a)(2)(A). Further, pursuant to 19 C.F.R. § 351.212(b)(1), Commerce "normally will calculate an assessment rate for each importer of subject merchandise covered by the review. . . . by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes."[11] 19 C.F.R. § 351.212(b)(1). No statute or regulation indicates that Commerce's obligation to calculate an importer-specific assessment rate varies based on whether the review concerns a market economy or a nonmarket-economy ("NME"). Further, no statute or regulation indicates that the "dumping margin" 19 C.F.R. § 351.212(b)(1) directs Commerce to use as the numerator in its calculation for the importer-specific assessment rate must be unique to the exporter being examined and cannot be an NME-entity rate.[12]

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[11] As the *KYD II* court explained, it was Commerce that

> decided to determine importer-specific dumping margins as an alternate method for correctly attributing the antidumping duties that would result from determining entry-specific dumping margins. *See* 19 C.F.R. § 351.212(b)(1); [Antidumping Duties; Countervailing Duties,] 62 Fed. Reg. [27,296,] 27,314–15 [(Dep't Commerce May 19, 1997)] (justifying Commerce's prior shift from an entry-specific assessment method to an importer-specific assessment method); [Antidumping Duties; Countervailing Duties,] 61 Fed. Reg. [7,308,] 7,316–17 [(Dep't Commerce Feb. 27, 1996)] ("To the extent possible, these assessment rates will be specific to each importer, because the amount of duties assessed should correspond to the degree of dumping reflected in the price paid by each importer.").

KYD, Inc. v. United States, 35 CIT __, __, 779 F. Supp. 2d 1361, 1372–73 (2011) ("*KYD II*").

[12] In an administrative review, Commerce is required to "determine—(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and

Commerce explains that it has a practice of not calculating an importer-specific assessment rate, unless it first derives an individual margin for each examined exporter. Final Decision Memo at 6 (citing Rejection Letter at 2). Discernable from Commerce's explanation is that it does not consider an NME-entity rate, assigned to an exporter that failed to rebut the presumption of government control, to be an individually examined margin, and that it will only calculate an importer-specific assessment rate when it calculates an individually examined margin.[13] Neither Commerce's rejection letter nor its final determination cites to any authority in support of this view. In fact, in the final determination, Commerce's sole support for its proposition that an exporter must be individually examined before an importer-specific assessment rate can be calculated is 19 C.F.R. § 351.212(b)(1). Commerce does not explain why its practice is reasonable in light of its regulation. Commerce does not claim that it is unable to calculate such a rate; in fact, Commerce specifically states that the question of

(ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). "The term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise[,]" 19 U.S.C. § 1677(35)(A), and constitutes the basis upon which antidumping duties on entries under review are assessed. 19 U.S.C. § 1675(a)(2)(C). Commerce calculates a dumping margin for producers and exporters operating in market and non-market economy countries. In the NME-context, Commerce will construct a normal value by multiplying a party's factors of production and surrogate values and subsequently compare the resulting value to the exporter's U.S. sales price. 19 U.S.C. §§ 1677(35), 1677b(c); 19 C.F.R. § 351.408.

Commerce can calculate a dumping margin relying solely on a reviewed party's submissions, or if a party's actions trigger 19 U.S.C. § 1677e(a) by relying in whole or in part on facts otherwise available, or if trigger both 19 U.S.C. § 1677e(a) and (b) by applying an adverse inference to those facts. The Court of Appeals for the Federal Circuit in *KYD, Inc. v. United States*, 520 F. App'x 956 (Fed. Cir. 2013) (per curiam), affirmed this Court's decision that an importer was entitled to its own assessment rate even though the mandatory respondent's dumping margin was established through AFA. *See generally KYD, Inc. v. United States*, 36 CIT __, __, 807 F. Supp. 2d 1372, 1376–79 (2012); *KYD II*, 35 CIT at __, 779 F. Supp. 2d at 1367–84; *KYD, Inc. v. United States*, 34 CIT 528, 539–43, 704 F. Supp. 2d 1323, 1331–34 (2010) ("*KYD I*"). The court analyzed the relevant statutory and regulatory framework and determined that when record evidence allows Commerce to distinguish between unaffiliated importers, it is required to do so. *KYD II*, 35 CIT at __, 779 F. Supp. 2d at 1373. Here, Commerce rejected Prime Time's submission and specifically stated that it did not need to address whether the record contained information necessary to calculate a margin for Homey's sales to Prime Time. Final Decision Memo at 6–7.

Commerce and Defendant attempt to distinguish the KYD line of cases. *See* Final Decision Memo at 6; Def.'s Resp. Br. at 10–12; Def.'s Suppl. Br. at 3. Commerce argues that the crux of the issue in the KYD line of cases was whether Commerce corroborated the assigned rate, and not whether there is an obligation to calculate an importer-specific assessment rate. Final Decision Memo at 6. Defendant argues that the KYD cases involved a market economy and an AFA rate, as opposed to an NME-entity rate. *See* Def.'s Resp. Br. at 10–12, Def.'s Suppl. Br. at 3. *KYD I* specifically ordered Commerce to evaluate an importer's proffered information "in determining an assessment rate for [the importer's] entries or explain why it can decline to do so pursuant to 19 U.S.C. § 1677m(e)." *KYD I*, 34 CIT at 543, 704 F. Supp. 2d at 1334. *KYD II*, in turn, more succinctly explained the statutory and regulatory framework that imposes the obligation to calculate an assessment rate. *KYD II*, 35 CIT at __, 779 F. Supp. 2d at 1368–72.

[13] Defendant advances the same argument. Def.'s Suppl. Br. at 2.

whether it has "the information necessary to calculate a margin for [ ] Homey's sales to Prime Time" is not before it because Homey is ineligible for a separate rate.[14] Final Decision Memo at 6–7.

Whether the final rate is the result of Commerce applying an adverse inference to facts otherwise available or using an individual exporter's own data does not negate the fact that Commerce has assigned a rate. Without further explanation, Commerce's purported practice of only calculating an importer-specific assessment rate when an exporter's rate is individually calculated is unsupported by substantial evidence.

Defendant contends that the regulation's use of the word "normally" implies that there are exceptions to when Commerce is required to calculate an importer-specific assessment rate. Def.'s Suppl. Br. at 2. Defendant claims that Commerce does not calculate an individual dumping margin for an exporter that fails to rebut the presumption of government control. *Id.* As a result, Defendant contends, there is no dumping margin to be used as the numerator in the importer-specific calculation. *Id.* at 2–3; *see also* 19 C.F.R. § 351.212(b)(1). This interpretation cannot withstand scrutiny. "Normally" in 19 C.F.R. § 351.212(b)(1) refers to the method Commerce will "normally" use to calculate the importer-specific assessment rate; not whether it will calculate such a rate at all.[15] When Commerce revised the relevant regulation, it remarked that the historical "master list" or entry-by-entry method for calculating the assessment rate had become burdensome because respondents were unable to tie individual entries to specific sales. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,314 (Dep't Commerce May 19, 1997). Commerce crafted the method encapsulated in the regulation as a new way for calculating the importer-specific assessment rate. Commerce, however, retained the "master list" method to be used

[14] Commerce may be able to explain why its practice of not calculating an importer-specific assessment rate under certain factual conditions is reasonable. It may be that the mechanics of calculating an importer-specific assessment rate, either when the exporter's individual rate is derived by resorting to AFA or a mandatory respondent fails to rebut the presumption of government control in the NME-context, would necessarily result in unreliable or distorted rates. However, it is not for this court to provide a rationale supporting Commerce's determination. It is for Commerce to explain and for the court to assess whether Commerce's stated practice is reasonable. For Commerce to simply say that it will not carry out a calculation establishing an importer-specific assessment rate because it has a practice of not doing so, when its own regulation states that it will so calculate and without explaining the basis for the practice, is unreasonable.

[15] Defendant argues that the use of the word "normally" in 19 C.F.R. § 351.212(b)(1) grants Commerce discretion not to calculate an importer-specific assessment rate. Def.'s Suppl. Br. at 2. Defendant's argument cannot withstand scrutiny, as discussed above. Moreover, it is Defendant's argument, not Commerce's. Commerce does not explain why the regulation grants its discretion or why its practice is reasonable in light of the regulation.

only under specific circumstances and on a case-by-case basis. *Id.* "Normally," therefore, refers to how Commerce will calculate the importer-specific assessment rate and not when. On remand, Commerce must either explain why its practice of not calculating an importer-specific assessment rate where an NME-entity rate is involved is reasonable; or determine whether it can use Prime Time's submission to calculate an importer-specific assessment rate for the entries Prime Time imported. If Commerce is unable to calculate such a rate, it will explain the basis for its conclusion.

III. Application of the PRC-wide rate to Prime Time's Entries

Plaintiff challenges Commerce's decision to assign Homey's PRC-wide rate to Prime Time as unsupported by substantial evidence and not in accordance with law. Prime Time's Br. at 31–35. Specifically, it contends that in choosing the highest available rate, i.e., the PRC-wide rate, Commerce should have given consideration to Prime Time's efforts to populate the record with necessary information. *See id.*; *see also* 19 U.S.C. § 1677e(d)(2). Defendant responds that Commerce did not choose the PRC-wide rate for Homey through an AFA analysis;[16] Homey simply failed to rebut the presumption of government control and was assigned the default PRC-wide rate. Def.'s Resp. Br. at 9–12. For the reasons that follow, the court agrees with the Defendant.

Commerce considers the PRC to be an NME-country. Prelim. Decision Memo at 4–5. In antidumping proceedings, Commerce presumes that the export activities of all companies operating in an NME-country are subject to government control. *Id.* at 5. Commerce assigns all exporters of a given subject merchandise in an NME-country a single antidumping duty rate. *Id.* The presumption is rebuttable; to rebut the presumption and qualify for a separate rate, an exporter must demonstrate the absence of de facto and de jure government control. *Id.* Commerce may establish an individual rate for the NME-country and assign that rate in future proceedings to all entities operating within that NME-country that fail to rebut the presumption. *See* 19 C.F.R. § 351.107(d).[17]

[16] Parties and Commerce sometimes use the shorthand "AFA" or "adverse facts available" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by a statute. *See* 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing from the record, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *Id.*

[17] Pursuant to 19 C.F.R. § 351.107(d), in antidumping proceedings involving imports from an NME-country, "'rates' may consist of a single dumping margin applicable to all exporters

Commerce did not, as Prime Time contends, rely on AFA to choose the PRC-wide entity's rate. [Prime Time's] Reply Br. Supp. Rule 56.2 Mot. J. Agency R. at 16, Jan. 11, 2019, ECF No. 25. The PRC-wide entity's rate was already established. Commerce's use of facts available in this review relates solely to Homey's failure to rebut the presumption that it is part of the PRC-wide entity. The rebuttable presumption applicable in the NME-context sets the NME-entity rate as the default rate. If a party fails to rebut the presumption of government control, it remains part of the NME-entity and is assigned the default NME-entity rate.[18] In the final determination, Commerce determined that Homey was not eligible for a separate rate because it failed to respond to Commerce's Section A Questionnaire, as was required of it as a mandatory respondent. Final Decision Memo at 6–7 (citing Prelim. Decision Memo at 5–6). One can view Commerce's application of the established PRC-wide rate to Homey, by virtue of Homey failing to rebut the presumption of government control, as a facts available determination or a facts available determination with an adverse inference. Either way, it was Homey's burden to rebut the presumption. Commerce continued to consider Homey to be part of the PRC-wide entity and, therefore, it assigned Homey the established PRC-wide-rate.[19] *Id.* at 7.

Relatedly, Plaintiff's argument that Commerce acted contrary to law by failing to consider Prime Time's efforts to populate the record, *see* Prime Time's Br. at 31–35, misconstrues the statutory scheme. Prime Time, as the importer, is not the party whose actions are considered by Commerce when engaging in the adverse inferences analysis under 19 U.S.C. § 1677e(b). The "interested party" the statute refers to is the party to whom Commerce directed its requests for information and to whom the adversely chosen rate would apply.

and producers." *See* 19 C.F.R. § 351.107(d); *see also Antidumping Proceedings*, 78 Fed. Reg. 65,963, 65,964, 65,970 (Dep't Commerce Nov. 4, 2013) (announcement of change in department practice for respondent selection in [ADD] proceedings and conditional review of the [NME] entity in NME [ADD] proceedings).

[18] Prime Time erects a straw man when it argues that Commerce implicitly resorts to AFA to assign Homey the PRC-wide rate, and as a result, assigns Prime Time, a cooperating party, an AFA rate as well. *See generally* Prime Time's Br. at 31–35; Prime Time's Reply Br. at 16–19. Prime Time's cooperation is irrelevant to the questions before Commerce. Whether one views Homey's rate as a function of an adverse inference that Homey failed to rebut the presumption of government control or as simply Homey's failure to rebut that presumption with record evidence, Prime Time's cooperation is of no moment. Homey is the exporter and the party that bears the burden of demonstrating independence or risk remaining part of the NME-entity for the purposes of this review.

[19] Here, the PRC-wide rate was last modified during the December 1, 1999, through November 30, 2000, review of the *ADD Order*. Resorting to AFA, Commerce chose the highest available rate, which was an individually calculated rate for respondent Kaiyuan Group Corporation (Kaiyuan). Issues & Decision Mem. Admin. Review Certain Cased Pencils from the [PRC] at 23–24, A-570–824, (July 16, 2002), *available at* http://ia.ita.doc.gov/frn/summary/prc/02–18856–1.pdf (last visited July 3, 2019).

Accordingly, Commerce's decision not to consider Prime Time's efforts to comply with Commerce's requests for information is in accordance with law. Further, the actions of an importer to comply with Commerce's requests for information are immaterial here and therefore Prime Time's substantial evidence challenge is unavailing.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's decision to reject and remove from the record Prime Time's submission, offered to replace Homey's lack of a response to a Sections C&D questionnaire issued to it, as an unsolicited questionnaire response is sustained; and it is further

ORDERED that Commerce shall place on the administrative record Prime Time's submission, offered as other factual information not elsewhere defined, and the accompanying narrative of admissibility because Commerce's decision to remove both items was contrary to law; and it is further

ORDERED that Commerce's decision to reject Prime Time's submission as other factual information not elsewhere defined is remanded for reconsideration; and it is further

ORDERED that Commerce shall consider the information in Prime Time's submission to calculate an importer-specific assessment rate for Prime Time's entries, or explain why its practice of not calculating such a rate is reasonable, or if unable to calculate, explain the basis for its conclusion; and it is further

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

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

ORDERED that the parties shall have 30 days thereafter to file their replies to comments on the remand redetermination.

Dated: July 9, 2019
New York, New York

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