Slip Op. 19–26

MCKESSON CANADA CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 10–00151

[In Customs classification matter, Plaintiff's motion for summary judgment is granted and Defendant's cross-motion for summary judgment is denied.]

Dated: February 28, 2019

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OPINION

Restani, Judge:

This matter is before the court on cross-motions for summary judgment made by plaintiff McKesson Canada Corporation ("McKesson"), an importer of pharmaceutical equipment, and defendant United States ("the government"). *See* Mem. of McKesson Canada Corp. in Supp. of Pl.'s Mot. for Summ. J., Doc. No. 79 ("McKesson Br."); Mem. in Supp. of Def.'s Cross-Mot. for Summ. J., Doc. No. 90 ("Gov't Br."). McKesson argues that the merchandise is properly classified under heading 8422 of the Harmonized Tariff Schedule of the United States ("HTSUS")[1] as a composite machine whose sole or principal function is packing, specifically, HTSUS 8422.40.91. *See* McKesson Br. at 3–14; Reply of McKesson in Supp. of Pl.'s Mot. for Summ. J. & Resp. in Opp. to Def.'s Cross-Mot. for Summ. J., Doc. No. 102 ("McKesson Resp."). The government, however, asserts that the United States Customs and Border Protection ("Customs") properly classified the subject merchandise under the residual basket subheading 8479.89, HTSUS, for "[m]achines and mechanical appliances having individual functions, not specified or included elsewhere in [Chapter 84];

[1] All citations to the HTSUS, including Section and Chapter Notes, are to the 2008 edition, the version in effect at the time of importation. Although there are no material changes to the relevant subheadings since that time, subheading 8479.89.98 is now 8479.89.94.

Other" and not under heading 8422. *See* Gov't Br. at 15–38; Reply Mem. in Supp. of Def.'s Cross-Mot. for Summ. J., Doc. No. 111 ("Gov't Reply"). For the reasons stated below, McKesson's motion is granted and the government's cross-motion is denied.

BACKGROUND

The following facts are undisputed. The subject merchandise is an "automated pharmacy system" referred to as a PACMED ("Pacmed") machine and described as "a gravity-fed unit dose . . . or multi dose . . . pill dispensing and packaging system" for use in hospitals and retail pharmacies. Statement of Facts of McKesson in Supp. of Pl.'s Mot. for Summ. J. ¶¶ 1–3, Doc. No. 79–1 ("Pl.'s Stmt. of Facts").[2] Its purpose is to "[p]romote compliance, patient safety and medication management" by ensuring that the appropriate amount of prescribed medication is packaged into a pouch and labeled with a patient's identifying information. *Id.* ¶¶ 13, 19, 24.

McKesson imports four Pacmed models.[3] *Id.* ¶ 15. The Pacmed is a composite machine, composed of a partially transparent pill canister compartment mounted on top of a packaging compartment, which are housed together in a large cabinet. *Id.* ¶¶ 4, 24. The unit features a touch screen that is used to input and receive data concerning the medication to be processed. *Id.* ¶¶ 4, 8. The upper compartment contains several canisters that are stocked by a user with a registered quantity of pills and features a bar code or electronic chip that allows the system to identify and monitor inventory. *Id.* ¶¶ 5, 6. The lower compartment is loaded with reels of plastic packaging material and printer ribbons. *Id.* ¶ 7. A printer in the lower compartment prints the patient and prescription data, including a bar code, directly onto the packaging material. *Id.* ¶ 11. After a user initiates an order based on a patient's information, the canisters release the specified quantity of medication, verified by an electronic scale, onto the packaging material, which is then sealed into a pouch containing the pills. *Id.* ¶¶ 9–10, 12. The pouch can be retrieved by a health care worker through a slot at the bottom of the unit for delivery to patients. *Id.* ¶ 13. The Pacmed unit works alongside a digital scale, a barcode scanner, and a computer workstation running Microsoft Windows and Pacmed Core software. *Id.* ¶ 8.

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[2] The facts cited in this opinion and averred in McKesson's Statement of Facts are either admitted by the government or deemed admitted because the government's objections thereto were immaterial or inapposite.

[3] The imported Pacmed models vary only in physical dimension, ranging from approximately three feet by three feet by six feet, at 1,060 pounds, to approximately three feet by four feet by seven feet, at 2,540 pounds. *See* Pl.'s Stmt. of Facts ¶¶ 16–17. A Pacmed holds between 100 and 500 canisters and, on average, packages fifty to sixty pouches per minute. *Id.* ¶¶ 14, 17.

Between July 2008 and November 2008, McKesson made entries of the Pacmed machines at the Port of Champlain, NY. Compl. ¶ 11, Doc. No. 6 (Feb. 10, 2011). Customs liquidated the entries between May 2009 and September 2009, classifying the merchandise under subheading 8479.89, which corresponded to a duty rate of 2.5% *ad valorem*. *Id.* ¶ 12. McKesson filed a protest and requested a ruling as to the proper classification of the merchandise. *Id.* ¶ 14. On September 29, 2009, Customs issued a letter ruling, asserting that the Pacmed should be classified under the residual basket category for "[m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other . . . Other . . . Other" under subheading 8479.89.9899, HTSUS. Cust. Rul. NY N074022 (Sept. 29, 2009). In the ruling, Customs described the merchandise as a "composite machine" that includes "a labeling machine, a hopper, packaging and a dispensing machine." *Id.* But it argued that the packaging was "ancillary to the performance of the machine's dispensing function," excluding heading 8422. Customs reasoned, instead, that the merchandise was a "composite machine consisting of various processing modules which consecutively perform complementary separate functions . . . described in different headings of Section XVI," which all "contribute to the principal function of the composite machine, i.e., the distribution of pharmaceuticals." *Id.* Accordingly, Customs denied McKesson's protest on November 12, 2009, and classified the merchandise under subheading 8479.89.98. Compl. ¶ 15. This action ensued.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the denial of a protest pursuant to 28 U.S.C. § 1581(a) (2006).[4] The court grants summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a). In tariff classification cases, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). The court decides classifications de novo. *See* 28 U.S.C. § 2640(a)(1); *Telebrands Corp. v. United States*, 865 F. Supp. 2d 1277, 1279–80 (CIT 2012).

[4] All statutory citations are to the 2006 edition of the United States Code.

DISCUSSION

The HTSUS is organized by headings, which set forth "general categories of merchandise," and each have one or more subheadings that "provide a more particularized segregation of the goods within each category." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013). Tariff classification under the HTSUS is governed by the General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs"). *See Wilton Indus. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The GRIs "are applied in numerical order and a court may only turn to subsequent GRIs if the proper classification of the imported goods cannot be accomplished by reference to a preceding GRI." *Id.* According to GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided such headings or notes do not otherwise require, according to the [remaining GRIs]."[5] *See* GRI 1. Absent contrary legislative intent, the terms of the headings are "construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). "The section and chapter notes are not optional interpretive rules, but are statutory law." *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed Cir. 2011).

For additional guidance as to the scope and meaning of tariff headings and notes, the court also may consider the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization. *See Carl Zeiss*, 195 F.3d at 1378 n.1 (Fed. Cir. 1999). Although Explanatory Notes are not binding on the court, they are "indicative of proper interpretation" of the tariff schedule. *Id.* (citing H.R. Rep. No. 100–576, at 549 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1582).[6]

Here, the parties agree that there is no genuine dispute as to the nature of the merchandise and, accordingly, summary judgment is

[5] According to Explanatory Note V(a) to GRI 1, "the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." World Customs Organization, Explanatory Note V(a) to GRI 1, HTSUS. Thus, the HTSUS is designed such that the headings and relevant notes are to be exhausted before less precise inquiries, such as those of GRI 3, are considered, e.g., specificity or essential character. *Telebrands*, 865 F. Supp. 2d at 1280–81; *accord Mita Copystar Am. v. United States*, 160 F.3d 710, 713 (Fed. Cir. 1998) ("[I]t is not appropriate to reach [GRI 3] if GRI 1 dictates the proper classification for particular merchandise.").

[6] Citations to the Explanatory Notes ("ENs") in this Opinion are to the 2007 edition, the relevant provisions of which were in effect at the time of importation. *See* World Customs Org., Explanatory Notes to the Harmonized Commodity Description and Coding System (4th ed. 2007).

appropriate. *See* McKesson Br. at 4; Gov't Br. at 3–4. The resolution of the case, therefore, turns on the meaning of the HTSUS provisions.

I. Competing Tariff Provisions

The parties agree that the merchandise properly falls under Chapter 84 of Section XVI, HTSUS, and the court has not uncovered a more apt classification provision elsewhere in the tariff schedule. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("[T]he court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand.") (emphasis in original). The relevant portions of Chapter 84 of the HTSUS read:

8422	Dishwashing machines; machinery for cleaning or drying bottles or other containers; machinery for filling, closing, sealing or labeling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; other packing or wrapping machinery (including heat-shrink wrapping machinery); machinery for aerating beverages; parts thereof: . . .
8422.40	Other packing or wrapping machinery (including heat-shrink wrapping machinery): . . .
8422.40.91	Other
. . .	
8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . .
8479.89	Other machines and mechanical appliances: . . .
8479.89.98	Other

McKesson argues that its Pacmed machines fall under heading 8422. Heading 8422 covers machines, generally, for "packing . . . goods for sale, transport or storage." EN Heading 84.22. This includes "[m]achines for filling containers (e.g., casks, barrels, cans, bottles, jars, tubes, ampoules, boxes, packets or bags), frequently equipped with subsidiary automatic volume or weight control and with devices for closing the containers." *Id.* The heading also includes wrapping machines, "including those with provision[s] for forming, printing, typing, stapling, taping, glueing, closing or otherwise finishing the packing" as well as labeling machines. *Id.* The machines will "frequently perform several of the foregoing functions." *Id.* Furthermore, the Explanatory Notes advise that

> [m]achines which in addition to packing, wrapping, etc., also perform other operations remain classified in the heading **provided** the additional operations are incidental to the packing, etc. Thus machines which pack or wrap good into the forms or presentations in which they are normally distributed and sold in

> commerce, are classified in this heading, whether or not the machines also contain devices for weighing or measuring.

Id. (emphasis in original).

The government proffers heading 8479 as the proper classification for McKesson's machines. Heading 8479 is a residual "basket" provision, which applies only where no other Chapter 84 heading appropriately covers the subject merchandise. EN Heading 84.79 (stating that heading 8479 "is restricted to machinery having individual functions, which cannot . . . be classified in any other particular heading of this Chapter"); *see also* HTSUS Ch. 84, Note 2 ("[A] machine or appliance which answers to a description in one or more of the headings 8401 to 8424 . . . and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group . . . and not the latter group."); *Chevron Chem. Co. v. United States*, 59 F. Supp. 2d 1361, 1368 (CIT 1999) ("Classification of imported merchandise in a basket provision, however, is appropriate only when there is no tariff category that covers the merchandise more specifically."). Thus, the court begins by determining whether the merchandise is classifiable under heading 8422.

II. Heading 8422, HTSUS (Plaintiff's Claimed Classification)

The parties agree that the Pacmed is a "composite machine" within the meaning of Note 3 to Section XVI. *See* Pl. Stmt. of Facts ¶ 24. Pursuant to Note 3,

> [u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

HTSUS § XVI, Note 3.[7] The note is one of "general application which, in certain circumstances, calls for a principal function analysis."

[7] The Explanatory Notes to Note 3 elaborate, describing the multiple machines as "generally complementary and are described in different headings of Section XVI." EN § XVI(VI). Moreover, "machines of different kinds are taken to be **fitted together to form a whole** when incorporated in one in the other or mounted one on the other, or mounted on a common base or frame or in a common housing." *Id.* (emphasis in original). Examples of composite machines are: "printing machines with a subsidiary machine for holding the paper (heading 84.43); a cardboard box making machine combined with an auxiliary machine for printing a name or simple design (heading 84.41); . . . a cigarette making machinery combined with a subsidiary packaging machinery (heading 84.78)." *Id.* The court agrees with the parties that the Pacmed is a composite machine.

BenQ Am. Corp., 646 F.3d at 1380. A comparative principal function analysis is not necessary, however, "when the composite machine is covered as such by a particular heading." EN § XVI(VI); *see also Sony Elecs., Inc. v. United States*, Slip. Op. 13–153, 2013 WL 6728681, at *14 (Dec. 23, 2013) ("Note 3 is only applicable where an item possesses multiple functions that are accounted for in different tariff provisions. Where a heading describes all of the functions of a multifunction article, an analysis of the principal function under Note 3 is not necessary."). Although not cited by the parties, Note 4 to Section XVI is also instructive:

> Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

HTSUS § XVI, Note 4.

The parties' dispute centers around whether the sole or principal function of the Pacmed machine is performed by the device's packing machinery. The Pacmed produces plastic pouches that encase pills that are individually labeled with identifying information for proper administration to the patient. This production process includes storing, sorting, packaging, and labeling functions. The packing operation, however, creates sealed pouches from a reel of either plastic or cellophane by thermally sealing the material around a specified quantity of medication. Pl. Stmt. of Facts ¶ 7, 12. The Pacmed does not merely "fill, close, seal and label [a] container," as described in the second clause of heading 8422, because the material used in packing is not a "container" until the machine seals the pharmaceuticals within it. Thus, pursuant to GRI 1, the operative term under consideration in heading 8422 is in the fourth clause: "other packing or wrapping machinery (including heat-shrink wrapping machinery)." *See also* EN Heading 84.22 (listing "wrapping . . . machines, including those with provision for forming, printing, . . . closing or otherwise finishing the packing"). In addition to packing, the labeling function (as well as any weighing or measuring operation) is contemplated by heading 8422 as confirmed by Explanatory Note 84.22. *See* EN Heading 84.22 (classifying "devices for weighing and measuring" and "[l]abeling machines, . . . which also print, cut and gum the labels" under "machines . . . generally, for packing").

McKesson contends that the storing, sorting, monitoring, and weighing of the pills, as well as the labeling and printing of the pouches fall within the ambit of "packing," as described in the Explanatory Notes. McKesson Br. at 9–14. Although Customs rulings are not binding on the court, McKesson notes the similarities between this case and Customs' classification of "a packaging system used for the delivery of transdermal drugs to patients" under heading 8422. *Id.* at 8 (citing Cust. Rul. NY N233938 (Oct. 23, 2012)). In that ruling, Customs concluded that several machines working as a "functional unit" to form, fill, and seal pouches containing a predefined dosage of an active pharmaceutical ingredient all contributed "to a clearly defined function of packaging (forming, filling, and sealing)." Cust. Rul. NY N233938 (implicitly referring to Note 4 to Section XVI). McKesson argues that the Pacmed performs the same function, dropping a predefined quantity of medicine into a packaging machine, printing a label on the pouching material, and sealing the pouch closed. McKesson Br. at 8–9.

McKesson also rejects Customs' finding that the Pacmed's principal function, by application of Note 3 to Section XVI, is the "distribution of pharmaceuticals." *See* McKesson Br. at 9, 13–14; McKesson Resp. at 9. Rather, McKesson argues, the Pacmed only "enable[s] such distribution" by providing a "packag[ed] medicine in a customized quantity" to a nurse or pharmacist who can "easily, accurately, and confidently . . . deliver it to the patient." McKesson Br. at 13–14. Contrary to Customs' ruling, here, McKesson concludes, the principal function is packing, performed by the Pacmed's constituent packing machine. *Id.* at 9.

The government, for its part, argues that classification under heading 8422 is inappropriate because the heading describes only one of several stages performed by the Pacmed's distribution system. Gov't Br. at 10, 15. Moreover, the government claims that, in addition to storing, sorting, packing, and labeling, the Pacmed

> segregates, weighs, and monitors the inventory, . . . tracks the identity and amount of medication [throughout the entire process with bar codes and measuring tools], . . . interfaces with the hospital or pharmacy computer system to receive and process the patient's information, . . . dispenses the medication pursuant to [the health care provider's] directives, . . . and labels the medication in a 'personalized' way, . . . ensur[ing] that the proper amount and type of medication is placed in the individual packages and that the label contains the specific patient information.

Id. at 28. It argues that, because "no one operation is more important in the system as compared to the next," the listed operations cannot be considered "incidental" to the packing operation. *Id.*

The government further concludes that the Pacmed performs no one principal function, such that Note 3 is not applicable to classification. Gov't Reply at 5 (quoting EN §XVI(VI), stating, in pertinent part, that "[w]here it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply [GRI] 3(c)," which requires classification under the heading last in numerical order). Alternatively, it supports Customs' determination that the principal function of the Pacmed is the distribution of pharmaceuticals, which does not have a corresponding heading in Chapter 84, and so requires classification under the residual heading 8479. *See* Gov't Br. at 24; Gov't Reply at 5.

The government's arguments are unconvincing. The enumerated functions are incidental to the packing function as set forth in the Section, Chapter, and Explanatory Notes. First, as discussed above, the weighing, measuring, and labeling operations are specifically identified as incidental to the packing machinery in the Explanatory Notes. *See* EN Heading 84.22. Second, the storing operation is similarly incidental to the packing. The Pacmed stores canisters in its upper cabinet, which in turn store pills. Pl. Stmt. of Facts ¶ 4. The machine's ability to store medications for future use is a result of the Pacmed's intermittent use. In other kinds of packing machines, a hopper or conveyor continuously feeds an item into the machinery that "fills" a container. *See, e.g.*, Cust. Rul. NY 879640 (Nov. 17, 1992) (stating that, for machines "used to automatically form and fill flexible plastic pouches with milk or other liquids[,] . . . the pouches are continuously filled from a constant level buffer tank, located at the top of the machine, which is fitted with a proportional valve and a ball-cock."); Cust. Rul. NY 866831 (Sept. 19, 1991) (describing a machine that fills pots and trays with soil as being fed by an "automatic pot conveyor"). Because the items are continuously fed into the machinery, they are not "stored." *See store*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY (2002) ("to stock or future against a future use"); *store*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("to keep in store for future use; to collect and keep in reserve; to form a store, stock, or supply of; to accumulate, hoard). Here, because the Pacmed requires a user's input to operate, the pills are not continuously fed into the lower packaging cabinet and are stored for future use. Thus, the Pacmed's storing operation facilitates its ability to create pouches

from a variety of pharmaceuticals on demand. Accordingly, the storage of the pills is incidental to the packing.

Third, the sorting or segregating operation is, again, incidental to the packing function. The Pacmed sorts pills from various canisters to be packaged within one pouch as part of a multi-dose prescription. *See* Gov't Exhibits in Supp. of Its Cross-Mot. for Summ. J. Ex. 8 ("Pacmed Core Operator's Manual, Bates Nos. 000930–001115") at 7, 15, Doc. No. 90–10 ("Gov't Ex. 8"). The sorting operation facilitates the filling and sealing functions of the packing machine by ensuring that the appropriate type and quantity of medication is packed in each pouch. Customs' rulings lends support to the notion that the sorting operation of the Pacmed is incidental to its packing of unit-dose or multi-dose pouches. In Customs Ruling HQ W968275, it determined that "syringe finishing line" machines, which label, arrange, connect, and package pre-filled syringes, were classified under heading 8422. *See* Cust. Rul. HQ W968275 (Jan. 26, 2010). The machine consisted of an "Accumulator," which "serve[d] as a collection and sorting area to accumulate the syringes for the next step in the processing." *Id.* Customs determined that the "Accumulator . . . facilitate[s] the labeling, closing and sealing functions by . . . sorting . . . the syringes." *Id.*; *see also* Cust. Rul. HQ 958809 (May 23, 1996) (finding that an automatic rose grading machine, which performed a sorting function by grading and bunching roses of similar lengths and thicknesses, was classified under heading 8422). Accordingly, Customs did not determine that the sorting function removed the machines from classification under heading 8422. The court arrives at the same conclusion here.

Fourth, the parties stipulated that the "pouch is . . . conveyed through a slot at the bottom of the unit." Pl. Stmt. of Facts ¶ 13. But Customs described the pouch as being "dispensed through a slot on the front." Cust. Rul. NY 074022. McKesson contends that Customs' use of the term "dispensing" is not helpful, as that term does not appear in the headings of Chapter 84, and because dispensing is of the same class or kind as the functions listed in heading 8422. *Id.* at 10. It points to several previous Customs rulings finding that a machine with a dispensing function was classified under heading 8422. *Id.*; *see* Cust. Rul. NY K87599 (July 30, 2004) (classifying a "hand-held device [that] dispenses 3/4" transparent tape" under "machinery used for filling, closing, sealing, capsuling or labeling boxes, bags or similar containers"); Cust. Rul. HQ 957269 (Mar. 3, 1995) (classifying a machine "used by farmers or contractors to automatically wrap round silage bales with plastic film" under the same heading, noting that it "dispenses plastic film while [a] turntable rotates in order to

wrap the bale"); Cust. Rul. NY 866831 (Sept. 19, 1991) (classifying a machine "used to automatically fill pots and trays with soil" under 8422 even though one potting machine "incorporat[ed] a pneumatic pot dispenser"). Accordingly, McKesson concludes that Customs disingenuously determined that "dispensing" is a separate function falling outside the packing provision. McKesson Br. at 11. The court agrees.

In other packing machines, transfer conveyors continuously deliver the item to the next downstream machine. Here, the Pacmed operates with the input of a user, to create and deliver a pre-determined number of pouches. The choice of the word "dispensing" by Customs to describe this process and the machine's function as a whole seems to relate to the pharmaceutical nature of the item packaged. In actuality, any packaging machine delivers or distributes, i.e., dispenses, a packaged item in some way, either to the user of the machine or to the next downstream machine. Dispensing is a part of all packaging. *See dispense*, OXFORD ENGLISH DICTIONARY (2d Ed. 1989) ("to mete out, deal out, distribute; to bestow in portions or from a general stock"); *dispense*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("to deal out in portions : distribute, give, provide"). Thus, Customs reliance on any "dispensing" function is inapposite.

Finally, the monitoring, tracking, interfacing, processing, and "personalization" operations are specifically addressed by Note 5(E) to Chapter 84. Note 5(E) provides that "[m]achines incorporating or working in conjunction with an automatic data processing [("ADP")] machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.[8] HTSUS Ch. 84, Note 5(E). Here, the Pacmed includes a touch screen that runs an Automated Tablet Dispensing and Packaging Software (ATDPS). *See* Gov't Ex. 8 at 7, 13, 15–16. Groups of prescriptions, or "batches," are created by a software on an external computer and are transferred to the Pacmed Core, the software used to package drugs operating on the PC workstation. *Id.* at 13, 17. This information is relayed to the touch screen, from which batches can be packaged. *Id.* at 17. The batches "contain all of the information necessary for the packaging process to be completed. This includes information such as patient name, administration date, administration time, mnemonic (drug

[8] Explanatory Note (E) to Note 5(E) of Chapter 84 adds that the "machine incorporating an automatic data processing machine" is classified "in the heading corresponding to the function of that machine or, in the absence of a specific heading, in a residual heading, and not in heading 84.71." The court concludes that the Pacmed both incorporates an ADP machine, the ATDPS touch screen, and works in conjunction with an ADP machine, the computer workstation running the Pacmed Core software.

code), quantity, etc." *Id.* The Pacmed Core software on the PC workstation performs the majority of actions. *Id.* at 37. The ATDPS touch screen serves to provide information about the batch in process, allow communication between the Pacmed Core software and Pacmed unit, and permit the user to start and stop the packaging process and refill canisters. *Id.* at 26, 63. The operations alleged by the government are data processing functions, handled by the Pacmed Core software. The component machinery performing the storing, sorting, packing, labeling, and other operations receive data from the ATDPS touch screen and Pacmed Core PC workstation to "personalize" pouches with individual patient-specific medication and labeling. The Pacmed's ability to communicate with a hospital or pharmacy's system, to track and monitor the medication, and to print unique labels is derived from the internal and external automated data processors using the Pacmed's proprietary software and Microsoft Windows. The Pacmed, however, has a specific function other than data processing under which it may be classified—to pack.

In summary, each allegedly distinct operation supports or is part of the Pacmed's primary packaging function. Thus, the Pacmed is a packing machine that is classified under heading 8422 of the HTSUS.

Note 3 to Section XVI does not alter this conclusion, to the extent any principal function analysis is required. For composite machines, classification is determined "according to the principal function of the composite machine." EN § XVI(VI). The principal function of the Pacmed is to provide medical professionals with packaged medications in individual, labeled packages. The Pacmed contains storage hoppers in the upper cabinet, a packing machine in the lower cabinet, an available LCD monitor, and a slot in the front used for delivering the pouches. The principal function, however, is performed by the packing machinery. The optical scanners, storage hoppers, electronic scales, dispensing slot, and ATDPS screen contribute functionalities arguably beyond that of a basic packing machine, including the holding of large amounts of medicine, continuous monitoring of inventory, minimization of packaging errors, and convenient means of retrieving packaged medication. These additional functionalities, if considered separately, are complementary to the principal function of packing, as they all relate to improving the speed, efficiency, and reliability of the packing operation. *See Belimo Automation A.G. v. United States*, 774 F.3d 1362, 1366 (Fed. Cir. 2014) (finding that a device connected to an actuator that measures the position of an air-conditioner's damper blades was an additional functionality, and did not change the classification of the actuator as an electric motor); *see id.* ("In other words, although the presence of the [device] may allow the motor to do its job

more efficiently and accurately, and in some cases more safely, [its] principal function is nonetheless to assist in moving the damper blades."). Despite the important operations the Pacmed performs in the interest of proper compliance, patient safety, and medication management, and in storing large amounts of medications in its hoppers, the Pacmed's essence is that of a packing machine.

The government's argument that the principal function of the machine, if any, is to distribute pharmaceuticals does not help to resolve the classification issue. The distribution of medication is a multistep process, not a function of a machine. The principal function of the Pacmed cannot be the distribution of medicine because the Pacmed does not perform the crucial steps required in a distributional scheme, including the delivery of the medication to the patient. Indeed, the government's expert witness defined "distribution" as "procurement, storage, packaging and dispensing." Gov't Exhibits in Supp. of Its Cross-Mot. for Summ. J. Ex. 5 ("Relevant excerpts from the transcript of the deposition of Dr. Edgar Gonzalez, taken July 14, 2015") at 79, Doc. No. 90–7. The Pacmed does not procure the medication, nor does it assist in the prescription of medications. Moreover, delivery and administration to patients is a critical step in the distributional chain. Those are not functions performed by the Pacmed, but rather by medical professionals.

The government's argument that the principal purpose of the Pacmed should govern the classification of the merchandise is similarly unavailing. The government points to Note 7 to Chapter 84, which states in relevant part:

> A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose.
>
> Subject to note 2 to this chapter and note 3 to section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 8479.

HTSUS Ch. 84, Note 7. The government argues that the principal purpose of the Pacmed machine is to "promote compliance, patient safety and medication management." Gov't Br. at 11 (quoting Pl. Stmt. of Facts ¶ 19). Thus, the government contends, because no heading of Chapter 84 describes the principal purpose of the Pacmed, application of Note 7 requires classification under heading 8479. *See* Gov't Reply at 4. The government errs in two ways. First, the other Section, Chapter, and Explanatory Notes adequately guide the court

in determining the appropriate classification at issue, such that the introduction of Note 7 would not require classification under heading 8479. *See* HTSUS Ch. 84, Note 7 (stating that the note is "[s]ubject to note 2 . . . and note 3 . . ."). Second, the government conflates the aspirational goals of the users of the Pacmed with purpose or use as a classification principle. Through its composite machine functions, the Pacmed's purpose is, with minimal error, to provide medical professionals with packaged medications labeled with patient-specific information. Appropriately packaged and labeled medication helps to, in the language of the parties, "promote compliance, patient safety and medication management." *See* Pl. Stmt. of Facts ¶ 19. Notwithstanding that the statement of facts uses the term "purposes," these are goals achieved not only through the use of the Pacmed, but also through the diligence of the health care professionals that stock the machine, prescribe the medication, and deliver the pharmaceuticals to the right patients. Because the Pacmed is properly classified under 8422 as a packing machine, it cannot be classified under the residual heading 8479 by way of Chapter Note 7, or otherwise.

III. The Pacmed's Subheading Classification

GRI 6 governs classification at the subheading level and requires a renewed sequential application of the first five GRIs. *See* GRI 6, HTSUS ("For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the [GRIs], on the understanding that only subheadings at the same level are comparable."). As stated above, because the Pacmed creates a container by packing and wrapping the pharmaceuticals within a packaging material, the operative term within heading 8422 is "other packing or wrapping machinery." Accordingly, the proper subheading classification is the corresponding subheading 8422.40, for "Other packing or wrapping machinery (including heat-shrink wrapping machinery)." Subheading 8422.30—listing "Machinery for filling, closing, sealing or labeling bottles, cans, boxes, bags or other containers; machine for capsuling bottles, jars, tubes and similar containers; machinery for aerating beverages"—does not apply because the Pacmed does not simply fill a container, as discussed in connection with GRI 1, supra page 9. The remaining subheadings are not relevant for the classification at issue.[9] Subheading 8422.40 is further broken out into 8422.40.11, which is for tobacco products or

[9] These subheadings can readily be discarded: heading 8422.11 is for "Dishwashing machines: of the household type," heading 8422.20 is for "machinery for cleaning or drying bottles or other containers," and heading 8422.90 is reserved for "Parts" of machines falling under the other subheadings.

candy, clearly not applicable, and 8422.40.91, "Other." Accordingly, the Court concludes that the proper tariff classification for McKesson's Pacmed machine is 8422.40.91, HTSUS.

CONCLUSION

For the foregoing reasons, the court grants McKesson's motion for summary judgment, denies the government's cross-motion for summary judgment, and holds that the Pacmed machines at issue are properly classified under subheading 8422.40.91, HTSUS, free of duty. Judgment will be entered accordingly.

Dated: February 28, 2019
New York, New York

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

Slip Op. 19–27

JACOBI CARBONS AB AND JACOBI CARBONS, INC., Plaintiffs, and NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CALGON CARBON CORP. AND CABOT NORIT AM., INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 15–00286

[The U.S. Department of Commerce's Second Remand Results are remanded with respect to the agency's surrogate country selection and sustained with respect to the agency's value-added tax adjustment.]

Dated: March 4, 2019

Daniel L. Porter and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, DeKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff-Intervenors Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Co., Ltd., Ningxia Mineral and Chemical Ltd., Shanxi DMD Corp., Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Carbon Co., Ltd., and Tianjin Maijin Industries Co., Ltd.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David A. Hartquist, *R. Alan Luberda*, *John M. Herrmann*, *Melissa M. Brewer*, and *Kathleen M. Cusack*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") second redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Court Remand ("2nd Remand Results"), ECF No. 133–1.

Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (together, "Jacobi") and Plaintiff-Intervenors[1] (collectively, with Jacobi, "Plaintiffs") initiated these consolidated cases challenging several aspects of

[1] Plaintiff-Intervenors include: Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui"); Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Co., Ltd., and Tianjin Maijin Industries Co., Ltd. (collectively, "CATC"); and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd., Cherishmet Inc., and Datong Municipal Yunguang Activated Carbon Co., Ltd., (collectively, "Cherishmet"). The court consolidated cases filed by Huahui, CATC, and Cherishmet under

Commerce's final results in the seventh administrative review ("AR7") of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC" or "China"). *See Certain Activated Carbon from the People's Republic of China*, 80 Fed. Reg. 61,172 (Dep't Commerce Oct. 9, 2015) (final results of antidumping duty admin. review; 2013–2014) ("*Final Results*"), ECF No. 37–3, and accompanying Issues and Decision Mem., A-570–904 (Oct. 2, 2015) ("I&D Mem."), ECF No. 37–4.[2] Plaintiffs challenged Commerce's (1) selection of Thailand as the primary surrogate country, (2) selection of Thai surrogate values to value financial ratios and carbonized material, and (3) reduction of Jacobi's constructed export price ("CEP") by an amount for irrecoverable value added tax ("VAT"). *See, e.g.*, Confidential Pls. Jacobi Carbons AB and Jacobi Carbons, Inc.'s Mot. for J. on the Agency R. and Pls.' Br. in Supp. of their Mot. for J. on the Agency R. ("Jacobi Rule 56.2 Mem."), ECF No. 51.

On April 7, 2017, the court remanded Commerce's surrogate country selection (specifically, its determinations regarding economic comparability generally and significant production of comparable merchandise by Thailand in particular); sustained Commerce's authority to deduct irrecoverable VAT from CEP while remanding its calculation methodology as lacking substantial evidence; and deferred resolving Plaintiffs' arguments regarding Thai surrogate values pending the results of Commerce's remand redetermination. *See Jacobi Carbons AB v. United States* ("*Jacobi (AR7) I*"), 41 CIT ___, 222 F. Supp. 3d 1159 (2017).

On August 10, 2017, Commerce filed its first remand redetermination. *See* Final Results of Redetermination Pursuant to Court Remand ("1st Remand Results"), ECF No. 105–1. Following briefing and oral argument, on April 19, 2018, the court sustained Commerce's economic comparability determination but again remanded the agency's determination that Thailand is a significant producer of comparable merchandise and irrecoverable VAT adjustment, as well as its surrogate value selections for financial ratios and carbonized mate-

lead Court No. 15–00286, filed by Jacobi. *See* Order (Dec. 16, 2015), ECF No. 39. Those parties had also intervened in this case. *See* Order (Oct. 26, 2015), ECF No. 22; Order (Nov. 17, 2015), ECF No. 28; Order (Nov. 20, 2015), ECF No.33. Accordingly, the court refers to those parties as "Plaintiff-Intervenors."

[2] The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 37–1, and a Confidential Administrative Record ("CR"), ECF No. 37–2. The administrative record associated with the 2nd Remand Results is contained in a Public Remand Record ("PRR"), ECF No. 134–3, and a Confidential Remand Record, ECF No. 134–2. Parties submitted public and confidential joint appendices containing record documents cited in their briefs on the 2nd Remand Results. *See* Public J.A. to Parties' Comments on Second Remand Redetermination ("PRJA"), ECF No. 141; Confidential J.A. to Parties' Comments on Second Remand Redetermination ("CRJA"), ECF No. 142.

rial. *See Jacobi Carbons AB v. United States* ("*Jacobi (AR7) II*"), 42 CIT ___, 313 F. Supp. 3d 1308 (2018).[3]

On October 24, 2018, Commerce filed its second remand redetermination. Therein, Commerce affirmed its determination that Thailand is a significant producer of comparable merchandise and its selection of Thai import data as the surrogate value for carbonized material. 2nd Remand Results at 3–8, 15–20. Commerce selected a different Thai source to value financial ratios and reconsidered the basis for its VAT adjustment while continuing to adjust Jacobi's constructed export price for VAT. *See id.* at 9–15, 20–32. Commerce's redetermination increased Jacobi's weighted-average dumping margin from $1.05 per kilogram to $1.76 per kilogram. *See id.* at 53–54; *Final Results*, 80 Fed. Reg. at 61,174. Commerce assigned Jacobi's rate to the non-individually-examined respondents eligible for a separate rate. *See* 2nd Remand Results 53–54.

Jacobi and CATC filed comments opposing the 2nd Remand Results. *See* Pls.' Comments on Commerce's Second Remand Determination ("Jacobi's Opp'n Cmts."), ECF No. 138; Consol. Pls. Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Carbon Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Comments in Opp'n to U.S. Department of Commerce's Second Remand Redetermination ("CATC's Opp'n Cmts."), ECF No. 137. Defendant United States ("the Government") and Defendant–Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc. ("Calgon") filed comments in support of the 2nd Remand Results. *See* Def.'s Reply to Pls.' and Consol. Pls.' Respective Comments on the Second Remand Redetermination ("Def.'s Reply Cmts."), ECF No. 140; Def.–Ints.' Comments in Supp. of the Department of Commerce's Remand Redetermination ("Def–Ints.' Reply Cmts."), ECF No. 139.

For the following reasons, the court remands Commerce's determination that Thailand is a significant producer of comparable merchandise and directs Commerce to reconsider its selection of a primary surrogate country. Because Commerce relied on its preference to use data from the primary surrogate country as a basis for selecting the challenged surrogate values, *see* 2nd Remand Results at 13, 19, the court also remands Commerce's surrogate value selections. The court sustains Commerce's VAT adjustment.

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[3] The court's opinions in *Jacobi (AR7) I* and *Jacobi (AR7) II* present background information on this case, familiarity with which is presumed.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[4] and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court's review of Commerce's interpretation and implementation of a statutory scheme is guided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See Apex Frozen Foods Private Ltd. v. United States,* 862 F.3d 1322, 1329 (Fed. Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* (quoting *Chevron,* 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron,* 467 U.S. at 84243). Only "if the statute is silent or ambiguous," must the court determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron,* 467 U.S. at 843). Additionally, "[t]he results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (internal quotation marks and citation omitted).

DISCUSSION

I. Significant Producer of Comparable Merchandise

A. Legal Framework

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production[5] in a surrogate country, *see id.* § 1677b(c)(1), and those values are referred to as "surrogate values." In selecting surrogate values, Commerce must use "the best available information" that is, "to the extent possible," from a market economy country or countries that are economically comparable to the nonmarket economy country and are "significant

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

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

producers of comparable merchandise." *Id.*§ 1677b(c)(1), (4). Commerce generally values all factors of production in a single surrogate country.[6]

Commerce has adopted a four-step approach to selecting a primary surrogate country. Pursuant thereto:

> (1) the Office of Policy ("OP") assembles a list of potential surrogate countries that are at a comparable level of economic development to the [non-market economy] country; (2) Commerce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

Jiaxing Brother Fastener Co., Ltd. v. United States, 822 F.3d 1289, 1293 (Fed. Cir. 2016) (citation omitted); *see also* Import Admin., U.S. Dep't of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Feb. 27, 2019) ("Policy Bulletin 04.1").

Neither the statute nor Commerce's regulations define "significant producer." *See* 19 U.S.C. § 1677b; 19 C.F.R. § 351.408. However, in its Policy Bulletin 04.1, Commerce described its practice for evaluating significant producing countries:

> [t]he extent to which a country is a *significant* producer should not be judged against the [subject non-market economy] country's production level or the comparative production of the five or six countries [that are considered potential surrogate countries]. Instead, a judgement [*sic*] should be made consistent with the characteristics of world production of, and trade in, comparable merchandise (subject to the availability of data on these characteristics). Since these characteristics are specific to the merchandise in question, the standard for "significant producer" will vary from case to case. For example, if . . . there are ten large producers and a variety of small producers, "significant producer" could be interpreted to mean one of the top ten. If, in the example above, there is also a middle-size group of producers, then "significant producer" could be interpreted as one of the top

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

> ten or middle group. In another case, there may not be adequate data available from major producing countries. In such a case, "significant producer" could mean a country that is a net exporter, even though the selected surrogate country may not be one of the world's top producers.

Policy Bulletin 04.1 at 3. Because the term "significant producer" is otherwise undefined and ambiguous, the court must assess whether Commerce's interpretation of significant producer in this case is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843; *Apex Frozen Foods*, 862 F.3d at 1329. To effectuate judicial review, Commerce must provide "a reasoned analysis or explanation for [its] decision" so the court may "determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 616 F.3d 1300, 1304 (Fed. Cir. 2010) (citation omitted).

B. Commerce's Interpretation of "Significant Producer" in This Proceeding

The 2nd Remand Results reflect Commerce's third effort to justify its determination that Thailand is a significant producer of comparable merchandise. In the Issues and Decision Memorandum, Commerce identified Thailand as a significant producer based on its total activated carbon export quantity. I&D Mem. at 7. The court held that reliance on total exports without evidence that those exports influenced global trade in activated carbon was not a permissible method of interpreting the term "significant producer" or, thus, identifying significant producer countries. *Jacobi (AR7) I*, 222 F. Supp. 3d at 1181 (citing *Chevron*, 467 U.S. at 843; *Fresh Garlic Producers Ass'n v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1313, 1338–39 (2015)).[7] Pointing to evidence that "Thailand's proportion of 2013 global exports . . . was just 1.4 [percent] including the PRC[] and 2.6 [percent] excluding the PRC," the court concluded that "Commerce has not explained the significance of Thailand's contribution to global exports sufficiently well so as to enable the court to conclude that its determination that Thailand is a 'significant producer' is supported

[7] In *Fresh Garlic*, the court opined that

> an interpretation of 'significant producer' countries as those whose domestic production could influence or affect world trade would be a permissible construction of the statute. This follows from the plain meaning of the word 'significant' as something 'having or likely to have influence or effect.' This definition, however, necessarily requires comparing potential surrogate countries' production to world production of the subject merchandise.

121 F. Supp. 3d at 1338–39 (citation omitted), *quoted in Jacobi (AR7) I*, 222 F. Supp. 3d at 1180.

by substantial evidence." *Id.* at 1181 (citations omitted). The court also rejected the Government's *post hoc* reliance on Thailand's ranking of ninth out of twenty-seven activated carbon exporting countries absent evidence regarding "the significance of that ranking in terms of its effect on global trade." *Id.* at 1181–82 (noting that "the top five exporters . . . collectively account for more than 90 [percent] of global exports" and, "[t]hereafter, listed countries contribute relatively little to global exports").

In its first remand redetermination, Commerce sought to rely on financial statements from two Thai manufacturers of activated carbon evidencing some domestic production of comparable merchandise and Thailand's net export quantity to conclude that Thailand is a significant producer of comparable merchandise. 1st Remand Results at 21–22. The court rejected Commerce's first basis—domestic production—because it lacked any analysis as to whether—or why—the amounts were significant, thereby reading the word "significant" out of the statute. *Jacobi (AR7) II*, 313 F. Supp. 3d at 1326. The court further faulted Commerce's attempt to rely on net exports. *Id.* at 1327–28. While noting that "the court does not hold that the current record does not support a permissible interpretation of significant producer on the basis of net exports," the court could not discern Commerce's reasons for so finding. *Id.* at 1328. Rather, Commerce appeared to assume that net exports *per se* satisfied the significant producer criterion, *see* 1st Remand Results at 21–22, which was contrary to Commerce's internal guidance explaining that "'significant producer' *could* mean a country that is a net exporter," Policy Bulletin 04.1 at 3 (emphasis added), and legislative history indicating that "[t]he term 'significant producer' includes any country that is a *significant* net exporter," H.R. Rep. No. 100–576, at 590 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623 (emphasis added).

In its second remand redetermination, Commerce explained that it does not measure the significance of a country's production according to whether that production influences or effects world trade (or is likely to do so). 2nd Remand Results at 5–6. Commerce instead interprets "significant" as meaning "a noticeably or measurably large amount." *Id.* at 6. As a substitute for production, Commerce again relied on Thailand's total export quantity and net export quantity, as well as Thailand's ranking as the ninth largest global exporter of activated carbon among 24 reporting countries and Thailand's ranking as the largest global exporter of activated carbon among the countries Commerce considers to be at the same level of economic development as China. *See id.* at 5–8.

C. Parties' Contentions

Jacobi contends that Commerce has adopted an impermissible interpretation of the term "significant" and has failed to point to substantial record evidence that Thailand is a significant producer of the subject merchandise. Jacobi's Opp'n Cmts. at 5–10. Jacobi notes that the court has already rejected Commerce's reliance on Thailand's total export ranking and asserts that Commerce has added nothing new to its analysis. *Id.* at 8. Jacobi also contends that Commerce's reliance on Thailand's export ranking among the economically comparable countries is contrary to Commerce's internal policy guidance. *Id.*

CATC likewise contends that Commerce's redetermination "add[s] essentially nothing" to the agency's prior analysis. CATC's Opp'n Cmts. at 5; *see also id.* at 5–7. CATC further contends that Commerce's interpretation of "significant" is "unreasonably subjective." *Id.* at 7. According to CATC, Commerce's selection of a primary surrogate country in this proceeding reflects a failure to consider the purpose of the analysis, which is to "find reliable surrogate country data that most accurately represents the purchasing and production situation of [Jacobi]." *Id.* at 8–9.

The Government and Calgon contend that Commerce has adopted a permissible construction of the term "significant" and its findings are supported by substantial evidence. Def.'s Reply Cmts. at 3–8; Def.-Ints.' Reply Cmts. at 8–11. They each point to *Juancheng Kangtai Chem. Co., Ltd. v. United States*, Slip Op. 17–3, 2017 WL 218910, at *4 (CIT Jan. 19, 2017), as support for Commerce's interpretation of "significant" as a "noticeably or measurably large amount." *See* Def.'s Reply Cmts. at 3–4; Def.-Ints.' Reply Cmts. at 9.

D. Commerce's Determination is Remanded for Reconsideration

Upon consideration of the agency's second remand redetermination and the briefing to the court, Commerce's finding that Thailand is a significant producer must be remanded. Commerce has effectively divorced the term "significant" from the term "production" and applied its definition of "significant" without the context necessary to ensure that its determination is not arbitrary. Commerce has not supplied the court with a well-reasoned explanation supporting its consideration of total or net exports as a substitute for production. Overall, the agency has failed to interpret or apply the statutory criterion in its entirety and has not supported its determination that Thailand is a significant producer with substantial evidence.

With respect to total exports, Commerce asserted that the statute "does not require [the agency] to seek the largest overall global exporter in order to find significant production; it only requires a reasonable finding that a country's exports are significant." 2nd Remand Results at 6–7 & n.27 (citing 19 U.S.C. § 1677b(c)(4)(B)). For this to be reasonable, Commerce must explain why exports are a permissible substitute for domestic production and substantiate the significance of a country's exports, taking into account the record before it, including information that fairly detracts from the agency's finding.[8] Commerce did not do so.[9]

Commerce characterized Thailand's total export quantity as "noticeably or measurably large." 2nd Remand Results at 35; *see also id.* at 37. Commerce is within its discretion to adopt that definition of "significant." *See Juancheng Kangtai*, 2017 WL 218910, at *4 (holding that Commerce's corresponding interpretation of the term "significant" merited *Chevron* deference). Nevertheless, Commerce must supply the court with some basis for reviewing the *application* of its chosen interpretation to the factual record, so the court can ensure that Commerce's determination is not arbitrary. *See, e.g.*, *Thai I-Mei Frozen Foods Co.*, 616 F.3d at 1304. Numbers are not "large" or "significant" in a vacuum; in order to consider whether such descriptors reasonably apply, the numbers must be placed in context.

Commerce's Policy Bulletin recognizes the contextual nature of the significant producer determination: it prompts the agency to issue a decision "consistent with the characteristics of world production of, and trade in, comparable merchandise." *See* Policy Bulletin 04.1 at 3. The examples that follow direct Commerce to examine significance from the perspective of relative contributions to global production. *See id.* (noting, "[f]or example, [that] if there are just three producers of comparable merchandise in the world, then arguably any commercially meaningful production is significant"). The same holds true for

[8] As noted, the statute's legislative history and Commerce's internal guidance speak to the use of net exports—not total exports—as a potential measure of the significance of production. H.R. Rep. 100–576, at 590; Policy Bulletin 04.1 at 3. The use of net exports provides at least some assurance that a country's exports do not consist entirely of transshipped imports.

[9] Regarding its use of exports as a proxy for domestic production, Commerce cited to its use of total exports in an unrelated proceeding involving certain oil country tubular goods ("OCTG") from the Socialist Republic of Vietnam. *See* 2nd Remand Results at 7 & n.28 (citing, *inter alia*, Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review, A-552–817 (Oct. 5, 2016) ("OCTG Prelim. Mem.") at 7, *available at* https://enforcement.trade.gov/frn/summary/vietnam/2016–24797–1.pdf (last visited Feb. 27, 2019). In that decision, Commerce identified countries with *any* exports as significant producers while likewise failing to explain its use of that metric as a substitute for the statutory criterion of production. *See* OCTG Prelim. Mem. at 7. Commerce's citation to this decision, therefore, fails to support meaningfully its redetermination in this proceeding.

export data. Here, however, Commerce has relied on rankings while avoiding any requisite contextual analysis.

Commerce noted that Thailand, with 7.8 million kilograms ("kg") of activated carbon exports, ranks ninth on a list of twenty-four global activated carbon exporters (or eighth excluding China). 2nd Remand Results at 6 & n.23 (citation omitted). According to Commerce, Thailand's "export quantity is large compared to other exporters" on the list. *See id.* at 6, 35. While Thailand's export quantity is larger than the countries ranked tenth to twenty-fourth, as the court previously explained in relation to this same evidence,

> [a]lthough Policy Bulletin 04.1 contemplates that in the event there are "ten large producers and a variety of small producers, 'significant producer' could be interpreted to mean one of the top ten," Policy Bulletin 04.1 at 3, *Commerce has not established that that is the situation here*. In fact, there appears to be no clear delineation between the top ten and remaining exporters; rather, the top five exporters (China, India, United States, the Philippines, and Indonesia) collectively account for more than 90 [percent] of global exports. . . . Thereafter, listed countries contribute relatively little to global exports.

Jacobi (AR7) I, 222 F. Supp. 3d at 1181 (emphasis added) (internal citation omitted). Without more, Commerce's identification of Thailand as a significant producer based on this ranking among exporters is arbitrary and lacks substantial evidence.

Commerce also relied on Thailand's ranking as the largest exporter among the countries that it considered to be at the same level of economic development as China. *See* 2nd Remand Results at 6. Separately, however, Commerce acknowledged its policy of *not* determining significance relative to the comparative production of the potential surrogate countries. *See id.* at 36 (citing Policy Bulletin 04.1). Commerce's policy acknowledges that a country's level of economic development is irrelevant to whether that country's production (or exports) of a given product may be considered "significant." Commerce is not irrevocably committed to this policy; however, its diametrically opposite approach in this case, absent any explanation, cannot be sustained. Accordingly, Thailand's ranking among this group of countries is not substantial evidence that Thailand is a significant producer of comparable merchandise.

With respect to net exports, Commerce asserted that "[a] country's status as a net exporter supports a finding of significant production because, as noted above, we interpret 'significant' to mean a notice-

ably or measurably large amount." *Id.* at 7. Precisely why Commerce considers this to be the case here is unclear. While Commerce has defined "significant" as "noticeably or measurably large," Commerce has not explained why having net exports signifies significant production. Commerce further asserted that "when a country is a net exporter, the assumption is that it produces more than it imports and consumes," *id.*; however, the extent to which this is relevant to finding significant production depends, in part, on the amount of domestic consumption. Here, Commerce has failed to identify record evidence of Thailand's domestic consumption, if there is any. The pertinent question then, is whether significant production may reasonably be inferred from Thailand's net export quantity for the relevant period, which was 1,172,897 kg. *See id.* at 7 & n.31 (citation omitted).

To that end, Commerce asserted that record evidence enabled a comparison of the net exports of Thailand, the Philippines, and Indonesia. *Id.* at 7. Commerce noted that Thailand, the Philippines, and Indonesia had net export quantities of 1,172,897 kg, 60,662,341 kg, and 11,112,825 kg, respectively. *Id.* at 7–8. But without actually analyzing the information, Commerce simply asserted that Policy Bulletin 04.1 provides that being "a net exporter *satisfies* the statutory requirement," and declared all three countries to be significant producers without addressing the disparities between their net export quantities. *Id.* at 8 (emphasis added). In fact, the Policy Bulletin states that although "'significant producer' *could* mean a country that is a net exporter," Commerce should avoid "fixed standards" in favor of case-specific assessments dependent upon the available data, indicating that an analysis of this data is required. Policy Bulletin 04.1 at 3 (emphasis added).[10] The court has previously rejected Commerce's conclusory reliance on net exports per se and is compelled to do so again here. *Jacobi (AR7) II*, 313 F. Supp. 3d at 1327–28.[11]

[10] In the absence of domestic consumption data, as noted above, the only evidence of Thailand's production volume is its net export quantity. For that reason, the legislative history's recognition that evidence of *significant* net exports may provide evidence of *significant* production is reasonable. H.R. Rep. 100–576, at 590. Relying on net exports without any information about domestic consumption is equivalent to treating those net exports as representative of total production. In *Jacobi (AR7) II*, the court faulted Commerce for relying on evidence of production without evaluating its significance because that approach "reads the word 'significant' out of the statute," in contravention of established principles of statutory interpretation. 313 F. Supp. 3d at 1326. Commerce simply repeats the same mistake here.

[11] Commerce also concluded that the evidence upon which it relied to conclude that Thailand is a significant producer "suggests that Thailand bears an influence on the global trade in activated carbon." 2nd Remand Results at 8. However, Commerce did not elaborate on why this is so, and its reasoning is not apparent. "Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citations omitted).

Commerce has now had three opportunities to justify its selection of Thailand as the primary surrogate country and each time has failed to provide substantial evidence supporting its determination that Thailand is a significant producer of comparable merchandise. In the 2nd Remand Results, Commerce circled back to some of the same reasoning the court previously rejected without addressing any of the concerns identified by the court. Moreover, Commerce's errant reasoning repeatedly ignores its own statements of practice. While Commerce is not bound by those statements of practice, it must explain its departures and has seemed unable. Therefore, the court finds that the record does not support the selection of Thailand as a significant producer. On remand, Commerce must identify a surrogate country, whether from its list of countries at the same level of economic development as the PRC or another country at a comparable level of economic development not on the list, which meets the statutory criteria and is supported by substantial evidence. Because Commerce justified its selection of surrogate values for carbonized material and financial ratios substantially on the basis that they are from the primary surrogate country, *see* 2nd Remand Results at 13, 19, Commerce must revisit these surrogate values on remand.

II. Value-Added Tax

A. The Application of Section 1677a(c)(2)(B) to Nonmarket Economies

When calculating export price and constructed export price, Commerce may deduct "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title."[12] 19 U.S.C. § 1677a(c)(2)(B). Such price adjustments must be "reasonably attributable to the subject merchandise." 19 C.F.R. § 351.401(c).

Prior to 2012, Commerce did not apply 19 U.S.C. § 1677a(c)(2)(B) in proceedings involving imports from nonmarket economy ("NME") countries. Commerce reasoned that "pervasive government intervention in NMEs precluded proper valuation of taxes paid by NME respondents to NME governments." *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non–Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36,481, 36,482 (Dep't Commerce June 19, 2012)

[12] Section 1677(6)(C) concerns "export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received" and is not relevant here.

("*Methodological Change*") (citing *Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 Fed. Reg. 16,440 (Dep't Commerce Mar. 30, 1995) (notice of final determination of sales at less than fair value) ("*Pure Magnesium from Russia*")). Commerce had taken the position that nonmarket economy countries are

> governed by a presumption of widespread intervention and influence in the economic activities of enterprises[and a]n export tax charged for one purpose may be offset by government transfers provided for another purpose. . . . To make a deduction for export taxes imposed by a NME government would unreasonably isolate one part of the web of transactions between government and producer.

Id. (citation omitted). Commerce's declination to apply section 1677a(c)(2)(B) in NME proceedings accorded with its former practice of declining to countervail subsidies paid by a NME government to a NME producer. *See id.* Commerce reasoned that "[a]ttempts to isolate individual government interventions in this setting—whether they be transfers from the government or from exporters to the government—make no sense." *Id.* (citation omitted).

As the countries that Commerce considered to be nonmarket economies evolved, so did Commerce's practices. In 2002, Commerce revoked Russia's status as a NME country. *See Silicon Metal From the Russian Federation*, 68 Fed. Reg. 6,885, 6,887 (Dep't Commerce Feb. 11, 2003) (notice of final determination of sales at less than fair value) (citation omitted). In 2007, Commerce determined that China (and Vietnam), while still regarded as NME countries, had nevertheless become sufficiently dissimilar from the centrally-planned economies of the Soviet-era such that Commerce could determine whether those governments bestowed countervailable subsidies on certain companies or industries. *See Methodological Change*, 77 Fed. Reg. at 36,482; Issues and Decision Mem. for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China, C-570–907 (Oct. 17, 2007) at Cmt. 1, *available at* https://enforcement.trade.govfrn/summary/prc/E7–21046–1.pdf (last visited Feb. 27, 2019).[13] In accordance with its determination that countervailable subsidies from China and Viet-

[13] Commerce's initial application of the countervailing duty laws to NME countries was challenged in court and held unlawful. *See GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 745 (Fed. Cir. 2011), *reh'g granted*, 678 F.3d 1308 (Fed. Cir. 2012).
However, Congress subsequently amended the statute to confirm that Commerce was authorized to apply the countervailing duty laws to nonmarket economy countries. *See* Application of Countervailing Duty Provisions to NonMarket Economy Countries, Pub. L. No. 112–99, 126 Stat. 265 (2012); 19 U.S.C. §§ 1671(f), 1677f–1(f).

nam could be measured, Commerce reconsidered whether taxes, duties and other charges paid by NME producers to those NME governments could likewise be identified and measured. *See Methodological Change*, 77 Fed. Reg. at 36,482.

In 2012, Commerce concluded that it could now identify and measure certain taxes paid by Chinese producers to the Chinese government and announced that, henceforth, it would consider whether the PRC "has imposed an export tax, duty, or other charge upon export of the subject merchandise during the period of investigation or the period of review," including, for example, "an export tax or VAT that is not fully refunded upon exportation." *Id.* at 36,482 (internal quotation marks omitted). Thus, when the PRC does so, and "the respondent was not exempted, [Commerce] will reduce the respondent's export price and constructed export price accordingly, by the amount of the tax, duty or charge paid, but not rebated." *Id.* at 36,483. When "the export tax, VAT, duty, or other charge" is "a fixed percentage of the price," Commerce announced that it would "adjust the export price or constructed export price downward by the same percentage." *Id.* "[B]ecause these are taxes affirmatively imposed by the Chinese . . . government[]," Commerce "presume[s] that they are also collected." *Id.*

B. Commerce's Application of the Statute to Chinese VAT

Pursuant to the *Methodological Change*, for the *Final Results*, Commerce reduced Jacobi's constructed export price by an amount it described as "irrecoverable VAT." I&D Mem. at 16–18. According to Commerce, irrecoverable VAT constituted an "export tax, duty, or other charge" because it represented the amount of VAT Jacobi paid on inputs and raw materials used in the production of activated carbon ("input VAT") that became nonrefundable when those inputs and raw materials were consumed in the production of exported subject merchandise. *Id.* at 16–17.[14] Commerce calculated irrecoverable VAT by multiplying the free on board ("FOB") value of the subject merchandise by the difference between the standard VAT rate (here, 17 percent) and the applicable VAT rebate rate (here, zero). *Id.* at 17. When Jacobi's entered values were less than an "estimated customs

[14] Commerce explained that

> [i]n a typical VAT system, companies do not incur VAT expense for exports; they receive on export a full rebate of the VAT they pay on purchases of inputs used in the production of exports, and, in the case of domestic sales, the company can credit the [input VAT] against the VAT they collect from customers ["output VAT"].

I&D Mem. at 16. In the PRC, however, "some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded." *Id.*

value," Commerce applied the resulting 17 percent irrecoverable VAT rate to the estimated customs value as a proxy for the FOB China port value. *Id*. at 18.

In *Jacobi (AR7) I*, the court found that section 1677a(c)(2)(B) was ambiguous. 222 F. Supp. 3d at 1186–87; *see also infra*, p. 28 (discussing the court's finding). Because the statute is ambiguous, pursuant to *Chevron* prong two, Commerce could reasonably determine that an input VAT that becomes nonrefundable when the finished product is exported constitutes, at the very least, an "other charge" that is "imposed by the exporting country on the exportation of the subject merchandise" because it remains recoverable (as a credit or offset against output VAT) until the product is exported. *Jacobi (AR7) I*, 222 F. Supp. 3d at 1186–87. The court further found that Commerce's determination that certain of Jacobi's entered values were unreliable was supported by substantial evidence and thus affirmed its use of estimated customs values. *Id.* at 1190–92. The court, however, remanded Commerce's VAT calculation because the agency's application of the irrecoverable VAT rate to the price of the finished good potentially overstated an adjustment intended to account for unrefunded input VAT. *Id.* at 1192–94.

In its first remand redetermination, Commerce continued to characterize its adjustment as accounting for irrecoverable VAT (i.e., unrefunded input VAT). *See* 1st Remand Results at 25–27. As the basis for its adjustment, however, Commerce pointed to the 17 percent output VAT rate applicable to Jacobi's foreign and domestic sales and found that it was, thus, included in Jacobi's U.S. price. *Id.* at 27.

The court again remanded the adjustment, this time because Commerce's revised explanation introduced an inconsistency between the calculation methodology (based on output VAT) and the theory underlying the adjustment (unrefunded input VAT). *Jacobi (AR7) II*, 313 F. Supp. 3d at 1341–44. Pointing to the record on remand, the court further instructed:

> [t]o the extent that Commerce continues to justify the adjustment as accounting for irrecoverable VAT defined as unrefunded *input VAT*, Commerce must address record evidence demonstrating that Jacobi, in fact, recovers the input VAT it incurs by the offset it takes before remitting the output VAT it collects. . .
>
> On the other hand, if Commerce asserts that the adjustment is based on an export tax due to Jacobi's collection of output VAT, Commerce must (a) address the record evidence regarding Jacobi's offset for input VAT paid on inputs taken against the output VAT collected, and (b) explain why the VAT adjustment is

> properly made on the basis of an estimated customs value instead of the FOB value on which the PRC assesses it.

Id. at 1342–43 (internal citations omitted).

In a subsequent order, the court instructed Commerce to include in its redetermination consideration of *Aristocraft of Am., LLC v. United States*, 42 CIT ___, 331 F. Supp. 3d 1372 (2018), in which that court posed several questions for Commerce to address on remand regarding the evidentiary basis for the adjustment, *id.* at 1379. *See* Order (Aug. 22, 2018), ECF No. 132. Commerce's explanation for the adjustment for Chinese VAT discussed in *Aristocraft* differed significantly from the explanation offered in the 1st Remand Results.

In its second remand redetermination in this action, Commerce changed the basis for its adjustment from irrecoverable VAT (i.e. unrefunded input VAT) to the 17 percent output VAT imposed on foreign and domestic activated carbon sales. 2nd Remand Results at 22, 25–26. Commerce supported its revised explanation by way of reference to a more recent iteration of Chinese VAT law the agency had placed on the record of the second remand proceeding. *Id.* at 21 & n.98 (citing Notice of the Ministry of Finance and the State Administration of Taxation on the Policies of Value-added Tax and Consumption Tax Applicable to Exported Goods and Services ("2012 VAT Notice"), PRR 9, PRJA Tab 6). Commerce's revised explanation recognizes that Chinese VAT law treats products differently depending on their eligibility for an export VAT refund. *See id.* at 22–26.

Pursuant to that law, companies that produce exported goods that are *ineligible* for an export VAT rebate do not incur a reduction in the input VAT amount credited against the output VAT. *Id.* at 25–26. Export sales of such goods are treated as domestic sales and are, thus, subject to the collection of output VAT. *Id.* at 25 & n.106 (citing 2012 VAT Notice, Art. 7.2(1)). In contrast, companies that produce exported goods that are *eligible* for a VAT rebate incur "a reduction in or offset to the input VAT that can be credited against output VAT" when the company calculates its net VAT payable amount. *Id.* at 23–24; *see also* 2012 VAT Notice, Art. 5.1(1). Export sales of such products are not subject to output VAT; instead, these companies incur a reduction in the input VAT amount they may credit against the output VAT collected solely on domestic sales. *See* 2nd Remand Results at 25. That reduction in the input VAT credit represents "irrecoverable VAT." *See id.* at 23–24.

In accordance with the foregoing description of Chinese VAT law, Commerce explained that activated carbon is one of the products that

is ineligible for an export rebate. Consequently, Commerce found that producers of activated carbon do not incur a reduction in the amount of input VAT creditable against output VAT. *Id.* at 26 & n.112 (citation omitted). Instead, export sales of activated carbon are treated in the same manner as domestic sales and are subject to the collection of output VAT. *Id.* at 25–26 & n.114 (citation omitted). Commerce concluded that it previously erred in adjusting Jacobi's constructed export price by an amount purportedly representing irrecoverable VAT. *Id.* Commerce nevertheless retained the downward adjustment to Jacobi's U.S. price to account for the 17 percent output VAT, which the agency concluded represented an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States" pursuant to section 1677a(c)(2)(B). *Id.* at 26. Commerce explained that deducting the output VAT from export price ensured the calculation of a tax-neutral dumping margin because normal value in a nonmarket economy proceeding is based on the factors of production, which are VAT-exclusive. *Id.* at 25 & n.108.

Commerce further noted that certain questions raised by the *Aristocraft* court concerning the calculation of irrecoverable VAT were now irrelevant to Commerce's adjustment in this case. *Id.* at 26–28. Additionally, in response to this court's instruction that any assessment based on output VAT should include consideration of record evidence regarding Jacobi's ability to offset the output VAT with input VAT, *see Jacobi (AR7) II*, 313 F. Supp. 3d at 1343, the agency explained that "Commerce's adjustment is not intended to account for the total amount of net VAT creditable," 2nd Remand Results at 30. Rather, pursuant to the *Methodological Change*, "when the 'export tax, VAT, duty, or other charge [is] a fixed percentage,' Commerce 'will adjust the export price or constructed export price downward by the same percentage.'" *Id.* (citing *Methodological Change*, 77 Fed. Reg. at 36,483).

Commerce calculated the VAT adjustment pursuant to the following formula set forth in Chinese law:

output VAT = FOB * exchange rate / (1 + legal VAT rate) * legal VAT rate.

Id. at 31 & n.132 (citing Jacobi's Suppl. Sec. C Resp. (Oct. 21, 2014) ("Jacobi's Suppl. § CQR"), Ex. SC-56, CR 124, 133, PR 157–58, PRJA Tab 5; 2012 VAT Notice). Commerce reconsidered its prior reliance on estimated customs values to calculate the adjustment and instead used Jacobi's entered values because those "are the FOB China port values used in the Chinese tax authorities' output VAT calculations." *Id.* at 31 & n.133 (citing Jacobi's Suppl. § CQR at 30); *see also id.* at 32. Commerce thus adjusted Jacobi's U.S. price downwards by the output VAT amount calculated using the above formula and Jacobi's

entered values. *Id.* at 32.

Commerce further explained that because Jacobi's sales of subject merchandise are subject to output VAT, Jacobi's U.S. price "necessarily include[s]" that amount. *Id.* at 30. In response to Jacobi's argument that Commerce had not shown its sales price to include output VAT because the invoice on the record of the remand proceeding does not reflect the collection of output VAT, *see id.* at 50, 51 & n.191 (citation omitted), Commerce pointed to Jacobi's questionnaire response explaining that its sales to foreign and domestic buyers are subject to 17 percent output VAT, *id.* at 51 & n.192 (citing Jacobi's Suppl. § CQR at 30, Ex. SC-56), and Jacobi's calculation of its net VAT payable that includes amounts representing the collection of output VAT for each POR month, *id.* at 51 & n.193 (citing Jacobi's Suppl. § CQR, Ex. SC-58, CRJA Tab 12); *see also id.* at 52.[15]

C. Commerce's Authority to Deduct Output VAT from U.S. Price

Jacobi contends that "Commerce's revised reasoning still fails to satisfy the statutory requirement for an adjustment" pursuant to section 1677a(c)(2)(B). Jacobi's Opp'n Cmts. at 23. Jacobi does not, however, develop any particular argument that output VAT does not fulfill the statutory criteria of an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." Nevertheless, the court recognizes that since it issued *Jacobi AR7 I*, two opinions from the court have called into question Commerce's legal authority to adjust export price or constructed export price to account for VAT (whether irrecoverable or not) pursuant to 19 U.S.C. § 1677a(c)(2)(B). *See Qingdao Qihang Tyre Co., Ltd. v. United States*, 42 CIT ___, ___, 308 F. Supp. 3d 1329, 1338–47 (2018); *China Mfrs. Alliance, LLC v. United States*, Slip Op. 19–7, 2019 WL 221237, at *4–8 (CIT Jan. 16, 2019). The court does not find those opinions persuasive and declines to follow them.

In *Qingdao* and *China Manufacturers*, the court, upon reviewing the statute in its current form and as enacted prior to the adoption of the Uruguay Round Agreements Act ("URAA"),[16] concluded, pursuant to *Chevron* prong one, that section 1677a(c)(2)(B) is unambiguous and does not permit Commerce to adjust export price or constructed

[15] The court recognizes that Jacobi reported that its sales to the United States "*are subject to*" the collection of output VAT, but did not explicitly state that its sales prices include output VAT. *See* Jacobi's Suppl. § CQR at 30 (emphasis added).

[16] On December 8, 1994, Congress enacted the URAA, including section 1677a in its current form. *See* Uruguay Round Agreements Act, Pub. L. No. 103–465, § 223, 108 Stat. 4809, 4876 (1994).

export price for VAT imposed on export sales indirectly through an input VAT that becomes irrecoverable or, by extension, directly through an output VAT. *Qingdao*, 308 F. Supp. 3d at 1338–42, 1346; *China Mfrs.*, 2019 WL 221237, at *4–8. The court characterized VAT as a domestic tax that is distinct from an export tax imposed on the exportation of finished goods. *See Qingdao*, 308 F. Supp. 3d at 1339, 1341, 1345; *China Mfrs.*, 2019 WL 221237, at *6. The court reasoned that an "export tax, duty, or other charge" is "limited to one that is 'imposed by the exporting country on the exportation of the subject merchandise to the United States,'" *Qingdao*, 308 F. Supp. 3d at 1343 (quoting 19 U.S.C. § 1677a(c)(2)(B)) and is, thus, "by definition" not included "in the home-market price," *id.*; *see also China Mfrs.*, 2019 WL 221237, at *4.

Previously, when considering Commerce's irrecoverable VAT theory for the adjustment, this court held that "the catchall phrase 'other charge' captures any financial obligation *provided* it is 'imposed by the exporting country on the exportation of the subject merchandise,' regardless of whether the imposing country explicitly labels the charge as one pertaining to exports." *Jacobi (AR 7) I*, 222 F. Supp. 3d at 1186–87 (emphasis added). In other words, the court considered "other charge" inherently ambiguous and Commerce reasonably interpreted the phrase to encompass irrecoverable VAT.

Upon Commerce's further consideration of the record and recognition that, with regard to activated carbon, China simply imposes an output VAT on domestic *and export* sales, the issue is now whether Commerce may apply the statute, 19 U.S.C. § 1677a(c)(2)(B), to a VAT that is equally applicable to domestic and export sales. This court determines that section 1677a(c)(2)(B)'s reference to "export tax[es], dut[ies], or other charge[s] imposed by the exporting country on the exportation of the subject merchandise" is ambiguous as to whether the statute applies to such assessments imposed *solely* upon export sales or assessments imposed upon sales *at the time of export*, regardless of whether the assessment is also applied to domestic sales. *But cf. Qingdao*, 308 F. Supp. 3d at 1343; *China Mfrs.*, 2019 WL 221237, at *4.

The notion that the imposition of a tax, duty or other charge that is generally applicable to both domestic and export sales does not alone preclude it from providing the basis for an adjustment pursuant to section 1677a(c)(2)(B) finds support in the U.S. Supreme Court's Export Clause jurisprudence. The Export Clause provides: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., Art. 1, § 9, cl. 5. In *United States v. International Business Machines Corp. ("IBM")*, the Court held that the Export Clause bars the impo-

sition of a generally applicable federal tax on goods in export transit, even if the tax is nondiscriminatory and equally applicable to non-export transactions. 517 U.S. 843, 845, 863 (1996); *see also United States v. U.S. Shoe Corp*., 523 U.S. 360, 363, 370 (1998) (holding that a harbor maintenance tax collected from exporters, importers, and domestic shippers and imposed at the time of loading for exports and unloading for other shipments violated the Export Clause as applied to exports). While the context in which those cases arose is arguably distinct, notwithstanding any such distinctions, *IBM* and *U.S. Shoe* support the proposition that a statutory reference to an export tax, duty, or other charge imposed upon exportation may include such a tax, duty or other charge also imposed on domestic sales.

The court now turns to consideration of whether Commerce's interpretation of section 1677a(c)(2)(B) was reasonable when applied to China's output VAT in this case. Here, Commerce interpreted section 1677a(c)(2)(B) to permit a reduction to EP/CEP in order to achieve a tax neutral comparison between EP/CEP and normal value, *see* 2nd Remand Results at 25 & n.108, and such an interpretation, as discussed more fully below, was reasonable.

As an initial matter, it is important to bear in mind that here, normal value is *not* based on home-market (i.e., domestic) sales prices, but is based on the respondent's factors of production and corresponding surrogate values, which are determined on a tax-exclusive basis.[17] In such a case, the principle that dumping margin calculations should be tax-neutral supports Commerce's adjustment.[18]

The Federal Circuit recognized more than two decades ago:

> Buried in the language of statute and case law, and obscured by the fog of litigation, is a simple policy issue: whether Congress, in the Tariff Act of 1930 (the Act), precluded Commerce from determining dumping margins in a tax-neutral fashion.

[17] In a proceeding involving a market economy country, a comparable tax-neutral comparison would be achieved by reducing the normal value for "taxes imposed directly upon the foreign like product . . . which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product." 19 U.S.C. § 1677b(a)(6)(B)(iii).

[18] Indeed, the *Qingdao* court recognized that Congress intended for Commerce to deduct export taxes from U.S. price in order to "achieve a tax-neutral comparison [with] normal value" in a market economy proceeding precisely because an export tax is not included in the home-market or comparison market price used to calculate normal value. 308 F. Supp. 3d at 1342–43. So too here, output VAT is not included in the surrogate values used to calculate normal value and, thus, notwithstanding the facts that output VAT is assessed on domestic sales of activated carbon and this is a nonmarket economy proceeding, the same principle of tax neutrality supports Commerce's deduction of output VAT from U.S. price.

Federal Mogul Corp. v. United States, 63 F.3d 1572, 1577 (Fed. Cir. 1995). The question, then, is whether Congress, when it did not substantively alter section 1677a in the URAA,[19] intended to prohibit Commerce from using that provision to achieve tax neutrality in nonmarket economy cases? This court can find no such intention.

First, the pre-URAA version of the statute clearly permitted Commerce to make tax-neutral dumping calculations. Whether it was through adjustments to foreign market value or purchase price/exporter's sales price, *Federal Mogul* confirms that "one thing is clear[:] . . . in administering the Act, [Commerce] over the years has pursued a policy of attempting to make the tax adjustment called for by the Act tax-neutral." 63 F.3d at 1580 (further holding that nothing in the pre-URAA version of section 1677a precluded Commerce from achieving tax-neutrality in its administration of the provision requiring an upward adjustment to U.S. price to account for taxes included in the home market sales price and rebated or exempted in the context of exports sales).[20] Commerce's policy accords with the principle that differences in sales prices due to differential tax treatment between the home market and export market "does not constitute unfair pricing behavior" but, rather, "is a difference created by forces outside the control of the competitor, and does not involve the idea behind the antidumping act," which is to prevent unfair competition from dumping. *Id.* at 1575 (citation omitted).

Second, the suggestion that Congress, by providing for adjustments to normal value or EP/CEP, is legislating adjustments to increase or decrease the margin of dumping is unsupported. *But cf., e.g.*, *Qingdao*, 308 F. Supp. 3d at 1341, 1343 (discussing congressional intent to impact the dumping margin through certain adjustments). To the contrary, Congress, when it enacted the URAA, intended to ensure that Commerce could continue to make the adjustments to normal value and EP/CEP necessary in order to place both prices, to the extent possible, on the same basis, permitting a "fair, 'apples-to-apples' comparison." *Maverick Tube Corp. v. United States*, 861 F.3d

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[19] The Statement of Administrative Action accompanying the URAA explained that although Congress gave new labels to "purchase price" and "exporter's sale price," now "export price" and "constructed export price," respectively, the adjustments to those prices pursuant to section 1677a were unchanged. *See Qingdao*, 308 F. Supp. 3d at 1339–40 (citing Uruguay Round Agreements Act, Statement of Administrative Action , H.R. Doc. No. 103–316, vol. 1, at 822–23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163) ("SAA"). Congress likewise renamed "foreign market value" to "normal value." SAA at 820, 1994 U.S.C.C.A.N. at 4161. The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d); *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1345 n.7 (Fed. Cir. 2002).

[20] At least as early as 1991, Commerce adjusted export price to enable a tax-neutral comparison to foreign market value. *See* U.S. Dep't Commerce, Int'l Trade Admin., Import Admin., Antidumping Manual Chapter 7, pp. 8–10 (1991). As noted, the URAA did not affect any substantive change to these adjustments. *See supra*, note 19.

1269, 1274 (Fed. Cir. 2017) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)); *see also* SAA at 827, 1994 U.S.C.C.A.N. at 4166 (noting that a new statutory provision regarding deductions from normal value to account for indirect taxes represents a change from the pre-URAA statute that accounted for indirect taxes through an upward adjustment to export price, which change "is intended to ensure that dumping margins will be tax-neutral"). Typically, these adjustments lead to ex-factory prices, packed in the same manner, and on the same tax basis. *See* SAA at 827.

Third, as discussed above, there is no indication that before 2012, Commerce (or Congress) considered section 1677a to be inapplicable in NME cases. *See Methodological Change*, 77 Fed. Reg. at 36,482; *Pure Magnesium from Russia*, 60 Fed. Reg. at 16,448 (noting that, in NME cases, "pecuniary aspects of internal transactions are considered meaningless and thus ignored"). Rather, Commerce considered itself unable to apply the provision in NME cases because "pervasive government intervention . . . precluded proper valuation of taxes paid by NME respondents to NME governments." *Methodological Change*, 77 Fed. Reg. at 36,482. Thus, while it may be the case that, all other things being equal, a dumping margin calculated before Commerce's policy shift would be lower than a margin calculated inclusive of an adjustment pursuant to section 1677a(c)(2)(B), there is nothing to indicate that the latter is not in accordance with law. Instead, the latter margin calculation simply includes an additional data point that Commerce was unable to include in the former.

Finally, returning to the "policy issue" identified in *Federal Mogul*, adjusting EP/CEP for VAT imposed on export sales allows Commerce to calculate a tax-neutral dumping margin when normal value is calculated exclusive of VAT. In this case, as discussed in more detail below, the constructed export price reported by Jacobi includes 17 percent output VAT imposed by the Chinese government, whereas the normal value, to which it is to be compared, is determined using surrogate values that are tax-exclusive. *See* 2nd Remand Results at 25 & n.108. To interpret section 1677a(c)(2)(B) as unambiguously barring Commerce from adjusting EP/CEP for these taxes when comparing those prices to a tax-exclusive normal value would be to require that it understate the margin of dumping. The court finds no support for such a requirement in the language of the statute. Thus, Commerce's conclusion that China's output VAT is an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise" is a permissible interpretation of

section 1677a(c)(2)(B), 2nd Remand Results at 26, and the court now turns to Jacobi's arguments that the adjustment is unsupported by substantial evidence.

D. Commerce's Adjustment is Supported by Substantial Evidence

Jacobi contends there is not substantial evidence to support Commerce's determination that Jacobi's U.S. price includes 17 percent output VAT. *See* Jacobi's Opp'n Cmts. at 24–25, 27. According to Jacobi, the existence of a "legal requirement" to collect output VAT on its U.S. sales is not evidence that it includes an amount for output VAT in its sales prices to the United States. *Id.* at 26. Jacobi points to its sales documentation submitted on the record and notes the lack of any reference to output VAT. *See id.* at 24 (citing Jacobi's Sec. A Questionnaire Resp. (July 24, 2014) ("Jacobi's § AQR"), Ex. A-16, CR 21, CRJA Tab 11). Jacobi further contends that Commerce has failed to address the court's "question regarding Jacobi's ability to offset paid input VAT against the output VAT due." *Id.* at 23. Jacobi also contends that *Aristocraft* remains relevant and Commerce erred in failing to address the opinion. *See id.* at 26.[21]

The Government contends that Jacobi's reporting that its U.S. sales were subject to the collection of 17 percent output VAT represents substantial evidence that output VAT was included in its U.S. prices. Def.'s Reply Cmts. at 22. The Government further contends that Commerce properly discounted the relevance of Jacobi's ability to offset input VAT from output VAT and its calculation of a net VAT payable amount because Commerce's adjustment to Jacobi's constructed export prices is not intended to account for the VAT amount Jacobi paid to the Chinese government, but rather, the amount of VAT included in U.S. price. *Id.* at 22–23.

Calgon contends that because "the cost of output VAT falls on the buyer of the good, not on the [seller]," it "is necessarily included in Jacobi's price." Def.-Ints.' Reply Cmts. at 22 (quoting 2nd Remand Results at 23). Calgon further contends that Commerce adequately addressed the court's questions regarding the relationship between input VAT and output VAT and the relevance of the *Aristocraft* opinion. *Id.* at 22–23.

The court sustains Commerce's VAT adjustment. The absence of a line item for output VAT on Jacobi's sales documents is not dispositive and the record supports Commerce's determination that Jacobi's export prices include output VAT. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (the possibility of

[21] CATC did not comment on this issue.

drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)).

Here, Jacobi concedes that its U.S. sales were subject to the collection of 17 percent output VAT pursuant to the 2012 VAT Notice. *See* Jacobi's Opp'n Cmts. at 26; Jacobi's Suppl. § CQR at 30; 2012 VAT Notice, Art. 7.2(1). Jacobi suggests, however, that it calculates the net VAT payable amount *as if* it collected output VAT on U.S. sales, but that it does not actually collect output VAT on those sales. *See* Jacobi's Opp'n Cmts. at 26. In making this claim, Jacobi points to no affirmative evidence demonstrating that the FOB China port value reflected in its sales documents is output VAT-exclusive. *See* Jacobi's § AQR, Ex. A-16 at ECF p. 13. The record reasonably supports Commerce's conclusion that Jacobi's U.S. prices included output VAT—regardless of whether Jacobi itemized that charge in its sales documents.

Additionally, contrary to Jacobi's arguments, *see* Jacobi's Opp'n Cmts. at 25, Commerce did not impermissibly base its adjustment on the contemporaneous Chinese law while ignoring evidence of Jacobi's net VAT payment. The statute directs Commerce to make adjustments based on certain amounts included in U.S. price, not amounts remitted to the subject nonmarket economy government.[22] *See* 19 U.S.C. § 1677a(c)(2)(B). Jacobi also faults Commerce for never requesting a U.S. sales-specific VAT reconciliation. See Jacobi's Opp'n Cmts. at 25. However, as noted, the reconciliation document it submitted appears to include output VAT collected in connection with Jacobi's U.S. sales. *See* Jacobi's Suppl. § CQR, Ex. SC-58. The lack of a U.S. sales-specific reconciliation does not undermine Commerce's determination.

In sum, Commerce's redetermination on this issue complies with the court's remand instructions set forth in *Jacobi (AR7) II* and the agency's deduction of output VAT from Jacobi's constructed export price is lawful and supported by substantial evidence.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's 2nd Remand Results are remanded for Commerce to reconsider its surrogate country selection as well as

[22] The court also notes that Jacobi's argument that it "only *pays* the Chinese government the 'net' VAT amount," Jacobi's Opp'n Cmts. at 25, is inaccurate. While the net VAT payment may represent Jacobi's direct VAT payment to the Chinese government, Jacobi is simply reducing the output VAT it collected by the input VAT it has already paid to the Chinese government, albeit indirectly via its purchases of inputs.

the surrogate values for carbonized material and financial ratios, as set forth in Discussion Section I above; it is further

ORDERED that Commerce's 2nd Remand Results are sustained with respect to the agency's VAT adjustment, as set forth in Discussion Section II above; it is further

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

ORDERED that Commerce shall file its third remand results on or before June 3, 2019; it is further

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

ORDERED that any opposition or supportive comments must not exceed 6,000 words.

Dated: March 4, 2019
New York, New York

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

Slip Op. 19–28

JACOBI CARBONS AB AND JACOBI CARBONS, INC., Plaintiffs, and NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CALGON CARBON CORP. AND CABOT NORIT AM., INC, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00185

[The U.S. Department of Commerce's Second Remand Results are remanded with respect to the agency's primary surrogate country selection and sustained with respect to the agency's value-added tax adjustment.]

Dated: March 5, 2019

Daniel L. Porter and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, DeKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff-Intervenors Carbon Activated Corporation, Ningxia Mineral and Chemical Ltd., Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co. Ltd., and Tianjin Maijin Industries Co., Ltd.

Mollie L. Finnan, 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 *Claudia Burke*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

R. Alan Luberda, John M. Herrmann, *David A. Hartquist*, *Melissa M. Brewer*, and *Kathleen M. Cusack*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") second redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Court Remand ("2nd Remand Results"), ECF No. 124–1.

Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (together, "Jacobi") and Plaintiff-Intervenors[1] (collectively, "Plaintiffs") challenged several aspects of Commerce's final results in the eighth ad-

[1] Plaintiff-Intervenors include Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. (collectively, "CAC"); Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd., and Datong Municipal Yunguang Activated Carbon Co., Ltd (collectively, "Cherishmet"); Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui"); and M.L. Ball Co., Ltd., and Jilin Bright Future Chemicals Company, Ltd. (together, "M.L. Ball"). The court consolidated cases filed by CAC, Cherishmet, and M.L. Ball under lead Court No. 16–00185, filed by Jacobi. *See* Order (Nov. 3, 2016), ECF No. 42. Those parties, along with Huahui, had also intervened in this action.

ministrative review of the antidumping duty order ("AD Order") on certain activated carbon from the People's Republic of China ("PRC" or "China"). *See Certain Activated Carbon from the People's Republic of China,* 81 Fed. Reg. 62,088 (Dep't of Commerce Sept. 8, 2016) (final results of antidumping duty admin. review; 2014–2015) ("*Final Results*"), ECF No. 44–4, and accompanying Issues and Decision Mem., A-570–904 (Aug. 31, 2016) ("I&D Mem."), ECF No. 44–5.[2] Specifically, Plaintiffs challenged Commerce's selection of Thailand as the primary surrogate country and Thai surrogate values for carbonized material, hydrochloric acid, coal tar, and financial ratios, and Commerce's adjustment to Jacobi's constructed export price to account for irrecoverable value-added tax ("VAT"). *See, e.g.*, Confidential Consol. Pls. Jacobi Carbons AB and Jacobi Carbons, Inc.'s Mot. for J. Upon the Agency R. and Br. in Supp. of Mot. for J. on the Agency R., ECF No. 48; Consol. Pls. Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 53.

On June 20, 2017, the court granted Commerce's request for a remand to clarify or reconsider its findings regarding economic comparability and Thailand's status as a significant producer of comparable merchandise based on its export quantity. *See* Order (June 20, 2017), ECF No. 77.[3] On September 5, 2017, Commerce issued its first remand redetermination. *See* Final Results of Redetermination Pursuant to Court Order (Sept. 1, 2017) ("1st Remand Results"), ECF No. 78–1. Therein, Commerce further explained its methodology for determining which countries are at the same level of economic devel-

See Order (Oct. 7, 2016), ECF No. 17; Order (Oct. 12, 2016), ECF No. 22; Order (Oct. 20, 2016), ECF No. 36; Order (Oct. 20, 2016), ECF No. 40.

[2] The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 44–3, and a Confidential Administrative Record ("CR"), ECF No. 44–2. The administrative record associated with the 2nd Remand Results is contained in a Public Remand Record, ECF No. 125–3, and a Confidential Remand Record, ECF No. 125–2. Parties submitted joint appendices containing record documents cited in their remand briefs. *See* J.A. to Parties' Comments on Second Remand Redetermination ("PRJA"), ECF No. 133; Confidential Suppl. App. to Comments on Second Remand Redetermination ("CRJA"), ECF No. 135. These appendices supplement the documents previously provided. *See* Public J.A. ("PJA"), ECF No. 92; Confidential J.A. ("CJA"), ECF No. 91.

[3] Commerce's request was prompted by the court's resolution of those issues in connection with the seventh administrative review of the AD Order on activated carbon. *See* Def.'s Mot. for a Voluntary Remand, ECF No. 72; *Jacobi Carbons AB v. United States* ("*Jacobi (AR7) I*"), 41 CIT ___, 222 F. Supp. 3d 1159 (2017). In that opinion, the court held that Commerce's economic comparability determination lacked reasoned analysis and the agency had failed to persuade that total exports, absent evidence regarding the influence of those exports on world trade, was a permissible method of construing the term "significant producer." *Jacobi (AR7) I*, 222 F. Supp. 3d at 1176–82.

opment as the PRC and relied on evidence of domestic production rather than exports to support its significant producer determination. *Id.* at 3–21. On April 19, 2018, following briefing and oral argument on the *Final Results* as amended by the 1st Remand Results, the court sustained Commerce's economic comparability determination while remanding the agency's determination that Thailand is a significant producer of comparable merchandise, irrecoverable VAT adjustment, and surrogate value selections. *See Jacobi Carbons AB v. United States* ("*Jacobi (AR8) I*"), 42 CIT ___, 313 F. Supp. 3d 1344 (2018).[4]

On October 24, 2018, Commerce filed the remand redetermination at issue here. *See* 2nd Remand Results. Therein, Commerce circled back to export quantity as its basis for finding that Thailand is a significant producer of comparable merchandise, *see id.* at 4–7; further explained its selection of Thai surrogate values for carbonized material and hydrochloric acid, *see id.* at 8–15; revised its surrogate value selections for coal tar and financial ratios using data from South Africa and Romania, respectively, *see id.* at 16–19, 20–24; and reconsidered the basis for its VAT adjustment while continuing to adjust Jacobi's constructed export price for VAT, *see id.* at 26–37. Commerce's redetermination reduced Jacobi's weighted-average dumping margin from $1.756 per kilogram to $0.44 per kilogram. *Compare id.* at 51, *with Final Results*, 81 Fed. Reg. at 62,089. The reduction in Jacobi's margin also reduced the weighted-average dumping margin assigned to the non-individually-examined respondents eligible for a separate rate from $1.357 per kilogram to $0.34 per kilogram. *Compare* 2nd Remand Results at 52, *with Final Results*, 81 Fed. Reg. at 62,089.

Jacobi and CAC filed comments opposing the 2nd Remand Results with respect to Thailand as a significant producer, the surrogate values selected for carbonized material and hydrochloric acid, and the VAT adjustment. *See* Pls.' Comments on Commerce's Second Remand Determination ("Jacobi's Opp'n Cmts."), ECF No. 127; Consol. Pls. Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Comments in Opp'n to Second Remand ("CAC's Opp'n Cmts."), ECF No. 126. No party challenged the 2nd Remand Results with respect to the surrogate values selected for coal tar or the financial ratios. Defendant United

[4] *Jacobi (AR8) I* presents background information on this case, familiarity with which is presumed.

States ("the Government") and Defendant–Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc. ("Calgon") filed comments in support of the 2nd Remand Results. *See* Def.'s Reply to Comments on the Second Remand Results ("Def.'s Reply Cmts."), ECF No. 131; Def.–Ints.' Comments in Supp. of U.S. Department of Commerce Second Remand Redetermination ("Def–Ints.' Reply Cmts."), ECF No. 132.

For the following reasons, the court remands Commerce's determination that Thailand is a significant producer of comparable merchandise and directs Commerce to reconsider its selection of a primary surrogate country. Because Commerce relied, in part, on its preference to use data from the primary surrogate country when making its surrogate value selections for carbonized material and hydrochloric acid, *see* 2nd Remand Results at 7, 15, the court also remands Commerce's surrogate value selections. The court sustains Commerce's VAT adjustment.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)(2012),[5] and 28 U.S.C. § 1581(c)(2012).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court's review of Commerce's interpretation and implementation of a statutory scheme is guided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See Apex Frozen Foods Private Ltd. v. United States,* 862 F.3d 1322, 1329 (Fed. Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* (quoting *Chevron,* 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron,* 467 U.S. at 84243). Only "if the statute is silent or ambiguous," must the court determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron,* 467 U.S. at 843). Additionally, "[t]he results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (internal quotation marks and citation omitted).

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

DISCUSSION

I. Significant Producer of Comparable Merchandise

A. Legal Framework

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production[6] in a surrogate country, *see id.* § 1677b(c)(1), and those values are referred to as "surrogate values." In selecting surrogate values, Commerce must use "the best available information" that is, "to the extent possible," from a market economy country or countries that are economically comparable to the nonmarket economy country and are "significant producers of comparable merchandise." *Id.* § 1677b(c)(1), (4). Commerce generally values all factors of production in a single surrogate country.[7]

Commerce has adopted a four-step approach to selecting a primary surrogate country. Pursuant thereto:

> (1) the Office of Policy ("OP") assembles a list of potential surrogate countries that are at a comparable level of economic development to the [non-market economy] country; (2) Commerce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

Jiaxing Brother Fastener Co., Ltd. v. United States, 822 F.3d 1289, 1293 (Fed. Cir. 2016) (citation omitted); *see also* Import Admin., U.S. Dep't of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Feb. 27, 2019) ("Policy Bulletin 04.1").

Neither the statute nor Commerce's regulations define "significant

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

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

producer." *See* 19 U.S.C. § 1677b; 19 C.F.R. § 351.408. However, in its Policy Bulletin 04.1, Commerce described its practice for evaluating significant producer countries:

> [t]he extent to which a country is a *significant* producer should not be judged against the [subject non-market economy] country's production level or the comparative production of the five or six countries [that are considered potential surrogate countries]. Instead, a judgement [*sic*] should be made consistent with the characteristics of world production of, and trade in, comparable merchandise (subject to the availability of data on these characteristics). Since these characteristics are specific to the merchandise in question, the standard for "significant producer" will vary from case to case. For example, if . . . there are ten large producers and a variety of small producers, "significant producer" could be interpreted to mean one of the top ten. If, in the example above, there is also a middle-size group of producers, then "significant producer" could be interpreted as one of the top ten or middle group. In another case, there may not be adequate data available from major producing countries. In such a case, "significant producer" could mean a country that is a net exporter, even though the selected surrogate country may not be one of the world's top producers.

Policy Bulletin 04.1 at 3.

Because the term is otherwise undefined and ambiguous, the court must assess whether Commerce's interpretation of significant producer "is based on a permissible construction of the statute." *Apex Frozen Foods*, 862 F.3d at 1329 (quoting *Chevron*, 467 U.S. at 843). To effectuate judicial review, Commerce must provide "a reasoned analysis or explanation for [its] decision" so the court may "determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 616 F.3d 1300, 1304 (Fed. Cir. 2010) (citation omitted).

B. Commerce's Interpretation of "Significant Producer" in This Proceeding

The 2nd Remand Results reflect Commerce's third effort to justify its determination that Thailand is a significant producer of comparable merchandise. Therein, Commerce explained that it would "compar[e] data for comparable merchandise to establish whether any country that is at the same level of economic development as [the PRC] was: a) a *significant net exporter*; or b) a *major exporter to the*

United States." 2nd Remand Results at 5–6 & n.25 (citing *Yantai Oriental Juice Co. v. United States*, 27 CIT 477, 481 (2003)) (emphasis added). To that end, Commerce noted that the record contained Global Trade Atlas ("GTA") import and export data for the potential surrogate countries as well as Malaysia and the Philippines, and 2014 UNCOMTRADE data for 65 activated carbon exporting countries. *Id.* at 6. The GTA data indicated that Malaysia and the Philippines were net exporters, but Thailand was not. *Id.* Commerce did not, however, examine whether Thailand (or any of the potential surrogate countries) was "a major exporter to the United States," its stated alternative metric for evaluating significant production. *See id.* Rather, Commerce discussed Thailand's total global exports. *See id.* at 6–7.

Commerce prefaced its discussion of export quantity by explaining that although "[t]he [c]ourt has suggested that significant production means production 'having or likely to have influence or effect' on world trade[,] . . . Commerce instead interprets 'significant' to mean a noticeably or measurably large amount." *Id.* at 6 & n.31 (quoting *Jacobi (AR8) I*, 313 F. Supp. 3d at 1358 & n.26). According to the 2014 UNCOMTRADE and GTA data sets, Thailand exported more than nine million kilograms ("kg") of activated carbon worldwide. *See id.* at 6 & n.32 (citations omitted). Commerce characterized this amount as "noticeably or measurably large." *Id.* at 7. Commerce further characterized Thailand as "among the top global exporters of activated carbon" because it is the 14th largest global exporter of activated carbon according to the 2014 UNCOMTRADE data, with 51 countries exporting less than Thailand, and 38 countries exporting less than one million kilograms.[8] *Id.* at 7, 39. Thailand also was the largest exporter among the potential surrogate countries. *Id.* at 7. Commerce relied on this evidence to conclude that Thailand is a significant producer of comparable merchandise. *See id.* at 7, 38, 39–40.

C. Parties' Contentions

CAC contends that Commerce's interpretation of significant as "noticeably or measurably large" is "unreasonably subjective." CAC's Opp'n Cmts. at 4. CAC also contends that the 2014 UNCOMTRADE data show that the top nine countries on the list may be considered "significant exporters" and, thereafter, the remaining countries, including Thailand, each account for less than two percent of total

[8] The 2014 UNCOMTRADE data show that 40 countries exported less than one million kilograms of activated carbon, and 38 countries exported less than one million U.S. dollars' worth. *See* Jacobi's Comments on Economic Comparability (July 20, 2015) ("Jacobi's EC Cmts."), Attach. E, PR 82–83, PJA Tab 18, ECF No. 92–3 (2014 UNCOMTRADE data). This minor error does not impact the court's analysis.

global exports. *Id.* at 6–7. CAC further contends that Thailand's status as a net importer undermines Commerce's reliance on total exports. *Id.* at 4–5.[9]

The Government and Calgon contend that Commerce has permissibly interpreted an ambiguous statutory term and the 2014 UN-COMTRADE data provide substantial evidence that Thailand is a significant producer. Def.'s Reply Cmts. at 5–6; Def.-Ints.' Reply Cmts. at 7–8.

D. Commerce's Determination is Remanded for Reconsideration

Upon consideration of the agency's second remand redetermination and the briefing to the court, Commerce's finding that Thailand is a significant producer must be remanded. Commerce has effectively divorced the term "significant" from the term "production" and applied its interpretation of "significant" without the context and explanation necessary to ensure that its determination is not arbitrary. Although Commerce is within its discretion to define "significant" as "noticeably or measurably large," *see Juancheng Kangtai Chem. Co., Ltd. v. United States*, Slip Op. 17–3, 2017 WL 218910, at *4 (CIT Jan. 19, 2017) (holding that Commerce's corresponding interpretation of the term "significant" merited *Chevron* deference), Commerce has not supplied the court with a well-reasoned explanation supporting its consideration of total exports as a substitute for production. Overall, the agency has failed to interpret or apply the statutory criterion in its entirety and has not supported its determination that Thailand is a significant producer with substantial evidence.

Commerce's Policy Bulletin 04.1 does not discuss the use of total exports to identify significant producers. It indicates that, in the absence of production data, a "'significant producer' *could* mean a country that is a *net* exporter." Policy Bulletin 04.1 at 3 (emphasis added); *cf.* H.R. Rep. No. 100–576, at 590 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623 ("The term 'significant producer' includes any country that is a significant net exporter.").[10] The use of net exports provides at least some assurance that a country's exports do not consist entirely of transshipped imports. When a country imports more than it exports, that assurance is lacking. Here, Thailand imported 696,685 kg more activated carbon than it exported

[9] Jacobi did not comment on this issue.

[10] While Commerce correctly notes that the legislative history's reference to significant net exports does not preclude reliance on other metrics, 2nd Remand Results at 5, Commerce must still explain why its chosen metric represents a permissible construction of the term "significant producer."

during the relevant period. *See* Pet'rs' Comments on Surrogate Country Selection (Aug. 31, 2015), Attach. 4, PR 155, PJA Tab 33, ECF No. 92–5 (Thailand's import and export quantities). Commerce's failure to address this aspect of the record undermines its reliance on total exports as a substitute for production. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (the court's review must consider "the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence") (internal quotation marks and citation omitted).[11]

Commerce also failed to adequately explain its determination that Thailand's total export quantity was significant. While Commerce appears to suggest that countries ranked among the top 15 exporters represent the "top global exporters," *see* 2nd Remand Results at 7, 39, the lack of further explanation or any clear delineation between countries ranked proximately above and below 15 leaves the court unable to discern the reasons for Commerce's conclusion. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (noting that although Commerce's "explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court"); Jacobi's EC Cmts., Attach. E.[12] Commerce's seemingly arbitrary delineation contrasts with Policy Bulletin 04.1's recognition of the contextual nature of the significant producer determination and corresponding examples that evaluate significance in terms of the particular characteristics of overall global trade in the subject merchandise. *See* Policy Bulletin 04.1 at 3 (noting, "[f]or example, [that] if there are just three producers of comparable merchandise in the world, then arguably any commercially meaningful production is significant").

Commerce's assertion that Thailand's export quantity is "noticeably large" in comparison to countries exporting less than one million

[11] Indeed, in the case upon which Commerce relied to support its consideration of significant net exports and major exports to the United States, the agency explained that India was not a significant producer because it did not fulfill either of those criteria *and* was a net importer of subject merchandise. *See Yantai*, 27 CIT at 481; 2nd Remand Results at 6 & n.25.

[12] CAC asserts that the line between significant and insignificant exports is more suitably drawn after Mozambique, ranked ninth with 35,035,750 kg of activated carbon exports, because the volume of exports decreases thereafter to roughly 15,000,000 kg, or from five to ten percent of global exports to one to two percent of global exports. CAC's Opp'n Cmts. at 6. The Government and Calgon respond to CAC's assertion by attempting to place Thailand within the "middle-sized group of producers" contemplated by Policy Bulletin 04.1. *See* Def.'s Reply Cmts. at 6; Def.-Ints.' Reply Cmts. at 8; Policy Bulletin 04.1 at 3. Regardless of the degree of merit in the Government's and Calgon's approach to interpreting the available evidence, it departs from Commerce's decision, and the court may not accept "*post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

kilograms is also unavailing. *See* 2nd Remand Results at 39. While perhaps true, the import of this observation for purposes of Commerce's significant producer determination is unclear. For example, Chile's export quantity of 2,200 kg is "noticeably larger" than El Salvador's 41 kg export quantity. *See* Jacobi's EC Cmts., Attach. E. Chile, which is ranked 60th and accounts for roughly 0.00027 percent of total global production, would not be considered a significant producer on the basis of export quantity. *See id.* Commerce's reliance on particular rankings or isolated data points highlights the relevance of appropriate contextual analysis in order to determine whether descriptors such as "large" or "significant" reasonably apply.

Lastly, Commerce's reliance on Thailand's status as "the largest exporter of activated carbon among the countries identified as being at the same level of economic development as China" lacks merit. *See* 2nd Remand Results at 7. As the Government points out, Commerce's practice is *not* to evaluate "[t]he extent to which a country is a *significant* producer . . . against . . . the comparative production of the five or six countries on [Commerce's] surrogate country list." Def.'s Reply Cmts. at 6 (quoting Policy Bulletin 04.1 at 3). Commerce's policy recognizes that a country's level of economic development is irrelevant to whether that country's production (or exports) of a given product may be considered "significant." Nevertheless, while Commerce is not irrevocably committed to this statement of policy, its diametrically opposite approach in this case, absent any explanation, cannot be sustained. Accordingly, Thailand's ranking among this group of countries is not substantial evidence that Thailand is a significant producer of comparable merchandise.

Commerce has now had three opportunities to justify its selection of Thailand as the primary surrogate country. Once again, Commerce has failed to provide a reasoned explanation or substantial evidence supporting its determination that Thailand is a significant producer of comparable merchandise. Commerce's reliance on Thailand's export quantity and various rankings among global exporters is untethered to its own statements of practice regarding the significant producer determination and appears arbitrary. While Commerce is not bound by its statements of practice, it must explain its departures therefrom and has seemed unable. Therefore, the court finds that the record does not support the selection of Thailand as a significant producer. On remand, Commerce must identify a surrogate country, whether from its list of countries at the same level of economic development as the PRC or another country at a comparable level of economic development not on the list, which meets the statutory criteria and is supported by substantial evidence. Because Commerce

justified its selection of surrogate values for carbonized material and hydrochloric acid, in part, on the basis that they are derived from Thailand as the primary surrogate, Commerce must revisit these surrogate values on remand.

II. Value-Added Tax

A. The Application of Section 1677a(c)(2)(B) to Nonmarket Economies

When calculating export price and constructed export price, Commerce may deduct "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title."[13] 19 U.S.C. § 1677a(c)(2)(B). Such price adjustments must be "reasonably attributable to the subject merchandise." 19 C.F.R. § 351.401(c).

Prior to 2012, Commerce did not apply 19 U.S.C. § 1677a(c)(2)(B) in proceedings involving imports from nonmarket economy ("NME") countries. Commerce reasoned that "pervasive government intervention in NMEs precluded proper valuation of taxes paid by NME respondents to NME governments." *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non–Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36,481, 36,482 (Dep't Commerce June 19, 2012) ("*Methodological Change*") (citing *Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 Fed. Reg. 16,440 (Dep't Commerce Mar. 30, 1995) (notice of final determination of sales at less than fair value) ("*Pure Magnesium from Russia*")). Commerce had taken the position that nonmarket economy countries are

> governed by a presumption of widespread intervention and influence in the economic activities of enterprises[and a]n export tax charged for one purpose may be offset by government transfers provided for another purpose. . . . To make a deduction for export taxes imposed by a NME government would unreasonably isolate one part of the web of transactions between government and producer.

Id. (citation omitted). Commerce's declination to apply section 1677a(c)(2)(B) in NME proceedings accorded with its former practice of declining to countervail subsidies paid by a NME government to a

[13] Section 1677(6)(C) concerns "export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received" and is not relevant here.

NME producer. *See id.* Commerce reasoned that "[a]ttempts to isolate individual government interventions in this setting—whether they be transfers from the government or from exporters to the government—make no sense." *Id.* (citation omitted).

As the countries that Commerce considered to be nonmarket economies evolved, so did Commerce's practices. In 2002, Commerce revoked Russia's status as a NME country. *See Silicon Metal From the Russian Federation*, 68 Fed. Reg. 6,885, 6,887 (Dep't Commerce Feb. 11, 2003) (notice of final determination of sales at less than fair value) (citation omitted). In 2007, Commerce determined that China (and Vietnam), while still regarded as NME countries, had nevertheless become sufficiently dissimilar from the centrally-planned economies of the Soviet-era such that Commerce could determine whether those governments bestowed countervailable subsidies on certain companies or industries. *See Methodological Change*, 77 Fed. Reg. at 36,482; Issues and Decision Mem. for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China, C-570907 (Oct. 17, 2007) at Cmt. 1, *available at* https://enforcement.trade.govfrn/summary/prc/E7–21046–1.pdf (last visited Feb. 27, 2019).[14] In accordance with its determination that countervailable subsidies from China and Vietnam could be measured, Commerce reconsidered whether taxes, duties and other charges paid by NME producers to those NME governments could likewise be identified and measured. *See Methodological Change*, 77 Fed. Reg. at 36,482.

In 2012, Commerce concluded that it could now identify and measure certain taxes paid by Chinese producers to the Chinese government and announced that, henceforth, it would consider whether the PRC "has imposed an export tax, duty, or other charge upon export of the subject merchandise during the period of investigation or the period of review," including, for example, "an export tax or VAT that is not fully refunded upon exportation." *Id.* at 36,482 (internal quotation marks omitted). Thus, when the PRC does so, and "the respondent was not exempted, [Commerce] will reduce the respondent's export price and constructed export price accordingly, by the amount of the tax, duty or charge paid, but not rebated." *Id.* at 36,483. When "the export tax, VAT, duty, or other charge" is "a fixed percentage of

[14] Commerce's initial application of the countervailing duty laws to NME countries was challenged in court and held unlawful. *See GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 745 (Fed. Cir. 2011), *reh'g granted*, 678 F.3d 1308 (Fed. Cir. 2012). However, Congress subsequently amended the statute to confirm that Commerce was authorized to apply the countervailing duty laws to nonmarket economy countries. *See* Application of Countervailing Duty Provisions to NonMarket Economy Countries, Pub. L. No. 112–99, 126 Stat. 265 (2012); 19 U.S.C. §§ 1671(f), 1677f–1(f).

the price," Commerce announced that it would "adjust the export price or constructed export price downward by the same percentage." *Id.* "[B]ecause these are taxes affirmatively imposed by the Chinese . . . government[]," Commerce "presume[s] that they are also collected." *Id.*

B. Commerce's Application of the Statute to Chinese VAT

Pursuant to the *Methodological Change*, for the *Final Results*, Commerce reduced Jacobi's constructed export price by an amount it described as "irrecoverable VAT." I&D Mem. at 7. According to Commerce, irrecoverable VAT constituted an "export tax, duty, or other charge" pursuant to section 1677a(c)(2)(B) because it represented the amount of VAT Jacobi paid on inputs and raw materials used in the production of activated carbon ("input VAT") that was nonrefundable when those inputs and raw materials were consumed in the production of exported subject merchandise. *Id.* at 7–8.[15] Commerce calculated irrecoverable VAT by multiplying the free on board ("FOB") value of the subject merchandise by the difference between the standard VAT rate (here, 17 percent) and the applicable VAT rebate rate (here, zero). *Id*. at 8. When Jacobi's entered values were less than an "estimated customs value," which Commerce defined as "ex-factory net U.S. price plus foreign movement expenses," Commerce applied the irrecoverable VAT rate to the estimated customs value as a proxy for the FOB China port value. *Id*. at 9–10.

In *Jacobi (AR8) I*, the court remanded the VAT adjustment for reconsideration in accordance with its resolution of this issue in the seventh administrative review.[16] 313 F. Supp. 3d at 1373. In that proceeding, the court found that section 1677a(c)(2)(B) was ambiguous. *See Jacobi (AR7) I*, 222 F. Supp. 3d at 1186–87. Because the statute is ambiguous, pursuant to *Chevron* prong two, Commerce could reasonably determine that an input VAT that becomes nonrefundable when the finished product is exported constitutes, at the

[15] Commerce explained that

> [i]n a typical VAT system, companies do not incur VAT expense for exports. Instead, they receive on export a full rebate of the VAT they pay on purchases of inputs used in the production of exports ("input VAT"), and, in the case of domestic sales, the company can credit [input VAT] . . . against the VAT they collect from customers ["output VAT"].

I&D Mem. at 7. In the PRC, however, "some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded." *Id.*

[16] The Government had acknowledged that there were no material differences in Commerce's VAT calculations in the seventh and eighth administrative reviews. See Jacobi (AR8) I, 313 F. Supp. 3d at 1373.

very least, an "other charge" that is "imposed by the exporting country on the exportation of the subject merchandise" because it remains recoverable (as a credit or offset against output VAT) until the product is exported. *Id*. The court further found that Commerce's determination that certain of Jacobi's entered values were unreliable was supported by substantial evidence and thus affirmed its use of estimated customs values. *Id.* at 1190–92. The court, however, remanded Commerce's VAT calculation because the agency's application of the irrecoverable VAT rate to the price of the finished good potentially overstated an adjustment intended to account for unrefunded input VAT. *Id.* at 1192–94.

In its first redetermination in the seventh administrative review, Commerce continued to characterize its adjustment as accounting for irrecoverable VAT (i.e., unrefunded input VAT). *See Jacobi Carbons AB v. United States* ("*Jacobi (AR7) II*"), 42 CIT ___, 313 F. Supp. 3d 1308, 1341 (2018). As the basis for its adjustment, however, Commerce pointed to the 17 percent output VAT rate applicable to Jacobi's foreign and domestic sales and found that it was, thus, included in Jacobi's U.S. price. *See id.* The court again remanded the adjustment, this time because Commerce's revised explanation introduced an inconsistency between the calculation methodology (based on output VAT) and the theory underlying the adjustment (unrefunded input VAT). *Id.* at 1341–44. Pointing to the record on remand, the court further instructed:

> [t]o the extent that Commerce continues to justify the adjustment as accounting for irrecoverable VAT defined as unrefunded *input VAT*, Commerce must address record evidence demonstrating that Jacobi, in fact, recovers the input VAT it incurs by the offset it takes before remitting the output VAT it collects. . .
>
> On the other hand, if Commerce asserts that the adjustment is based on an export tax due to Jacobi's collection of output VAT, Commerce must (a) address the record evidence regarding Jacobi's offset for input VAT paid on inputs taken against the output VAT collected, and (b) explain why the VAT adjustment is properly made on the basis of an estimated customs value instead of the FOB value on which the PRC assesses it.

Id. at 1342–43 (internal citations omitted).

In addition to reconsidering its VAT adjustment in accordance with *Jacobi (AR7) I* and *Jacobi (AR7) II*, in a subsequent order, the court instructed Commerce to include in its redetermination consideration

of *Aristocraft of Am., LLC v. United States*, 42 CIT ___, 331 F. Supp. 3d 1372, 1379 (2018), in which that court posed several questions for Commerce to address on remand regarding the evidentiary basis for the adjustment. *See* Order (Aug. 22, 2018), ECF No. 120. Commerce's explanation for the VAT adjustment as discussed in *Aristocraft* differed significantly from the explanation offered in this proceeding.

In its second remand redetermination in this action, Commerce changed the basis for its VAT adjustment from irrecoverable VAT (i.e. unrefunded input VAT) to the 17 percent output VAT imposed on foreign and domestic activated carbon sales. 2nd Remand Results at 30–31. Commerce supported its revised explanation by way of reference to a more recent iteration of Chinese VAT law, the relevance of which it had not previously considered. *Id.* at 27–28 & n.133 (citing Notice of the Ministry of Finance and the State Administration of Taxation on VAT and Consumption Tax Policies for Exported Goods and Labor Services ("2012 VAT Notice")); *see also* Jacobi's Second Suppl. Sec. C Questionnaire Resp. (Nov. 25, 2015), Ex. C-6, PR 266, PRJA Tab 3 (the 2012 VAT Notice). Commerce's revised explanation recognizes that Chinese VAT law treats products differently depending on their eligibility for an export VAT refund. *See id.* at 26–30.

Pursuant to that law, companies that produce exported goods that are *ineligible* for an export VAT rebate do not incur a reduction in the input VAT amount credited against the output VAT. *See* 2nd Remand Results at 29–30. Export sales of such goods are treated as domestic sales and are, thus, subject to the collection of output VAT. *See id.* at 29–30 & n.136 (citation omitted); 2012 VAT Notice, Art. 7.2(1)). In contrast, companies that produce exported goods that are *eligible* for a VAT rebate incur "a reduction in or offset to the input VAT that can be credited against output VAT" when the company calculates its net VAT payable amount. 2nd Remand Results at 27; *see also* 2012 VAT Notice, Art. 5.1(1). Export sales of such products are not subject to output VAT; instead, these companies incur a reduction in the input VAT amount they may credit against the output VAT collected solely on domestic sales. *See* 2nd Remand Results at 29. That reduction in the input VAT credit represents "irrecoverable VAT." *See id.* at 28–29.

In accordance with the foregoing description of Chinese VAT law, Commerce explained that activated carbon is one of the products that is ineligible for an export rebate. Consequently, Commerce found that producers of activated carbon do not incur a reduction in the amount of input VAT creditable against output VAT. *Id.* at 30; *see also* 2012 VAT Notice, Art. 7.1(1). Instead, export sales of activated carbon are treated in the same manner as domestic sales and are subject to the collection of output VAT. 2nd Remand Results at 30 & n.141 (citations

omitted). Commerce concluded that it previously erred in adjusting Jacobi's constructed export price by an amount purportedly representing irrecoverable VAT. *Id.* at 30–31. Commerce nevertheless retained the downward adjustment to Jacobi's U.S. price to account for the 17 percent output VAT, which the agency concluded represented an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States" pursuant to section 1677a(c)(2)(B). *Id.* at 31. Commerce explained that deducting output VAT from Jacobi's constructed export price ensured the calculation of a tax-neutral dumping margin because normal value in a nonmarket economy proceeding is based on the factors of production, which are VAT-exclusive. *Id.* at 30 & n.139.

Commerce further noted that certain questions raised by the *Aristocraft* court concerning the calculation of irrecoverable VAT were now irrelevant to Commerce's adjustment in this case. *Id.* at 31–32. Additionally, in response to the court's instruction that any assessment based on output VAT should include consideration of record evidence regarding Jacobi's ability to offset the output VAT with input VAT, *see Jacobi (AR7) II*, 313 F. Supp. 3d at 1343, the agency explained that "Commerce's adjustment is not intended to account for the total amount of net VAT creditable," 2nd Remand Results at 34. Rather, pursuant to the *Methodological Change*, "when the 'export tax, VAT, duty, or other charge [is] a fixed percentage,' Commerce 'will adjust the export price or constructed export price downward by the same percentage.'" *Id.* at 35 (citing *Methodological Change*, 77 Fed. Reg. at 36,483).

Commerce calculated the VAT adjustment pursuant to the following formula set forth in Chinese law:

output VAT = FOB * exchange rate / (1 + legal VAT rate) * legal VAT rate.

Id. at 36 & n.164 (citing Jacobi's Sec. C Questionnaire Resp. (Aug. 14, 2015) ("Jacobi's § CQR"), Ex. SC-18, CR 56, CRJA Tab 6; 2012 VAT Notice). Commerce reconsidered its prior reliance on estimated customs values to calculate the adjustment and instead used Jacobi's entered values because those "are the FOB China port values used in the Chinese tax authorities' output VAT calculations." *Id.* at 36 & n.165 (citation omitted). Commerce thus adjusted Jacobi's U.S. price downwards by the output VAT amount calculated using the above formula and Jacobi's entered values. *Id.* at 36.

Commerce further explained that because Jacobi's sales of subject merchandise are subject to output VAT, Jacobi's U.S. price "necessarily include[s]" output VAT. *Id.* at 35. In response to Jacobi's argument that Commerce had not shown its sales price to include output VAT because the invoice on the record of the remand proceeding does not

reflect the collection of output VAT, Commerce pointed to Jacobi's questionnaire response explaining that its sales to foreign and domestic buyers are subject to 17 percent output VAT and Jacobi's calculation of its net VAT payable that includes amounts representing the collection of output VAT for each POR month. *Id.* at 49 & nn.207–08 (citations omitted).

C. Commerce's Authority to Deduct Output VAT from U.S. Price

Jacobi contends that "Commerce's revised reasoning still fails to satisfy the statutory requirement for an adjustment" pursuant to section 1677a(c)(2)(B). Jacobi's Opp'n Cmts. at 13. Jacobi does not, however, develop any particular argument that output VAT does not fulfill the statutory criteria of an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." Nevertheless, the court recognizes that since it issued *Jacobi AR7 I*, two opinions from the court have called into question Commerce's legal authority to adjust export price or constructed export price to account for VAT (whether irrecoverable or not) pursuant to 19 U.S.C. § 1677a(c)(2)(B). *See Qingdao Qihang Tyre Co., Ltd. v. United States*, 42 CIT ___, ___, 308 F. Supp. 3d 1329, 1338–47 (2018); *China Mfrs. Alliance, LLC v. United States*, Slip Op. 19–7, 2019 WL 221237, at *4–8 (CIT Jan. 16, 2019). The court does not find those opinions persuasive and declines to follow them.

In *Qingdao* and *China Manufacturers*, the court, upon reviewing the statute in its current form and as enacted prior to the adoption of the Uruguay Round Agreements Act ("URAA"),[17] concluded, pursuant to *Chevron* prong one, that section 1677a(c)(2)(B) is unambiguous and does not permit Commerce to adjust export price or constructed export price for VAT imposed on export sales indirectly through an input VAT that becomes irrecoverable or, by extension, directly through an output VAT. *Qingdao*, 308 F. Supp. 3d at 1338–42, 1346; *China Mfrs.*, 2019 WL 221237, at *4–8. The court characterized VAT as a domestic tax that is distinct from an export tax imposed on the exportation of finished goods. *See Qingdao*, 308 F. Supp. 3d at 1339, 1341, 1345; *China Mfrs.*, 2019 WL 221237, at *6. The court reasoned that an "export tax, duty, or other charge" is "limited to one that is 'imposed by the exporting country on the exportation of the subject merchandise to the United States,'" *Qingdao*, 308 F. Supp. 3d at 1343 (quoting 19 U.S.C. § 1677a(c)(2)(B)) and is, thus, "by definition" not

[17] On December 8, 1994, Congress enacted the URAA, including section 1677a in its current form. *See* Uruguay Round Agreements Act, Pub. L. No. 103–465, § 223, 108 Stat. 4809, 4876 (1994).

included "in the home-market price," *id.*; *see also China Mfrs.*, 2019 WL 221237, at *4.

Previously, when considering Commerce's irrecoverable VAT theory for the adjustment, this court held that "the catchall phrase 'other charge' captures any financial obligation *provided* it is 'imposed by the exporting country on the exportation of the subject merchandise,' regardless of whether the imposing country explicitly labels the charge as one pertaining to exports." *Jacobi (AR 7) I*, 222 F. Supp. 3d at 1186–87 (emphasis added). In other words, the court considered "other charge" inherently ambiguous and Commerce reasonably interpreted the phrase to encompass irrecoverable VAT.

Upon Commerce's further consideration of the record and recognition that, with regard to activated carbon, China simply imposes an output VAT on domestic *and export* sales, the issue is now whether Commerce may apply the statute, 19 U.S.C. § 1677a(c)(2)(B), to a VAT that is equally applicable to domestic and export sales. This court determines that section 1677a(c)(2)(B)'s reference to "export tax[es], dut[ies], or other charge[s] imposed by the exporting country on the exportation of the subject merchandise" is ambiguous as to whether the statute applies to such assessments imposed *solely* upon export sales or assessments imposed upon sales *at the time of export*, regardless of whether the assessment is also applied to domestic sales. *But cf. Qingdao*, 308 F. Supp. 3d at 1343; *China Mfrs.*, 2019 WL 221237, at *4.

The notion that the imposition of a tax, duty or other charge that is generally applicable to both domestic and export sales does not alone preclude it from providing the basis for an adjustment pursuant to section 1677a(c)(2)(B) finds support in the U.S. Supreme Court's Export Clause jurisprudence. The Export Clause provides: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., Art. 1, § 9, cl. 5. In *United States v. International Business Machines Corp*. ("*IBM*"), the Court held that the Export Clause bars the imposition of a generally applicable federal tax on goods in export transit, even if the tax is nondiscriminatory and equally applicable to non-export transactions. 517 U.S. 843, 845, 863 (1996); *see also United States v. U.S. Shoe Corp*., 523 U.S. 360, 363, 370 (1998) (holding that a harbor maintenance tax collected from exporters, importers, and domestic shippers and imposed at the time of loading for exports and unloading for other shipments violated the Export Clause as applied to exports). While the context in which those cases arose is arguably distinct, notwithstanding any such distinctions, *IBM* and *U.S. Shoe* support the proposition that a statutory reference to an export tax,

duty, or other charge imposed upon exportation may include such a tax, duty or other charge also imposed on domestic sales.

The court now turns to consideration of whether Commerce's interpretation of section 1677a(c)(2)(B) was reasonable when applied to China's output VAT in this case. Here, Commerce interpreted section 1677a(c)(2)(B) to permit a reduction to EP/CEP in order to achieve a tax neutral comparison between EP/CEP and normal value, *see* 2nd Remand Results at 30 & n.139, and such an interpretation, as discussed more fully below, was reasonable.

As an initial matter, it is important to bear in mind that here, normal value is *not* based on home-market (i.e., domestic) sales prices, but is based on the respondent's factors of production and corresponding surrogate values, which are determined on a tax-exclusive basis.[18] In such a case, the principle that dumping margin calculations should be tax-neutral supports Commerce's adjustment.[19]

The Federal Circuit recognized more than two decades ago:

> Buried in the language of statute and case law, and obscured by the fog of litigation, is a simple policy issue: whether Congress, in the Tariff Act of 1930 (the Act), precluded Commerce from determining dumping margins in a tax-neutral fashion.

Federal Mogul Corp. v. United States, 63 F.3d 1572, 1577 (Fed. Cir. 1995). The question, then, is whether Congress, when it did not substantively alter section 1677 a in the URAA,[20] intended to pro-

[18] In a proceeding involving a market economy country, a comparable tax-neutral comparison would be achieved by reducing the normal value for "taxes imposed directly upon the foreign like product . . . which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product." 19 U.S.C. § 1677b(a)(6)(B)(iii).

[19] Indeed, the *Qingdao* court recognized that Congress intended for Commerce to deduct export taxes from U.S. price in order to "achieve a tax-neutral comparison [with] normal value" in a market economy proceeding precisely because an export tax is not included in the home-market or comparison market price used to calculate normal value. 308 F. Supp. 3d at 1342–43. So too here, output VAT is not included in the surrogate values used to calculate normal value and, thus, notwithstanding the facts that output VAT is assessed on domestic sales of activated carbon and this is a nonmarket economy proceeding, the same principle of tax neutrality supports Commerce's deduction of output VAT from U.S. price.

[20] The Statement of Administrative Action accompanying the URAA explained that although Congress gave new labels to "purchase price" and "exporter's sale price," now "export price" and "constructed export price," respectively, the adjustments to those prices pursuant to section 1677a were unchanged. *See Qingdao*, 308 F. Supp. 3d at 1339–40 (citing Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 822–23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163) ("SAA")). Congress likewise renamed "foreign market value" to "normal value." SAA at 820, 1994 U.S.C.C.A.N. at 4161. The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d); *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1345 n.7 (Fed. Cir. 2002).

hibit Commerce from using that provision to achieve tax neutrality in nonmarket economy cases? This court can find no such intention.

First, the pre-URAA version of the statute clearly permitted Commerce to make tax-neutral dumping calculations. Whether it was through adjustments to foreign market value or purchase price/exporter's sales price, *Federal Mogul* confirms that "one thing is clear[:] . . . in administering the Act, [Commerce] over the years has pursued a policy of attempting to make the tax adjustment called for by the Act tax-neutral." 63 F.3d at 1580 (further holding that nothing in the pre-URAA version of section 1677a precluded Commerce from achieving tax-neutrality in its administration of the provision requiring an upward adjustment to U.S. price to account for taxes included in the home market sales price and rebated or exempted in the context of exports sales).[21] Commerce's policy accords with the principle that differences in sales prices due to differential tax treatment between the home market and export market "does not constitute unfair pricing behavior" but, rather, "is a difference created by forces outside the control of the competitor, and does not involve the idea behind the antidumping act," which is to prevent unfair competition from dumping. *Id.* at 1575 (citation omitted).

Second, the suggestion that Congress, by providing for adjustments to normal value or EP/CEP, is legislating adjustments to increase or decrease the margin of dumping is unsupported. *But cf., e.g.*, *Qingdao*, 308 F. Supp. 3d at 1341, 1343 (discussing congressional intent to impact the dumping margin through certain adjustments). To the contrary, Congress, when it enacted the URAA, intended to ensure that Commerce could continue to make the adjustments to normal value and EP/CEP necessary in order to place both prices, to the extent possible, on the same basis, permitting a "fair, 'apples-to-apples' comparison." *Maverick Tube Corp. v. United States*, 861 F.3d 1269, 1274 (Fed. Cir. 2017) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)); *see also* SAA at 827, 1994 U.S.C.C.A.N. at 4166 (noting that a new statutory provision regarding deductions from normal value to account for indirect taxes represents a change from the pre-URAA statute that accounted for indirect taxes through an upward adjustment to export price, which change "is intended to ensure that dumping margins will be tax-neutral"). Typically, these adjustments lead to ex-factory prices,

[21] At least as early as 1991, Commerce adjusted export price to enable a tax-neutral comparison to foreign market value. *See* U.S. Dep't Commerce, Int'l Trade Admin., Import Admin., Antidumping Manual Chapter 7, pp. 8–10 (1991). As noted, the URAA did not affect any substantive change to these adjustments. *See supra*, note 20.

packed in the same manner, and on the same tax basis. *See* SAA at 827.

Third, as discussed above, there is no indication that before 2012, Commerce (or Congress) considered section 1677a to be inapplicable in NME cases. *See Methodological Change*, 77 Fed. Reg. at 36,482; *Pure Magnesium from Russia*, 60 Fed. Reg. at 16,448 (noting that, in NME cases, "pecuniary aspects of internal transactions are considered meaningless and thus ignored"). Rather, Commerce considered itself unable to apply the provision in NME cases because "pervasive government intervention . . . precluded proper valuation of taxes paid by NME respondents to NME governments." *Methodological Change*, 77 Fed. Reg. at 36,482. Thus, while it may be the case that, all other things being equal, a dumping margin calculated before Commerce's policy shift would be lower than a margin calculated inclusive of an adjustment pursuant to section 1677a(c)(2)(B), there is nothing to indicate that the latter is not in accordance with law. Instead, the latter margin calculation simply includes an additional data point that Commerce was unable to include in the former.

Finally, returning to the "policy issue" identified in *Federal Mogul*, adjusting EP/CEP for VAT imposed on export sales allows Commerce to calculate a tax-neutral dumping margin when normal value is calculated exclusive of VAT. In this case, as discussed in more detail below, the constructed export price reported by Jacobi includes 17 percent output VAT imposed by the Chinese government, whereas the normal value, to which it is to be compared, is determined using surrogate values that are tax-exclusive. *See* 2nd Remand Results at 30 & n.139. To interpret section 1677a(c)(2)(B) as unambiguously barring Commerce from adjusting EP/CEP for these taxes when comparing those prices to a tax-exclusive normal value would be to require that it understate the margin of dumping. The court finds no support for such a requirement in the language of the statute. Thus, Commerce's conclusion that China's output VAT is an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise" is a permissible interpretation of section 1677a(c)(2)(B), 2nd Remand Results at 31, and the court now turns to Jacobi's arguments that the adjustment is unsupported by substantial evidence.

D. Commerce's Adjustment is Supported by Substantial Evidence

Jacobi argues that Commerce's determination that 17 percent output VAT is included in Jacobi's constructed exported price lacks sub-

stantial evidence. *See* Jacobi's Opp'n Cmts. at 13–14, 16. According to Jacobi, the existence of a "legal requirement" to collect output VAT on its U.S. sales is not evidence that it includes 17 percent output VAT in sales prices to the United States. *Id.* at 16. Jacobi points to its sales documentation submitted on the record and notes the lack of any reference to output VAT. *See id.* at 13–14 (citing Jacobi's Sec. A Questionnaire Resp. (July 15, 2015) ("Jacobi's § AQR"), Ex. A-17, CR 27, 30, CRJA Tab 5). Jacobi further contends that Commerce has ignored the court's instruction to address evidence that Jacobi offsets paid input VAT against the output VAT due. *Id.* at 14. Jacobi also contends that *Aristocraft* remains relevant and Commerce erred in failing to address the opinion. *Id.* at 15–16.

The Government contends that Jacobi's reporting of its output VAT collection obligations represents substantial evidence that output VAT was included in its U.S. prices and Jacobi's sales documentation does not detract from the substantiality of that evidence. Def.'s Reply Cmts. at 16–17. The Government further contends that Commerce properly discounted the relevance of Jacobi's ability to offset input VAT from output VAT and its calculation of a net VAT payable amount because Commerce's margin calculations are intended to account for the amount of VAT included in U.S. price, not Jacobi's net VAT burden. *Id.* at 17–18.

Calgon contends that because "the cost of output VAT falls on the buyer of the good, not on the [seller]," Def.-Ints.' Reply Cmts. at 14 (quoting 2nd Remand Results at 27), it is "necessarily included in Jacobi's price," *id.* Calgon further contends that Commerce adequately addressed the court's questions regarding the relationship between input VAT and output VAT and the relevance of the *Aristocraft* opinion in light of activated carbon's treatment under Chinese VAT law. *Id.* at 15–16.[22]

The court sustains Commerce's VAT adjustment. The absence of a line item for output VAT on Jacobi's sales documents is not dispositive and the record supports Commerce's determination that Jacobi's export prices include output VAT. *See Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (the possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)).

Here, Jacobi concedes that its U.S. sales were subject to the collection of 17 percent output VAT pursuant to the 2012 VAT Notice. *See* Jacobi's Opp'n Cmts. at 16; 2012 VAT Notice, Art. 7.2(1). Jacobi

[22] CAC did not comment on this issue.

suggests, however, that it calculates the net VAT payable amount *as if* it collected output VAT on U.S. sales, but that it does not actually collect output VAT on those sales. *See* Jacobi's Opp'n Cmts. at 16. In making this claim, Jacobi points to no affirmative evidence demonstrating that the FOB China port value reflected in its sales documents is output VAT-exclusive. *See* Jacobi's § AQR, Ex. A-17 at ECF p. 94. The record reasonably supports Commerce's conclusion that Jacobi's U.S. prices included output VAT—regardless of whether Jacobi itemized that charge in its sales documents.

Moreover, contrary to Jacobi's arguments, *see* Jacobi's Opp'n Cmts. at 14–15, Commerce did not impermissibly base its adjustment on the contemporaneous Chinese law while ignoring evidence of Jacobi's net VAT payment. The statute directs Commerce to make adjustments based on certain amounts included in U.S. price, not amounts remitted to the subject nonmarket economy government.[23] *See* 19 U.S.C. § 1677a(c)(2)(B).

In sum, Commerce's redetermination on this issue complies with the court's remand instructions set forth in *Jacobi (AR8) I* and the agency's deduction of output VAT from Jacobi's constructed export price is lawful and supported by substantial evidence.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's 2nd Remand Results are remanded for Commerce to reconsider its surrogate country selection as well as the surrogate values for carbonized material and hydrochloric acid, as set forth in Discussion Section I above; it is further

ORDERED that Commerce's 2nd Remand Results are sustained with respect to the agency's VAT adjustment, as set forth in Discussion Section II above; it is further

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

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

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

ORDERED that any opposition or supportive comments must not exceed 6,000 words.

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[23] The court also notes that Jacobi's argument that it "only *pays* the Chinese government the 'net' VAT amount," Jacobi's Opp'n Cmts. at 14, is inaccurate. While the net VAT payment may represent Jacobi's direct VAT payment to the Chinese government, Jacobi is simply reducing the output VAT it collected by the input VAT it has already paid to the Chinese government, albeit indirectly via its purchases of inputs.

Dated: March 5, 2019
New York, New York

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

Slip Op. 19–29

STEIN INDUSTRIES INC., D/B/A CARLSON AIRFLO MERCHANDISING SYSTEMS, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00150

[Remanding the U.S. Department of Commerce's scope determination for reconsideration.]

Dated: March 5, 2019

Richard P. Ferrin, Drinker Biddle & Reath LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *Douglas J. Heffner* and *Lukose J. Karamyalil*.

Jessica L. Cole, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Caroline D. Bisk*, Attorney, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Barnett, Judge:

This action involves a challenge to a U.S. Department of Commerce ("Commerce" or "the agency") scope determination for the antidumping and countervailing duty orders on light-walled rectangular ("LWR") pipe and tube from the People's Republic of China ("the PRC" or "China"). *See* Compl., ECF No. 5; Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Carlson AirFlo Merchandising Systems Scope Ruling Req., A-570–914, A-570–915, A-583–803 (May 29, 2018) ("Final Scope Ruling"), ECF No. 12–4; *Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea*, 73 Fed. Reg. 45,403 (Dep't Commerce Aug. 5, 2008) (antidumping duty orders and notice of am. final determination of sales at less than fair value with respect to the Republic of Korea) ("*AD Order*"); *Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 Fed. Reg. 45,405 (Dep't Commerce Aug. 5, 2008) (notice of countervailing duty order) ("*CVD Order*") (together, "the *Orders*").[1]

[1] The administrative record filed in connection with the Final Scope Ruling is divided into a Public Administrative Record ("PR"), ECF No. 12–2, and a Confidential Administrative Record ("CR"), ECF No. 12–1. Parties submitted joint appendices containing record documents cited in their Rule 56.2 briefs. *See* Public J.A. ("PJA"), ECF No. 25; Confidential J.A. ("CJA"), ECF No. 26. The court references the confidential versions of the relevant record documents, unless otherwise specified.

Plaintiff, Stein Industries Inc., d/b/a Carlson AirFlo Merchandising Systems ("Plaintiff" or "Carlson"), challenges Commerce's determination that its merchandising bar and adjustable welded mounted bar kit are each within the scope of the *Orders*. *See* Mot. of Pl. Stein Industries Inc. for J. on the Agency R., ECF No. 18, and Confidential Mem. of P. & A. of Pl. Stein Industries Inc., d/b/a Carlson Airflo Merchandising Systems in Supp. of its Mot. for J. on the Agency R. ("Pl.'s Mem."), ECF No. 20; Reply Br. of Pl. Stein Industries Inc., d/b/a Carlson Airflo Merchandising Systems ("Pl.'s Reply"), ECF No. 23. Defendant United States ("the Government") urges the court to sustain Commerce's scope determination. *See* Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 22. For the reasons discussed herein, the court remands the Final Scope Ruling.

BACKGROUND

I. Legal Framework for Scope Determinations

Because descriptions of merchandise contained in the scope of an antidumping or countervailing duty order must be written in general terms, issues may arise as to whether a particular product is included within the scope of such an order. *See* 19 C.F.R. § 351.225(a). When those issues arise, Commerce's regulations direct it to issue "scope rulings" that clarify whether the contested product falls within the purview of an antidumping or countervailing duty order's scope. *Id*. Although there are no specific statutory provisions that govern the interpretation of the scope of an order, the determination of whether a product is included within the scope of an order is governed by case law and the regulations published at 19 C.F.R. § 351.225. *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (citation omitted); *see also Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071–72 (Fed. Cir. 2001) (noting that 19 C.F.R. § 351.225 provides the process for determining whether an antidumping duty order covers a product).[2]

Commerce's inquiry must begin with the relevant scope language. *See, e.g.*, *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (explaining that the language in the order is the "predicate for the interpretive process" and the "cornerstone" of a scope analysis"). If the language is ambiguous, Commerce interprets the scope "with the aid of" the sources set forth in 19 C.F.R. §

[2] The regulations establish a two-step process, and "case law has added another layer to the inquiry." *Meridian Prods.*, 851 F.3d at 1381 (distinguishing between Commerce's examination of the "text of an order's scope" and the sources enumerated in 19 C.F.R. § 351.225(k)(1), discussed herein).

351.225(k). *Meridian Prods*., 851 F.3d at 1381 (quoting *Duferco Steel*, 296 F.3d at 1097).

Specifically, Commerce first considers the description of the merchandise in the petition and initial investigation, and prior determinations by Commerce (including scope determinations) and the International Trade Commission ("ITC"). *See Meridian Prods*., 851 F.3d at 1382 (citing 19 C.F.R. § 351.225(k)(1) (the "(k)(1) factors")). If the (k)(1) factors are dispositive, Commerce issues a final scope ruling. *See* 19 C.F.R. § 351.225(d).[3] When the (k)(1) factors are not dispositive, Commerce considers the sources in subsection (k)(2) of the regulation. *See* 19 C.F.R. § 351.225(k)(2).[4]

"Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty orders." *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). Nevertheless, "Commerce cannot interpret an antidumping order so as to change the scope of th[e] order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus.*, 254 F.3d at 1072 (internal quotation marks and citation omitted). When a party challenges a scope determination, the court's objective is to determine whether the scope of the order "contain[s] language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel*, 296 F.3d at 1089.

II. Administrative Proceedings and Procedural Background

On August 5, 2008, Commerce published antidumping and countervailing duty orders on LWR pipe and tube from China. *See AD Order*, 73 Fed. Reg. at 45,403; *CVD Order*, 73 Fed. Reg. at 45,405. The *Orders* contain effectively identical scope language describing subject merchandise, *inter alia*, as "certain welded carbon quality light-walled steel pipe and tube, of rectangular (including square) cross section . . ., having a wall thickness of less than 4 mm." *AD Order*, 73 Fed. Reg. at 45,404; *see also CVD Order*, 73 Fed. Reg. at 45,405. The *Orders* further note that "[t]he welded carbon-quality rectangular pipe and tube subject to these orders is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7306.61.50.00 and 7306.61.70.60." *AD Order*, 73 Fed. Reg. at

[3] To be dispositive, the (k)(1) factors "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007).

[4] Specifically, Commerce will consider: "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2) (the "(k)(2) factors").

45,404; *CVD Order*, 73 Fed. Reg. at 45,406. Commerce provided the tariff provisions "for convenience and Customs purposes" only; the "written description of the scope of these orders is dispositive." *AD Order*, 73 Fed. Reg. at 45,404; *CVD Order*, 73 Fed. Reg. at 45,406.

On December 11, 2017, Carlson requested a scope ruling to determine whether four of its products imported from China were outside the scope of the *Orders*. *See* Scope Req. of Carlson AirFlo Regarding Certain Finished Components of Refrigerated Merchandising and Display Structures (Dec. 11, 2017) ("Scope Req."), CR 1, PR 1, CJA Tab 1, PJA Tab 1. On January 24, 2018, Commerce issued Carlson a supplemental questionnaire requesting additional information about the products. *See* Suppl. Questionnaire (Jan. 24, 2018), PR 2, PJA Tab 3. Carlson responded on April 11, 2018. *See* Am. Scope Req. of Carlson AirFlo Regarding Certain Finished Components of Refrigerated Merchandising and Display Structures (Apr. 11, 2018) ("Suppl. Scope Req."), CR 2–4, PR 8–9, CJA Tab 2, PJA Tab 4.[5]

Carlson characterized the products at issue as "certain finished components of refrigerated merchandising and display structures." Scope Req. at 1; Suppl. Scope Req. at 1. Carlson asserted that all four products were properly classified pursuant to HTSUS subheading 9403.90.80.41.[6] *See* Suppl. Scope Req. at 7. Carlson described each product as follows:

1. Part No. R10447, which consists of a "merchandising bar" made of 1.50 millimeter ("mm") thick 16-gauge carbon steel that is "formed and welded into a hollow rectangular shape." Scope Req. at 2; *see also id.*, Ex. 3. Before importation, "[t]wo tubes are welded on the top of the bar, in order to prevent the frame from sliding too much to either the right or left side inside the case." *Id.* at 3. The tubes "are also made of carbon steel, 0.5 inch x 1.5 inch x 0.5 inch." *Id.*
2. Part No. P0228321, which consists of a "universal mounting bar" made of 1.50 mm thick 16-gauge carbon steel that is "formed and welded into a hollow rectangular shape." *Id.* at 3. "Numerous holes are drilled into [the mounting bar]" before importation. *Id.* at 3–4. The mounting bar "is imported separately as a component of kit part number 250211," which "is

[5] Carlson initially requested a scope ruling with respect to antidumping and countervailing duty orders on LWR pipe and tube imported from China and Taiwan. *See* Final Scope Ruling at 2. Carlson later clarified that the products at issue are manufactured in and imported from China. *See id.* Thus, Commerce's scope determination applies to the published orders on LWR pipe and tube from China only. *See id.*

[6] Carlson initially asserted that all four products are properly classified pursuant to subheading 8302.50.00.00 of the HTSUS. *See* Scope Req. at 5. Carlson later amended its position. *See* Suppl. Scope Req. at 7. Subheading 9403.90.80.41 covers "Other furniture and parts thereof: Parts: Other[:] Other," with a corresponding duty rate of zero.

assembled after importation." *Id.* at 4.

3. Kit No. 250172, which consists of a "rear hang cantilever component kit" containing a mounting bar, brackets, and hex wrench. *Id*. at 4–5. The mounting bar consists of 1.50 mm thick 16-gauge carbon steel that is "formed and welded into a hollow rectangular shape." *Id.* at 4. Following importation, "the brackets and the bar are screwed together[] with the enclosed hex wrench." *Id.*
4. Kit No. 250355, which consists of an "adjustable welded mounting bar kit" containing "a one-piece welded adjustable insert." *Id*. at 5. The insert, Part No. P01793, consists of 0.12-inch-thick 11-gauge carbon steel that is "formed and welded into a hollow rectangular shape." *Id.* Before importation, "[t]wo pieces of custom-cut cold-rolled steel . . . are punched and welded to the bar." *Id.*

Carlson asserted several arguments before Commerce supporting the exclusion of its products from the scope of the *Orders*. *See id*. at 9–17; Suppl. Scope Req. at 3–6, 9–12. Carlson argued that the plain language of the scope does not include "finished components [of] refrigerated merchandising and display structures." Scope Req. at 9. Carlson acknowledged that its products contain "structural steel bars" as inputs that would be covered by the scope; according to Carlson, however, the imported products are not LWR pipes or tubes but instead are "finished downstream components made from LWR pipes or tubes." *Id*. Carlson noted that all four products are powder coated and perforated. Suppl. Scope Req. at 9–10, 11–12. Perforation of the bars "in particular places . . . and with particular drill hole shapes dedicates the part for a specific use," i.e., "refrigerated merchandising and display structures." *Id*. at 12. Additionally, Carlson noted that alterations to three of its products resulted in the lack of a uniform square or rectangular cross-section. Scope Req. at 13–14. Relevant thereto, Carlson pointed to pre-importation alterations to the merchandising bar (Part No. R10447) and adjustable welded mounting bar kit (Kit No. 250355) and post-importation assembly of the rear hang cantilever component kit (Kit No. 250172). *Id.*; *see also* Suppl. Scope Req. at 3, 5, 6.

Carlson further argued that consideration of the (k)(1) factors favored exclusion. Scope Req. at 10. According to Carlson, the underlying petition and ITC investigative reports indicate that subject LWR pipe and tube is an "intermediate product" used to make various downstream products, such as store shelving, which are not included in the scope. *Id*. at 10–12. Carlson also argued that consideration of the (k)(2) factors favored excluding all four products from the scope.

Id. at 14–17. No other interested party commented on Carlson's scope ruling request. Final Scope Ruling at 7.

On May 29, 2018, Commerce issued its scope determination pursuant to 19 C.F.R. § 351.225(k)(1) without initiating a formal scope inquiry or considering the (k)(2) factors. *See* Final Scope Ruling at 7. In its ruling, Commerce determined that all four of Carlson's products were subject to the *Orders*. *See id.* at 7–10.

Specifically, Commerce concluded that "all four parts in their original form" are described by the scope language regarding steel type (carbon or carbon-quality) and wall thickness (less than 4 mm). *Id.* at 7. Commerce rejected Carlson's argument that pre-importation processing removes the products from the scope of the *Orders*, asserting that "[p]roducts that meet the description of subject merchandise in the scope are covered unless explicitly excluded from the scope," and the relevant scope did not contain exclusionary language. *Id.* at 7–8; *see also id.* at 8 ("[T]he scope of the *Orders* does not limit coverage based on whether the products have undergone certain further processing, such as perforation, either before importation or after importation."). According to Commerce, "it is not reasonable to conclude that simply because a particular type of LWR pipe and tube is not specifically mentioned in the scope, that product is not covered." *Id.* at 8.

Commerce further rejected Carlson's argument that its products are outside the scope "because they may be used, or are intended to be used, in 'certain finished components of refrigerated merchandising and display structures.'" *Id.*Pointing to *King Supply Co. v. United States*. 674 F.3d 1343, 1349 (Fed. Cir. 2012), Commerce asserted that end-use restrictions must be clearly stated, and the scope language at issue does not "exclud[e] LWR pipe and tube based on end use." *Id.* at 8 & n.60.

Lastly, Commerce concluded that an analysis of the (k)(1) factors does not support excluding Carlson's products. *Id.* at 9. Commerce explained that the petition does not contain "specific requirements . . . regarding Carlson['s . . .] proposed exclusions," and the underlying Commerce and ITC investigations do "not provide any guidance as to the imposition of any surface-treatment, length, specification, or end-use requirements." *Id.* In sum, Commerce determined that Carlson's "perforated tubes . . . are within the scope of the *Orders*." *Id.* at 10.

Plaintiff now challenges Commerce's determination with respect to the merchandising bar and adjustable welded mounting bar kit (Part No. R10447 and Kit No. 250355, respectively). *See, e.g.*, Pl.'s Mem. at 13–21. Plaintiff's motion for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.2 is fully briefed, and the

court heard oral argument on February 20, 2019. *See* Docket Entry, ECF No. 28.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi)(2012),[7] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Parties' Contentions

Plaintiff contends that the merchandising bar and adjustable welded mounting bar kit are not subject to the *Orders* based on the plain language of the scope. Pl.'s Mem. at 13. Plaintiff asserts that subject merchandise must "uniformly" exhibit a rectangular (or square) cross-section, and its merchandising bar and adjustable welded mounting bar kit have welded attachments that negate uniformity of cross-section. *Id*. at 13–16. Specifically, the merchandising bar does not exhibit a rectangular cross-section at the location of the tubes welded thereto, *id.* at 14–15, and the bar component of the adjustable welded mounting bar kit has custom-cut cold-rolled steel pieces welded to each end such that the bar lacks "two parallel sides from end to end," *id.* at 15. According to Plaintiff, Commerce failed to address whether the lack of a uniform cross-section removed the merchandising bar and adjustable welded mounting bar kit from the scope of the *Orders*, and instead conflated this argument with Plaintiff's separate argument that perforation transforms an LWR pipe or tube "into a down-stream out-of-scope product." *Id.* at 16–17; Pl.'s Reply at 11–12. Plaintiff asserts that Commerce's failure to address this argument is "clear error that independently warrants a remand." Pl.'s Reply at 13.

Plaintiff also contends that consideration of the (k)(1) factors favors excluding the merchandising bar and adjustable welded mounting bar kit from the scope. Pl.'s Mem. at 17. Plaintiff notes that illustrations in an ITC report regarding the types of LWR pipes and tubes subject to the *Orders* reflect products with uniform cross-sections, and the ITC described subject merchandise as "an *intermediate*

[7] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code and all citations to the U.S. code are to the 2012 edition, unless otherwise specified.

product" used for downstream purposes, such as display shelving. *Id.* at 18; *see also id.* at 19–20 (listing downstream products utilizing LWR pipe or tube cited by the ITC). According to Plaintiff, the ITC's description "simply makes no sense if . . . the ITC considered all of the downstream products *made from* LWR pipe or tube to still be considered LWR pipe and tube within the scope of the investigation." *Id.* at 19. Plaintiff further asserts that the underlying petition likewise indicates that LWR pipes and tubes are intermediate products that are distinct from the downstream products into which they are manufactured. *Id.* at 20–21.

Defendant contends that Carlson's merchandising bar and adjustable welded mounting bar are covered by the plain language of the scope, which does not clearly exclude products that have undergone further processing. Def.'s Resp. at 12. Defendant asserts that interpreting the scope to require a uniform cross-section, as argued by Plaintiff, "impermissibly changes the scope of the *Orders*." *Id.* at 13. Rather, according to Defendant, the scope merely requires products to form a rectangular cross-section "in most parts," and Carlson's products meet this requirement. *Id.* at 13–14. Defendant also asserts that Commerce considered Carlson's argument regarding the need for a uniform cross-section "jointly" with Carlson's arguments regarding other types of further processing or end-use, *id.* at 15, and Commerce's "path [to its determination] may be reasonably discerned," *id.* (quoting *Bowman Transp., Inc. v. Ark.–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

Defendant further contends that the (k)(1) factors support Commerce's determination. *Id.* at 15. According to Defendant, "the variety of uses to which LWR pipe and tube is put" suggests that "many importers would further process this product by adding items such as brackets," and "[i]t would make little sense for the petition to describe" the various applications in which LWR pipe and tube is used "if the petitioners only intended for LWR pipe and tube to be covered when imported in its original form." *Id.* at 16. Defendant also asserts that the ITC's reference to LWR pipe and tube's use in "store display shelves and racks" does not mean that "display shelf components are excluded," *id.*; "end-use . . . is only relevant [when] there is clear exclusionary language," and there is none here, *id.* at 17 (citing *King Supply*, 674 F.3d at 1349). According to Defendant, "even if the ITC report could be properly read to exclude downstream, end-use products, Carlson's merchandise would still fall within the scope [because] *they are still intermediate products at the time of importation*." *Id.*

II. Commerce's Scope Ruling is Remanded for Reconsideration

The scope at issue covers, *inter alia*, "certain welded carbon quality light-walled steel pipe and tube" with a "rectangular (including square) cross-section." *AD Order*, 73 Fed. Reg. at 45,404; *CVD Order*, 73 Fed. Reg. at 45,405. From the outset, remand is required for Commerce to address Carlson's argument that the merchandising bar and adjustable welded mounting bar kit are outside of the scope based on the lack of a uniform cross-section. Although Commerce is correct that "[p]roducts that meet the description of subject merchandise in the scope are covered unless explicitly excluded from the scope," Final Scope Ruling at 7–8, Commerce incorrectly assumed that Carlson's products met the description of subject merchandise and then proceeded to consider whether the scope contained exclusionary language based on further processing or end use, *see id.* at 8 ("[A]ny exclusion *for [Carlson's] LWR pipes and tubes* would have to be clearly articulated.") (emphasis added). Commerce, thus, did not consider the correct question: *Do Carlson's merchandising bar and adjustable welded mounting bar kit products, as imported, meet the description of the scope notwithstanding their lack of a uniform cross-section*? Without more, the court cannot ensure that Commerce has not interpreted the scope of the *Orders* "in a manner contrary to its terms." *Eckstrom Indus.*, 254 F.3d at 1072.

Defendant's assertion that Commerce's consideration of this argument and rationale for dismissing it are discernable is not persuasive. Commerce's statement that "the scope of the *Orders* does not limit coverage based on whether products have undergone further processing, *such as perforation*, either before importation or after importation," Final Scope Ruling at 8 (emphasis added), provides no indication that Commerce considered the extent to which products must exhibit a rectangular or square cross-section in order to be covered by the plain language of the scope. This is a distinct issue that is not encompassed by Commerce's consideration of the degree to which products may be further processed while still being in scope. Defendant's assertion that the scope requires products to exhibit a rectangular cross-section "in most parts" is simply a *post hoc* attempt to interpret the scope language, using language that does not appear in the scope, which is impermissible.[8] *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168–69 (1962).

[8] Defendant grounds its assertion in the scope's lack of an explicit reference to the need for a uniform cross-section. *See* Def.'s Resp. at 13 ("If Commerce intended for the *Orders* to cover only those LWR pipes and tubes with a uniform-cross-section, it would have specified

Commerce further erred in its analysis of Carlson's argument that the scope does not cover downstream products made with subject LWR pipes or tubes. Commerce asserted that Carlson's products are not "outside of the scope of the *Orders* because they may be used, or are intended to be used, in 'certain finished components of refrigerated merchandising and display structures.'" Final Scope Ruling at 8. Carlson argued, however, that its products *are* "certain finished components of refrigerated merchandising and display structures," Scope Req. at 1, and, thus, consisted of "*downstream products* dedicated to particular uses as components of refrigerated merchandising and display structures," Suppl. Scope Req. at 9 (emphasis added). Carlson did not argue that its products are outside of the scope based on their end-use. *See* Pl.'s Reply at 9. For that reason, Commerce's—and, by extension, the Government's—reliance on the U.S. Court of Appeals for the Federal Circuit's holding that "end-use restrictions do not apply to [antidumping duty orders] unless the [] order at issue includes clear exclusionary language" is unavailing. Final Scope Ruling at 8 & n.60 (quoting *King Supply*, 674 F.3d at 1349); Def.'s Resp. at 12 (same).[9]

Commerce's conclusory assessment of the (k)(1) factors does not save its determination. The agency's conclusion that the sources referenced therein do "not provide guidance as to the imposition of any surface treatment, length, specification, or end-use requirements on the products within the scope of the *Orders*," Final Scope Ruling at 9, failed to address Carlson's argument that the (k)(1) sources distin-

this. Because Commerce did not, the logical reading of the *Orders*' scope is that covered products must only form a rectangle in most parts."). Preliminarily, when scope language is ambiguous, the law requires Commerce to interpret the language using the sources set forth in 19 C.F.R. § 351.225(k). *See Meridian Prods.*, 851 F.3d at 1381. It is not the Government's role—in litigation—to interpret ambiguous scope language in the first instance. Moreover, although Commerce did not explicitly include a uniform cross-section requirement, it did provide for a "rectangular (including square) cross section." *See, e.g.*, *AD Order*, 73 Fed. Reg. at 45,404. The court notes that the HTSUS subheadings referenced in the scope language are contained in Chapter 73 of the HTSUS. As Plaintiff points out, the Explanatory Notes to Chapter 73 describe "tubes and pipes," as, *inter alia*, "[c]oncentric hollow products, of *uniform cross-section*." World Customs Organization, Harmonized Commodity Description and Coding System, Explanatory Notes 4th Ed. (2007), Ch. 73; *see also* Pl.'s Reply at 6. Thus, Commerce's inclusion of Chapter 73 tariff provisions, even if provided for convenience and, thus, not dispositive, undermines Defendant's argument that Commerce did not intend for covered products to have a uniform cross-section.

[9] The scope at issue in *King Supply* covered "carbon steel butt-weld pipe fittings . . . *used to* join sections in piping systems where conditions require permanent, welded connections." 674 F.3d at 1346 (citation omitted) (emphasis added). The plaintiff argued that its butt-weld pipe fittings were excluded from the scope because they were used for purposes other than those stated in the scope. *Id.* at 1347 (citation omitted). The court held that the plaintiff's products, which met the physical description of the products covered by the order, were in scope regardless of their use because the uses stated in the scope were merely exemplary. *Id.* at 1349–50. This case is distinct from *King Supply* because, here, the issue is whether Carlson's further manufactured products continue to meet the physical description of the products described by the scope, not whether they are excluded based on their use.

guish between subject LWR pipes and tubes and out-of-scope downstream products, such as store shelving, made from LWR pipes or tubes, *see* Scope Req. at 10–12. Defendant's assertion that the petitioners' listing of potential end-uses reflects an intention to include downstream products, *see* Def.'s Resp. at 16, is speculative, at best. Defendant's analysis of the ITC reports also lacks merit. Defendant asserts that the ITC sources support the inclusion of intermediate *and* downstream products in the scope. *See id.* at 16–17. That assertion is difficult to reconcile with the ITC's description of LWR pipe and tube—the subject merchandise—as an intermediate product, and the ITC's inclusion of pictures of LWR pipes and tubes reflecting uniform cross-sections devoid of further processing or attachments. *See* Scope Req. at 11–12. The ITC's discussion of the types of end-use products in which LWR pipe and tube is used is not reasonably read to suggest that all LWR pipe and tube further manufactured for one of the identified uses remains within the scope no matter the downstream product's shape or the degree of further manufacturing.

For the reasons stated above, Commerce's scope determination is remanded for reconsideration.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Final Scope Ruling is remanded to the agency for further consideration in accordance with the terms of this opinion; and it is further

ORDERED that the agency shall file its redetermination on remand on or before June 3, 2019; and it is further

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

ORDERED that any comments or responsive comments must not exceed 6,000 words.

Dated: March 5, 2019
New York, New York

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