# U.S. Court of International Trade

Slip Op. 19–129

CAN THO IMPORT-EXPORT JOINT STOCK COMPANY, Plaintiff, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 16–00071
PUBLIC VERSION

Remanding the U.S. Department of Commerce's remand redetermination.]

Dated: October 17, 2019

*Andrew Brehm Schroth*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Hong Kong, S.A.R., *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., and *Jordan Charles Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, for plaintiff Can Tho Import-Export Joint Stock Company.

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

*Jonathan Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for defendant-intervenors Catfish Farmers of America; America's Catch; Alabama Catfish, Inc.; Heartland Catfish Company; Magnolia Processing, Inc. d/b/a Pride of the Pond; and Simmons Farm Raised Catfish, Inc.

## *OPINION AND ORDER*

**Kelly, Judge:**

Before the court is the United States Department of Commerce's ("Department" or "Commerce") results of its final remand redetermination in the eleventh administrative review of the antidumping duty ("ADD") order covering certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam") 2013–2014, 81 Fed. Reg. 17,435 (Dep't Commerce March 29, 2016), filed pursuant to the court's order in *Can Tho-Import Export Joint Stock Company v. United States*, Consol. Ct. No. 16–00071, Oct. 15, 2018, ECF No. 42 ("Order"). *See* Final Results of Redetermination Pursuant to Ct. Remand, Apr. 4, 2019, ECF No. 51 ("*Remand Results*"). On remand, Commerce elaborates on its decision to deny a separate rate to Can Tho Import-Export Joint Stock Company ("Plaintiff" or "Caseamex") in the eleventh

administrative review.[1] *See generally Remand Results* at 1–20. Caseamex requests the court to again remand the case to Commerce to establish Caseamex's separate rate. Pl.'s Cmts. on [Commerce's] Final Remand Redetermination at 2, June 7, 2019, ECF No. 61 ("Pl.'s Br."). Defendant United States and Defendant-Intervenors request the court to affirm the *Remand Results*. *See* Def.'s Resp. [Pl.'s Br.], July 12, 2019, ECF No. 67 ("Def.'s Br."); Def.-Intervenors' Resp. [Pl.'s Br.], July 12, 2019, ECF No. 64. For the reasons that follow, Commerce's remand redetermination is unsupported by substantial evidence.

## BACKGROUND

Caseamex submitted a separate rate application in the eleventh administrative review. *See* Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Memo. for the Final Results of the Eleventh [ADD] Administrative Review; 2013–2014 at 4, A-552–801, (Mar. 18, 2016), ECF No. 22–3 ("Final Decision Memo"); *see also* Resp. Grunfeld Desiderio Lebowitz Silverman Klestadt, LLP to Sec. of Commerce Pertaining to Caseamex Separate Rate Application Pt. 1, CD 36, bar code 3244388–01 (Dec. 1, 2014) ("Caseamex's SRA Pt. 1").[2] The eleventh administrative review covers the period dating August 1, 2013 through July 31, 2014 ("eleventh POR"). *See* Final Decision Memo at 1.

On remand, Commerce found that the minority government shareholder[3] retained potential influence over the selection of management and Caseamex's day-to-day operations. *See Remand Results* at 7–20. As a result, Commerce concluded that Caseamex failed to demonstrate autonomy and, therefore, did not qualify for a separate rate. *See generally id.*

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[1] Commerce, without confessing error, sought a remand in the eleventh administrative review, because it had denied Caseamex's separate rate application based on findings made in the tenth administrative review, which the court remanded in *An Giang Fisheries Import and Export Joint Stock Co. v. United States*, 41 CIT __, 203 F. Supp. 3d 1256 (2017) ("*An Giang I*"). *See* Joint Status Report & Br. Sched., Oct. 12, 2018, ECF No. 41. On October 15, 2018, the court granted Defendant's request to reconsider Caseamex's separate rate status. *See* Order.

[2] On June 20, 2016, Defendant filed on the docket the indices to the public and confidential administrative records of this review at ECF Nos. 22–4–5. Subsequently, on April 15, 2019, Defendant also filed indices to the public and confidential remand record at ECF Nos. 53–2–3. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices.

[3] The minority government shareholder is the [[ ]]. Caseamex's SRA Pt. 1 at 13.

## JURISDICTION AND STANDARD OF REVIEW

The court continues to have jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii), and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order.[4] The court will sustain Commerce's final determinations if they are supported by substantial evidence and are in accordance with law. *See* 19 U.S.C. § 1561a(b)(1)(B)(i).

## DISCUSSION

Plaintiff challenges Commerce's *Remand Results* as contrary to law and unsupported by substantial evidence.[5] *See* Pl.'s Br. at 1–4. Specifically, Plaintiff contends that Commerce erred by applying a legal standard that assesses potential control based upon facts occurring prior to the period of review. *Id.* at 2, 4–7. Further, Plaintiff argues that, using the proper legal standard, Commerce's determination is not reasonable given the record evidence. *Id.* at 2–4, 8–20. Defendant disagrees and requests the court to sustain the *Remand Results* in their entirety. *See* Def.'s Br. at 1. For the following reasons, the court finds that Commerce's determination in the *Remand Results* is unsupported by substantial evidence.

When Commerce investigates subject merchandise from a nonmarket economy ("NME"), such as Vietnam, Commerce presumes that the government controls export-related decision-making of all companies operating within that NME. Import Admin., [Commerce], Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving [NME] Countries, Policy Bulletin 05.1 at 1 (Apr. 5, 2005) ("Policy Bulletin 05.1") (citation omitted), *available at* http://enforcement.trade.gov/policy/bull05–1.pdf (last visited Oct. 11, 2019); *see also* Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates, 72 Fed. Reg. 13,246, 13,247 (Dep't

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

[5] Caseamex challenges Commerce's *Remand Results* as both unsupported by substantial evidence and as contrary to law. *See* Pl.'s Br. at 1–5. Plaintiff bases its contrary to law arguments on the court's holding in *An Giang II*, which, in Plaintiff's reading, establishes, as a matter of law, that Commerce may not engage in retrospective analysis. *Id.* at 4–7. However, the court in *An Giang II* determined that Commerce did not meet the substantial evidence standard by relying on retrospective analysis; it did not hold that Commerce erred in law by examining evidence preceding the period of review. *See An Giang Fisheries Import and Export Joint Stock Co. v. United States*, 42 CIT __, 284 F. Supp. 3d 1350, 1361–64 (2018) ("*An Giang II*"). Therefore, the court will analyze Plaintiff's challenge as one of substantial evidence.

Commerce Mar. 21, 2007) (request for comment) (stating the Department's policy of presuming control for companies operating within NME countries); *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (approving Commerce's use of the presumption). Commerce will assign those companies a single, NME-wide rate, unless the exporter requests a separate rate and demonstrates an absence of government control, both in law (de jure) and in fact (de facto).[6] Policy Bulletin 05.1 at 1.

Commerce evaluates an exporter's eligibility for a separate rate by assessing the absence of de facto and de jure control.[7] Policy Bulletin 05.1 at 2; *see, e.g.*, *Silicon Carbide from the People's Republic of China [PRC]*, 59 Fed. Reg. 22,585, 22,587 (Dep't Commerce May 2, 1994). As a matter of practice, Commerce considers government ownership share in assessing de facto control. Commerce views government majority ownership as actual control, regardless of whether that control is exercised. *See, e.g.*, 1,1,1,2-Tetrafluoroethane from the [PRC]: Issues and Decision Memorandum for the Final Determination of Sales at Less than Fair Value [ADD] Investigation at 8, A-570–998 (Oct. 14, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–24903–1.pdf (last visited Oct. 11, 2019); Decision Memorandum for the Preliminary Determination of the [ADD] Investigation of Carbon and Certain Alloy Steel Wire Rod from the [PRC] at 7, A570–012 (Aug. 29, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–213351.pdf ("Steel Wire Rod Decision Memo"); *see also An Giang II*, 284 F. Supp. 3d at 1359 ("Where a majority shareholder has potential control that control is, for all intents and purposes, actual control.").

In cases of minority government ownership, Commerce requires additional indicia of control prior to concluding that a respondent company cannot rebut the presumption of de facto control. *See, e.g.*, 53-Foot Domestic Dry Containers from the [PRC]: Issues and Decision Memo. for the Final Determination of Sales at Less Than Fair

[6] Respondents seeking to rebut the presumption of government control submit a separate rate application. Policy Bulletin 05.1 at 3–4.

[7] Commerce will examine the following factors to evaluate de facto control: "whether the export prices are set by, or subject to the approval of, a governmental authority;" "whether the respondent has authority to negotiate and sign contracts and other agreements;" "whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management;" and, "whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses." Policy Bulletin 05.1 at 2. With respect to de jure control, Commerce considers three factors: "an absence of restrictive stipulations associated with an individual exporter's business and export licenses;" "any legislative enactments decentralizing control of companies;" and, "any other formal measures by the government decentralizing control of companies." *Id.*

Value at 48–50, A-570–014 (Apr. 10, 2014), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–08903–1.pdf (last visited Oct. 11, 2019) ("Containers Decision Memo") (finding de facto control where two government-owned minority shareholders, together, made the government a controlling shareholder according to the respondent company's Articles of Association). Commerce considers the totality of the circumstances for a given period of review and may draw reasonable inferences that the respondent company does not control its export activities. *See* Steel Wire Rod Decision Memo at 5; *see also* Containers Decision Memo at 46–53.

The court reviews the substantiality of the evidence "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)) (internal quotes omitted).

In the eleventh administrative review, Plaintiff submitted evidence to rebut the presumption of de facto governmental control, namely Caseamex's 2012 Articles of Association ("AoA") and five affidavits and a letter (collectively, "affidavits").[8] *See* Resp. Grunfeld Desiderio Lebowitz Silverman Kledstadt, LLP to Sec. of Commerce Pertaining to Caseamex Separate Rate Application Pt. 2 at Ex. 10, CD 34, bar code 3244388–02 (Dec. 1, 2014) ("Caseamex's SRA Pt. 2"); *see also* Caseamex's Supp. Resp. at Exs. S1, S2–1–3, S3–4, S3–9, RCD 4, bar

[8] The affidavits submitted by Caseamex address issues of management and operation. *See* Caseamex's Supp. Resp. at Exs. S-1, S2–1–3, S3–4, S3–9. Commerce considered all six to be "unpersuasive[.]" *Remand Results* at 19–20, 36. Collectively, the affidavits assert that: the local government does not control or monitor Caseamex; its shares are represented by Mr. X; and, it is not involved in the selection of management or pricing. Caseamex's Supp. Resp. at Exs. S-1, S2–1–3, S3–4, S3–9. Further, Mr. X, in two affidavits, attests that he is not involved with the minority government shareholder. See id. at Exs. S2–2, S3–9. Commerce found that the affidavits were almost all [[ ]] and questioned their credibility. *See Remand Results* at 16–20, 28–46. Commerce faulted two affidavits for failing to address pre-POR events, "where [the minority government shareholder] selected Caseamex's managers[,]" and rejected them, in part, on that basis. *Id.* at 19. Commerce found, moreover, that none "contain[] . . . affirmative statements . . . that confirm the Vietnamese government separated itself from the operations of Caseamex[.]" *Id.* According to Plaintiff, this finding amounts to "pure tautology – based on a negative inference[,]" when, in fact, the affidavits demonstrate that the minority government shareholder had relinquished its shareholder rights and any ability to control Caseamex. Pl.'s Br. at 29. Nonetheless, Commerce did not credit these affidavits and the court will not "reweigh Commerce's findings" regarding these inferences to be drawn from these affidavits. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1379 (Fed. Cir. 2015); *see also Timken Co. v. United States*, 22 CIT 955, 962, 699 F. Supp. 300, 306 (1988) ("It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of differing interpretation of the record."); *An Giang I*, 203 F. Supp. 3d at 1280 n.37.

code 3782005–03 (Feb. 19, 2014) ("Caseamex's Supp. Resp."). Even without the affidavits, the AoA rebuts the presumption of government control, and Commerce points to no record evidence that reasonably supports its view that the minority government shareholder retained control.

The AoA restricts a minority shareholder's control over the appointment of Caseamex's directors and management.[9] Shareholders with more than [[ ]] of shares may nominate candidates to the Board of Directors and Board of Managers;[10] however, the AoA limits the number of candidates a shareholder, or group of shareholders, may nominate to the Board of Managers in proportion to shares held.[11] *See* Caseamex's SRA Pt. 2 at Ex. 10. Further, an individual minority shareholder may have sufficient shares to nominate a candidate or candidates but will be unable to approve the nominee(s) alone. The AoA requires 65% approval by vote for any appointment to either the Board of Managers or the Board of Directors.[12] Thus, Commerce's arguments that the AoA support its view that the minority government shareholder retained potential control over Caseamex during the eleventh POR are unavailing.

Although Commerce reasonably concludes that Caseamex employees were beholden to Mr. X[13] throughout the eleventh POR, that conclusion detracts from, rather than supports, Commerce's conclusion regarding government control. Having established Mr. X was the General Director, Chairman of the Board, and controller of Caseamex's daily operations, Commerce concluded that his power over Caseamex employees—to hire, pay, and fire—made them beholden to him. *Remand Results* at 13. Commerce concluded it would be unlikely for the employees to exercise any minority rights inconsistent with Mr. X's wishes. Mr. X therefore could count his own shares and on those of Caseamex employees. Commerce reasons that

[9] The AoA came into effect prior to October 2012 and remained in effect throughout the eleventh POR. Caseamex's SRA Pt. 2 at Ex. 10.

[10] *See* Caseamex's SRA Pt. 2 at Ex. 10 (Articles 12.3 and 12.5).

[11] For example, fewer than [[ ]] of shares—but greater than [[ ]]—translates into the nomination of [[ ]] member, and between [[ ]] and [[ ]] of shares furnishes [[ ]] nominations. See Caseamex's SRA Pt. 2 at Ex. 10 (Article 25).

[12] In its Separate Rate Application, Caseamex confirms that "[n]o material changes in company structure, shareholdings or operations have occurred since [the ninth period of review] or [the tenth period of review.]" *See* Remand Results at 2 (citing Caseamex's SRA Pt. 1 at 2). Throughout the eleventh POR, the largest shareholders of Caseamex comprised: Mr. X with [[ ]], the minority government shareholder with [[ ]], and Caseamex employees with [[ ]]. *See Remand Results* at 12; *see also* Caseamex SRA Pt. 1 at Ex. 4 (listing Caseamex's shareholders in business registration certificates preceding and following the eleventh POR ).

[13] Mr. X refers to [[ ]]. *See Remand Results* at 8; *see also* Caseamex SRA Pt. 1 at Ex. 1.

because Mr. X and his employees held [[ ]] of voting shares, and the minority government shareholder owned [[ ]], together, with [[ ]] of shares, they would prevent other shareholder(s) from reaching the 65% threshold to approve managers and directors. *Remand Results* at 12, 15; *see* Caseamex's SRA Pt. 2 at Ex. 11. However, Mr. X and his employees could block an appointment with or without the minority government shareholder's assistance. Commerce points to no record evidence that obliges Mr. X to follow the minority government shareholder's voting prerogatives during the eleventh POR. *See An Giang II*, 284 F. Supp. 3d at 1361. Rather, Commerce assumes that Mr. X will vote with the minority government shareholder and direct his employees to do so, because Mr. X remains beholden to the minority government shareholder that initially appointed him the General Director of Caseamex.[14] *See Remand Results* at 13. Yet the record evidence establishes that a minority shareholder has no power to effectuate change in the company. Indeed, given the share allocations, the AoA renders the minority government shareholder beholden to Mr. X's voting prerogatives, to exert influence in the company.[15]

Commerce's finding that Mr. X was beholden to the minority government shareholder stems from its survey of events before the period of review. Commerce purports to examine the totality of the circumstances that support its finding that a potential for govern-

[14] Commerce's position here regarding the hiring of Mr. X is similar to its claim in *An Giang II*, where Commerce unreasonably relied on evidence preceding the period of review, or "retrospective" evidence of control prior to the period of review. 284 F. Supp. 3d at 1361. In the tenth administrative review of the same ADD order at issue here, Commerce based its denial of Caseamex's separate rate status based on a two-component "beholden" theory, "one retrospective (i.e., the government hired Mr. X) . . . and the other prospective (i.e., the government could fire Mr. X)[,]" both rendering Mr. X beholden to the government and susceptible to its control. *Id.* at 1361. Although the minority government shareholder may have hired Mr. X at the inception of Caseamex, the court noted that event in itself "do[es] not demonstrate how the minority government shareholder was able to influence Mr. X's decision-making as to the day-to-day operations of CASEAMEX or the selection of CASEAMEX's management during the [tenth period of review]." *Id.* Further, to the extent Commerce "suggest[ed] that past employees may feel grateful to their past employers[,]" Commerce did not explain "why that gratitude translates into a lack of independence where a past government employer no longer has the power to dismiss the employee." *Id.* at 1361 n.17. The court therefore concluded that Commerce's reliance on such "retrospective" evidence was unreasonable. *Id.* at 1361. Nonetheless, the court sustained Commerce's determination because Commerce reasonably found prospective control. *Id.* at 1364.

[15] Commerce also addresses Caseamex's claim that the minority government shareholder. divested its shares and forfeited its shareholder rights and responsibilities. *See Remand Results* at 32–36, 41–44. Commerce claims that none of the cited provisions of the AoA "addresses one party appointing an authorized representative of its shares at the General Meeting." *Id.* at 33. Commerce therefore concludes that the minority government shareholder did not abdicate its shares. *Id.* at 36. Even if Commerce's conclusion is reasonable, it does not detract from the evidence showing that the AoA curtails minority government shareholder rights.

mental control existed during the eleventh POR. *See Remand Results* at 10–13. Yet it catalogues a series of events, from 2005 to 2012, that precede the eleventh POR, namely: the formation of Caseamex from a state-owned enterprise; the minority government shareholder's appointment of Mr. X as the director of that state-owned enterprise and then of Caseamex; and, the minority government shareholder's appointment of the Board of Directors and the Board of Managers. *Remand Results* at 7–12. Commerce does not explain how these past factual circumstances—Mr. X's employment history and the creation of the first Board of Directors and selection of managers—support the inference of the minority government shareholder's control over the operation of Caseamex during the eleventh POR. *See An Giang II*, 284 F. Supp. 3d at 1361 n.17. Commerce determined that the minority government shareholder had not removed itself from the operations of the company, and, as a result, Mr. X remained beholden to the minority government shareholder—as he had been from the inception of the company. *Id.* at 14. Commerce offers no explanation why it is reasonable to conclude that Mr. X, was beholden to the government, when the AoA precludes the minority government shareholder from exercising any independent influence on the Board of Directors or any manager of Caseamex, including Mr. X. Although Caseamex has the burden of rebutting governmental control, it has rebutted that presumption here. Commerce's attempt to look backwards from the eleventh POR to a time when the minority government shareholder had the power to control the company in order to infer continued control in the eleventh POR is not reasonable. Nothing in the record supports Commerce's view that the minority government shareholder could circumvent the restrictions and limitations imposed by the AoA. Rather, record evidence suggests that Mr. X could count on his own shares and those of the Caseamex employees to operate jointly and even counter to the minority government shareholder.

## CONCLUSION

The court remands Commerce's determination not to grant Caseamex separate rate status in the *Remand Results* for further consideration and explanation. In accordance with the foregoing, it is

**ORDERED** that Commerce's determination not to grant Caseamex separate rate status is remanded for further consideration consistent with this opinion; and it is further

**ORDERED** that Commerce shall file its remand determination with the court within 60 days of this date; and it is further

**ORDERED** that Plaintiff shall have 30 days thereafter to file comments; and it is further

**ORDERED** that Defendant and Defendant-Intervenors shall have 15 days thereafter to file their replies to comments on the remand determination.

Dated: October 17, 2019
New York, New York

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

Slip Op. 19–134

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

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

[Remanding the U.S. Department of Commerce's remand determination in the less than fair value investigation of imports of welded line pipe from the Republic of Korea.]

Dated: October 21, 2019

*Gregory James Spak*, White & Case LLP, of Washington, DC, for Maverick Tube Corporation. With him on the brief were *Frank J. Schweitzer*, *Kristina Zissis*, *Luca Bertazzo*, and *Matthew W. Solomon*.

*Elizabeth Anne Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Claudia Burke*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Acting Assistant Attorney General. Of Counsel on the brief was *Reza Karamloo*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Jaehong David Park*, Arnold & Porter LLP, of Washington, DC, for Hyundai Steel Company. With him on the brief was *Henry D. Almond*. Consulting on the brief was *Phyllis L. Derrick*.

## *OPINION AND ORDER*

**Kelly, Judge:**

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") remand redetermination filed pursuant to the court's order in *Stupp Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1293, 1313–14, Slip Op. 2019–2 at 34–35 (2019) ("*Stupp I*"). *See also* Final Results of Redetermination Pursuant to Ct. Remand Order Confidential Version, May 2, 2019, ECF No. 134 ("*Remand Results*"). In *Stupp I*, the court sustained in part and remanded in part Commerce's final determination in the less than fair value ("LTFV") investigation of imports of welded line pipe from the Republic of Korea ("Korea") for the period of October 1, 2013, through September 30, 2014. *See Welded Line Pipe From [Korea]*, 80 Fed. Reg. 61,366 (Dep't Commerce Oct. 13, 2015) (final determination of sales at [LTFV]), as amended by *Welded Line Pipe From [Korea]*, 80 Fed. Reg. 69,637 (Dep't Commerce Nov. 10, 2015) (amended final determination of sales at [LTFV]) ("*Amended Final Determination*") and accompanying Issues & Decision Memo for the Final Affirmative

Determination in the [LTFV] Investigation of Welded Line Pipe from [Korea], A-580–876, (Oct. 5, 2015), ECF No. 30–3. ("Final Decision Memo"); *Welded Line Pipe From [Korea] and the Republic of Turkey [("Turkey")]*, 80 Fed. Reg. 75,056, 75,057 (Dep't Commerce Dec. 1, 2015) (antidumping duty orders). Specifically, the court ordered Commerce to further explain or reconsider its decision to include certain local sales in Hyundai HYSCO's ("HYSCO")[1] home market sales database. *Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1313–1314. The court also ordered Commerce to review and determine which portions of Maverick Tube Corporation's ("Maverick") supplemental case brief should be retained and placed on the administrative record. *Id.*

On remand, Commerce permitted Maverick to place the entirety of its supplemental case brief on the record. *See Remand Results* at 3; *see also* Letter from [Commerce] to Interested Parties Pertaining to Interested Parties Open Record for Suppl. Case Br. and Rebuttal, PD 1, bar code 3790211–01 (Feb. 6, 2019). Further, after examining record evidence pursuant to the court's instructions in *Stupp I*, Commerce decided to remove the challenged local sales from HYSCO's home market database. *Remand Results* at 4–7. Despite having removed these sales, Commerce refused to reconsider HYSCO's home market viability.[2] *See Remand Results* at 12–13. For the following reasons, the court remands for further explanation or reconsideration its refusal to reconsider HYSCO's home market viability.

## BACKGROUND

The court presumes familiarity with the facts of this case, as set out in the previous opinion ordering remand to Commerce, and now recounts the facts relevant to the court's review of the *Remand Results*. *See Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1296–1300. On October 5, 2015, Commerce published its final determination pursuant to its antidumping duty ("ADD") investigation of welded line pipe from Korea. *See generally Amended Final Determination*. When calculating the weighted-average dumping margins, Commerce included certain local sales in mandatory respondent HYSCO's home market

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

[2] Maverick raised home market viability as a point of contention during the administrative proceedings. *See* Final Decision Memo at 40–44 ("Maverick concludes that, after excluding [the challenged] sales, HYSCO's home market will be found not viable for purposes of establishing [normal value]"); *see also* Memo Pl.-Intervenor [Maverick] Supp. Mot. J. Agency R. at 1, 5–7, 12– 35, July 6, 2016, ECF No. 44.

sales database. *See Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1297. Maverick challenged the inclusion of these sales for failure to adequately address record evidence that the subject merchandise was to be exported without further processing.[3] *Id.* at 1297.

Stupp Corporation, a division of Stupp Bros., Inc., TMK IPSCO, and Welspun Tubular LLC USA, SeAH Steel Corporation, and Maverick brought a consolidated action on several motions for judgment on the agency record before this court pursuant to USCIT R. 56.2. Defendant United States argued that Commerce appropriately included the challenged sales because HYSCO did not or could not have known that the challenged sales would be exported without further processing—as demonstrated by the fact that HYSCO did not prepare export licenses for those transactions and the challenged sales included sales to "at least one customer that may [have] further manufacture[d] HYSCO's welded line pipe prior to export."[4] *See Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1311 (quoting Final Decision Memo at 45). Maverick argued that Commerce's decision was not in accordance with law because it did not account for HYSCO's "imputed knowledge" of whether the challenged sales were for export. *See id.* at 1309.

The court remanded the matter for further explanation or reconsideration, holding that Commerce failed to diligently inquire into what the respondents knew or should have known by failing to account for such record evidence when making its determination. *See Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1313–14. Further, the court held that Commerce's decision to reject Maverick's supplemental case brief on the matter was an abuse of discretion and ordered Commerce to "review and place on the record those portions of Maverick's supplemental case brief that address the effect HYSCO's revisions had on the sales databases." Id. at 1312–14.

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[3] Maverick sought to demonstrate that the home market was not viable for purposes of determining normal value. *See Remand Results* at 12; *see generally* Pl.-Interv.'s Cmts.

[4] On remand, HYSCO maintains that it did not know, nor should it have known, that the challenged local sales were for export without further manufacturing. *See generally* [HYSCO's] Cmts. Opp'n [Remand Results] Confidential Version, June 7, 2019, ECF No. 147 ("HYSCO's Cmts. Opp'n"). HYSCO explains that Commerce ignored its consistent reporting practices differentiating between "Local Domestic" sales and "Local Export Sales." *See id.* at 7–8. The latter distinction is employed when a "product is sold to a trading company for export with HYSCO's knowledge" and, in such cases, "HYSCO itself prepares the export license." *Id.* at 8. HYSCO alleges that the Department confirmed its reporting approach. *See id.* Commerce rendered its previous decision to include these sales based on this approach. *See Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1311. However, this court determined that relying on these practices, alone, was insufficient to determine what "[HYSCO] knew or should have known" in light of record evidence before Commerce. *Id.* Namely, reliance on this information amounts to an assessment of "actual knowledge," and ignores evidence of HYSCO's "imputed knowledge." *See id.* at 1309, 1311.

On remand, Commerce reclassified the challenged local sales.[5] *See Remand Results* at 13–14. The exclusion of these sales resulted in a "revised estimated weighted-average dumping margin" of 6.22 percent. *Id.* The reclassification did not affect the calculation of the all-others rate, which remained at 4.38 percent. *Id.* Maverick asserts that the exclusion of the challenged sales renders the home market not viable and requires Commerce to calculate Maverick's margin using a constructed value methodology, as opposed to normal value. *Remand Results* at 12–13; *see also* 19 C.F.R. § 351.404(f) (2014).[6] Commerce, in response, explains that its practice is to "identify the appropriate basis for normal value early in a proceeding," and points to a lack of statutory or precedential authority that requires Commerce to revisit this determination. *Remand Results* at 13. Further, Defendant submits that Commerce is entitled to deference in the interpretation of its statutory and regulatory obligations. *See* Def.'s Resp. Cmts. on [Remand Results] at 9–11, Aug. 7, 2019, ECF No. 154 ("Def.'s Resp.").

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[7] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an investigation of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

On remand, Maverick argues that Commerce's exclusion of the challenged local sales necessitates a reconsideration of HYSCO's

[5] HYSCO contests Commerce's decision to reclassify the challenged local sales. *See* Remand Results at 7–12; *see generally* HYSCO's Cmts. Opp'n. HYSCO maintains that Commerce's review of the record should have been confined to consideration of HYSCO's "sales records and information," as opposed to "after-the-fact research," as Commerce typically references the former to determine whether "a home market sale will be directly exported without further manufacture." *See id.* at 1–2. As this court explained in *Stupp I*, Commerce's review "is not limited to documentation submitted by the producer[.]" *See Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1310 (citing *INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 123–25, 957 F. Supp. 251, 263–64, Slip Op. 97–12 (1997)). Rather, Commerce's review is based on an objective assessment of the particular facts and circumstances. *See id.* Therefore, HYSCO's arguments on remand are unpersuasive.

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

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

home market viability, *Remand Results* at 12, because the Department's exclusion causes the aggregate quantity of the subject merchandise to fall below the statutorily and regulatorily prescribed "five percent threshold[.]" *See* Pl.-Interv. [Maverick's] Cmts. on [Remand Results] at 7, June 7, 2019, ECF No. 149 ("Pl.-Interv.'s Cmts."). Maverick argues that the market viability determination is a "substantive obligation[,]" meant to "ensure there is a fair comparison for the calculation of accurate dumping margins." Pl.-Interv.'s Cmts. at 4. Commerce counters that, as a matter of practice, it determines home market viability early on in a proceeding, and declines to revisit that determination later in the proceeding. *Remand Results* at 13. For the reasons that follow, the matter is remanded to Commerce to reconsider home market viability.

In an ADD Investigation, Commerce compares the export price, or the constructed export price, of the subject merchandise, to its normal value. *See* 19 U.S.C. § 1677b(a). Typically, the normal value is "the price at which a foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price[.]" 19 U.S.C. § 1677b(a)(1)(B)(i). However, 19 U.S.C. § 1677b directs Commerce not to use the price in the exporting country as a basis for calculation in certain circumstances. Namely, if Commerce "determines that the aggregate quantity . . . of the foreign like product in the exporting country is insufficient to permit proper comparison," Commerce shall normally look to sales from a third country. 19 U.S.C. § 1677b(a)(1)(C)(ii); *see also* 19 C.F.R. § 351.404(f). The statute also provides that normal value may also be based upon constructed value where it cannot be based on prices in the exporting country. 19 U.S.C. § 1677b(a)(4). The statutory provision directing use of third country sales specifically explains that the aggregate quantity of foreign like product sold in the exporting country is normally insufficient for purposes of determining normal value if it "is less than 5 percent of the aggregate quantity . . . of sales of the subject merchandise to the United States." 19 U.S.C. § 1677b(a)(1)(C).

Commerce's regulations mirror the statute. The regulations provide that, in most circumstances, the home market prices, prices in the exporting country, are the appropriate basis for determining normal value. *Compare* 19 C.F.R. §§ 351.404(a) *and* 351.404(b)(1) *with* 19 U.S.C. § 1677b(a)(1)(B)(i) (stating that the normal value is typically the price at which a foreign like product is first sold for consumption in the exporting country). If the exporting country does not constitute a viable market, Commerce may resort to a third country or con-

structed value. 19 C.F.R. §§ 351.404(c)(ii), (f).[8] Under 19 C.F.R. § 351.404(b), a market is viable if Commerce "is satisfied that sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value." *See* 19 C.F.R. § 351.404(b)(1). Like the statute, the regulations provide that sales are normally sufficient if the aggregate quantity of sales in the exporting country is 5 percent or more of the aggregate quantity of its sales of the subject merchandise in the United States. *Compare* 19 C.F.R. § 351.404(b)(2) *with* 19 U.S.C. § 1677b(a)(1)(C) (the former stating that 5 percent or more is normally sufficient and the latter stating that less than 5 percent is insufficient.)

Commerce failed to comply with its statutory and regulatory mandate to ensure the sufficiency of the home market as a basis for normal value. The statutory scheme requires sufficient home market sales in order for Commerce to base normal value on the prices in the exporting country. *See* 19 U.S.C. § 1677b(a)(1). The statute does not impose a time frame within which Commerce must make a market viability determination. Moreover, Commerce itself has recognized that although it would prefer to make a determination early in the proceeding, it may sometimes need to delay the determination or reconsider a determination. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,358 (Dep't Commerce May 19, 1997) ("*Notice of Final Rules 1997*") (noting that Commerce "should strive to make viability determinations early in an investigation or review" but also that "there may be instances in which the Department must delay or reconsider a decision on viability").

In its remand determination, Commerce explained that it would not reconsider market viability because it typically makes the determination early in the proceedings. *See Remand Results* at 12–13. Although it may be reasonable for Commerce to strive to make such determinations early in a proceeding,[9] the reasonableness of such a preference does not negate the statutory and regulatory requirement that home market sales be sufficient to form the basis of normal

[8] The regulations specify that Commerce will normally calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable. *See* 19 C.F.R. § 351.404(f) (citing to 19 U.S.C. § 1677b(a)(4)).

[9] Indeed, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act envisions that such determinations would be made early in the proceeding. "The Administration intends that Commerce will normally use the five percent threshold except where some unusual situation renders its application inappropriate. A clear standard governing most cases is necessary because Commerce must determine whether the home market is viable at an early stage in each proceeding to inform exporters which sales to report." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 834 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4162 ("SAA").

value. *See* 19 U.S.C. § 1677b(a)(1)(C)(ii); 19 C.F.R. 351.404(b)(2). Moreover, it would be unreasonable for Commerce to refuse to revisit its viability determination when it determines that the components of its prior determination were incorrect. Failing to reconsider viability in such cases would render judicial review meaningless.

The statute sets forth the means by which Commerce will make a fair comparison between export price and normal value. 19 U.S.C. §1677b(a). Congress requires that the prices used must permit a proper comparison. *See id.* The statute also delineates situations that do not permit a proper comparison. Specifically, 19 U.S.C. § 1677b(a)(1)(C) instructs that home market sales cannot be used when:

> (i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),
>
> (ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or
>
> (iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.
>
> For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

19 U.S.C. § 1677b(a)(1)(C). The language of subsection (ii) is affirmative and unambiguous. Commerce cannot use home market sales where the "aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison[.]" 19 U.S.C. § 1677b(a)(1)(C)(ii). To allow Commerce to use home market sales that were insufficient to permit a proper comparison because Commerce determined such insufficiency late in its process would frustrate the purpose of the statute, i.e., to have a fair comparison.[10]

[10] Following Commerce's reasoning to its logical conclusion, Commerce could determine that there were only a handful or even no home market sales and still refuse to reconsider home market viability.

Admittedly, Commerce is charged with determining sufficiency and has some discretion in making that determination. *See* 19 U.S.C. § 1677b(a)(1)(C)(ii). Congress has set forth what is normally sufficient. *See* 19 U.S.C. § 1677b(a)(1)(C). Home market sales must "normally" be 5 percent of the aggregate sales in order to be considered sufficient. *Id.*; *see also* 19 C.F.R. § 351.404(b)(2). The use of the word "normally" indicates there may be times when Commerce may find home market sales sufficient, even if they are not 5 percent of the aggregate sales. *See Notice of Final Rules 1997*, 62 Fed. Reg. at 27,358 (noting that Commerce retained the word "normally" in its regulations in order to provide the Department with the flexibility to deal with unusual situations.) In such cases, Commerce may base sufficiency on some other measure, or it may accept less than 5 percent, if doing so would be reasonable under the circumstances. One such circumstance may involve the timing of the determination. If the timing of the determination regarding home market sales affects Commerce's sufficiency analysis, Commerce should explain how it affects the analysis and why its analysis is nonetheless reasonable in light of its statutory mandate.[11] Nonetheless, Commerce has discretion to determine what is sufficient, not to dispense with the requirement because of its preference to make such determinations early in the proceedings. *See Remand Results* at 12–13; 19 U.S.C. § 1677b(a); 19 C.F.R. §§ 351.404(a)–(c).[12] The statute mandates that Commerce consider whether home market sales are sufficient for a proper comparison. If the sales are not sufficient, they cannot be used.

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[11] Prior to the Uruguay Round Amendments, the statute simply required that Commerce consider whether the quantity of goods sold in the home market was "so small" so as not to provide a viable comparator. H.R. Rep. No. 103–826, pt. 1, at 82–83 (1994). The Uruguay Round Amendments provided a quantitative standard recognizing that Commerce would make a determination early in a proceeding, but also recognizing that there may be cases where "sales constituting less than five percent of sales to the United States could be considered viable[.]" SAA,1994 U.S.C.C.A.N. at 4162.

[12] Defendant's argument that the statute does not affirmatively require Commerce to reconsider its viability determination and therefore the statute is ambiguous proposes an ambiguity where none exists. *See* Def.'s Resp. at 9–11 (citing *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). The statute's failure to affirmatively provide that Commerce must revisit a viability determination does not render section 1677b(a)(1)(C) ambiguous. Section 1677b(a)(1)(C) provides "[t]his subparagraph applies when– . . . [Commerce] determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison . . ." 19 U.S.C. § 1677b(a)(1)(C)(ii). Moreover, even if one could find some ambiguity in the statute more generally, Commerce's interpretation would be unreasonable. Section 1677b(a)(1)(C) identifies when Commerce cannot use home market sales. Subsection (ii) requires a sufficiency analysis to justify the use of home market sales. If the determinations that are necessary to conduct the sufficiency analysis are revisited by Commerce, then the sufficiency analysis must be revisited. Any other conclusion would read the sufficiency analysis out of the statute which would be unreasonable.

## CONCLUSION

Therefore, the court remands the issue to Commerce to reconsider HYSCO's home market viability. For the foregoing reasons, it is

**ORDERED** that Commerce's remand redetermination is remanded for further consideration consistent with this opinion; and it is further

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

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

**ORDERED** that the parties shall have 15 days to file their replies to comments on the second remand redetermination.

Dated: October 21, 2019
New York, New York

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

Slip Op. 19–135

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

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

[The U.S. Department of Commerce's Final Results of Redetermination Pursuant to Second Court Remand are Remanded.]

Dated: October 29, 2019

*Matthew M. Nolan*, Arent Fox, LLP, of Washington, DC, for Consolidated Plaintiffs Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S.

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

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

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

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

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

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

## *OPINION AND ORDER*

**Barnett, Judge:**

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon second court-ordered remand. *See* Final Results of Redetermination Pursuant to Second Court Remand ("2nd Remand Results"), ECF No. 133. Plaintiff Ereğli Demir ve Çelik Fabrikalari T.A.Ş. ("Erdemir") and Consolidated Plaintiffs Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. (together, "Çolakoğlu") each challenged aspects of Commerce's final determination in the sales at less than fair value investigation of certain hot-rolled steel flat products from the Republic of Turkey. *See Certain Hot-Rolled Steel Flat Products from the Republic of Turkey,* 81 Fed. Reg. 53,428 (Dep't Commerce Aug. 12, 2016) (final determination of sales at less than fair value; 2014–2015)

*("Final Determination"),*ECF No. 41–1, and accompanying Issues and Decision Mem., A-489–826 (Aug. 4, 2016), ECF No. 41–3, as amended by *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic Korea, the Netherlands, the Republic of Turkey, and the United Kingdom,* 81 Fed. Reg. 67,962 (Dep't Commerce Oct. 3, 2016) (am. final aft. antidumping determinations for Australia, the Republic of Korea, and the Republic of Turkey and antidumping duty orders), ECF No. 41–2.[1] This is the court's third opinion addressing challenges arising out of Commerce's *Final Determination.*

On March 22, 2018, the court remanded the *Final Determination* with respect to Erdemir's home market date of sale; the denial of Çolakoğlu's duty drawback adjustment; and the rejection of Çolakoğlu's corrections to its international freight expenses. *See Ereğli Demir ve Çelik Fabrikalari T.A.S v. United States ("Erdemir I"),* 42 CIT_, 308 F. Supp. 3d 1297 (2018). The court sustained Commerce's *Final Determination* in all other respects. *See id.* at 1304. On remand from *Erdemir I,* Commerce revised its date of sale determination for Erdemir's home market sales in a manner favorable to Erdemir; granted Çolakoğlu's duty drawback adjustment but revised its method of calculating the adjustment; and provided additional evidence and explanation supporting its rejection of Çolakoğlu's corrections to international freight expenses. *See* Confidential Final Results of Redetermination Pursuant to Remand ("1st Remand Results") at 1, 5–24, ECF No. 105.[2] In response to Çolakoğlu's challenges to Commerce's method of calculating the duty drawback adjustment and continued rejection of its freight expense corrections, on December 27, 2018, the court remanded the former determination and sustained the latter. *See Ereğli Demir ve Çelik Fabrikalari T.A.Ş v. United States ("Erdemir I"),* 42 CIT ___, ___, 357 F. Supp. 3d 1325, 1332–34, 1336 (2018).[3]

On June 3, 2019, Commerce filed its second remand results. *See* 2nd Remand Results. Therein, Commerce again revised its method of

[1] The administrative record filed in connection with the 2nd Remand Results is contained in a Public 2nd Remand Record, ECF No. 134–2, and a Confidential 2nd Remand Record ("2nd CRR"), ECF No. 134–3. Parties submitted public and confidential joint appendices containing record documents cited in their briefs. *See* Non Confidential J.A. to 2nd Remand Redetermination, ECF No. 141; Confidential J.A. to 2nd Remand Redetermination ("CRJA"), ECF No. 140. The court references the confidential version of record documents, unless otherwise specified.

[2] The administrative record filed in connection with the 1st Remand Results is contained in a Public 1st Remand Record, ECF No. 107–2, and a Confidential 1st Remand Record ("1st CRR"), ECF No. 107–3.

[3] *Erdemir I* and *Erdemir II* present additional background on this case, familiarity with which is presumed.

calculating Çolakoğlu's duty drawback adjustments to U.S. price and made a circumstance of sale ("COS") adjustment to normal value to increase it by the same amount as the duty drawback adjustment. *Id.* at 2, 6–16, 21–28. The changes made by Commerce increased Çolakoğlu's weighted-average dumping margin from 5. 70 percent to 6.27 percent. *Id.* at 16.

Çolakoğlu filed comments opposing Commerce's use of a COS adjustment. *See* Consol. Pis. Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S.'s Comments on Remand Redetermination ("Çolakoğlu's Cmts."), ECF No. 135. Defendant United States ("the Government") and Defendant-Intervenors filed comments in support of the 2nd Remand Results. *See* Def.'s Resp. to Comments on Second Remand Redetermination ("Gov't's Reply Cmts."), ECF No. 138; Def.-lnts.' Comments in Supp. of 2nd Remand Results ("Def.-Ints.' Reply Cmts."), ECF No. 139.[4]

The court recently remanded Commerce's decision to make a COS adjustment to normal value in the same amount as the duty drawback adjustment to U.S. price. *See generally Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States,* Slip Op. 19–130, 2019 WL 5270152 (CIT Oct. 17, 2019). For the reasons discussed in *Habaş* and herein, the court sustains Commerce's duty drawback adjustment as applied to export price and remands Commerce's decision to make a COS adjustment in the same amount.

## JURISDICTION AND STANDARD OF REVIEW

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

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

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[4] Defendant-lntervenors consist of ArcelorMittal USA LLC, AK Steel Corporation, Nucor Corporation, Steel Dynamics Inc., SSAB Enterprises LLC, and United States Steel Corporation. Def.-lnts.' Reply Cmts. at 2.

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

## DISCUSSION

### I. Duty Drawback and Circumstance of Sale Adjustments

#### A. Commerce's Duty Drawback Calculation Methodologies Prior to *Erdemir II*

To determine whether the subject merchandise is being sold at less than fair value, Commerce compares the export price or constructed export price[6] of the subject merchandise to its normal value. *See generally* 19 U.S.C. §§ 1673 *et seq*. Generally, an antidumping duty is the amount by which the normal value of a product-typically, its price in the exporting country—exceeds export price, as adjusted. *See id. §* 1673. One of the adjustments Commerce makes to export price pursuant to 19 U.S.C. § 1677a(c) is known as the "duty drawback adjustment." Specifically, Commerce is to increase export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *Id.* § 1677a(c)(1 )(B). This statutory adjustment is intended to prevent the dumping margin from being increased by import taxes that are imposed on inputs used to produce subject merchandise, if those import taxes are rebated or exempted from payment when the subject merchandise is exported to the United States. *See Saha Thai Steel Pipe (Public) Co. Ltd. v. United States,* 635 F.3d 1335, 1338 (Fed. Cir. 2011); *Wheatland Tube Co. v. United States,* 30 CIT 42, 60, 414 F. Supp. 2d 1271, 1286 (2006), *rev'd on other grounds,* 495 F .3d 1355 (Fed. Cir. 2007). The adjustment accounts for the fact that imported inputs remain subject to the import duties when consumed in the production of the foreign like product, "which increases home market sales prices and thereby increases [normal value]." *Saha Thai,* 635 F.3d at 1338.

"Until recently, Commerce calculated the duty drawback adjustment to U.S. price ... by dividing rebated or exempted duties by total exports and adding the resultant per unit duty burden to the export price." *Erdemir II,* 357 F. Supp. 3d at 1330. When producers were

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

exempt[7] from the payment of import duties, Commerce also increased cost of production and constructed value[8] to account for the cost of the exempted duties for which the producer remained liable until the exemption program requirements were satisfied. *Id.; see also Saha Thai,* 635 F.3d at 1341–44 (affirming the upward adjustment to cost of production). In 2016, Commerce modified its duty drawback adjustment "by allocating exempted duties over total production rather than exports." *Erdemir II,* 357 F. Supp. 3d at 1330–31. Commerce adjusted its methodology in response to assertions that margin distortions arose when foreign producers "use[d] fungible inputs both from foreign sources, which incur[red] import duties, and domestic sources, which [did] not." *Id*. at 1331 Commerce reasoned that "the larger denominator on the cost-side [i.e., total production] resulted in a smaller adjustment to normal value than U.S. price"; consequently, it determined that "equalizing the denominators used in each adjustment" ensured that an equal amount would be added to U.S. price and normal value and the agency would compare the two values on a "duty neutral" basis. *Id.* at 1331.

In the administrative proceeding underlying *Erdemir II,* Commerce used this modified duty drawback methodology to calculate the adjustment to U.S. price and make a corresponding equal upward adjustment on the cost side pursuant to *Saha Thai. See* 1st Remand Results at 11–12, 20–21. The court remanded the duty drawback adjustment to U.S. price—specifically, Commerce's allocation of the exempted duties over total production—as "inconsistent with the statutory linkage between [the foregone] duties and exported merchandise." *Erdemir II,*357 F. Supp. 3d at 1333 (collecting cases reaching the same conclusion). The court reasoned that "Congress ...

[7] A duty exemption program is different from a duty rebate (or reimbursement) program. For a rebate program, "import duties are paid and later refunded by the government of the exporting country." 2nd Remand Results at 6. Thus, the duties are usually recorded as a "direct material cost" in the producer's books and a separate revenue is recorded to book the amount of any drawback granted in connection with an export transaction. *Id.* For an exemption program, an "off-the-books" liability is created upon importation of the input, which is later forgiven when the finished product is exported. *Id.* at 15. In that case, the producer typically will "neither record an amount for import duties as a direct material cost, nor recognize a separate revenue for the amount of duty drawback granted for the export transaction." *Id.* at 6–7.

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

clearly intended the adjustment to capture the amount of duties Çolakoğlu would have paid on its export sales but for the exportation of that merchandise"; thus,

> [a]llocating Çolakoğlu's exempted duties over total production contravene[d] the plain language of 19 U.S.C. § 1677a(c)(1)(B) because it attribute[d] some of the [duty] drawback to domestic sales, which do not earn drawback, and fail[ed] to adjust export price by the amount of the import duties exempted by reason of exportation.

*Id.* (internal quotation marks and citation omitted). The court further rejected Commerce's reliance on *Saha Thai* to support its revised methodology. *Id.* at 1334. While the cost-side adjustment approved by the *Saha Thai* court "ensure[s] that normal value and U.S. price are compared on a mutually-duty-inclusive basis," the appellate court "never stated or otherwise inferred that the adjustments to [U.S. price] and normal value must be equal ... in order to render the comparison between U.S. price and normal value duty neutral." *Id.* (internal citations and internal quotation marks omitted). The court remanded the issue "to the agency to revise its calculation of the duty drawback adjustment using exports as the denominator rather than total production." *Id.*

### B. Commerce's Calculation Methodology on Remand from *Erdemir II*

In accordance with *Erdemir II,* Commerce recalculated the duty drawback adjustment using exports as the denominator. 2nd Remand Results at 16, 17. In addition, however, Commerce made a circumstance of sale adjustment to normal value to add the same per-unit amount of duty "in order to achieve a fair comparison." *Id.* at 14; *see also id.* at 16.

Çolakoğlu imported several inputs subject to varying duties and purchased the same inputs from domestic sources. *Id.* at 12. Çolakoğlu participated in a duty exemption program, and, thus, did not record liability for the import duties in its books and records. *Id.* at 12, 15. According to Commerce, when subject merchandise can be produced from various inputs, only some of which are dutiable imports, or from inputs that are procured from foreign and domestic sources, "the presumption that the normal value includes the full duty proportionate to the full duty drawback is uncertain." *Id.* at 7. Commerce asserts that most countries permit substitution of inputs, which means that, "while the actual imported material subject to

duty is fungible and can be consumed in any of the finished goods, it is assigned by the company to exported finished goods for purposes of the program." *Id.* Thus, while the statute requires Commerce to increase U.S. price to account for the duties exempted by reason of exportation, there is a lesser amount of (or no) import duties reflected in normal value. *Id.* at 7–8. Commerce provided "the following example, wherein one unit of input is domestically sourced for $10 and one unit of input is imported for $10, plus a $5 duty":

> Under the standard way of determining costs for general accounting purposes, the company's average cost for the inputs per unit is the domestic input of $10 plus the imported input of $15 ($10 + $5) divided by two units of input which equals $12.50 (*i.e.,* $10 + $15 = $25 and $25/2 = $12.50). Thus, $12.50 is the annual average per-unit input cost, including only $2.50 of the import duty for each unit. However, upon export of one unit of the finished good, the duty drawback scheme allows the entire $5 of import duties to be rebated or forgiven. As a result, following this logic, the adjusted U.S. price reflects $5 per unit of duties, while the [normal value] cost of production includes an average of $2.50 per unit. This creates an imbalance in the amount of duties on each side of the dumping equation, artificially lowering the margin by $2.50 of duties (assuming through the cost test the average home market [] price would include the $2.50 of duties in the cost of the input).

*Id.* at 8.

As discussed, Commerce initially attempted to remedy this perceived distortion by limiting the duty drawback adjustment to the amount of duties imputed on the costside. *Id.* at 9. In response to several opinions from this court holding that the reduced duty drawback adjustment was unlawful, Commerce developed a new methodology. See *id.* at 9–10 & n.36 (collecting cases). Specifically, in those cases, Commerce applied the full duty drawback adjustment to U.S. price, applied the cost-side adjustment pursuant to Saha *Thai,* and also made a COS adjustment to normal value ultimately imputing the same amount of per-unit duties to normal value that were added to U.S. price. *Id.* at 10. In other words, using the example above, Commerce added (1) $5 per unit of import duties to U.S. price; (2) $2.50 per unit to cost; and (3) $2.50 per unit to normal value as a COS adjustment. *Id.*

Upon review by another judge of this court, the court determined that the agency improperly double-counted the amount of duties

included within normal value. *Id.* at 10 & n.38 (citing *Uttam Galva Steels Ltd. v. United States,* 43 CIT ___, ___, 374 F. Supp. 3d 1360, 1364 (2019)). Taking that court opinion into account, while also asserting that the double-counting finding was in error, Commerce further changed its methodology in this case to provide for two COS adjustments: the first COS adjustment removes all duties from normal value and the second COS adjustment "add[s] to the normal value the same per-unit amount of duty added to U.S. price." *Id.* at 14. Commerce explained that the second COS adjustment is necessary because:

> (1) ... the import duty program and drawback provision impose a different set of accounting and duty treatments dependent upon which market the finished good was sold and the markets from which the imported input is sourced; and (2) the effect of the different sourcing of inputs and associated duty costs, and how the duty drawback is treated for the U.S. and home market sales.

*Id.* at 13. The combined effect of a duty exemption scheme and domestic sourcing of inputs for foreign-like product sold in the home market, according to Commerce, is to "permit[] the assignment of imported inputs and the associated import duties to export sales, while attributing the domestic purchases exclusive of duty to domestic sales." *Id.* at 14. This treatment differs "from standard cost accounting and the respondent's normal books and records, which calculate an annual weighted-average price of inputs and is allocated to overall production versus market-specific production." *Id.* According to Commerce, this results in a duty-inclusive U.S. price being compared to a normal value that reflects less or no duties. *Id.*

In the 2nd Remand Results at issue here, Commerce explained that it did not make the first COS adjustment to remove booked duties because Çolakoğlu participated in a duty exemption program and, thus, constructed value and home market prices are duty-exclusive. *See id.* at 15. Commerce did, however, make the second COS adjustment to add to normal value the same per-unit amount of duties the agency added to U.S. price, "ensuring that both sides of the dumping equation contain the same amount of per-unit import duties." *Id.* at 14.[9]

[9] Commerce did not impute exempted import duties to the cost of production as would be consistent with *Saha Thai*. *See* 2nd Remand Results at 13, 15. Instead, Commerce made a COS adjustment to normal value (regardless of whether it was based on home market sales or constructed value). *Id.* at 16.

In the remand proceeding, Çolakoğlu challenged Commerce's reliance on its authority to adjust normal value pursuant to the circumstance of sale provision. *See id* at 20. Commerce explained that it made the COS adjustment "to account for differences not otherwise accounted for in the statute." *Id.* at 25.

The normal value provision of the statute gives Commerce the authority to increase or decrease normal value "by the amount of any difference (or lack thereof) between" U.S. price and normal value, "other than a difference for which allowance is otherwise provided under this section," that Commerce determines is "wholly or partly due to ... other differences in the circumstances of sale." 19 U.S.C. § 1677b(a)(6)(C)(iii). Commerce explained that the COS provision is the only provision that "address[es] differences in the home market price relating to import duties," by which Commerce means "taxes imposed only on particular inputs, at particular rates, from particular markets, input into particular goods, which can be claimed and rebated only when resold to particular markets." 2nd Remand Results at 25. In this case, Commerce explained, Çolakoğlu imports substitutable inputs that "incur import duties at different rates, (or not at all}, while the domestically sourced identical inputs incur no duties." *Id.* The Turkish duty drawback scheme permits Çolakoğlu "to assume that the exported product consumed the inputs subject to duties," and the duty drawback provision, 19 U.S.C. § 1677a(c)(1)(B), likewise "implies that imported inputs ... subject to import duties ... were consumed in making the exported products." *Id.* Commerce described the different "circumstance of sale" as the assignment of duty costs to particular products "based on where they are sold." *Id.* at 26.

As Commerce explains it, the agency confronted the following : (1) the requirement to increase U.S. price to account for import duties foregone by reason of exportation of the subject merchandise in order "to make a fair price comparison" to a normal value that is "presumably set to recover such import duties" on goods sold domestically; (2) a normal value that does not contain any import duties because dutiable inputs are allocated to export sales; and (3) a statute that is silent on what Commerce should do in that situation. *Id.* at 25. Commerce determined that "[t]he 'other differences in the circumstances of sale' provision is the only means" at its disposal "to ensure a fair comparison" between a duty-exclusive normal value and duty inclusive U.S. price. *Id.* at 26.

### C. Commerce's COS Adjustment Contravenes the Plain Language of the Applicable Statute and Regulation

Çolakoğlu raises several challenges to Commerce's 2nd Remand Results, foremost of which is that the statutory COS provision, along

with Commerce's implementing regulation, do not justify an offset to the statutory duty drawback adjustment. Çolakoğlu's Cmts. at 10–12. The court agrees. *See Habaş,* 2019 WL 5270152, at *6–11.

Congress authorized Commerce to adjust normal value for differences between normal value and U.S. price that are not otherwise provided for in the statute and are due to "other differences in the circumstances of sale." 19 U.S.C. § 1677b(a)(6)(C)(iii). In the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, Pub. L. No. 103–465, § 224, 108 Stat. 4809 (1994), Congress explained that:

> Commerce will continue to employ the circumstance-of-sale adjustment to adjust for differences in direct expenses and differences in selling expenses of the purchaser assumed by the foreign seller, between normal value and both export price and constructed export price. . . . [D]irect expenses and assumptions of expenses incurred in the foreign country on sales to the affiliated importer will form a part of the circumstances of sale adjustment.

Uruguay Round Agreements Act, Statement of Administrative Action, H R. Doc. No. 103–316, vol. 1, at 828 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4167.[10] Consistent with the SAA, Commerce's regulations limit COS adjustments consistent with 19 U.S.C. § 1677b(a)(6)(C)(iii) to "direct selling expenses and assumed expenses," with one exception for commissions paid in one market that is not relevant here. 19 C.F.R. § 351.41 0(b) (providing for COS adjustments "only for direct selling expenses and assumed expenses"). Direct selling expenses are defined as "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." *Id. §* 351.410(c). Assumed expenses are defined as "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." *Id.*§ 351.410(d).

According to Çolakoğlu, "[n]othing in the law, regulations, or past cases suggests that import duties that have not been collected—on inputs destined for export sales—qualify as a COS, let alone as a selling expense." Çolakoğlu's Cmts. at 11. Çolakoğlu further argues that the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has determined that a COS adjustment may not be made to

[10] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

"nullify a U.S. price adjustment." *Id.* at 12 (citing *Zenith Electronics Corp. v. United States,* 988 F.2d 1573, 1581 (Fed. Cir. 1993)).

The Government argues that "Turkey's duty drawback scheme and the statutory duty drawback provision[] ... transformed the import duties subject to the duty drawback scheme into a direct selling expense." Gov't's Reply Cmts. at 10 (citing 2nd Remand Results at 15 & n.49). The Government further argues that Commerce's COS adjustment is authorized by the statutory requirement to ensure a "fair comparison" between U.S. price and normal value. *Id.* at 9 (citing 19 U.S.C. § 1677b(a)); *see also id.* at 12. The Government also argues that Commerce's methodology is not precluded by the *Zenith* line of cases. *Id.* at 12–13.

Defendant-lntervenors argue that Çolakoğlu treats imports duties as "akin to selling expenses" and, thus, Commerce's COS adjustment complies with the agency's regulation. Def.-lnts.' Reply Cmts. at 15–16; *see also id.* at 16 ("[I]ncurring import duties and the exemption or rebate of those duties is an economic activity that occurs in the home market."). Defendant-Intervenors concur with the Government that the COS adjustment furthers the statutory purpose of making a fair comparison. *Id.* at 15.

Commerce's COS adjustment to normal value contravenes both the statutory provision and the agency's implementing regulation. Beginning with the statute, 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). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *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.* at 842–43. Only "if the statute is silent or ambiguous," must the court determine whether the agency's action "is based on a permissible construction of the statute." *Id.* at 843. The court may find that "Congress has expressed unambiguous intent by examining 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation. '" *Gazelle v. Shulkin,* 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino v. Shinseki,* 683 F.3d 1372, 1378 (Fed. Cir. 2012)).

Commerce determined that adjustments to normal value pursuant to 19 U.S.C. § 1677b "do not address differences in the home market price relating to import duties other than through the COS provision," 2nd Remand Results at 25, and "the 'other differences in the circumstances of sale' provision is the only means to ensure a fair

comparison," *id.* at 26. Notwithstanding Commerce's claims, the statutory COS provision "is not an omnibus provision to be used ... for whatever adjustment [the agency] seek[s] to effect." *Zenith Electronics Corp. v. United States,* 14 CIT 831 , 837, 755 F. Supp. 397, 406 (1990).

This more limited understanding of the COS provision is confirmed by the legislative history. The Senate report accompanying the enactment of the COS provision lists as adjustable differences "terms of sale, credit terms, and advertising and selling costs," all of which are attendant to the sale of the merchandise. S. Rep. No. 851619, at 7 (1958). When Congress enacted the URAA, including section 1677b in its current form, it intended for "Commerce's current practice with respect to [the COS] adjustment to remain unchanged" (with the exception of the "constructed export price offset" that is not relevant here). SAA at 828, *reprinted in* 1994 U.S.C.C.A.N. at 4167. Prior to enactment of the URAA, Commerce's COS regulation provided that differences in the circumstances of sale for which it would "make reasonable allowances normally [were] those involving differences in commissions, credit terms, guarantees, warranties, technical assistance, and servicing," in addition to "differences in selling costs (such as advertising) incurred by the producer or reseller" generally to the extent those costs were assumed "on behalf of the purchaser." 19 C.F.R. § 353.56(a)(2) (1990).

Although the examples listed in the regulation and legislative history are not exhaustive, they are all examples of "expenses made to support and promote sales." *Torrington Co. v. United States,* 156 F.3d 1361, 1366 (Fed. Cir. 1998) (Archer, J., dissenting) (disagreeing that certain freight costs constituted selling expenses). Adjustments for these types of selling expenses are necessary in order to compare normal value and U.S. price "at a similar point in the chain of commerce." *Maverick Tube Corp. v. Toscelik Profil,* 861 F.3d 1269, 1274 (Fed. Cir. 2017) (citation omitted). Commerce's adjustment for an asserted difference in duty costs arising from Plaintiffs' different sourcing of inputs and the statutory duty drawback adjustment pursuant to 19 U.S.C. § 1677a(c)(1)(B) is not a circumstance surrounding the sale of the merchandise. Notwithstanding Commerce's strained attempt to describe its method using terms relevant to a COS adjustment, Commerce, in fact, made the adjustment to remedy what it

characterized as a distortion[11] that arose by operation of the statutory drawback adjustment on a particular set of facts. *See* 2nd Remand Results at 8, 11, 22. In so doing, Commerce directly and completely nullified the duty drawback adjustment to U.S. price by adding to normal value the same per-unit amount of exempted duties added to U.S. price. *Id.* at 14. Commerce may not, however, use the COS provision to "effectively writ[e] [a separate adjustment] section out of the statute." *Zenith,* 988 F.2d at 1581.[12]

Commerce's circumvention of the statutory scheme cannot be saved by its appeal to the need "to ensure a fair comparison." 2nd Remand Results at 14, 15, 26; *cf.* Gov't's Reply Cmts. at 9, 12; Def-Int's.' Reply Cmts. at 15. Section 1677b requires that "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). As the Federal Circuit has recognized, the statute expressly sets out how to determine normal value "[i]n order to achieve a fair comparison with the export price or constructed export price." *Timken Co. v. United States,* 354 F.3d 1334, 1344 (Fed. Cir. 2004) (characterizing the enumerated requirements and adjustments to normal value in subsections 1677b(a)(1)-(8) as "exhaustive"). Thus, the "fair comparison" requirement is met when normal value is calculated in accordance with the statute and does not provide Commerce with additional authority to make adjustments "beyond those explicitly established in the statute." *Id.; cf. Micron Tech., Inc. v. United States,* 243 F.3d 1301, 1313 (Fed. Cir. 2001) (when U.S. price is based on constructed export price, a "fair comparison" to normal value is achieved by making statutory adjustments in order to arrive at the appropriate level of trade). Commerce itself made this point when it promulgated the rule in its current

[11] In *Erdemir II,* the court noted that Commerce's concern regarding distortion is based on the unsubstantiated assumption that "the cost of the domestically-sourced inputs approximates the import duty-exclusive cost of the foreign-sourced input." 357 F. Supp. 3d at 1334 n.15 (emphasis omitted). The court observed that a domestic supplier of a dutiable input "would price its product at a level competitive with the duty-inclusive cost of the imported input," and, that "[i]n such a scenario, it is difficult to understand the margin effect of a proper duty drawback adjustment as distortive." *Id*. Commerce's explanation of the distortion that arises by operation of the duty drawback adjustment in the 2nd Remand Results indeed assumes that domestically-sourced and foreign-sourced inputs share the same unit price ($10) without regard to any market effect from the 50 percent duty in Commerce's example. 2nd Remand Results at 8. Commerce does not explain why this is so, nor does Commerce address the court's observation in the 2nd Remand Results and the record does not otherwise support the agency's assumption. *See id.*

[12] Çolakoğlu and the Government disagree on the applicability of *Zenith* to the court's review of Commerce's determination here. *See* Çolakoğlu's Cmts. at 12; Gov't's Reply Cmts. at 12–13; *cf* 2nd Remand Results at 22–25. While *Zenith* addressed Commerce's use of a COS adjustment to remedy the effect on the antidumping margin of a separate pre-URAA statutory provision relating to domestic taxes, the court's statements regarding Commerce's authority pursuant to the COS provision remain instructive, if not binding, here. *See Zenith,* 988 F.2d at 1580–82.

form. *See Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,346 (Dep't Commerce Feb. 27, 1996) (proposed rule) (explaining that the statute and the Antidumping Agreement "specify in detail the methods by which [the fairness] requirement is satisfied" and declining to inure to itself the authority to go further).

Throughout the almost 25 years of administration and litigation pursuant to the Uruguay Round Agreements Act version of the Tariff Act of 1930, and in the years that preceded, parties have argued for and against various extra-statutory adjustments as necessary to a "fair comparison" or allowing for "an apples-to-apples" comparison. Generally speaking, domestic interested parties have asserted that certain adjustments leading to higher dumping margins are needed to be fair, and respondent interested parties have asserted that other adjustments leading to lower dumping margins are needed to be fair. However, where, as here, Congress has provided for an adjustment in one part of the dumping calculation and not another, it is not for Commerce or the court to circumvent the legislative framework even if the purported goal is to render an allegedly fairer comparison. *See, e.g., Ad Hoc Comm. of AZ-NM-TX-FL Prods. of Gray Portland Cement v. United States,* 13 F.3d 398, 401–03 (Fed. Cir. 1994). Accordingly, Commerce's COS adjustment to offset the effect of the statutory duty drawback adjustment must be rejected as inconsistent with the statute.[13]

While regulatory consistency cannot save an adjustment otherwise inconsistent with the statute, the court notes that Commerce's COS adjustment also contravenes the plain language of its regulation.[14] The Federal Circuit has held that Commerce's identification of a particular cost as a "selling expense[] properly the subject of a COS

[13] Defendant-lntervenors' reliance on *Budd Co., Wheel & Brake Div. v. United States,* 14 CIT 595, 599–603, 746 F.Supp. 1093, 1097–1100 (1990), to support the proposition that Commerce may make a COS adjustment generally to remedy "an imbalance in the dumping calculation" is unpersuasive. *See* Def.-lnts.' Cmts. at 15. In *Budd* Co., the court upheld a COS adjustment intended to remedy currency fluctuations that resulted from Commerce's application of its currency conversion regulations. 14 CIT at 602–07, 746 F. Supp. at 1099–1103. *Budd* Co. is factually inapposite, non-binding, and predates several Federal Circuit opinions cited herein, including *Zenith, Timken Co., and Ad Hoc Committee of AZ-NM-TX-FL Producers*, which discuss in detail Commerce's authority to make COS adjustments and obligation to render a "fair comparison." Accordingly, the court adheres to those authorities.

[14] Commerce's regulation provides for a COS adjustment "only for direct selling expenses and assumed expenses." 19 C.F.R. § 351.410(b). While Commerce did not specify which of the two categories it considered the adjustment at issue to fall within, it sought to explain why certain "duty costs" "are directly related to the sales in different markets." 2nd Remand Results at 26. From this the court discerns that Commerce considers the COS adjustment to fall within the category for direct selling expenses. *See* 19 C.F.R. § 351.410(c) (defining "direct selling expenses" as expenses "that result from, and bear a direct relationship to, the particular sale in question").

adjustment" represents an instance of the agency "simply interpreting its own regulations" to which the court owes "substantial deference." *Torrington* Co., 156 F .3d at 1364 (citing *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994)); *see also Auer v. Robbins,*519 U.S. 452, 461–62 (1997) (according deference to an agency's "fair and considered" interpretation of its own ambiguous regulation). More recently, however, the U.S. Supreme Court cautioned that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor v. Wilkie,* 139 S. Ct. 2400, 2415 (2019). "[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (quoting *Chevron,* 467 U.S. at 843 n.9). Those "tools" consist of "the text, structure, history, and purpose of a regulation." *Id.*

Turning first to the plain language of the regulation, the court must "consider the terms in accordance with their common meaning." *Mass. Mut. Life Ins. Co. v. United States,* 782 F.3d 1354, 1365 (Fed. Cir. 2015) (quoting *Lockheed Corp. v. Windnall,* 113 F.3d 1225, 1227 (Fed. Cir. 1997)). A "direct selling expense" must be (1) an "expense[]" that (2) "result[s] from, and bear[s] a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c). Commerce's regulation includes "commissions, credit expenses, guarantees, and warranties" as examples of direct selling expenses. *Id.* All of these examples involve an actual or imputed expenditure by the respondent.[15]

Commerce's determination in the remand proceeding is inconsistent with the plain language of the regulation and, thus, merits no deference. Commerce's adjustment for differences in import duties, *see* 2nd Remand Results at 13–14, 25, ignores the fact that Çolakoğlu *"did not incur and record any actual duty costs* in its normal books and records. Rather, an 'off-the-books' liability was generated when inputs were imported under the IPR program, *and that liability was later reversed* upon exportation of subject merchandise to the United States and other markets." *Id.* at 15 (emphasis added); *see also id.* ("Çolakoğlu *did not pay* or record as a cost *any duties* associated with the IPR exemption program.") (emphasis added). Here, the record is clear that Çolakoğlu incurred *no expense* respecting import duties on inputs consumed in the production of subject merchandise. *See id.*

Commerce focused on the fact that U.S. price is ultimately duty-inclusive as the basis for the COS adjustment; however, such is the

[15] Credit expenses are typically imputed expenses for the seller, representing the time value of money for the period between shipment and payment. *See generally* Import Admin. Policy Bulletin 98.2: Imputed Credit Expenses and Interest Rates (Feb. 23, 1998), *available at* https://enforcement.trade.gov/policy/bull98–2.htm (last visited Oct. 24, 2019). Such expenses recognize the value to the buyer, and the cost to the seller, of extending payment terms. *Id.*

case by operation of the duty drawback adjustment. *Id.* at 25–26. Commerce offers no explanation as to how a statutory adjustment to U.S. price constitutes an "expense" as the term is commonly understood or, indeed, a circumstance of sale. The duty drawback adjustment resulted from the operation of law, it was not incurred as part of the sales process. When Commerce promulgated the current rule, it explicitly rejected drafting the regulation "in such a way as to essentially function as a catch-all provision to achieve 'fairness,'" finding the approach inconsistent with the carefully crafted statutory scheme.[16] *Antidumping Duties; Countervailing Duties,* 61 Fed. Reg. at 7,346. In attempting to do so now, Commerce has done what the Supreme Court said it could not do: "creat[ing] *de facto* a new regulation" "under the guise of interpreting a regulation." *Kisor,* 39 S. Ct. at 2415 (citation omitted).

Commerce's reliance on *Saha Thai* to support the agency's use of a COS adjustment also fails. *See* 2nd Remand Results at 24 ("Moreover, . . . the Federal Circuit in *Saha Thai* ruled that Commerce has the authority to adjust [normal value] when the duties at issue are not paid or included in a respondent's books and records. "). In *Saha Thai,* the Federal Circuit affirmed Commerce's interpretation of cost-related provisions of the normal value statute to include "implied costs" (i.e., unbooked/exempted duty costs) as well as "actual costs" for purposes of calculating a duty-inclusive normal value to compare to a U.S. price subject to the duty drawback adjustment. 635 F.3d at

[16] The court is concerned by the Government's misleading alteration of the regulation in its reply comments, to wit: "The regulations further clarify that '[i]n general ... the Secretary will make circumstance of sale adjustments ... only for direct selling expenses and assumed expenses.'" Gov't's Reply Cmts. at 10 (alterations in original) (quoting 19 C.F.R. § 351.410(b)). The Government's alteration suggests that the phrase "in general" forms part of the sentence describing the adjustments made pursuant to the regulation in such manner that it appears to broaden the scope of the regulation. The regulation actually provides:

> (b) In general. With the exception of the allowance described in paragraph (e) of this section concerning commissions paid in only one market, the [agency] will make circumstances of sale adjustments under [19 U.S.C. § 1677b](6)(C)(iii) ... only for direct selling expenses and assumed expenses.

19 C.F.R. § 351.410(b). Thus, the phrase "In general" is the heading to subsection (b), not part of the text. Rather than speaking to the scope of the permissible adjustments, it speaks to the scope of the regulation, which, with the exception of certain commissions, permits adjustments "*only* for direct selling expenses and assumed expenses." *Id.* (emphasis added). It is a well-settled interpretive rule that "the heading of a section ... cannot undo or limit that which the text makes plain." *Brotherhood of R. R. Trainmen v. Baltimore & Ohio R.* Co., 331 U.S. 519, 529 (1947) (construing a statute); *see also Aqua Prods., Inc. v. Matal,* 872 F.3d 1290, 1316 (Fed. Cir. 2017) (principles of statutory interpretation apply likewise to regulations). The Government's alteration, which seeks to negate the explicit limitation the word "only" places on the types of permissible adjustments, is therefore misleading and erroneous.

1342–43. In contrast to the cost-side adjustment affirmed in *Saha Thai,* the COS provision adjusts normal value even when normal value is based on home market sales and that sales price is greater than the cost of production. *See* 19 U.S.C. § 1677b(a)(1)(B), (a)(6)(C)(iii), (b)(1). This approach is distinct from *Saha Thai* because it presumes that a theoretical duty liability has a price effect on home market sales. Such a presumption is contrary to the *Saha Thai* court's observation that "[a]n import duty exemption granted only for exported merchandise has *no* effect on home market sales prices" and, thus, "the duty exemption should have *no* effect on [normal value]." 635 F.3d at 1342 (emphasis added). Thus, while Commerce properly may include exempted duties in its *cost* calculations, *id.* at 1342–43, *Saha Thai* cannot support a COS adjustment to price-based normal value. Accordingly, the court finds that Commerce's COS adjustment is also barred by the unambiguous language of the regulation.[17] This issue will be remanded to the agency for reconsideration consistent with the foregoing.

## CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce's 2nd Remand Results are remanded; it is further

**ORDERED** that, on remand, Commerce shall, consistent with this Opinion, recalculate normal value without making a circumstance of sale adjustment related to the duty drawback adjustment made to export price (or constructed export price; it is further

**ORDERED** that Commerce shall file its remand redetermination on or before 1/27/2020; it is further

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[17] Because the court finds that Commerce's COS adjustment was contrary to the relevant statutory and regulatory provisions, it need not resolve Çolakoğlu's remaining challenges to the adjustments. The court finds, however, that Çolakoğlu's argument that Commerce failed to comply with the court's instruction in *Erdemir II* regarding the appropriate denominator to use in calculating the duty drawback adjustment lacks merit. *See* Çolakoğlu's Cmts. at 3–4. To support this argument, Çolakoğlu cites Commerce's amended final calculation memoranda from the first and second remand proceedings. *See id.* at 4 (citing Draft Results of Second Redetermination Pursuant to Second Remand of Certain Hot-Rolled Steel Products from the Republic of Turkey: Am. Final Calculation Mem. for Çolakoğlu Dis Ticaret AS. and its Affiliates (May 8, 2019) ("Colakoğlu Cale. Mem.") at 3, 2nd CRR 1, CRJA Tab 8; Final Results of Redetermination. Pursuant to Remand of Certain Hot-Rolled Steel Products from the Republic of Turkey: Am. Final Calculation Mem. for Çolakoğlu Dis Ticaret AS. and its Affiliates (July 20, 2018) at 2–4, 1st CRR 41, CRJA Tab 6). The calculation memorandum relevant to the second remand proceeding shows that Commerce adjusted U.S. price in accordance with Çolakoğlu's self-reported duty drawback variable, Çolakoğlu Cale. Mem. at 3, which Çolakoğlu calculated by dividing exempted duties by total export quantity, 2nd Remand Results at 17. Thus, Commerce complied with the court's instruction in this regard.

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

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

Dated: October 29, 2019
New York, New York

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