U.S. Court of International Trade

Slip Op. 20–7

SAO TA FOODS JOINT STOCK COMPANY et al., Plaintiffs and Consolidated Plaintiff, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00205
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the twelfth administrative review of the antidumping duty order covering frozen warmwater shrimp from the Socialist Republic of Vietnam.]

Dated: January 16, 2020

Matthew R. Nicely and *Daniel M. Witkowski*, Hughes Hubbard & Reed LLP, of Washington, DC, argued for plaintiffs Sao Ta Foods Joint Stock Company, et al.

Robert G. Gosselink, Trade Pacific, PLLC, argued for consolidated plaintiff Mazzetta Company, LLC. With him on the brief was *Aqmar Rahman*.

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

Nathaniel Maandig Rickard and *Zachary J. Walker*, Picard, Kentz & Rowe, LLP, of Washington, DC, argued for defendant-intervenor Ad Hoc Shrimp Trade Action Committee.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on motion for judgment on the agency record. *See* Consol. Pl.'s R. 56.2 Mot. J. Agency Rec., Mar. 15, 2019, ECF No. 26; Pls.' R. 56.2 Mot. J. Agency Rec., Mar. 15, 2019, ECF No. 28. Plaintiffs Sao Ta Foods Joint Stock Company, a.k.a. Fimex VN ("Fimex"), et al. (collectively, "Vietnamese Respondents") and Consolidated Plaintiff Mazzetta Company, LLC ("Mazzetta") challenge various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the antidumping duty ("ADD") review of certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam").[1] *See Certain Frozen Warmwater Shrimp*

[1] Vietnamese Respondents are foreign producers and exporters of frozen warmwater shrimp from Vietnam. *See* Compl. at ¶ 6. Mazzetta is an importer and distributor of subject merchandise. *See* Compl. at ¶ 2, Oct. 9, 2018, ECF No. 8 (from associated docket Ct. No. 18–00207).

From [Vietnam], 83 Fed. Reg. 46,704 (Dep't Commerce Sept. 14, 2018) (final results of [ADD] admin. review, 2016–2017) ("*Final Results*"), and accompanying Issues & Decision Memo. for the Final Results, Sept. 7, 2018, ECF No. 45 ("Final Decision Memo.").

Vietnamese Respondents and Mazzetta commenced separate actions pursuant to Section 516A(d) of the Trade Act of 1930, 19 U.S.C. § 1516a(d), and 28 U.S.C. § 2631(c) (2012),[2] which were later consolidated. *See* Summons, Oct. 1, 2018, ECF No. 1; Compl. at ¶ 4, Oct. 2, 2018, ECF No. 7; Order, Dec. 14, 2018, ECF No. 23 (consolidating Ct. No. 18–00205 and Ct. No. 18–00207 under Ct. No. 18–00205). Vietnamese Respondents and Mazzetta challenge Commerce's selection of Bangladeshi NACA data as the "best available information" to value Fimex's vannamei shrimp input in the raw shrimp factor of production ("FOP") as unsupported by substantial evidence and not in accordance with law. *See* Pls.' Confid. Memo. Supp. R. 56.2 Mot. J. Agency Rec. at 1, 9–24, Mar. 15, 2019, ECF No. 29 ("Pls.' Br."); Memo. Supp. Mot. [Mazzetta] J. Agency R. at 1–2, 9–31, Mar. 15, 2019, ECF No. 26 ("Consol. Pl.'s Br."). Vietnamese Respondents separately contest Commerce's determination not to grant separate rate status to certain factory and trade names as unsupported by substantial evidence and not in accordance with law. *See* Pls.' Br. at 1, 24–46. Defendant and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("AHSTAC") request the court to uphold the *Final Results* in their entirety. *See* Def.'s Opp'n Pls.' & Consol. Pl.'s Mots. J. Agency Rec. at 2, 14–44, June 21, 2019, ECF No. 34 ("Def.'s Br."); Def.-Intervenor [AHSTAC's] Resp. Pls.' & [Consol. Pl.'s] Mots. J. Agency Rec. at 1–2, 8–31, June 21, 2019, ECF No. 33 ("Def.-Intervenor's Br."). For the reasons set forth below, the court sustains Commerce's selection of Bangladeshi NACA data as the best available information to value the raw shrimp FOP and its denial of separate rate status to the name "Sao Ta Foods Joint Stock Company"; however, the court remands for further explanation or reconsideration Commerce's denial of separate rate status to the factory names "Frozen Seafoods Factory No. 32" and "Seafoods and Foodstuffs Factory."[3]

BACKGROUND

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

[3] Vietnamese Respondents confirmed, during oral argument, that they had waived arguments regarding Commerce's denial of separate rate status to Camau Seafood Factory No. 4, which they had included in their complaint but had not raised in their opening brief. *See* Oral Arg. at 1:32:38–1:32:44; *see also* Compl. at ¶¶ 26–28. As a result, the court will not review this issue.

On April 10, 2017, Commerce initiated the twelfth administrative review[4] of the antidumping duty order covering frozen shrimp from Vietnam. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 17,188, 17,194–95 (Dep't Commerce Apr. 10, 2017) ("Initiation"). Commerce selected Fimex as a mandatory respondent.[5]

On March 12, 2018, Commerce published its preliminary results. *See Certain Frozen Warmwater Shrimp From [Vietnam]*, 83 Fed. Reg. 10,673 (Dep't Commerce Mar. 12, 2018) (prelim. results of [ADD] admin. review & prelim. determination of no shipments; 2016–2017) ("*Prelim. Results*"), and accompanying Decision Memo. for Prelim. Results of [ADD] Admin. Review, A-552–802, Mar. 5, 2018, *available at* https://enforcement.trade.gov/frn/summary/vietnam/2018–04901–1.pdf (last visited Jan. 9, 2020) ("Prelim. Decision Memo."). Given that Commerce considers Vietnam to be a non-market economy ("NME") country, Commerce determined normal value using surrogate values ("SVs") from a surrogate market economy country, preliminarily selecting Bangladesh as the primary surrogate country to value Fimex's FOPs. *See* Prelim. Decision Memo. at 6, 12–17. In making this selection, Commerce evaluated the availability of data in that surrogate country. *Id.* at 14–17. It considered the value of the main input, head-on, shell-on fresh shrimp ("raw shrimp"), to be "the critical FOP" in the calculation of normal value, and it selected data from Bangladesh reported in a study by the Network of Aquaculture Centers in Asia-Pacific ("Bangladeshi NACA data") to value that FOP. *See id.* at 15–16. Commerce acknowledged that even though the Bangladeshi NACA data pertained only to one species of shrimp, black tiger, and Fimex produced and sold two species of shrimp, black tiger and vannamei, the Bangladeshi NACA data catalogued raw shrimp prices by count-size, like the subject merchandise and reported input. *Id.* at 16, 23.

Commerce also preliminarily granted separate rate ("SR") status to Fimex's trade name, "Fimex VN," but denied separate rate status to certain other trade names, including Fimex's name "Sao Ta Foods Joint Stock Company" and two factory names of Thuan Phuoc Sea-

[4] The twelfth administrative review covers the period February 1, 2016 to January 31, 2017 ("period of review" or "POR"). *See* Initiation, 82 Fed. Reg. at 17,194.

[5] Initially, Commerce also selected Soc Trang Seafood Joint Seafood Company, a.k.a. Stapimex, as a mandatory respondent. *See* Selection of Respondents for Individual Examination at 5, PD 83, bar code 3574447–01 (May 23, 2017). Given that petitioners subsequently withdrew their requests for administrative review of Stapimex, Commerce, too, rescinded its review of Stapimex, leaving Fimex as the sole mandatory respondent. *See Certain Frozen Warmwater Shrimp from [Vietnam*], 82 Fed. Reg. 37,563, 37,563 (Dep't Commerce Aug. 11, 2017) (partial rescission of [ADD] admin. review; 2016–2017); *see also* Prelim. Decision Memo. at 3.

foods and Trading Corporation ("Thuan Phuoc"). *See id.* at 9–10, 28. In an accompanying memorandum, Commerce elaborated on why it had declined to grant separate rate status to certain trade names. *See* Names Not Granted [SR] Status at the Prelim. Results, PD 225, bar code 3679580–01 (Mar. 5, 2018) ("Trade Names Memo.").[6] Specifically, Commerce denied SR status to the name "Sao Ta Foods Joint Stock Company," because it was not used on export documents during the POR. *Id.* at 4–5. Further, because neither "Frozen Seafoods Factory No. 32" nor "Seafoods and Foodstuffs Factory" were listed on respective valid business registration certificates ("BRCs"), Commerce also denied SR status to those factory names. *Id.* at 4.

On September 14, 2018, Commerce published its final results. *See generally Final Results*. It continued to find Bangladeshi NACA data the best available information to value raw shrimp and to deny separate rate status to certain trade and factory names. *See* Final Decision Memo. at 6–14, 16–23. Commerce elaborated on its reasons to favor Bangladeshi NACA data over another source, data from Indonesia reported in the same NACA study ("Indonesian NACA data"), that included prices of both black tiger shrimp and vannamei shrimp but covered fewer count-sizes than the Bangladeshi NACA data. *See id.* at 6–14. In addition, Commerce further explained its reasons for rejecting certain trade and factory names. *See id.* at 16–23. Commerce assigned Fimex a weighted-average dumping margin of 4.58 percent, and also applied that margin to non-examined respondents granted separate-rate status. *Final Results*, 83 Fed. Reg. 46,705–06. Commerce assigned companies not granted SR status the Vietnam-wide entity rate. *Id.* at 46,705.

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

---

[6] On November 13, 2018, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination to the docket at ECF 19–2–3. Citations to the administrative record in this opinion are to the numbers Commerce assigned to such documents in the indices.

DISCUSSION

I. Commerce's Selection of Bangladeshi NACA Data to Value Raw Shrimp

Vietnamese Respondents' and Mazzetta's challenge to Commerce's selection of Bangladeshi NACA data as the best available information to value Fimex's vannamei shrimp input proceeds from the premise that Commerce had not one generic raw shrimp FOP but two species-specific FOPs to value. *See* Pls.' Br. at 9–24; Consol. Pl.'s Br. at 12–30.[7] Both allege that Commerce's determination is unsupported by substantial evidence and not in accordance with law, because the Indonesian NACA data, which reports both vannamei and black tiger shrimp prices, was more specific than the Bangladeshi NACA data to value the vannamei shrimp FOP. *See* Pls.' Br. at 9–24; Consol. Pl.'s Br. at 12–30. Moreover, they contend that Commerce ignored detracting evidence that indicated the Bangladeshi NACA data was not the best available information on the record. *See* Pls.' Br. at 11–22; Consol. Pl.'s Br. at 16–30. Defendant and AHSTAC counter that Commerce reasonably determined that the Bangladeshi NACA data was the best available information on the record. *See* Def.'s Br. at 16–31; Def.-Intervenor's Br. at 9–22. For the reasons that follow, Commerce reasonably determined there was one raw shrimp FOP, and its selection of Bangladeshi NACA data to value that FOP is supported by substantial evidence and in accordance with law.

In an antidumping proceeding, if Commerce considers an exporting country to be an NME, like Vietnam, it will identify one or more market economy countries to serve as a "surrogate" for that NME country in the calculation of normal value.[8] *See* 19 U.S.C. § 1677b(c)(1), (4). Normal value is determined on the basis of FOPs from the surrogate country or countries used to produce subject merchandise. *See id.* at § 1677b(c)(1). FOPs to be valued in the surrogate market economy include "hours of labor required," "quantities of raw materials employed," "amounts of energy and other utilities con-

[7] Vietnamese Respondents and Mazzetta only challenge Commerce's selection of Bangladeshi NACA data to value vannamei shrimp with data that cover black tiger shrimp prices. Neither contests Commerce's application of Bangladeshi NACA data to value Fimex's black tiger shrimp input. *See* Pls.' Br. at 10 n.49; *see also* Consol. Pl.'s Br. at 11. They argue that Commerce had not one generic raw shrimp FOP but two species-specific FOPs to value. *See also* Consol. Pl.'s Br. at 28–30; *see also* Oral Arg. at 4:45–6:09, 7:20–8:40.

[8] Dumping occurs when merchandise is imported into the United States and sold at a price lower than its "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See* 19 U.S.C. §§ 1673, 1677(34), 1677b(a). The difference between the normal value of the merchandise and the U.S. price is the "dumping margin." *See id.* at § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See id.* at § 1673; *see generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010).

sumed," and "representative capital cost, including depreciation." *See id.* at § 1677b(c)(3).

By statute, Commerce must value FOPs "to the extent possible . . . in one or more market economy countries that are . . . at a level of economic development comparable to that of the [NME], and . . . significant producers of comparable merchandise." *See id.* at § 1677b(c)(4)(A)–(B).[9] When several countries are at a level of economic development comparable to the NME country and are significant producers of comparable merchandise, Commerce evaluates the reliability and completeness of the data in these similarly situated countries and generally selects the one with the best data as the primary surrogate country. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Pol'y Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Jan. 9, 2020) ("Policy Bulletin 04.1"). Commerce prefers to use data from one primary surrogate country. *See* 19 C.F.R. § 351.408(c)(2) (2017).

Section 1677b requires Commerce to use "the best available information" to value FOPs. 19 U.S.C. § 1677b(c)(1). Although Commerce has broad discretion in deciding what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (noting the absence of a definition for "best available information" in the AD statute), it must ground its selection of the best available information in the overall purpose of the antidumping statute, calculating accurate dumping margins. *See CS Wind Vietnam Co. v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1271, 1277 (2014) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). "Commerce generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review" (collectively, "selection criteria"). *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Policy Bulletin 04.1.

An agency's determination is supported by substantial evidence when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The "substantiality of evidence must take into account whatever in the record fairly de-

[9] This analysis is designed to determine a producer's costs of production in an NME as if that producer operated in a hypothetical market economy. *See, e.g.*, *Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015); *see also* 19 U.S.C. § 1677b(c)(1)(B).

tracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Nevertheless, "the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence on the record." *Zhaoqing New Zhongya Aluminum Co. v. United States*, 36 CIT 1390, 1392, 887 F. Supp. 2d 1301, 1305 (2012) (citing *Universal Camera Corp.*, 340 U.S. at 488).

Commerce's determination to value Fimex's raw shrimp FOP, including the vannamei shrimp input, with Bangladeshi NACA data is supported by substantial evidence and in accordance with law.[10] First, despite Vietnamese Respondents' and Mazzetta's position that Commerce should value vannamei shrimp with a separate SV for black tiger shrimp, Commerce reasonably determined there was one raw shrimp FOP. *See* Final Decision Memo. at 9. By statute, Commerce has discretion to identify FOPs, *see* 19 U.S.C. § 1677b(c)(3) ("[T]he [FOPs] utilized in producing merchandise include, but are not limited to . . . quantities of raw materials employed[.]"), as well as discretion to identify the best available information to value those FOPs. *See id.* at § 1677b(c)(1) ("[T]he valuation of the [FOPs] shall be based on the best available information[.]"). The term "best available information" is not defined. *See QVD Food Co.*, 658 F.3d at 1323. Commerce, therefore, defines the FOPs, based on information that it uncovers in an investigation or review, and selects the best available information to value that FOP. However, limiting that discretion, Commerce's determination must be reasonable and based upon the record evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Notably in this case, Fimex, in response to Commerce's request to explain the materials used in the production process and methods to calculate each input, reported that the raw shrimp materials included "purchased frozen shrimp from domestic sources, purchased frozen shrimp from imports, and purchased raw shrimp and shrimp which comes from the Fimex farm." *See* Fimex VN's Resp. Section D Questionnaire at D-22, PD 164, bar code 3593103–01 (July 13, 2017) ("Fimex's SDQR"). Fimex explained that its raw shrimp inputs were reported by count-size; it did not specifically identify raw vannamei shrimp and black tiger shrimp as separate FOPs. *See id.* at D-23.[11] Commerce reasonably treated raw shrimp as a single FOP, of which vannamei shrimp and black tiger shrimp were constituent inputs.

[10] Commerce only applied the Bangladeshi NACA data to value Fimex's raw shrimp input, because it had separately valued FOPs at the farming stage and applied a different SV to frozen shrimp. *See* Analysis for the Final Results for Fimex VN at 3, CD 335, bar code 3752461–01 (Sept. 7, 2018).

[11] As discussed above, Vietnamese Respondents and Mazzetta are not arguing that Commerce should use Indonesian NACA data to value all raw shrimp; rather, they contend that

Second, given that Commerce had one raw shrimp FOP to value, it reasonably determined that the Bangladeshi NACA data was the best available information on the record, because it was most specific to that FOP. Although the Bangladeshi NACA data encompassed only black tiger shrimp prices, and the Indonesian NACA data reported both vannamei and black tiger shrimp prices, the Bangladeshi NACA data, unlike the Indonesian NACA data, reported a larger range of raw shrimp prices by count-size.[12] *See* Final Decision Memo. at 8, 11–12; *see also* VASEP SV Info. at Ex. SV-2, PD 187–88, bar code

Commerce should value vannamei shrimp with Indonesian NACA data and black tiger shrimp with Bangladeshi NACA data. Therefore, they view each species as a separate FOP. *See* Oral Arg. at 4:45–6:09, 7:20–8:40. Indeed, Mazzetta considers each product characteristic reflected in the CONNUMs, or control numbers, corresponds to a distinct FOP. *Id.* at 10:33–10:46. Vietnamese Respondents keenly observe that these characteristics are "baked in" to the valuation of the subject merchandise, because the characteristics are part of the control number and, therefore, integral in the comparison of normal value to export price. *See id.* at 12:28–12:55. However, Mazzetta does not persuade in suggesting that each characteristic reflected in each CONNUM itself represents a singular FOP. The CONNUM relates to the finished product. The statute identifies the FOPs as inter alia "quantities of raw materials employed," *see* 19 U.S.C. § 1677b(c)(3), and directs Commerce that the "valuation of the factors of production shall be based on the best available information[.]" *Id.* at § 1677b(c)(1). Moreover, treating each characteristic as a distinct FOP—be it species, count-size, cooked/raw, or de-veined/veined— could unduly complicate the exercise in requiring Commerce to apply its selection criteria to each—and to potentially look far beyond data in the primary surrogate country, thus introducing distortions.

[12] Commerce explained that record evidence indicated that count-size was more important than species in pricing raw shrimp. *See* Final Decision Memo. at 12–13; *see also* Final Calc. Memo. at 7–8. In the underlying proceeding—and in response to Vietnamese Respondents' comments— Commerce considered whether, as alleged, species, rather than count-size, was more price determinative for raw shrimp. *See* Final Decision Memo. at 12–13. First, Commerce examined the Bangladeshi and Indonesian NACA data sets as well as Fimex's raw sales data. *See id.* (citing Final Calc. Memo. at 7). Commerce considered that the NACA data indicated a pricing relationship with count-size but not with species. *Id.* at 12. Second, in its review of Fimex's raw sales data, Commerce noted that the "pricing structure of both black tiger shrimp and vannamei shrimp, by count-size, is more distinct and predictable than the pricing structure between the two species of the same count-size." Final Calc. Memo. at 7; *see also* Final Decision Memo. at 12–13. Before the court, Vietnamese Respondents argue that, with respect to Commerce's analysis of the NACA data sets, Commerce wrongly discerned a relationship of price and count-size in the NACA data itself, and also contend that if Commerce controlled for other physical characteristics in its analysis of Fimex's sales data, then a relationship between shrimp species and price would be revealed. *See* Pls.' Br. at 18–22; *see also* Consol. Pl.'s Br. at 24–26. Yet even if, as Vietnamese Respondents allege, this analysis is flawed, *see* Pls.' Br. at 18–22; Consol. Pl.'s Br. at 24–26, Commerce also considered the distortive effects of extrapolation using data that did not capture all reported count-sizes and data from a tertiary surrogate country. *See* Final Decision Memo. at. 6–12, 13–14. Thus, given these other concerns, and the importance of count-size specificity, Commerce reasonably determined, from the totality of the evidence, that the Bangladeshi NACA data was the best available information to value the raw shrimp input. *See id.* at 7–8; *see also Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) ("[T]he Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion.").

3605123–01 (Aug. 7, 2017).[13] Specifically, reviewing Fimex's raw shrimp allocation data, Commerce observed that Fimex reported raw shrimp inputs by fifteen different count-sizes. Final Decision Memo. at 11. The Bangladeshi NACA data would cover nine of those fifteen count-sizes, and the Indonesian NACA data would cover only five count-sizes. *Id.* Commerce reasonably "place[d] greater weight" on count-size, than species, because the subject merchandise and the raw shrimp input were both reported by count-size. *Id.* at 8.

Commerce also explained its concern that using the Indonesian NACA data would result in more extrapolation of SVs in the calculation of normal value than applying the Bangladeshi NACA data. Fimex calculated its raw shrimp consumption by count-size[14] using a "mix ratio" of different count-size bands, meaning that Fimex may have consumed a mix of different count-sizes to produce a final product falling within a single count-size band.[15] *See* Final Decision Memo. at 11 n.49; Analysis for the Final Results for Fimex VN at 5, CD 335, bar code 3752461–01 (Sept. 7, 2018) ("Final Calc. Memo.") (citing Fimex's SDQR at D-24). As a result, the count-sizes consumed do not fully correspond to the count-sizes sold. *See* Final Decision Memo. at 5; Final Calc. Memo. at 5.[16] Commerce estimated, that due to the mix ratio reporting and the necessity to extrapolate data to fill in the count-size bands not covered by the NACA data sets, it would, in turn, rely on extrapolated SVs for some of Fimex's sales observations. *See* Final Decision Memo. at 11; Final Calc. Memo. at 5. Commerce calculated that far more sales observations would require extrapolation using the Indonesian NACA data as opposed to the

[13] Commerce also noted that the NACA study containing shrimp prices from Bangladesh were a "reliable and objective source of fresh, whole shrimp prices available to the public" that it had used in prior administrative reviews. Final Decision Memo. at 8 (citing Prelim. Decision Memo. at 15).

[14] Specifically, Fimex reported its raw shrimp by the field "RMX," where "X" corresponds to the number of raw shrimp ("count-size") pieces in one pound. *See* Fimex's SDQR at D-17–18. For example, "RM02" comprises 8 to 12 pieces of shrimp per pound, while RM14 designates 201 to 300 pieces of shrimp per pound. *See id.* at D-18. Fimex had designated its frozen and farmed shrimp inputs with different RM variables, "RM_FARM" and "RM_FROZEN" respectively. *Id.* at D-22–23.

[15] Commerce provided the following example: "[T]he RM mix for black tiger shrimp . . . which was sold under reported count-size code [[ ]] denoting a count size range of [[ ]] corresponds to the reported RM codes mix ratio of [[ ]]. Thus, a count-size range of [[ ]] sold is not strictly composed of those exact shrimp sizes in the reported FOP database, and the normal value for this CONNUM is composed of SVs for all [[ ]] RM codes as the mix ratio to produce the count-size range sold: [[ ]], denoted as only SIZEU [[ ]] in the sales data." Final Calc. Memo. at 5 (citing Fimex's SDQR at D-24).

[16] To illustrate this point, Vietnamese Respondents note that "Fimex might have consumed a mix of RM03, RM04, and RM05 to produce a final product with a count-size falling within RM04." Pls.' Br. at 15.

Bangladeshi NACA data.[17] *See id.* Commerce further noted that the extrapolation of smaller count-sizes only, required by both data sets, would have less impact on the calculation of normal value, than the additional extrapolation of higher-value, larger count-size raw shrimp required only by the Indonesian NACA data.[18] *See* Final Decision Memo. at 11. Therefore, the Bangladeshi NACA data would require less extrapolation, and risk less distortion, in the calculation of normal value than the Indonesian NACA data. *Id.* at 9–12.

Moreover, Commerce reasonably sought to further limit possible distortion that could be introduced by resorting to a tertiary surrogate country's data.[19] Commerce determined that Bangladesh fulfilled the statutory requirements and its selection criteria to be the

---

[17] Commerce noted that "[[ ]] sales (roughly 63 percent) of Fimex's [[ ]] sales observations of vannamei are composed of RM mix ratios that would require extrapolation if Indonesia[n] NACA SV data were used. Conversely, . . . using the Bangladeshi NACA SV data, we used extrapolated SV data for only RM10 through RM15, which accounts for [[ ]] sales (roughly [[ ]] percent) of Fimex's [[ ]] sales of vannamei, based on the mix ratios reported for sales of SIZEU 10, 11, 13, 15, and 17." Final Calc. Memo. at 5.

[18] Vietnamese Respondents take issue with Commerce's characterization of the extent of extrapolation required by the Indonesian NACA data. According to Plaintiffs, using the Indonesian NACA data would mean that "[s]ixty-three percent of vannamei sales would include an input with a count-size requiring an extrapolated SV[,]" not that "63 percent of the count-sizes used to produce vannamei sales to the United States would require an extrapolated SV." Pls.' Br. at 15. Vietnamese Respondents seem to be parsing Commerce's statement that "[w]e also note that [[ ]] sales (roughly 63 percent) of Fimex's [[ ]] sales observations of vannamei are composed of RM mix ratios containing RMs that would require extrapolation if Indonesia NACA SV data were used." However, in the very next sentence, Commerce notes that "using the Bangladeshi NACA SV data, we used extrapolated SV data for only RM10 through RM15, which accounts for [[ ]] sales (roughly [[ ]] percent) of Fimex's [[ ]] sales of vannamei, based on the RM mix ratios reported for sales of SIZEU 10, 11, 13, 15, and 17." *See* Final Calc. Memo. at 5; *see also* Final Decision Memo. at 11 n.49. Thus, it is reasonably discernable that Commerce expressed a concern about the inclusion of an extrapolated count-size input in Fimex's vannamei sales observations.

Moreover, Plaintiffs do not appear to dispute the 63 percent figure—and indeed correct the calculated percentage to 63.6—but focus on the potential impact of extrapolation on normal value. *See* Pls.' Br. at 15–17 & n.65. Plaintiffs estimate from Fimex's shrimp consumption volumes that using the Indonesian NACA data results in only an additional [[ ]] of vannamei shrimp, by volume, to be valued using extrapolated data. *Id.* at 17. However, as noted above, Commerce expressed concern about the inclusion of extrapolated SVs with respect to Fimex's sales observations. *See* Final Calc. Memo. at 5. Even accepting Plaintiffs' calculation, they acknowledge that their estimate of [[ ]] additional extrapolation "would be spread across several final products." *See* Pls.' Br. at 17. The use of the Indonesian NACA data would result in more extrapolation, in terms of sales observations and by volume, and Commerce has discretion to minimize any distortive effect.

[19] Commerce, however, used data from India to value four non-shrimp FOPs for which Bangladesh could not provide SVs (i.e., shrimp scrap byproduct, shrimp larvae, shrimp feed, and labor). *See* Final Decision Memo. at 8 (citing Prelim. Decision Memo. at 3, 6, 9). Commerce explained that India was at the same level of economic development as Vietnam. *See* Prelim. Decision Memo. at 24. Moreover, Commerce considered the data from India to value these FOPs to be more specific than other data sources on the record. *See id.*

primary surrogate country, unlike Indonesia. *See* Prelim. Decision Memo. at 13–17.[20] Although Commerce looks to other countries to find the best available information to value a FOP where data from the primary surrogate country is unavailable or unreliable, *see, e.g.*, *Jiaxing Brother Fastener Co. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1326, 1332–33 (2014), here, Commerce reasonably determined that the Bangladeshi NACA data is a reliable SV data source. *See* Final Decision Memo. at 8 (citing Prelim. Decision Memo. at 15). Commerce's determination is supported by its reasonable concern that using data sources from multiple countries would potentially lead to distortive and inaccurate calculations. *See id.* at 13–14. In the absence of any authority requiring it to use data from multiple countries to value raw shrimp, Commerce chose to value the raw shrimp FOP with data from the primary surrogate country Bangladesh. *See* 19 C.F.R. § 351.408(c)(2). Commerce's explanation for its refusal to supplement the Bangladeshi data is reasonable.

Vietnamese Respondents' and Mazzetta's arguments that Commerce erroneously emphasized count-size specificity to the sacrifice of species specificity are unavailing, because their contentions proceed from the erroneous premise that Commerce had two species-specific FOPs to value.[21] *See* Pls.' Br. at 9–24; Consol. Pl.'s Br. at 12–30; *see also* Pls.' Confidential Reply Supp. R. 56.2 Mot. J. Agency Record at 2 & n.2, ECF No. 42, Aug. 16, 2019 ("Pls.' Reply Br."); [Consol. Pl.'s] Reply Br. Supp. Mot. J. Agency R. at 2, 16, ECF No. 41, Aug. 16, 2019 ("Consol. Pl.'s Reply Br."). According to Vietnamese Respondents,

[20] Bangladesh met the statutory criteria under 19 U.S.C. § 1677b(c)(4)(A)–(B) as a country at the same level of economic development as Vietnam and as a significant producer of comparable merchandise. *See* Prelim. Decision Memo. at 13–14, 17; *see also* Final Decision Memo. at 6–7. Further, consistent with its selection criteria, Commerce found Bangladesh to provide the best available SV information for most FOPs, including, in its view, "the critical FOP" raw shrimp. Final Decision Memo. at 7 (citing Prelim. Decision Memo. at 15). Moreover, only Bangladesh, unlike other countries under consideration, had SV information for direct materials and surrogate financial statements. Prelim. Decision Memo. at 15. Therefore, Mazzetta's argument that Indonesia is a legally permissible surrogate country is misplaced, as Commerce found that only Bangladesh fulfilled the statutory requirements and its selection criteria. *See* Consol. Pl.'s Br. at 14–16.

[21] Vietnamese Respondents, during oral argument, cited to Commerce's seventh administrative review in this investigation as authority for species-specific FOPs. *See* Oral Arg. at 35:10–35:40; *see also Certain Frozen Warmwater Shrimp from [Vietnam]*, 78 Fed. Reg. 56,211 (Sept. 12, 2013) (final results of [ADD] admin. review, 2011–2012), and accompanying Issues and Decision Memo. for the Final Results, Sept. 6, 2013, *available at* https://enforcement.trade.gov/frn/summary/vietnam/2013–22228–1.pdf (last visited Jan. 9, 2020) ("AR7 Final Decision Memo."). Plaintiffs are mistaken. In that review, Commerce did not treat vannamei and black tiger shrimp as separate FOPs; rather, Commerce determined that the Indian data on the record, compared to the Indonesian data, was less specific in terms of both species and count-size, reporting just one count-size of vannamei shrimp. *See* AR7 Final Decision Memo. at 9–10. Commerce selected the Indonesian NACA data to value the raw shrimp input and was able to parse the data, by both count-size and species. *See id.*

Commerce, "[i]n exchange for count-size specificity for less than [[ ]] of Fimex's fresh shrimp input, [it] sacrificed species specificity for [[ ]] of the fresh shrimp that Fimex consumed" when using the Bangladeshi NACA data. Pls.' Br. at 17.[22] Mazzetta similarly avers that "the trade-off for not using surrogate values that were specific to all of the white vannamei" was slightly less extrapolation. Consol. Pl.'s Br. at 22.[23] Here, however, Commerce reasonably selected raw shrimp as a single FOP, and reasoned that the most important characteristic to specifically value this single FOP was count-size. As discussed above, Commerce reasonably determined that the Bangladeshi NACA data offered greater coverage as to count-size and had the benefit of being from the primary surrogate country. *See* Final Decision Memo. at 9, 11, 13–14. The court cannot say that Commerce's choice to elevate count-size specificity and to select Bangladeshi NACA data to value the raw shrimp FOP is unreasonable on this record. Commerce has discretion to make trade-offs in selecting the best available information to value FOPs, and, here, reasonably determined that for what the Bangladeshi NACA data lacked in species-specific coverage of both the vannamei and black tiger shrimp species was counterbalanced by wider count-size coverage. *See id.* at 9–11. Both the Bangladeshi and Indonesian NACA data sets were incomplete by not reporting all count-sizes and/or reflecting all species. Commerce, in selecting between two imperfect choices, reasonably "ma[de] a judgment call as to what constitutes the 'best' information[,]" here, the Bangladeshi NACA data to value raw shrimp, comprising the vannamei and black tiger species. *Lifestyles Enter., Inc. v. United States*, 751 F.3d 1371, 1378 (Fed. Cir. 2014).

---

[22] Specifically, Fimex consumed approximately 80% vannamei shrimp compared to 20% black tiger shrimp. *See* Final Calc. Memo. at 4.

[23] Mazzetta also argues that when Commerce incorporates physical characteristics into its control number, it must consider which data "reflect all of those characteristics[.]" *See* Consol. Pl.'s Reply Br. at 15; *see also* Oral Arg. at 10:33–10:46. Here, Commerce did select data that reflect the physical characteristics in the CONNUM, inclusive of count-size and species. *See* Final Decision Memo. at 9.

Mazzetta further contends that, compared to a prior administrative review, nearly [[ ]] of subject merchandise sold to the United States was vannamei shrimp, which indicates the importance of selecting a SV specific to an input that comprises the majority of sales. *See* Consol. Pl.'s Br. at 16–17. According to Mazzetta, Commerce's failure to "acknowledge the relevance of species-specific sales quantities in determining the importance of the characteristics of the normal value to which those sales are compared" merits remand. *Id.* at 18. However, Commerce addressed this argument in the underlying administrative proceeding. Commerce noted that sales of subject merchandise do not necessarily equate with the consumption of inputs to make a finished product. *See* Final Decision Memo. at 9. Moreover, Fimex reported that it comingles all shrimp—frozen or raw—at the production stage, meaning that U.S. sales data would not accurately represent Fimex's raw vannamei shrimp consumption. *See* Final Calc. Memo. at 3.

II. Commerce's Denials of Separate Rate Status to Certain Names

Vietnamese Respondents contend that Commerce's denials of SR status to Fimex's full business name, "Sao Ta Foods Joint Stock Company," as well as to two factory names, "Frozen Seafoods Factory No. 32" and "Seafoods and Foodstuffs Factory" (collectively, "Thuan Phuoc's factories" or "factories"), are unsupported by substantial evidence and not in accordance with law. *See* Pls.' Br. at 6–7, 24–46. Defendant and AHSTAC counter that Commerce reasonably denied SR status to the names. *See* Def.'s Br. at 12, 14, 31–44; *see also* Def.-Intervenor's Br. at 8, 22–30. For the reasons that follow, the court remands for further explanation or reconsideration the denial of SR status to the factory names "Frozen Seafoods Factory No. 32" and "Seafoods and Foodstuffs Factory" yet sustains Commerce's denial of SR status to the name "Sao Ta Foods Joint Stock Company."

A. Legal Standard

When Commerce investigates subject merchandise from an NME, such as Vietnam, Commerce presumes that the government controls export-related decisionmaking of all companies operating within that NME. Import Admin., [Commerce], Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving [NME] Countries, Pol'y Bulletin 05.1 at 1 (Apr. 5, 2005) ("Policy Bulletin 05.1"), *available at* http://enforcement.trade.gov/policy/bull05–1.pdf (last visited Jan. 9, 2020); *see also Antidumping Methodologies in Proceedings Involving [NME] Countries: Surrogate Country Selection and [SRs]*, 72 Fed. Reg. 13,246, 13,247 (Dep't 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 assigns an NME-wide rate, unless a company successfully demonstrates an absence of government control, both in law (de jure) and in fact (de facto). Policy Bulletin 05.1 at 1–2.[24]

[24] Commerce examines 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.*

To do so, a company submits a separate rate application ("SRA") or a separate rate certification ("SRC") (collectively, "separate rate forms").[25] Policy Bulletin 05.1 at 3–4; *see also* Pls.' Br. at Annex 2 ("SRA"); Pls.' Br. at Annex 3 ("SRC"). Under Commerce's practice, enumerated in Policy Bulletin 05.1 ("policy"), each company that exports subject merchandise to the United States must submit its own individual SRA, "regardless of any common ownership or affiliation between firms[.]" Policy Bulletin 05.1 at 5. Commerce limits its consideration to only companies that exported subject merchandise to the United States during the period of investigation or review.[26] *Id.* at 4–5. In addition, the policy sets out the requirement that applicants identify affiliates in the NME that exported to the United States during the period of investigation or review and provide documentation demonstrating that the same name in its SR request appears both on the business registration certification ("BRC") and on shipments declared to U.S. Customs and Border Protection ("CBP"). *Id.* at 4–5. The separate rate forms reflect these requirements. Question two of the SRA, like question seven of the SRC, asks whether the applicant "is identified by any other names . . . (i.e., does the company use trade names)" and requests applicants to provide BRCs and "evidence that these names were used during the [period of investigation or review]." *See* SRA at 10; *see* SRC at 7.

B. Thuan Phuoc's factories

With respect to the denial of SR status to Thuan Phuoc's factories, Plaintiffs argue that Commerce's determinations are not supported by substantial evidence, because the record indicates that the factories were not separate companies; and, even if they were separate companies, Commerce would have sufficient record evidence to nonetheless grant SR status. *See* Pls.' Br. at 26–32. Plaintiffs further challenge Commerce's determinations as arbitrary and capricious and not in accordance with law, because, in previous administrative reviews, Commerce had granted separate status to the factories, and, further, Commerce failed to provide notice of an SRA deficiency and an opportunity to remedy that deficiency. *See id.* at 32–40. Defendant and AHSTAC counter that Commerce reasonably denied Thuan Phuoc's factories SR status because record evidence indicated that

[25] In an SRC, like an SRA, an applicant provides information and supporting documentation that it is not subject to NME control. *See* Final Decision Memo. at 19. Firms that currently hold a separate rate submit an SRC, while firms that do not hold a separate rate or have had changes to corporate structure, ownership, or official company name submit an SRA. *See* SRA at 2.

[26] Although Policy Bulletin 05.1 refers to investigations, the SRA incorporates Policy Bulletin 05.1 by reference. *See* SRA at 2.

"Frozen Seafoods Factory No. 32" and "Seafoods and Foodstuff Factory" were members of Thuan Phuoc's "group" and not its trade names that could benefit from its SR status. *See* Def.'s Br. at 35–40; Def.-Intervenor's Br. at 22–28. Further, Defendant and AHSTAC defend Commerce's determination as not arbitrary and capricious and in accordance with law. *See* Def.'s Br. at 40–42; Def.-Intervenor's Br. at 22–28.

Commerce's determination that Thuan Phuoc's factories did not qualify for SR status is unsupported by substantial evidence, because Commerce failed to consider the documentary evidence included with Thuan Phuoc's SRC and explain why, in view of that evidence, the factory names did not qualify as trade names of Thuan Phuoc. Pursuant to 19 U.S.C. § 1677f-1(c), Commerce assigns dumping margins to "exporter[s]" and "producer[s]" of subject merchandise. In NME cases, exporters that successfully rebut a presumption of governmental control may avert an NME-wide dumping margin. *See* Policy Bulletin 05.1 at 1–2. Here, it is undisputed that Thuan Phuoc established its eligibility for a separate rate. If Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory are trade names and therefore the same entity as Thuan Phuoc, then Commerce's finding that Thuan Phuoc operates independently of the government in its export activities would extend to these factories and their trade names. *See id.* at 2. Thus, Frozen Seafoods Factory No. 32 and Seafoods and Foodstuff Factory can rebut the presumption of government control by demonstrating that they are trade names or the same entity as Thuan Phuoc.

Here, Thuan Phuoc, an exporter of subject merchandise, requested that it and its factories' names be granted separate rate status. *See* [SRC] of [Thuan Phuoc], PD 71, bar code 3572148–01 (May 15, 2017) ("Thuan Phuoc SRC"). Commerce granted Thuan Phuoc SR status but denied the same to its factories, when Thuan Phuoc had indicated the factories were under common ownership, identified them as trade names of Thuan Phuoc, and provided BRCs and export documentation.[27] *See* Final Decision Memo. at 22–23; Thuan Phuoc SRC at 1–8. Commerce, in denying SR status to the factory names, focused narrowly on the instructions to the SRA that define a "trade name" as "other names under which the company does business[,]" exclusive of "names of any other entities in the firm's 'group,' affiliated or other-

[27] Although, in the narrative portion of the SRC, Thuan Phuoc did not call the factories' names "trade names" or d/b/a names—instead referring to them as "separate factories" or "branch factories"—it checked off the form's boxes indicating that it sought SR status for these factory names through the conduit of "trade names." *See generally* Thuan Phuoc SRC. Thuan Phuoc did entitle one table column with "trade names," and listed the factory names within that category, in its response to question eight of the SRC. *See id.* at 6–7.

wise."[28] *See* Final Decision Memo. at 18; *see also* Thuan Phuoc SRC at 5 n.3. Commerce noted that the factory names appeared on Thuan Phuoc's BRC as "branch factories," which, in its view, indicated that the factories were part Thuan Phuoc's "group," not names under which it does business. Final Decision Memo. at 23. Therefore, Commerce found that these "branch factories" fell within the exception to the definition of a trade name and could not benefit from Thuan Phuoc's SRC; instead, Commerce stated they must submit their own SRAs. *See id.* (quoting Policy Bulletin 05.1 at 5 ("Each applicant seeking [SR] status must submit a separate . . . individual application regardless of any common ownership[.]")).

Commerce assumed the very point at issue and did not consider record evidence that detracts from its determination.[29] Thuan Phuoc supplied documentary evidence that these factories are trade names, the same entity as Thuan Phuoc. Commerce failed to consider the copies of the factories' BRCs, each entitled "Certificate of Activities Registration and Tax Registration of Branch" ("branch certifications"), that Thuan Phuoc included with its application.[30] *See* Thuan Phuoc SRC at Ex. 1. Although the branch certifications had registration numbers that differed from that on Thuan Phuoc's BRC, both branch certifications identified Thuan Phuoc as the "[n]ame of the enterprise." *See id.*[31] Notably, these individual branch certifications suggest the factories are divisions under the enterprise Thuan Phuoc, rather than members of its "group." *See id.*; *see also* SRC at 7 n.3 (defining "trade name"). Commerce must explain why it nonetheless

[28] Commerce preliminary denied SR status to the factories, because it determined that the names were not on a currently valid BRC. *See* Trade Names Memo. at 2–4; Prelim. Decision Memo. at 9–10. However, in the Final Decision Memo., Commerce conceded that it had "inadvertently" miscategorized the reason why it had denied SR status, *see* Final Decision Memo. at 23 n.100, and, instead, offered a new rationale, recounted above.

[29] In the Final Decision Memo., Commerce prefaced its discussion with a generic explanation as to why it had denied SR status to trade names, including Thuan Phuoc's factories. None of those reasons—i.e., non-inclusion of names on BRCs, lack of evidence that the names were used commercially to export subject merchandise during the POR, and superseding new names following changed circumstances determinations—appear to apply to Thuan Phuoc. Final Decision Memo. at 16. As Commerce itself notes, Thuan Phuoc's BRC listed the factories' names. *See id.* at 23.

[30] Thuan Phuoc's factories' branch certifications have business registration numbers and grant dates that differ from Thuan Phuoc's BRC. *See* Thuan Phuoc SRC at Ex. 1. Unlike Thuan Phuoc's BRC, the branch certifications do not have sections regarding registered capital, abbreviated names, or shareholders. *See id.*

[31] Consistent with its prior practice, Commerce considered only the most recently amended BRCs, because when a company amends its BRC, it surrenders the preceding amendment. *See* Final Decision Memo. at 19–20; *see e.g., Certain Frozen Warmwater Shrimp from [Vietnam]*, 81 Fed. Reg. 62,717 (Sept. 12, 2016) (final results of [ADD] admin. review, 2014–2015), and accompanying Issues and Decision Memo. for the Final Results at 79–81, A-552–802 Sept. 6, 2016, *available at* https://enforcement.trade.gov/frn/summary/vietnam/2016–21882–1.pdf (last visited Jan. 9, 2020).

chose to view Thuan Phuoc's factories as separate entities from, rather than divisions of, Thuan Phuoc, given the factories' branch certifications.

Commerce also did not consider Thuan Phuoc's invoices from the factories, which listed the respective factory name and not Thuan Phuoc's. *See id.* at Exs. 2-B–C. According to Policy Bulletin 05.1, an exporter must use the same name as the legal business name in its commercial documents submitted to CBP. *See* Policy Bulletin 05.1 at 5 ("All shipments to the United States declared to [CBP] must identify the exporter by its legal business name. This name must match the name that appears on the exporter's business license/registration documents[.]"). Therefore, these invoices seem to support the factories' claim that they have exported during the POR as a division of Thuan Phuoc. Commerce however disregarded this evidence because it concluded these two factories were distinct entities which were required to file their own SRA.[32] Here, because Commerce did not appear to consider the information contained in Thuan Phuoc's SRC or the supporting documentation, it unreasonably denied SR status to Thuan Phuoc's factories.[33] *See* Final Decision Memo. at 22–23.[34]

C. Sao Ta Foods Joint Stock Company

Vietnamese Respondents challenge Commerce's denial of SR status to Fimex's full business name, "Sao Ta Foods Joint Stock Company," faulting Commerce for not explaining the basis of its denial. *See* Pls.' Br. at 41–46. Further, Plaintiffs contend its reliance on Policy Bulle-

[32] Vietnamese Respondents contend that Commerce adopted an unreasonable reading of Policy Bulletin 05.1 and the SRA instructions in requiring Thuan Phuoc's factories, which are one-in-the-same as the applicant Thuan Phuoc, to submit separate SRAs. *See* Pls.' Br. at 30–31. As explained above, Commerce's determination that the factories needed to submit individual SRAs is unsupported by substantial evidence, because record evidence does not support its finding that the factories were separate companies part of Thuan Phuoc's "group" rather than trade names of Thuan Phuoc. See Final Decision Memo. at 22–23.

[33] Vietnamese Respondents contend that Commerce departed from its prior practice in declining to grant SR status to Thuan Phuoc's factories, when, in prior administrative reviews, Commerce had granted the factories SRs. *See* Pls.' Br. at 33–37; *see also* Pls.' Reply Br. at 9–13. However, it is Commerce's practice to make SR determinations on a segment-by-segment basis and in view of the evidence on that proceeding's record. *See Qingdao Sea-Line Trading Co.*, 766 F.3d at 1387 ("[E]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record.").

[34] According to Vietnamese Respondents, Commerce was required under 19 U.S.C. § 1677m(d) to provide notice to Thuan Phuoc that its SRA would not also serve as the SRA for its factories and, further, to consider information on the record to nonetheless determine whether the factories were entitled to SR status pursuant to 19 U.S.C. § 1677m(e). *See* Pls.' Br. at 37–40. Given that the court remands the denial of SR status to the factory names, the court does not address whether Commerce had such statutory obligations. Relatedly, the court does not address AHSTAC's contention that this argument is waived, because it was not raised before Commerce. See Def.-Intervenor's Br. at 28.

tin 05.1 for its determination is contrary to law. *See id.*; *see also* Pls.' Reply Br. at 20–23. Defendants and AHSTAC respond that Commerce reasonably found that Sao Ta Foods Joint Stock Company was not eligible for a SR because there was no evidence of use of this trade name on the record. *See* Def.'s Br. at 42–44; *see also* Def.-Intervenor's Br. at 28–30.

The court sustains Commerce's determination. Policy Bulletin 05.1 directs Commerce to consider whether companies are independent from government control with respect to export activities.[35] *Id.* at 2. The policy explains that Commerce's SR test focuses on exporters and export-related decisions, rather than producers and, as such, requires a company to have exported subject merchandise during the POR. *See id.* at 1–2. Further, the policy directs Commerce to consider whether a company is independent from government control with respect to its export functions. *Id.* at 2. Commerce, consistent with that policy, requires each SR applicant to provide the name of the exporting entity, and any trade name(s) under which it may export, as identified in its BRC, and demonstrate that such entity name and/or trade name(s) match the name on documents for declared shipments to CBP. *See id.* at 5; *see also* SRA at 10.[36] Here, although Fimex listed the name "Sao Ta Foods Joint Stock Company" in response to question two of the SRA, it did not include export documentation demonstrating that the name had been used during the POR. *See* [SRA] of Sao Ta Joint Stock Company, aka FIMEX VN at 5, CD 71, bar code 3573086–01 (May 17, 2017). If a company has not exported, Commerce has nothing to apply its test that assesses independence from the NME government with respect to the company's export functions. *See, e.g.*, Policy Bulletin 05.1 at 2 (detailing Commerce's test to evaluate the absence of de jure and de facto governmental control). Commerce reasonably denied SR status to the name "Sao Ta Foods Joint Stock Company" because, as it explained, there was no record evidence that it had been used on export documents during the period of

[35] Commerce's test to determine de facto and de jure independence from an NME government focuses on a company's export activities. *See* Policy Bulletin 05.1 at 2. For example, in determining the absence of de facto control, Commerce considers, inter alia, whether the NME government sets or approves export prices. *Id.* at 2.

[36] Although Vietnamese Respondents concede that Fimex had not included export documentation with the full business name "Sao Ta Foods Joint Stock Company," they allege that Policy Bulletin 05.1 is arbitrary, both facially and as applied to Fimex. *See* Pls.' Br. at 41–46. Vietnamese Respondents' challenge that there is "no justification" for the policy does not find support. *Id.* at 44. Reasonably, Commerce requires that shipment documentation and BRCs serve as documentary evidence that a name is used by the entity seeking SR status, because Commerce focuses on whether a company's export-related activities are independent from the NME government in order to qualify for a SR. *See* Policy Bulletin 05.1 at 1–4. Fimex, consistent with that policy, was required to provide evidence that it had exported as "Sao Ta Foods Joint Stock Company" to receive a SR for that name.

review. *See* Final Decision Memo. at 15–21; *see also* Prelim. Decision Memo. at 10.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's final determination with respect to the denial of separate rate status to the names "Frozen Seafoods Factory No. 32" and "Seafoods and Foodstuffs Factory" is remanded for further explanation or consideration consistent with this opinion; and it is further

ORDERED that Commerce's final determination is sustained in all other respects; 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 the parties shall have 30 days thereafter to file comments; and it is further

ORDERED that the parties shall have 15 days thereafter to file replies to comments on the remand determination.

Dated: January 16, 2020
New York, New York

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

Slip Op. 20–9

THE NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiff, THE BEER INSTITUTE, Intervenor-Plaintiff v. UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES CUSTOMS AND BORDER PROTECTION, STEVEN T. MNUCHIN, in his Official capacity as secretary of the Treasury, and JOHN SANDERS, in his official capacity as Acting Commissioner of United States Customs and Border Protection, Defendants.

Before: Jane A. Restani, Judge
Court No. 19–00053

[The court holds unlawful the challenged aspects of the agencies' Final Rule]

Dated: January 24, 2020

Peter D. Keisler, Virginia A. Seitz, Tobias S. Loss-Eaton, and *Barbara G. Broussard*, Sidley Austin, LLP, of Washington, D.C., *Catherine E. Stetson* and *Susan M. Cook*, Hogan Lovells US LLP, of Washington, D.C., *Peter C. Tolsdorf* and *Leland P. Frost*, Manufacturers' Center for Legal Action, of Washington, D.C., for Plaintiff The National Association of Manufacturers.

James E. Tysse, Lars-Erik A. Hjelm, Raymond P. Tolentino, and *Devin S. Sikes*, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, D.C., for Intervenor-Plaintiff The Beer Institute.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of

Justice, of New York, N.Y., and *Alexander J. Vanderweide*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendants United States Department of the Treasury, United States Customs and Border Protection, *Steven T. Mnuchin*, and *John Sanders*. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, Civil Division, U.S. Department of Justice, of Washington, D.C., *David M. Morrell*, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, of Washington, D.C., *Jeanne E. Davidson*, Director, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., *Claudia Burke*, Assistant Director, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of counsel on the brief were *Daniel J. Paisley*, U.S. Department of the Treasury, of Washington, D.C., and *Alexandra Khrebtukova*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

John M. Peterson, Richard F. O'Neill, and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., for *Amicus Curiae* Customs Advisory Services, Inc.

OPINION AND ORDER

Restani, Judge:

The question before the court is how far should it go in interpreting statutory provisions so that they are not inconsistent with regulations that appear to address valid administrative and economic concerns of the agencies responsible for the implementation and operation of the statute. The answer is not very far from the actual words of the statute, particularly where Congress acts with presumed knowledge of the problem the agencies attempt to address in their regulations. In other words, Congress has acted. If the agencies wish a different result, they must seek it from Congress, not a court.

I. BACKGROUND

This case involves the interaction of federal excise taxes and duty drawback under the Tariff Act of 1930. Federal excise taxes are imposed on certain domestically consumed goods, regardless of origin, such as wine, beer, spirits, tobacco, and petroleum products.[1] Before the changes at issue, the regulations defined drawback as "the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation, and the refund of internal revenue taxes paid on domestic alcohol as prescribed in 19 U.S.C. § 1313(d)." 19 C.F.R. § 191.2(i) (2015). Although drawback can occur in multiple ways, the iteration most relevant to this case is

[1] Federal excise taxes, however, generally are not paid on exported goods if exported from a bonded facility or are refunded if paid and then exported. *See, e.g.* 26 U.S.C. § 5001(a)(1) (imposing a tax on all "distilled spirits produced in or imported into the United States"); 26 U.S.C. § 5214(a)(4) (noting that spirits withdrawn from a bonded premise and exported shall be withdrawn "without payment of tax"); 26 U.S.C. § 5062(b) (authorizing a drawback of excise tax paid or determined on exported distilled spirits or wine).

"substitution drawback." *See* 19 U.S.C. § 1313(j)(2) (2018)[2] (substitution for unused merchandise).[3] Simply put, a party[4] is entitled to substitution drawback on the taxes, fees, and duties (collectively "charges") paid on imports when other merchandise is exported[5] under the same Harmonized Tariff Schedule of the United States ("HTSUS") subheading in a one-to-one fashion.[6] *See* 19 U.S.C. § 1313(j)(2); 19 C.F.R. § 191.22(a) (2019).[7] This may occur whether or not certain taxes were paid on the corresponding exported merchandise. *See* 19 U.S.C. §§ 1313(j)(2), (l)(2). The resulting non-collection of these taxes is what the agencies attempted to address.

For several years, companies that both export and import wine have been claiming drawback on charges paid on the imported wine on the basis of their substituted exports, due in part to a relaxed substitution standard.[8] For example, if a company imported 100 bottles of red wine and then exported 100 bottles of red wine, that company could claim drawback for nearly all charges assessed on the imported merchandise. The wine substitution exception has resulted in a near total refund of the excise taxes paid on the imported wine. This has occurred even though the substituted exported wine was either not subjected to any excise tax or had received a complete refund of any previously paid excise taxes. Customs and Border Protection ("Customs") claims that this treatment of wine was a mistake that began occurring at the Port of San Francisco in 2004.

---

[2] All further citations to the U.S. Code are to the 2018 edition unless otherwise indicated.

[3] Substitution drawback can also occur under 19 U.S.C. §§ 1313(b) (manufacturing substitution drawback) and 1313(p) (finished petroleum derivatives), but it is drawback under 19 U.S.C. § 1313(j)(2) that is of primary interest to this case.

[4] Although a party is often both exporter and importer, a party can transfer its right to drawback. *See, e.g.*, 19 U.S.C. §§ 1313(b)(2)(A–C); 1313(j)(2).

[5] In the case of a drawback claim made under 19 U.S.C. § 1313(j)(2), rather than exporting the substituted good, it can be destroyed under the supervision of Customs and Border Protection ("Customs"). *See* 19 U.S.C. § 1313(j)(2).

[6] As described below, the substitution standard has changed over the years and wine has been afforded special treatment.

[7] All further citations to the Code of Federal Regulations are to the 2019 edition unless otherwise indicated.

[8] Since 2008, drawback has been allowed for wine in situations where the imported wine and the exported wine are the same color and the price variation between the imported wine and the exported wine does not exceed 50 percent. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234 §15421, 122 Stat. 923, 1547 (2008) *codified as amended* (19 U.S.C. § 1313 (j)(2) (2008)). In contrast, before the passage of the Trade Facilitation & Enforcement Act of 2015 ("TFTEA"), in the case of substitution for unused merchandise drawback, goods had to be "commercially interchangeable." *See* 19 U.S.C. § 1313(j)(2) (2008). For manufacturing substitution drawback, goods had to be of the "same kind and quality." *See* 19 U.S.C. § 1313(b) (2008).

See Modernized Drawback, 83 Fed. Reg. 37,886, 37,896 (Aug. 2, 2018) ("Proposed Regulation"). Although Customs identified the issue and expressed concern on multiple occasions to Congress, as detailed *infra*, no statute was passed to curtail the practice. After repeated Congressional inaction, Customs and the Department of the Treasury ("Treasury") (collectively "the agencies") passed regulations to stop the wine industry from continuing to benefit from what the agencies refer to as "double drawback"[9] and to ensure that other industries would not attempt to benefit from the same scheme following the liberalization of the substitution drawback requirements by the Trade Facilitation & Enforcement Act of 2015 ("TFTEA") . Modernized Drawback, 83 Fed. Reg. 64,942, 64,960–61 (Dec. 18, 2018) ("Final Rule").

The Final Rule makes two fundamental changes to the drawback regime. First, the agencies amended the regulations to "clarify" that "drawback" and "drawback claim" includes a "refund or remission of other excise taxes pursuant to other provisions of law." 19 C.F.R. § 190.2. With this definition, the agencies characterize the export of merchandise even without excise tax "paid or determined" as a claim for drawback. Second, the agencies amended various provisions to limit drawback to the amount of taxes paid and not previously refunded. *See* 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.22(a), and 191.32(b)(4). The Final Rule prevents a domestically produced exported good, that would have been subject to the excise tax if made available for domestic use, from satisfying a claim for substitution drawback under the language of 19 U.S.C. § 1313(j)(2).

Plaintiff, the National Association of Manufacturers ("NAM"), challenges these aspects of the Final Rule as violative of the governing statute, arbitrary and capricious, and impermissibly retroactive. Pl. Nat'l Ass'n of Mfrs. Br. in Supp. of its Mot. for J. on the Agency R., at 14–54, ECF. No. 20–1 (June 24, 2019) ("NAM Br."). NAM and *Amicus Curiae*, Customs Advisory Services Inc. ("CASI"), state that the language of 19 U.S.C. § 1313(j)(2) forecloses the agencies' interpretation of 19 U.S.C. § 1313(v)[10] as section 1313(j)(2) states that if certain conditions are met then drawback shall be refunded "notwithstand-

[9] The court will instead refer to what is occurring as "zeroed excise tax," although it recognizes that this is slightly inaccurate given that one percent of the excise tax is ultimately paid on the imported good.

[10] "Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback; except that appropriate credit and deductions for claims covering components or ingredients of such merchandise shall be made in computing drawback payments." 19 U.S.C. § 1313(v).

ing any other provision of law." NAM Br. at 20–23; Br. of *Amicus Curiae*, Customs Advisory Servs. Inc., at 5–7, 23–24, ECF No. 21–2 (June 24, 2019) ("CASI Br."). CASI also notes that the agencies' understanding of 19 U.S.C. § 1313(v) conflicts with section 1313(l)(2), which provides for the calculation of substitution drawback. *See* CASI Br. at 6–9. Further, NAM argues that the agencies overread 19 U.S.C. § 1313(v) to prohibit substitution drawback of excise taxes paid on imported goods when the substituted exported goods were exempt from excise tax. NAM Br. at 24–39. At base, NAM and CASI argue that an untaxed export is not a claim for drawback, even though, as NAM notes, in some situations Title 26, the Internal Revenue Code, refers to drawback in regard to taxes that have already been paid or determined prior to exportation. NAM Br. at 25–32; CASI Br. at 13–17. CASI further notes that Congress is familiar with the issue identified by the agencies and has considered statutory amendments that would have restricted drawback in some situations in the same way as the Final Rule, but that these amendments were not passed. CASI Br. at 17–21.

NAM also argues that agencies' Final Rule "would prevent the use of untaxed exports as the basis for drawback of *any taxes, duties, or fees at all*," which the agencies do not intend. NAM Br. at 32; Defs. Mem. in Resp. to the Mots. for J. on the Agency R., at 14–15, ECF No. 30 (Aug. 28, 2019) ("Def. Br."). NAM claims that even if this court evaluates the Final Rule under *Chevron* step two, the Final Rule is not reasonable and is arbitrary and capricious because it is unsupported by record evidence.[11] NAM Br. at 39–52 (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Finally, should the court find the Final Rule valid, NAM, CASI, and Plaintiff-Intervenor, the Beer Institute, contend that it is impermissibly retroactive. NAM Br. at 52–54; CASI Br. at 24–29; The Beer Inst. Mem. In Supp. of Rule 56.1 Mot. for J. on the Agency R., at 15–40, ECF No. 27–2 (June 25, 2019) ("Beer Br.").[12]

The defendants argue that the interpretation of 19 U.S.C. § 1313(v) is reasonable, historically supported, and necessary to reconcile the purpose of federal excise tax with the drawback regime. Def. Br. at 9–31. They aver that the understanding of "drawback" to include "unpaid tax liability that is extinguished" finds support in several

[11] Specifically, NAM claims that defendants' export incentive and revenue-loss rationales are unsupported. NAM Br. at 41–52.

[12] Plaintiff-Intervenor, The Beer Institute, submitted a brief that is concerned solely with the retroactive application of the Regulation. Because the court invalidates the Regulation sections at issue, these arguments are moot and are not discussed in detail.

statutory provisions and dictionary definitions. *Id.* at 13–15. Further, defendants' understanding as codified in the new Final Rule "preserves the integrity of both [the excise tax and drawback] regimes by vindicating the animating principle of each of them." *Id.* 15–18. They reject that the Final Rule conflicts with 19 U.S.C. §§ 1313(j)(2) and (l)(2), claiming that a contrary reading prevents 19 U.S.C.§ 1313(v) from acting as a necessary safeguard against abuse. *Id.* at 19–23. The defendants state that drawback is not limited to taxes paid, but extends to tax exemptions in order to prevent improper "piggybacking" of exemption benefits onto drawback benefits. *Id.* at 23–31; *see also* H.R. Rep. No. 103–361 at 130 (1993), *reprinted in* 1993 U.S.C. C.A.N. 2552, 2680 (stating that 19 U.S.C. § 1313 "codifies current Customs practice against 'piggybacking' other duty exemption benefits (foreign-trade zones, bonded warehouses and duty-free temporary importation) onto the drawback benefits."). Finally, defendants argue that the Final Rule was reasonably supported such that it is not arbitrary and capricious and that it does not apply retroactively. Def. Br. at 31–44.

NAM replies that the agencies are trying to revert to Customs' pre-2004 regime, when Congress clarified the law to allow for drawback of excise taxes among other consequences. NAM Reply in Supp. of its Mot. for J. on the Agency R., at 4–6, ECF No. 31 (Sep. 23, 2019) ("NAM Reply"). NAM further defends its assertion that an untaxed exportation is not a claim for drawback, which is "a claim to recover charges on *imports*" and "does not include any tax exemption, remittance or refund for charges on exports." *Id.* at 6–13. In particular, NAM notes that if defendants' claim that the new definition of drawback was long-understood to include refunds and remissions, then the agencies would not have needed to amend the definitions of "drawback" and "drawback claim" between the notice of proposed rulemaking and the Final Rule to include the phrase "[m]ore broadly drawback also includes the refund and remission of other excise taxes pursuant to other provisions of law." *See id.* at 9; *compare* Proposed Regulation, 83 Fed. Reg. at 37,922 *with* Final Rule, 83 Fed. Reg. at 64,998.

II. JURISDICTION AND STANDARD OF REVIEW

Petitioners bring a challenge under 28 U.S.C. § 1581(i), which the court reviews under the Administrative Procedure Act ("APA"). 28 U.S.C. § 2640(e); *see also Quiedan Co. v. United States*, 927 F.3d 1328, 1331 (Fed. Cir. 2019). An agency final rule must be set aside if the court holds it to be "arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citations omitted).

III. DISCUSSION

In determining whether the Final Rule conflicts with the statute, the court applies the two-step framework established in *Chevron*, 467 U.S. at 842–43. First, the court must ascertain whether Congress has "directly spoken to the precise question at issue." *Id.* at 842. If Congress's intent is clear then "that is the end of the matter," as the agency and the court must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If the statute is "silent or ambiguous with respect to the specific issue" then the court must determine whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843. For the reasons stated below, the court finds that the inquiry ends at step one because the Final Rule conflicts with the unambiguous text of the statute.

A. The Definition of Drawback

To prevail, the agencies must succeed in both their redefinition of drawback, particularly for the purposes of the "double drawback" prohibition of 19 U.S.C. § 1313(v), and in their interpretation of numerous subsections of 19 U.S.C. § 1313. They fail in both.

Defendants claim that "drawback" includes instances in which "an unpaid tax liability has been extinguished." Def. Br. at 10. Support for this proposition is found primarily in certain provisions of Title 19 and 26 that use the phrase "drawback equal in amount to the tax found to have been paid or determined." *Id.* at 11–12.[13] Defendants assert that "it is clear the term 'drawback' encompasses both remissions and refunds, applies to excise taxes as well as other duties and fees, and covers both exports and imports." *Id.* at 14.

The agencies amended the applicable regulations to reflect this understanding of drawback. Prior to the changes at issue, the applicable regulation defined drawback as:

> Drawback means the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation, and the refund of internal revenue taxes paid on domestic alcohol as prescribed in 19 U.S.C. 1313(d) (see also § 191.3 of this subpart).

[13] The government also cites a definition of drawback contained in a case regarding remission of duties by the German government. *See United States v. Passavant*, 169 U.S. 16 (1898). The court does not find this case instructive, as it interprets foreign law and was issued long-before the Tariff Act of 1930.

19 C.F.R. § 191.2(i) (2015). The new regulation reads:

> Drawback, as authorized for payment by CBP, means the refund, in whole or in part, of the duties, taxes, and/or fees paid on imported merchandise, which were imposed under Federal law upon entry or importation, and the refund of internal revenue taxes paid on domestic alcohol as prescribed in 19 U.S.C. 1313(d). More broadly, drawback also includes the refund or remission of other excise taxes pursuant to other provisions of law.

19 C.F.R. § 190.2. Although most of the changes to the definition are cosmetic, the addition of the final sentence substantially expands the definition of drawback. Under the new definition, Customs treats the "refund or remission" of excise taxes that occurs when merchandise is *exported* as a drawback, which functionally prevents a company from then filing a claim for drawback of charges assessed on a substitutable import.

The statute does not provide a definition of drawback, so the court must ascertain the ordinary meaning of the term. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140 (2018) (when a term is undefined in a statute, "we give the term its ordinary meaning.") (citations omitted). The court "assume[s] that the terms have their ordinary, established meaning, for which we may consult dictionaries." *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1320 (Fed. Cir. 2003) (citations omitted). Generally, "drawback" is understood to mean the refund or cancellation of import duties, but can also mean the refund of domestic taxes, such as excise taxes. *See Drawback, Black's Law Dictionary* (11th ed. 2019) ("a government allowance or refund on import duties when the importer reexports imported products rather than selling them domestically"); *Oxford English Dictionary* (2d ed. 1989) ("[a]n amount paid back from a charge previously made; esp. a certain amount of excise or import duty paid back or remitted when the commodities on which it has been paid are exported"); *Barron's Dictionary of Int'l Business Terms* (3d ed. 2004) ("a rebate by a government, in whole or in part, of customs duties assessed on imported merchandise that is subsequently exported."); *Ballentine's Law Dictionary* (3d ed. 1969) ("The refund of duties paid upon the importation of materials used in the manufacture or production of articles in the United States, when such articles are exported."); *Dictionary of Tariff Information* (1924) (defining drawback as a "(1) a repayment in whole or in part of customs duties paid on imported merchandise that is reexported . . . or (2) the refund upon the exportation of an article of a domestic tax to which is has been subjected).

The question then becomes which definition or definitions Congress intended to be applicable to Title 19. The agencies' new understanding is not supported by the statute, which almost exclusively uses the term drawback in relation to duties and fees imposed upon importation and then recovered. *See generally* 19 U.S.C. § 1313;[14] *see also Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991) (noting that a word "must draw its meaning from its context"). The exception is 19 U.S.C. § 1313(d), which makes it clear that Congress intended excise taxes on certain alcohol to be recovered as long as the product was not for sale or consumption in the domestic market.

> Upon the exportation of flavoring extracts, medicinal or toilet preparations (including perfumery) manufactured or produced in the United States in part from domestic alcohol on which an internal-revenue tax has been paid, there shall be allowed a drawback equal in amount to the tax found to have been paid on the alcohol so used.
>
> *Upon the exportation of bottled distilled spirits and wines manufactured or produced in the United States on which an internal revenue tax has been paid or determined, there shall be allowed, under regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, a drawback equal in amount to the tax found to have been paid or determined on such bottled distilled spirits and wines.* In the case of distilled spirits, the preceding sentence shall not apply unless the claim for drawback is filed by the bottler or packager of the spirits and unless such spirits have been stamped or restamped, and marked, especially for export, under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

19 U.S.C. § 1313(d) (emphasis added). This section does refer to the refund of "paid or determined" internal revenue tax as "drawback," but this section notably does not call internal revenue taxes never paid or determined "drawback," as the agencies attempt to apply the term.

26 U.S.C. § 5062(b) (using "drawback to refer to a refund of "tax found to have been paid or determined"), on which the government relies, is similarly structured and suffers from the same limitation. In

[14] *See, e.g.*, 19 U.S.C. §§ 1313(b)(1) (using drawback as to "imported duty-paid merchandise"); 1313(j) (unused merchandise drawback of charges import "upon entry of importation"); 1313(k) (liability for drawback claims referring to charges on imported merchandise); 1313(l)(2) (drawback used in reference to charges paid on imported merchandise); 1313(y) (drawback of duties paid on merchandise upon importation from United States insular possessions).

Title 26, the term "drawback" consistently is used only with reference to taxes paid or determined,[15] and is not applied to all of the scenarios to which the agencies now attempt to apply the term. *See, e.g.*, 26 U.S.C. §§ 5053(a) (beer is exported without payment of tax), 5214(a) (exported spirits are removed from bond free of tax), 5362(c) (wine exported without tax having been paid or determined does so without payment of tax). Title 26 does not use drawback to refer to instances in which excise tax is never paid or determined. The government's argument for "substance over form" in regard to this glaring discrepancy is not well-taken. *See* Def. Br. at 12. Had Congress intended "drawback" to describe all the instances in Title 26 to which the agencies attempt to apply the term, it would not have selectively used the terms in some sections, but not others. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("It is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of language.).

In addition to lacking statutory support in either Title 19 or Title 26, the agencies' expanded definition makes no logical sense. Excise tax is often never paid on exported alcohol. *See* 26 U.S.C. §§ 5053(a), 5214(a)(4), 5362(c)(1).[16] Although some companies under Title 26 receive a refund of excise taxes previously paid on goods that are then exported, in order for Customs' prohibition on "double drawback" to have the reach it intends with the Final Rule, "drawback" must also include instances in which excise tax is never "paid or determined"[17] on exported merchandise. *See* 26 U.S.C. §§ 5704(b), 5214(a), 5362(c). This latter situation is nonsensical. A tax that has never been paid cannot naturally be said to have been "drawn back."

Accordingly, there is no statutory support for the expansive definition in the Final Rule that extends drawback to situations in which tax is never paid or determined. Further, as noted in the following section, the statute unambiguously forecloses the agencies' definition.

---

[15] *See* 26 U.S.C. §§ 5055 (drawback for taxes paid on exported beer), 5062(b) & 5114 (drawback on taxes paid or determined on wine or distilled spirits), 5706 (drawback for taxes paid on exported tobacco and certain related products).

[16] Each of these sections notes conditions, such as removal from bonded facilities, when exported beer (26 U.S.C. §§ 5053(a)), distilled spirits (26 U.S.C. § 5214(a)(4)), or wine (26 U.S.C. § 5362(c)(1)), can be removed without payment of tax.

[17] NAM cites legislative history to state: "[w]ith respect to the tax on distilled spirits [determined] is used in instances where the tax is determined and paid at the time the spirits are withdrawn from bond, as well as in instances where the amount of the tax to be paid is computed and fixed at the time the spirits are withdrawn from bond." *See* NAM Br. at 29 (citing S. Rep. No. 85–2090, § 5006 (1958) *reprinted in* 1958 U.S.C.C.A.N. 4395, 4492).

B. Resulting Statutory Conflicts

Without the benefit of the expanded definition of drawback, the agencies' argument unravels. Even if, however, the court were to attempt to apply the new definition, the Final Rule creates irreconcilable conflicts with statutory provisions that evince that the agencies' Final Rule is not a valid interpretation of the statute. After referring to the non-payment of excise tax on exports as a "drawback," the agencies then evoke 19 U.S.C. § 1313(v), which prohibits a single export from serving as a basis for multiple drawback claims, so as to prevent a company from filing a substitution drawback claim on the basis of an export on which no excise tax was paid. In addition, the Final Rule limits drawback claims on exported or destroyed substituted merchandise "to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise." *Final Rule*, 84 Fed. Reg. at 65,008, 65,012, 65,029,65,064, 65,066; *see also* 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.22(a), and 191.32(b)(4). These understandings directly conflict with other statutory provisions, most notably 19 U.S.C. § 1313(j)(2) and 19 U.S.C. § 1313(l)(2).

Section 1313(j)(2) (unused merchandise drawback) is categorical in stating that with respect to "imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation" that "notwithstanding any other provision of law, upon the exportation or destruction of such other merchandise an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (l) shall be refunded as drawback." 19 U.S.C. § 1313(j)(2). The Supreme Court held that a "notwithstanding" section "override[s] conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *see also Nat'l Labor Relations Bd. v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017) (noting that "'notwithstanding' clauses show that one provision prevails over another in the event of a conflict."). For this court to hold otherwise would be to render the word "notwithstanding" meaningless. Drawback is simply not conditioned on the tax status of the substituted merchandise. That consideration finds no basis in the statute. Defendants argue that an interpretation contrary to its new understanding of section 1313(v) would "override § 1313(v)'s prohibition on double drawback," Def. Br. at 23, but in fact a contrary reading would maintain the consistent interpretation of section 1313(v) to prohibit a single export from serving as a basis for multiple drawback claims, as the term "drawback" in this context has long been understood. *See, e.g.* HQ 229892, 2003 WL 22408906, at *5 (July 3, 2003) (noting that section 1313(v) "prevents multiple drawback claims on the same

exported or destroyed merchandise."). Section (j)(2) is unequivocal and mandates that drawback "shall" issue so long as the enumerated preconditions are met. These preconditions do not include a requirement that a company paid tax on its exports in order to claim drawback on charges assessed on its imports.

The agencies' interpretation of section 1313(v) also creates a conflict between sections 1313(d) and 1313(j)(2). As noted above, 1313(d) uses the term drawback in reference to the refund of internal revenue taxes paid on exported distilled spirits and wine. The TFTEA added to section 1313(j)(2), that "drawback shall be allowed under this paragraph with respect to wine if the imported wine and exported wine are of the same color and the price variation between the imported and exported wine does not exceed 50 percent." *See* TFTEA, 130 Stat. at 228; *see also* 19 U.S.C. § 1313(j)(2). For this provision to have any effect, drawback under section 1313(v) cannot be understood to prevent drawback from occurring under section 1313(j)(2) because of a refund of taxes under section 1313(d). To do so would further undermine the "notwithstanding and other provision of law" language in section 1313(j)(2). The agencies' interpretation of section 1313(v) creates an irreconcilable conflict with the clear and superseding language of section 1313(j)(2) and thus cannot withstand scrutiny under *Chevron* step one.

Additionally, in promulgating section 1313(l)(2) Congress introduced limiting language on the agencies' previously broad-reaching ability to simply "prescribe regulations for determining the calculation of amounts refunded as drawback under [§ 1313]." 19 U.S.C. § 1313(1)(2)(A). The new subsection entitled "[c]alculation of drawback" delineates a clear calculation procedure. *Id.* In doing so, Congress set limits on how to determine the amount to be refunded and made clear that refunds were not limited to the charges actually paid on the imported or exported merchandise, but are based on the "fees that would apply to the exported article if the exported article were imported." 19 U.S.C. § 1313(1)(2)(B)(i)(II). Defendants' interpretation of 19 U.S.C. § 1313(v) to disallow exports on which excise tax was not paid from serving as substituted merchandise largely nullifies the alternative calculation methodology described in 19 U.S.C. § 1313(1)(2)(B)(i)(II) and cannot stand. *See Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936) ("A regulation which does not [effect the will of Congress], but operates to create a rule out of harmony with the statute, is a mere nullity."). It is not a rational reading of the statute to interpret Congress' intent to liberalize drawback to impose a restriction on drawback that did not

previously exist. Section 1313(l) clearly envisions taxes that "would apply" not taxes that *did* apply. 19 U.S.C. § 1313(l)(2).

Defendants attempt to support their reading of section 1313(v) in part by citing section 1313(u), which states that "[i]mported merchandise that has not been regularly entered or withdrawn for consumption shall not satisfy any requirement for use, exportation, or destruction under this section." Def. Br. at 15 (citing 19 U.S.C. § 1313(u)). But section 1313(u) only applies to merchandise that was *imported* (and then exported or destroyed),[18] this provision simply does not apply to domestic merchandise. *See* 19 U.S.C. § 1313(u). Customs' own guidance confirms that 1313(u) does not apply to domestic merchandise:

> As stated above § 1313(u) was enacted to codify the prohibition against paying duty drawback on, among other things, the exportation of foreign merchandise upon which no duty had been paid. However, there is no similar rule against paying drawback on exported domestic goods that are substituted for imported duty-paid goods. The language of § 1313(u) states that "imported merchandise that has not been regularly entered . . ." (emphasis added) will not support a claim for drawback. Thus, this section only applies to imported goods and has no application to . . .domestic merchandise.

HQ 230591, 2005 WL 1230799, at *3 (Feb. 17, 2005). Accordingly, section 1313(u) does not support defendant's understanding of section 1313(v).

Additionally, the Final Rule's limitation on drawback leads to what NAM refers to as an "absurd result." NAM Br. at 17, 25, 32–35; *see also* CASI Br. at 12–13. The agencies' interpretation of section 1313(v) would, by its text, prevent an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity. 19 U.S.C. § 1313(v) ("[M]erchandise that is exported or destroyed to satisfy *any* claim for drawback shall not be the basis of *any* other claim for drawback.") (emphases added). This means that a company both importing and exporting merchandise would be liable not just for the excise tax on its imports, but for all non-excise tax charges assessed at import. Defendants argue that "[t]he Rule merely prohibits double recovery of any particular assessment," but this reads into section 1313(v) a restriction that does not exist. Def. Br. at 14. The court cannot uphold a regulation that produces irrational

[18] Re-exportation without duty may occur as a result of various duty deferral or avoidance programs (foreign trade zones, temporary importation under bond, etc.). *See* 19 C.F.R. § 181.53. Obviously, section 1313(u), which is concerned with imports, applies to duty drawback and not excise tax refunds. *See* 19 U.S.C. § 1313(u).

results simply because an agency does not intend such a result, and it will not read into a statute limiting language to save an agency's interpretation.

Finally, Defendants argue that their interpretation of the statute is required to "vindicat[e] the animating principle[s]" of both the federal excise tax and drawback regimes. Def. Br. 15–18. These regimes are necessarily in tension with one another. Whereas the federal excise tax is a revenue-raising tax, drawback is meant to encourage exports by allowing a refund of taxes paid on imports. *See* S. Rep. No. 85–2165 § 313(h) (1958), *reprinted in* 1958 U.S.C.C.A.N. 3576, 3577 (noting that drawback is "designed to relieve domestic processors and fabricators of imported dutiable merchandise, in competing for export markets, of the disadvantages which the duties on the imported merchandise would otherwise impose upon them."); *see also* H.R. Rep. No. 114–114(I) (2015); S. Rep. No. 114–45 (2015). Because these two regimes necessarily cannot both operate with full force, a policy decision must be made regarding which to privilege when they collide. As the legislative history of the drawback regime demonstrates, it appears that Congress has repeatedly chosen to expand access to drawback at the expense of lost excise tax revenue. The agencies cannot now attempt to alter this policy choice by way of a regulation that does not comport with the animating statute.

The agencies' Final Rule runs afoul of the ordinary meaning of drawback and results in irreconcilable statutory conflicts. *See* 19 U.S.C. § 1313(j)(2) (notwithstanding clause undermined by agencies' interpretation of 19 U.S.C. § 1313(v)); 19 U.S.C. § 1313(l)(2)(B)(i)(ii) (agencies' interpretation renders this calculation of drawback section a nullity); 19 U.S.C. § 1313(v) (agencies' interpretation renders this provision unlawfully restrictive in a way even the agencies do not intend). The Final Rule is contrary to the clear intent of Congress as expressed in the language and structure of the statute. Accordingly, the court must hold the Final Rule unlawful.

C. Legislative History

Because the statutory text and structure forecloses defendants' interpretation, the court need not review the relevant legislative history. Nonetheless, the court's decision is well-supported by the legislative history of drawback. *See Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp*., 474 U.S. 361, 371–72 (1986) (holding that the plain reading of a statute foreclosed the Federal Reserve Board's regulation, but finding that the legislative history supported the plain reading).

Congress has several times addressed the issue of drawback since enacting the substitution drawback provision, 19 U.S.C. § 1313(j)(2), in 1984. In 1993, Congress added a provision that prevented merchandise exported or destroyed from satisfying multiple claims for drawback. *See* 19 U.S.C. § 1313(v). Then in 2004, Congress amended 19 U.S.C. § 1313(j)(2) to require that drawback be paid "notwithstanding any other provision of law."[19] Although Congress considered statutory amendments in 2007 that would have reduced drawback on certain imported ethanol "by an amount equal to any Federal tax credit or refund of any Federal tax paid on the merchandise with respect to which the drawback is claimed," those amendments were not passed. 153 Cong. Rec. S7909, S7941, § 832(b) (June 19, 2007); 153 Cong. Rec. S13774, S13927, § 12318(b) (Nov. 5, 2007). Further, in 2008, Congress liberalized substitution drawback with regard to wine by allowing substitution for wine of the same color that is also within 50 percent of the same price. *See* Pub. L. No. 110–234 §15421, 122 Stat. at 1547, *codified as amended* 19 U.S.C. § 1313 (j)(2)(2008). Following Congress's inaction to address the issue at hand, Customs and Treasury proposed the following regulation change:

> For purposes of drawback of internal revenue tax imposed under Chapters 32, 38, 51, and 52 of the Internal Revenue Code of 1986, as amended (IRC), drawback granted on the export or destruction of substituted merchandise will be limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substitute merchandise.

Drawback of Internal Revenue Excise Tax, 74 Fed. Reg. 52,928, 52,931 (Oct. 15, 2009) ("2009 Proposed Rule"). Many commenters, including several members of Congress, opposed the new regulations. *See* A.R. 10–11, 83–84, 99–100. While statements of individual members of Congress are by no means dispositive on the question of legislative intent, they do support the court's conclusion. Eighteen legislators stated as follows:

> The agencies have been heard many times on this issue and can continue to comment as Drawback Simplification makes its way through Congress. Noticing the proposed rules at this time

[19] The 2004 amendments were in part a reaction to the Court of Appeals for the Federal Circuit's decision in *Texport Oil Co. v. United States*, which found that certain non-import-specific taxes, were not eligible for substitution drawback. *See* 185 F.3d 1291 (Fed. Cir. 1999). In amending the statute, Congress made clear its intention to override *Texport* and to allow drawback on any duty, tax, or fee imposed upon entry. *See Shell Oil Co. v. United States*, 688 F.3d 1376, 1380 (Fed. Cir. 2012) (describing the impetus for the amendments). The amendment replaced the phrase "because of its importation" with "upon entry or importation" regarding circumstances in which drawback was permissible. *See* 19 U.S.C. § 1313(j). This amendment clarified that excise taxes were eligible for drawback under Title 19.

> amounts to challenging Congress by initiating a rulemaking that will run concurrently with Congressional action on the same subject in the context of pending [Customs] reauthorization legislation. We view these proposed rules as an attempt by the administering agencies to change existing law via rulemaking, pre-empting and negating the role of Congress.

A.R. 9–11. The agencies then withdrew the proposed regulations. *See Drawback of Internal Revenue Excise Tax*, 75 Fed. Reg. 9,359–60 (Mar. 2, 2010) (Withdrawal of Notice of Proposed Rulemaking). Congress took no action to pass any legislation that would address the agencies' concerns as expressed in the 2009 Proposed Rule.

This history demonstrates that Congress made a policy choice to encourage exports by expanding the ability to claim drawback, even with the knowledge that industries may then avoid some payment of excise tax. Congress is presumed to know that the wine industry was filing substitution drawback claims in situations where no excise tax had been paid and yet did not address the issue, and, in fact, appears to have at least indirectly sanctioned the practice. *See* 19 U.S.C. § 1313(l)(2)(D) (section added in the TFTEA that maintained the treatment of wine); *see also* H.R. Rep. No. 114–376, at 221 (2016), *reprinted in* 2016 U.S.C.C.A.N. at 112 (noting that "the existing treatment of wine under section 313(j)(2) of the Tariff Act of 1930 is preserved"). It is not the court's role to undermine Congressional policy decisions. Ultimately, the defendants' Final Rule is unsupported by both the statute and the legislative history.

D. Alternative Arguments

Because the court holds the challenged portions of the Final Rule to be an unlawful interpretation of the statute, it will not address in detail arguments that the Final Rule was both arbitrary and capricious and impermissibly retroactive. As to the retroactivity challenge, the agencies' attempt to apply the Final Rule to claims filed before its effective date runs afoul of fair notice. The regulatory quandary in which the agencies found themselves, whereby a period during which no path for operation of the new statute existed, was one of the agencies' own making as they delayed publishing regulations to implement the TFTEA until well after the statutory deadline had lapsed. *See Tabacos de Wilson, Inc. v. United States*, Slip Op. 18–138, 2018 WL 4961917 (CIT Oct. 12, 2018). On the other hand, the court notes that defendants made seemingly valid policy arguments for why the "zeroed excise tax" scheme should not be permitted. But statutes cannot be constructively amended through agency action;

such power lies with Congress. If the public fisc does suffer ultimately from uncollected excise tax, then it is up to Congress to decide whether to remedy the situation.

CONCLUSION

For the foregoing reasons the Final Rule is held unlawful as to the challenged provisions. Plaintiff shall propose a form of judgment by February 7, 2020. Defendant may respond by February 18, 2020.

Dated: January 24, 2020
New York, New York

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

Slip Op. 20–10

ICDAS CELIK ENERJI TERSANE ve ULASIM SANAYI, A.S., Plaintiff, HABAS SINAI ve TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., Consolidated Plaintiff, v. the UNITED STATES, Defendant, and NUCOR CORPORATION, CHARTER STEEL and KEYSTONE CONSOLIDATED INDUSTRIES, INC., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Consol. Court No. 18–00143

[Plaintiffs' motion for judgment on the agency record is granted in part and Commerce's Final Determination is remanded consistent with this opinion.]

Dated: January 28, 2020

Leah N. Scarpelli, Arent Fox LLP, of Washington, DC, argued for plaintiff. With her on the brief were *Matthew M. Nolan* and *Diana Dimitriuc Quaia*.

David L. Simon, Law Office of David L. Simon, of Washington, DC, for consolidated plaintiff.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant *United States*. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *L. Misha Preheim*, Assistant Director. Of counsel was *Emma Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC. With her on the brief was *Nikki Kalbing*.

Maureen E. Thorson, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor *Nucor Corporation*. With her on the brief were *Stephen J. Claeys* and *Derick G. Holt*.

R. Alan Luberda, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenors *Charter Steel and Keystone Consolidated Industries, Inc.*

OPINION

Katzmann, Judge:

This case involves a challenge to the Department of Commerce's ("Commerce") calculation of antidumping ("AD") duties on carbon and

alloy steel wire rod ("wire rod") imported into the United States from Turkey. Commerce assesses AD duties where merchandise is exported to the United States for sale at a price lower than is or would be charged in the country of origin. Section 732(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673(2).[1] Here, Turkish producers and exporters of wire rod, Plaintiff Icdas Celik Enerji Tersane ve Ulasim, A.S. ("Icdas") and consolidated-plaintiff Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. ("Habaş")(collectively, "Plaintiffs"), bring this action against the United States ("the Government") to contest certain aspects of Commerce's final determination in the sales-at-less-than-fair-value investigation that resulted in the imposition of AD duties on the wire rod Plaintiffs exported to the United States. *See Carbon and Alloy Steel Wire Rod from Italy, the Republic of Korea, Spain, the Republic of Turkey, and the United Kingdom,* 83 Fed. Reg. 23,417 (Dep't Commerce May 21, 2018), P.R. 1289 ("*Amended Final Determination*"). Specifically, Plaintiffs argue that Commerce's "duty neutral methodology" of adjusting for duty drawback is unsupported by substantial evidence and not in accordance with law. Habaş also challenges Commerce's use of a surrogate short-term borrowing rate in lieu of Habaş's reported zero-interest rate to impute credit expenses on home market sales. For the reasons discussed herein, the court remands Commerce's methodology used to calculate the duty drawback adjustment with instructions to recalculate the adjustment and sustains Commerce's methodology for imputing credit expense on home market sales.

JURISDICTION, STANDARD OF REVIEW, AND INTERPRETIVE FRAMEWORK

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

The two-part framework established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), guides

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are not to the U.S. Code 2012 edition, but to the unofficial U.S. Code Annotated 2018 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. § 1677e (2012) by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). The TPEA amendments are applicable to all determinations made on or after August 6, 2015, and therefore, are applicable to this proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2015).

the court's review of Commerce's statutory interpretation. *See also Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1329 (Fed. Cir. 2017). Under *Chevron*'s first prong, the court asks "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. *See also Apex Frozen Foods*, 862 F.3d at 1329. "If yes, 'that is the end of the matter,' and we 'must give effect to the unambiguously expressed intent of Congress.'" *Apex Frozen Foods*, 862 F.3d at 1329 (quoting *Chevron*, 467 U.S. at 842–43). If, however, "'the statute is silent or ambiguous with respect to the specific issue,'" the court proceeds to the second prong of the *Chevron* analysis. *Id.* (quoting *Chevron*, 467 U.S. at 843). "[T]he question for the court" then becomes "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "A permissible construction of a statute is one that is reasonable." *ABB, Inc. v. United States*, 920 F.3d 811, 824 (Fed. Cir. 2019) (citing *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1369–70 (Fed. Cir. 2011)).

BACKGROUND

I. Legal and Regulatory Framework

Pursuant to 19 U.S.C. § 1673, Commerce imposes antidumping duties on foreign goods if they are being or are likely to be sold in the United States at less than fair value and the International Trade Commission ("ITC") determines that the sale of the merchandise at less than fair value materially injures, threatens, or impedes the establishment of an industry in the United States. *See also Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __331 F. Supp. 3d 1390, 1394 (2018). "Sales at less than fair value are those sales for which the 'normal value' (the price a producer charges in its home market) exceeds the 'export price' (the price of the product in the United States)." *Apex Frozen Foods*, 862 F.3d at 1326 (quoting *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013)). The amount of the antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. *See also Shandong Rongxin*, 331 F. Supp. 3d at 1394. Here, Icdas and Habaş challenge Commerce's duty drawback methodology, and Habaş additionally challenges Commerce's methodology for imputing credit expenses on home market sales. In the discussion section below, the court addresses the relevant legal framework for the duty drawback and credit expense calculations, respectively.

II. Factual and Procedural History

On March 28, 2017, Charter Steel, Gerdau Ameristeel US Inc., Keystone Consolidated Industries, Inc. ("Keystone"), and Nucor Corporation (collectively, "petitioners"), all domestic producers of wire rod, filed with Commerce AD petitions concerning imports of wire rod from several countries, including Turkey. *See Carbon and Alloy Steel Wire Rod From Belarus, Italy, the Republic of Korea, the Russian Federation, South Africa, Spain, the Republic of Turkey, Ukraine, United Arab Emirates, and United Kingdom: Initiation of Less-Than-Fair-Value Investigations*, 82 Fed. Reg. 19,207, 19,207 (Dep't Commerce Apr. 26, 2017), P.R. 8 ("*Initiation Notice*"). Petitioners alleged that "imports of wire rod from Belarus, Italy, Korea, Russia, South Africa, Spain, Turkey, Ukraine, the UAE, and the United Kingdom are being, or are likely to be, sold in the United States at less than fair value . . . and that such imports are materially injuring, or threatening material injury to, an industry in the United States." *Id.* On April 26, 2017, Commerce announced its initiation of an AD duty investigation into wire rod imported into the United States from these countries for the period beginning January 1, 2016 through December 31, 2016 (the "period of interest," or "POI"). *Id.* at 19,207, 19,211. On May 18, 2017, within forty-five days of the date on which the petition was filed, the ITC preliminarily determined that "there is a reasonable indication that an industry in the United States is materially injured by reason of imports of wire rod from . . . Turkey." *See Carbon and Certain Alloy Steel Wire Rod From Belarus, Italy, Korea, Russia, South Africa, Spain, Turkey, Ukraine, United Arab Emirates, and the United Kingdom*, 82 Fed. Reg. 22,846, 22,846 (Int'l Trade Comm'n May 18, 2017).

On October 31, 2017, Commerce published its preliminary determination, finding that certain wire from Turkey "is being, or is likely to be, sold in the United States at less than fair value . . . ." *Carbon and Alloy Steel Wire Rod From Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Negative Determination of Critical Circumstances*, 82 Fed. Reg. 50,377, 50,377 (Dep't Commerce Oct. 31, 2017), P.R. 989. Commerce determined AD duty rates for mandatory respondents Icdas and Habaş of 8.01 percent and 2.80 percent respectively, as well as an all-others rate of 5.41 percent. *Id.* at 50,378. As part of this preliminary determination, Commerce concluded that Icdas and Habaş were eligible for a duty drawback adjustment to export price. *See* Memorandum from J. Maeder to G. Taverman, re: Decision Memorandum for the Preliminary Determination and Negative Determination of Critical Circumstances, 10–11 (Dep't Commerce Oct. 24, 2017), P.R. 951 ("Pre-

liminary Determination Memo"). Pursuant to 19 U.S.C. § 1677a(c)(1)(B), Commerce determined that the Inward Processing Regime, through which Turkey rebated duties paid on goods imported into Turkey upon exportation of these goods, met the requirements for a duty drawback adjustment because it "1) projected quantities of imports; and 2) projected quantities of exports of wire rod based on an approved production yield/loss ratios . . . ." *Id.* at 10. Commerce explained that "[s]ince [Icdas and Habaş] have satisfied the criteria described above, we have granted a duty drawback adjustment to both companies consistent with our practice." *Id.* In calculating the duty drawback adjustment, Commerce employed a "duty neutral" methodology, which allocated duty drawback over "all production for the relevant period . . . ." *Id.* at 11.

Commerce also adjusted Habaş short-term home market borrowing rate ("home market borrowing rate") to impute credit expenses on home market sales price. Commerce rejected the zero-percent borrowing rate reported by Habaş because it found that it did "not conform with commercial reality." Analysis for the Preliminary Determination of the Less-Than-Fair-Value Investigation of Carbon and Alloy Steel Wire Rod from Turkey, 3 (Dep't Commerce Oct. 24, 2017), P.R. 973. Commerce instead used the Central Bank of Turkey's average short-term lending rate of 10.23 percent (the "TCB rate"). *Id.*

Following the preliminary determination, Icdas and Habaş filed case briefs challenging certain aspects of Commerce's margin calculations in an administrative proceeding. *See* Case Brief of Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S., (Feb. 21, 2018), P.R. 1119 ("Icdas Case Brief"); Case Brief of Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.S., (Feb. 21, 2018), P.R. 1089 ("Habaş Case Brief"). Both Icdas and Habaş challenged Commerce's methodology for calculating the duty drawback adjustment, an adjustment Commerce makes to export price, *see* Discussion *infra* Sec. I. A., which allocated duty drawback over total production (the "duty neutral methodology"), *see* Discussion *infra* Sec. I. A. 3. *See also* Icdas Case Brief at 2; Habaş Case Brief at 2. Additionally, Habaş objected to Commerce's use of the TCB rate in lieu of its zero-percent home market borrowing rate to calculate home market credit expenses. Habaş Case Brief at 16. Nucor also submitted a case brief to Commerce, in which it argued that Commerce should continue to apply (1) the duty neutral methodology to calculate the duty drawback adjustment for Icdas and Habaş; and (2) the TCB rate of 10.23 percent as Habaş's home market borrowing rate. Rebuttal Brief of Nucor Corporation, 2, 11–12 (Feb. 26, 2018), P.R. 1189.

In its final determination, issued on March 28, 2018, Commerce assigned AD margins for Icdas and Habaş of 7.94 percent and 4.74 percent, respectively, and an "All Others" rate of 6.34 percent. *Carbon and Alloy Steel Wire Rod from Turkey: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances,* 83 Fed. Reg. 13,249, 13,250 (Dep't Commerce Mar. 28, 2018), P.R. 1285 ("*Final Determination*"). Commerce explained in an accompanying issues and decisions memorandum ("IDM") that it calculated the duty drawback adjustment for the final determination consistent with the methodology employed in the preliminary determination, thereby rejecting Icdas's and Habaş's arguments. Memorandum from J. Maeder to G. Taverman, re: Issues and Decision Memorandum for the Final Affirmative Determination and Negative Determination of Critical Circumstances, 9 (Dep't Commerce Mar. 19, 2018), P.R. 1273 ("IDM"). On May 21, 2018, Commerce amended the final determination to use rates of 7.94 percent and 4.93 percent for Icdas and Habaş, respectively, due to ministerial errors. *Amended Final Determination* at 23,418.

In the IDM accompanying Commerce's final determination, Commerce also made its position clear — that Habaş's zero-interest loans did not reflect "usual commercial behavior." IDM at 17. Commerce thus continued to use the average home market borrowing rate provided by Nucor to calculate Habaş's home market credit expenses in the final determination. *Id.*

Icdas filed a summons on June 19, 2018 and a complaint against the United States ("the Government") on July 19, 2018 to challenge Commerce's final determination. Icdas's Summons, ECF No. 1; Icdas's Compl., ECF No. 8. Nucor filed a consent motion to intervene as defendant-intervenor on August 9, 2018, and the court granted the motion on August 10, 2018. Nucor's Mot. to Intervene, ECF No. 11; Court's Order Granting Nucor's Mot. to Intervene, ECF No. 15. On August 17, 2018, Charter Steel and Keystone filed consent motions to intervene as defendant-intervenors, which the court granted on August 22, 2018. Charter Steel and Keystone's Mot. to Intervene, ECF No. 17; Court's Order Granting Charter Steel and Keystone's Mot. to Intervene, ECF No. 21.

Habaş commenced a separate action against the Government to challenge Commerce's final determination, filing a summons on June 19, 2018 and a complaint on July 12, 2018. Habaş's Summons, *Habaş v. United States*, No. 18–145 (CIT filed June 19, 2018), ECF No. 1; Habaş's Compl., *Habaş*, No. 18–145, ECF No. 6. Nucor, Charter Steel, and Keystone joined the action as defendant intervenors. Nucor's Mot. to Intervene, *Habaş*, No. 18–145, Aug. 9, 2018, ECF No. 9;

Court's Order Granting Nucor's Mot. to Intervene, *Habaş*, No. 18–145, Aug. 10, 2018, ECF No. 13; Charter Steel and Keystone's Mot. to Intervene, *Habaş*, No. 18–145, Aug. 10, 2018, ECF No. 14; Court's Order Granting Charter Steel and Keystone's Mot. to Intervene, *Habaş*, No. 18–145, Aug. 22, 2018, ECF No. 21.

On September 20, 2018, the parties filed a motion to consolidate Habaş's action (No. 18–145) with the lead case brought by Icdas (No. 18–143). Joint Mot. to Consol. Cases, ECF No. 23. The court granted the motion to consolidate on September 26, 2018. ECF No. 26. Habaş filed its brief on January 4, 2019. Cons.-Pl.'s Mot. for J. on Agency R. 56.2, ECF No. 29 ("Cons.-Pl.'s Br."). Icdas filed its brief on January 7, 2019. Pl.'s Mot. for J. on Agency R. 56.2, ECF No. 30 ("Pl.'s Br."). The Government responded on April 26, 2019. Def.'s Resp. to Mot. for J. on Agency R., ECF No. 31 ("Def.'s Br."). Nucor responded on May 10, 2019. Def.-Inter.'s Resp. to Mot. for J. on Agency R., ECF No. 33 ("Def.-Inter.'s Br."). Icdas and Habaş replied on May 24, 2019. Pl.'s Reply Br. in Support of Mot. for J. on Agency R., ECF No. 35 ("Pl.'s Reply"); Cons.-Pl.'s Reply Br. in Support of Mot. for J. on Agency R., ECF No. 34 ("Cons.-Pl.'s Reply Br."). Oral argument was held on November 21, 2019. ECF No. 50.

DISCUSSION

Icdas and Habaş challenge Commerce's final determination because they argue that the duty neutral methodology employed by Commerce to calculate the duty drawback adjustment contradicts the plain language of 19 U.S.C. § 1677a(c), resulting in higher AD duties on their exports of wire rod from Turkey. Pl.'s Br. at 3–4, Cons.-Pl.'s Br. at 6. Habaş, moreover, also argues that Commerce's reliance on a surrogate rate, in lieu of using Habaş's actual zero-interest borrowing rate, to impute its credit expenses on home market sales is unreasonable and unsupported by substantial evidence. Cons.-Pl.'s Br. at 20. For the reasons stated below, the court remands Commerce's duty neutral methodology because it is not in accordance with law. The court sustains Commerce's use of the surrogate home market borrowing rate for Habaş because it is supported by substantial evidence and in accordance with law.

I. Commerce's Duty Neutral Methodology for Calculating the Duty Drawback Adjustment Is Not in Accordance With Law.

Icdas and Habaş first challenge Commerce's duty neutral methodology for calculating the duty drawback adjustment because, they argue, it is inconsistent with the plain language of 19 U.S.C. § 1677a(c), which links duty drawback to U.S. exports. The court turns first to the statutory framework governing duty drawback before

turning to the merits of Icdas and Habaş's challenge to the duty neutral methodology. The court then concludes that Commerce's duty neutral methodology contravenes the plain language of the statute and thus fails the first prong of *Chevron*. *See* 467 U.S. at 842. Accordingly, the court remands Commerce's duty neutral methodology and need not reach whether Commerce's interpretation was a permissible construction of the statute under the second prong of *Chevron*. *See id*. at 843.

A. Legal Background on Duty Drawback Adjustment

1. Statutory Framework Governing the Duty Drawback Adjustment

To calculate AD duties, Commerce determines the amount by which "normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. Normal value is generally the price at which a good is sold in the exporting country, 19 U.S.C. § 1677b(a)(1)(B), while export price is the price at which it is sold in the United States, 19 U.S.C. § 1677a(a). *See also Uttam Galva Steels Ltd. v. United States*, 42 CIT __, __ 311 F. Supp. 3d 1345, 1350 (2018); *id.* 43 CIT __, 374 F. Supp. 3d 1360 (2019); *id.* 43 CIT __, Slip Op. 19–168 (Dec. 18, 2019).

Specifically, normal value is defined as "the price at which the foreign product is first sold . . . for consumption in the exporting country . . .." 19 U.S.C. § 1677b(a)(1)(B)(i). When Commerce has reasonable grounds to believe that sales of the foreign like product were made at a price less than the cost of production, Commerce may disregard such sales in determining normal value. 19 U.S.C. § 1677b(b)(1). The core elements of cost of production are "(1) the cost of manufacture; (2) 'selling, general, and administrative expenses'; and (3) packaging expenses." *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011) (quoting 19 U.S.C. § 1677b(b)(3)). If no sales are left after disregarding sales made at less than the cost of production, "normal value shall be based on the constructed value of the merchandise." 19 U.S.C. § 1677b(b)(1). Constructed value "includes the same or similar elements as [cost of production], but with the additional component of profit." *Saha Thai*, 635 F.3d at 1338 (citing 19 U.S.C. § 1677b(e)).

Export price instead is the price at which the subject merchandise is first sold before the date of importation by the foreign exporter to an unaffiliated purchaser in the United States. 19 U.S.C. § 1677a(a). The determination of export price is subject to several possible adjustments, including the duty drawback adjustment to export price at issue here. *See* 19 U.S.C. § 1677a(c). The statute provides the following:

> (c) Adjustments for export price and constructed export price The price used to establish export price and constructed export price shall be—
>
> (1) increased by—
>
> . . .
>
> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States . . .

19 U.S.C. § 1677a(c). "In other words, if a foreign country would normally impose an import duty on an input used to manufacture the subject merchandise, but offers a rebate or exemption from the duty if the input is exported to the United States, then Commerce will increase [export price] to account for the rebated or unpaid import duty (or, the 'duty drawback')." *Saha Thai*, 635 F.3d at 1338. The duty drawback adjustment is intended "to account for the fact that the producers remain subject to the import duty when they sell the subject merchandise domestically, which increases home market sales prices and thereby increases [normal value]." *Id.* By adjusting export price to reflect duty drawback, the adjustment ensures "a fair comparison between normal value and export price." *Tosçelik Profil v. Sac Endüstrisi A.S.*, 42 CIT __, 321 F. Supp. 3d 1270, 1275 (2018) (citing *Saha Thai*, 635 F.3d at 1338 (other citations omitted)); *id.* 43 CIT __, __, 375 F. Supp. 3d 1312 (2019); *id.* 43 CIT __, __, Slip Op. 19–166 (Dec. 18, 2019)).

Commerce relies on a two-pronged test to determine if a foreign exporter is entitled to a duty drawback adjustment. *Saha Thai*, 635 F.3d at 1340. The foreign exporter must demonstrate

> (1) that the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, that the exemption is linked to the exportation of the subject merchandise, and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise.

Id. (citations omitted).

2. Commerce's Past Methodology for Calculating the Duty Drawback Adjustment

Prior to adopting the duty neutral methodology at issue here, Commerce's practice was to calculate the duty drawback adjustment to the export price by adjusting export price, pursuant to 19 U.S.C. §

1677a(c)(1)(B). *See Habaş Sinai ve Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, 43 CIT __, __ 361 F. Supp. 3d 1314, 1320 (2019); *id.* 43 CIT __, __, Slip Op. 19–130 (Oct. 17, 2019). The parties do not dispute that Commerce previously calculated the duty drawback adjustment by allocating the duties rebated or not collected by a foreign government over U.S. sales, and this per unit amount was then added to export price. See Pl.'s Br. at 10; Cons.-Pl.'s Br. at 12; Def.'s Br. at 13; Def.-Inter.'s Br. at 3. *See also Tosçelik*, 321 F. Supp. 3d at 1276 ("Under its previous practice, Commerce divided the amount rebated or forgiven by the exported quantity to determine the duty burden borne by each unit of merchandise sold in the United States."). In *Saha Thai*, the Federal Circuit upheld a corresponding modification to cost of production, which is incorporated into constructed value and ultimately the normal value. 635 F.3d at 1344. The adjustment to cost of production adds the duties not collected as a result of an exemption-based duty drawback program into cost of production so that the normal value reflects the cost of goods as if all goods were sold in the exporting country instead of having been exported to the United States. *Id.*

3. Commerce's Current Duty Neutral Methodology

Commerce's methodology for calculating the duty drawback adjustment in this case, and other recent AD investigations, departs from the past practice described above. *See* IDM at 9–11; Def.'s Br. at 14. After Commerce determined that Icdas and Habaş were eligible for the adjustment, as Turkey's Inward Processing Regime satisfied both prongs of *Saha Thai*, 635 F.3d at 1340, Commerce then employed what it calls a "duty neutral approach" to calculate the duty drawback adjustment. *See* Preliminary Determination Memo at 10–11; IDM at 9–11. This methodology adjusts export price to account for the duty drawback by dividing the duty drawback by the total cost of production, instead of by total U.S. sales. *Id.* As Commerce explained in the IDM, "to ensure that the comparison of [export price] with [normal value], . . . Commerce will make the duty drawback adjustment to [export price] in a manner that will render this comparison duty neutral."[2] IDM at 9. *See also Habaş*, Slip Op.

[2] Commerce explained its reasoning behind duty neutral methodology in the Issues and Decisions Memorandum:

> A duty drawback adjustment to export price [] is based on the principle that the 'goods sold in the exporter's domestic market are subject to import duties while exported goods are not.' In other words, home market sales prices and cost of production [] may be import duty 'inclusive,' while U.S. (and third-country) export sales prices are import duty 'exclusive.' Therefore, this inconsistency in whether prices or costs are import duty exclusive or inclusive will result in an imbalance in the comparison of [export price] with

19–130.[3] Commerce here "made an upward adjustment to [export price] based on the amount of the duty imposed on the input and rebated or not collected on the export of the subject merchandise by allocating the amount rebated or not collected to all production for the relevant period based on the cost of inputs during the POI." IDM at 9. The calculation is otherwise the same as described above.

B. Analysis of Commerce's Duty Neutral Methodology

Icdas and Habaş both challenge Commerce's duty neutral methodology as contrary to the plain language of 19 U.S.C. § 1677a(c)(1)(B). Pl.'s Br. at 12–13; Cons.-Pl.'s Br. at 6. Thus, they argue, Commerce's interpretation of 19 U.S.C. § 1677a(c)(1)(B) fails the first prong of *Chevron* analysis. *See* Pl's Br. at 12–13; Cons.-Pl.'s Br. at 16. Icdas contends that Commerce's new duty neutral methodology "deviated from the statutory language and effectively granted Icdas an adjustment to U.S. price representing only a fraction of actual duty exemptions earned on U.S. sales." Pl.'s Br. at 12. According to Icdas, the plain language of the statute "requires a full upward adjustment to U.S. price related to exportation, not production." *Id.* at 13. Thus, according to Icdas, "[h]aving found that Icdas satisfied its requirements for a duty drawback adjustment, Commerce should have simply granted Icdas a full duty drawback adjustment to U.S. price by dividing the amount of the uncollected duty by Icdas's total exports as reported by Icdas in its U.S. sales listing, in accordance with its usual practice." *Id.* at 11. Habaş, likewise, argues that "[a]pplying the cost-side adjustment to [the U.S. price] unlawfully dilutes the adjustment" because "it does not adjust fully for the duties drawn back on U.S. exports . . .." Cons.-Pl.'s Br. at 10. Instead, Habaş contends, "the law requires Commerce to base the U.S. sales drawback adjustment on the ratio of the total duties foregone divided by total exports – that is, the denominator must be related to export sales and not to total cost of manufacture." *Id.*

The Government refutes Icdas and Habaş's contentions, instead arguing that the statute is "silent regarding how duty drawbacks are

> normal value []. Thus, it is incumbent on Commerce to ensure that the comparison of [export price] with [normal value] is undertaken on a duty neutral basis.

Memorandum from J. Maeder to G. Taverman, re: Issues and Decision Memorandum for the Final Affirmative Determination and Negative Determination of Critical Circumstances, 9 (Dep't of Commerce Mar. 19, 2018) ("IDM"), P.R. 1273.

[3] In *Habaş*, the court summarized Commerce's rationale for its new duty neutral methodology:

> 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.

Slip Op. 19–130 (citations omitted).

to be allocated and does not require a specific denominator." Def.'s Br. at 15. According to the Government, "[h]ad Congress intended to limit Commerce's discretion in performing the [export price/constructed export price] duty drawback calculation as Habaş and Icdas contend, the statute would state that for each unit of subject merchandise exported, the [export price/constructed export price] shall be increased by the amount of duty rebated or not collected on that unit. But the statute does not contain those instructions." *Id.* at 16. The Government, therefore, argues that because the statute is silent as to the denominator, the court instead must ask under the second step of *Chevron* "whether Commerce's interpretation constitutes a permissible construction of the statute." Def.'s Br. at 16 (citing *Chevron*, 467 U.S. at 843). Here, the Government contends, "'any reasonable construction of the statute is a permissible construction,'" Def.'s Br. at 6 (quoting *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (quoting *Torrington Co. v. United States*, 82 F.3d 1039, 1044) (Fed. Cir. 1996))). The Government further asserts that "Commerce is . . . free to fill that [statutory] gap—as it has done with its duty neutral methodology—provided its interpretation is a reasonable construction of the statute." Def.'s Br. at 6 (citing *Chevron*, 467 U.S. at 843).

The court finds unavailing the Government's contention that the statute is silent regarding how duty drawbacks are to be allocated. In providing for the duty drawback adjustment, 19 U.S.C. § 1677a(c)(1)(B) states that export price shall be increased 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" (emphasis added). Contrary to the Government's assertion, therefore, the statute is not silent on this issue; instead, it explicitly states that the export price should be increased by the amount of import duties rebated or not collected because of exportation of the merchandise. *See* 19 U.S.C. § 1677a(c)(1)(B). The plain language, moreover, provides no indication that the duty drawback should instead be tied to overall production.

The court's conclusion that the duty neutral methodology is inconsistent with the plain language of 19 U.S.C. § 1677a(c)(1)(B) aligns with the court's recent holdings in at least five other duty drawback cases. *See Tosçelik*, 321 F. Supp. 3d at 1278 ("By including costs associated with manufacturing goods sold in the domestic market, [Commerce's] methodology lessens the upwards adjustment, and conceptually reintroduces an imbalance in the dumping margin calcula-

tion."); *Habaş*, 361 F. Supp. 3d at 1322 (the "allocation of foregone duties over total production is inconsistent with the clear statutory linkage between those duties and exported merchandise"); *Ereğli Demir ve Çelik Fabrikalari T.A.Ş. v. United States*, 42 CIT __, __, 357 F. Supp. 3d 1325, 1333 (2018); *id.*, 43 CIT __,__, Slip Op 19–135 (Oct. 23, 2019) ("[I]nstead of calculating the amount of the adjustment on the basis of duties foregone solely in relation to the exported merchandise eligible for drawback, as the statute requires, Commerce has calculated an amount that is based on the distribution of some of the exempted duties to domestic sales, which is contrary to the statute's plain language"); *Uttam*, 311 F. Supp. 3d at 1355 (The duty neutral methodology "fails to adequately connect the adjustment to duties forgiven "by reason of" the products' exportation to the United States."); *Rebar Trade Action Coal. v. United States*, 40 CIT __, __, 38 ITRD 1730 (2016) ("The [U.S. price] adjustment for drawback, being causally related to exportation, not production, is allocable only to the exports to which it relates"). In each instance, the court found that Commerce's duty neutral methodology contravened the plain language of the statute because it failed to tie the duty drawback adjustment to exported merchandise. *See id.*

The legislative history of 19 U.S.C. § 1677a(c)(1)(B) further supports that the duty neutral methodology fails the first prong of *Chevron*. This section was enacted in its current form through the Uruguay Round Agreements Act. *Uruguay Round Agreements Act*, Pub. L. No. 103–465, § 223, 108 Stat. 4809, 4876 (1994). The Statement of Administrative Action ("SAA"),[4] which was adopted with the Act, stated that Commerce "will calculate export price and constructed export price by adding to the starting prices . . . import duties that are rebated or not collected due to the exportation of the merchandise (duty drawback) . . .." Uruguay Round Agreements Act, *Statement of Administrative Action*, H.R. Doc. No. 103–316, Vol. 1, 656, 822–23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163 ("*SAA*"). Thus, the SAA explicitly tied duty drawback to exportation, not production, of merchandise.

The Government argues that the lack of an explicit methodology in the legislative history indicates that Congress has "left the selection of methodology to the reasonable exercise of the agency's discretion." Def.'s Br. at 16 (citing *Chevron*, 467 U.S. at 843). The Government also points out that "the SAA states that under 19 U.S.C. §

[4] 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).

1677a(c)(1), Commerce will add to the [export price] 'import duties that are rebated or not collected due to the exportation of the merchandise (duty drawback)'." *Id.* at 16 (citing *SAA* at 823). The Government is correct that this language does not articulate a specific calculation methodology. However, this language does not support Commerce's contention that the plain language of the statute was ambiguous and that Commerce was reasonable in dividing the duty drawback over domestic sales, to which the drawback is unrelated, before adding the drawback to the export price. To the contrary, this legislative history is consistent with the Congressional intent discernable from the statutory text and supports a calculation which fully adjusts export price for the duties that would have been paid but for the exportation of the merchandise to the United States.

The plain language of the statute, persuasive case law from this court, and the legislative history all support the proposition that the duty drawback must be tied to exported merchandise, not overall domestic production. The court, therefore, concludes that Commerce's duty neutral methodology is contrary to the plain language of the statute and thus fails the first prong of *Chevron*. *See* 467 U.S. at 842–43. Accordingly, the duty neutral methodology is contrary to law and the court remands Commerce's duty drawback methodology with instructions to recalculate the duty drawback adjustment in accordance with this opinion.

II. Commerce's Reliance on a Surrogate Rate to Impute Credit Expenses Is in Accordance with Law and Supported by Substantial Evidence.

Habaş next challenges Commerce's reliance on a surrogate rate, in lieu of Habaş's zero-interest loans, to impute credit expenses on home market sales, alleging that Commerce's approach is both contrary to law and unsupported by substantial evidence. Cons.-Pl.'s Br. at 20. Habaş argues that "Commerce has no factual basis for finding that the zero-interest loans from unaffiliated banks are not commercial other than the bald fact that the interest rate, zero, is different from the 10.23 percent average short-term rate for all companies nationwide." *Id.* at 26. The court, however, concludes that Commerce's determination that Habaş's short-term borrowing rate was non-commercial, and subsequent use of a surrogate rate, comports with established Federal Circuit precedent requiring the cost of credit to "be imputed on the basis of usual and reasonable commercial behavior." *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 461 (Fed. Cir. 1990). Additionally, contrary to Habaş's assertions, the

surrogate rate relied on by Commerce is supported by substantial evidence. The court therefore sustains Commerce's reliance on a surrogate rate to impute credit expense on home market sales.

A. Legal Standards for Imputing Credit Expense on Home Market Sales

When calculating normal value, 19 U.S.C. § 1677b(a)(6)(C)(iii) "authorizes Commerce to adjust normal value to account for any differences (or lack thereof) between the export price (or constructed export price) and normal value that are wholly or partly due to differences in the circumstance of sale ("COS") between sales made in the U.S. and sales made in the foreign market under consideration." *Hornos Electricos de Venezuela v. United States*, 27 CIT 1522, 1538, 285 F. Supp. 2d 1353, 1368 (2003) (citing 19 U.S.C. § 1677b(a)(6)(C)). The regulation implementing this section of the statute, 19 C.F.R. § 351.410, directs Commerce to adjust for "direct selling expenses," such as credit expenses. *See* 19 C.F.R. § 351.410(b)–(c). Accordingly, Commerce adjusts normal value to reflect that a foreign firm "incurs certain costs in its home market sales that it does not incur when selling in the U.S. market." *Hornos Electricos*, 285 F. Supp. 2d at 1368 (citing *Torrington*, 156 F.3d at 1363). With respect to credit expenses, in a policy bulletin released in 1998, Commerce described this adjustment as follows:

> The Department has long recognized that greater credit expenses are associated with longer terms of payment, and that these credit expenses are usually built into the price of the sale. For example, if a respondent requires U.S. customers to pay within 30 days of shipment but allows home market customers 120 days, the respondent incurs greater credit expenses in the home market, because money a company receives after 120 days has a lower present value than the same amount of money received within 30 days. These credit expenses may also be thought of as the opportunity cost of money: they are the cost to the respondent for not receiving immediate payment for its sales.

U.S. Dep't of Commerce, Import Administration Policy Bull. No. 98.2, Imputed Credit Expenses and Interest Rates (Feb. 23, 1998), https://enforcement.trade.gov/policy/bull98–2.htm ("Policy Bulletin 98.2"). In other words, Commerce adjusts normal value to reflect that the credit expenses accompanying a firm's domestic sales account for different payment times across foreign and domestic markets, i.e. the

time value of money.[5] In making the adjustment, Commerce "measures the credit expense on a sale by the amount of interest that the sale revenue would have earned between date of shipment and date of payment." *Id.* This expense is referred to as the "imputed credit expense," and appropriate adjustments are made to the normal value and export price.

Policy Bulletin 98.2 then sets forth Commerce's policy for selecting a rate for imputed credit expense relating to foreign market sales. *See id.* The policy favors using existing short-term borrowings in the currency of the home country, when such borrowings exist. *Id.* "Where respondents have no U.S. dollar short-term loans," however, Policy Bulletin 98.2 provides for use of a surrogate rate. *Id.* Policy Bulletin 98.2 provides three criteria to determine a suitable surrogate rate: "1) the surrogate rate should be reasonable; 2) it should be readily obtainable and predictable; and 3) it should be a short-term interest rate actually realized by borrowers in the course of 'usual commercial behavior' in the United States." *Id.* The Federal Circuit emphasized the third criterion, that the imputed cost of credit conforms with commercial reality, in *LMI*:

> [T]he imputation of credit cost itself is a reflection of the time value of money, and hence commercial practice. The time value of money is not an arbitrary fiction, but must correspond to a dollar figure reasonably calculated to account for such value during the gap period between delivery and payment. If the cost of credit is imputed in the first instance to conform with commercial reality, it must be imputed on the basis of usual and reasonable commercial behavior.

912 F.2d at 460–61. As addressed below, Commerce applied Policy Bulletin 98.2 to impute credit expenses to Habaş.

B. Commerce's Reliance on a Surrogate Rate to Impute Credit Expenses

Commerce's cost verification report found that Habaş "obtained commercial loans denominated in Turkish Lira and U.S. dollars from an affiliated company, Anadolubank, during the POI." Memorandum from P. Scholl to the File re: Verification of Cost Response of Habaş Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. in the Antidumping Duty Investigation of Carbon and Alloy Steel Wire Rod from Turkey,

[5] "The time value of money (TVM) is the concept that money available at the present time is worth more than the identical sum in the future due to its potential earning capacity. This core principle of finance holds that provided money can earn interest, any amount of money is worth more the sooner it is received. TVM is also sometimes referred to as present discounted value." James Chen, *Time Value of Money (TVM)*, Investopedia.com (Sept. 25, 2019), https://www.investopedia.com/terms/t/timevalueofmoney.asp.

5 (Dep't Commerce Feb. 12, 2018), P.R. 1059 ("Habaş CVR"). The interest rate on these loans was zero percent. IDM at 16–17. Commerce determined that these zero-interest loans were not an appropriate basis to calculate the short-term interest rate, stating Habaş "zero-interest rate loans put it in the same position as a company that reports having no short-term commercial borrowings, and for which Commerce would use an appropriate surrogate short-term interest rate." *Id.* at 18

Commerce then found that Habaş's "short-term interest rate does not meet the criteria of being reasonable or representative of usual commercial behavior, as Turkish short-term publicly available rates differ significantly from that of Habaş" and determined that use of a surrogate rate was necessary. *Id.* at 18. Commerce also noted that it was "reasonable to use a publicly available interest rate to impute the credit expense that properly reflects the time value of money in this situation." *Id.* Commerce then adopted the TCB rate as the surrogate short-term borrowing rate for Habaş. As addressed below, Habaş challenges Commerce's use of a surrogate rate as both contrary to law and unsupported by substantial evidence.

C. Analysis of Commerce's Use of a Surrogate Rate to Impute Credit Expenses

Habaş contends that "Commerce's finding of non-commerciality is not supported by substantial evidence and is inconsistent with Commerce's treatment of zero-interest loans in other cases, where Commerce explicitly held such loans to be commercial." Cons.-Pl.'s Br. at 20. The Government, however, argues that substantial evidence supported Commerce's decision "to equate a zero-interest rate loan with the absence of short-term borrowing," Def.'s Br. at 38, and to instead use a surrogate rate, as Habaş's "reported zero percent short term interest rates to calculate home market credit expenses . . . were not representative of usual commercial behavior," *id.* at 31 (citing IDM at 17–18). The court concludes that Commerce's reliance on a surrogate rate, where the reported rate was not appropriate for imputation of credit expenses, was supported by substantial evidence and in accordance with law.

III. Commerce's Use of a Surrogate Rate Instead of Habaş's Reported Short Term Borrowing Rate Is Supported by Substantial Evidence.

Habaş first argues that Commerce lacked a "factual basis for finding that the zero-interest loans from unaffiliated banks are not commercial other than the bald fact that the interest rate, zero, is different from the 10.23 percent average short-term rate for all companies

nationwide." Cons.-Pl.'s Br. at 26. Habaş further contends that Commerce has made no showing as to why Habaş's interest rate should "approximate the average borrowing experience of all Turkish companies" and noted that all its loans were overnight loans, which typically have a lower average borrowing rate than loans reflected by the average short-term TCB rate used by Commerce. *Id.* at 27. Zero percent interest, according to Habaş, "does not make [its loans] noncommercial." *Id.* The Government, however, argues that Commerce's use of a surrogate rate was supported by substantial evidence on the record and in accordance with law because Habaş's zero-interest loans were akin to no short-term borrowings and thus inappropriate for imputing credit expenses. Def.'s Br. at 38.

Pursuant to 19 U.S.C. § 1677b(a)(6)(C)(iii), 19 C.F.R. § 351.410(c), and Policy Bulletin 98.2, Commerce adjusted for the difference in export price and normal value due to circumstances of sale, including direct selling expenses like credit expenses. The court is unpersuaded by Habaş's contention that (1) Commerce determined that the loans were noncommercial, and (2) using the term "commercial loans" in the verification report undercut the reasonableness of Commerce's decision to use a surrogate rate. First, "Commerce . . . never stated that Habaş's loans were noncommercial; rather, Commerce found that Habaş's short-term interest rate associated with those loans was not 'reasonable or representative of usual commercial behavior' when considering the appropriate rate with which to impute revenue derived from prepayment." *See Habaş*, 361 F. Supp. 3d at 1332. Second, contrary to Habaş's assertions, the verification report's consideration of the zero-interest loans as commercial has no bearing on whether the loans are reflective of usual commercial behavior such that they would be an appropriate basis for determining the opportunity cost which accompanies prepayment. Commerce did state in the cost verification report that Habaş "also obtained *commercial loans* denominated in Turkish Lira and U.S. dollars from an affiliated company, Anadolubank, during the POI." Habaş CVR at 51 (emphasis added). As the Government points out, however, it is well established that "verification reports are not final determinations, but constitute only a collection of facts which, along with other record evidence, inform Commerce's final determination." Def.'s Br. at 36 (citing *Hyundai Steel Co. v. United States*, 42 CIT __, __ 319 F. Supp. 3d 1327, 1343 (2018) (other citations omitted)). Indeed, the verification report itself states that such reports do not "draw conclusions as to whether the

reported information was successfully verified, and further does *not* make findings or conclusions regarding how the facts obtained at verification will ultimately be treated in [Commerce's] determinations." Habaş CVR at 1.

Habaş next argues that Commerce misconstrues the meaning of Policy Bulletin 98.2, "as the Bulletin favors a respondent's *actual* borrowing rate, particularly if it is different from some average rate . . . ." Cons.-Pl.'s Br. at 28 (emphasis added). Habaş contends that Policy Bulletin 98.2 establishes a "simple rule": "for the purposes of calculating imputed credit expenses, we will use a short-term interest rate tied to the currency in which the sales are denominated. We will base this interest rate on the respondent's weighted-average short-term borrowing experience in the currency of the transaction." Cons.-Pl.'s Br. at 28 (quoting Policy Bulletin 98.2). As the Government argues, however, Habaş fails to establish on the record, "whether the particular zero-interest loans at issue in this investigation represent usual commercial behavior in Turkey." Def.'s Br. at 39. Habaş cites interest rates from the Federal Reserve to show why Habaş's overnight loans could result in a lower interest rate than a company with a mix of shorter and long-term loans, Cons.-Pl.'s Br. at 22, but, as the Government highlights, and Commerce noted in the *Final Determination*, the data Habaş provided did not include zero-interest loans, Def. Br. at 39 (citing IDM at 18). Thus, Habaş failed to establish that its zero-interest loans in fact constituted an actual short-term borrowing rate. *Id.* The court, therefore, is persuaded by the Government's contention that the "zero-interest rate loans put [Habaş] in the same position as a company that reports having no short-term commercial borrowings, and for which Commerce would use an appropriate surrogate short-term interest rate." *See* IDM at 18.

Furthermore, Policy Bulletin 98.2 emphasizes that in the event there are no borrowings in the home currency, the surrogate rate should be "reasonable, readily obtainable, and representative of 'usual commercial behavior.'" Here, Commerce complied with this guidance, explaining that because Habaş "has no short-term borrowings in the currency of the transaction," any selected surrogate interest rate "should meet the three criteria . . . [of being] reasonable, readily obtainable, and representative of 'usual commercial behavior.'" Def.'s Br. at 38 (citing IDM at 18). Accordingly, the court concludes that Commerce's decision to use a surrogate rate, to impute credit expenses "on the basis of usual and reasonable commercial behavior" was not unreasonable. *See LMI*, 912 F.2d at 461.

Habaş further contends that the Government's reliance on LMI to justify Commerce's use of a surrogate rate is misplaced. Cons.-Pl.'s

Reply at 9. According to Habaş, *LMI* stands for the proposition that "where the respondent had actual dollar borrowings in the [POI], it was error for Commerce to impute credit on U.S. sales using a foreign-currency rate." *Id.* at 9. Habaş's misinterprets *LMI*, however, because the decision was based on the principle that imputed expenses must be based on reasonable commercial behavior. *See* 912 F.2d at 460–61. In *LMI*, the Federal Circuit rejected Commerce's reliance on the home market short-term financing rate of sixteen percent for imputing credit cost on U.S. sales despite LMI's insistence that it would not have borrowed in the U.S. at such a high rate. *Id.* at 460. LMI did have some dollar borrowings during that period which Commerce refused to rely on because "these loans were made to finance dollar purchases of raw materials, not dollar sales of finished products." *Id.* The Federal Circuit found that it was unreasonable to use a home-market borrowing rate to impute credit expenses on U.S. sales because doing so did not conform with "reasonable commercial behavior." *Id.* at 460–61. In other words, the Federal Circuit held that it would be unreasonable to impute U.S. credit expenses based on a sixteen percent rate derived from Italian borrowings because if these expenses were actually incurred in the United States, they would have been lower than 9.5 percent. *See id.* Therefore, *LMI* stands for the proposition that the rates used to impute expenses should conform with "reasonable commercial behavior." *See id.* at 460–61. The court thus concludes Commerce's decision to use a surrogate rate comported with the Federal Circuit's holding in *LMI* that Commerce should use a rate that reflects "reasonable commercial behavior."

IV. Commerce's Decision Not To Use Habaş's Zero-Interest Loan Rate Is Not Arbitrary.

Habaş also argues that Commerce's treatment of zero-interest loans was inconsistent with its past practice of including zero-interest loans within weighted averages used to determine the home market borrowing rate in previous AD duty administrative reviews. Cons.-Pl.'s Br. at 29–30 (citing *Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Results of Antidumping Duty Administrative Review,* 76 Fed. Reg. 76,939 (Dep't Commerce Dec. 9, 2011) ("*Carbon Pipe from Turkey*"); *Welded Line Pipe From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 61,362 (Dep't Commerce, Oct. 13, 2015) ("*Line Pipe from Turkey*") Habaş points out that inclusion of zero-interest rate loans in the weighted-average, in *Carbon Pipe from Turkey* and *Line Pipe from Turkey*, had the effect of increasing the AD margin. Cons.-Pl.'s Br. at 29. Habaş contends that Commerce's inclusion of zero-interest rate loans as part of a weighted-average short-term borrowing rate when

it increases the AD margin, but refusal to base the rate entirely on only zero-interest rates in a manner that decreases the AD margin, constitutes "margin engineering at its most blatant." Cons.-Pl.'s Reply Br. at 11.[6]

The court is not persuaded by Habaş's contention that Commerce's treatment of zero-interest loans in prior administrative reviews forecloses Commerce's ability to reasonably rely on a surrogate rate in this case. *See* Cons.-Pl.'s Br. at 29–30 (citing *Carbon Pipe from Turkey*; *Line Pipe from Turkey*). "[A]n agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (further citations omitted)). *See also Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 37 CIT __, 896 F. Supp. 2d 1313, 1325 (2013) (citations omitted). Here, however, the situations differ in key respects. In *Carbon Pipe from Turkey* and *Line Pipe from Turkey*, over the objections of the foreign firms in each case, Commerce included zero-interest loans as part of a weighted average interest rate used to determine home-market credit expense. *See* Certain Welded Carbon Steel Pipe and Tube from Turkey: Issues and Decision Mem., A-489–501 (Dep't Commerce Dec. 9, 2011) at Comment 10, 76 ITADOC 76939 ("Carbon Pipe from Turkey IDM");Welded Line Pipe from the Republic of Turkey: Issues and Decision Mem., A-489–822 (Dep't Commerce, Oct. 5, 2015) at Comment 13, 80 ITADOC 61632 ("Line Pipe from Turkey IDM"). Those administrative reviews, however, did not involve instances of pre-payment. As the court previously observed in *Habaş*, 361 F. Supp. 3d 1314 (2019), Habaş's reliance on Commerce's prior inclusion of zero-interest loans in its credit expense calculations is misplaced because the cited determinations do not involve instances of prepayment." *Habaş*, 361 F. Supp. 3d at 1332 (citing Carbon Pipe from Turkey IDM at 28–29; Line Pipe from Turkey at 30–31). This distinction is relevant because relying on a zero-interest rate in instances of prepayment would deny that there is any benefit to prepayment at all and cause the imputation of credit expense in a manner inconsistent with commercial reality. Commerce's treatment of zero-interest loans in this case, moreover, is consistent with its treatment of such loans

[6] In its reply brief, Habaş explains the reason for the different effects on the AD margin:

> The only real difference between the Turkish pipe cases and the present cases is that in the Pipe cases the respondent had a positive lag between shipment and payment, so that a zero-interest rate reduced imputed credit and thereby increased normal value. Here, on the other hand, Habaş had a negative lag between payment and shipment (i.e., sales were paid prior to shipment), so that a zero-interest rate would reduce normal value.

Cons.-Pl.'s Reply Br. at 11.

in the administrative review at issue in the court's earlier decision, *Habaş*. *See* 361 F. Supp. 3d at 1332.

The *Habaş* opinion is persuasive and worth quoting at length:

> From the outset, Habaş misstates Commerce's basis for rejecting its zero-interest short-term rates. Habaş asserts that Commerce rejected its rates as "noncommercial" and, thus, seeks to persuade the court that its loans are indeed commercial. Commerce, however, never stated that Habaş's loans were noncommercial; rather, Commerce found that Habaş's short-term interest rate associated with those loans was not "reasonable or representative of usual commercial behavior" when considering the appropriate rate with which to impute revenue derived from prepayment. The issue confronting Commerce concerned the proper interest rate with which to calculate the *benefit* inuring to Habaş from the advance payment, not the *loss* occasioned by delayed payment. Because longer lending periods are associated with higher interest rates, Commerce determined that applying a zero-interest rate to Habaş's negative receivables would not capture the benefit derived therefrom, and, thus, the rate was not "reasonable or representative of usual commercial behavior," . . . Habaş fails to persuade the court that Commerce should effectively treat prepayment as worthless.

361 F. Supp. 3d at 1332 (citations omitted).[7] The imputed credit expense adjustment is intended to reflect the opportunity cost that accompanies selling goods in the domestic market with a longer term of payment. Utilizing zero-interest loans as the basis for imputing credit expense would deny that there is a benefit to shorter terms of payment. As the Federal Circuit said in *LMI*, "[t]he time value of money is not an arbitrary fiction, but must correspond to a dollar figure reasonably calculated to account for such value during the gap period between delivery and payment." 912 F.2d at 460–61. The concept of the time value of money, which is at the core of the adjustment, requires reliance on a rate which is representative of usual commercial behavior in order to reflect the opportunity cost that accompanies longer terms of payment. Here, therefore, using the TCB rate to impute credit expenses, instead of the zero-interest rate, was not inconsistent with past practice.[8] The court thus concludes

[7] Habaş argues that *Habaş* is "not a final decision and remains subject to further appeal, and Commerce's logic in that case was different from its logic here." Cons.-Pl.'s Reply Br. at 9–10 (citations omitted).

[8] Habaş argues that arguments raised by Nucor regarding the time value of money were waived because "Nucor did not make this argument in the proceeding below, and Commerce

that Commerce's decision not to use zero-interest loans as the basis for imputing credit expense on home market sales was not arbitrary.

V. Commerce's Choice of a Surrogate Rate Is Supported by Substantial Evidence.

Lastly, the court notes that Habaş offers no alternative to the TCB rate, except for using the zero-interest rate itself. In the absence of any evidence on the record to the contrary, the court thus finds Commerce's reliance on the TCB rate to be reasonable. *See Habaş*, 361 F. Supp. 3d at 1333 (citing *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (the burden of creating an adequate record before Commerce lies with interested parties)). The TCB rate, moreover, satisfies Policy Bulletin 98.2's guidance that any surrogate rate should be "reasonable, readily obtainable, and representative of 'usual commercial behavior.'"

Accordingly, the court sustains Commerce's use of the TCB rate because it is in accordance with law and supported by substantial evidence on the record. *See* 19 U.S.C. § 1516a(b)(l)(B)(i).

CONCLUSION AND ORDER

The court concludes that Commerce's use of the duty neutral methodology to make the duty drawback adjustment in calculating the AD margin was not in accordance with the plain language of the statute. The court thus remands the duty drawback methodology with instructions to recalculate the adjustment. The court sustains Commerce's treatment of Habaş's zero-interest borrowing rate and use of a surrogate rate as in accordance with law and supported by substantial evidence. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination with the court, and the parties shall have 30 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: January 28, 2020
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

---

did not discuss this theory in its ID Memo." Cons.-Pl.'s Reply Br. at 11 (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1378–82 (Fed. Cir. 2007)). However, the Government also made similar arguments with respect to time value of money, and Commerce discussed the importance of time value of money in the IDM. *See* Def.'s Br. at 39–40; IDM at 17–18.

Slip Op. 20–11

JIAXING BROTHER FASTENER CO., LTD. et al., Plaintiffs, v. UNITED STATES, Defendant, and VULCAN THREADED PRODUCTS INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 15–00313

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the fifth administrative review of certain steel threaded wire rod from the People's Republic of China.]

Dated: January 29, 2020

Gregory S. Menegaz, J. Kevin Horgan, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiffs Jiaxing Brother Fastener Co., Ltd., a/k/a Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd.

Joseph H. Hunt, Deputy Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Elizabeth Anne Speck*, Senior Trial Counsel. Of counsel was *Daniel Calhoun*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on a motion for judgment on the agency record challenging several aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the fifth administrative review of the antidumping duty ("ADD") order covering certain steel threaded rod ("STR") from the People's Republic of China ("PRC"). *Certain [STR] from the [PRC]*, 80 Fed. Reg. 69,938 (Dep't Commerce Nov. 12, 2015) (final results of [ADD] admin. review & final determination; 2013–2014) ("Final Results") and accompanying Issues and Decision Memo. for the Final Results of the Fifth Administrative Review of the [ADD] Order on Certain [STR] from the [PRC], A-570–932, (Nov. 3, 2015), ECF No. 18–4 ("Final Decision Memo.").

Plaintiffs Jiaxing Brother Fastener Co., Ltd. (a/k/a Jiaxing Brother Standard Parts, Co., Ltd.), IFI & Morgan Ltd., and RMB Fasteners Ltd. (collectively, "Jiaxing") challenge three aspects of Commerce's final determination. *See* Pls.' Memo. Supp. Mot. J. Agency R., May 31, 2019, ECF No. 43–2 ("Pls.' Br."). Plaintiffs challenge as unsupported by substantial evidence Commerce's selection of Thailand as the primary surrogate country, *see id.* at 8–22, and the selection of GTA

data from Thailand to value STR inputs, *see id.* at 23–26.[1] Plaintiffs also challenge as unsupported by substantial evidence Commerce's decision not to adjust the surrogate financial ratios. *See id.* at 27–28.

For the reasons that follow, the court sustains Commerce's selection of Thailand as the primary surrogate country and Commerce's selection of GTA data from Thailand. However, the court remands Commerce's determination regarding the calculation of surrogate financial ratios for further explanation or consideration.

BACKGROUND

On May 29, 2014, Commerce initiated the fifth administrative review covering STR entered during the period of review ("POR") April 1, 2013 through March 31, 2014. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 79 Fed. Reg. 30,809, 30,813 (Dep't Commerce May 29, 2014). Commerce selected Jiaxing as a mandatory respondent for this review. *See Certain [STR] from the [PRC]*, 80 Fed. Reg. 26,222, 26,222 (Dep't Commerce May 7, 2015) (preliminary results of the [ADD] review; 20132014) ("*Preliminary Results*"), and accompanying Decision Memo. for Prelim. Results of Fifth [ADD] Review, A-570–932, (Apr. 30, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–11082–1.pdf (last visited Jan. 23, 2020) ("Preliminary Decision Memo.").

Given that Commerce considers the PRC to be a non-market economy ("NME"), Commerce calculated Jiaxing's dumping margin based on factors of production ("FOPs") by using prices from a surrogate market economy country ("primary surrogate country"). *See* 19 U.S.C. § 1677b(c)(4) (2012).[2] On July 14, 2014, Commerce sought comments from interested parties on its selection of possible primary surrogate countries, which included South Africa, Colombia, Bulgaria, Thailand, Ecuador, and Indonesia. *See* Request for Surrogate Country and Surrogate Value Cmts. and Information, PD 28, bar code 3215368–01 (July 14, 2014) ("Commerce's Surrogate Country Request").[3] In reply, Jiaxing proposed that Commerce also consider the Ukraine, and submitted additional information and data concerning

[1] Although Plaintiffs in their moving brief characterize Commerce's decision as arbitrary and capricious and as contrary to law, in substance, Plaintiffs' arguments challenge the determination as unsupported by the record and therefore lacking substantial evidence. *See* Pls.' Br. at 1, 3, 8. The court therefore addresses the Plaintiffs' arguments as substantial evidence arguments.

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

[3] On January 11, 2016, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination, on the docket, at ECF No. 18–1-2. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices.

that country.[4] *See* Jiaxing Surrogate Country Selection Cmts. at 2, PD 66, bar code 3229776–01 (Sept. 19, 2014) ("Jiaxing SC Seln. Cmts."); *see also* Jiaxing Surrogate Value Information, PD 95–98, bar code 3239156–01 (Oct. 31, 2014) ("Jiaxing SV Info."); Jiaxing Rebuttal Factual Information, PD 100–01, bar code 3240415–01 (Nov. 7, 2014) ("Jiaxing SV Rebuttal").

On November 3, 2015, Commerce published its *Final Results* and selected Thailand as the primary surrogate country for the valuation of FOPs and surrogate financial ratios. *See* Final Decision Memo. at 7–9, 45–56; *see also* Final Surrogate Value Memo., PD 275–79, bar code 3414832–01 (Nov. 3, 2015) ("Final SV Memo."). Commerce explained that although it considered Ukraine and Thailand to be at a comparable level of economic development to the PRC in terms of per capita gross national income ("GNI") and to be significant producers of STR, steel import data for Thailand from the Global Trade Atlas ("Thai GTA data") was more specific than data from Ukraine. Final Decision Memo. at 47–49, 52–55. Specifically, the Thai GTA data, unlike data sources from the Ukraine, catalogued import prices by carbon content and diameter specific to the steel grade of Jiaxing's primary STR inputs, i.e., round bar and steel wire rod (collectively, "STR inputs").[5] *See id.* at 53. Commerce also considered the Thai GTA data to be more contemporaneous than the Ukrainian data and, further, found that only Thailand "offer[ed] multiple financial statements that mirror the production experience of [Jiaxing.]" *Id.* at 53, 56. Given that, in Commerce's view, "Thailand offers superior quality of data for the surrogate financial ratios" and the foregoing considerations, Commerce selected Thailand as the primary surrogate country. *Id.* at 56. Commerce also selected the Thai GTA data to value Jiaxing's STR inputs and used the financial statements from two Thai companies to calculate surrogate financial ratios. *Id.* at 59, 61–66.

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) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in a review of an anti-

[4] Jiaxing also proposed the Philippines as the primary surrogate country. *See* Jiaxing SC Seln. Cmts. at 2; Final Decision Memo. at 46. However, Commerce found that the Philippines was not at a comparable level of economic development as the PRC and therefore rejected the Philippines as a potential primary surrogate country. *See* Final Decision Memo. at 47–48.

[5] As Commerce explained, "[STR] is drawn from wire rod or round bar, [and] these steel inputs constitute most of the material cost and are the most important factors for surrogate country selection purposes in proper valuation of [STR]." Final Decision Memo. at 52 (citing Final SV Memo. at Ex. 1).

dumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Primary Surrogate Country Selection

Jiaxing challenges as unsupported by substantial evidence Commerce's selection of Thailand as the primary surrogate country because Commerce did not consider evidence that Thai GTA data are distorted and failed to understand the quality of the Ukrainian data. *See* Pls.' Br. at 8–22.[6] Defendant argues that there is substantial evidence supporting Commerce's selection of Thailand as the primary surrogate country. *See* Def.'s Br. at 8–22. For the reasons that follow, the court sustains Commerce's selection of Thailand as the primary surrogate country.

In an antidumping proceeding, if Commerce considers an exporting country to be an NME, like the PRC, it will identify one or more market economy countries to serve as a "surrogate" for that NME country in the calculation of normal value.[7] *See* 19 U.S.C. § 1677b(c)(1), (4). Normal value is determined on the basis of FOPs from the surrogate country or countries used to produce subject merchandise. *See id.* at § 1677b(c)(1). FOPs to be valued in the surrogate market economy include "quantities of raw materials employed," "amounts of energy and other utilities consumed," "representative capital cost, including depreciation[,]" and "hours of labor required[.]" *See id.* at § 1677b(c)(3). However, the statute does not distinguish between production labor, or labor used to produce subject merchandise, and non-production labor, or labor associated with selling, general, and administrative ("SG&A") functions. *See generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010). After calculating the total value of FOPs, Commerce will add "an amount

[6] Jiaxing also contends that a "much higher standard" applies when Commerce reviews and selects surrogate values. *See* Pls.' Br. at 1. However, Jiaxing does not cite support for this proposition or elaborate further in its briefs. Therefore, the court does not understand Jiaxing to be making a contrary to law argument.

[7] Dumping occurs when merchandise is imported into the United States and sold at a price lower than its "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See* 19 U.S.C. §§ 1673, 1677(34), 1677b(a). The difference between the normal value of the merchandise and the U.S. price is the "dumping margin." *See* 19 U.S.C. § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See* 19 U.S.C. § 1673; *see generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010).

for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). To do so, Commerce calculates "surrogate financial ratios" that the agency derives from the financial statements of one or more companies that produce identical or comparable merchandise in the primary surrogate country. *See* 19 C.F.R. § 351.408(c)(4) (2015); *Dorbest*, 604 F.3d at 1368.

By statute, Commerce must value FOPs "to the extent possible . . . in one or more market economy countries that are . . . at a level of economic development comparable to that of the [NME], and . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B).[8] When several countries are both at a level of economic development comparable to the NME country and significant producers of comparable merchandise, Commerce evaluates the reliability and completeness of the data in similarly situated surrogate countries and generally selects the one with the best data as the primary surrogate country. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Pol'y Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Jan. 23, 2020) ("Policy Bulletin 04.1"). Commerce prefers to use one primary surrogate country. *See* 19 C.F.R. § 351.408(c)(2).

Further, section 1677b requires Commerce to use "the best available information" to value FOPs. 19 U.S.C. § 1677b(c)(1). Commerce has discretion to determine what constitutes the best available information. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). "Commerce generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review" (collectively, "selection criteria"). *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Policy Bulletin 04.1.

An agency's determination is supported by substantial evidence when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S.

[8] This analysis is designed to determine a producer's costs of production in an NME as if that producer operated in a hypothetical market economy. *See, e.g., Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999); *see also* 19 U.S.C. § 1677b(c)(1).

474, 488 (1951). Nevertheless, "the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence on the record." *Zhaoqing New Zhongya Aluminum Co., Ltd. v. United States*, 36 CIT 1390, 1392, 887 F. Supp. 2d 1301, 1305 (2012) (citing *Universal Camera Corp.*, 340 U.S. at 488).

Commerce's selection of Thailand, over Ukraine, as the primary surrogate country is supported by substantial evidence, because Thailand was the only country for which Commerce had steel-grade specific values that could be matched to Jiaxing's low-carbon STR inputs—i.e., wire rod and round bar—as well as financial statements that were fully contemporaneous with the POR. *See* Final Decision Memo. at 45–56. Although Commerce found Ukraine, like Thailand, to be "within the GNI band of countries that are considered to be at the same level of economic development to the PRC" and to be a significant producer of STR, thus satisfying the statutory requirements under section 1677b(c)(4)(A)–(B),[9] Commerce, in comparing data sources from Thailand and the Ukraine reasonably found that data from Thailand were the "best available information" on the record. *See id.* at 47, 49–56; *see also* 19 U.S.C. § 1677b(c)(4)(A)–(B).

First, Commerce compared Thai and Ukrainian data sources to value STR inputs, i.e., wire rod and round bar. *See* Final Decision Memo. at 52–55. Specifically, Commerce considered three possible data sources, GTA data from Thailand, GTA data from the Ukraine, and Metal Expert data from the Ukraine. *Id.* at 53–55. Commerce found that the Thai GTA data was divided by grades of steel based on carbon content and reported at the ten-digit HTS level.[10] *Id.* at 53. The Ukrainian GTA data, by contrast, was organized in "broad basket categories" and reported at the eight-digit HTS level. *Id.; see also* Jiaxing SV Info. at Ex. SV-5. Although Commerce found that the Ukrainian and Thai GTA data both "provide[d] specific breakouts for carbon content and diameter that is specific to the grade of [Jiaxing's] steel input" for wire rod, the Thai GTA data was more specific to value

[9] Commerce also determined that Bulgaria, Colombia, Ecuador, Indonesia, and South Africa were economically comparable to the PRC and significant producers of comparable merchandise; however, no party placed information from these countries on the record or argued that any should be selected as the primary surrogate country. *See* Final Decision Memo. at 46–47, 50. Instead, interested parties submitted information on Thailand and the Ukraine. *Id.* at 50.

[10] Jiaxing consumed low-carbon steel in its production of STR and reported specific carbon content ranges. *See* Final Decision Memo. at 52–53; *see also* Jiaxing's Supp. Sec. D. Questionnaire Resp. Resubmission, CD 158–60, bar code 3257803–01 (Feb. 5, 2015); Jiaxing's Supp. Sec. C Questionnaire Resp., CD 97–98, bar code 3246816–01 (Dec. 12, 2014).

round bar.[11] *See* Final Decision Memo. at 53. Commerce also compared Thai GTA data with Metal Expert data from the Ukraine. *See id.* at 54. Commerce found that the Ukrainian Metal Expert data was as "specific to the diameter for the grade of steel wire rod and round bar" as the Thai GTA data. *Id.* Commerce also found the two data sources to be equal in terms of "public availability, specificity, tax exclusivity, and broad market average representation"—but not in terms of contemporaneity. *Id.* The Ukrainian Metal Expert data covered only April 2013, one month of the POR, unlike the Thai GTA data. *Id.*[12]

Second, Commerce evaluated financial statements from Thai and Ukrainian companies. *Id.* at 55–56. Jiaxing had placed on the record financial statements of a Ukrainian company, dating to 2011, which precedes the POR; and, petitioners submitted 2013 financial statements from Thai producers of comparable merchandise that were contemporaneous with the POR. *See id.* at 56.[13] Commerce, again consistent with its preference to select data that satisfy all its selection criteria, including contemporaneity with the POR, chose to rely upon financial statements from Thai companies. *See id.* Therefore, given the inputs to be valued, and in consideration of the record evidence, Commerce determined that the data from Thailand was the "best available information" to value Jiaxing's FOPs.

Jiaxing does not demonstrate that Commerce failed to consider detracting evidence regarding the alleged distortion of Thai import values due to the Thai custom's authority's valuation practice. Jiaxing points to several reports from the United States Trade Representative ("USTR"), U.S. companies, and the Department itself concerning the Thai customs authority's customs valuation practices that "indicate the pervasiveness of this practice" that is not "confined to

[11] Commerce explained that the Thai data "are specific to the percentage of carbon content and diameter of the grade for the . . . steel input[.]" Final Decision Memo. at 53. The Ukrainian data was not subdivided by carbon content and less specific to value round bar. *Id.*

[12] Jiaxing argues that "the specificity of the Thai steel round bar carbon content is critically less important" in selecting the primary surrogate country, because over 95% of steel purchased and consumed by Jiaxing was wire rod. Pls.' Br. at 22. This argument ignores Commerce's other regulatory preferences to select SV data that is fully contemporaneous with the POR. *See* Policy Bulletin 04.1. Commerce examines all SV selection criteria—public availability, contemporaneity with the POR, representation of a broad market average, tax and duty-exclusive, and specific to the input—and prefers to select data that meet all criteria. *See, e.g.*, Issues and Decision Memo. for 6th Admin. Review Certain Preserved Mushrooms from the [PRC] at 3, A-570–851, (July 5, 2006), *available at* https://enforcement.trade.gov/frn/summary/prc/E6–11276–1.pdf (last visited Jan. 23, 2020).

[13] Commerce found that the four financial statements on the record from Thai companies to be "publicly available, complete, and audited." *See* Final Decision Memo. at 62.

certain types of commodities[.]"[14] *See* Pls.' Br. at 10–14; *see also* Jiaxing SV Rebuttal at Exs. SV-2–12. However, none of the reports, as Commerce explains and Jiaxing concedes, specify that the Thai customs authority manipulates the customs valuation of STR imports.[15] *See* Final Decision Memo. at 51; Pls.' Br. at 14. Commerce, in considering the reports' general discussion on alleged customs valuation manipulation, did not find them to render unreliable the Thai GTA data on the record. *See* Final Decision Memo. at 51. Commerce addressed Jiaxing's arguments in the underlying proceeding concerning these reports, and it is not the court's role to reweigh or itself reassess the credibility of that evidence.[16] *See Downhole Pipe & Equipment,*

[14] Jiaxing further contends that "the Department should take more seriously information indicating it has reason to believe or suspect the Thai Custom's data is being manipulated" given that Commerce rejects financial statements of surrogate companies that receive subsidies. *See* Pls.' Br. at 19. According to Jiaxing, both customs value manipulation and subsidization "speak[] to fundamentally the same issue: government involvement in pricing." *Id.* However, Congress specifically directed Commerce to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R. 3, H.R. Rep. No. 100–576 at 590–91 (1998) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24. Commerce, by its regulations, rejects data tainted by subsidization. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19, 1997) (final rule). Jiaxing has not established why Commerce acted unreasonably in declining to fault the Thai data on the basis of alleged manipulation, when Congress has not spoken to the issue and Commerce's regulations do not compel rejection.

[15] The reports are the USTR's annual "National Trade Estimate Report on Foreign Trade Barriers" for the years 2011–2014, a publication by Commerce's U.S. Commercial Service entitled "Doing Business in Thailand: 2012 Country Commercial Guide for U.S. Companies," a country profile of Thailand prepared by FedEx in 2013, and two requests for consultations filed with the World Trade Organization ("WTO") in 2008. *See* Jiaxing SV Rebuttal at Exs. SV-2–11. Each raises general concerns about the customs valuation practices of Thai customs authority. For example, although there are differences between the USTR's annual reports, each has a substantially similar section on "Customs Barriers" that, in each, conveys the (substantially same) concerns:

> The United States continues to have serious concerns about the lack of transparency in the Thai customs regime and the significant discretionary authority exercised by Customs Department officials. . . . The U.S. Government and industry also have expressed concern about the inconsistent application of Thailand's transaction valuation methodology and reports of repeated use of arbitrary values by the Customs Department.

Id. at Ex. SV-5; *see also id.* at Exs. SV-2–4. Commerce's 2012 "Doing Business in Thailand" publication echoes these concerns from the USTR reports. *See id.* at Ex. SV-6. The FedEx profile of Thailand reports that Thai customs officials will regularly assess import values through use of an indicative price prepared from the highest declared price of previous shipments of a product instead of the actual transaction value. *See id.* at Ex. SV-11. The two requests for consultations for WTO dispute settlement were filed by the European Union and the Philippines, alleging that Thailand has, since 2006, been applying arbitrary customs values to certain imports of alcoholic beverages and cigarettes, respectively. *See id.* at Exs. SV-7–8; *see also id.* at Ex. SV-9. None of these reports raise specific allegations as to the treatment of STR imports into Thailand by the Thai customs authority.

[16] According to Jiaxing, Commerce did not have a choice "between two competing datasets with various advantages and disadvantages" because data from Thailand "is distorted—and thus fatally flawed." *See* Pls.' Reply Br. at 1. As explained above, Commerce reasonably found that Jiaxing did not adduce evidence of alleged manipulation of STR imports by the Thai customs authority that amounted to distortion.

L.P., 776 F.3d at 1376 (explaining that the court's task is not to reweigh the evidence).

Nor does Jiaxing persuade that Commerce erred by failing to consider the reports in conjunction with record evidence on Thai steel import prices. Jiaxing argues, that given Thailand's import values for STR were at least 35% higher than world prices, this fact "lends specific factual support" to the reported concerns about the Thai customs authority's manipulation of import values with respect to STR.[17] *See* Pls.' Br. at 14. In making this argument, Jiaxing draws a parallel to *Jacobi Carbons AB v. United States*, 42 CIT __, 313 F. Supp. 3d 1308 (2018). *See* Pls.' Br. 15–16; *see also* Pls.' [Jiaxing] Reply Br. at 4–6, Oct. 9, 2019, ECF No. 49 ("Pls.' Reply Br."). However, Jiaxing's reliance is misplaced. In *Jacobi Carbons*, the court concluded that Commerce selection of Thai surrogate values was not supported by substantial evidence and inadequately explained. *See* 313 F. Supp. 3d at 1338. The court explained that record evidence regarding the manipulation of customs data together with high Thai prices suggested possible aberrancy. *See id.* at 1334–38. That decision, on a different record, concerns a different question of substantial evidence, whether Commerce's selection of a surrogate value was reasonable. *See id.* at 1332–38. The answer to that question is not probative of whether Commerce's selection of a primary surrogate country is, on this record, supported by substantial evidence. Therefore, Commerce reasonably selected Thailand as the primary surrogate country because it offered the "best available information."

[17] Jiaxing also points to 14 other data sources on the record to value STR inputs, which are "at least 35% lower on average than the Thai [GTA import values,]" that suggest the Thai GTA data aberrant and not the best available information. Pls.' Br. at 20–22 (citing Jiaxing SV Rebuttal); *see also* Pls.' Reply Br. at 6–7. However, Jiaxing did not place on the record evidence Commerce generally considers in determining aberrancy, namely input prices from the POR and prior years from countries comparable by GNI to the NME. *See, e.g.*, Issues & Decision Memo. for the Final Results in the Admin. Review of Certain Preserved Mushrooms from the [PRC] at 9–11, A-570–851, (Sept. 4, 2012), *available at* https://enforcement.trade.gov/frn/summary/prc/2012–22353–1.pdf (last visited Jan. 23, 2020). Moreover, as Commerce noted, data is not aberrational because it is the lowest or highest data on the record. Final Decision Memo. at 55 (citing *Camau Frozen Seafood Processing Import Export Corp. v. United States*, 37 CIT __, __ n.9, 929 F. Supp. 2d 1352, 1356 n.9 (2013)). Jiaxing further contends that the lower Thai domestic data sources are "particularly probative," because a Thai producer of STR would "not pay significantly inflated import prices when it could obtain such commodity steels from numerous other domestic sources at a lower cost." Pls.' Br. at 21. Commerce considered and reasonably rejected each of these third-country data sources along with the Thai domestic data, because they were not specific to the type of low-carbon STR Jiaxing consumed. *See* Final Decision Memo. at 55. Further, although a surrogate value must be representative of the situation in the NME country, Commerce had no obligation to duplicate the exact production experiences of Thai STR manufacturers. *See e.g., National Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

II. Selection of Surrogate Values

Jiaxing contends that, assuming Commerce appropriately selected Thailand as the primary surrogate country, Commerce should have rejected the Thai GTA data to value Jiaxing's STR inputs. Pls.' Br. at 24. Jiaxing argues that the Thai GTA data is not the "best available information," given that domestic price sources on the record are "consistently and considerably lower" than the GTA data. *Id.* at 23. Instead, Commerce, according to Jiaxing, should have relied on one of the Thai domestic data sources on the record.[18] *Id.* at 24. Defendant responds that Commerce's selection of the Thai GTA data is supported by substantial evidence and Commerce sufficiently explained why the domestic price sources failed to satisfy its surrogate value selection criteria. Def.'s Br. at 22–25. For the reasons that follow, the court sustains Commerce's selection of Thai GTA data to value Jiaxing's STR inputs.

As explained above, section 1677b requires Commerce to use "the best available information" to value FOPs. 19 U.S.C. § 1677b(c)(1). Commerce will generally select surrogate values from the primary surrogate country that are publicly available, product-specific, and contemporaneous with the period of review, as well as reflect a broad market average. *Qingdao Sea-Line Trading Co.*, 766 F.3d at 1386 (Fed. Cir. 2014); *see also* Policy Bulletin 04.1.

Commerce reasonably selected Thai GTA data to value Jiaxing's STR inputs, because it was the only data on record that was fully contemporaneous with the POR and was the most specific to the diameter of wire rod and carbon content consumed by Jiaxing than other record data. *See* Final Decision Memo. at 58–59. Commerce compared the Thai GTA data with two other data sources on the record, i.e., Thai domestic wire rod prices from the Asian Metal Market, and domestic and export prices from TATA Steel (Thailand). *Id.* at 58. With respect to the Asian Metal Market data, Commerce explained that the data were neither contemporaneous with the POR[19] nor specific, given that Jiaxing reported usage of a much wider range of diameter than the three steel wire rod diameters reported by

[18] According to Jiaxing, Commerce has a "preference" for domestic data when "import value is significantly higher than domestic price." Pls.' Br. at 24. Jiaxing refers to *Hebei Metals & Materials Imp. & Exp. Corp. v. United States* as support for this preference; however, in that case, the court explained that although Commerce may prefer a surrogate country's domestic prices over import values, that preference does not trump all other considerations "where it would conflict with the goal of accuracy." 29 CIT 288, 299, 366 F. Supp. 2d 1264, 1274 (2005).

[19] Jiaxing concedes that the Asian Metal Market data "is not contemporaneous" with the POR. Pls.' Br. at 26. To remedy this deficiency, Jiaxing suggests that Commerce "us[e] the price index to inflate the values." *Id.* Jiaxing does not cite to any authority as support requiring Commerce to inflate values.

Asian Metal Market. *See* Final Decision Memo. at 59. With respect to data from TATA Steel (Thailand), Commerce focused on the report's domestic prices, rather than the export prices, because Commerce considered that the export sales data likely reflected price distortion due to "the Department's affirmative finding that Thai [STR] industry is dumping to the United States[.]" *See id.* at 58. Commerce also rejected the TATA Steel (Thailand) domestic price data, because it did not represent a broad-market average, given that the data reflect the experiences of a single company, and only covered a narrow range of medium-and low-carbon wire rod of a single diameter. *See id.*[20] Neither the Asian Metal Market nor TATA Steel (Thailand) data satisfied Commerce's selection criteria, unlike the Thai GTA data.[21] *See* Final Decision Memo. at 57–58. Therefore, Commerce reasonably rejected the former two data sources in favor of the latter to value Jiaxing's STR inputs. *Id.* at 58.

III. Adjustment of Financial Ratios

Jiaxing challenges how Commerce accounted for labor in its normal value calculation. Specifically, Jiaxing points to certain labor-related line items categorized under "selling and administration costs" in the surrogate financial statements[22] and alleges that Commerce, in its surrogate financial ratio calculations, improperly treated these line items ("SG&A labor-related line items") as SG&A expenses rather than labor costs. *See* Pls.' Br. at 27. As a result, Jiaxing claims that Commerce erroneously double-counted labor costs, because Commerce's valuation of hours of labor reflected all labor costs, inclusive of the SG&A labor-related line items. Pls.' Br. at 27; Pls.' Reply Br. at 9–11. Defendant responds that Jiaxing's argument is without merit, because Commerce cannot "go behind" a surrogate financial statement to, as Jiaxing urges, re-categorize the SG&A labor-related line items, that in Commerce's view, the surrogate companies identified as SG&A. Def.'s Resp. Br. at 25–29. Defendant further contends that Commerce was not required to adjust the surrogate financial ratios because the labor costs in the normal value calculation are not over-

[20] Commerce also explained that the TATA Steel (Thailand) domestic prices were "quotes . . . offered as a price for export" that could, therefore, be distorted by Thai export subsidies. Final Decision Memo. at 58.

[21] Commerce explained that the GTA data from Thailand "provide better coverage" for the type of STR reported by Jiaxing, in terms of diameter and carbon content, and were fully contemporaneous with the POR. Final Decision Memo. at 59 (citing Final SV Memo. at 3).

[22] The surrogate financial statements categorized the line items at issue under the headings "Selling Expenses" and "Selling and Administration Cost," referred collectively here as "selling and administration costs." See Final SV Memo. at Ex. 13.

stated. *Id.* at 28. For the reasons that follow, the court remands for further explanation or consideration Commerce's calculation of the surrogate financial ratios related to labor.

As explained above, Commerce determines "normal value . . . on the basis of [FOPs]," including "hours of labor," to which Commerce "add[s] an amount for general expenses and profit[.]" 19 U.S.C. § 1677b(c)(1). Thus, section 1677b(c)(1) provides for the separate valuation of the hours of labor FOP and of general expenses and profit in the normal value calculation. *See id.* To value hours of labor, Commerce generally relies on labor costs reported in the International Labor Organization's ("ILO") Chapter 6A data, unless another data source better accounts for direct and indirect labor costs. *See Antidumping Methodologies in Proceedings Involving [NMEs]: Valuing the [FOP]: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 11, 2011) ("Labor Methodologies").[23] To value general expenses and profit, Commerce calculates surrogate financial ratios from financial statements of one or more producers of comparable merchandise in the primary surrogate country to capture certain items used in the production of subject merchandise. *See* 19 C.F.R. § 351.408(c)(4); *Dorbest*, 604 F.3d at 1368. Specifically, Commerce calculates separate surrogate financial ratios for SG&A, manufacturing overhead, and profit from a surrogate financial statement. *See, e.g., Manganese Metal From the [PRC]*, 64 Fed. Reg. 49,447, 49,448 (Dep't Commerce Sept. 13, 1999) (final results of second admin. review). To do so, Commerce analyzes each financial statement line item and either assigns the line item value to a particular category—i.e., raw materials, labor, energy, manufacturing overhead, finished goods, and profit—or excludes the value from its calculation. *See, e.g.*, Final SV Memo. at Ex. 13. Commerce then calculates separate surrogate financial ratios—for manufacturing overhead, SG&A, and profit—based on the total value of each category. *See id.* ; *see also Manganese Metal From the [PRC]*, 64 Fed. Reg. at 49,448. As relevant here, to calculate the SG&A surrogate financial ratio, Commerce divides the total SG&A value (numerator) by the total cost of manufacturing (denominator), i.e., the sum of raw materials, labor, energy, manufac-

[23] Commerce originally valued labor hours with ILO Chapter 5B data, which only captured direct labor costs. *See* Labor Methodologies, 76 Fed. Reg. at 36,093. In its Labor Methodologies, Commerce announced that it would, instead, use ILO Chapter 6A data, because the ILO Chapter 5B data could result in an undercounting of indirect labor costs, if indirect labor costs were not itemized—and reflected in—surrogate financial ratios. *See id.* However, the effect of switching from data that reflected only direct labor costs to a source that reflected both indirect and direct labor costs, could result in an overstatement of labor costs. To minimize this risk, Commerce stated that it will "adjust the surrogate financial ratios when the available record information—in the form of itemized indirect labor costs—demonstrates that labor costs are overstated." *Id.* at 36,094.

turing overhead, and finished goods. *See, e.g.*, Final SV Memo. at Ex. 13; *see also Manganese Metal From the [PRC]*, 64 Fed. Reg. at 49,448.

Commerce will make adjustments to the calculation of surrogate financial ratios to avoid double-counting[24] labor costs, "when the available record information—in the form of itemized indirect labor costs—demonstrates that labor costs are overstated." *See* Labor Methodologies, 76 Fed. Reg. at 36,094; *see also* Issues & Decision Memo. for the Final Determination of the [ADD] Investigation of Drawn Stainless Steel Sinks from the [PRC] at 15, A-570–983, (Feb. 19, 2013), *available at* https://enforcement.trade.gov/frn/summary/prc/2013–04379–1.pdf (last visited Jan. 23, 2020) ("Stainless Steel Sinks IDM") (stating that "because the NSO data include all labor costs, the Department has treated itemized SG&A labor costs in the surrogate financial statements as a labor expense rather than an SG&A expense, and we have excluded those costs from the surrogate financial ratios"). In such a case, Commerce will determine whether the surrogate financial statements "include disaggregated overhead and [SG&A] expense items that are already included in the [record data used to value labor], [Commerce] will remove these identifiable costs items." *See* Labor Methodologies, 76 Fed. Reg. at 36,094.

Here, Commerce valued hours of labor with data from the National Statistical Office of Thailand's Labor Force Survey of the Whole Kingdom from the second and third quarters of 2013 ("NSO quarterly data"), because it found the data to be more industry-specific and contemporaneous with the POR than the ILO Chapter 6A data.[25] *See id.* at 60, 65; *see also* Final SV Memo. at Exs. 8–9.[26] Further, Commerce derived surrogate financial ratios from the financial statements of three Thai companies.[27] *See* Final Decision Memo. at 56. Each company's financial statements itemized production labor costs separately from non-production labor, which were categorized under "selling and administration costs." *See* Final SV Memo. at Ex. 13. In the calculation of surrogate financial ratios, Commerce categorized SG&A labor-related line items as SG&A. It did not, as Jiaxing urged

---

[24] Generally, double counting is disfavored in antidumping calculations because it is distortive and renders margins less accurate. *See, e.g., Zhaoqing Tifo New Fibre Co. v. United States*, 41 CIT __, __ n.8, 256 F. Supp. 3d 1314, 1319 n.8 (2017) (collecting cases).

[25] Commerce, in line with its Labor Methodologies, opted to use the NSO quarterly data, because the NSO quarterly data was more product-specific and contemporaneous than the ILO Chapter 6A data. *See* Final Decision Memo. at 60, 65; *see also* Labor Methodologies, 76 Fed. Reg. at 36,093.

[26] The NSO quarterly data is contained in Exhibits 8 and 9. *See* Final SV Memo. at Exs. 8–9; *see also* Vulcan's SV Information at Ex. 6, PD 93–94, bar code 3238953–01 (Oct. 31, 2014).

[27] Those three companies are: L.S. Industry Co., Ltd., Thai Mongkol Fasteners Co., Ltd., and Sahasilp Rivet Industrial Co., Ltd.. Final Decision Memo. at 56.

during the administrative proceeding, reclassify the SG&A labor-related line items—such as salary, welfare, and social security—as labor. *See* Final Decision Memo. at 64–66. As a result, the SG&A surrogate financial ratio numerators included these line items' values, along with other SG&A expenses; and, the denominators contained, inter alia, other labor costs.[28] *See* Final SV Memo. at 9 & Ex. 13.

Commerce's determination not to adjust the surrogate financial statements is inadequately explained and does not appear to be supported by record evidence. First, Commerce found that the NSO quarterly data to value hours of labor "do not include SG&A labor because . . . [the data] identifies individual data line items for 'manufacturing' and 'administrative and support activities.'" Final Decision Memo. at 65. Commerce noted that, because the NSO quarterly data did not encompass SG&A labor, it would decline to adjust the surrogate financial ratios to reclassify the SG&A labor-related line items as labor. *See id.* However, it is unclear on what basis Commerce determined that the NSO quarterly data is exclusive of SG&A labor, because the NSO quarterly data only identify individual data line items for "manufacturing" activities, and there is no reference to "administrative and support activities" as Commerce stated in the Final Decision Memo. *See* SV Memo. at Exs. 8–9; Final Decision Memo. at 65. Although Commerce notes that it relies on the same NSO quarterly data to calculate labor hours as in the previous administrative review, *see* Final Decision Memo. at 65–66, the records of the two proceedings are not the same.[29] Here, unlike the previous administrative review, the record contains only excerpted data, not the full NSO reports.[30] The agency must make its determinations

[28] Had Commerce instead categorized these line items as labor, and placed the values in the denominator, the resulting surrogate financial ratio would have been less than what Commerce calculated.

[29] Each of Commerce's proceedings are treated "as independent proceedings with separate records and which lead to independent determinations." *See E.I. DuPont De Nemours & Co. v. United States*, Slip. Op. 98–7, 22 CIT 19, 32 (1998). Likewise, judicial review of such determinations must be limited to the record before the agency that was compiled during that segment of the proceeding. *See QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324–25 (Fed. Cir. 2011).

[30] By teleconference with the parties, the court requested the parties to indicate whether, and where, the complete NSO reports were on the record. *See* Telephone Conference, Dec. 16, 2019, ECF No. 56. In reply, Defendant and Defendant-Intervenor pointed to the excerpted NSO quarterly data. *See* Def.'s Resp. Ct.'s Request for Information, Dec. 17, 2019; [Def.-Intervenor's] Resp. Ct.'s Request for Information, Dec. 17, 2019, ECF No. 58. Plaintiffs, after reviewing the record, responded that "it was mistakenly presumed that the complete quarterly [Thai NSO data] was on the record . . . The submission of this labor data contained only an excerpt . . . with a webpage link to the full report." Pls.' Resp. Ct.'s Request for Information, Dec. 17, 2019, ECF No. 59.

based on the record before it.[31] On this record, Commerce's determinations that the NSO quarterly data does not cover SG&A labor, and as a consequence, that no adjustment of the surrogate financial ratios is warranted, does not find support.

Further, in declining to adjust the surrogate financial ratios, Commerce offers a second rationale, its inability to "go behind" a surrogate company's financial statement, a practice where Commerce declines to adjust surrogate financial statements that do not disaggregate expenses.[32] *See* Final Decision Memo. at 64. Yet the support that Commerce cites for this practice confirms that Commerce treats a

[31] In its *Final Results*, Commerce, however, assumes that the NSO quarterly data presented in this review was the same as in the prior review. For example, Commerce states that the Thai quarterly data "do not include SG&A labor because the Department previously found this labor source identifies individual line items for 'manufacturing' and 'administrative and support activities'" but cites, as support, to an exhibit containing 2012 census data, which Commerce declined to use, and the Issues and Decision Memo. from the prior administrative review. *See* Final Decision Memo. at 65 n.345. In addition, Commerce summarizes the methodology by which the NSO quarterly data were collected in the Final Calculation Memo, *see* Final Calc. Memo. at 6, but that methodology appears nowhere in the record.

Plaintiffs, in their briefs, also assume that the records of this proceeding and the prior administrative proceeding are the same. Specifically, Plaintiffs quote *Jiaxing I* at length, where the court explained how Commerce failed to address detracting evidence that suggest the NSO quarterly data encompasses more than manufacturing-related labor, and argue that the same reasoning applies here. *See* Pl.'s Br. at 28; Pl's Reply Br. at 9–10. However, the NSO data referenced here, and on the record in *Jiaxing I*, is not on this record.

[32] Commerce prefers to accept surrogate financial statement line items as listed, because the Department generally lacks the information necessary to alter line items of a surrogate company as if it were the respondent under review. When a surrogate financial statement does not list specific expenses, it is Commerce's practice not to "go behind" those financial statements and make adjustments, because, doing so, may introduce distortions. *See, e.g.*, Issues and Decision Memo. for the [ADD] Investigation of Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from the [PRC]: Final [ADD] Determination at 72, A-570–958, (Sept. 20, 2010), *available at* https://enforcement.trade.gov/frn/summary/prc/2010–24159–1.pdf (last visited Jan. 23, 2020) (declining to exclude line items when the financial statement did not segregate specific types of expenses); Issues and Decision Memo. for the Final Results of the Admin. Review of the [ADD] Order on Wooden Bedroom Furniture from the [PRC] at 35, A-570–890, (Aug. 5, 2011), *available at* https://enforcement.trade.gov/frn/summary/prc/2011–20434–1.pdf (last visited Jan. 23, 2020) (declining to adjust financial statements by applying a packing materials ratio when the companies did not separately report a packing material expense); *see also Dongguan Sunrise Furniture Co., Ltd. v. United States*, 36 CIT 860, 888, 865 F. Supp. 2d 1216, 1244 (2012) (sustaining Commerce's decision not to exclude selling costs from surrogate financial statement to match respondent's exact expenses). The practice "serve[s] the goal of balancing increasing accuracy against the danger of introducing distortions in cases where either the difference between NME and ME producers or differences between the nationality of producers would make line-by-line comparisons misleading." *Thai Plastic Bags Industries Co., Ltd. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1298, 1306 (2013). However, where there is information on the record to exclude certain expenses to avoid double-counting in the normal valuation calculation, Commerce will exclude those line items. *See, e.g.*, Issues and Decision Memo. for the [ADD] Investigation of Certain Frozen and Canned Warmwater Shrimp from the [PRC] at 55–56, A-570–893, (Nov. 29, 2004), *available at* https://enforcement.trade.gov/frn/summary/prc/04–26976–1.pdf (last visited Jan. 23, 2020).

surrogate financial statement's itemized SG&A labor line items as a labor expense rather than an SG&A expense so to avoid double-counting. *See id.* at 65 n.340 (citing Stainless Steel Sinks IDM).[33] Here, the surrogate companies' financial statements itemized all expenses. *See* Final SV Memo. at Ex. 13. Therefore, this practice appears to have no bearing, here, on Commerce's valuation of labor costs in normal value and, moreover, runs against its statutory obligation to calculate dumping margins as accurately as possible.[34] *Cf.* Labor Methodologies, 76 Fed. Reg. at 36,094 (Commerce will remove disaggregated overhead and SG&A labor line items from the surrogate financial statements that are already included in the valuation of hours of labor.).

Commerce's determination cannot be sustained on this record. On remand, Commerce may wish to reopen the record. However, Commerce should explain, in any event, the basis for finding record evidence that allows it to conclude that it could capture, and not overstate, labor costs by applying the NSO quarterly data and, as a result, decline to adjust the surrogate financial ratios.[35]

CONCLUSION

For the reasons set forth above, the *Final Results* are sustained in part and remanded in part. Accordingly, it is

ORDERED that Commerce's selection of Thailand as the primary surrogate country is sustained; and it is further

---

[33] In Commerce's investigation of stainless steel sinks, Commerce, contrary to what the Department did here, treated itemized SG&A labor costs in the surrogate financial statements as a labor expense rather than an SG&A expense, when the data to value labor hours included total labor costs (e.g., manufacturing and SG&A), so to avoid double-counting. *See* Stainless Steel Sinks IDM at 15.

[34] As further support for Commerce's decision to not "go behind" a surrogate financial statement of a company not party to the proceeding, Defendant refers to the Issues and Decision Memo. for the Admin. Review of [ADD] Order on Diamond Sawblades and Parts Thereof from the [PRC], A-570–900, (Feb. 8, 2013), *available at* https://enforcement.trade.gov/frn/summary/prc/2013–03481–1.pdf (last visited Jan. 23, 2020) ("DSBs Decision Memo."). *See* Final Decision Memo. at 28. In that administrative review on an ADD order on diamond sawblades, Commerce examined a surrogate company's financial statements "on their face" to determine whether to make certain adjustments for certain miscellaneous income. *See* DSBs Decision Memo. at 34. Although Commerce did not "go behind" the financial statements, it did make adjustments based on its analysis of relationships between activities that generated miscellaneous income and the general operations of the surrogate financial company. *Id.*

[35] If Commerce fails "to consider or discuss record evidence, which, on its face, provides significant support for an alternative conclusion[,] [the Department's determination] is unsupported by substantial evidence." *Ceramark Tech., Inc. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1317, 1323 (2014) (quoting *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000)). Although Commerce's "explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ORDERED that Commerce's selection of surrogate values for Plaintiffs' STR factor of production is sustained; and it is further

ORDERED that Commerce's calculation of Plaintiffs' surrogate financial ratios as related to labor is remanded for further explanation or reconsideration consistent with this opinion; and it is further

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

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

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

Dated: January 29, 2020
New York, New York

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