U.S. Court of International Trade

Slip Op. 20–91

VICENTIN S.A.I.C. et al., Plaintiffs and Consolidated Plaintiff, v. UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00111
PUBLIC VERSION

[Sustaining in part and remanding in part Commerce's remand redetermination.]

Dated: July 1, 2020

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OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce") remand redetermination pursuant to the court's order in *Vicentin S.A.I.C. v. United States*, 43 CIT __, 404 F. Supp. 3d 1323, 1343 (2019) ("*Vicentin I*"). *See* Final Results of Redetermination Pursuant to Ct. Remand, Jan. 31, 2020, ECF No. 79–1 ("*Remand Results*"). In *Vicentin I*, the court remanded for further consideration or explanation Commerce's final determination in the antidumping duty ("ADD") investigation of biodiesel from Argentina. *See Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1327, 1334, 1343; *see also Biodiesel from Argentina*, 83 Fed. Reg. 8,837 (Dep't Commerce Mar. 1, 2020) (final determination of sales at less than fair value and final affirmative determination of critical circumstances, in part) ("*Final Results*") and

accompanying Issues and Decisions Memo. for the [*Final Results*], A-357–820, Feb. 20, 2018, ECF No. 16–5 ("Final Decision Memo"). Specifically, the court ordered Commerce to further consider or explain its adjustment of constructed value by an estimated value for U.S. revenue related to the sale of renewable identification numbers ("RIN"), as well as its finding of a particular market situation ("PMS") that would justify disregarding soybean costs in Argentina. *Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1343.

On remand, Commerce reconsidered its decision to account for RINs by increasing normal value (in this case constructed value), and instead, accounted for RINs by decreasing export and constructed export price ("U.S. Price"). *See Remand Results* at 3–16. Commerce further explained its PMS determination, maintaining that it is not obliged to demonstrate whether the distortion giving rise to the PMS was remedied by a countervailing duty ("CVD") imposed in the companion proceeding, and that there is otherwise no record evidence to support such a finding. *See id.* at 16–31. For the following reasons, the court sustains Commerce's decision to account for RINs by adjusting the U.S. Price, but remands Commerce's PMS determination for further explanation or reconsideration.

BACKGROUND

The court presumes familiarity with the facts of this case, as set out in the previous opinion ordering remand to Commerce, and now recounts the facts relevant to the court's review of the *Remand Results*. On March 1, 2018, Commerce published its final determination pursuant to its ADD investigation of biodiesel from Argentina. *See Final Results*, 83 Fed. Reg. at 8,837. Commerce selected Vicentin Group[1] and LDC Argentina S.A ("LDC Argentina" or "LDC") as mandatory respondents. *See* Respondent Selection Memo at 3–5, PD 56, bar code 3568950–01 (May 3, 2017).[2] Commerce determined normal value by using constructed value after determining that a PMS in

[1] Commerce selected Vicentin S.A.I.C. and examined data from Vicentin and its affiliates, including Oleaginosa Moreno Hermanos S.A. and Molinos Agro S.A. *See Biodiesel From Argentina*, 82 Fed. Reg. 50,391, 50,391 n.5 (Dep't Commerce Oct. 31, 2017) (prelim. affirmative determination of sales at less than fair value, prelim. affirmative determination of critical circumstances, in part) ("*Prelim. Results*") and accompanying Decision Memo. for the [*Prelim Results*], PD 353, bar code 3632930–01 (Oct. 19, 2017) ("Prelim. Decision Memo").

[2] On June 25, 2018, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 16–2–3. On February 14, 2020, Defendant filed indices to the public and confidential administrative records underlying Commerce's remand redetermination. These indices are located on the docket at ECF Nos. 80–2–3. All references to documents from the initial administrative record are identified by the numbers assigned by Commerce in the June 25th indices, *see* ECF No. 16, and preceded by "PD" or "CD" to denote the public or confidential documents. All references to the administrative record for the remand

Argentina, arising from the Government of Argentina's ("GOA") regulatory control over biodiesel prices, rendered home market prices outside the ordinary course of trade. *See Biodiesel From Argentina*, 82 Fed. Reg. 50,391 (Dep't Commerce Oct. 31, 2017) (prelim. affirmative determination of sales at less than fair value, prelim. affirmative determination of critical circumstances, in part) ("*Prelim. Results*") and accompanying Decision Memo. for the [*Prelim Results*] at 21–22, PD 353, bar code 3632930–01 (Oct. 19, 2017) ("Prelim. Decision Memo"). When calculating respondents' dumping margins, Commerce, relying on 19 C.F.R. § 351.401(c) (2015),[3] increased the normal value (here, constructed value) of the subject merchandise to account for the estimated value of RINs.[4] *See* Final Decision Memo at 11–14. Commerce viewed the estimated value of RINs as costs embedded in respondents' U.S. sales prices, and increased normal value to "neutralize" those embedded costs. *See id.* at 11–12. Further, when constructing normal value, Commerce determined that a PMS distorted the costs of soybeans, a primary input in biodiesel. *Id.* at 21–23; *see also* Prelim. Decision Memo at 19. Specifically, Commerce found that distortions caused by the GOA's export tax regime rendered the prices respondents paid for soybeans outside the ordinary course of trade. *See* Final Decision Memo at 21. Commerce thus adjusted respondents' cost of production by substituting a market-determined price for respondents' reported soybean prices. *Id.*

On May 15, 2018, Plaintiffs Vicentin S.A.I.C., Oleaginosa Morenos Hermanos S.A., and Molinos Agro S.A. (collectively "Vicentin") commenced the present action, which was later consolidated with an action brought by LDC Argentina.[5] *See* Summons, May 15, 2018, ECF No. 1; Compl., May 16, 2018, ECF No. 7; Memorandum and Order, July 20, 2018, ECF No. 18. Vicentin and LDC Argentina challenged Commerce's decision to account for the RINs by increasing con-

determination are identified by the numbers assigned in the February 14th indices, *see* ECF No. 80, and preceded by "PRR" or "CRR" to denote remand public or confidential documents.

[3] Further citations to the Code of Federal Regulations are to the 2015 edition.

[4] RINs are tradeable credits established pursuant to a U.S. regulatory scheme administered by the Environmental Protection Agency ("EPA"). *See Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1328 (citing Prelim. Decision Memo at 28–30). The EPA requires that biodiesel producers or importers ("obligated parties") meet an annual "renewable volume obligation," pursuant to which obligated parties must submit RINs equal to the number of gallons of renewable fuel comprising their renewable volume obligation. *Id.* (citing Prelim. Decision Memo at 28–29). RINs are generated through biodiesel production in the United States or importation of biodiesel. *Id.* (citing Prelim. Decision Memo at 29). The obligated party that generates RINs may use them to satisfy its renewable volume obligation, or it may trade or sell them to other obligated parties. *Id.* (citing Prelim. Decision Memo at 29).

[5] On June 13, 2018, the court issued an order allowing National Biodiesel Board Fair Trade Coalition—the petitioner in the administrative proceeding below—to intervene as a defendant-intervenor. *See* Order, June 13, 2018, ECF No. 15.

structed value. *See* Pls.' Br. Supp. Mot. J. Agency R. Confidential Version at 1–2, 7–20, Oct. 29, 2018, ECF No. 26 ("Pls.' Moving Br."); Memo. of Points & Authorities Supp. Consol. Pl.'s Rule 56.2 Mot. J. Agency R. at 8, 10–21, Oct. 29, 2018, ECF No. 25–1 ("Consol. Pl.'s Moving Br."). Vicentin and LDC Argentina also challenged Commerce's methodology for determining constructed value in light of the agency's PMS finding regarding soybeans. *See* Pls.' Moving Br. at 20–38; Consol. Pl.'s Moving Br. at 10–21. Vicentin argued, inter alia, that Commerce's determination to disregard Vicentin's reported costs of soybeans in Argentina was unsupported by the record. Pls.' Moving Br. at 28–38.

In *Vicentin I*, the court remanded Commerce's final determination for further consideration or explanation. *See Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1343. The court ruled that Commerce failed to identify its statutory authority for increasing constructed value to neutralize the value of RINs embedded in respondents' U.S. sales prices. *See Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1329–34. The court also ruled that Commerce failed to adequately explain its determination that GOA's export tax regime caused a distortion giving rise to a PMS in light of the fact that the agency countervailed the GOA's program in the companion CVD proceeding. *See id.*, 43 CIT at __, 404 F. Supp. 3d at 1340–43.

On January 31, 2020, Commerce published its remand redetermination. *See generally Remand Results*. On remand, Commerce reconsidered its decision to neutralize the value of RINs in respondents' U.S. sales by increasing constructed value, and instead decided to remove the value of RINs by decreasing the net U.S. Price. *See Remand Results* at 8–16. Commerce explained 19 U.S.C. § 1677a(a) and (b) direct the agency to determine the price at which merchandise is first sold, and that it is thus authorized to deduct the value of RINs from the invoice price for U.S. sales of biodiesel from Argentina in order to "isolate a U.S. starting price for biodiesel[.]" *See id.* at 9–11, 39. Additionally, Commerce restated its position that, despite having countervailed the GOA's export tax regime in the concurrent proceeding, disregarding reported costs of soybeans in Argentina in light of a PMS, without accounting for the possibility of a double remedy, is reasonable because the ADD and CVD statutes serve different purposes. *See Remand Results* at 22–31.[6]

[6] On May 22, 2020, Defendant filed a letter notifying the court of the results of Commerce's changed circumstances review of the antidumping and CVD orders on biodiesel from Argentina. *See* Def.'s Notice Subsequent Development at 1–2, May 22, 2020, ECF No. 94 ("Def.'s Notice") (citing *Biodiesel from Argentina*, 85 Fed. Reg. 27,987 (Dep't Commerce May 12, 2020) (final results of [CVD] changed circumstances review) ("*Biodiesel from Argentina CVD/CRR*"); *Biodiesel from Argentina*, 85 Fed. Reg. 29,989 (Dep't Commerce May 12, 2020)

Vicentin and LDC Argentina challenge Commerce's asserted authority to adjust for the value of RINs when determining U.S. Price as well as its support for its calculations. *See* Pls.' Cmts. on [*Remand Results*] Confidential Version at 3– 14, Mar. 2, 2020, ECF No. 82 ("Pls.' Br."); [Consol. Pl.'s] Cmts. on [*Remand Results*] at 2–7, Mar. 2, 2020, ECF No. 81 ("Consol. Pl.'s Br."). Further, Vicentin and LDC Argentina challenge Commerce's adjustments for the value of RINs as unsupported by substantial evidence. *See* Pls.' Br at 14–19; Consol. Pl.'s Br. at 7–10. Vicentin and LDC Argentina also challenge Commerce's continued determination to disregard reported costs of soybeans in Argentina to remedy a PMS. *See* Pls.' Br. at 20–26; Consol. Pl.'s Br. at 13–16.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516a(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[7] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an ADD investigation. The court "shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Lawfulness of the RIN Adjustment

A. Statutory Authority for RIN Adjustment

Vicentin and LDC argue that 19 U.S.C. § 1677a(a) and (b) do not authorize Commerce to decrease U.S. Price to remove the value of

(final results of [ADD] changed circumstances review) ("*Biodiesel from Argentina ADD/CRR*"). Commerce determined that there were insufficient changed circumstances to warrant revisions to either order. *See id.* at 2 (citing *Biodiesel from Argentina CVD/CRR*, 85 Fed. Reg. at 27, 989; *Biodesel from Argentina ADD/CRR*, 85 Fed. Reg. at 27,987).

[7] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are to the unofficial U.S. Code Annotated 2018 edition, which reflects the amendments made to 19 U.S.C. § 1677e by the Trade Preferences Extension Act of 2015. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

RINs reflected in respondents' invoice prices to U.S. customers. *See* Pls.' Br. at 3–11;[8] Consol. Pl.'s Br. at 2–7. Defendant submits that 19 U.S.C. § 1677a(a) and (b) plainly support Commerce's authority, and, in the alternative, insists on deference to the agency's interpretation of the statute. *See* Def.'s Resp. Cmts. on [*Remand Results*] at 11–24, Apr. 15, 2020, ECF No. 89 ("Def.'s Br."). Defendant and Defendant-Intervenor National Biodiesel Board Fair Trade Coalition ("NBB Fair Trade Coalition" or "Def-Intervenor") maintain that Commerce's approach is a reasonable method to isolate the starting price of the subject merchandise. *Id.*; [Def-Intervenor's] Cmts. on [*Remand Results*] at 5–11, Apr. 15, 2020, ECF No. 90 ("Def.-Intervenor's Br."). For the following reasons, Commerce's adjustment to U.S. Price is in accordance with law.

Where Commerce determines that merchandise is being sold at less than fair value ("LTFV") and the International Trade Commission ("ITC") determines that a domestic industry is materially injured or threatened with material injury, Commerce imposes an ADD. *See* 19 U.S.C. § 1673. To determine whether subject merchandise is being sold at LTFV, Commerce makes "a fair comparison . . . between the export price or constructed export price and normal value."[9] 19 U.S.C. § 1677b(a). Export price ("EP") refers to:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [19 U.S.C.§ 1677a(c)].

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[8] As a threshold matter, Vicentin argues that *Vicentin I* did not grant Commerce discretion to change its rationale, but rather, only to further explain its rationale. *See* Pls.' Br. at 2–3. Vicentin misapprehends the court's ruling. *Vicentin I* ruled that Commerce did not clearly identify the statutory and regulatory basis for its determination to increase normal value to account for the value of RINs. *See Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1332–34. *Vicentin I* expressly "decline[d] to comment on precisely what steps Commerce should take on remand." *Vicentin I*, 43 CIT at __ n.14, 404 F. Supp. 3d at 1333 n.14; *see also SEC v. Chenery Corp.*, 332 U.S.194, 199–201 (1947).

[9] Further, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") acknowledges that to achieve the "fair comparison" of U.S. Price to normal value required by 19 U.S.C. § 1677b(a), § 1677b "provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability." SAA, H.R. Doc. 103–316, at 820 (1994), reprinted in 1994 U.S.C-.C.A.N. 4040, 4161. The statute generally "seek[s] to produce a fair 'apples to apples' comparison between foreign market value and [U.S.] price," which requires "adjustments to the base value of both foreign market value and [U.S.] price to permit comparison of the two prices at a similar point in the chain of commerce." *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

19 U.S.C. § 1677a(a).[10] Constructed export price ("CEP") refers to:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under [19 U.S.C.§ 1677(c), (d)].

19 U.S.C. § 1677a(b).[11] Normal value refers to:

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordi-

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[10] 19 U.S.C. § 1677a(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—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,

(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, and

(C) the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States, and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

[11] 19 U.S.C. § 1677a(d). Additional adjustments to constructed export price

For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C);

(2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e); and

(3) the profit allocated to the expenses described in paragraphs (1) and (2).
19 U.S.C. § 1677.

> nary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . .

19 U.S.C. § 1677b(a)(1)(B)(i).[12]

The antidumping statute does not dictate a method for determining "the price at which the subject merchandise is first sold," *see* 19 U.S.C. § 1677a(a)–(b), and the court affords Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature." *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) ("*Fujitsu*"). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("*Chevron*"); *Abbott v. Donovan*, 6 CIT 92, 570 F. Supp. 41, 46–47 (1983)), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) ("*Ceramica*"); *see also PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 764 (Fed. Cir. 2012) (quoting *Fujitsu*, 88 F.3d at 1039).

Commerce invokes 19 U.S.C. § 1677a(a) and (b) as its authority for applying 19 C.F.R. § 351.401(c) to isolate the starting price of biodiesel. *See Remand Results* 9–10. Pursuant to 19 C.F.R. § 351.401(c), when calculating U.S. Price, Commerce relies on a "price that is net of price adjustments, as defined in section 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)." *Remand Results* at 10 (quoting 19 C.F.R. § 351.401(c)). Commerce defines price adjustments as:

> a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale (see section 351.401(c)), that is reflected in the purchaser's net outlay.

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[12] Where Commerce determines that home-market sales prices or third-country sales prices should not be used to determine normal value, Commerce uses constructed value as a basis for normal value. *See* 19 U.S.C. § 1677b(a)(4); *see also* Prelim. Decision Memo at 21–23. Constructed value consists of (1) the cost of materials and fabrication or other processing of any kind used to produce the merchandise; (2) the actual amounts incurred and realized by the exporter or producer being examined for selling, general, and administrative expenses, and profits, tied to the production and sale of the goods; and (3) the cost of packing the merchandise for shipment to the United States. *See* 19 U.S.C. § 1677b(e). If Commerce determines that "a [PMS] exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade," Commerce "may use another calculation methodology under this part or any other calculation methodology." 19 U.S.C. § 1677b(e).

19 C.F.R. § 351.102(b)(38).[13]

Here, Commerce asserts that it adjusts the price on invoices to U.S. customers to arrive at the "price at which the subject merchandise is . . . 'first sold (or agreed to be sold) in the United States.'" *Remand Results* at 10, 38; *see also* 19 U.S.C. § 1677a(a), (b). Commerce argues that RINs are essentially a commodity, and that the invoice price for the subject merchandise reflects the value of this commodity. *See Remand Results* at 11 ("Essentially, when a foreign producer/exporter sells RIN-eligible biodiesel to the United States, it is selling two commodities: biodiesel, bundled with a RIN."). Commerce thus characterizes the value of RINs "as an adjustment already included in the reported invoice price for biodiesel[.]" *Id.* at 10. Commerce regulations provide that it shall rely on a "price that is net of price adjustments, as defined in section 351.102(b)[.]" 19 C.F.R. § 351.401. Commerce isolates the starting price of biodiesel by removing the adjustment to the invoice price that it finds attributable to the value of RINs. *See* 19 C.F.R. § 351.401(c); *see also* 19 C.F.R. § 351.102(b)(38).

Commerce has stated its authority to isolate the price of biodiesel by removing the value associated with RINs. Section 1677a(a) requires Commerce to identify the price at which the merchandise is first sold.[14] *See* 19 U.S.C. § 1677a(a); 19 C.F.R. § 351.401(c). It is reasonably discernible that Commerce interprets section 1677a(a) and (b)'s directive to determine "the price at which the subject merchandise is first sold (or agreed to be sold)" as requiring the agency to

[13] The regulatory history of 19 C.F.R. § 351.102(b) indicates that the list of examples is not exhaustive:

> With respect to the proposed changes to 19 C.F.R. 351.102(b)(38) in the Proposed Rule, these modifications were not intended to foreclose other types of price adjustments, such as billing adjustments and post-sale decreases to home market prices or increases to U.S. prices. Nonetheless, in light of a party's comment, the Department is modifying 19 CFR 351.102(b)(38) to refine the definition of price adjustment and to clarify that a price adjustment is not just limited to discounts or rebates, but encompasses other adjustments as well.

Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, 81 Fed. Reg. 15,641, 15,644 (Int'l Trade Admin. Mar. 24, 2016) (final rule); *see also Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,329 (Int'l Trade Admin. Feb. 27, 1996) (notice of proposed rulemaking); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,300 (Int'l Trade Admin. May 19, 1997) (final rule).

[14] The parties' arguments that 19 U.S.C. § 1677a(a)–(b) plainly support their respective positions lack merit. *See* Def.'s Br. at 12–21; Pls.' Br. at 11–13; Consol. Pl.'s Br. at 6–7. The statute does not provide a methodology for determining the "price at which the subject merchandise is first sold (or agreed to be sold) in the United States[.]" *See* 19 U.S.C. § 1677a(a)–(b). In the absence of a prescribed statutory methodology for determining the starting price, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica*, 10 CIT at 404–05, 636 F. Supp. at 966 (citing *Chevron*, 467 U.S. at 843).

determine a starting price for the subject merchandise, *see Remand Results* at 10, such that it is not beholden to "the invoice price" where that price "does not reflect the true 'starting price' of biodiesel or 'price at which the subject merchandise is first sold.'" *See id.* Pursuant to 19 C.F.R. § 351.401(c), Commerce's methodology is reasonable because it identifies "the price at which the subject merchandise is first sold (or agreed to be sold)" by separating out value that is attributable to a distinct commodity. *See* 19 U.S.C. § 1677a; *see also Chevron*, 467 U.S. at 843–44.

Vicentin argues that Commerce's approach under 19 C.F.R. § 351.401(c) contradicts the plain meaning of 19 U.S.C. § 1677a. *See* Pls.' Br. at 3–13. Vicentin submits that the only adjustments to U.S. Price allowed under subsections (a) and (b) are those enumerated under 19 U.S.C. § 1677a(c)–(d), and that none of the enumerated adjustments allow Commerce to decrease U.S. Price to account for the value of RINs. *See id.* (citing *Dongguan Sunrise Furniture v. United States*, 36 CIT 860, 893–95, 865 F. Supp. 2d 1216, 1248–49 (2012) ("*Dongguan*")). Vicentin relies specifically on the language "as adjusted by [subsection (c) or subsections (c) and (d)]" contained in subsections (a) and (b), respectively, to argue that Commerce's choices are limited by statute. Pls.' Br. at 10 (quoting 19 U.S.C. § 1677a(a), (b)). However, as explained, it is reasonably discernible that Commerce interprets 19 U.S.C. § 1677a(a)–(b) as requiring the agency to determine a "starting price" for the subject merchandise that must also, and separately, be "adjusted" under subsections (c) and (d). *See Remand Results* at 39–40; *see also* 19 U.S.C. § 1677a(c)–(d).[15] As such, Vicentin's arguments regarding 19 U.S.C. § 1677a(c)–(d) are unavailing. *See* Pls.' Br. at 4–9. Commerce observes that, instead of prices for the sale of biodiesel, the reported invoice prices reflect transactions for the sale of biodiesel plus an added amount for the value of RINs—the latter component being a separate commodity with measurable and discernible value. *See Remand Results* at 8–14, 36. In this case, it is not unreasonable for Commerce to treat the value of RIN as an

[15] Vicentin's reliance on *Dongguan* is unavailing. *See* Pls.' Br. at 7–8 (citing *Dongguan*, 36 CIT at 893–95, 865 F. Supp. 2d at 1248–49). *Dongguan* upheld Commerce's practice of deducting net freight expenses from U.S. Price under 19 U.S.C. § 1677a(c)(2)(A) because the statute does not specify whether the deduction should be calculated based on "net" or "gross" freight expenses. *See Dongguan*, 36 CIT at 893–95, 865 F. Supp. 2d at 1248–49. *Dongguan* then dismissed the counterargument that freight revenues should be included in U.S. Price under 19 U.S.C. § 1677a(a) or (b) because, in addition to the lack of evidence that the freight revenue in that proceeding was "inherently part of the [U.S. Price,]" the argument "overlook[ed] the statutory requirement to adjust [EP] or [CEP] to permit an 'apples-to-apples' comparison[.]" *Id.* at 1249–50. To that end, *Dongguan* viewed 19 U.S.C. § 1677a(c)–(d) as setting forth necessary adjustments to the U.S. Price, but nowhere purports to limit Commerce's discretion to determine the starting price under 19 U.S.C. § 1677a(a)–(b).

adjustment pursuant to 19 C.F.R. §§ 351.401(c) and 351.102(b)(38). Commerce's invocation of 19 U.S.C. § 1677a(a) and (b) as the basis for its statutory authority for applying 19 C.F.R. § 351.401(c) is in accordance with law.[16]

B. Commerce's Antidumping Margin Calculations

Vicentin argues that Commerce's antidumping margin calculation is contrary to law because it contravenes 19 U.S.C. §§ 1677f(2)(i) and 1677b(e) as well as agency practice. *See* Pls.' Br. at 17–19. Defendant answers that Commerce clearly identifies and explains its calculations, which are consistent with the statute. *See* Def.'s Br. at 27–29. For the reasons that follow, Commerce's methodology for its margin calculation on remand is reasonable.

Commerce has considerable discretion to develop methodologies when administering the antidumping laws. *See NTN Bearing Corp. of Am. v. United States*, 26 C.I.T. 53, 81–82, 186 F. Supp. 2d 1257, 1285 (2002) (citing *Federal-Mogul Corp. v. United States*, 18 C.I.T. 785, 807–08, 862 F. Supp. 384, 405 (1994) (internal citations omitted); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984)). However, when Commerce chooses to deviate from an established practice or methodology, the agency must clearly explain itself so that the court may assess the reasonableness of its decision. *See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (the agency has a "duty to explain its departure from prior norms."). Additionally, Commerce's regulations provide, in pertinent part, that it:

> will disclose to a party to the proceeding calculations performed, if any, in connection with . . . a final determination under [19 U.S.C. § 1673d] .. . normally within five days after the date of any public announcement or, if there is no public announcement of, within five days after the date of publication of[ ] the . . . final determination[.]

19 C.F.R. § 351.224(b).

Commerce has, consistent with 19 U.S.C. § 1677f(i)(2), given notice and explanation of the methodology used in its final determination.

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[16] LDC Argentina proposes that Commerce instead account for the value of RINs by adding expenses associated with making biodiesel RIN-compliant to constructed value. *See* Consol. Pl.'s Br. at 10–14. However, Commerce observes that those expenses only represent a small fraction of the value of RINs, and further, explains that there is enough information on the record to enable the agency to more fully ascertain the value of RINs. *See Remand Results* at 41–42. As explained below, Commerce's methodology for ascertaining the value of RINs is reasonable, therefore, the court declines LDC Argentina's proposed solution.

See generally Final Results; Final Decision Memo. On remand, Commerce explains that it is taking the same RIN values used in the final determination and deducting them from the U.S. Price rather than adding them to normal value. *See Remand Results* at 14. Commerce placed on the remand record its revised calculations in the form of excel spreadsheets, viewing this to be the most transparent way to illustrate its revisions. *See Remand Results* at 14–15 (citing, *inter alia*, Vicentin Draft Remand Analysis Memo & Attach. 1, CRRs 3, 1, bar codes 3926704–01, 3926694–01 (Jan. 6, 2020) ("Vicentin Analysis Memo" and "Remand Calculations", respectively); *see also id.* at 42. Commerce also provided to the parties the Vicentin Analysis Memo, *see* Vicentin Analysis Memo, where it explains how it removed the RIN values from the previously-determined constructed value, decreased U.S. Price by the amount of those RIN values, and calculated the margin.[17]

Commerce's methodology is consistent with the statute and sufficiently explained. Vicentin's appears to argue not that Commerce fails to explain what it did, but rather, that Commerce did not do, and then explain, what it should have done. *See* Pls.' Br. at 19 ("Commerce claims that it is adopting an adjustment to Vicentin's U.S. 'starting prices' . . . but Commerce does nothing of the kind."). Vicentin contends that instead of adjusting individual starting prices, Commerce is actually using an average net price for each control number and applying the RIN value adjustment to that price. *See* Pls.' Br. at 19. Vicentin's argument incorrectly assumes that Commerce lacks the expertise and discretion to decide a particular methodology for adjusting the starting prices to account for the value of the RINs. *See id.*; *but see Ceramica*, 10 CIT at 404–05, 636 F. Supp. at 966 (citing *Chevron*, 467 U.S. at 843). Commerce explains it now accounts for the value of RINs on the U.S. Price side of the LTFV equation by decreasing U.S. Price. Previously, Commerce had increased normal value (here, constructed value) to match the value of the RINs in U.S. selling prices. Therefore, here, it decreases normal value to reverse the effect of its prior methodology, and decreases U.S. Price to imple-

[17] Specifically, in the Vicentin Analysis Memo, Commerce explains that it deducted the RIN values from the U.S. Price by converting the SAS dataset it generated for the final determination into an excel spreadsheet; dividing the sum of the extended margin (the variable "EMARGIN") by the sum of the variable USVALUE; subtracting the RIN value (the variable "RINADJ") from normal value; subtracting the same RINADJ variable from the mean net U.S. price (represented by the variable "USNETPRI_Mean") to determine a revised U.S. Price net of the RIN adjustment; subtracting the revised U.S. Price from the revised normal value; multiplying the difference by QTYU1 to derive a new extended margin, and then dividing the new extended margin ([[ ]]) by the sum of the USVALUE ([[ ]]) *See* Vicentin Analysis Memo at 1–2 (citing Remand Calculations).

ment its methodology on remand. *See Remand Results* at 14–16. Moreover, Commerce provided to the parties an explanation of its revisions for comment in the underlying proceeding, and Vicentin did not request additional calculation disclosure materials. *See id.* at 14–16, 42; *see also* Vicentin Analysis Memo. Vicentin fails to elaborate how Commerce's explanation fails to satisfy 19 U.S.C. § 1677f(i)(2).

Further, Vicentin's argument that, pursuant to 19 U.S.C. § 1677b(a)(4) and 1677b(e), Commerce is required to add the components of constructed value fails. *See* Pls.' Br at 19. The statute provides that "the constructed value of imported merchandise shall be an amount equal to the sum of [various costs and amounts]." *See* 19 U.S.C. § 1677b(e). The statute requires constructed value to be equal to the "sum" of the listed amounts but does not state that Commerce must provide separate component sums or figures in its remand calculations.

Finally, Vicentin argues that Commerce's approach is contrary to agency practice because, rather than perform a new margin calculation that adjusts the U.S. invoice price to account for RINs, "Commerce simply provides a worksheet containing limited data output from its improperly determined margin." Pls.' Br. at 18. Again, Vicentin appears to take issue with Commerce's application of the RIN adjustment to the average U.S. net price for each control number, suggesting, without illustration, that applying the adjustment to the averaged data creates inaccuracies in Commerce's margin calculations. *See* Pls.' Br. at 18–19. However, Vicentin fails to demonstrate that Commerce's methodology on remand is unreasonable. It is reasonable for Commerce to make the adjustment without performing a new margin calculation because the agency seeks to reallocate a value—a task which, on its own, does not compromise the integrity of Commerce's calculations such that a new calculation is apparently warranted. Even if Commerce here deviates from its typical methodology, the agency explains that it views this approach to be the most transparent method for making its adjustments. *Remand Results* at 42. Further, as Commerce observes, Vicentin did not request additional calculation disclosure materials, or for any specific changes to be made. *See id.* A bald statement that Commerce's approach constitutes a deviation from agency practice resulting in incorrect margins fails to demonstrate how Commerce's determination is unreasonable.

C. Reasonableness of Commerce's RINs Adjustment

Vicentin submits that Commerce's determination that its sales reflect the value of RINs is unsupported by substantial evidence. *See* Pls.' Br. at 14–17. LDC Argentina argues that the calculated RIN

values are not supported by substantial evidence because Commerce does not connect the separate RINs to the individual transaction values in the sales databases. *See* Consol. Pl.'s Br. at 7–10.[18] Defendant and Defendant-Intervenor maintain that Commerce adequately explained and supported its finding that prices for biodiesel imported into the United States from Argentina are upwardly adjusted to account for the value of RINs. *See* Def.'s Br. at 24–27; Def.-Intervenor's Br. at 11–17. For the reasons that follow, Commerce reasonably calculates the RIN adjustment.

As explained, 19 U.S.C. § 1677a(b) requires Commerce to calculate EP or CEP by starting with "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States" and making certain adjustments to that price pursuant to 19. U.S.C. § 1677(c), (d). Pursuant to 19 C.F.R. § 351.401(c), Commerce relies on a "price that is net of price adjustments, as defined in section 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)."

Commerce's determination that the price of biodiesel in sales to U.S. customers are upwardly adjusted to account for the value of RINs is supported by the record.[19] On remand, Commerce cites the Congressional Research Service as support for its finding that RINs are tradeable credits and, as such, are effectively commodities with independent value. *See Remand Results* at 11 (citing Petitioner's [PMS] Allegation Regarding Respondents' Home and Third Country Market Sales and Cost of Production at Ex. 13, PD 189–98, bar codes 3604083–01–10 (Aug. 2, 2017) ("PMS Allegation")). Additionally, Commerce cites data from the ITC to demonstrate that, when RINs are attached to the sale of biodiesel, the price of that sale is significantly higher. *See Remand Results* at 11–12 (citing PMS Allegation at

[18] LDC Argentina initially claims that Commerce's reliance on "hypothetical" values when adjusting U.S. Price is not permitted by statute, but later clarifies that by describing RINs as a "hypothetical" or "proxy" value, it is contending that the values are not "directly connected to the biodiesel sales in the period of investigation." Consol. Pl.'s Br. at 3–8. As discussed below, Commerce reasonably explains that the RIN values are not hypothetical. *See Remand Results* at 36. Further, to the extent that LDC Argentina contends that 19 U.S.C. § 1677a(a)–(b) requires Commerce to start with the price as reported on an invoice, as Commerce notes, there is record evidence that the invoice price does not capture the value of the subject merchandise alone, *see Remand Results* 8–14, 36, and such an interpretation, which is not plainly supported by the statute, would unduly restrict the agency's application of the statute to the frustration of its purpose. *See* 19 U.S.C. § 1677a(a)–(b).

[19] In its preliminary results, Commerce found that "all biodiesel shipped from Argentina is eligible for a D4 RIN, the RIN type applicable to fuel made from soybean feedstock." Prelim. Decision Memo at 30 (citing PMS Allegation at 30); *see also* Def.-Intervenor's Br. at 15 (citations omitted).

Ex. 9 Table V-4).[20] Finally, noting LDC Argentina and Vicentin's claims that RIN values were not a separately negotiated component of their reported prices, Commerce points to findings contained in the preliminary ITC Report that the price of biodiesel is typically comprised of the value of the merchandise itself, the value of any attached RINs, and occasionally a portion of the blender's tax credit. *See Remand Results* at 12 (citing PMS Allegation at Ex. 9). According to Commerce, a U.S. consumer of Argentine biodiesel indicated that the RIN value "is just embedded in the price of the product that [they] pay for. . . [and views] the RIN as just value components to the product that [they are] buying." *Remand Results* at 13 (quoting Petitioner's Rebuttal Factual Information pts. 5–6 at p.109 of the ITC Staff Conference Transcript, PD 273–274, bar codes 3620192–05–06 (Sept. 15, 2017)).

Commerce supports its finding that RIN values are built into the price of Argentine biodiesel using record evidence about Vicentin's and LDC's own practices. Although Vicentin cites a statement from an unaffiliated U.S. customer that "it is absolutely impossible to link the revenue it receives from sales of separated RINs to its import purchase transactions for biodiesel from Plaintiffs[,]" Pls.' Br. at 15 (citing Vicentin's Section B and C Suppl. Questionnaire Response at Ex. 6a, CD 440, bar code 3613816–03 (Aug. 30, 2017)), Commerce points to LDC's and Vicentin's own indications that awareness of the value of RIN-eligible biodiesel to U.S. customers is ubiquitous. *See Remand Results* at 12–13, 40–41.[21] As Commerce observes, Vicentin admitted, during verification, that even though "RIN eligibility is not expressly discussed while negotiating biodiesel sales contracts, the company is informally aware that all U.S. sales must be accompanied by the certifications necessary to establish that the biodiesel is 'RIN eligible'" and that "Vicentin knows to only sell RIN-eligible biodiesel to U.S. {customers} because non-RIN-eligible biodiesel has minimal value in the U.S. market." *Remand Results* at 13, 40–41 (quoting Verification of Vicentin's Sales Questionnaire Responses at 26, PD 414, bar code 3646347–01 (Nov. 29, 2017) ("Vicentin Sales Verifica-

[20] For example, the data indicates an average price of $2.27 per gallon for B99 biodiesel with RINs attached, as opposed to $1.01 per gallon for biodiesel without RINs in 2016. *Remand Results* at 11–12 (citing PMS Allegation at Ex. 9 Table V-4).

[21] Vicentin distinguishes itself from LDC, arguing that it neither generates nor has information regarding the value of, RINs. *See* Pls.' Br. at 16. Commerce does not seek to demonstrate that Vicentin generates or sells RINs, as Vicentin suggests, *see id.* at 14–16; rather, Commerce demonstrates that the Vicentin's U.S. Price is upwardly adjusted to reflect the value of RIN-eligible biodiesel. *See Remand Results* at 12 (noting that Vicentin's and LDC's claims that RINs are not a separate component in the invoice "do not contradict the conclusion that sales prices charged to U.S. customers contain both a biodiesel component and a RIN component."); *see* also id. at 40.

tion")). Moreover, Commerce points to Vicentin's acknowledgement that the description "RIN-eligible is often included in the offer/confirmation emails between Vicentin and its U.S. customers[.]" *Remand Results* at 13 (quoting Vicentin Sales Verification at 26). Commerce points to LDC's U.S. affiliate's indication that even though RIN values are not explicitly included as a line item in the overall pricing, the value is implicitly factored in, and that "obligated buyers are cognizant of the value of RINs associated with a sale and likely factor it in when negotiating a price because they need RINs to meet their EPA obligations[.]" *Remand Results* at 12–13 (citing Verification of LDC's CEP Sales at 8, PD 413, bar code 3646257–01 (Nov. 30, 2017) ("LDC CEP Verification")[22]). Commerce's determination that Vicentin's and LDC's U.S. prices are upwardly adjusted to account for RINs is thus supported by substantial evidence.

In order to derive the value of RINs, Commerce relies on spot prices contained in daily biodiesel reports, published by a broker and provided to Commerce by LDC's U.S. affiliate, for all CEP sales, alongside RIN values reported by petitioners for all EP sales—noting that these values are nearly identical. *See* Prelim. Decision Memo at 30; *see also id.* at 38 (citations omitted). Commerce does so, based on facts available, because, except for the RIN values associated with LDC Argentina's CEP price sales, the respondents were unable to estimate RIN values. *See Remand Results* at 6; Prelim. Decision Memo at 28–30; *Vicentin I*, 43 CIT at __ n.4, 404 F. Supp. 3d at 1328 n.4; 19 U.S.C. § 1677e(a). Commerce explains that these prices are derived from the only market available for trading RINs, the EPA Moderated Transaction System. *See Remand Results* at 38 (citing PMS Allegation at Ex. 13). Commerce's reliance on spot prices is also reasonable.

LDC Argentina contends that Commerce's reliance on estimates and spot prices to calculate the RINs adjustment is not supported by substantial evidence because those prices are not "sufficiently connected to the sales at issue." *See* Consol. Pl.'s Br. at 7–10. However, considering respondents' failure to report the value of RINs embedded in the prices for those sales, Commerce reasonably relies on its findings that U.S. sales of biodiesel contain a RIN component, and that the RIN values are easily discernible from published sources. *See Remand Results* at 36–37. LDC Argentina submits that there is no evidence establishing that prices for separated RINs would be the same as prices for attached RINs. Consol. Pl.'s Br. at 8–9. However,

[22] The U.S. affiliate added that ". . . RIN values are not discussed during sales negotiations or identified in sales contracts." LDC CEP Verification at 8. However, regardless of whether RIN values are discussed during sales negotiations or identified in sales contracts, Commerce cites the initial statement in support of its position that RIN values are an implicit factor in the price of Argentine biodiesel. *See Remand Results* at 12–13.

Commerce notes that the price for RINs are the product of market mechanisms, and that there is no evidence demonstrating that the price of separated RINs would be different than the price for attached RINs. *See Remand Results* at 37. Thus, it is not the case, as LDC Argentina suggests, that Commerce is "guessing" the value of RINs when rendering the adjustment to U.S. Price. Consol. Pl.'s Br. at 10 ("Commerce is not permitted to guess"). Rather, as Defendant argues, Commerce draws reasonable inferences from the information available, explaining that spot prices demonstrate what buyers must pay for RINs at that given moment, and that "there is no basis to believe a seller [of RIN-eligible biodiesel] would accept anything less than that amount [when determining prices.]" *See Remand Results* at 37; *see also* Def.'s Br. at 25 ("The Plaintiffs are large, private, profit-driven companies. The idea that they would not take RINs into account when calculating export prices is nonsensical."). Without more, LDC Argentina and Vicentin fail to demonstrate that Commerce's determination is unreasonable. *See Consolo. v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

D. The Imposition of a Double Remedy

Vicentin and LDC Argentina again contend that Commerce does not explain why the remedy imposed as a result of the CVD investigation does not remedy the PMS distortion. *See* Pls.' Br. at 20–25; Consol. Pl.'s Br. at 13–16. Defendant insists that the law does not require Commerce to ascertain whether the CVD remedy ameliorated the PMS distortion, but nonetheless counters that Commerce reasonably explains that the CVD did not remedy the distortion in this case. *See* Def.'s Br. at 29–32. For the reasons that follow, Commerce's determination is remanded for further explanation or reconsideration.

As discussed, dumping determinations require Commerce to compare U.S. Price and normal value. *See* 19 U.S.C. § 1677b(a). Normal value may be based upon home market sales made in the ordinary course of trade, third-country sales, or constructed value. *See* 19 U.S.C. § 1677b(a)(1)(B)–(C), (a)(4). Commerce determines normal value based upon constructed value, rather than home market sales, where a PMS exists.[23] *See* 19 U.S.C. § 1677b(a)(4); *see also* Prelim. Decision Memo at 21–23. To establish the existence of a PMS, Commerce must demonstrate that there are distortions present in the market and that those distortions prevent a proper comparison of

[23] Commerce resorted to constructed value after finding that "domestic biodiesel sales prices are established by the government and are not based on competitive market conditions[,]" resulting in a PMS. Final Decision Memo at 16.

normal value with EP or CEP. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), (C)(iii). Commerce then calculates constructed value by determining "the cost of materials and fabrication or other processing, plus an amount for selling, general, and administrative expenses, as well as an amount for profit." *See* 19 U.S.C. § 1677b(e). The statute further provides that, when calculating constructed value, the presence of a separate PMS may permit Commerce to deviate from the typical methodology:

> For purposes of paragraph (1), if a [PMS] exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology.

19 U.S.C. § 1677b(e).[24] Therefore, when using constructed value, Commerce may resort to any other calculation methodology if a PMS renders the cost of materials and fabrication unsuitable for use as normal value. Commerce's determinations must be supported by substantial evidence. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Although the statute empowers Commerce to use another methodology provided under the statute, or any other methodology it chooses, to establish normal value, the methodology it chooses must be reasonable. The court reviews Commerce's determinations for substantial evidence, meaning that they are reasonable given the factual record in the case. *See e.g.*, *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (2003) (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Commerce and Defendant correctly observe that the statute does not mandate offsetting CVDs from a concurrent CVD case where Commerce uses constructed value or an alternative under 19 U.S.C. § 1677b(e). *See Remand Results* 28–30; Def.'s Br. at 32. However, the lack of a statutory directive does not render Commerce's alternative methodology rea-

[24] Here, in addition to the initial PMS that caused Commerce to calculate the normal value of biodiesel based on constructed value, Commerce separately finds that an export tax regime in Argentina results in a PMS that distorts the costs of soybeans—an input in the production of biodiesel. *See Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1334–43; *Remand Results* at 17–21. To remedy the distortion caused by the export tax regime, Commerce employs an alternate methodology, and relies on international market prices for soybeans contained in petitioner's PMS allegation. *See id.* at 17–18 (citing Final Decision Memo at 21–23); *see also* Final Decision Memo at 21–23 (citing Vicentin Prelim. Cost Memo., PD 356, bar code 3633485–01 (Oct. 19, 2017); LDC Prelim. Cost Memo., PD 359, bar code 3633491–01 (Oct. 19, 2017) (citing PMS Allegation at Ex 3).

sonable. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983).

Commerce has not explained how any distortion created by the PMS in this case has not already been remedied by the concurrent CVD case, and therefore its resort to international market prices for soybeans, without adjustment for the CVD remedy, is unreasonable. In its remand, Commerce spends a good deal of time explaining the different purposes of the AD and CVD regimes.[25] Commerce also explains how companies that benefit from subsidies may use those subsidies for purposes other than lowering the price of exports.[26] Commerce labels "speculative" the view that subsidies affect normal value.[27] *Remand Results* at 26. Commerce's comments fail to address the problem posed by the court, namely whether its calculation of normal value (i.e., using international market prices for soybeans) remedies subsidies that have already been remedied by the concurrent CVD case.

Commerce's use of an alternative methodology for constructed value, using market prices for soybeans, may remedy the effects of domestic subsidization already remedied by the concurrent CVD case, such that Commerce must either account for the increase in the weighted average dumping margin resulting from the countervailing duties or explain why doing so is unnecessary. *Cf.* 19 U.S.C. § 1677f-1(f)(1)(C) (offsetting the potential double remedy cause by using a surrogate value for normal value in an NME dumping case). Commerce's alternative calculation methodology corrects for a distortion in home market prices caused by a domestic subsidy that has potentially already been accounted for in the concurrent CVD case. Commerce itself alludes to the potential problem with its approach by the use of two examples. *See Remand Results* at 28–30.

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[25] Commerce disagrees with the notion that it must demonstrate why the CVD imposed on the GOA's export tax regime did not cure the distortion giving rise to its PMS finding. *See Remand Results* at 22–31; *see also Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1341–43 (citing *Biodiesel From the Republic of Argentina*, 82 Fed. Reg. 53,477 (Dep't Commerce Nov. 16, 2017) (final affirmative [CVD] determination) and accompanying Issues and Decision Memo. for the Final Determination in the [CVD] Investigation of Biodiesel from the Republic of Argentina at 13, C-357–821, (Nov. 6, 2017), *available at* https://enforcement.trade.gov/frn/summary/argentina/201724857–1.pdf (last visited June 23, 2020)). Commerce explains, and Defendant echoes, that the CVD and AD regimes target different behaviors. *See Remand Results* at 24–27; Def.'s Br. at 29–32.

[26] Both Commerce and the Defendant give a list of effects that the subsidy may have that do not necessarily affect the U.S. Price. *See Remand Results* at 26–27 (noting that a subsidy may, for example, increase foreign production and shipment volumes to the U.S., or render a mismanaged producer solvent); Def.'s Br. at 30–31.

[27] Namely, according to Commerce, a CVD is not intended to address the differential between the U.S. Price and normal value, and a countervailable subsidy may have no effect on the U.S. Price. *Remand Results* at 25–28.

The very examples Commerce gives in support of its position that no explanation or reconsideration is needed illustrate the relationships between the CVD and ADD cases, as well as why further explanation or reconsideration is needed in this case. First, Commerce invokes Congress's treatment of export subsidies, as opposed to domestic subsidies. Congress explicitly provides an adjustment to U.S. Price in an AD proceeding where Commerce has imposed a CVD to offset an export subsidy. *See* 19 U.S.C. § 1677a(c)(1)(C). The treatment of export subsidies illustrates that export subsidies affect only one side of the LTFV equation such that the price differential between normal value and U.S. Price is presumed to be the result of the subsidy. *See Low Enriched Uranium From France*, 69 Fed. Reg. 46,501, 46,506 (Dep't Commerce Aug. 3, 2004) (notice of final results of [ADD] admin. review). Conversely, domestic subsidies are presumed to impact both sides of the LTFV equation, such that any price differential between normal value and U.S. Price is presumed to result from something other than the subsidy. *See id.*

Commerce also invokes Congress's treatment of concurrent remedies in the non-market economy ("NME") context.[28] In the NME situation, a domestic subsidy that would normally affect both sides of the LTFV is remedied when Commerce determines normal value because the statute requires that normal value be determined through surrogate values. *See* 19 U.S.C. § 1677b(c) (providing that rather than using invoice prices Commerce constructs a normal value using factors of production). Because the NME surrogate value provisions effectively remedy the domestic subsidy in an ADD case (by increasing the normal value side of the LTFV equation), Congress provided a statutory provision to avoid a double remedy where there is a concurrent CVD case. *Cf.* 19 U.S.C. § 1677f-1(f)(1)(C) (Commerce will "reduce the antidumping duty [applied to NME imports] by the amount of the increase in the weighted average dumping margin estimated by [Commerce] [to result from the imposition of countervailing duties.]")[29]

Here, Commerce's adoption of an international market price for soybeans when calculating constructed value negates the assumed

[28] The term "nonmarket economy country" means any foreign country that Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). In such cases, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses.]" 19 U.S.C. § 1677b(c)(1).

[29] Thus, "the new law instructs Commerce to reduce the duties applied to NME imports when the antidumping and countervailing duties imposed on those goods double count for the same unfair trade advantage." *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, 745 F.3d 1194, 1197 (Fed. Cir. 2014).

even-handedness of a domestic subsidy and remedies the domestic subsidy in the same way that the surrogate values remedy a domestic subsidy in an NME situation. Congress has provided guidance for addressing the risk of double counting in an NME situation, yet Commerce and Defendant argue that its silence in this instance leave the Plaintiffs without a remedy. *See Remand Results* at 51; Def.'s Br. at 32. However, Commerce's methodology must still be reasonable.[30] Commerce has not explained why the dumping margin is not improperly increased when there is an unadjusted remedy imposed for a PMS that has already been addressed by the imposition of CVDs on the same merchandise, nor has it explained why it cannot adjust the remedy for the PMS to account for the already imposed CVDs. Accordingly, Commerce's PMS determination is remanded for further explanation or reconsideration.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's determination 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; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination.

Dated: July 1, 2020
New York, New York

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

[30] Commerce has acknowledged its desire to avoid double counting. *See, e.g.*, *Zhaoqing Tifo New Fibre Co. v. United States*, 41 CIT __, __ n. 8, 256 F. Supp. 3d1314, 1319 n.8 (2017) (citations omitted).

Slip Op. 20–92

NUCOR CORPORATION, Plaintiff, and DONGBU INCHEON STEEL CO., LTD., AND DONGBU STEEL CO., LTD., Consolidated Plaintiffs, and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and DONGBU STEEL CO., LTD., DONGBU INCHEON STEEL CO., LTD., HYUNDAI STEEL COMPANY, NUCOR CORPORATION, UNITED STATES STEEL CORPORATION, CALIFORNIA STEEL INDUSTRIES, AND STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 19–00042

[Sustaining in part and remanding in part the U.S. Department of Commerce's *Final Results* of the first administrative review of the countervailing duty order on *Certain Corrosion-Resistant Steel Products From the Republic of Korea*.]

Dated: July 2, 2020

Alan H. Price, *Adam M. Teslik*, *Elizabeth S. Lee*, *Robert E. DeFrancesco III*, and *Tessa V. Capeloto*, Wiley Rein LLP, of Washington, D.C., for Plaintiff and Defendant-Intervenor Nucor Corporation. *Christopher B. Weld*, *Maureen E. Thorson*, *Stephanie M. Bell*, and *Timothy C. Brightbill* also appeared.

Donald B. Cameron, *Brady W. Mills*, *Julie C. Mendoza*, *Mary S. Hodgins*, and *R. Will Planert*, Morris, Manning, & Martin, LLP of Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors Dongbu Steel Co., Ltd. and Dongbu Incheon Steel Co., Ltd, and Defendant-Intervenor Hyundai Steel Co. *Edward J. Thomas III*, *Eugene Degnan*, *Jordan L. Fleischer*, *Ragan W. Updegraff*, and *Sabahat Chaudhary* also appeared.

Claudia Burke, Assistant Director, and *Elizabeth A. Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the briefs were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel were *Ayat Mujais* and *John Anwesen*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises from the first administrative review of certain corrosion-resistant steel products from the Republic of Korea ("Korea") by the U.S. Department of Commerce ("Commerce"). *Certain Corrosion-Resistant Steel Products From the Republic of Korea*, 84 Fed. Reg. 11,749 (Dep't. Commerce Mar. 28, 2019) (final results and partial rescission of countervailing duty administrative review 2015–2016) ("*Final Results*"); *see Certain Corrosion-Resistant Steel Products from the Republic of Korea*: Issues and Decision Mem. for the Final Results and Partial Rescission of Countervailing Duty Administrative Review, PR 299 (Mar. 18, 2019) ("IDM"). Before the court are two motions for judgment on the agency record filed by Plaintiff Nucor Corporation ("Nucor") and Consolidated Plaintiffs Dongbu In-

cheon Steel Co., Ltd. ("Dongbu Incheon") and Dongbu Steel Co., Ltd. ("Dongbu Steel") (collectively, "Dongbu"). For the reasons that follow, the court sustains in part and remands in part the *Final Results* to Commerce for further consideration.

ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's determination that Dongbu did not receive a countervailable benefit from government equity infusions is supported by substantial evidence;

2. Whether Commerce's determination that Dongbu's loans from private creditors on the debt restructuring creditors committee could not be used as benchmarks for measuring benefits from the government loans is supported by substantial evidence;

3. Whether Commerce's determination that Dongbu's loan restructuring was specific is supported by substantial evidence;

4. Whether Commerce's determination that Hyundai Green Power and Hyundai Steel were not cross-owned is supported by substantial evidence; and

5. Whether Commerce's determination that Nucor's arguments concerning an alleged input supplier relationship were moot is in accordance with the law.

BACKGROUND

Commerce published the *Preliminary Results* on August 10, 2018. *Certain Corrosion-Resistant Steel Products From the Republic of Korea*, 83 Fed. Reg. 39,671 (Dep't. Commerce Aug. 10, 2018); *see Certain Corrosion-Resistant Steel Products from the Republic of Korea*: Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review, in Part, and Intent to Rescind, in Part; 2015–16, PR 256 (Aug. 3, 2018) ("Preliminary Decision Memorandum"). Commerce published the *Final Results* on March 28, 2019. *Final Results* at 11,749. Commerce detailed its findings in the accompanying IDM.

Plaintiff initiated this action on March 28, 2019. Summons, Mar. 28, 2019, ECF No. 1; Compl. ¶ 4, Mar. 28, 2019, ECF No. 6. The court entered a statutory injunction on April 12, 2019. Am. Order for Statutory Inj. Upon Consent, Apr. 12, 2019, ECF No. 18. United States Steel Corporation intervened as Plaintiff-Intervenor on April 15, 2019. Order, Apr. 15, 2019, ECF No. 19. Dongbu intervened as Defendant-Intervenors on April 18, 2019. Order, Apr. 18, 2019, ECF No. 24. Hyundai Steel Company ("Hyundai Steel") intervened as Defendant-Intervenor on April 29, 2019. Order, Apr. 29, 2019, ECF No. 29.

The court consolidated this case with Court No. 19–00049. Order, May 10, 2019, ECF No. 32. California Steel Industries ("CSI") and Steel Dynamics, Inc. ("SDI") intervened as Defendant-Intervenors on May 14, 2019. Order, May 14, 2019, ECF No. 39. This action was reassigned on June 11, 2019. Order, June 11, 2019, ECF No. 45.

Plaintiff Nucor and Consolidated Plaintiffs Dongbu filed motions for judgment on the agency record. Mot. of Consol. Pl. Dongbu for J. on the Agency R., Aug. 20, 2019, ECF No. 51 ("Dongbu Mot."); Pl. Nucor [Rev.] Mot. for J. on the Agency R., Aug. 20, 2019, ECF No. 53 ("Nucor Mot."). Defendant and Defendant-Intervenors responded. Def.'s Mem. in Opp. to Pl. and Consol. Pl. Mot. for J. Upon the Agency R., Dec. 19, 2019, ECF No. 59 ("Def. Resp."); Resp. Br. of Def.-Int. Dongbu in Opp. to Pl. Mot for J. on the Agency R., Jan. 14, 2020, ECF No. 67 ("Dongbu Resp."); Def.-Int. Hyundai Steel Br. in Resp. to Pl. Mot. for J. on the Agency R., Jan 14, 2020, ECF No. 69 ("Hyundai Steel Resp."). Plaintiff and Consolidated Plaintiffs replied. Pl. Nucor Reply Br., Feb. 10, 2020, ECF No. 71 ("Nucor Reply"); Reply Br. of Consol. Pl. Dongbu in Supp. Of Mot. for J. Upon the Agency R., Feb. 11, 2020, ECF No. 74 ("Dongbu Reply"). The joint appendix was filed on March 23, 2020. Joint App'x, Mar. 23, 2020, ECF Nos. 79, 79–1, 79–2, 79–3. The court decides this matter on the briefs and record, having granted the parties' motion to forgo oral argument. Order, May 19, 2020, ECF No. 84.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). The court will hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. Commerce's Determination That Dongbu Did Not Receive a Countervailable Benefit From Government Equity Infusions

The first issue is whether Commerce's determination that Dongbu did not receive a countervailable benefit from government equity infusions is supported by substantial evidence.

The court requires the exhaustion of administrative remedies when appropriate. 28 U.S.C. § 2637(d). Generally, exhaustion requires that a party submit an administrative case brief to Commerce presenting all arguments that continue to be relevant to Commerce's final deter-

mination or results. *United States Steel Corp. v. United States*, 42 C.I.T. __, __, 348 F. Supp. 3d 1248, 1260 (2018). A party who does not adequately raise an issue to Commerce in its case brief will fail to have exhausted that issue. *See Nucor Corp. v. United States*, 927 F.3d 1243, 1256 (Fed. Cir. 2019) (concluding that an issue was not preserved when Nucor mentioned the issue only in passing and presented no meaningful argument about the issue).

Commerce addresses the significance of private investor participation when private investor prices are available. 19 C.F.R. § 351.507(a)(2)(iii). Here, Commerce found that private investor prices were available, and thus the significance of private investor participation was a relevant issue in Commerce's determination. Preliminary Decision Memorandum at 16 n.84. Nucor failed to raise in its administrative case brief the issue of whether the share of private investor equity infusions relevant to this case were significant for purposes of 19 C.F.R. § 351.507(a)(2)(iii), and only raises this specific issue for the first time before this court. *See* Nucor Case Br., PR 278 (Sept. 24, 2018) ("Nucor Case Br.") (failing to argue that private investors' percentage share of equity investments was insignificant). Because Commerce addressed the significance of private investor participation after having found that private investor prices were available, Nucor should have raised in its administrative case brief the issue of whether the share of private investor equity infusions were significant if Nucor wanted to preserve its challenge to Commerce's determination before the court.

Because Nucor failed to raise in its administrative case brief the issue of whether the share of private investor equity infusions were significant as defined by the applicable legal standard, the court concludes that Nucor failed to exhaust its administrative remedies and does not reach the merits of this issue.

II. Commerce's Determination That Dongbu's Loans From Private Creditors on The Debt Restructuring Creditors Committee Could Not be Used as Benchmarks For Measuring Benefits From The Government Loans

The second issue is whether Commerce's determination that Dongbu's loans from private creditors on the debt restructuring creditors committee could not be used as benchmarks for measuring benefits from the government loans is supported by substantial evidence.

In a creditworthiness analysis, Commerce must determine whether a company could have obtained long-term loans from conventional commercial sources. *Archer Daniels Midland Co. v. United States*, 37 CIT __, __, 917 F. Supp. 2d 1331, 1349 (2013) (citing 19 C.F.R. § 351.505(a)(4)(i)). To make this determination, "Commerce may apply

the factors set forth in 19 C.F.R. § 351.505(a)(4)(i)(A)–(D), or others it deems appropriate according to a proper exercise of its flexibility and discretion." *Id.* (citing *Saarstahl AG v. United States*, 21 CIT 1158, 1163, (1997)) (internal punctuation omitted). Commerce will normally calculate the benefit associated with the extension of a government-provided long-term loan to an uncreditworthy company. 19 C.F.R. § 351.505(a)(3)(iii); *see also* Notice of Final Rules, 63 Fed. Reg. 65,348, 65,401 (Nov. 25, 1998) ("CVD Preamble") (discussing separate benchmarking methodology for uncreditworthy companies). Finally, "Commerce's Issues and Decision Memorandum, by itself, does not constitute substantial evidence. In the absence of substantial evidence, [a] conclusion must be remanded." *Hyundai Heavy Indus., Co. v. United States*, 42 CIT __, __, 332 F. Supp. 3d 1331, 1349 (2018). For example, Commerce's discussion should not "lack[] record citations supporting the agency's findings [and] . . . consist[] of conclusory statements . . . without any examples or citations to support those statements." *Id.*

The parties do not dispute Commerce's finding that Dongbu was uncreditworthy during the period of review. IDM at 4; Dongbu Mot. at 35–43; Def. Resp. at 24. Commerce found additionally that:

> given the influence of the [Government of Korea]–controlled banks in setting the restructured loan terms, the private banks['] . . . private loans do not reflect credit that would have been available to Dongbu in the market outside of the Creditor Bank Committee . . . [and therefore] cannot be used as a commercial benchmark when measuring the benefit conferred by the restructuring program.

IDM at 33. Dongbu concedes that 19 C.F.R. § 351.505(a)(3)(iii) provides that for uncreditworthy companies, Commerce normally will calculate the interest rate using a formula not tied to a company's actual private loans. Dongbu Reply at 14. Dongbu argues that this is nonetheless not required, and that if a private loan otherwise meets the criteria for use as a benchmark, it could still be used as a benchmark. *Id.*

Here, Commerce's finding that the private loans cannot be used as a benchmark is unsupported by substantial evidence. The Government's brief cites only the IDM and the Preliminary Decision Memorandum in support of its finding, while citing no documents or other evidence in the record. Def. Resp. at 22–24 (citing Preliminary Decision Memorandum at 12, 14–16 and IDM at 4, 32–33). The information contained in the IDM and the Preliminary Decision Memoran-

dum does not suffice as substantial evidence. *See Hyundai Heavy Indus., Co.*, 332 F. Supp. 3d at 1349. Commerce's findings are conclusory statements to the effect that the Government of Korea-controlled banks overly influenced the private banks' behavior in the course of the restructuring program at issue, and are not based on any cited evidence in the record. The court remands this issue to Commerce to either identify substantial record evidence in support of its finding or to reconsider its determination.

III. Commerce's Determination That Dongbu's Loan Restructuring Was Specific

The third issue is whether Commerce's determination that Dongbu's loan restructuring was specific is supported by substantial evidence.

A subsidy is countervailable when an authority provides a financial contribution to a person, a benefit is conferred, and the subsidy is specific, as described in 19 U.S.C. § 1677(5A). 19 U.S.C. § 1677(5)(A)–(B). A subsidy is specific if it is an export subsidy, an import substitution subsidy, or a domestic subsidy under 19 U.S.C. § 1677(5A)(A)–(D). Domestic subsidies are specific, and thus countervailable, when "[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1330 (2018) (quoting 19 U.S.C. § 1677(5A)(D)(iii)(I)). Separately, the court will not sustain Commerce's determination when Commerce failed to address a party's relevant argument. *See Stein Industries Inc. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1364, 1371 (2019) (remanding to Commerce to consider an argument that Commerce failed to address).

Dongbu argues that Commerce treated Dongbu's corporate restructuring improperly by treating restructuring differently than under bankruptcy and further asserts that Commerce did not address this argument. Dongbu Mot. at 22; Dongbu Reply at 2–9. Commerce responds that its reference to the original investigation and restatement of the relevant facts suffices to address Dongbu's argument. Def. Resp. at 28 (citing *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products From the Republic of Korea: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 Fed. Reg. 35,310, and accompanying Issues and Decision Memorandum at cmt. 4).

Despite Commerce's argument to the contrary, Commerce's cited references in the IDM and the Preliminary Decision Memorandum to the original investigation do not address directly Dongbu's argument. IDM at 21, 31; Preliminary Decision Memorandum at 14. Because the

court cannot evaluate this issue on an incomplete record, the court concludes that Commerce's determination that Dongbu's loan restructuring was specific is not supported by substantial evidence. The court remands this issue to Commerce to respond to Dongbu's argument and either support its determination with substantial record evidence or reconsider its determination.

IV. Commerce's Determination That Hyundai Green Power and Hyundai Steel Were Not Cross-Owned

The fourth issue is whether Commerce's determination that Hyundai Green Power and Hyundai Steel were not cross-owned is supported by substantial evidence.

Generally, Commerce "attributes subsidies to goods produced by the company receiving the subsidy." *Nantong Uniphos Chems. Co. v. United States*, Slip Op. 18–78, 2018 WL 3134845, at *2 (CIT June 25, 2018) (describing 19 C.F.R. § 351.525(b)(6)(i)). When two or more corporations with cross-ownership produce the subject merchandise, Commerce will attribute the subsidies received by either or both corporations to the products produced by both corporations. 19 C.F.R. § 351.525(b)(6)(ii). If the cross-owned corporations are an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, Commerce will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations. *Id.* § 351.525(b)(6)(iv). Cross-ownership exists when, between two or more corporations, one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. *Id.* § 351.525(b)(6)(vi). The cross-ownership standard normally is met when there is a majority voting ownership interest between two corporations or through common ownership of two or more corporations. *Id.* The CVD Preamble adds that "[i]n certain circumstances, a large minority voting interest (for example, 40 percent) or a 'golden share' may also result in cross-ownership." CVD Preamble at 65,401.

Commerce's finding that Hyundai Steel and Hyundai Green Power were not cross-owned is supported by substantial evidence. IDM at 16–17. The record shows that Hyundai Steel's ownership share in Hyundai Green Power was 29 percent, considerably less than the 40 percent contemplated by the CVD Preamble. Hyundai Green Power Initial Questionnaire Response, CR 224–37 at Exhibit 3 (June 22, 2018); *see also* Hyundai Steel Resp. at 16 (conceding that Hyundai Steel's ownership share was 29 percent); CVD Preamble at 65,401. Nucor argues that Hyundai Steel's and Hyundai Green Power's operations are intertwined and interdependent, that Hyundai Steel can

use or direct the individual assets of Hyundai Green Power in essentially the same way it can use its own assets, and subsidies to Hyundai Green Power directly benefit Hyundai Steel's production of the subject merchandise. Nucor Mot. at 24. Nucor concedes that Hyundai Steel had a right to buy the shares of Hyundai Green Power from all other shareholders as of October 2019, well after the 2015–2016 period of review at issue here. Nucor Mot. at 25; *see* Hyundai Steel Response to Nucor's New Subsidy Allegation, CR 147–155 at 9 (Mar. 27, 2018). Nucor points to no record evidence sufficient to render Commerce's finding unreasonable; despite Nucor's efforts, the record does not support the existence of a "golden share." *See* Nucor Mot. at 19–35; *see* Nucor Reply at 13–21.

The court sustains Commerce's finding that Hyundai Steel and Hyundai Green Power were not cross-owned because Commerce's determination is supported by substantial evidence.

V. Commerce's Determination That Nucor's Arguments Regarding an Alleged Input Supplier Relationship Were Moot

The fifth issue is whether Commerce's determination that Nucor's arguments regarding an alleged input supplier relationship were moot is in accordance with the law.

The input supplier relationship analysis under 19 C.F.R. § 351.525(b)(6)(iv) requires a prerequisite finding of cross-ownership. 19 C.F.R. § 351.525(b)(6)(iv) (providing for an input supplier subsidy analysis "[i]f there is cross-ownership").

Commerce concluded that Nucor's arguments regarding an alleged input supplier relationship between Hyundai Steel and Hyundai Green Power under 19 C.F.R. § 351.525(b)(6)(iv) were moot. IDM at 17 (noting that "[a]bsent cross-ownership, we find petitioners' arguments regarding subsidies received by cross-owned companies and any consequent attribution to be moot"); *see* Nucor Mot. at 30–33, Nucor Reply at 13–20.

As previously stated above, the court concluded that Commerce's finding that Hyundai Steel and Hyundai Green Power were not cross-owned is supported by substantial evidence. Because the prerequisite finding of cross-ownership under the relevant legal standard has not been met, an input supplier relationship analysis for cross-owned entities cannot be conducted. The court sustains, therefore, Commerce's determination that Nucor's arguments were moot because it is in accordance with the law.

CONCLUSION

For the foregoing reasons, the court remands this matter to Commerce for further proceedings consistent with this opinion. Accordingly, upon consideration of all papers and proceedings in this action, it is hereby

ORDERED that this action shall proceed in accordance with the following schedule:

1. Commerce must file its remand determination on or before August 31, 2020;
2. Commerce must file the administrative record on or before September 14, 2020;
3. The Parties' comments in opposition to the remand determination must be filed on or before September 30, 2020;
4. The Parties' comments in support of the remand determination must be filed on or before October 30, 2020;
5. The Joint Appendix must be filed on or before November 13, 2020.

Dated: July 2, 2020
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 20–93

CONFEDERACIÓN DE ASOCIACIONES AGRÍCOLAS DEL ESTADO DE SINALOA, A.C., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00203

CONFEDERACIÓN DE ASOCIACIONES AGRÍCOLAS DEL ESTADO DE SINALOA, A.C., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Court No. 19–00206

ASOCIACIÓN MEXICANA DE HORTICULTURA PROTEGIDA, A.C., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Court No. 20–00036

[Granting Defendant's motion to dismiss for failure to state a claim.]

Dated: July 7, 2020

Christopher Ryan, *Thomas B. Wilner*, *Robert S. LaRussa*, and *Neil H. Koslowe*, Shearman & Sterling LLP, of Washington, D.C., and *Spencer S. Griffith*, *Bernd G. Janzen*, *Yujin K. McNamara*, and *Devin S. Sikes*, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., for Plaintiffs Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Asociación de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate.[1]

Elizabeth Anne Speck, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. On the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Emma T. Hunter*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Jonathan M. Zielinski, *Robert C. Cassidy, Jr.*, *Charles S. Levy*, *James R. Cannon, Jr.*, *Mary Jane Alves*, and *Chase J. Dunn*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for The Florida Tomato Exchange.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiffs Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C. ("CAADES"), Consejo Agrícola de Baja California, A.C. ("CABC"), Asociación Mexicana de Horticultura Protegida, A.C. ("AMHPAC"), Asociación de Productores de Hortalizas del Yaqui y Mayo ("APHYM"), and Sistema Producto Tomate ("SPT"), and their individual members (collectively, "Plaintiffs" or "Mexican Growers") filed

[1] Plaintiffs substituted the law firm of Shearman & Sterling LLP for Akin Gump Strauss Hauer & Feld LLP as counsel of record after Defendant's motion to dismiss was fully briefed. Notice of Substitution of Att'y, ECF No. 37, Court No. 19–00203; ECF No. 36, Court No. 19–00206; ECF No. 25, Court No. 20–00036.

three complaints, which the Mexican Growers have submitted in three forms to satisfy all possible jurisdictional requirements and the North American Free Trade Agreement ("NAFTA") procedures.[2] The Mexican Growers challenge the Department of Commerce's ("Commerce") withdrawal and termination from a suspension agreement, the continuation of the subject antidumping duty investigation on fresh tomatoes from Mexico, and Commerce's final determination made in the subject antidumping duty investigation. Compl. ¶ 1; *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 20,858, 20,860 (Dep't Commerce May 13, 2019) (termination of suspension agreement, rescission of administrative review, and continuation of the antidumping duty investigation) ("*May 2019 Withdrawal Notice*"); *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 18,377 (Dep't Commerce Apr. 25, 1996) (notice of initiation of antidumping duty investigation); *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,618 (Dep't Commerce Nov. 1, 1996) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,608 (Dep't Commerce Nov. 1, 1996) (preliminary determination) ("*1996 Preliminary Determination*"). Specifically, Plaintiffs allege that Commerce's "[final] determination is based on a sham investigation that Commerce invalidly undertook after it unlawfully terminated a 2013 suspension agreement between the Secretary of Commerce and the Mexican Growers and forced the Mexican Growers to sign a 2019 suspension agreement." Compl. ¶ 1. Plaintiffs are parties to the suspension agreements involved in this case and are subject to the challenged final determination issued by Commerce. *Id.*¶ 2.

Before the court is Defendant United States' Motion to Dismiss Plaintiffs' Complaints for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss Br., ECF No. 30 ("Def. Br."). Plaintiffs opposed. Pls.' Opp'n to Def.'s Mot. to Dismiss Pls.' Compls., ECF No. 33 ("Pls. Opp'n). Defendant replied. Def.'s Reply in Supp. of its Mot. to Dismiss Pls.' Compls., ECF No. 36 ("Def. Reply").[3]

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[2] CAADES filed complaints in the following matters: *CAADES v. United States*, Court No. 19–00203, ECF No. 14; *CAADES v. United States*, Court No. 19–00206, ECF. No. 13; and *AMHPAC v. United States*, Court No. 20–00036, ECF No. 2. Even though the order of the named plaintiffs is arranged differently in Court No. 20–00036, CAADES filed the complaint. For ease of reference and because the three complaints are generally identical, except in paragraph 7 of the complaint in Court Nos. 19–00203 and 19–00206 (the timeliness of the action), and the pleading of jurisdiction in Court No. 20–00036, the court refers to the three complaints as the "Complaint" and, unless otherwise noted, cites only to the Complaint in the first-filed case, Court No. 19–00203.

[3] Defendant-Intervenor The Florida Tomato Exchange did not join in Defendant's motion to dismiss. Nonetheless, Defendant-Intervenor "support[s] the entirety of the United States' motion and agree[s] with the arguments presented therein." Def.-Intervenor's Resp. 2, ECF No. 34.

For the reasons that follow, Defendant's motion to dismiss is granted.

I. BACKGROUND

A. History of the Fresh Tomatoes from Mexico Antidumping Duty Proceeding

Commerce's investigation of fresh tomatoes from Mexico spans almost a quarter century. In April 1996, Commerce initiated an antidumping duty investigation to determine whether imports of fresh tomatoes from Mexico were being, or likely to be, sold in the United States at less than fair value. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 18,377. Following a preliminary determination from the International Trade Commission ("ITC"), Commerce made a preliminary determination in October 1996, finding that imports of fresh tomatoes from Mexico were being sold in the United States at less than fair value. *See 1996 Preliminary Determination*, 61 Fed. Reg. at 56,608. Commerce was required to make a final determination within 75 days after the date of its preliminary determination, 19 U.S.C. § 1673d(a)(1), but it received requests from five of six mandatory respondents to keep the investigation open, *1996 Preliminary Determination*, 61 Fed. Reg. at 56,609; Compl. ¶ 10. Under 19 U.S.C. § 1673d(a)(2)(A), Commerce postponed making a "final determination until the 135th day after the date of publication of the affirmative preliminary determination in the Federal Register[,]" which was March 16, 1997. *1996 Preliminary Determination*, 61 Fed. Reg. at 56,609; Compl. ¶ 10.

That same day, Commerce announced that Commerce and the signatories had signed an agreement to suspend the investigation—the 1996 Suspension Agreement. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 56,618; 19 U.S.C. § 1673c(c).[4] The 1996 Suspension Agreement provided that exporters were compelled to sell fresh tomatoes in the United States at or above an established "reference price." *Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 56,618. Commerce instructed Customs and Border Protection ("CBP") to terminate the suspension of liquidation and collection of cash deposits, release any bonds, and refund cash deposits. Compl. ¶ 14 (citing CBP Message No. 7327113 (Nov. 22, 1996)); *see Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 56,619.

[4] The term "signatory" or "signatories" throughout the various suspension agreements refers to "the signatory producers/exporters of fresh tomatoes from Mexico." *Fresh Tomatoes from Mexico*, 84 Fed. Reg. at 49,989; *Fresh Tomatoes from Mexico*, 78 Fed. Reg. at 14,968; *Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 56,619.

Over the next 23 years, Commerce and the signatories entered into a series of suspension agreements after the Mexican Growers gave notice that they wanted to withdraw from the operative suspension agreement. The Mexican Growers informed Commerce of their intent to withdraw from the relevant suspension agreement three times: in 2002, 2007, and 2013.[5] Each time the Mexican Growers announced their withdrawal from the effective suspension agreement, Commerce terminated the suspension agreement, resumed the antidumping investigation, suspended liquidation, and instructed CBP to require a cash deposit or bond at the rate set forth in the *1996 Preliminary Determination*. *Fresh Tomatoes from Mexico*, 67 Fed. Reg. at 50,860; *Fresh Tomatoes from Mexico*, 73 Fed. Reg. at 2889; *Fresh Tomatoes from Mexico*, 78 Fed. Reg. at 14,772. Each time the Mexican Growers withdrew from the relevant suspension agreement, the parties negotiated and entered into a new suspension agreement, and in 2002, 2008, and 2013, new suspension agreements went into effect.[6] In those instances, Commerce directed CBP to refund cash deposits collected during the resumption period of the antidumping duty investigation and to release any bonds that were posted. *See* Compl. ¶¶ 21, 27, 34. And in each instance, Commerce resumed the antidumping duty investigation in 2002, 2008, and 2013 "as if" the *1996 Preliminary Determination* had been made and published in the Federal Register on the effective date of termination and indicated that the investigation would be completed within 135 days. *Fresh Tomatoes from Mexico*, 67 Fed. Reg. at 50,859–60; *Fresh Tomatoes from Mexico*, 73 Fed. Reg. at 2889; *Fresh Tomatoes from Mexico*, 78 Fed. Reg. at 14,772.

B. Commerce Withdraws from the 2013 Suspension Agreement and Continues the 1996 Fresh Tomatoes Investigation

A clause in the 2013 Suspension Agreement allowed a signatory to withdraw upon giving 90 days' written notice. Under that clause,

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[5] *See Fresh Tomatoes from Mexico*, 67 Fed. Reg. 50,858, 50,858–59 (Dep't Commerce Aug. 6, 2002) (notice of termination of suspension agreement, termination of sunset review, and resumption of antidumping investigation); *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 2887, 2887–88 (Dep't Commerce Jan. 16, 2008) (notice of termination of suspension agreement, termination of sunset review, and resumption of antidumping investigation); *Fresh Tomatoes from Mexico*, 78 Fed. Reg. 14,771, 14,771 (Dep't Commerce Mar. 7, 2013) (notice of termination of suspension agreement, termination of sunset review, and resumption of antidumping investigation).

[6] *Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77,044 (Dep't Commerce Dec. 16, 2002) (notice of suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 4,831 (Dep't Commerce Jan. 28, 2008) (notice of suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 78 Fed. Reg. 14,967, 14,967–68 (Dep't Commerce Mar. 8, 2013) (notice of suspension of antidumping investigation) ("*2013 Suspension Agreement*").

Commerce withdrew and terminated the 2013 Suspension Agreement, effective May 7, 2019, and resumed the antidumping investigation. *See May 2019 Withdrawal Notice*, 84 Fed. Reg. at 20,860–61; *2013 Suspension Agreement*, 78 Fed. Reg. at 14,967. CBP then suspended liquidation of the entries of fresh tomatoes from Mexico and required the posting of cash deposits or bonds. *May 2019 Withdrawal Notice*, 84 Fed. Reg. at 20,860. Commerce also postponed the deadline for making a final determination because "[t]he statute d[id] not identify the timing for completion of this investigation in this particular scenario." *Id.* Commerce thus resumed the antidumping duty investigation and proceeded towards making a final determination "as if" Commerce had published the *1996 Preliminary Determination* on May 7, 2019. *Id.*[7]

C. The Mexican Growers' Lawsuit

On May 9, 2019, two days after Commerce announced its decision to withdraw from the 2013 Suspension Agreement, the Mexican Growers brought suit in this court challenging Commerce's withdrawal from the 2013 Suspension Agreement and moving for a temporary restraining order and preliminary injunction. The court denied the Mexican Growers' request for a temporary restraining order and preliminary injunction because Plaintiffs failed to show a likelihood of success on the merits and irreparable harm absent injunctive relief. *Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1386, 1397–98, 1403 (2019), Court No. 19–00059 ("*CAADES I*"), *aff'd In re Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C.*, 781 F. App'x 982, 983– 84 (Fed. Cir. 2019) (per curiam) (denying a petition for a writ of mandamus and "uphold[ing] the Trade Court's determination that the petitioners [we]re unlikely to succeed on the merits of their challenge to Commerce's actions," when Commerce's withdrawal from the 2013 Suspension Agreement was lawful and otherwise complied with the statutory framework set out in 19 U.S.C. §§ 1673b, 1673d).

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[7] Commerce's schedule for issuance of a final determination is based explicitly on the schedule set forth in the *1996 Preliminary Determination*:

> As explained in its 1996 Preliminary Determination, Commerce previously postponed the final determination until the 135th day after the date of the preliminary determination. Commerce, therefore, intends to issue its final determination in the investigation 135 days after the effective date of withdrawal from and termination of the 2013 Agreement . . . .

May 2019 Withdrawal Notice, 84 Fed. Reg. at 20,860.

On September 11, 2019, the court stayed *CAADES I* until October 21, 2019. *CAADES I*, Order, ECF No. 97. Following expiration of the stay, the court requested briefing on mootness. In response, the Mexican Growers and Defendant stipulated to dismissing *CAADES I*. *CAADES I*, Order of Dismissal, ECF No. 103.

D. The 2019 Suspension Agreement

Commerce published a Federal Register notice with an effective date of September 19, 2019, announcing the suspension of its antidumping duty investigation of fresh tomatoes from Mexico because Commerce and the Mexican Growers—the signatory producers and exporters accounting for a substantial portion of imports of fresh tomatoes from Mexico (85% or more of subject imports)—signed a new suspension agreement. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 49,987 (Dep't Commerce Sept. 24, 2019) (notice of suspension of antidumping duty investigation) ("*2019 Suspension Agreement*"); *see* 19 U.S.C. § 1673c(b), (c). No party challenged Commerce's decision to suspend the investigation. The ITC also announced that it was suspending its antidumping investigation as of September 24, 2019. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 54,639 (Int'l Trade Comm'n Oct. 10, 2019) (notice of suspension of antidumping duty investigation).

E. Commerce's Final Determination

Commerce continued its antidumping duty investigation under 19 U.S.C. § 1673c(g) pursuant to timely requests, including from Defendant-Intervenor. On October 25, 2019, Commerce issued its final determination. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 57,401, 57,401 (Dep't Commerce Oct. 25, 2019) (final determination of sales at less than fair value). The ITC issued an affirmative injury determination on December 12, 2019. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 67,958 (Int'l Trade Comm'n Dec. 12, 2019) (notice of affirmative injury determination).

F. The Current Litigation

Plaintiffs filed three separate actions challenging Commerce's final determination, beginning with filing the Summons in Court No. 19–00203 on November 22, 2019, ECF No. 1, and in Court No. 19–00206 on November 26, 2019, ECF No. 1. Plaintiffs then filed Complaints in Court No. 19–00203, ECF No. 14, and Court No.

19–00206, ECF No. 13, on December 20, 2019.[8] On February 5, 2020, Plaintiffs filed the Summons and Complaint concurrently in Court No. 20–00036, ECF Nos. 1, 2.

Plaintiffs allege seven causes of action. Specifically, Plaintiffs challenge as "unlawful, and null, and void" Commerce's termination of the 2013 Suspension Agreement, Compl. ¶¶ 53– 55 (Count One), ¶¶ 56–58 (Count Two);[9] resumption of the antidumping duty investigation, *id.* ¶¶ 59–62 (Count Three); finalization of the 2019 Suspension Agreement, *id.* ¶¶ 63–65 (Count Four); final determination, *id.* ¶¶ 66–69 (Count Five); and the correctness of certain aspects of the final determination (the dumping margins and individual rate determinations), *id.* ¶¶ 70–75 (Counts Six and Seven). In all, Plaintiffs ask the court to resurrect and reinstate the 2013 Suspension Agreement and declare "unlawful and null and void" the resumed antidumping duty investigation that Commerce began on May 7, 2019, the 2019 Suspension Agreement, and the subsequent final determination Commerce made on October 25, 2019. *Id.* ¶ 76.

II. LEGAL STANDARDS

Article III of the Constitution limits federal courts to hearing actual, ongoing controversies. *Davis v. FEC*, 554 U.S. 724, 732 (2008). An actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Id.* at 732–33; *see DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (noting that the Court is "presumed to be without jurisdiction unless the contrary appears affirmatively from the record" (internal quotation marks and citations omitted)). "Though justiciability has no precise definition or scope, doctrines of standing, mootness, ripeness, and political question are within its ambit." *Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005).

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court takes the facts alleged in the complaint as true and views all reasonable inferences from those facts in the non-moving

[8] Plaintiffs assert that "[t]he complaint in Court No. 19–203 was timely filed on November 22, 2019, meeting the requirements of . . . 19 U.S.C. § 1516a(a)(2)(A)(i)(I), and invoking jurisdiction primarily under 28 U.S.C. § 1581(c). The complaint in Court No. 19–206, which is essentially the same, was timely filed on November 26, 2019, meeting the notice requirements of . . . 19 U.S.C. § 1516a(a)(5)(A), (g)(3)(B), which apply to NAFTA cases, and invoking jurisdiction primarily under 28 U.S.C. 1581(c)." Pls. Opp'n at 13. Plaintiffs are incorrect. The Summonses in Court Nos. 19–00203 and 19–00206 were filed on November 22 and 26, 2019, respectively. The Complaints were both filed later on December 20, 2019.

[9] Count Two stands out in particular because Plaintiffs represented to this court in *CAADES I* that Commerce was allowed to withdraw under the terms of the 2013 Suspension Agreement. *CAADES I*, 389 F. Supp. 3d at 1396 & n.1.

party's favor. *Ashcroft v. Iqbal*, 556 U.S. 672, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1147 (Fed. Cir. 2014). Although courts generally consider the allegations contained in the complaint, the court may also consider documents "incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *A & D Auto Sales, Inc.*, 748 F.3d at 1147 (internal quotation marks and citation omitted). To survive a motion to dismiss, the "complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

Defendant contends that the court is precluded from adjudicating Plaintiffs' claims, arguing that Plaintiffs cannot show a live case or controversy as to the claims challenging Commerce's withdrawal from the 2013 Suspension Agreement, resumption of the investigation, and finalization of the 2019 Suspension Agreement. Def. Br. at 15–18; Def. Reply at 8. Further, Defendant also argues that Plaintiffs need not wait for a judicial declaration that the 2019 Suspension Agreement is "unlawful, null, and void" because Plaintiffs can simply withdraw from the current agreement. Def. Reply at 8. For the same reason, Defendant contends that there is no live case or controversy in challenging the final determination because Plaintiffs currently pay no antidumping duties while the 2019 Suspension Agreement remains in effect—an agreement that Plaintiffs can withdraw from at any time. Def. Br. at 21. Defendant and Defendant-Intervenor point out that Plaintiffs can challenge the final determination if and when the 2019 Suspension Agreement ends and the antidumping duty order is issued. *Id.*; Def-Intervenor Resp. at 5. Defendant asserts "that this litigation is an attempt to obtain the benefits of a suspension agreement while simultaneously challenging its legality." Def. Reply at 8.

Plaintiffs counter that the controversy remains live—even though they signed the 2019 Suspension Agreement—because whether the court can invalidate the current 2019 Suspension Agreement and reinstate the 2013 Suspension Agreement is a merits question that goes to the court's power to grant relief, not jurisdiction. Pls. Opp'n at 17–18. Plaintiffs argue that the court has the power to invalidate the

current agreement and resurrect the 2013 Suspension Agreement because a court decision finding the final determination unlawful would infect the 2019 Suspension Agreement. *Id.* at 18. Plaintiffs next assert that even if the court cannot disturb the 2019 Suspension Agreement and reinstate the 2013 Suspension Agreement, the controversy remains live with Plaintiffs challenging the final determination. *Id.* at 18–20.

Plaintiffs plead jurisdiction under Section 1581(c) and, in the alternative, Section 1581(i)(4). Compl. ¶¶ 4–5. Section 1581(c) grants the Court exclusive jurisdiction over any civil action commenced under 19 U.S.C. § 1516a, which includes challenges to Commerce's final determination made in an antidumping duty proceeding. 19 U.S.C. § 1516a. Section 1581(i) is a "residual" grant of jurisdiction over all civil actions against the United States arising out of, *inter alia*, the "administration and enforcement" of the customs laws. 28 U.S.C. § 1581(i)(4). A party cannot invoke Section 1581(i) jurisdiction "when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (citations omitted). Section 1581(i) does "not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 [19 U.S.C. § 1516a]."[10]

A. The Mootness Doctrine

There is no "case or controversy" under Article III, and a suit becomes moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). The mootness doctrine applies when "events have so transpired that the [court's] decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (citation omitted).

[10] The legislative history of Section 1581(i) shows "that any determination specified in section 516A of the Tariff Act of 1930, [as amended,] or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A." *M S Int'l, Inc. v. United States*, 44 CIT ___, ___, 425 F. Supp. 3d 1332, 1336 (2020) (quoting H.R. Rep. No. 96–1235, at 48 (1980), reprinted in 1980 U.S.C.C.A.N. 3729, 3759–60).

B. Overcoming the Mootness Bar

An action can avoid dismissal on mootness grounds if the claims asserted in the complaint are "capable of repetition, yet evading review." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998); *Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995) (citations omitted). "[T]he capable-of-repetition doctrine applies only in exceptional situations," where a plaintiff can show that "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer*, 523 U.S. at 17 (internal quotation marks and citations omitted); *see Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010) ("The initial heavy burden of establishing mootness lies with the party asserting a case is moot," yet "the opposing party bears the burden of showing an exception applies[.]"). Supreme Court precedent recognizes "inherently transitory" claims are capable of evading review. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980); *e.g.*, *Davis*, 554 U.S. at 735 (election law challenge); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 542 (1976) (imposing prior restraints on speech); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (pretrial detention conditions).

C. The Mexican Growers' Claims are Moot

Plaintiffs' Complaint challenges Commerce's termination of the 2013 Suspension Agreement, resumption of the antidumping duty investigation, entry into the 2019 Suspension Agreement, and final determination. Plaintiffs ask the court to resurrect and reinstate the 2013 Suspension Agreement and declare "unlawful, null, and void" the resumed antidumping duty investigation conducted by Commerce from May 7, 2019 until September 19, 2019, the 2019 Suspension Agreement, and the subsequent final determination by Commerce. Here, the event of Plaintiffs signing the 2019 Suspension Agreement superseded the 2013 Suspension Agreement. The court concludes that each of the claims alleged in Plaintiffs' Complaint, as well as the requested relief from the court, became moot upon Plaintiffs' voluntary signing of the 2019 Suspension Agreement.

Plaintiffs' requests for relief in Counts One, Two, and Three that the court (1) order the reinstatement of the 2013 Suspension Agreement and (2) declare as "unlawful and null and void" Commerce's termination of the 2013 Suspension Agreement and continuation of the investigation Commerce conducted from May 7, 2019 until September 19, 2019 ignores a determinative fact that Commerce and Plaintiffs signed the 2019 Suspension Agreement, a new agreement which

superseded the 2013 Suspension Agreement. Compl. ¶¶ 54–55, 57–58, 60–62. Plaintiffs' decision to enter into the 2019 Suspension Agreement undercuts their assertion that Commerce unlawfully terminated the 2013 Suspension Agreement. *Id.* ¶¶ 53–55, 56–58, 60, 76. Thus, Plaintiffs cannot ask this court to breathe new life into and reinstate the 2013 Suspension Agreement when Plaintiffs voluntarily signed the 2019 Suspension Agreement, a new agreement which superseded the prior 2013 Suspension Agreement. *See 2019 Suspension Agreement*, 84 Fed. Reg. at 49,989–99; *see also Pub. Utils. Comm'n v. FERC*, 236 F.3d 708, 714 (D.C. Cir. 2001) ("Ordinarily, it would seem readily apparent that a challenge to an expired contract is moot, because the court could provide no relief to the allegedly aggrieved parties."). Although a suspension agreement may differ from an expired contract, it is similarly readily apparent to this court that the finalizing of the 2019 Suspension Agreement terminated and superseded the 2013 Suspension Agreement. Put differently, Plaintiffs cannot have it both ways: they cannot sign the new agreement and receive its benefits and protections, while at the same time seek legal remedies calling for the reinstatement of an expired agreement that was superseded by Plaintiffs' own actions of entering into the new agreement.

The pleading deficiency in Counts One, Two, and Three contesting Commerce's withdrawal from the 2013 Suspension Agreement and continuation of the antidumping duty investigation also infects Plaintiffs' claim in Counts Four and Five challenging the 2019 Suspension Agreement and final determination as "unlawful and null and void." Compl. ¶¶ 64, 69. As in Counts One through Three, Plaintiffs' request that the court "reinstate the 2013 Suspension Agreement," *id.* ¶¶ 65, 69, ignores the unmistakable fact that Plaintiffs and Commerce are signatories to the new 2019 Suspension Agreement, a new agreement which "render[ed] nugatory" the 2013 Suspension Agreement. *See Am. Spring Wire Corp. v. United States*, 6 CIT 122, 123 (1983) (finding an importer's challenge to various aspects of a suspension agreement entered into among Commerce, the International Trade Administration ("ITA"), and the Government of Brazil moot when, after the action was filed, the ITA issued a final negative injury determination on subject merchandise from Brazil that rendered the suspension agreement "null and void *ipso facto*"); Compl., Ex. 1, ECF No. 14–1 (listing in the 2019 Suspension Agreement the signatories belonging to the Mexican Growers: AMHPAC, APHYM, CAADES, CABC, and SPT). It strains credulity for Plaintiffs to bring a challenge to the 2019 Suspension Agreement and continued investigation when Plaintiffs voluntarily signed the 2019 Suspension Agreement and, as sig-

natories to the new agreement, currently pay no antidumping duties because the final determination has no effect while the new agreement remains operative. *See, e.g.*, *Usinas Siderúrgicas De Minas Gerais S/A v. United States*, 26 CIT 422, 431 (2002) (noting that a final determination that is issued when Commerce continues an investigation after entering into a suspension agreement constitutes "a challenge which is not yet (and may never be) ripe[]") ("*Usinas*"). Consequently, as alleged in Counts Six and Seven, the court is precluded from reviewing whether certain aspects of the final determination (margin calculation and individual rate determination) were "wrong" and "unlawful," Compl. ¶¶ 71, 75, because the dumping margins and individual rate determinations have no effect so long as the 2019 Suspension Agreement is in place. *See Am. Spring Wire Corp.*, 6 CIT at 124 (noting that "[s]uspension agreements . . . will generally be of long duration[]"). The court concludes, therefore, that the claims brought by Plaintiffs and the relief sought from the court, are moot.

Plaintiffs' current remedy may be to withdraw from the 2019 Suspension Agreement, and, in that event, the antidumping duties would take effect. In that case, the antidumping duty investigation would resume, but there is no logical scenario in which the superseded 2013 Suspension Agreement would be reinstated. So long as Plaintiffs remain signatories to the 2019 Suspension Agreement, the dumping margins will have no effect. Thus, any challenge to the final determination is not ripe. *See Usinas*, 26 CIT at 431; *Am. Spring Wire Corp.*, 6 CIT at 123.[11]

Further supporting the court's conclusion that the claims are moot is the absence of precedent showing instances when the Court has reinstated a prior suspension agreement that was either (1) superseded by a new agreement or (2) entered into after Commerce or the ITC made a final determination.[12] The controversy is no longer live, as Plaintiffs signed the 2019 Suspension Agreement, and the court can no longer grant Plaintiffs "any effectual relief," *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019), in

[11] The court in *Usinas* rejected claims of possible piecemeal litigation and explained that the statute governing suspension agreements, 19 U.S.C. § 1516a(a)(2)(B)(iv), provides that "[a] continued final affirmative determination has no practical effect unless and until the related suspension agreement is dissolved." 26 CIT at 431.

[12] This case differs from this Court's decisions in *CSC Sugar LLC v. United States*, 43 CIT ___, 413 F. Supp. 3d 1318 (2019), and *CSC Sugar LLC v. United States*, 43 CIT ___, 413 F. Supp. 3d 1310 (2019). In the *CSC Sugar LLC* cases, the Court vacated amendments to extant suspension agreements, but did not restore the suspension agreement that was terminated and then superseded by a new agreement, when finding that Commerce's failure to follow statutory procedural recordkeeping requirements was beyond harmless and substantially prejudiced the plaintiff. 413 F. Supp. 3d at 1326; 413 F. Supp. 3d at 1318.

the form of reinstating the superseded 2013 Suspension Agreement or reviewing a challenge to a final determination that has no current effect. Therefore, the court dismisses Plaintiffs' claims as moot.

This case is not an "exceptional situation" in which Plaintiffs' claims meet an exception to mootness where the alleged wrongs are "capable of repetition, yet evading review." *See Spencer*, 523 U.S. at 17; *see Am. Spring Wire Corp.*, 6 CIT at 124 (rejecting the plaintiffs' arguments that the wrongs capable of repetition yet evading review exception applied to a case concerning a suspension agreement). Repetition of the complained-of conduct is unlikely to recur because Plaintiffs signed the 2019 Suspension Agreement and, as signatories to the agreement, there is no reasonable expectation that the same controversy will recur involving the same complaining party. *Am. Spring Wire Corp.*, 6 CIT at 124–25; *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005) ("The essential point is that the case before us is highly dependent upon a series of facts unlikely to be duplicated in the future. . . . [A] legal controversy so sharply focused on a unique factual context . . . rarely present[s] a reasonable expectation that the same complaining party [will] be subjected to the same actions again."). Given that the 2019 Suspension Agreement bars Commerce from applying antidumping duties, that any signatory can withdraw from the current agreement without penalty, and that the final determination only takes effect if a signatory withdraws from the current agreement, the possibility that Plaintiffs again will be subjected to the same action is purely speculative and does not rise to a level of "reasonable likelihood" here. *See Spencer*, 523 U.S. at 3; *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *2019 Suspension Agreement*, 84 Fed. Reg. at 49,994 ("An individual Signatory, or Signatories, collectively, or Commerce may withdraw from this Agreement upon 90 days' written notice to Commerce or the Signatories, respectively.").

In sum, the court does not find the exception to the mootness doctrine satisfied when Plaintiffs continue to reap the benefits of signing the 2019 Suspension Agreement while simultaneously challenging the legality of that agreement.[13] Plaintiffs pursued a problematic litigation strategy by signing the "unlawful" 2019 Suspension Agreement to avoid paying the antidumping duties that would have been required had Commerce issued the antidumping duty, while maintaining an after-the-fact challenge to the same agreement. Notwithstanding Plaintiffs' strategy in simultaneously litigating nearly

[13] Plaintiffs are familiar with the withdrawal provision found in prior suspension agreements, as they withdrew from prior suspension agreements in 2002, 2007, and 2013. *See Fresh Tomatoes from Mexico*, 67 Fed. Reg. at 50,858–59; *Fresh Tomatoes from Mexico*, 73 Fed. Reg. at 2887– 88; *Fresh Tomatoes from Mexico*, 78 Fed. Reg. at 14,771.

three identical complaints so as to preserve multiple, speculative paths for appeal, Plaintiffs' own actions in signing the 2019 Suspension Agreement prevent the court from adjudicating the claims for relief.[14]

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendant's motion to dismiss is granted and Plaintiffs' Complaint is dismissed with prejudice. Judgment will enter accordingly.

Dated: July 7, 2020
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

[14] Because Plaintiffs' claims are moot, the court need not discuss whether Plaintiffs' challenge of the 2019 Suspension Agreement and Commerce's final determination under 28 U.S.C. § 1581(c) is time-barred or whether equitable tolling applies.

Slip Op. 20–94

THE NAVIGATOR COMPANY, S.A., Plaintiff, PACKAGING CORPORATION OF AMERICA, et al., Consolidated Plaintiffs, and DOMTAR CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and PACKAGING CORPORATION OF AMERICA, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00192

[Sustaining the U.S. Department of Commerce's final results of redetermination in the first administrative review of the antidumping duty order on certain uncoated paper from Portugal.]

Dated: July 7, 2020

Jonathan M. Zielinski, *Thomas M. Beline*, and *James E. Ransdell*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Plaintiff/Defendant-Intervenor The Navigator Company, S.A.

Geert De Prest and *William A. Fennell,* Schagrin Associates, of Washington, DC, for Plaintiff/Defendant-Intervenor Packaging Corporation of America, et al.

Stephen J. Orava and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for Plaintiff-Intervenor Domtar Corporation.

Michael D. Snyder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon court-ordered remand. *See* Final Results of Remand Redetermination, ECF No. 97 ("Remand Results"). Commerce issued its Remand Results in response to the court's disposition of separate challenges to the final results and amended final results of the first administrative review of the antidumping duty order on certain uncoated paper from Portugal.[1] *See The Navigator Co., S.A. v. United States*, 43 CIT ___, 415 F. Supp. 3d 1278 (2019);[2] *Certain Uncoated Paper From Portugal*, 83 Fed. Reg. 39,982 (Dep't Commerce Aug. 13, 2018) (final results of

[1] The administrative record associated with the remand results is contained in a Public Remand Record ("PRR"), ECF No. 98–1, and a Confidential Remand Record ("CRR"), ECF No. 98–2. Parties submitted public and confidential joint appendices containing record documents cited in their remand comments. *See* Public J.A. (Remand) ("RPJA"), ECF No. 107; Confidential J.A. (Remand) ("RCJA"), ECF No. 106. The court references the confidential version of the relevant record documents, unless otherwise specified.

[2] *Navigator* presents additional background on this case, familiarity with which is presumed.

antidumping duty admin. review; 2015–2017) ("*Final Results*"), ECF No. 33–2, and accompanying Issues and Decision Mem., A-471–807 (Aug. 6, 2018) ("I&D Mem."), ECF No. 33–3; *Certain Uncoated Paper From Portugal*, 83 Fed. Reg. 52,810 (Dep't Commerce Oct. 18, 2018) ([am.] final results of antidumping duty admin. review; 2015–2017) ("*Amended Final Results*"), ECF No. 33–1, and accompanying Confidential Ministerial Error Mem. (Oct. 9, 2018), ECF No. 65–1.

Consolidated Plaintiffs and Plaintiff-Intervenor (collectively, "Petitioners")[3] challenged Commerce's *Amended Final Results* as making a substantive change to the *Final Results* rather than correcting a purely ministerial error. Confidential Mem. of Law in Supp. of Rule 56.2 Mot. of Consol. Pls. Packaging Corp. of America and USW and Pl.-Int. Domtar Corp. for J. on the Agency R., ECF No. 48. Plaintiff, The Navigator Company, S.A. ("Navigator"), asserted a contingent challenge to the *Final Results*, arguing that Commerce erred in using the facts otherwise available, with or without an adverse inference. The Navigator Co.'s Mot. for J. on the Agency R. ("Navigator's 56.2 Mot."), ECF No. 50.[4]

With respect to Petitioners' challenge to the *Amended Final Results*, the court held that Commerce made an impermissible substantive modification when it amended the *Final Results* and did not, as the agency asserted, correct an inadvertent clerical error. *Navigator*, 415 F. Supp. 3d at 1286–88. With respect to Navigator's challenge to the *Final Results*, the court held that Commerce permissibly used the facts otherwise available, but the agency's decision to use an adverse inference in selecting from among the facts otherwise available (referred to as "adverse facts available" or "AFA") was unsupported by substantial evidence. *Id.* at 1290–92.

In the administrative proceeding underlying the *Final Results*, Commerce rejected Navigator's *allocated* U.S. brokerage and handling expenses (reported in the field USBROK2U) as anomalous while accepting Navigator's *actual* expenses (reported in the field USBROKU). I&D Mem. at 6–8. Commerce further found that an adverse inference was merited because Navigator failed to demonstrate "that its allocation methodology . . . [did] not cause inaccuracies or distortions." I&D Mem. at 8. Commerce selected the highest reported allocated U.S. brokerage and handling expense as partial AFA for Navigator's allocated expenses, which resulted in a weighted-

[3] Petitioners consist of Packaging Corporation of America; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC; and Domtar Corporation.

[4] Navigator stated that it "would waive its right to pursue its challenge" if Petitioners did not prevail in their challenge to the *Amended Final Results*. Navigator's Mot. at 3.

average dumping margin of 37.34 percent. *Id.* ; *see also Final Results*, 83 Fed. Reg. at 39,983.

Upon review, the court held that "Commerce's stated basis for making an adverse inference was the very same basis that justified Commerce's use of the facts available—that Navigator failed to establish that its allocation was non-distortive." *Navigator*, 415 F. Supp. 3d at 1292. Thus, the court remanded the determination for Commerce to "either select a neutral value to use as facts available or provide an explanation addressing how Navigator failed to act to the best of its ability that is distinct from Commerce's basis for using facts available." *Id*.

On January 24, 2020, Commerce issued the draft results of redetermination to interested parties. Draft Results of Remand Redetermination (Jan. 24, 2020) ("Draft Results"), PRR 107, RPJA Tab 1. Therein, Commerce explained that it "selected a neutral facts available value for allocated brokerage expenses by calculating the weighted-average of all positive USBROK2U values reported for the [period of review ("POR")]." *Id.* at 2; *see also id.* at 4 (explaining that Commerce adjusted the reported USBROK2U expenses by removing all zero and negative values). Petitioners submitted comments on the Draft Results in which they argued, *inter alia*, that Commerce should continue to apply an adverse inference instead of applying neutral facts available. Pet'rs' Cmts. on the Draft Results of Redetermination Pursuant to Court Remand (Jan. 30, 2020) ("Pet'rs' Draft Cmts.") at 1–7, CRR 5, PRR 3, CRJA Tab 3.

On February 19, 2020, Commerce issued its Remand Results and submitted them to the court. The Remand Results remained substantively the same as the Draft Results. *See* Remand Results at 5. Commerce's use of neutral facts available resulted in an amended weighted-average dumping margin of 1.63 percent for Navigator. *Id.*

Petitioners oppose the Remand Results. Confidential Remand Cmts. of [Consol. Pls.] and Pl.-Int. Domtar Corp. ("Pet'rs' Opp'n Cmts."), ECF No. 100. Petitioners argue that Commerce's uniform substitution of the purportedly neutral allocated brokerage expense value, including its use for transactions for which the original value was higher than the neutral value, introduced distortions and was effectively non-neutral because it reduced Navigator's allocated brokerage expenses and, thus, Navigator's dumping margin. *Id.* at 3–4. For this reason, Petitioners argue that Commerce's Remand Results lack a "rational connection between the facts of record and the agency's characterization" of its determination as applying neutral facts

available. *Id.* at 4 (citing *Motor Vehicle Mfrs. Assn. of United States Inc. v. State Farm Mut. Automobile Ins. Co*. 463 U.S. 29, 51–52 (1983)).

Defendant, United States ("the Government"), and Navigator support Commerce's Remand Results. Def.'s Resp. to Cmts. Regarding the Remand Redetermination ("Def.'s Reply Cmts."), ECF No. 102; The Navigator Co.'s Responsive Cmts. in Supp. of the Agency's Remand Determination ("Navigator's Reply Cmts."), ECF No. 103. The Government argues that Petitioners have failed to administratively exhaust their argument, which otherwise fails on its merits. Def.'s Reply Cmts. at 4–10. Navigator argues that Commerce's selection and application of neutral facts available is reasonable and supported by substantial evidence, whereas Petitioners' proposed methodology is inherently adverse. Navigator's Reply Cmts. at 2–6.

For the reasons discussed below, the court sustains Commerce's Remand Results.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[5] and 28 U.S.C § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (citation and internal quotation marks omitted).

DISCUSSION

Petitioners oppose Commerce's uniform application of its neutral facts available value for the allocated U.S. brokerage and handling expenses. Pet'rs' Opp'n Cmts. at 3–4. The court first addresses whether Petitioners adequately exhausted this argument before the agency and then turns briefly to the merits.

I. Exhaustion of Administrative Remedies

A. Legal Framework

"[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. §

[5] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition.

2637(d). While exhaustion is not jurisdictional, *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1363–64 (Fed. Cir. 2019), the statute "indicates a congressional intent that, absent a *strong* contrary reason, the [CIT] should insist that parties exhaust their remedies before the pertinent administrative agencies," *id.* at 1362 (quoting *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017)) (alteration original) (emphasis added). Failure to present an argument on remand generally precludes parties from raising that argument before the court. *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008). There are exceptions to the exhaustion requirement, such as when "the party had no opportunity to raise the issue before the agency." *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014) (citation omitted).[6]

B. Petitioners Failed to Exhaust their Administrative Remedies

During the remand proceeding, Petitioners argued that Commerce should continue to apply an adverse inference as it had done for the *Final Results* or select a different adverse value from the non-aberrational values reported in USBROK2U. Pet'rs' Draft Cmts. at 6–7. Before the court, however, Petitioners have abandoned that argument and instead challenge Commerce's methodology for applying neutral facts available. Pet'rs' Opp'n Cmts. at 2. Specifically, Petitioners argue that Commerce should only apply the neutral facts available value to those transactions for which the reported expense is less than the selected neutral facts available value. *Id.* at 4–5. Petitioners' methodology would raise Navigator's dumping margin from that calculated in the Remand Results. *See id.* at 5. Petitioners had the opportunity to present this argument to Commerce and failed to do so. Accordingly, Petitioners failed to exhaust their administrative remedies. *See, e.g.*, *Boomerang*, 856 F.3d at 913 (foreclosing consideration of an argument when the proponent had the information, opportunity, and incentive to present it to the agency).

Petitioners argue that their failure to suggest any alternative neutral facts available methodology or value to Commerce should be excused because, in the Draft Results, Commerce abandoned its reliance on adverse facts available and, thus, Petitioners' comments on the Draft Results pressed "Commerce to return to its previous posi-

[6] There are other exceptions to the exhaustion requirement, including futility, an intervening court decision, pure questions of law, or when plaintiff had no reason to believe the agency would not follow established precedent. *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (collecting cases). Those exceptions are not relevant here.

tion." Pet'rs' Opp'n Cmts. at 5. Petitioners' "excuse" does not relieve their failure to raise the instant challenge before Commerce in the alternative.

Petitioners also argue that they "did propose actual selections, with the specific goal of avoiding reducing reported costs, i.e., the same concern that remains now." *Id*. However, the only alternative selection that Petitioners proposed was "the highest value reported in USBROK2U" (and an alternative in case the highest value was considered aberrational), which they encouraged Commerce to use "as appropriate adverse facts available, as was done in the original *Final Results*." Pet'rs' Draft Cmts. at 7. That the "same concern" motivated Petitioners' proposed AFA value in its comments on the Draft Results and now motivates Petitioners' current challenge to Commerce's methodology, Pet'rs' Opp'n Cmts. at 5, is irrelevant. "Arguments must be presented *in toto* for this entire judicial review process to work sensibly." *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 41 CIT ___, ___, 277 F. Supp. 3d 1346, 1353 (2017) (exhaustion is required when the plaintiff failed to fully apprise Commerce of its arguments).

Accordingly, Petitioners failed to exhaust their argument before Commerce and no exception applies to excuse that failure.

II. Petitioners' Argument Also Fails on its Merits

Even if an exception applied to excuse Petitioners' failure to exhaust their administrative remedies, Petitioners' argument that the weighted-average value should be applied only to transactions for which Navigator reported expenses that were less than the weighted-average value would, nevertheless, fail on its merits. *See* Pet'rs' Opp'n Cmts. at 4. As discussed below, Commerce has provided a rational explanation for its uniform substitution of its neutral facts available value to all transactions for allocated U.S. brokerage and handling expenses; thus, Petitioners' argument lacks merit.

First, unless all the values are identical, the calculation of a weighted-average value based on thousands of transactions typically will result in a value that is higher or lower than each of the transaction-specific values. Def.'s Reply Cmts. at 5. Thus, substitution of the weighted-average value uniformly means that certain transactions are adjusted upwards while others are adjusted downwards. *See id.* at 6. As Commerce explained, that certain reported values were higher than the weighted-average value "does not negate the neutral nature of Commerce's facts available value." Remand Results at 13.

Second, correcting Petitioners' perceived deficiency by applying the neutral value only to transactions with lower reported expenses would *increase* those expenses and increase the dumping margin. *See* Pet'rs' Opp'n Cmts. at 5; Def.'s Reply Cmts. at 6. The court need not determine whether such an alternative methodology would best be considered "neutral" facts available or "adverse" facts available because such an alternative was neither presented to nor selected by Commerce. Commerce has broad discretion when selecting from among the facts otherwise available. *See, e.g.*, *Acciai Speciali Terni S.P.A. v. United States*, 25 CIT 245, 264, 142 F. Supp. 2d 969, 989 (2001) ("[T]he ultimate choice of facts available is a matter largely reserved to Commerce's discretion.") (citation omitted). Commerce addressed any distortion that arose from the reporting of zero or negative expenses by substituting a positive value for all such transactions. *See* Pet'rs' Opp'n Cmts. at 3. Petitioners fail to persuade the court that Commerce's only reasonable invocation of facts available was to limit its application to transactions for which the reported U.S. allocated brokerage and handling expense was lower than the selected facts available value.

In sum, Commerce supplied a reasoned explanation to support its use of neutral facts available, and its uniform application of a neutral weighted-average value is supported by substantial evidence and in accordance with the law.

CONCLUSION

In accordance with the foregoing, Commerce's Remand Results will be sustained. Judgment will enter accordingly.

Dated: July 7, 2020
New York, New York

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