Slip Op. 20–49

UNITED STATES, Plaintiff, v. MAVERICK MARKETING, LLC et al., Defendants and Consolidated Defendants.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00174

[Granting Defendants' motion to supplement and denying Defendants' motion to reconsider.]

Dated: April 16, 2020

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OPINION AND ORDER

Kelly, Judge:

Before the court are Defendants Good Times USA, LLC ("Good Times"), Maverick Marketing, LLC ("Maverick"), and Gateway Import Management, Inc.'s ("Gateway") (collectively, "Defendants") motions for partial reconsideration ("motion to reconsider") of the court's order, denying in part and granting in part Defendants' motions to compel discovery ("order"), as well as for leave to file supplemental evidence for the motion to reconsider ("motion to supplement"). *See United States v. Maverick Marketing, LLC*, 44 CIT __, Slip. Op. 20–17 (Feb. 7, 2020) ("*Maverick I*"); *see also* Am. Mot. Partial Reconsideration of [Order] at 1–2, Apr. 14, 2020, ECF No. 102 ("Defs.' Br. Supporting Reconsideration"); Am. Mot. File Supp. Defs.' Mot. Reconsider, Apr. 14, 2020, ECF No. 103 ("Defs.' Mot. Supp.").[1] Specifically,

[1] On February 18, 2020, Defendants filed a motion to reconsider and, subsequently, on March 16, 2020, Defendants also filed a motion to supplement. However, in light of an error in the named counsel for Defendants, Defendants refiled corrected motions on April 14, 2020 at the request of the court, which the court accepted for filing the following day. *See* Order, Apr. 15, 2020, ECF No. 104. The refiled motions are identical to the originals, except Mr. Boren indicates in the refiled motions that here presents Maverick and Gateway, rather than "all Defendants."

Defendants request, pursuant to U.S. Court of International Trade Rule ("USCIT") Rule 54(b), that the court reconsider its decision to deny: Maverick's requests for production ("RFP") Nos. 9, 25, 38, and 39 for industry documents pertaining to cigar pricing; Maverick's RFP Nos. 30–33 for production related to trademarks of nonparty companies; and, Good Times' RFP Nos. 4–8, 15, and 17–21 for government documents on affiliated nonparties.[2] *See* Defs.' Br. Supporting Reconsideration at 3–5; *see also* Maverick Status Report at RFP Nos. 9, 25, 30–33, 38, 39; Good Times Status Report at RFP Nos. 4, 8, 15, 17–21.[3] Defendants further ask the court to amend its order and compel Plaintiff to produce the documents requested. *Id.* at 14–15. In addition, Defendants request leave to file supplemental evidence in support of that motion. *See* Defs.' Mot. Supp. at 1–2. Plaintiff opposes both motions. *See* Pl.'s Opp'n [Defs.' Br.] at 1, March 9, 2020, ECF No. 95 ("Pl.'s Br. Opp'n Reconsideration"); *see also* Pl.'s Opp'n Defs.' Mot. for Leave Supp. Mot. Reconsideration, Mar. 31, 2020, ECF No. 99 ("Pl.'s Opp'n Mot. Supp."). For the reasons that follow, the court grants Defendants' motion to supplement and denies Defendants' motion for partial reconsideration.

BACKGROUND

The court presumes familiarity with the facts of this case as set forth in its previous opinion, *see Maverick I*, Slip Op. 20–17 at 3–5, 44 CIT at __, and recounts those relevant to disposition of these motions. Plaintiff commenced separate actions, later consolidated, pursuant to section 592 of the Tariff Act of 1930, as amended 19 U.S.C. § 1592(d) (2012),[4] seeking to recover unpaid Federal Excise Taxes ("FET") from Defendants. *See* Am. Summons, Aug. 3, 2017, ECF No. 8; Compl., July 10, 2017, ECF No. 2; Order, Sept. 12, 2019, ECF No. 66 (consolidating Ct. Nos. 17–00174, 17–00232, 19–00004, and 19–00019 under Ct. No. 17–00174). Plaintiff alleges that Defendants failed to disclose a "special arrangement." *See* Compl. at ¶ 21. Additionally, according to Plaintiff, Defendants made material misstatements to Customs and Border Protection ("CBP") regarding FET owed, by

[2] Defendants' motion for partial reconsideration concerns Maverick's and Good Times' RFPs. *See* Defs.' Br. Supporting Reconsideration at 3 n.2 (noting that Gateway's RFP Nos. 10, 26, 39 and 40 are the same as Maverick's RFP Nos. 9, 25, 38, and 39).

[3] This opinion refers to the Defendants' RFPs and Plaintiff's responses to the RFPs as itemized and excerpted in Defendants' status reports. *See* Discovery Status Report of Def. [Good Times] in the Maverick and Gateway Cases, Feb. 3, 2020, ECF No. 891 ("Good Times Status Report"); Discovery Status Report of Def. [Maverick], Feb. 3,2020, ECF No. 89–2 ("Maverick Status Report"); *see also* Amend. Status Report of Def. [Gateway], Feb. 4, 2020, ECF No. 90.

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

using "transaction value" on entry forms, when the statute demands application of constructive sales price ("CSP") to merchandise entered pursuant to a special arrangement. *Id.* at ¶¶ 21–25. Plaintiff alleges these false statements were the result of Defendants' failure to exercise reasonable care. *See id.*

Defendants deny these allegations, *see* Defs.' [Maverick] & [Good Times'] Answers and Affirmative Defenses at ¶¶ 21–25, Mar. 29, 2018, ECF No. 48 ("Answer"), and raise among their affirmative defenses that they acted with reasonable care and were not negligent, "because they received and reasonably relied on professional advice from their customs house broker and an experienced trade attorney" and fully complied with applicable statutes and regulations. *See id.* at Third Affirm. Defense. Defendants further contend they were not negligent because "Plaintiff had an established and uniform practice" ("EUP") of allowing the same behavior complained of in this case. *See id.* at Fifth Affirm. Defense.

On April 4, 2019, Defendants Maverick and Good Times served RFPs on Plaintiff. *See* [Maverick and Good Times'] Mot. Order Compelling Disc. & Consideration Sanctions at Exs. A–B, Sept. 26, 2019, ECF No. 67 ("Maverick's Mot."). On June 7, 2019, Plaintiff responded. *Id.* at Exs. E–F. On June 27, 2019, Defendants notified Plaintiff of their objections to Plaintiff's production responses. *Id.* at Exs. I–J. Plaintiff replied to Defendants' objections on July 10, 2019 and supplemented its responses. *Id.* at Ex. M. Defendants thereafter filed their motion to compel. *See generally* Maverick's Mot.

On February 7, 2020, the court rendered its decision on Defendants' motion to compel. *See generally Maverick I*. In relevant part, the court denied the motion to compel with respect to certain industry documents pertaining to cigar pricing, certain trademark information of nonparty companies, and certain government documents on affiliated nonparties (collectively, "discovery requests"). *Id.* at 6–22. Discovery remains ongoing.

JURISDICTION AND STANDARD OF REVIEW

The court continues to have jurisdiction pursuant to 28 U.S.C. § 1582. *See United States v. Maverick Mktg., LLC*, 42 CIT __, __, 322 F. Supp. 3d 1373, 1379–80 (2018) (holding that the court possesses subject-matter jurisdiction in this case); *see also United States v. Gateway Imp. Mgmt.*, 42 CIT __, 324 F. Supp. 3d 1328 (2018).

A court may reconsider a non-final judgment, pursuant to USCIT Rule 54 "'as justice requires,' meaning when the court determines that 'reconsideration is necessary under the relevant circumstances.'" *Irwin Indus. Tool Co. v. United States*, 41 CIT __, __, 269 F. Supp. 3d

1294, 1300–01 (2017) (quoting *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005)), *aff'd*, 920 F.3d 1356 (Fed. Cir. 2019). Factors a court may weigh when contemplating reconsideration include whether there has been a controlling or significant change in the law or whether the court previously "patently" misunderstood the parties, decided issues beyond those presented, or failed to consider controlling decisions or data. *See, e.g.*, *In re Papst Licensing GmbH & Co. KG Litigation*, 791 F. Supp. 2d 175, 181 (D.D.C. 2011); *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). The movant carries the burden of proving that "some harm, legal or at least tangible," would accompany a denial of the motion. *Cobell*, 355 F. Supp. 2d at 540.

Given that the USCIT Rules do not prescribe a procedure to amend or supplement a motion or brief, USCIT Rule 1 governs, granting the court discretion to "prescribe the procedure to be followed in any manner not inconsistent with these rules." *See* USCIT R. 1. Further, USCIT Rule 1 provides that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination in every action and proceeding." *Id.*

DISCUSSION

Defendants request that the court reconsider and amend its order to compel Plaintiff's response to Defendants' discovery requests. *See* Defs.' Br. Supporting Reconsideration at 1–2, 6–14. Defendants explain this production is relevant for determining whether Defendants' entries were valued at fair market price ("FMP") and whether or not they exercised reasonable care, i.e., were not negligent, in reporting value of their cigars on entry. *See id.* at 3–6, 9–13. Further, Defendants point to Plaintiff's own discovery requests that, in their view, further underscore the relevance of Defendants' requested production and for which they seek leave to file as supplemental evidence. *See* Defs.' Mot. Supp. at 1–2. Without the requested cigar pricing documents, trademark information, and government documents, Defendants contend that they would suffer harm in presenting their case. Defs.' Br. Supporting Reconsideration at 1–2, 9. Plaintiff counters that the motion to reconsider is unwarranted because the court did not err in denying the motion to compel and, therefore, requests the court to deny that motion in full. *See* Pl.'s Br. Opp'n Reconsideration at 1, 3–10. In addition, Plaintiff urges the court to reject Defendants' request for leave to supplement their motion to reconsider, as it is untimely and irrelevant. *See* Pl.'s Opp'n Mot. Supp. at 1, 4–5. The court grants Defendants leave to supplement their

motion to reconsider, given that no harm follows from granting their motion, and accepts their supplemental evidence, Pl.'s Second Set of Interrogatories, Requests for Admission and [RFPs] to [Good Times], Mar. 17, 2020, ECF No. 96–1, for filing. However, and in view of that supplemental evidence, because the discovery sought is irrelevant, duplicative, and unduly burdensome, and Defendants do not persuade that they would be harmed without the requested production, the court denies the motion to reconsider.

I. Motion to supplement

Defendants request leave to supplement the motion to reconsider with Plaintiff's discovery requests, because that supplemental evidence "sheds light on the relevance" of Defendants' own discovery requests at issue in the motion to reconsider. *See* Defs.' Mot. Supp. at 1–2. In particular, Defendants allege that Plaintiff's RFPs seek third-party information that Plaintiff previously characterized as irrelevant and refused to produce, when requested by Defendants. *Id.* Plaintiff counters that Defendants' motion to supplement is untimely, because Defendants could have sought to supplement their motion for reconsideration prior to receiving Plaintiff's reply to that motion, avoiding a second round of briefing. *See* Pl.'s Opp'n Mot. Supp. at 4. Further, Plaintiff contends that the supplemental evidence is irrelevant to the motion to reconsider, because Plaintiff's RFPs concern Good Times' state of mind about its transactions compared to third-parties, relevant to establishing violation of 19 U.S.C. § 1592(a), unlike Defendants' RFPs that ask Plaintiff to produce documents pertaining to the government's other enforcement actions, which is irrelevant to the question of Defendants' alleged negligence. *Id.* at 4–5. Plaintiff, however, raises no argument that allowing Defendants to supplement their motion would be prejudicial and, further, does not persuade that the filing is barred as untimely by virtue of following Plaintiff's response to Defendants' motion to reconsider.[5] *See* Pl.'s Opp'n Mot. Supp. at 4. Therefore, Defendants are granted leave to file supplemental evidence in support of their motion to reconsider and the court accepts that supplemental evidence for filing.[6] To the extent

[5] Defendants filed their original motion to reconsider on February 18, 2020. On February 27, 2020, Plaintiff served its discovery request on Defendants. Thereafter, on March 16, 2020, Defendants filed their original motion for leave to supplement.As explained above, at the request of the court, Defendants refiled both motions on April 14, 2020, to correct an error in named counsel. *See* Order, Apr. 15, 2020, ECF No. 104.

[6] Defendants, in amending the motion to supplement, also refiled the same supplemental evidence included in the original motion to supplement. The court, in granting the motion to supplement, accepts for filing the supplemental evidence, which it deems as filed as of April 14, 2020, the date Defendants re-filed the motion to supplement.

that the parties raise questions as to the relevance of that supplemental evidence, the court considers those arguments with respect to the motion to reconsider.

II. Motion to reconsider

Defendants request the court to reconsider and amend its order to compel Plaintiff's response to Defendants' discovery requests, *see* Defs.' Br. Supporting Reconsideration at 1–2, 6–14, because the production is relevant to determine FMP of cigars as well as to establishing Defendants' exercise of reasonable care, and, without the requested production, they would suffer harm in presenting their case. *See id.* at 3–6, 9–13. Plaintiff counters that, as the court held, the production is irrelevant and urges the court to deny the motion to reconsider. *See* Pl.'s Br. Opp'n Reconsideration at 1, 3–10. For the reasons that follow, Defendants' motion to reconsider is denied.

A. Fair market price

Defendants' view that the government must supply certain industry documents pertaining to cigar pricing to determine FMP is mistaken, because the requested production is not relevant to the Alcohol and Tobacco Tax and Trade Bureau's ("TTB") assessment of Defendants' FET liability, and, to the extent that it has any relevancy, it is duplicative and unduly burdensome.[7] Defendants' motion to compel discovery stems from a misreading of the applicable statute and regulations that govern TTB's FET calculation.

Here, Plaintiff alleges that Defendants erroneously used transaction value as the basis for FET liability, when, given their special arrangement, they should have used CSP as the basis for FET. *See*

[7] Plaintiff argues that Defendants' request is also barred by statute, because the United States cannot release a taxpayer's return or return information, absent application of an exception. *See* Pl.'s Br. Opp'n Reconsideration at 6; *see also* 26 U.S.C. § 6103. Previously, Plaintiff had also argued it could not disclose nonparty taxpayer information that Defendants requested and sought to compel. *See* Pl.'s Opp'n Def.'s Mots. Compel at 6–8, Oct. 11, 2019, ECF No. 69. However, *Maverick I* did not address the parties' arguments regarding the non-discoverability of nonparty taxpayer information under 26 U.S.C. § 6103 and instead denied the motion on relevancy grounds. *See Maverick I*, 44 CIT at __, Slip Op. 20–17 at 6–11. Again, the court does not need to reach this issue but raises it to note that, to the extent, as Defendants assert, they have authorizations from affiliated companies to permit the government to disclose taxpayer information pursuant to 26 U.S.C. § 6103(c), it stands to reason that Defendants can seek at least some of that information directly from those parties. *See* Maverick's Mot. at 8; [Defs.' Gateway Good Times] Mot. Order Compelling Disc. & Consideration Sanctions at 7, Sept. 26, 2019, ECF No. 66 (from associated Dkt. Ct. No. 17–00232). Although Defendants may wish to use data obtained from their affiliates or other companies as proffered industry data, expert testimony, or other information to demonstrate that a lower price applies to Defendants' cigar entries to determine CSP, *see Storm Plastics, Inc.*, 770 F.2d at 154–56, it would be unduly burdensome to require the government to attempt to compile this information for the Defendants.

Compl. at ¶ 22; *see also* Compl., Sept. 6, 2017, ECF No. 2 (from associated Dkt. No. 17–00232). TTB normally calculates FET based on the sales price that a particular importer sells to an unrelated party in arm's length transaction. *See* 26 U.S.C. § 5702(l)(3) ("In determining price [of cigars] . . . rules similar to the rules of section 4216(b) shall apply."); 27 C.F.R. §§ 40.22, 41.39 (2014) (setting out how to determine sale price of large cigars).[8] If, however, a sale is not at arm's length, e.g., made pursuant to a special arrangement, and at less than FMP, TTB determines FET liability on the basis of CSP.[9] 26 U.S.C. § 4216(b)(1)(C); 26 C.F.R. § 48.4216(b)-2(e). CSP is "computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary" of the Internal Revenue Service ("IRS"). 26 U.S.C. § 4216(b)(1)(C).

In light of the difficulties to determine the price at which merchandise, such as cigars, "are sold, in the ordinary course of trade, by manufacturers or producers[,]" the IRS adopted the "95 percent presumption." The "95 percent presumption" is the IRS's longstanding practice to presume, for the basis of excise tax, that CSP equals 95 percent of the taxpayer's lowest established resale price to an unrelated distributor in the ordinary course of trade. A taxpayer may rebut this presumption with industry data, expert testimony, or other information, to overcome the presumption and show a lower price applies. *See Storm Plastics, Inc. v. United States*, 770 F.2d 148, 152—56 (10th Cir. 1985) (discussing the practice, as set out in IRS Revenue Rulings, and noting that witness testimony on the industry rebutted the presumption).[10] Here, Defendants contend that TTB "determined the price used by manufacturers in the ordinary course

[8] The citation is to the Code of Federal Regulations 2014 edition, the most recent version in effect at the time of the last entries of the subject merchandise. The entries at issue in this action were imported between the years 2012 and 2015. *See* Compl. at ¶ 1.

[9] Courts have read 26 U.S.C. § 4216(b)(1)(C) as imposing two interrelated criteria for the application of CSP, namely that the sale is made (1) at otherwise than arm's length and (2) at less than fair market price. *Accord Creme Manufacturing Co., Inc. v. United States*, 492 F.2d 515, 520–22 (5th Cir. 1974); *Storm Plastics, Inc. v. United States*, 770 F.2d 148, 152–54 (10th Cir. 1985). The Fifth Circuit, in *Creme Manufacturing*, explained that the two criteria are directed to ensuring that the price is a "bona fide expression" of price and an accurate representation of its true worth. 492 F.2d at 520. Further, by permitting the IRS to employ CSP, "Congress sought to prevent taxpayers from reducing their excise tax liability by charging artificially low prices to related buyers who then, without excise tax liability, might obtain the market price from independent buyers." *Id.* at 519 (citing H.R. REP. NO. 708, 72nd Cong., 1st Sess. 38 (1932)).

[10] Although revenue rulings lack force of law, they guide IRS officials' practice. *See Storm Plastics, Inc.*, 770 F.2d at 154 (holding a revenue ruling as inconsistent with Congressional intent). Relevant here, revenue ruling 62–68, as modified, sets forth the IRS's 95 percent presumption. *See* Rev. Rul. 62–68, 1962–1 C.B. 216. ("on intercompany sales at less than arm's length and less than the fair market price, a manufacturer of an article . . . may elect

of trade[.]" *See* Defs.' Br. Supporting Reconsideration at 3–4. Defendants wish to survey the prices at which cigars are sold using unrelated taxpayer information in the government's possession. Yet, as the revenue rulings demonstrate, when TTB calculates FET based on CSP, it presumes that CSP equals 95 percent of the taxpayer's lowest established resale price the taxpayer sells to unrelated customers. *See Storm Plastics*, 770 F.2d at 152. Therefore, Defendants' request for certain industry documents pertaining to cigar pricing is not relevant, because TTB does not itself investigate and determine what the industry actually charges for that product but applies the 95 percent presumption. *See id.* at 152–54.[11]

To the extent that the government calculated liability, i.e., underpayment of FET based on calculated CSP of Defendants' cigar imports, *see, e.g.*, Compl. at Attach. 1, July 10, 2017, ECF No. 2–1, the court compelled Plaintiff to produce documents relied upon in that determination of damages and liability, as requested by Maverick's RFP Nos. 4, 15, 26, and 28. Specifically, Plaintiff has already been instructed to produce, "every document, spreadsheet, worksheet, supporting documents, or record used by the government to calculate the FETs claimed to be due in this case" as well as "every document or record used or obtained by the government to investigate, calculate or establish the sales price for which each article imported by Maverick was sold in the ordinary course of trade by manufacturers or producers thereof." *See* Maverick Status Report at RFP Nos. 26, 28. Further, Plaintiff must also produce information supporting its response to Maverick's Interrogatory No. 3, which provides: "For each item the government contends was not sold in an arms-length transaction, please provide the price at which such articles were 'sold, in the ordinary course of trade, by manufacturers or producers thereof', how

to use as a basis for tax, pursuant to section 4216(b)(1)(C), a [CSP] equal to 95 percent of its selling company's lowest established resale price for the article to unrelated wholesale distributors in the ordinary course of trade."); *see also* Rev. Rul. 71–240, 1971–1 C.B. 372 (providing that any intercompany sale price that is less than 95 percent of the selling company's lowest established resale price to unrelated distributors is presumed to be less than FMP). Subsequent revenue rulings elaborated that a taxpayer is entitled to rebut the presumption. *See* Rev. Rul. 76–182, 1976–1 C.B. 343; Rev. Rul. 89–47, 1989–1 C.B. 295 (modifying Rev. Rul. 76–182 to enable a taxpayer to rebut the presumption when the taxpayer does not have sales to unrelated wholesale distributors in the ordinary course of trade and, consistent with *Storm Plastics*, do so "in a variety of ways," be it the use of industry data, expert testimony, or other information).

[11] USCIT Rule 26(b)(1) permits "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the discovery outweighs its likely benefit." USCIT R. 26(b)(1)."Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.

each price was calculated, upon what facts and evidence this price was determined to be the appropriate price, and list each and every manufacturer or producer whose prices were examined to determine this price." *See id.* at RFP No. 15, Interrogatory No. 3; *see also Maverick I*, 44 CIT at __, Slip Op. 20–17 at 22–23. If Plaintiff relied on other information, or other information is necessary for Plaintiff to make its case, and Plaintiff has not produced that information, Plaintiff may be unable to introduce that information at trial. *See* USCIT R. 37(c)(1) ("If a party fails to provide information . . . the party is not allowed to use that information . . . at a trial[.]").

However, the court denied the expansive requests for information related to the calculation of FET on all imports of cigars into the United States.[12] *See Maverick I*, 44 CIT at __, Slip Op. 20–17 at 11 n.12. USCIT Rule 26(b)(2) limits discovery, inter alia, when "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive[.]" USCIT R. 26(b)(2)(C)(i). Defendants acknowledge that, when calculating FET liability on the basis of CSP, the 95 percent presumption applies, unless the taxpayer can come forward with industry data rebutting that presumption. *See* Defs.' Br. Supporting Reconsideration at 8–9. They seem to rely upon their right to rebut that presumption to argue that the information is relevant and aver that it is in the sole possession of Plaintiff. *See id.* at 3, 9. To the extent that industry data not already captured by discovery ordered thus far is relevant, placing the onus on Plaintiff to produce all the requested documents, records, agreements, and correspondence pertaining to all companies' pricing information would be overly burdensome, as Plaintiff has reasonably explained. *See, e.g.*, Maverick Status Report at RFP Nos. 9, 38, 39; *see also* Pl.'s Opp'n Defs.' Mot. Compel at 8, Oct. 11, 2019, ECF No. 69 ("Pl.'s Opp'n Mot. Compel") (explaining that "[t]he effort to retrieve and produce all these records for TTB alone, and not including IRS records, would take 3,800 to 4,800 person-hours at a cost of $153,446.40 to $191,808.00" to respond to Maverick RFP Nos. 38 and 39, alone). To

[12] Maverick seeks: "copies of all documents, records, agreements, and correspondence . . . that pertain[] to the assessment, taxation, or computation of FET for imported cigars since April 1, 2009"; "copies of every document or record which references or refers to advanced pricing arrangements or other agreements, expert reports, audit results and reports, and economic studies that relate or refer in any way to the calculating [sic] of FETs for large cigars"; "copies of any documents and records regarding the sale price of cigars including, but not limited to[,] any report or study regarding cigar pricing"; and, "copies of any correspondence, notes, records, agreements, contracts, documents, rulings, decisions, and audit results including, but not limited to any, Advanced Pricing Agreements or similar agreements, between Customs, TTB, the IRS, or any other government entity and any cigar company or group of companies that relate in whole or in any part to the pricing of cigars." Maverick Status Report at RFP Nos. 9, 25, 38, and 39.

hold otherwise would be tantamount to reversing the government's use of the 95 percent presumption in the first place: the government would be forced to compile and maintain industry data in order to pursue a penalty action for underpayment of FET.

B. Reasonable Care

Likewise, the reasonable care standard fails to justify Defendants' requests. The reasonable care standard, as the court previously explained, "is concerned with the reasonableness of a defendant's actions alone—not whether the actions of similarly situated entities evinces a 'reasonableness' standard that would bear on defendant's actions." *See Maverick I*, 44 CIT at __, Slip Op. 20–17 at 10; *see also United States v. Aegis Sec. Ins. Co.*, 43 CIT __, __, Slip Op. 19–162 at 26 (Dec. 17, 2019) (determining that whether or not one exercises reasonable care does not depend upon the "consensus in the community[,]" but rather on the "application of reason").[13] Defendants, in requesting production of trademark information of nonparty companies and government documents on affiliated nonparties—i.e., Maverick's RFP Nos. 30–33 and Good Times' RFP Nos. 4–8, 15, 17–21[14] —seek to establish that "the requirement to disclose [their arrangement] was not known in the trade," and, as a result, Defendants were not negligent.[15] *See* Defs.' Br. Supporting Reconsideration at 12 ("Something must put [importers] on notice that they might not be in compliance with the law"). Yet, contrary to Defendants' assertion, the statute and regulations compel disclosure of a special relationship.

[13] The H.R. Report on the amendments to 19 U.S.C. § 1592 provides examples of steps an importer should take to meet the "reasonable care" standard, including: "seeking guidance from the Customs Service through the pre-importation or formal ruling program; consulting with a Customs broker, a Customs consultant, or a public accountant or an attorney; using in-house employees such as counsel, [etc.]" H.R. REP. NO. 103–361, pt.1, at 120 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670. Notably, these examples do not include relying on the government's past action or inaction toward the behavior. *Id.*

[14] Maverick RFP Nos. 30–33 seek trademark information of nonparties, such as "documents or records which identif[y] all the trademarks" on cigars manufactured or imported by named nonparties. *See* Maverick Status Report at RFP Nos. 30–33. Similarly, Good Times' RFP Nos. 4–8, 15, and 17–21 request government documents on affiliated nonparties, i.e., "copies of every document, record, or communication" concerning a named nonparty, *see* Good Times' RFP Nos. 4–8, 15, and documents and records, inter alia, related to federal investigations of Good Times and its affiliates. *See* Good Times Status Report at RFP Nos. 17–21.

[15] Specifically, Defendants assert that trademark information of nonparties is relevant to whether there was a requirement to disclose a special arrangement because, "TTB audited [those] companies and did not find that importing cigars with trademarks owned by others was a disqualifying factor," when, in this case, Plaintiff contends that Good Times controlled the importer "because the imported cigars bore [Good Times'] trademarks[.]" Defs.' Br. Supporting Reconsideration at 12.

See 19 U.S.C. §§ 1484(a), 1592(a); 26 C.F.R. § 48.4216(b)–2.[16]

In addition, Defendants mistakenly invoke, and selectively cite to, *Hitachi v. United States* to argue that knowledge in the trade is relevant to their defense against negligence. *See* Defs.' Br. Supporting Reconsideration at 10–13 (citing *Hitachi v. United States*, 21 CIT 373, 964 F. Supp. 344 (1997), *aff'd* in part, *rev'd* in part, 172 F.3d 1319 (Fed. Cir. 1999)). Relevant here, Defendants refer to the Court of Appeals' decision to argue that "if the requirement to disclose was not known in the trade, then the Defendant would not have been negligent under *Hitachi*." *Id.* at 12. However, in that case, the government challenged on appeal the Court of International Trade's decision not to penalize importer's failure to disclose escalation payments under an economic price adjustment clause because it would be contrary to due process. *See Hitachi*, 172 F.3d at 1330. The government argued that the importers had notice that they must disclose escalation payments and the importers' failure to disclose violated the Customs laws. *See id.* 1323–25. Yet, as the Court of Appeals for the Federal Circuit explained, no statute or regulation required the disclosure of the escalation payments. *See id.* at 1330. The Court of Appeals for the Federal Circuit faulted the government in suggesting that, in the absence of such a statute and the presence of a Customs Decision, that such reporting was not required. *Id.* at 1330–31. In such a situation the Court of Appeals tasked the government to point to some knowledge in the trade. *Id.* Unlike the situation in *Hitachi*, the statute, here, clearly proscribes Defendants' conduct. Further, the government is not estopped from enforcing its laws, irrespective of whether, and to what extent, it has enforced the law in the past or its state of mind in deciding whether or not to enforce the law.[17] *See*

[16] Defendants may be trying to assert that they were not on notice that the particular circumstances of their transactions were made under a "special arrangement" that needed to be disclosed. If that is their position, whether the statute and regulations provide notice of the need to disclose a special arrangement does not rely upon the knowledge or actions of other importers. Defendants raise, as a separate affirmative defense, that "26 CFR § 48.4216(b)(2)(e) [sic] is void for ambiguity." *See* Answer at First Affirm. Defense. Section 48.4216(b)-(2)(e) sets out when a sale is "considered to be made under circumstances otherwise than at 'arm's length[,]'" including when "[t]he sale is made pursuant to special arrangements between a manufacturer and a purchaser." 26 C.F.R. § 48.4216(b)(2)-(e)(2).

[17] Although Defendants emphasize they "do not seek to estop Plaintiff from enforcing the law," they argue that estopping enforcement "must be balanced with the requirements of due process in relation to notice." Defs.' Br. Supporting Reconsideration at 13. This argument conflates the due process considerations of notice, whether a party has notice of penalizable conduct, with reasonable care, the conduct required to avoid the penalty of negligence. *See, e.g.*, *Lambert v. California*, 355 U.S. 225, 228 (1957).

In addition, Defendants attempt to distinguish differences in the government's obligations for unliquidated as opposed to liquated entries. *See* Defs.' Br. Supporting Reconsideration at 13–14. They state that "[i]n proceeding against Defendants for liquidated entries as the Plaintiff does here, the bar to estoppel does not bar Defendants from using Plaintiff's past practices as evidence relevant to whether or not Defendants exercised reasonable

Hitachi v. United States, 21 CIT 373, 390–91, 964 F. Supp. 344, 363 (1997) ("Despite the harsh consequences, the federal government is not estopped to enforce laws against citizens who were advised by government that their actions were legal when the government later ascertains that such actions were not in compliance with the law.").[18] The government's treatment or past investigations of nonparties do not relate to whether Defendants, here, violated the law or acted with reasonable care.[19] Therefore, information on trademarks and government documents are not relevant in determining whether Defendants' conduct would be that "expected from [] person[s] in the same circumstances." *See* Defs.' Br. Supporting Reconsideration at 9 n.13, 10 (citing 19 C.F.R. Pt. 171, app. B(D)(6)). Moreover, Plaintiff has reasonably explained that the cost of obtaining the documents requested would be overly burdensome to the government given the limited, if any, relevancy. *See, e.g.*, Maverick Status Report at RFP Nos. 5–8, 15, and 17–21 (Plaintiff objects that the requests are overly burdensome).

Nonetheless, Defendants seek to establish that the discovery sought is relevant by pointing to Plaintiffs' requests for information about third-parties. *See* Defs.' Mot. Supp. at 1–3.[20] This argument is

care or were negligent in relation to Plaintiff's 19 U.S.C. § 1592 claims." *Id.* at 14. However, reference to Plaintiff's alleged past practice is irrelevant, because declining to act does not establish a practice. *See Maverick I*, Slip Op. 20–17 at 9, 44 CIT at __. Moreover, it is not the bar to estoppel that renders the Defendants' request irrelevant; it is the reasonable care standard.

[18] Similarly, Defendants' citation of the lower court's decision for the proposition that Customs' past acquiescence would be evidence tending to show reasonable care in the circumstances is also misplaced. *See* Defs.' Br. Supporting Reconsideration at 12. Read in context, the court explained that "even if there were such a past practice, it would not estop the federal government from enforcing the statute." *Hitachi*, 21 CIT at 390–91, 964 F. Supp. at 363.

[19] For example, Maverick RFP Nos. 30–33 seek trademark information of nonparties, such as "documents or records which identif[y] all the trademarks" on cigars manufactured or imported by named nonparties. *See* Maverick Status Report at RFP Nos. 30–33. Maverick claims this trademark information is relevant because Plaintiff invokes Good Times' ownership of trademarks on the imported cigars to demonstrate Good Times' control, Defs.' Br. Supporting Reconsideration at 11–12, and avers that it believes the government did not pursue other similarly situated parties. *See* Maverick's Mot. at 8. Likewise, Good Times' RFP Nos. 4–8, 15, and 17– 21 request government documents on affiliated nonparties, i.e., "copies of every document, record, or communication" concerning a named nonparty, *see* Good Times' RFP Nos. 4–8, 15, and documents and records, inter alia, related to federal investigations of Good Times and its affiliates. *See* Good Times Status Report at RFP Nos. 17–21. Setting aside the variety of a factors that the government considers in determining whether to pursue an investigation, even if another company might have acted in the same manner as Defendants is not relevant to whether Defendants exercised reasonable care here. *See Maverick I*, 44 CIT at __, Slip Op. 20–17 at 10; *see also Aegis*, 43 CIT at __, Slip Op. 19–162 at 26.

[20] Defendants point to supplemental evidence that comprises Plaintiff's RFPs pertaining to an email regarding other importers' contracts and for documents within Good Times' possession relating to the determination of FET on tobacco products. *See* Defs.' Mot. Supp. at 2–3.

unavailing. As a threshold matter USCIT R. 26(b)(1) permits discovery regarding any nonprivileged matter that is relevant to any party's claim or defense "[u]nless otherwise limited by court order." USCIT R. 26(b)(1). Federal Rule of Evidence 401 provides "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The court may limit the proposed discovery if it is irrelevant. USCIT R. 26(b)(2)(C)(iii). It is for the court to determine what is relevant. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384, 387 (2008) (noting that the question of relevancy is one reserved to the sound discretion of the trial court.). Moreover, it is possible for plaintiffs and defendants to seek discovery for different purposes depending on their claims and defenses. Plaintiff here claims to seek information regarding Good Times' state of mind as allegedly relevant to liability under 19 U.S.C. § 1592. *See* Pl.'s Opp'n Mot. Supp. at 4. However, whether or not the documents Plaintiff has sought are relevant to its claims is not before the court. The issue before the court is whether the documents requested by Defendants are relevant. Defendants fail to persuade that Plaintiff's discovery requests in this case bear on the relevance of their own discovery requests.

CONCLUSION

Defendants have not demonstrated that they would suffer harm if the court declines to reconsider and amend its order. Although Defendants contend they "would be harmed by the[] unavailability" of the requested production to make their case, *see* Defs.' Br. Supporting Reconsideration at 2, Defendants' discovery requests are irrelevant, duplicative, and unduly burdensome. To the extent that the requested information is relevant, Defendants may pursue alternate avenues that alleviate the burden of production otherwise placed on Plaintiff. Further, if Plaintiff relied on any other information in the determination of FET of Defendants' cigar imports, or if it would need to rely upon any other information at trial to make its case, and did not proffer that relevant information, Plaintiff may be unable to introduce that information at trial. *See* USCIT R. 37(c)(1).

For the foregoing reasons, it is

ORDERED that Defendants' motion to supplement is granted; and it is further

ORDERED that Defendants' supplemental evidence, Pl.'s Second Set of Interrogatories, Requests for Admission and [RFPs] to Good Times, Apr. 14, 2020, ECF No. 103–1, is accepted for filing and is deemed filed as of April 14, 2020; and it is further

ORDERED that Defendants' motion for reconsideration is denied.

Dated: April 16, 2020
New York, New York

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

Slip Op. 20–50

SHENZHEN XINBODA INDUSTRIAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 12–00174

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the sixteenth administrative review of the antidumping duty order covering fresh garlic from the People's Republic of China.]

Dated: April 17, 2020

Gregory S. Menegaz, *Alexandra H. Salzman*, and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, DC, for plaintiff Shenzhen Xinboda Industrial Co., Ltd.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Richard P. Schroeder*, Trial Attorney. Of counsel was *Brendan Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey and *John M. Herrmann*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors Fresh Garlic Producers Association, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court is Plaintiff Xinboda Industrial Co. Ltd.'s ("Xinboda") motion for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final results in the sixteenth administrative review of the antidumping duty ("ADD") order covering fresh garlic from the People's Republic of China ("PRC"). *See* [Pl.'s] Mot. J. Agency R., Aug. 30, 2019, ECF No. 45. *See Fresh Garlic from the [PRC]*, 77 Fed. Reg. 34,346 (Dep't Commerce June 11, 2012) (final results of the 2009–2010 admin. review of the [ADD] order) ("*Final Results*"), and accompanying Issues and Decisions Memo. for the [*Final Results*], A-570–831, (June 4, 2012), ECF No. 54 ("Final Decision Memo"); *see also Fresh Garlic from the [PRC]*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) ([ADD] order) ("ADD Order").

Xinboda commenced this action pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516a(a)(2)(B)(iii) (2012).[1] *See* Summons, June 21, 2012, ECF No. 1;

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

Compl., June 27, 2012, ECF No. 10.[2] Xinboda challenges as unsupported by substantial evidence Commerce's selection of surrogate values ("SVs") for Xinboda's garlic bulb intermediate input as well as its selection of Tata Global Beverages Limited's ("Tata Tea") unconsolidated financial statements to calculate Xinboda's surrogate financial ratios. *See* Pl.'s Memo. Supp. Mot. J. Agency R. at 1–2, 14–44, Aug. 30, 2019, ECF No. 45–1 ("Pl.'s Br."). Defendant and Defendant-Intervenors Fresh Garlic Producers Association ("FGPA") and its individual members, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc., request that the court sustain the *Final Results* in its entirety. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. at 1, 5–41, Dec. 18, 2018, ECF No. 50 ("Def.'s Br."); Def-Intervenors' Resp. Opp'n Pl.'s Mot. J. Agency R. at 1–2, Jan. 9, 2020, ECF No. 51 ("Def.-Intervenors' Br."). For the reasons set forth below, the court sustains Commerce's SV determination for Xinboda's garlic bulb intermediate input and remands for further consideration or explanation Commerce's decision to rely on Tata Tea's unconsolidated financial statements to calculate Xinboda's surrogate financial ratios.

BACKGROUND

On December 28, 2010, Commerce initiated its sixteenth administrative review of the ADD Order on fresh garlic from the PRC, for the period of review November 1, 2009 through October 31, 2010 ("POR"), at the request of FGPA and its individual members. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 75 Fed. Reg. 81,565, 81,568–69 (Dep't Commerce Dec. 28, 2010). On December 7, 2011, Commerce published its preliminary results. *See Fresh Garlic from [the PRC]*, 76 Fed. Reg. 76,375, 76,377–80 (Dep't Commerce Dec. 7, 2011) (prelim. results of the 2009–2010 [ADD] admin. review) ("*Prelim. Results*"), and accompanying Issues and Decisions Memo for the [*Prelim. Results*], A-570–831, PD 134, Doc. No. INT_042256 (Nov. 30, 2011) ("Prelim. Decision Memo.").[3] Commerce selected, inter alia,

[2] On December 10, 2012, this action was stayed pending the final and conclusive determination of the appeal in the fifteenth administrative review of the ADD order covering fresh garlic from the PRC. *See* Order, Dec. 10, 2012, ECF No. 27. The stay ended in 2019 when the court issued its opinion and no party subsequently appealed. *See Shenzhen Xinboda Indus. Co. v. United States*, 43 CIT __, 361 F. Supp. 3d 1337 (2019).

[3] During the sixteenth administrative review, Commerce switched from manual to electronic filings of the administrative record. Therefore, there are two indices, one manual and the other electronic, for the public and confidential documents. On August 6, 2012, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination, on the docket, at ECF No. 22. Citations to administrative record documents in this opinion are to the document numbers Commerce assigned to such documents in the indices.

Xinboda and Golden Bird as mandatory respondents. *See* Prelim. Results, 76 Fed. Reg. 76,376.[4] Given that Commerce considers the PRC to be a non-market economy ("NME"), Commerce calculated normal value by using India as the primary surrogate country to value factors of production ("FOPs"). *See* Prelim. Decision Memo. at 6, 8–18. However, Commerce elected to apply its "intermediate input methodology" to directly determine SVs for an intermediate input, garlic bulbs, rather than select SVs for the FOPs used to produce that intermediate input. *Id.* at 11. As a result, Commerce approximated the SV of fresh garlic based on the value of garlic bulbs, and selected prices of grade A and grade Super A ("grade SA") garlic bulbs[5] from the Azadpur Agricultural Produce Marketing Committee's "Market Information Bulletin" ("APMC Bulletin")[6] as the best available information to value Xinboda's garlic bulb input. *Id.* at 12–13. In addition, Commerce selected Tata Tea Ltd.'s ("Tata Tea") 2010–2011 unconsolidated financial statement to calculate surrogate financial ratios. *See id.* at 17–18.

On June 11, 2012, Commerce published its *Final Results*. *See generally Final Results*, 76 Fed. Reg. 34,346–49. Commerce continued to rely on garlic prices from the APMC Bulletin, rather than the financial statements of Garlico Industries Limited ("Garlico"), to value the garlic bulb input, because the APMC Bulletin prices were publicly available, specific to the input, largely contemporaneous with the POR, tax and duty exclusive, and represented a broad market average. *See* Final Decision Memo at 11–36. Commerce adjusted the data by deducting a six percent commission reflected in those prices. *See id.* at 23. In addition, Commerce continued to use Tata Tea's financial statements to calculate Xinboda's surrogate financial ratios, finding that its production processes—albeit of tea—were most similar to Xinboda's fresh garlic processing. *See* Final Decision Memo at 40–45. Commerce noted that there was no evidence in the financial statements that indicated the company was in receipt of countervailable subsidies. *See* Final Decision Memo at 42.

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[4] Initially, Commerce selected three additional exporters as mandatory respondents, but, following petitioners' withdrawals of their requests for review, Commerce rescinded review with respect to those exporters. *See Prelim. Results*, 76 Fed. Reg. at 76,375–76.

[5] The APMC Bulletin uses a grading system to classify garlic bulbs by size. *See* Prelim. Surrogate Value Memo at Ex. 3, PD 136, Doc. No. INT_042261 (Nov. 30, 2011).

[6] The APMC comprise wholesale agricultural markets that operate on a daily basis. *See* Final Decision Memo. at 18; *see also* Petitioners' Information Submission at App'x 7 at 1–2, PD 125, Doc. No. 7808 (July 12, 2011) ("Petitioners' Info. Submission"). Each day, the Azadpur APMC publishes prices of agricultural products, including garlic. *See* Petitioners' Info. Submission at Attach. 1.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. APMC Bulletin Prices to Value Garlic Bulbs

Xinboda challenges Commerce's decision to rely on the APMC Bulletin's pricing data to value garlic bulbs as unsupported by substantial evidence, arguing it is not the best available information on the record. *See* Pl.'s Br. at 1–2, 14–17. Rather, according to Xinboda, Garlico's financial statements better reflect Xinboda's production process and similar purchasing power and trading; and, Garlico, like Xinboda, pays farmgate prices for large quantities of garlic bulb inputs. *Id.* at 15–17. However, should the court sustain Commerce's use of the APMC Bulletin, Xinboda argues Commerce should rely solely on grade A garlic bulb prices, because record evidence indicates grade SA prices were subsumed into grade A prices. Pl.'s Br. at 17–19. In addition, according to Xinboda, Commerce must deduct certain costs and expenses in order to bring the grade A prices closer to farmgate prices. *See* Pl.'s Br. at 20–26. Defendant counters that Commerce's decision to rely on the APMC Bulletin is supported by substantial evidence, emphasizing Commerce's preference for size-specific data and noting deficiencies in Garlico's financial statements. *See* Def.'s Br. at 5, 8–25. Further, Defendant argues that Commerce reasonably rejected arguments in the underlying proceeding that grade SA prices were subsumed into grade A prices, *see id.* at 25–28, and that additional adjustments to grade A prices should be made, *see id.* at 28–32.[7] For the reasons that follow, the court sustains Commerce's determination to rely on the AMPC Bulletin prices to value Xinboda's garlic bulb input, including grade SA garlic bulbs, and its decision not to adjust the pricing data further.

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[7] Defendant-Intervenors "fully support and endorse the points and arguments" of Defendant and raise one additional argument, namely that the court is not bound by prior court decisions involving challenges to the final results of the fifteenth administrative review. *See* Def.-Intervenors' Br. at 1–4.

A. Use of APMC Bulletin Prices

In an antidumping proceeding, if Commerce considers an exporting country to be an NME, like the PRC, it will identify one or more market economy countries to serve as a "surrogate" for that NME country in the calculation of normal value. *See* 19 U.S.C. § 1677b(c)(1), (4).[8] Normal value is determined on the basis of FOPs from the surrogate country or countries used to produce subject merchandise.[9] *See id.* at § 1677b(c)(1); *see also* 19 C.F.R. §§ 351.408(a)–(c) (2014).[10] However, in certain circumstances, Commerce will utilize its "intermediate input methodology" to apply a SV to an intermediate input directly, as opposed to the FOPs used to yield that intermediate input.[11]

Section 1677b requires Commerce to use "the best available information" to value FOPs. 19 U.S.C. § 1677b(c)(1). Although Commerce has broad discretion in deciding what constitutes the best available information, *see QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (noting the absence of a definition for "best available information" in the antidumping statute), it must ground

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

[9] By statute, Commerce must value FOPs "to the extent possible . . . in one or more market economy countries that are . . . at a level of economic development comparable to that of the [NME], and . . . significant producers of comparable merchandise." *See* 19 U.S.C. § 1677b(c)(4)(A)–(B); *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Pol'y Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Apr. 14, 2020). Commerce prefers to use data from one primary surrogate country. *See* 19 C.F.R. § 351.408(c)(2).

[10] FOPs to be valued in the surrogate market economy include "hours of labor required," "quantities of raw materials employed," "amounts of energy and other utilities consumed," and "representative capital cost, including depreciation." *See* 19 U.S.C. § 1677b(c)(3).

[11] Commerce applies its intermediate input methodology when the FOPs to produce an intermediate input account for an insignificant share of total output, and the burden to value each FOP to produce that intermediate input outweighs a possible increase in accuracy in the normal value calculation. *See* Fresh Garlic from the [PRC]-16th Admin. Review-Intermediate Input Methodology, PD 135, Doc. No. INT_042257 (Nov. 30, 2011) ("Intermediate Input Memo.") (citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37,116 (Dep't Commerce June 23, 2003) (notice of final [ADD] determination of sales at less than fair value), and accompanying Issues and Decision Memo. at 26–45, A-552–801, (June 16, 2003), *available at* https://enforcement.trade.gov/frn/summary/vietnam/0315794–1.pdf (last visited Apr. 14, 2020)). Commerce also applies the methodology when valuing FOPs to produce an intermediate product would lead to an inaccurate result, because a significant element of cost would not be adequately captured. *Id.* (citing *Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 67 Fed. Reg. 55,785 (Dep't Commerce Aug. 30, 2002) (notice of final determination of sales at less than fair value)).

its selection of the best available information in the overall purpose of the antidumping statute, calculating accurate dumping margins. *See CS Wind Vietnam Co. v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1271, 1277 (2014) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). "Commerce generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review" (collectively, "selection criteria"). *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Pol'y Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Apr. 14, 2020).

Commerce reasonably determines that the APMC Bulletin prices are the best available information on the record to value the garlic bulb input.[12] *See* Final Decision Memo. at 15–23. Specifically, the APMC Bulletin prices satisfy Commerce's selection criteria as a specific, publicly available data source, reflecting a broad market average and reported exclusive of taxes and duties. *Id.* at 15–19. With respect to specificity, the APMC Bulletin catalogues raw garlic prices on size-based grades. *Id.* at 17; *see also* Prelim. Surrogate Value Memo at Ex. 3, PD 136, Doc. No. INT_042261 (Nov. 30, 2011) ("Prelim. SV Memo."). Given that "size is the key component in the pricing of garlic[,]"[13] Commerce explains that the APMC Bulletin data enables it to construct "detailed and therefore accurate size/grade-specific" normal value calculation by matching respondents' 40–55 mm garlic bulbs with grade A values and 55 mm or larger garlic bulbs with an average of grades A and SA values. Final Decision Memo. at 17; *see also* Prelim. Decision Memo. at 13–14. Further, Commerce reasonably finds the APMC Bulletin data to be publicly available—posted at Azadpur facilities, available as a pamphlet at the market, and accessible through electronic archives—as well as representative of a

[12] Commerce applies its intermediate input methodology to value respondents' intermediate input garlic bulbs, because each respondent reported raw garlic inputs as FOPs, rather than garlic seed and growing factors used to produce garlic bulbs. *See* Prelim. SV Memo. at 2; *see also* Intermediate Input Memo. at 2.

[13] Commerce refers to several past reviews in explaining that size and quality are significant price-determinants of garlic bulbs. *See* Final Decision Memo. at 17 (citing *Fresh Garlic From the [PRC]*, 76 Fed. Reg. 37,321 (Dep't Commerce June 27, 2011) (final results and final rescission, in part, of the 2008–2009 [ADD] admin. review), and accompanying Issues and Decisions Memo. at 10–15, A-570–831, (June 20, 2011), *available at* https://enforcement.trade.gov/frn/summary/prc/2011–16072–1.pdf (last visited Apr. 14, 2020); *Fresh Garlic from the [PRC]*, 74 Fed. Reg. 29,174 (Dep't Commerce June 19, 2009) (final results and partial rescission of the 13th [ADD] admin. review & new shipper reviews), and accompanying Issues and Decisions Memo. at 6–19, A-570–831, (June 8, 2009), *available at* https://enforcement.trade.gov/frn/summary/prc/E9–14358–1.pdf (last visited Apr. 14, 2020)).

broad market average, in light of the scope of the data and the volume of garlic traded at the market.[14] Final Decision Memo. at 16–19. Commerce, relying on findings in previous administrative reviews, also determines that the APMC Bulletin prices are reported free of taxes and duties. *Id.* at 19. Even though the APMC Bulletin prices are not fully contemporaneous for grade SA garlic bulbs, prices for grades A, B, and C are contemporaneous with the POR.[15] *Id.* at 19, 35–36. Commerce, in light of its findings on each selection criteria, finds that, taken together, they reveal the APMC Bulletin prices to be the best available information to value the garlic bulb input.[16] *Id.* at 19.

Although Commerce ultimately selects the APMC Bulletin data, it also considers, but reasonably rejects, the financial statements of Garlico, as a possible surrogate value alternative, because it finds that Garlico's financial statements are not specific, do not represent a broad market average, and contain discrepancies. *See* Final Decision Memo. at 11–13. As Commerce explains, Garlico is a company that primarily purchases and dehydrates fresh vegetables, including garlic, to make powders and flakes. *Id.* at 12. Farmers cultivating garlic to be dehydrated plant and harvest garlic to achieve maximum yield, without concern for size or appearance, unlike farmers that sell raw garlic. *See id.* Commerce, therefore, reasons that the raw garlic inputs purchased by Garlico would not be physically comparable, or specific in size and quality, to those purchased by respondents, producers of whole and peeled garlic. *Id.* Further, Commerce notes that Garlico's financial statements do not reflect a broad market average, because they reflect the experience of one company, rather than, as preferred, transactions between many buyers and sellers. *Id.* at 13. Moreover, Commerce observes several discrepancies—e.g., Garlico

[14] Specifically, as Commerce explains, the APMC received "nearly 26,000 MT" of garlic from several states in India known to produce larger, high quality garlic, indicating that the APMC Bulletin prices are "geographically and temporally representative of the garlic industry in India." Final Decision Memo at 18–19.

[15] Commerce adjusts the value of the grade SA prices to account for their noncontemporaneity. *Id.* at 19; *see also* Prelim. Memo at 13–14 ("Because the Grade Super-A prices reported by the APMC which are on the record of this review are from 2007–2008, the Department applied a garlic-specific Wholesale Price Index to the non-contemporaneous data to make them contemporaneous to the POR.")

[16] Xinboda argues that APMC Bulletin prices are distorted by pointing to a finding in a report by the Indian Department of Agriculture & Co-operation ("AgriCorp Report") that states "[o]ver a period of time these [agricultural] markets have . . . acquired the status of restrictive and monopolistic markets[.]" Pl.'s Br. at 24–25 (citing Xinboda Final Surrogate Value Submission at Ex. 2, PD 155, Doc. No. SCA_047683 (Jan. 6, 2012) ("Xinboda SV Submission")). However, as Commerce explains, the AgriCorp Report merely demonstrates that the APMC market system "has resulted in an increase in the cost of marketing which results in farmers obtaining low prices." *See* Final Decision Memo. at 23; *see also* Xinboda SV Submission at Ex. 2 at 58. Given that Commerce selects a SV based on the price a processor would pay, not the price a farmer obtains, Commerce reasonably rejects Xinboda's argument. Final Decision Memo at 23.

incurred the exact same purchase expenses for two different agricultural products in two consecutive years—that call into question the overall reliability of Garlico's financial statements. *See id.* at 13, 41; *see also* Final Surrogate Value Memo. at 2–3, PD 224, Doc No. TNT_077215 (June 4, 2012) ("Final SV Memo.").[17] Given that Garlico's financial statements do not satisfy Commerce's selection criteria, unlike the APMC Bulletin, Commerce reasonably selects the latter over the former to value the garlic bulb input.[18] Final Decision Memo. at 13.

Notwithstanding the flaws Commerce identifies with the Garlico financial statements, Xinboda maintains that they represent the best available information on the record to calculate the garlic bulb input, because they reflect farmgate prices, unlike the AMPC Bulletin prices. *See* Pl.'s Br. at 15–17.[19] Commerce addresses, and reasonably rejects, this argument in the underlying proceeding. *See* Final Decision Memo. at 19–23. In doing so, Commerce acknowledges that even if there may be differences between the costs embedded in the respondents' prices and the AMPC Bulletin prices, the record demonstrates the products are fundamentally similar. *Id.* at 21. Commerce explains respondents' merchandise is not sold at farmgate prices, which it defines as "the purchase price of raw garlic as it is harvested with no further processing or handling, and including no additional charges." *Id.* 19–20. Although respondents averred in the underlying proceeding that they purchased raw garlic at farmgate prices throughout the POR, Commerce points to record evidence that indi-

[17] Commerce identifies further discrepancies in Garlico's financial statements, namely: the reported purchases of traded goods in one section does not match the purchase values in another section of the financial statements; the cost of raw garlic purchased matches the sales figure; and, the reported raw onion sales in one section does not correspond to the raw onion sales in another. *See* Final SV Memo. at 2–3.

[18] Xinboda contends that Commerce does not similarly scrutinize the reliability of the APMC Bulletin prices. *See* Pl.'s Br. at 21 ("[T]he Department's critique of the Market Value Chain Report holds equally true for the Azadpur Market data."); *see also* Pl.'s Reply Br. at 16–17, Feb. 5, 2020, ECF No. 52 ("Pl.'s Reply Br."). Alleging defect in Commerce's analysis of the APMC Bulletin does not cure the defects Commerce reasonably identifies in the Market Value Chain Report. Indeed, Commerce answers the questions Xinboda poses in its moving brief concerning the APMC Bulletin's data collection and data quality. *Compare* Pl.'s Br. at 21 *with* Final Decision Memo. at 18. Commerce reasonably explains that in "past cases, [the agency has] found official government publications to be reliable and credible sources of information." Final Decision Memo. at 18 (citing *Sebacic Acid from the [PRC]*, 69 Fed. Reg. 75,303 (Dep't Commerce Dec. 16, 2004), and accompanying Issues and Decision Memo. at 3–9, A570–825, (Dec. 10, 2004), *available at* https://enforcement.trade.gov/frn/summary/prc/E4–3678–1.pdf (last visited Apr. 14, 2020)).

[19] Xinboda does not identify fault in Commerce's analysis of the APMC Bulletin or the Garlico financial statements. Rather, it points out evidence that, in its view, indicate the superiority of the Garlico financial statements over the APMC Bulletin to value the garlic bulb input—the very same evidence Commerce considers and reasonably weighs in the underlying proceeding. *See* Pl.'s Br. at 15–17. The court will not reweigh evidence. *See Downhole Pipe*, 776 F.3d at 1376.

cates it would have been unlikely for Xinboda and Golden Bird to do so, given the short window of garlic harvest, from May through early June. *See id.* at 20–21. Rather, as respondents both noted, they purchased raw garlic from farmers that used third-party cold storage in the months following the harvest season. *Id.* at 21. Even in the absence of record evidence indicating the location of the cold storage, Commerce reasons that the use of cold storage facilities, alone, would incur additional costs on the part of raw garlic seller. *Id.*[20] In addition, Xinboda, like Golden Bird, ordered raw garlic bulbs based on bulb size, which, Commerce reasons, means that the farmer selling that garlic, to meet Xinboda's specifications, must "have gone through the raw harvested garlic, cleaned it up, sorted it based on size and type, placed it into large mesh bags, and, finally, delivered it to Xinboda's processor Dadi." *Id.* Commerce points to these sorting and handling costs as additional evidence that Xinboda, as well as Golden Bird, did not pay farmgate prices. *Id.* Therefore, and in light of the type and timing of respondents' input purchases, Commerce concludes that the garlic purchased by respondents include sorting, handling, and storage costs and, therefore, was not farmgate. *Id.* Xinboda does not take issue with Commerce's foregoing analysis, and its mere assertions fail to persuade that Commerce unreasonably concludes that Xinboda did not pay farmgate prices.[21]

Xinboda also contends that its purchasing power closely matches that of Garlico. Pl.'s Br. at 15–16. Yet, to the extent that Garlico and Xinboda purchase similar large quantities of raw garlic, Xinboda does not explain why "[t]he correspondence between the two companies" is paramount in the selection of a SV data source, *id.* at 17, especially when, as Commerce reasonably determines, Garlico's financial statements do not satisfy its selection criteria and are unreliable. *See* Final Decision Memo. at 11–13. Therefore, Xinboda fails to undermine Commerce's reasonable decision to select the APMC Bulletin over the Garlico financial statements. *See id.* at 24.

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[20] Xinboda restates an argument from the underlying proceeding, contending that the price Garlico pays for raw garlic from local farmers, close to its processing plant, are similar to the prices that Xinboda pays; and, as further support, Xinboda points to Garlico's location in the state of Madhya Pradesh, a major garlic producing region. *See* Pl.'s Br. at 15–16. However, Commerce reasonably does not consider purchasing from local or proximate farmers to bear on the issue of whether those farmers sorted, handled, and stored garlic. *See* Final Decision Memo. at 20–21.

[21] In the underlying proceeding, Xinboda failed to fully define "farmgate prices." *See* Final Decision Memo. at 19–20. However, before the court, Xinboda points to the Market Value Chain Report for the definition of farmgate as "includ[ing] expenses such as sorting, grading, packaging, and loading[,]" *see* Pl.'s Br. at 26–27, which is unavailing. Commerce reasonably determines, for reasons explained below, that the Market Value Chain Report is unreliable. *See* Final Decision Memo. at 25–31.

B. Use of Grade SA Prices in APMC Bulletin

Xinboda argues that if Commerce continues to rely on the APMC Bulletin prices, it should rely solely on contemporaneous grade A prices, and exclude non-contemporaneous grade SA prices, because record evidence indicates that grade SA prices have been subsumed into grade A prices. Pl.'s Br. at 17–19. Defendant counters that Commerce's reliance on both contemporaneous and non-contemporaneous prices is supported by substantial evidence. Def.'s Br. at 17–28. Specifically, Defendant contends that Commerce reasonably rejects the record evidence on which Xinboda basis its claim as unreliable. *Id.* For the reasons that follow, Commerce reasonably selects contemporaneous and non-contemporaneous AMPC Bulletin prices for grade A and SA prices garlic bulbs, respectively.

Generally, in the selection of SVs, Commerce prefers to use SVs that are fully contemporaneous with the POR, because those SVs more accurately reflect a respondent's costs during the relevant POR. *See Home Meridian Int'l, Inc. v. United States*, 772 F.3d 1289, 1295 (Fed. Cir. 2014). Although Commerce must select the "'best available information,' . . . there is no requirement that the data be perfect." *Id.* at 1296. Thus, depending on the factual circumstances, Commerce may select non-contemporaneous data over contemporaneous data. *See id.* at 1296 (recognizing that Commerce has discretion in SV selection and may select non-contemporaneous data).

Commerce reasonably relies on non-contemporaneous grade SA prices from the APMC Bulletin 2007–2008 to value certain-sized garlic bulbs. Given that grade SA garlic bulbs compare to a "significant portion" of raw garlic inputs processed by Xinboda and Golden Bird, Commerce explains that using prices from the APMC Bulletin enables the construction of more accurate normal values, despite the noncontemporaneity of the grade SA pricing data. *See* Final Decision Memo. at 32–36. To specifically match the prices by grade reported in the APMC Bulletin with the respondents' purchase information, Commerce uses grade A prices to value garlic bulbs with a range in diameter from 40–55 mm and an average of grades A and SA prices to value garlic bulbs with a diameter of 55 mm or greater. *Id.* at 33. In addition, Commerce adjusts the prices with a garlic-specific wholesale price index to adjust the grade SA prices to the 2009–2010 POR. *Id.*

Xinboda does not persuade that Commerce is unreasonable in selecting non-contemporaneous grade SA prices to value its garlic bulb inputs, and it offers no argument that Commerce should elevate contemporaneity, over specificity, in the selection of SVs for the garlic bulb inputs. Rather, Xinboda's argument proceeds from the mistaken premise that because no grade SA garlic was allegedly sold at the

Azadpur Market during the POR, grade SA prices cannot be used to value garlic bulb inputs sized 55 mm or greater. Pl.'s Br. at 17–19. Xinboda bases its claim on a declaration, prepared by Xinboda, in which a researcher recounts interviews with garlic traders ("Researcher Declaration"). *See id.* at 18; *see also* Xinboda Surrogate Value Submission at Attach. Declaration, PD 148, Doc. No. EXT_047406 (Jan. 6, 2012) ("Xinboda SV Submission"). However, Commerce reasonably finds the Researcher Declaration to be unreliable, because: the researcher's observations were based on a single visit and interviews with eight vendors; the researcher's credentials were unclear; and, the researcher failed to provide details regarding the interviewed vendors so that Commerce could corroborate the Research Declaration. *See* Final Decision Memo. at 31; *see also* Xinboda SV Submission at Attach. Declaration. Even if reasonable minds can disagree on Commerce's assessment of the weight of evidence, the agency's determination of SVs for the garlic bulb input is consistent with its selection criteria and supported by the record.[22] *Cf. Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015).

C. Adjustments to APMC Bulletin Prices

Xinboda argues that if the court sustains Commerce's reliance on the APMC Bulletin prices to value the garlic bulb input, Commerce must deduct costs and expenses associated with bringing garlic bulbs to the Azadpur Market. *See* Pl.'s Br. at 20–276. Specifically, Plaintiff avers that "considerable mark-ups for transportation, commissions, taxes, loading and unloading, and wastage and weight loss" are reflected in the APMC Bulletin prices and should be deducted to more closely approximate the farmgate prices Xinboda paid. *See id.* at 20. Defendant counters that Plaintiff has failed to demonstrate that further adjustments than those Commerce reasonably made are war-

[22] Xinboda contends that the court has "already ruled on this issue," referring to *Shenzhen Xinboda Indus. Co. v. United States*, 43 CIT __, 361 F. Supp. 3d 1337 (2019) ("*Shenzhen III*"), where the court sustained, in the fifteenth administrative review, Commerce's exclusion of grade SA prices. *See* Pl.'s Br. at 19 (citing *Shenzhen III*, 43 CIT at __, 361 F. Supp. 3d at 1358–59). More generally, Xinboda argues that the court should carefully consider not only *Xinboda III* but two preceding decisions concerning the fifteenth administrative review, given the similarity of issues discussed in those opinions to those presently under consideration. *See* Pl.'s Reply Br. at 1–6. However, each administrative review is a separate segment of an antidumping proceeding and each with its own, unique administrative record, *see, e.g.*, *Jiaxing Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2016). A determination must be supported by substantial evidence based on that administrative record. Further, as Defendant-Intervenors observe, "one judge of the United States Court of International Trade [("CIT")] is not bound by the decision of another judge of the [CIT]." *See* Def.-Intervenor's Br. at 3 (citing *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989)).

ranted. Def.'s Br. at 28–32. For the reasons that follow, Commerce's decision not to further adjust the APMC Bulletin prices is sustained.

Commerce has broad discretion not only to determine what data constitutes the "best available information" to value FOPs and inputs, *see QVD Food Co.*, 658 F.3d at 1323, but also to rely on such data without adjustment, provided its methodology is reasonable in light of its obligation to calculate the dumping margin as accurately as possible. *See e.g.*, *Shakeproof Assemb. Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *Timken Co. v. United States*, 26 CIT 434, 461, 201 F. Supp. 2d 1316, 1341 (2002). Further, Commerce has broad discretion in assessing the reliability of data. *See, e.g.*, *Vinh Hoan Corp. v. United States*, 39 CIT __, __, 49 F. Supp. 3d 1285, 1320 (2015); *Wuhan Bee Healthy Co. v. United States*, 29 CIT 587, 593, 374 F. Supp. 2d 1299, 1304 (2005).

Commerce's decision not to apply further adjustments to the APMC Bulletin price is reasonable because the basis for those adjustments is predicated on findings contained in the Market Value Chain Report and Researcher Declaration, sources Commerce determines to be unreliable. *See* Final Decision Memo 24–31. With respect to the Market Value Chain Report—a report that provides information on garlic price, quantity, and industry—Commerce finds the report to contain numerous discrepancies, as well as missing supporting data to corroborate the findings, that call into question its reliability. *See* Final Decision Memo at 24–31; *see also* Xinboda SV Submission at Attach. Report.[23] Commerce chronicles its concerns at length and in detail, observing: record evidence controverts Xinboda's claim that it had commissioned the report, *id.* at 25–26;[24] there are inconsistences as to when the report was compiled,[25] *id.* at 26; and, the report lacks underlying data analysis, or an explanation of the methodology used, to support its conclusions. *Id.*

That last discrepancy, in Commerce's view, is of "most concern," because "the lack of analysis means that the Department cannot review how the data used as the basis of the report was collected,

[23] Commerce's reliability evaluation of research reports focuses on four factors: "(1) the source and accuracy of the data; (2) explanation of the analysis/calculations; (3) whether the underlying raw data was provided; and (4) explanation of how the data was collected, sorted and analyzed." Final Decision Memo. at 25.

[24] Specifically, Commerce observes that the first page of the report states that an exporter interested in the garlic trade commissioned the report. Final Decision Memo. at 25; *see also* Xinboda SV Submission at Attach. Report at 1. Although Commerce, citing confidentiality concerns, could not provide the name of that exporter, it finds that there was no record evidence to support the inference that the entity was related to Xinboda, conflicting with Xinboda's statement that it had commissioned the report. *Id.* at 25–26.

[25] The cover letter to the report dates to early 2011, while the report itself contains garlic prices and quantities through November 2011, raising a question, in Commerce's view, as to when the report was compiled and finalized. Final Decision Memo. at 26.

compiled, analyzed and incorporated into, or excluded from, the final conclusions." Final Decision Memo. at 26. Specifically, Commerce, in examining the so-called "primary" and "secondary" sources cited in the Market Value Chain Report, finds that many are unidentified and, among those that are specifically identified, the sources do not include supporting data or documentation. *Id.* at 26–28.

Regarding the three sources of "primary" data—information derived from meetings with garlic experts, data derived from the Global AgriSystem, and responses to questionnaires sent to growers, traders, and horticultural department officials—Commerce finds each to be deficient. *Id.* at 26–27. Meetings with garlic experts form the basis of data collected in Annexure 3, which lists monthly arrival prices and quantities for major agricultural markets in India; however, the Market Value Chain Report does not provide details of the meetings, how the data was obtained, and whether any adjustments were made to the data. *Id.* at 27; *see also* Xinboda SV Submission at Attach. Report at 55–65. The Market Value Chain Report also cites to Global AgriSystem data regarding three production belts— Mandsaur/Neemuch (Madhya Pradesh), Mainpuri/Gihror (Uttar Pradesh), and Kullu (Himachal Pradesh)—but neither provides the raw data underlying the analyses nor explains why the cited production belts were "important," *id.* at 27; *see also* Xinboda SV Submission at Attach. Report at 6, leaving Commerce unable to determine whether this data was "reflective of the Indian garlic market in general." *Id.* Similarly, the Market Value Chain Report relies on responses to questionnaires sent to the growers, traders, and horticultural department officials. *Id.* Although the Market Value Chain Report includes copies of the questionnaires and a list of those surveyed, it does not provide the responses, making it impossible for Commerce to evaluate whether the information collected was complete and the responses could be considered representative of the general garlic market. *See id.*; *see also* Xinboda SV Submission at Attach. Report at 68–78.

Regarding secondary information, encompassing statistics on the garlic trade and prices derived from multiple sources, Commerce explains that, in many instances, the report fails to identify the specific sources and, as a result, Commerce has no way to confirm the report's reliance on those sources. *Id.* at 27–28. Where citations to sources are provided, the report does not contain the underlying data used to generate the statistics. *Id.* Further, even where the Market Value Chain Report includes underlying data and supporting docu-

mentation, Commerce identifies internal inconsistencies[26] and inaccuracies[27] that further undermine the reliability of the report. Therefore, in light of these many issues, Commerce considers the Market Value Chain Report unreliable and declines to give it probative weight. *Id.* at 29–31.

Likewise, Commerce expresses concerns about the reliability of the Researcher Declaration that Xinboda submitted. *See* Final Decision Memo at 31 (citing Xinboda SV Submission at Attach. Declaration). Commerce questions the researcher's qualifications, because it is not clear whether this individual was a market researcher or a field expert, when the researcher only attested to working in "import/export trade for over 20 years." *Id.* Further, the researcher chronicled observations based on a single visit to the Azadpur Market and on interviews with eight unidentified vendors. *Id.* Xinboda adduced no other additional information for Commerce to corroborate the researcher's claims. *Id.* Finally, Commerce notes that the researcher's affidavit was signed and notarized in 2011, but also contains an unexplained stamp date of 2010. *Id.* Taken together, Commerce reasonably finds that the Researcher Declaration is unreliable. *Id.*

Xinboda does not challenge Commerce's explanations or its reliability determinations,[28] but, instead, persists in its view that it paid

[26] Commerce points to the Madhya Pradesh section of the report as emblematic of its overall concerns regarding the reliability of the Market Value Chain Report. *See* Final Decision Memo at 28 (citing Xinboda SV Submission at Attach. Report at 31–38). Specifically, Commerce notes that a table entitled "Seasonal Farm Gate Prices and the Price Trend," which breaks out farmgate prices between harvesting season and the rest of the year, does not provide dates; and, a second table on the same page, entitled, "Table 4: Arrivals at APMC Neemuch, MP" ("Table 4") does not include data for certain months. *See* Final Decision Memo at 28; *see also* Xinboda SV Submission at Attach. Report at 36. Further, Commerce, in attempting to reconcile the data in the first table with the second, observes that the average prices in the second table were much higher than the average prices in the first table. *See* Final Decision Memo at 29. Turning to Table 4 in particular, Commerce explains that it expected that the data in Table 4 would be based on the "primary" data in Annexure 3, which also provides arrival prices and quantities for major markets in India. *Id.* However, the figures do not match, and the Market Value Chain Report does not explain the discrepancy. *Id.* These inconsistencies, as Commerce reasonably concludes, call into question the accuracy of information throughout the report as well as indicate that the information collected may not have been properly analyzed. *Id.*

[27] Even though the internal trade sections and supporting data at Annexure 4 are based on data collected from the Food and Agricultural Organization of the United Nations ("FAO"), Commerce notes that the data in the report do not match the cited FAO data. Final Decision Memo. at 30; *see also* Xinboda SV Submission at Attach. Report at 65–67. Without an explanation or reason for the discrepancies, Commerce reasonably concludes that the report relied on inaccurate or secondary sources for the FAO statistics, or the researcher erred in compiling data. Final Decision Memo. at 30.

[28] Rather, Xinboda refers to several articles that "corroborate" the Market Value Chain Report and a field study therein. *See* Pl.'s Br. at 24–26 (citing Xinboda SV Submission at Exs. 3–4). However, pointing to extraneous commentary does not resolve the internal inconsistencies, discrepancies, and missing documentation and data Commerce reasonably identifies in its analysis of the Market Value Chain Report. Xinboda asks the court to

farmgate prices, which the APMC Bulletin prices do not reflect, and, further, that the Market Value Chain Report and Researcher Declaration provide a basis to make adjustments[29] that match Xinboda's purchasing experience. *See* Pl.'s Br. at 20–24. However, as explained above, Commerce reasonably determines that Xinboda did not pay farmgate prices. *See* Final Decision Memo. at 21. Moreover, Commerce acknowledges that although Xinboda did not purchase its garlic bulb inputs at a market like Azadpur Market, there was no information on the record demonstrating that the prices Xinboda paid and the APMC Bulletin prices were fundamentally different. *Id.* at 24. Commerce has no obligation to directly replicate the production experience of Xinboda, if doing so would result in a determination of a less accurate SV for the garlic bulb input. *See, e.g.*, *Nation Ford Chemical v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

Moreover, in rehashing the same arguments that Commerce reasonably rejects in the underlying proceeding, Xinboda asks the court to reweigh evidence, which it cannot. Further it tasks the court with making a reliability determination when Commerce has discretion to evaluate the reliability of evidence and when Xinboda has not come forward with evidence that undermines Commerce's reliability findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("[D]rawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *see also Vinh Hoan Corp.*, 39 CIT at __, 49 F. Supp. 3d at 1320. Thus, Commerce reasonably determines that the Market Value Chain Report and the Researcher Declaration are unreliable, as Commerce highlights numerous and undisputed inconsistencies and discrepancies that reasonably justify the concerns it raises, and that further adjustment to the APMC Bulletin prices, based on the information contained in those two sources, is not warranted.

II. Selection of Financial Ratios

Xinboda argues that Commerce reliance on Tata Tea's unconsolidated financial statements to derive financial ratios is unsupported by substantial evidence. *See* Pl.'s Br. at 27–45. According to Xinboda, Commerce erroneously chose the unconsolidated financial statements of Tata Tea, an integrated producer of branded tea, over those of Garlico, a non-integrated producer garlic flakes, which processes gar-

substitute its judgment for Commerce's and reweigh evidence, which it cannot do. *See Downhole Pipe*, 776 F.3d at 1376.

[29] Specifically, Xinboda contends that "considerable mark-ups for transportation, commissions, taxes, loading and unloading, and wastage and weight loss" should be removed from the APMC Bulletin prices. *See* Pl.'s Br. at 20.

lic in a manner comparable to respondents. *Id.* at 27–28, 31–41. Xinboda further contends that Commerce fails to address record evidence indicating that Tata Tea's financial statements were distorted by the receipt of countervailable subsidies. *Id.* at 41–45. Defendant counters that Commerce reasonably selects Tata Tea's unconsolidated financial statements over Garlico's because Tata Tea's production process is most similar to Xinboda's and Commerce found Garlico's financial statements to be unreliable. Def.'s Br. at 32–38. In addition, Defendant argues that Commerce reasonably determines that Tata Tea's financial statements did not contain sufficient evidence of subsidization. *See* Def.'s Br. at 38–41. For the following reasons, Commerce's decision to rely on Tata Tea's statements is remanded for further explanation or consideration.

As explained above, in NME cases, Commerce determines normal value on the basis of FOPs used to produce subject merchandise from a market economy surrogate country or countries. *See* 19 U.S.C. § 1677b(c)(1). FOPs to be valued in the surrogate market economy include "hours of labor required," "quantities of raw materials employed," "amounts of energy and other utilities consumed," and "representative capital cost, including depreciation." *See id.* at § 1677b(c)(3). After calculating the total value of FOPs, Commerce will add to normal value "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* at § 1677b(c)(1). To value general expenses and profit, Commerce calculates surrogate financial ratios that the agency derives from the financial statements of one or more companies that produce identical or comparable merchandise in the primary surrogate country. *See* 19 C.F.R. § 351.408(c)(4); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010). Specifically, Commerce calculates separate surrogate financial ratios from the surrogate financial statement for selling, general, and administrative expenses ("SG&A"); manufacturing overhead; and, profit. *See, e.g.*, *Manganese Metal From the [PRC]*, 64 Fed. Reg. 49,447, 49,448 (Dep't Commerce Sept. 13, 1999) (final results of second admin. review).[30]

By statute, Commerce "may disregard price or cost values without further investigation if [it] has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price of cost values or if those price or

[30] To do so, Commerce analyzes each financial statement line item and either assigns the line item value to a particular category—i.e., raw materials, labor, energy, manufacturing overhead, finished goods, and profit—or excludes the value from its calculation. Commerce then calculates separate surrogate financial ratios—for manufacturing overhead, SG&A, and profit—based on the total value of each category. *Manganese Metal From the [PRC]*, 64 Fed. Reg. at 49,448.

cost values were subject to an antidumping order." 19 U.S.C. § 1677b(c)(5). Congress thus tasked Commerce to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices" when valuing FOPs. Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R. 3, H.R. Rep. No. 100–576 at 590–91 (1988) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24; *see also Nation Ford*, 166 F.3d at 1378. In doing so, Commerce is not expected "to conduct a formal investigation to ensure that such prices are not dumped or subsidized," but is instead to "base its decision [as to whether there is 'reason to believe or suspect'] on information generally available to it at that time." H.R. Rep. No. 100–576 at 590–91, 1988 U.S.C.C.A.N. at 1623–24. Moreover, whether a determination is supported by substantial evidence is based on the whole record, which includes evidence that detracts from its weight. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Tudor v. Dep't of Treasury*, 639 F.3d 1362, 1366 (Fed. Cir. 2011).

Commerce has not adequately explained why its choice of Tata Tea's financial statements to calculate surrogate financial ratios is reasonable in light of record evidence that suggests that the company is or may be the beneficiary of subsidies. Instead, Commerce focuses narrowly on the financial statements' line items and fails to address record evidence indicating subsidization. Specifically, Xinboda placed on the record loan documents filed with the Government of India that show the company's receipt of packing credits and export credits. *See* Xinboda Final Surrogate Value Submission at Ex. 33, PD 155, Doc. No. SCA_047683 (Jan. 6, 2012) ("Xinboda Final SV Submission").[31] Each loan document[32] is a hypothecation agreement, a type of secured loan, where Tata Tea pledges collateral, e.g., movable assets, to

[31] Xinboda notes that, in the past, Commerce has determined export and packing credits to constitute countervailable subsidies. *See* Pl.'s Br. at 44–45 (citing *Polyethylene Terephthalate Film, Sheet, and Strip from India*, 73 Fed. Reg. 75,672 (Dep't Commerce Dec. 12, 2008) (final results of countervailing duty admin. review), and accompanying Issues and Decision Memo. at 4–5, C-533–825, (Dec. 5, 2008), *available at* https://enforcement.trade.gov/frn/summary/india/E8–29482–1.pdf (last visited Apr. 14, 2020); *Certain Hot-Rolled Carbon Steel Flat Products from India*, 74 Fed Reg. 20,923 (Dep't Commerce May 6, 2009) (final results and partial rescission of countervailing duty admin. review), and accompanying Issues and Decision Memo., C-533–821, (Apr. 29, 2009), *available at* https://enforcement.trade.gov/frn/summary/india/E9–10496–1.pdf (last visited Apr.14, 2020)).

[32] Xinboda points to three loan documents: first, a "Supplemental Agreement of Hypothecation of Goods and Assets for Increase in the Overall Limit" with the State Bank of India, dated December 16, 2008; second, a "Deed of Hypothecation of Current Assets" with Axis Bank Limited of Kolkata, dated October 30, 2009; and, an "Unattested Deed of Hypothecation" with the Bank of Baroda, dated October 30, 2009. *See* Pl.'s Br. at 42; *see also* Xinboda Final SV Submission at Ex. 33.

obtain a credit. *See generally id.*[33] The terms of those loan documents include the receipt of export credits, packing credits, and export packing credits. *See id.*[34] At least one loan document stipulates that the loan is provided at below market rate. *Id.*[35] Tata Tea's financial statements appear to catalogue receipt of these loans at Schedule 3 under the line item "Working Capital Facilities," which describes the constituent loans as "[s]ecured by way of hypothecation of inventories, crop, book debts and movable assets, other than plant and machinery and furniture, of the holding company." *See* Chengwu Yuanxiang Surrogate Value Comments at Ex. 2 at 107, PD 13, Doc No. EXT_021742 (Aug. 11, 2011) ("Chengwu SV Cmts.").[36] Given that a "subsidy" may take the form of a loan by a government authority that confers a benefit in the form of more favorable lending terms than a recipient could obtain on the market, *see* 19 U.S.C. § 1677(5), the loan documents and financial statements, together, suggest that Tata Tea's financial statements reflect subsidized prices. Even though Commerce not only "note[s] instances in which the company may have received export incentive or other general subsidies" in the financial statements but also acknowledges that "Xinboda has placed loan documents on the record to demonstrate that Tata Tea has received subsidies[,]" Commerce states, without any analysis or explanation, that it "has found no evidence of these loans in the financial statements."[37] Final Decision Memo. at 43. Commerce's failure to engage with this evidence is not reasonable.

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[33] For example, in Tata Tea's "Unattested Deed of Hypothecation" with the Bank of Baroda, the collateral includes, inter alia, "ALL the current assets of the Borrower, namely, stock of raw material, work-in-progress, finished goods, consumable stores, spares[.]" *See* Xinboda Final SV Submission at Ex. 33.

[34] The "Supplemental Agreement of Hypothecation of Goods and Assets for Increase in the Overall Limit" with the State Bank of India provides for an export credit of Rs 50 crore; the "Deed of Hypothecation of Current Assets" with Axis Bank Limited of Kolkata confers a packing credit of Rs 14 crore; and, the "Unattested Deed of Hypothecation" with the Bank of Baroda specifies a packing credit of Rs 14 crore. *See* Pl.'s Br. at 42; *see also* Xinboda Final SV Submission at Ex. 33.

[35] The "Supplemental Agreement of Hypothecation of Goods and Assets for Increase in the Overall Limit" specifies that the loan is provided at "2.75% below SBAR," when SBAR is 13%. *See* Xinboda Final SV Submission at Ex. 33.

[36] As Xinboda points out, Tata Tea's 2010–2011 financial statement generally indicates the receipt of subsidies, noting, with respect to fixed assets, "[s]ubsidies receivable from government in respect of fixed assets are deducted from the cost of respective assets as and when they accrue." *See* Chengwu SV Cmts. at Ex. 2. at 82.

[37] Defendant argues that Commerce found "insufficient evidence of subsidization." Def.'s Br. at 38. However, Commerce neither scrutinized Tata Tea's financial statement given Xinboda's allegations nor considered possible detracting evidence, both analytic exercises that would shed light on whether there was sufficient evidence of subsidization. Instead, Commerce merely states that it "found no evidence" of alleged subsidies. Final Decision Memo. at 43.

Commerce's apparent position is that it may rely on the financial statements of a company that "may have received export incentive or other general subsidies" so long as the Department has not previously found "that the[] subsidies were received pursuant to a specific program . . . determined to be countervailable." *See* Final Decision Memo. at 43. If this a practice upon which Commerce relies, on remand, Commerce should clarify its practice and, further, explain why it is reasonable, in light of evidence of countervailable subsidies in this case.[38] . Although Congress did not intend for Commerce to undertake a formal investigation as to whether prices are subsidized, it did instruct Commerce to base its decision "on information generally available to it at that time." H.R. Rep. No. 100–576 at 590–91, 1988 U.S.C.C.A.N. at 1623–24. Commerce fails to address record evidence of possible subsidization and fails to explain why such evidence would not suffice to constitute a "reason to believe or suspect" that the reported prices in Tata Tea's statements are subsidized. Here, because Commerce does not consider information on the record regarding Tata Tea's receipt of subsidies, it unreasonably selects Tata Tea's financial statements to calculate surrogate financial ratios, which, irrespective of Plaintiff's other concerns regarding Tata Tea's financial statements, merits remand.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's determination to rely on the AMPC Bulletin prices to value Xinboda's garlic bulb intermediate input, including grade SA garlic bulbs, and its decision not to adjust the APMC Bulletin prices further is sustained; and it is further

ORDERED that Commerce's decision to rely upon Tata Tea's financial statements for the calculation of surrogate financial ratios is remanded for further explanation or consideration 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

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[38] Commerce points to its practice of relying financial statements "as is" in calculating surrogate financial ratios. *See* Final Decision Memo. at 43 (citing *Certain Frozen Warmwater Shrimp From the [PRC]*, 72 Fed. Reg. 52,049 (Dep't Commerce Sept. 12, 2007) (notice of final results and rescission, in part, of 2004/2006 [ADD] admin. andnew shipper reviews), and accompanying Issues and Decisions Memo. at 8–12, A-570893, (Sept. 5, 2007), *available at* https://enforcement.trade.gov/frn/summary/prc/074495–1.pdf (last visited Apr. 14, 2020)). However, accepting financial statements as they are does not explain how a reasonable examination of Tata Tea's financial statements yields no evidence of loans or justifies Commerce's apparently cursory assessment of "information generally available to it at that time," namely the loan documents on record. H.R. Rep. No. 100–576 at 590–91, 1988 U.S.C.C.A.N. at 1623–24.

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination; 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: April 17, 2020
New York, New York

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

Slip Op. 20–51

HABAŞ SINAI VE TIBBI GAZLAR ISTIHSAL ENDÜSTRISI, A.Ş., Plaintiff, and ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Consolidated Plaintiff, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Consol. Court No. 17–00204

[Sustaining in part and remanding in part the U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Remand.]

Dated: April 17, 2020

David L. Simon, Law Office of David L. Simon, of Washington, DC, for Plaintiff Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş.

Matthew M. Nolan and *Leah N. Scarpelli*, Arent Fox, LLP, of Washington, DC, for Consolidated Plaintiff Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S.

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

Alan H. Price, *John R. Shane*, and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Rebar Trade Action Coalition.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") second redetermination upon remand. *See* Final Results of Redetermination Pursuant to Court Remand ("2nd Remand Results"), ECF No. 83–1. Plaintiff Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. ("Habaş") and Consolidated Plaintiff Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. ("Icdas") (together, "Plaintiffs") each challenged certain aspects of Commerce's final affirmative determination in the sales at less than fair value investigation of steel concrete reinforcing bar ("rebar") from the Republic of Turkey.[1] *See Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 23,192 (Dep't Commerce May 22, 2017) (final determination of sales at less than fair value)

[1] The administrative record associated with the *Final Determination* is divided into a Public Administrative Record, ECF No. 17–1, and a Confidential Administrative Record ("CR"), ECF No. 17–2. The administrative record associated with the 2nd Remand Results is contained in a Public Remand Record ("2nd PRR"), ECF No. 86–2, and a Confidential Remand Record, ECF No. 86–3. Parties submitted public and confidential joint appendices containing record documents cited in their briefs. *See* Public J.A. ("RPJA"), ECF No. 97; Confidential J.A. ("RCJA"), ECF No. 96.

("*Final Determination*"), ECF No. 17- 5, *as amended by Steel Concrete Reinforcing Bar From the Republic of Turkey and Japan*, 82 Fed. Reg. 32,532 (Dep't Commerce July 14, 2017) (am. final affirmative antidumping duty determination for the Republic of Turkey and antidumping duty orders), ECF No. 17–7, and accompanying Issues and Decision Mem., A-489–829 (May 15, 2017), ECF No. 17–6.[2]

The court has issued two prior opinions resolving most of the issues in this case, familiarity with which is presumed. *See Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States* ("*Habaş I*"), 43 CIT ___, 361 F. Supp. 3d 1314 (2019); *Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States* ("*Habaş II*"), 43 CIT ___, 415 F. Supp. 3d 1195 (2019). Briefly, in *Habaş I*, the court sustained Commerce's refusal to employ a quarterly cost-averaging methodology for either Plaintiff; selection of the invoice date as the date of sale for Habaş's U.S. sales; and rejection of Habaş's zero-interest short-term loans to calculate imputed credit expenses. 361 F. Supp. 3d at 1317–18. The court remanded Commerce's method of calculating Plaintiffs' respective duty drawback adjustments by allocating exempted duties over total production and the use of partial adverse facts available in relation to certain sales for which Icdas could not provide manufacturer codes. *Id.* In *Habaş II*, the court sustained Commerce's revised duty drawback adjustment as applied to export price, remanded Commerce's decision to make a circumstance of sale adjustment to normal value in the same amount, and sustained Commerce's use of partial adverse facts available with respect to Icdas. 415. F. Supp. 3d at 1201.

On remand, Commerce, under protest,[3] recalculated normal value without making a circumstance of sale adjustment and, consistent with *Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335, 1341–44 (Fed. Cir. 2011), increased the cost of production and constructed value to account for the cost of exempted import duties for which Plaintiffs remained liable until they satisfied the duty exemption program requirements. 2nd Remand Results at 3.

Habaş and Defendant-Intervenor Rebar Trade Action Coalition ("RTAC") filed comments in opposition to the 2nd Remand Results in whole or in part. While Habaş agrees with Commerce's duty drawback calculation methodology, Habaş challenges Commerce's decision not to include in the adjustment import duties forgiven in connection

[2] The period of investigation ("POI") was July 1, 2015, through June 30, 2016. *Final Determination*, 82 Fed. Reg. at 23,192.

[3] By making the determination under protest, Commerce preserves its right to appeal. *See Meridian Prods. v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)).

with two inward processing certificates[4] —IPC # 36 and IPC # 1598—that closed after the end of the POI. Habaş's Opp'n at 1, 6–11. RTAC challenges Commerce's rejection of its proposed cost-side adjustment that RTAC argues would result in duty-neutral margin calculations. [RTAC's] Cmts. on Final Results of Second Redetermination ("RTAC's Opp'n") at 5–12, ECF No. 89.

Defendant United States ("the Government") requests a remand for Commerce to include IPC # 36 in Habaş's drawback adjustment and urges the court to otherwise sustain the 2nd Remand Results. Def.'s Resp. to Cmts. on the Remand Redetermination ("Gov't's Reply") at 4–9, ECF No. 93. RTAC argues that Habaş has waived its objection to Commerce's exclusion of IPCs that closed post-POI by failing to raise them in a timely manner or, in the alternative, that the court should find the objection subject to the doctrine of laches. Confidential [RTAC's] Opp'n to Pl. Habaş's Cmts. on Redetermination on Second Remand ("RTAC's Reply") at 4–9, ECF No. 94. RTAC argues further that Commerce's exclusion of IPC # 36 and IPC # 1598 was reasonable and supported by substantial evidence. *Id.* at 9–15. Habaş supports Commerce's decision not to adopt RTAC's proposed methodology on the basis that it would add to the "cost of production an amount far in excess of the amount of duties drawn back" and is, therefore, unlawful. Confidential Cmts. of Pl. [Habaş] in Resp. to Cmts. of [RTAC] on Final Results of Second Redetermination ("Habaş's Reply") at 3, ECF No. 90.[5]

For the reasons discussed herein, the court remands the 2nd Remand Results for Commerce to include exports subject to IPC # 36 in Habaş's duty drawback adjustment. The 2nd Remand Results will be otherwise sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to subsection 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i)(2012), and 28 U.S.C. § 1581(c) (2012).[6]

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C.

[4] An inward processing certificate ("IPC") is used to track "the identity, quantity, and value of goods to be imported" and subsequently exported in order "to satisfy the export commitment of the IPC." Confidential Cmts. of Pl. [Habaş] in Partial Opp'n to Redetermination on Second Remand ("Habaş's Opp'n") at 2, ECF No. 87.

[5] Icdas filed comments supporting Commerce's duty drawback calculation methodology and requests the court to sustain the 2nd Remand Results. Consol. Pl. [Icdas's] Cmts. on Second Remand Redetermination at 2–3, ECF No. 92.

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

§ 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

On remand from *Habaş II*, Commerce issued to interested parties a draft remand redetermination in which the agency recalculated Plaintiffs' respective normal values to exclude the circumstance of sale adjustment. Draft Results of Redetermination Pursuant to Court Remand (Dec. 26, 2019) at 3, 2nd PRR 1, RPJA Tab 15. Commerce also imputed exempted duty costs to the cost of production. *Id.*

In comments on the draft, Habaş argued that Commerce erred in excluding two IPCs covering POI exports to the United States but which "remained open at the end of the POI." Habaş Cmts. on Draft Redetermination in Second Remand (Jan. 3, 2010) at 2, 2nd PRR 6, RPJA Tab 16 (citing *Tosçelik Profil ve Sac Endüstrisi v. United States*, 42 CIT ___, ___, 348 F. Supp. 3d 1321, 1328 (2018)). Habaş argued further that it had "provided a reasonable methodology for calculating the drawback attributable to the exports under those two IPCs." *Id.* (citation omitted)

RTAC argued that Commerce's duty drawback calculation methodology continued to produce distorted margins. RTAC's Cmts. on Draft Results of Remand Redetermination (Jan. 3, 2020) at 6, 2nd PRR 8, RPJA Tab 17. To remedy this distortion, RTAC argued, *Saha Thai* permits Commerce to add "implied costs" to the cost of production "on a per-unit basis, in an amount equivalent with the per-unit sales-side increase to [U.S. price]." *Id.* at 8.

Commerce rejected Habaş's and RTAC's arguments. Commerce explained that, unlike in *Toscelik*, in which the agency had "verified that IPCs which were open at the end of the POI had been closed prior to verification," here, "there is no information on the record that indicates that the two IPCs at issue have been closed." 2nd Remand Results at 8; *see also Toscelik*, 348 F. Supp. 3d at 1327–28. Commerce explained further that credit for exempted duties in the form of a duty drawback adjustment will only be given upon evidence that the subject country's government has forgiven those duties. 2nd Remand Results at 9. Thus, Commerce stated, it "will not provide credit for an open IPC" because the record lacks evidence "that the Turkish government has forgiven the input import duty liability under those open

IPCs." *Id.* Commerce declined to adopt RTAC's methodology "because there is no statutory or regulatory basis for making such a cost-side adjustment," which amounts to "an artificial allocation of cost to compensate for the duty drawback adjustment to U.S. price." *Id.* at 8.

I. The Government's Request for a Remand to Include IPC # 36 in Habaş's Duty Drawback Adjustment Will be Granted

When an agency determination is challenged in the courts, the agency may "request a remand (without confessing error) in order to reconsider its previous position" and "the reviewing court has discretion over whether to remand." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted). Remand is appropriate "if the agency's concern is substantial and legitimate," but "may be refused if the agency's request is frivolous or in bad faith." *Id.*

Here, Commerce indicated that it intended to include closed IPCs in Habaş's duty drawback adjustment. 2nd Remand Results at 9. Commerce mistakenly believed, however, that the record lacked evidence demonstrating that IPC # 36 had been closed. *See id.*; Gov't's Reply at 5–6; Suppl. Questionnaire Resp. Concerning Duty Drawback of [Habaş] (Mar. 3, 2017), Ex. S4–2 at ECF p. 174, CR 364–74, RCJA Tab 6 (reflecting the closure of IPC # 36). The Government acknowledges that Commerce "mistakenly omitted" IPC # 36 from Habaş's duty drawback adjustment calculation. Gov't's Reply at 5–6. Correcting that mistake represents a "substantial and legitimate" concern for which the court will grant a remand. *See SKF USA*, 254 F.3d at 1029.

Cases relied on by RTAC to support its argument that Habaş has waived this claim are not persuasive in this regard. *See* RTAC's Reply at 6 (discussing *Changzhou Trina Solar Energy Co. v. U.S. Int'l Trade Comm'n*, 39 CIT ___, ___, 100 F. Supp. 3d 1314, 1347 n.40 (2015); *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002); *Ad Hoc Comm. of AZ-NM-TX-FL Prods. of Gray Portland Cement v. United States*, 19 CIT 929 (1995); and *Pomeroy Collection, Ltd. v. United States*, 37 CIT ___, ___, 893 F. Supp. 2d 1269, 1283 (2013)). It is not the case that Habaş raised this argument for the first time in a reply, thereby depriving other parties of the opportunity to respond. *See Changzhou Trina*, 100 F. Supp. 3d at 1347 n.40; *Novosteel SA*, 284 F.3d at 1274; *Pomeroy Collection*, 893 F. Supp. 2d at 1284. The *Ad Hoc Committee* court's finding that an argument was untimely is based on the party's change to a previously asserted position. 19 CIT at 929.

RTAC also fails to persuade the court to apply the doctrine of laches. RTAC's Reply at 8. The doctrine of laches may apply when there is "(1) inexcusable delay on the part of the claimant; and (2)

prejudice to [the opposing party] as a result of such delay." *Pepper v. United States*, 794 F.2d 1571, 1573 (Fed. Cir. 1986) (citation omitted). RTAC points to no specific prejudice resulting from Habaş's delay. *See* RTAC's Reply at 8 (referring generally to the need to defend this aspect of Commerce's calculations after Habaş's delay); *cf. Pepper*, 794 F.2d at 1575 (listing "such problems as difficulty in finding witnesses and documents" or "difficulty in reviving fading memories" as the types of prejudice that may bar litigation of "stale claims"). While efficiency considerations and the preservation of resources would benefit from Habaş's increased diligence in uncovering and raising its challenges to the *Final Determination*, here, Habaş did object to the exclusion of IPC # 36, Commerce erred in its response, and the record is such that Commerce can readily correct that error and amend Habaş's duty drawback adjustment. Indeed, Commerce wishes to do so.

RTAC's remaining challenges to Commerce's inclusion of IPC # 36 lack merit. *See* RTAC's Reply at 10–12 (averring that confining inclusion of IPCs in margin calculations to those that closed during the POI is consistent with Commerce's practice and there is insufficient evidence that Commerce verified the closure of IPC # 36). In this proceeding, Commerce indicated its intent to include IPCs upon evidence of closure, 2nd Remand Results at 8–9, and the agency is satisfied with the record evidence establishing that IPC # 36 was closed prior to verification, Gov't's Reply at 5–6. Accordingly, the court will remand this aspect of Commerce's determination.

II. Commerce's Exclusion of IPC # 1598 is Supported by Substantial Evidence

With respect to IPC # 1598, Habaş argues that although it was not closed prior to verification, the reasoning behind *Toscelik* still applies. Habaş's Opp'n at 9–10. Habaş also finds support in *Habaş I*, asserting that the opinion "envisions that the respondent will be credited with all duties rebated on all its U.S. POI exports." *Id.* at 9 (citing *Habaş I*, 361 F. Supp. 3d at 1322). Habaş argues further that "Commerce acted arbitrarily and capriciously in failing to consider the reasonableness of Habaş's allocation [methodology]." *Id.*

Toscelik cannot fairly be read to support the proposition that Commerce must include all IPCs reflecting POI exports in its margin calculations regardless of whether record evidence demonstrates closure. 348 F. Supp. 3d at 1325 (finding critical to its analysis the fact that "Commerce collected and verified information on all of the [IPCs] submitted by [the plaintiffs] (regardless of whether the [IPCs] closed within the POI or not) for the amount of [the plaintiffs] uncollected import duties") (emphasis omitted).

Notably, the court rejected the Government's argument that "it would be impracticable for Commerce to rely on information concerning [IPCs] closed after the POI" because Commerce verified "all the closed IPCs." *Id.* at 1327 (citation and internal quotation marks omitted). Thus, the court rejected Commerce's POI limitation as "unreasonably undercut[ting] its stated goals of accuracy, transparency, and predictability by *ignoring verified record information*." *Id.* at 1328 (emphasis added). Accordingly, *Toscelik* does not support the inclusion of IPC # 1598 in Habaş's adjustment.

Habaş errs further in seeking to rely on *Habaş I*. Habaş's Opp'n at 9. There, the court addressed Commerce's allocation of Habaş's exempted duties over total production. *Habaş I*, 361 F. Supp. 3d at 1322–24. Thus, its statements regarding application of the full duty drawback adjustment were made in that context and cannot be extended to cover an entirely distinct claim. *See id.* at 1323.

Lastly, while Commerce did not explicitly reference its consideration of Habaş's allocation methodology, its rationale for rejecting that methodology is discernible to the court. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (providing that a court may sustain an agency decision when its explanation may not "be perfect" but "the path of [its] decision [is] reasonably discernable") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Commerce explained that eligibility for inclusion in the adjustment is based on the existence of record evidence establishing that the IPC has closed, which demonstrates that "the Turkish government has forgiven the duty liability." 2nd Remand Results at 9. Commerce reasonably predicates its inclusion of IPCs on evidence of closure as demonstrating final duty exemption; thus, Commerce was within its discretion to decline to adopt or further address Habaş's method of calculating duties conditionally exempted under open IPCs. Accordingly, this aspect of Commerce's determination is sustained.

III. Commerce Reasonably Rejected RTAC's Proposed Methodology

RTAC argues that Commerce's rationale for rejecting its methodology is "unpersuasive" because its proposed methodology "is approved by the *Saha Thai* court—that of imputing duty costs sufficient to ensure that" normal value is increased by an amount equal to the duties included in export price. RTAC's Opp'n at 10.

Missing entirely from RTAC's comments is any reference to the court's standard of review. The court may not disturb the agency's determination unless it is unsupported by substantial evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

Commerce found RTAC's methodology to be unsupported by statute or regulation and RTAC has failed to demonstrate to the court that Commerce's finding was not in accordance with law. While *Saha Thai* supports the imputation of duty costs to the cost of production based on the actual amount of exempted duties, it does not support—or require—an adjustment based on an artificial inflation of that amount. 635 F.3d at 1344 (explaining that "Commerce only added imputed import duty costs to [cost of production] in an amount appropriate to offset [the respondent's] *actual* import duty exemptions") (emphasis added); *see also* Habaş's Reply at 1–4 (arguing that RTAC's methodology would increase its cost of production by an amount that is greater than the amount of exempted duties). Accordingly, RTAC's challenge to the 2nd Remand Results lacks merit.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's 2nd Remand Results are remanded for Commerce to include IPC # 36 in its duty drawback calculations; it is further

ORDERED that Commerce's 2nd Remand Results are otherwise sustained; it is further

ORDERED that Commerce shall file its remand redetermination on or before July 1, 2020; it is further

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

ORDERED that any comments or responsive comments must not exceed 3,000 words.

Dated: April 17, 2020
New York, New York

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

Slip Op. 20–52

SHAKE AND SHINGLE ALLIANCE, Plaintiff, and GOVERNMENT OF CANADA, Plaintiff-Intervenor, v. United States, Defendant, and COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00228

[Sustaining the U.S. Department of Commerce's remand redetermination as to the scope ruling on certain cedar shakes and shingles.]

Dated: April 20, 2020

Heather Jacobson, Junker & Nakachi P.C., of Seattle, WA, for Plaintiff Shake and Shingle Alliance.

Eric S. Parnes, *Joanne E. Osendarp*, *Daniel M. Witkowski*, and *Stephen R. Halpin III*, Hughes Hubbard & Reed LLP, of Washington, D.C., for Plaintiff-Intervenor Government of Canada.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

David A. Yocis, *Lisa W. Wang*, *Whitney M. Rolig*, and *Zachary J. Walker*, Picard, Kentz & Rowe LLP, of Washington, D.C., for Defendant-Intervenor Committee Overseeing Action for Lumber International Trade Investigations or Negotiations.

OPINION

Choe-Groves, Judge:

The court revisits the decades-long dispute over Canadian softwood lumber in this case. Specifically, the court reviews here whether the scope of the U.S. Department of Commerce's ("Commerce") antidumping and countervailing duty orders on certain softwood lumber products from Canada cover certain cedar shakes and shingles ("CSS"). *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 350 (Dep't Commerce Jan. 3, 2018) (antidumping duty order and partial amended final determination) ("AD Order") and *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 347 (Dep't Commerce Jan. 3, 2018) (amended final affirmative countervailing duty determination and countervailing duty order) ("CVD Order") (collectively, "Orders").

Before the court are the Final Results of Redetermination Pursuant to Court Remand Order, ECF No. 58 ("*Remand Results*"), filed by Commerce per the court's opinion, *Shake and Shingle Alliance v. United States*, 43 CIT __, 415 F. Supp. 3d 1249, 1260 (2019) ("*Shake and Shingle Alliance I*"). Commerce reversed its prior determination and found in the *Remand Results* that CSS were outside the scope ofthe order, and the court sustains Commerce's *Remand Results*.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in *Shake and Shingle Alliance I* and recites the facts pertinent to the court's review of the *Remand Results*.

Commerce issued the Orders on January 3, 2018. AD Order, 83 Fed. Reg at 350; CVD Order, 83 Fed. Reg. at 347. The Orders contained identical scope language describing the subject merchandise:

> The merchandise covered by this order is softwood lumber, siding, flooring and certain other coniferous wood (softwood lumber products). The scope includes:
>
> • Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.
>
> • Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.
>
> • Coniferous drilled and notched lumber and angle cut lumber.
>
> • Coniferous lumber stacked on edge and fastened together with nails, whether or not with plywood sheathing.
>
> • Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above.

Finished products are not covered by the scope of [the Orders]. AD Order, 83 Fed. Reg. at 351; CVD Order, 83 Fed. Reg. at 349. In its final scope ruling, Commerce determined that the scope of the Orders covers CSS. *Shake and Shingle Alliance I*, 415 F. Supp. 3d at 1255 (citing Final Scope Ruling – Cedar Shakes and Shingles, A-122–857/C-122–858, at 1, PD 18 (Sept. 10, 2018) ("Final Scope Ruling")). Plaintiff Shake and Shingle Alliance ("Plaintiff") and Plaintiff-Intervenor Government of Canada ("Plaintiff-Intervenor") challenged the Final Scope Ruling to this court. Pl. Mot. for J. on Agency R., ECF No. 35; Pl-Int. Rule 56.2 Mot. for J. on Agency R., ECF No. 36.

This Court held that Commerce's finding that the scope of the Orders covers CSS was not in accordance with the law and remanded

the case to Commerce. *Shake and Shingle Alliance I*, 415 F. Supp. 3d at 1260. The court reasoned that Commerce's Final Scope Ruling was contrary to the controlling regulation, 19 C.F.R. § 351.225(k)(1), because Commerce's analysis of the (k)(1) criteria lacked consideration of prior softwood lumber proceedings or prior scope determinations in which Commerce found CSS distinct from softwood lumber since at least 1983.[1] *Id.* at 1259 (noting the extensive history of softwood lumber proceedings spans five investigations and two international agreements and "that past proceedings involved the same subject [merchandise] (softwood lumber) and country (Canada) and included scope language substantively identical to the current scope language[]"). The court concluded that Commerce's "passing reference to the history of contrary prior softwood lumber investigations in its Final Scope Ruling" was not in accordance with the methodology set forth in Commerce's own regulations. *Id.* at 1259–60.

Commerce issued the *Remand Results*, finding that CSS fall beyond the scope of the Orders, on February 13, 2020. *Id.* at 1. Defendant United States ("Defendant"), Plaintiff, and Plaintiff-Intervenor urge the court to sustain the *Remand Results* because Commerce's analysis in the *Remand Results* complies with the court's remand order. *See* Def. Cmts. in Supp. of the Remand Results 1–2, ECF No. 60 ("Def. Cmts."); Pl. Cmts. in Supp. of Final Remand Results 5, ECF No. 61 ("Pl. Cmts."); Pl.-Int. Cmts. in Supp. of the Remand Results 3, ECF No. 62 ("Pl.-Int. Cmts."). No party, including Defendant-Intervenor Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("Defendant-Intervenor" or "Petitioner"), filed comments opposing the *Remand Results*. For the following reasons, the court sustains the *Remand Results*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court will uphold Commerce's final scope determination, including redeterminations made on remand, unless the findings are unsupported by substantial record evidence, or are otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

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[1] The framework for evaluating the scope of an order is set forth in Commerce's regulations. Under 19 C.F.R. § 351.225(k), Commerce must consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." *Id.* § 351.225(k)(1). If Commerce "can determine, based solely upon the application [for a scope ruling] and the descriptions of the merchandise referred to in [19 C.F.R. § 351.225(k)(1)], whether a product is included within the scope of an order . . . , [then Commerce] will issue a final ruling . . . ." *Id.* § 351.225(d).

DISCUSSION

Commerce's *Remand Results* are consistent with the court's prior opinion and order in *Shake and Shingle Alliance I*. Commerce reversed its conclusion in the *Remand Results* and explained its reconsideration of the same record evidence, in light of reviewing the parties' comments and binding precedent from the U.S. Court of Appeals for the Federal Circuit in *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F. 3d 82, 88–89 (Fed. Cir. 2012) ("*ArcelorMittal*"). *Remand Results* at 4. Commerce found that the final "scope language from *Lumber IV* and the Orders is unquestionably similar and, in the portions relevant to the scope issue at hand, virtually identical." *Id.* at 8; *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (Dep't Commerce May 22, 2002); *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,070 (Dep't Commerce May 22, 2002) (together, "*Lumber IV*"). Commerce interpreted the scope language in *Lumber IV* to exclude CSS because the applicable tariff heading, 4418.50.00, Harmonized Tariff Schedule of the United States, covered "articles of shingles and shakes," which were "not covered by the scope of these investigations." *Remand Results* at 8–9. When comparing the current scope language at issue here against Commerce's prior determination in *Lumber IV* treating CSS as outside the scope, Commerce concluded that its prior determination "weighs heavily in favor of a determination in this proceeding that CSS is not subject to the Orders." *Id.* at 9.

Commerce found that specific language and an exhibit included in the petition—a (k)(1) source of information—showed that Defendant-Intervenor lacked an intent to include CSS as subject to the scope of the Orders. *See id.* at 9–10 (analyzing language in the petition that "the remainder [of certain timber] is used in veneer, oriented strand board ('OSB'), pulp, shake and shingle, and other mills that generally produce merchandise not subject to this Petition[]")[2] and 9–11 (discussing an exhibit attached to the petition that listed shake and

[2] Commerce cited the following language in the petition as support that Defendant-Intervenor described CSS as non-subject merchandise:

> Overall, of the timber harvested in BC from all sources (Crown and private), sawmills use 70.6 percent (41.3 percent on the Coast and 82.2 percent in the Interior), while 10.1 percent is exported (29.7 percent on the Coast and 2.4 percent in the Interior) and *the remainder is used in veneer, oriented strand board ("OSB"), pulp, shake and shingle, and other mills that generally produce merchandise not subject to this Petition*.

Remand Results at 9 (citing Petition, Vol. III at 10)

shingle mills as examples of mills in British Columbia that produce allegedly non-subject merchandise).[3] Importantly, Commerce disclaimed its prior reasoning for considering and rejecting Plaintiff and Plaintiff-Intervenor's arguments that the language Defendant-Intervenor used in the petition and attached exhibit supported a finding that CSS fall outside the scope of the Orders. *Compare Remand Results* at 10–11 *with* Final Scope Ruling at 18.

Commerce provided a reasonable explanation that binding precedent in *ArcelorMittal* compelled reviewing "prior interpretations" of "identical scope language" in previous orders when issuing a scope ruling. *Remand Results* at 4, 8–9. Commerce also relied upon record evidence in explaining why the language and supporting exhibit Defendant-Intervenor included with the petition "persuade[d] Commerce to conclude that, at the time the Petition was filed, [Petitioner] did not consider shakes and shingles to be subject to the investigations and Orders." *Id.* at 10. The court concludes that the *Remand Results* are supported by substantial evidence and in accordance with the law because Commerce's (k)(1) analysis, citations to record evidence, and explanation supports a finding that the scope of the Orders excludes CSS. *See* Final Scope Ruling at 12 ("[W]e have determined that the factors in 19 CFR 351.225(k)(1) are dispositive as to whether CSS are subject merchandise."); *Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007) (To be dispositive, the (k)(1) sources Commerce examined "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question.").

Although the parties challenged Commerce's findings at the administrative level, no party filed comments challenging the *Remand Results* before the court. *See generally* Def. Cmts. at 2; Pl. Cmts. at 5; Pl.-Int. Cmts. at 2. Because the court concludes that the *Remand Results* comply with the court's remand order, the court sustains the *Remand Results*.

CONCLUSION

The court sustains the *Remand Results*.

Judgment will be entered accordingly.

Dated: April 20, 2020
New York, New York

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

[3] *Id.* (citing Petition, Vol. III at 10).

Slip Op. 20–53

NATURAL RESOURCES DEFENSE COUNCIL, INC., CENTER FOR BIOLOGICAL DIVERSITY, AND ANIMAL WELFARE INSTITUTE, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, CHRIS OLIVER, in his official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 18–00055

[The court lifts its previously issued preliminary injunction and, in accordance with the stipulation, grants the motion for voluntary dismissal.]

Dated: April 22, 2020

Giulia C.S. Good Stefani and *Vivian Wang*, Natural Resources Defense Council, of Santa Monica, CA, for argued plaintiffs. With them on the stipulation and proposed order of voluntary dismissal was *Sarah Uhlemann*, of Seattle, WA, for plaintiffs, Center for Biological Diversity, and Animal Welfare Institute.

Stephen C. Tosini, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With him on the stipulation and proposed order of voluntary dismissal were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Jason Forman*, National Oceanic and Atmospheric Administration, of Silver Spring, MD.

OPINION AND ORDER

Katzmann, Judge:

Today, April 22, 2020, marks the 50th anniversary of Earth Day, a date that is often remembered as the birth of the modern environmental movement. Today, as humankind is gripped by the deadly coronavirus pandemic, an ever present, brutal reminder of mortality, the court is presented again with the dire plight of the vaquita, the world's smallest porpoise on the verge of extinction. Endemic to the northern Gulf of California, in the Sea of Cortez in Mexican waters, this panda of the sea, measuring only about five feet long and weighing one hundred pounds, has seen its population plummet from 567 in the late 1990s, when it was first surveyed, to approximately fifteen today. It is undisputed that the vaquita is being caught inadvertently and tangled, strangled and drowned in the gillnets, which are fishing nets hung in the water to entangle fish and shrimp. It is undisputed

that the primary threat to the vaquita is gillnet fishing within the vaquita's range. It is undisputed that the vaquita may soon disappear from the planet forever.

In an effort to avert such a catastrophe, the instant case was filed. In response to that action, brought by Plaintiffs, Natural Resources Defense Council ("NRDC"), Center for Biological Diversity ("CBD"), and Animal Welfare Institute ("AWI") against Defendants (several United States agencies and officials, collectively "the Government") pursuant to the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §1371 (a)(2), the court issued a preliminary injunction requiring the Government, pending final adjudication of the merits, to ban the importation of all fish and fish products from the four specified Mexican commercial fisheries — shrimp, curvina, chano and sierra — that use gillnets within the vaquita's range, unless affirmatively identified as having been caught with a gear type other than gillnets or affirmatively identified as having been caught outside the vaquita's range. While the Government has fully implemented the preliminary injunction, it also sought, unsuccessfully, to overturn it. Now, as this case headed for final adjudication by the court, the Government has changed course, announcing an embargo that embraces the one sought by Plaintiffs in their complaint and preliminarily issued by the court; indeed, it expands its reach. In short, Plaintiffs have achieved the outcome they sought before the court in the suit they filed. Presented for the court's review is the settlement of the instant litigation as set forth in the Stipulation and Proposed Order of Voluntary Dismissal Under CIT Rule 41(a)(2), Apr. 10, 2020, ECF No. 112 ("Stipulation and Proposed Order"), filed by the parties. The court addresses below the Stipulation and Proposed Order.

BACKGROUND AND DISCUSSION

The essential facts in this case are not in dispute. The vaquita, one of seven species of porpoise worldwide, was listed as an endangered species in 1985. *Endangered Fish or Wildlife; Cochito*, 50 Fed. Reg. 1056 (Jan. 9, 1985) (codified at 50 C.F.R. § 17.11). The vaquita is an evolutionarily distinct animal with no close relatives, whose loss would represent a disproportionate loss of biodiversity, unique evolutionary history, and the potential for future evolution. Jefferson Decl. ¶ 5, Mar. 19, 2018, ECF No. 14–4. It has been listed by the Zoological Society of London as a top Evolutionarily Distinct and Globally Endangered species, a list reserved for those species that are especially "unique . . . [and] when they are gone there will be nothing like them left on earth." *Id.* Its range in the northern Gulf of California is approximately 4,000 square kilometers and as relevant to this case,

overlaps with commercial fisheries that target shrimp, curvina, chano, and sierra, and with an illegal fishery targeting the endangered totoaba. Jefferson Decl. ¶ 6; Compl. ¶¶ 35, 43, 51, Mar. 21, 2018, ECF No. 1. Notwithstanding that the Mexican government banned fishing for the totoaba, regardless of equipment, in 1975, Good Stefani Decl. Ex. 10, Gov't of Mexico Sept. 21, 2017 Letter to NOAA Fisheries, at 2, because of high demand for the fish's swim bladder on the Chinese black market, poachers continue to illegally hunt for the fish, often with gillnets, Good Stefani Decl. Ex. 42, Comité Internacional para la Recuperación de la Vaquita ("CIRVA")[1] 10th Meeting Report, (Dec. 11–12, 2017).[2] Both Plaintiffs and the Government agree that, though the vaquita is not a target of Mexican fishermen, it is threatened and inadvertently killed by gillnets[3] deployed to capture these other species with which it shares its territory. The parties also agree that the vaquita is on the verge of extinction as a result.

The relevant legal and factual background of the prior proceedings has been set forth in greater detail in *Natural Resources Defense Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1338 (2018). The court has exclusive jurisdiction over any civil action arising out of any law of the United States providing for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety," such as those prescribed by the MMPA. 28 U.S.C. § 1581(i)(3); *see also Earth Island Institute v. Brown*, 28 F.3d 76, 79 (9th Cir. 1994) ("[Plaintiffs'] suit under the MMPA is an action arising under a law providing for embargoes. As such, it is reserved to the exclusive jurisdiction of the

[1] Meaning the "International Committee for the Recovery of the Vaquita."

[2] "The totoaba cartels specialize in the poaching and trafficking of totoaba swim bladders — the bottom half of the supply chain. The chain starts in the villages of San Felipe and Santa Clara along the Gulf of California coast, but moves quickly to central smuggling operations in cities like Tijuana and Mexicali. [The Elephant Action League] has found that these cartels are led primarily by three Mexican criminals who fund the Mexican poachers, and then sell the swim bladders to a group of well-connected Chinese traders and businessmen residing in Mexico. It is those Chinese traders that facilitate the smuggling of totoaba maws to China – the top of the supply chain." Elephant Action League, "Operation Fake Gold: The Totoaba Supply Chain" (July 2018) at 2447, A.R. 89.

[3] A gillnet is a wall of netting that fishermen hang vertically in the water column to catch target species. Jefferson Decl. ¶ 11. Gillnets come in various mesh sizes, and fishermen use them actively or set them with weights and buoys for later retrieval. Accordingly, gillnets kill species indiscriminately, except insofar as a given animal would not be of a size that would be caught in the webbing. *Id.* ¶ 12. In the United States, the use of gillnets is tightly regulated and banned in many areas. Oppenheim Decl. ¶¶ 15–17, Mar. 29, 2018, ECF No. 14–6. The Mexican government declared a temporary ban on some gillnet use within the vaquita's range in 2015. Good Stefani Decl. Exs. 1–2, 2015 Temporary Gillnet Ban and English Translation (Oct. 4, 2015).

CIT."). Over the last two years, the saga of the vaquita has been presented to this court in vigorously contested litigation, as addressed in three opinions. *See Natural Resources Defense Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1338 (2018) ("*NRDC I*"); *Natural Resources Defense Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1381 (2018) ("*NRDC II*"); *Natural Resource Defense Council, Inc. v. Ross*, 42 CIT __, 348 F. Supp. 3d 1306 (2018) ("*NRDC III*").

On March 21, 2018, Plaintiffs brought a two-count suit in this court against the Government for agency action unlawfully withheld or unreasonably delayed under § 706(1) of the Administrative Procedure Act ("APA") and pursuant to the MMPA.[4] *NRDC I*, 331 F. Supp. 3d at 1352. The MMPA provides in relevant part that the Government "shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2); *see also NRDC I*, 331 F. Supp. 3d at 1346. Plaintiffs alleged that the vaquita, an endangered species of porpoise of which fewer than fifteen remain, faces extinction due to gillnet fishing in the small area in the northern Gulf of California it inhabits. *See NRDC I*, 331 F. Supp. 3d at 1344, 1351 n.11. They contended that the failure of the Government to ban imports of fish harvested with gillnets from the vaquita's habitat constituted agency action unlawfully withheld or unreasonably delayed under the APA and MMPA. *Id.* at 1352.

On July 26, 2018, the court granted Plaintiffs' motion for a preliminary injunction "requiring the Government, pending final adjudication of the merits, to ban the importation of all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range." *Id.* at 1371–72. The court noted that "[w]hile [P]laintiffs and the Government argue about remedy, what cannot be disputed is that the vaquita's plight is desperate, and that even one more bycatch death in the gillnets of fisheries in its range threatens the very existence of the species." *Id.* at 1371. Furthermore, "[i]n granting the preliminary injunction ordering the embargo set forth in the statute, the court is simply directing compliance with a Congressional

[4] Plaintiffs' First Claim for Relief alleged that the Government's failure to ban imports of fish caught with gillnets in Mexico's northern Gulf of California violated section 101(a)(2) of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1371(a)(2), because shrimp, curvina, sierra, and chano fish caught with gillnets incidentally injure or kill the endangered vaquita porpoise in excess of United States standards, *see* Compl. ¶¶ 57–59; and Plaintiffs' Second Claim for Relief alleged that the Government's failure to insist on reasonable proof from the Mexican government regarding the effect of the use of gillnets in Mexican fisheries on the vaquita violated section 101(a)(2)(A) of the MMPA, 16 U.S.C. § 1371(a)(2)(A), *see* Compl. ¶¶ 61–65. On July 26, 2019, with the agreement of the parties, the court dismissed Plaintiffs' Second Claim for Relief as moot. *NRDC I*, 331 F.3d at 1356 n.12.

mandate that an import ban be imposed where marine mammals are killed at unsustainable rates because of commercial fishing technology used to catch other species." *Id.* "The public interest is served by ensuring that governmental bodies comply with the law." *Id.* (quoting *Am. Signature, Inc. v. United States*, 598 F.3d 816, 830 (Fed. Cir. 2010)).

On August 14, 2018, in response to the Government's Motion to Clarify, Aug. 3, 2018, ECF No. 34, which sought to limit the preliminary injunction, the court affirmed its original import ban, stating that its order made clear that the Government was "enjoined and ordered to ban the importation from Mexico all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range." *NRDC II*, 331 F. Supp. 3d at 1383. On August 24, 2018, the Government filed a notice of appeal of this court's preliminary injunction to the Court of Appeals for the Federal Circuit. ECF No. 42. Although the Government had fully implemented the ban ordered by the preliminary injunction, it filed motions to stay the injunction pending appeal with both this court and the Federal Circuit. Aug. 24, 2018, ECF No. 43; *Natural Resources Defense Council, Inc. v. Ross*, No. 18–2325 (Fed. Cir. Oct. 22, 2018), ECF No. 24. Those motions were denied on October 22, 2018 and November 28, 2018, respectively. *NRDC III* 348 F. Supp. 3d 1306; Order Denying Mot. to Stay, *Natural Resources Defense Council, Inc. v. Ross*, No. 18–2325 (Fed. Cir. Nov. 28, 2018), ECF No. 47 (per curiam).

On November 27, 2018, the National Marine Fisheries Service ("NMFS") issued its determinations on whether to impose an embargo on each of the four fisheries challenged by Plaintiffs. Decision Memorandum Regarding Comparability Findings for the Government Mexico's Fisheries in the Upper Gulf of California and Attachments (NOAA Nov. 27, 2018), Amended A.R. 103. NMFS imposed an import prohibition on curvina fish and fish products harvested in a curvina fishery. *Id.* Under a new Mexican regulatory scheme, this curvina fishery was the only fishery in the vaquita's range of the Gulf of California in which gillnets were allowed to be used. Def.'s Mot. to Dismiss as Moot at 5, Dec. 4, 2018, ECF No. 72. Thus, the Government explained, it declined to impose an embargo on the shrimp, chano, and sierra fisheries in the vaquita's range. *Id.* On December 4, 2018, the Government moved this court to dismiss Plaintiffs' action as moot. *Id.*

In its motion to dismiss, the Government claimed, notwithstanding that it had not effectuated the relief sought by Plaintiffs, that its decisions constituted final agency actions; consequently, it argued that the court could no longer grant the remedy sought by Plaintiffs

under APA § 706(1) and therefore Plaintiffs' claim was moot. *Id.* The Government further contended that because the purpose of a preliminary injunction is to preserve the status quo of the parties until a trial on the merits can be held, and there can be no trial on the merits of a moot claim, the court was required to vacate its preliminary injunction. *Id.* at 6.

In their brief filed on January 18, 2019, Plaintiffs argued that their claims related to the shrimp, sierra, and chano gillnet fisheries were not moot because the Government's actions did not comply with the MMPA's mandate that the Government shall ban imports of fish from fisheries that do not meet U.S. standards, and no exception to the relevant MMPA provision is made based on removal from the List of Foreign Fisheries. *See* Pls.' Opp'n to Def.'s Mot. to Dismiss as Moot at 11, Jan. 18, 2019, ECF No. 78. *See also NRDC II*, 331 F. Supp. 3d. at 1386 n.4. Plaintiffs also contended that their claim regarding the curvina fishery was not moot because the Government's determination was not equivalent to the comprehensive import ban on all gillnet curvina fisheries within the vaquita's range that the MMPA requires and that Plaintiffs sought. *Id.* at 15–16. Plaintiffs claimed that the preliminary injunction must remain in effect because the vaquita remained imperiled and the alternative measures taken or promised by the governments of the United States and Mexico were unlikely to halt the import of the fish in question. *Id.* at 17.

In its reply brief filed on January 23, 2019, the Government contended that Plaintiffs' arguments against its motion to dismiss as moot were in fact arguments about the substance of the Government's final actions that must be challenged under 5 U.S.C. § 706(2), not § 706(1). *See* Def.'s Reply in Supp. of Their Mot. to Dismiss as Moot at 1, Jan. 23, 2019, ECF No. 79. The Government also asserted that, although it bears the burden as the movant to show that Plaintiffs' claim is moot, the burden of proof remains with Plaintiffs as the parties seeking to invoke jurisdiction. *Id.* at 2 (citation omitted). According to the Government, the court's power to compel agency action under § 706(1) does not include the power to substitute the court's discretion for that of the agency in determining what form of action is most appropriate. *Id.* at 4 (citation omitted). Moreover, the Government contested Plaintiffs' assertions about the efficacy of the embargo in place on fish from the curvina fishery and of Mexico's regulatory scheme more broadly. *Id.* at 6–7. Citing the ongoing harm to the Government resulting from the preliminary injunction, the Government requested an expedited ruling. *Id.* at 7.

Oral argument on the issue was held on April 30, 2019. ECF No. 87. Upon consideration of the pleadings and oral argument, the court

stayed all proceedings pending the Federal Circuit's determination on appeal of the preliminary injunction. Order to Stay Proceedings, May 3, 2019, ECF No. 90. On appeal, the Federal Circuit did not reach the merits of the preliminary injunction. Rather, the Federal Circuit remanded to this court to review in the first instance the new factual circumstances put forth by the Government in its motion to dismiss as moot and to determine whether they altered the basis for the preliminary injunction. *Natural Resources Defense Council, Inc. v. Ross*, 774 Fed. Appx. 646, 649 (Fed. Cir. 2019). The Federal Circuit directed that the preliminary injunction "remain in force pending further determination." *Id.*

With the case returned to this court for the final adjudication of the merits, the court posed detailed questions to the parties regarding the motion to dismiss as moot. Order for Suppl. Brs., Jan. 24, 2020, ECF No. 102. Events would prove it unnecessary for the parties to respond to those questions. Although the Government had consistently objected on the merits of the import ban ordered by the court's preliminary injunction, it changed course. On March 9, 2020, the Government — specifically the National Oceanic and Atmospheric Administration ("NOAA") of the Department of Commerce —published a Federal Register notice stating the Government of Mexico "lack[s] . . . a regulatory program comparable in effectiveness to the U.S. regulatory program for mitigating fishery bycatch of marine mammals" and "has failed to fully implement and enforce its existing laws and regulatory regime including the existing gillnet ban." *Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act* – Notification of Revocation of *Comparability Findings and Implementation of Import Restrictions; Certification of Admissibility for Certain Fish Products From Mexico*, 85 Fed. Reg. 13,626, 13,627–28 (Mar. 9, 2020) ("Notification of Revocation"). The notice announced, among other actions, that "the Secretary of Commerce, in cooperation with the Secretaries of Treasury and Homeland Security" will "immediately ban the importation from Mexico of all shrimp, curvina, sierra, chano" and certain other fish and their products that are "caught with gillnets inside the vaquita's range under section 101(a)(2) of the MMPA (16 U.S.C. § 1371(a)(2))." *Id.* The embargo announced in the notice thus bans the four fisheries at issue in Plaintiffs' first claim for relief under section 101(a)(2) of the MMPA. *See* Compl. ¶¶ 57–59. Indeed, not only does the embargo encompass the ban ordered by the court in the preliminary injunction (in response to the Plaintiffs' claims for relief), but it expands the reach of that ban to include "anchovy, herrings, sardines, mackerels

croaker, and pilchard fish and fish products . . . caught inside the vaquita's range under section 101(a)(2) of the MMPA [16 U.S.C. 1371 (a)(2)]." *Notification of Revocation* at 13,628.

CONCLUSION

On April 10, 2020, the parties filed their Stipulation and Proposed Order, setting forth for the court's review the settlement of the instant litigation. There, the parties noted that: (1) the March 9, 2020 Federal Register notice specified the import restrictions would become effective April 3, 2020, and as of that date, the Government has embargoed all shrimp, curvina, sierra, and chano fish and fish products caught with gillnets inside the vaquita's range; and (2) the parties "have reached an agreement as to Plaintiffs' claims for attorney fees and litigation costs in this case pursuant to which Plaintiff NRDC agrees to bear its own attorneys' fees and costs, and the United States agrees to pay Plaintiffs CBD and AWI a total of $35,000.00 in full and complete satisfaction of any and all claims, demands, rights, and causes of action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), the [Endangered Species Act], 16 U.S.C. § 1540(g), and/or any other statute and/or common law theory for attorneys' fees and costs incurred through and including the date of this agreement in connection with this litigation." Stipulation and Proposed Order at 2–3 (citations omitted). With the Government acceding to the relief sought by Plaintiffs in their complaint and provided by the court's preliminary injunction — indeed now expanding the breadth of the embargo — Plaintiffs seek voluntary dismissal of this action without prejudice pursuant to Court of International Trade Rule 41(a)(2).

Rule 41(a)(2) states that a plaintiff can request the voluntarily dismissal of an action "by court order, on terms that the court considers proper." CIT R. 41(a)(2). The court conducted a hearing regarding the Proposed Order via teleconference on April 21, 2020. ECF No. 114 (also available at U.S. Court of International Trade, *Audio Recordings of Select Public Court Proceedings*, https://www.cit.uscourts.gov/audio-recordings-select-public-court-proceedings). After due consideration, the court lifts the preliminary injunction it had issued in this case and grants the request to voluntarily dismiss this action without prejudice. It also directs that the Government shall pay Plaintiffs CBD and AWI a total of $35,000.00 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). As requested, the court retains jurisdiction to enforce the Government's payment obligations under the parties' agreement on attorneys' fees and costs associated with this case. The Order is issued below.

The road to this day has been a tortuous one. The vaquita remains an endangered species; every death brings it perilously close to disappearing from the planet forever. The illegal trade in the totoaba, caught in gillnets which catch and strangle the vaquita, is a matter not before this court — but the need for vigorous international enforcement against its continuing threat is a compelling one. On this Earth Day, as we ponder the imperatives of biodiversity and the environment, we would do well to heed the sobering words of Rachel Carson: "So delicately interwoven are the relationships that when we disturb one thread of the community fabric we alter it all — perhaps almost imperceptibly, perhaps so drastically that destruction follows."[5] The panda of the sea, the little cow, cannot be replaced.

For the reasons stated, the Order of Voluntary Dismissal is granted as requested.

SO ORDERED.

Dated: April 22, 2020
New York, New York

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

[5] Rachel Carson, *Essay on Biological Sciences*, *in* Good Reading (Atwood Townshend & J. Sherwood Weber eds., 1958).

NATURAL RESOURCES DEFENSE COUNCIL, INC., CENTER FOR BIOLOGICAL DIVERSITY, AND ANIMAL WELFARE INSTITUTE, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, CHRIS OLIVER, in his official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 18–0005518–00055

ORDER OF VOLUNTARY DISMISSAL UNDER CIT Rule 41(a)(2)

This matter came before the court on a Stipulation and Proposed Order of Voluntary Dismissal Under CIT Rule 41(a)(2), April 10, 2020, ECF No. 112 ("Stipulation and Proposed Order"), filed jointly by Plaintiffs Natural Resources Defense Council, Inc.; Center for Biological Diversity ("CBD"); and Animal Welfare Institute ("AWI"); and Defendants Wilbur Ross, in his official capacity as Secretary of Commerce; United States Department of Commerce; Chris Oliver, in his official capacity as Assistant Administrator of the National Marine Fisheries Service; National Marine Fisheries Service; Steven Mnuchin, in his official capacity as Secretary of the Treasury; United States Department of the Treasury; Chad Wolf, in his official capacity as Acting Secretary of Homeland Security; and United States Department of Homeland Security.

The Stipulation and Proposed Order present terms that the court deems proper. It is hereby **GRANTED AS REQUESTED**, and this matter is dismissed without prejudice. Defendants shall pay Plaintiffs CBD and AWI a total of $35,000.00 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). The court retains jurisdiction to enforce Defendants' payment obligations under the Parties' agreement on attorneys' fees and costs associated with this case.

SO ORDERED.

Dated: April 22, 2020
New York, New York

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

Slip Op. 20–54

JINDAL POLY FILMS LIMITED OF INDIA, Plaintiff, v. UNITED STATES, Defendant, and DUPONT TEIJIN FILMS et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 19–00050

[Sustaining Commerce's final determination in its 2016 administrative review of the countervailing duty order on polyethylene terephthalate film, sheet, and strip from India.]

Dated: April 22, 2020

Lizbeth R. Levinson, *Ronald M. Wisla*, and *Brittney R. Powell*, Fox Rothschild LLP, of Washington, D.C., for plaintiff Jindal Poly Films Limited of India.

Joseph H. Hunt, Assistant Attorney General, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Sonia M. Orfield*, Trial Attorney. Of counsel on the brief was *Michele D.* Lynch, Assistant Chief Counsel, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce.

Patrick J. McLain, *Sarah S. Sprinkle*, and *Stephanie E. Hartmann*, Wilmer, Cutler, Pickering, Hale and Dorr, LLP, of Washington, D.C., for defendant-intervenors DuPont Teijin Films, Mitsubishi Polyester Film, Inc. and SKC, Inc.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on motion for judgment on the agency record. *See* Pl.'s 56.2 Mot. J. Agency Rec., Oct. 1, 2019, ECF No. 38. Plaintiff Jindal Poly Films Limited of India ("Jindal"), a foreign producer and exporter of polyethylene terephthalate ("PET") film, sheet, and strip, challenge various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in its administrative review of the countervailing duty ("CVD") order on PET film, covering the period of review January 1, 2016 to December 31, 2016 ("POR"). *See [PET] Film, Sheet, and Strip from India*, 84 Fed. Reg. 10,789 (Dep't Commerce Mar. 22, 2019) (final results of [CVD] admin. review; 2016) ("*Final Results*"), and accompanying Issues and Decision Memo. for the [Final Results], C 533–825, (Mar. 19, 2019), ECF No. 26–5.

Jindal challenges four aspects of Commerce's determination as unsupported by substantial evidence and not in accordance with law. *See* Pl.'s Memo. of Points and Authorities Supp. Pl.'s 56.2 Mot. J. Agency Rec. at 2, Oct. 1, 2019, ECF No. 38–2 ("Pl.'s Br."). First, Jindal contends that Commerce erroneously included benefits received on

both subject and non-subject merchandise in its calculation of countervailable benefits under the Government of India's ("GOI") Merchandise Exports from India Scheme ("MEIS"). *Id.* at 2, 6–8. Second, Jindal argues that Commerce failed to determine whether the State Government of Maharashtra's ("SGOM") Package Scheme of Incentives ("PSI") constitutes a subsidy to a disadvantaged region. *Id.* at 2, 8–13. Third, Jindal alleges that Commerce should not have determined that certain capital investment deductions, under subsection 32AC(1A) of Section 32 Capital Investment Deductions of India's Income Tax Act of 1961 ("Subsection 32AC program"), were specific based on adverse facts available, when Jindal had provided sufficient information during the review to demonstrate that the deduction is not specific. *Id.* at 2, 13–17. Fourth, Jindal avers that because it had purchased goods from suppliers exempt from the requirement of collecting taxes under state laws ("state tax incentive programs"), Commerce erred in determining that these programs provided a benefit to Jindal. *Id.* at 2, 17–18. For the reasons set forth below, the court sustains Commerce's *Final Results* in its entirety.

BACKGROUND

On September 13, 2017, Commerce initiated an administrative review of the CVD order on PET film from India. *See Initiation of Antidumping and [CVD] Admin. Reviews*, 82 Fed. Reg. 42,974, 42,982 (Dep't Commerce Sept. 13, 2017). Subsequently, on August 10, 2018, Commerce issued the preliminary results of its administrative review. *See [PET] Film, Sheet and Strip from India*, 83 Fed. Reg. 39,677 (Dep't Commerce Aug. 10, 2018) (prelim. results and partial rescission of [CVD] admin. review) ("Prelim. Results"), and accompanying Decision Memo. for the [Prelim. Results], PD 93, bar code 3739891–02 (Aug. 3, 2018) ("Prelim. Decision Memo.").[1]

Relevant here, in the preliminary results, Commerce determined that three programs of the GOI—the MEIS, PSI, and state sales tax programs—provided countervailable subsidies. Prelim. Decision Memo. at 20, 24–27. With respect to the MEIS program, in which the GOI issues a duty scrip to exporters to be applied to the payment of future customs duties or transferred to another company, Commerce calculated Jindal's rate by dividing benefits received by total export sales during the POR. *Id.* at 6, 20. Commerce also preliminarily countervailed the PSI program that provides incentives to encourage

[1] On June 26, 2019, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination, on the docket, at ECF No. 26–2–3. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices.

economic development within the State of Maharashtra, *id.* at 24, as well as state tax incentive programs, which allow selected industries in certain regions to sell goods without charging or collecting sales taxes, *id.* at 26–27. However, Commerce required further information to determine whether the Subsection 32AC program was countervailable. *Id.* at 28.

On February 25, 2019, Commerce issued a post-preliminary analysis memorandum, where it found that the GOI had withheld requested information concerning, inter alia, the Subsection 32AC program and, as a result, applied adverse facts available ("AFA")[2] to determine de facto specificity. *See* Post-Prelim. Analysis Memo. at 3–6, 9–10, PD 136, bar code 3797273–01 (Feb. 25, 2019).

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a (2012),[3] and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review final determinations in a CVD administrative review. "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).

DISCUSSION

I. Commerce's Calculation of Benefit Under the MEIS Program

Jindal alleges that Commerce erroneously calculated benefit from the MEIS program based on benefits received on sales of both subject and non-subject merchandise. Pl.'s Br. at 6–8; *see also* Pl.'s Reply Br. at 6–7, Jan. 17, 2020, ECF No. 45 ("Pl.'s Reply Br."). Instead, according to Jindal, Commerce should have calculated benefits received only in connection with subject merchandise. Pl.'s Br. at 7–8. Defen-

[2] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b). The phrase "total adverse inferences" or "total AFA" encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available.

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. 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 ("TPEA"). *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

dant and Defendant-Intervenors counter that Commerce's reasonably calculated benefit, because benefits under the MEIS program were not tied to subject merchandise. Def.'s Br. at 7–9; Def.-Intervenors' Br. at 5–6. For the reasons that follow, Commerce's reasonably calculated benefit under the MEIS program.

Generally, Commerce's subsidy attribution depends upon the type of subsidy and whether it is tied to a particular market or product. 19 C.F.R. § 351.525 (2018). However, if a firm produces more than one product, Commerce will attribute the subsidy only to sales of a particular product if the subsidy is tied to the production or sale of only that product. *See id.* at § 351.525(b)(5).[4] Neither the statute nor Commerce's regulation defines when a subsidy is tied to the production or sale of a particular product. *See* 19 U.S.C. § 1677(5)(E)(iv); 19 C.F.R. §§ 351.525(b)(2), (b)(5). Commerce, as a matter of practice, determines whether a subsidy is tied by evaluating the purpose of the subsidy based on information available at the time of bestowal; Commerce does not trace how the subsidy is actually used by recipients. *See* Final Decision Memo. at 19; *see also Large Residential Washers From the Republic of Korea*, 77 Fed. Reg. 75,975 (Dep't Commerce Dec. 26, 2012) (final affirmative [CVD] determination), and accompanying Issues and Decision Memo. for the Final Determination in the [CVD] Investigation of Large Residential Washers from the Republic of Korea at 41, C-580–869, (Dec. 18, 2012), *available at* https://enforcement.trade.gov/frn/summary/korea-south/2012–31078–1.pdf (last visited Apr. 14, 2020)).

Here, Commerce reasonably attributes the amount of benefit from the MEIS program to all of Jindal's export sales of subject and non-subject merchandise. Under the MEIS program, the GOI issues a duty scrip, or credit, to licensed exporters that can be applied to the payment of future customs duties or transferred to another company. *See* Prelim. Decision Memo. at 18. Because the actual scrip amount, i.e., the amount of benefit, is not known until export sales are made,[5] Commerce considers the date that the GOI issued the MEIS license to be the date of bestowal. *See* Prelim. Decision Memo. at 20; Final

[4] Likewise, if a subsidy is an export subsidy Commerce will attribute it to only exports. *See id.* at § 351.525(b)(5).

[5] Under the MEIS program, an eligible exporter files an application, with supporting documentation and up to 50 shipping bills, to obtain an MEIS license. *See* Prelim. Decision Memo. at 19. The GOI issues a duty scrip worth one, three, or five percent of the lesser of either the FOB value of exports in free foreign exchange or the FOB value in the shipping bills in free foreign exchange. *Id.* (citing Jindal Poly Questionnaire Resp. at 94–97, CD 9, barcode 3660266–01 (Jan. 10, 2018)). After receiving and registering a scrip, the recipient may freely transfer it to another company or apply it to payment of future customs duties. *Id.*

Decision Memo. at 19; *see also Countervailing Duties*, 63 Fed. Reg. 65,348, 65,403 (Dep't Commerce Nov. 25, 1998) (explanation of final rules). The MEIS license does not restrict the merchandise to which an exporter could apply the scrip. *See* Final Decision Memo. at 19. Therefore, at the point of bestowal, the amount foregone by the GOI was the value of the MEIS license, regardless of the fact that the license was later used for subject and non-subject merchandise. *Id.* Even though Jindal could identify which scrips were used for export sales of subject merchandise, *see* Jindal Poly Initial Questionnaire Resp. at Exs. 91–92, CD 48–49, bar codes 3660266–40–41 (Jan. 10, 2018), and of non-subject merchandise, *see* Jindal Poly Second Supp. Questionnaire Resp. at Exs. 115–116, CD 82, bar code 3735042–01 (July 25, 2018), Commerce's practice is not to post hoc "trace the use of subsidies" through records. *See Countervailing Duties*, 63 Fed. Reg. at 65,403; *cf. Royal Thai Gov't v. United States*, 30 CIT 1072, 1085, 441 F. Supp. 2d 1350, 1363–64 (2006). Therefore, Commerce did not err in determining that the GOI provided a subsidy not tied to the production or sale of a particular product and reasonably calculated Jindal's CVD rate based on benefits received for both subject and non-subject merchandise.

II. Commerce's Application of AFA to Determine De Facto Specificity of the Subsection 32AC program

Jindal argues that Commerce's application of AFA to find the Subsection 32AC program de facto specific is unsupported by substantial evidence and contrary to law. *See* Pl.'s Br. at 13–17; *see also* Pl.'s Reply Br. at 4–6. Further, according to Jindal, Commerce's reliance on AFA "penalize[s]" Jindal for the GOI's failure to cooperate. *See* Pl.'s Br. at 16; *see also* Pl.'s Reply Br. at 5–6. Defendant and Defendant-Intervenors respond that Commerce appropriately relied on AFA and argue Jindal's suggestion that the application of AFA punishes Jindal is misplaced. *See* Def.'s Br. at 15–19; Def.-Intervenors' Br. at 7–10. For the reasons that follow, Commerce's use of facts available with an adverse inference is supported by substantial evidence and in accordance with law.

Commerce has discretion to use facts otherwise available to make determinations where, inter alia, "necessary information is not available on the record" or a party "withholds information that has been requested by [Commerce] . . . , fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . , [or] significantly impedes a proceeding[.]" 19 U.S.C. § 1677e(a). If Commerce additionally "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . , [Commerce], in reaching

the applicable determination . . . , may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" to fill the factual gaps in the record. *Id.* at § 1677e(b)(1); *see also Nan Ya Plastics Corp., Ltd. v. United States*, 810 F.3d 1333, 1338 (Fed. Cir. 2019). A respondent cooperates to the "best of its ability" when it "has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Notwithstanding Commerce's discretion to employ AFA in certain situations, Commerce's AFA determination must be supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

Commerce reasonably applied facts otherwise available because it found that necessary information was not on the record for it to determine whether the Subsection 32AC program was specific within the meaning of 19 U.S.C. § 1677(5A). In its initial questionnaire, Commerce requested the GOI to coordinate with respondent companies and report any other subsidy programs, not specifically examined, used by these companies. *See* Letter from [Commerce] to Embassy of India Pertaining to GOI/Jindal/SRF Questionnaire at II-18, PD 21, bar code 3645037–01 (Nov. 27, 2017). Although both mandatory respondents Jindal and SRF reported participating in the Subsection 32AC program, the GOI stated that it "is not aware of any other schemes availed by the Mandatory Respondents." *Compare* SRF Supp. QR at 14–16, PD 84, bar code 3733852–01 (July 23, 2017); Jindal Poly Second Supp. QR Resp. at 2–3, CD 82, bar code 3735042–01 (July 25, 2018) ("Jindal SQR"); *with* GOI Sec. II QR Resp. at 96, CD 64, bar code 3661496–01 (Jan. 16, 2018). After indicating that more information was needed with respect to the program, *see* Prelim. Decision Memo. at 28, Commerce subsequently issued two supplemental questionnaires to the GOI.

However, in response to each, the GOI failed to fully answer Commerce's specific inquiries that pertain to whether the program is de facto specific. *See* GOI Second Supp. QR at 28–40, CD 97, bar code 3751378–01 (Sept. 5, 2018) ("GOI Second SQR"); GOI Third SQR at 31–41, CD 102, bar code 3758147–01 (Oct. 1, 2018) ("GOI Third SQR"). By statute, Commerce discerns de facto specificity from the presence of one or more factors: (1) whether the actual number of recipients are limited; (2) whether an enterprise or industry is a predominant user of the subsidy; (3) whether an enterprise or industry receives a disproportionally large amount of subsidy; and, (4) whether the authority favored an enterprise or industry in its deci-

sion to grant a subsidy. *See* 19 U.S.C. § 1677(5A)(D)(iii). Commerce asked the GOI to provide the total amount of assistance for each mandatory respondent as well as for all companies, the total number of companies approved for assistance, and the total number of companies that applied for, but were denied, assistance. *See* GOI Second SQR at 36–37; *see also* GOI Third SQR at 40–41. The GOI replied that "[t]he details with respect to the mandatory respondents is provided in response to this questionnaire[,]"[6] did not provide any information about third companies, and otherwise maintained that data on the program was not "maintained in a centralized format." GOI Second SQR at 37; GOI Third SQR at 40–41. The GOI's response did not equip Commerce with the information necessary to make a de facto specificity finding. Therefore, Commerce reasonably filled in missing information with facts otherwise available.[7]

Further, Commerce's application of an adverse inference in selecting among facts otherwise available is reasonable, because the GOI did not act to the "best of its ability" when it failed to provide requested information. Repeatedly, Commerce requested that the GOI provide complete responses to its questions pertaining to the Subsection 32AC program. *See, e.g.*, Letter from Commerce Pertaining to GOI 2nd Supp. Questionnaire, PD 99, bar code 3746828–01 (Aug. 22, 2018) ("[P]lease describe . . . assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the [listed appendices]."); Letter from Commerce Pertaining to GOI 3rd Supp. Questionnaire, PD 118, bar code 3754436–01 (Sept. 17, 2018) ("As previously requested, please provide a full narrative response to [questions about the Subsection 32AC program]."). Commerce also warned that failing to provide the requested information could result in the application of AFA. *Id.* Despite repeated opportunities, the GOI did not notify Commerce, and explain why, it could not

[6] The GOI appears to refer to its response, where it lists the amount of assistance approved to the two mandatory respondents. *See* GOI Second SQR at 37; GOI Third SQR at 34.

[7] Jindal avers that Commerce had the requisite information to make a de facto specificity determination and points to its accounting of the benefits received under the Subsection 32AC program. *See* Pl.'s Br. at 13–15 (citing Jindal SQR at 2–4, Ex. 105). However, that information submitted by Jindal concerns only its own use of the program. Jindal SQR at 2–4, Ex. 105. To the extent that Jindal describes how the program works, that information relates primarily to a determination of de jure specificity, i.e., the availability of the subsidy to potential users. *Id.* at 2–4; *see also* 19 U.S.C. § 1677(5A)(D)(i)–(ii) (A subsidy is specific as a matter of law "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." A subsidy is not specific as a matter of law if "eligibility is automatic," "the criteria or conditions for eligibility are strictly followed," and "the criteria or conditions are . . .capable of verification.") By contrast, a de facto specificity determination concerns the actual recipients of the subsidy and the amount of support received. *See* 19 U.S.C. § 1677(5A)(D)(iii). Jindal's own use of the program says nothing about the use of the program by other recipients.

provide information in the form and manner requested.[8] *See* 19 U.S.C. § 1677m(c). To avoid the risk of an adverse inference, the GOI must "put forth maximum effort to investigate and obtain all requested information." *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306 (Fed. Cir. 2014) (citing *Nippon Steel*, 337 F.3d at 1382). Here, as Commerce reasonably concluded, the GOI failed to act to the best of its ability, warranting the application of an adverse inference.

Given that the GOI, not Jindal, failed to cooperate, Jindal argues that the collateral application of AFA is not warranted and is punitive. *See* Pl.'s Br. at 16; Pl.'s Reply Br. at 5–6. However, the court cannot say that Commerce's use of AFA to calculate Jindal's CVD rate is unreasonable. It is an unfortunate consequence that a government's failure to cooperate impacts a respondent that had cooperated; therefore, to the extent it is able, Commerce must avoid this collateral effect in making its determination.[9] *See Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1212 n.10, 865 F. Supp. 2d 1254, 1262, n.10 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014); *see, e.g., Guizhou Tyre Co., Ltd. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1271 (2018) (noting that Commerce could have avoided the collateral application of AFA by verifying alternate information placed on the record by respondents, when the government failed to cooperate). Here, however, the record did not enable Commerce to do so. *See* Final Decision Memo. at 14, 24–25.

III. Commerce's Treatment of the PSI Program as a Countervailable Subsidy

Jindal alleges that Commerce erred in law by failing to consider whether an exception to countervailability under 19 U.S.C. § 1677(5B)(C) applies to the PSI program. *See* Pl.'s Br. at 8–9, 11–13. Jindal further avers that substantial evidence supports a determination that the PSI program was a nonspecific program that provided a subsidy in SGOM, an economically disadvantaged region, within the meaning of subsection (5B)(C). *See id.* at 10–11. Defendant and Defendant-Intervenors counter that Jindal never raised this argument during the administrative proceeding, and, therefore, failed to

[8] Eleven months elapsed from the time Commerce first issued the initial questionnaire to the GOI to the deadline for Commerce to respond to the third supplemental questionnaire. *See* GOI Second SQR; *see also* GOI Third SQR.

[9] Jindal's contention that Commerce's application of AFA "penalizes" Jindal for the GOI's inaction is misplaced. Commerce applies facts otherwise available, with an adverse inference, to fill in gaps in the record so that it may make a determination and encourage, in the future, cooperation of parties and their governments. *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); *see also Fine Furniture*, 865 F. Supp 2d at 1373 (noting that the collateral impact on a respondent may encourage the government to cooperate in future investigations so as to not harm industry).

exhaust its administrative remedies. *See* Def.'s Br. at 9–12; *see* Def.-Intervenors' Br. at 6–7. However, even if Jindal did not waive this argument, Defendant and Defendant-Intervenors contend that Jindal's arguments are premised on a misunderstanding of the statute. *See* Def.'s Br. at 9, 12–14; Def-Intervenors' Br. at 7. For the reasons that follow, Jindal failed to exhaust its administrative remedies by not raising its arguments concerning section 1677(5B)(C) in the underlying proceeding.

Parties are required to exhaust administrative remedies before the agency by raising all issues in their initial case briefs before Commerce. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (citing to 19 C.F.R. § 351.309(c)(2), (d)(2); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)); *ABB, Inc. v. United States*, 920 F.3d 811, 818 (Fed. Cir. 2019). However, the court has discretion not to require exhaustion of administrative remedies where a pure legal question arises. 28 U.S.C. § 2637(d); *see also Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007).[10] A pure legal question does not require additional factual development or resort to agency expertise for the court to dispose of this purely legal question. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003–04 (Fed. Cir. 2003); *see also Consol. Bearings Co. v. United States*, 25 CIT 546, 553–54, 166 F. Supp. 2d 580, 587 (2001), *rev'd* on other grounds, 348 F.3d 997 (Fed. Cir. 2003) (synthesizing from numerous decisions four non-exhaustive requirements for application of the "pure legal question" doctrine: (a) a new argument that is (b) purely legal and (c) does not require agency involvement or fact finding and (d) does not create undue delay) (internal citations omitted).

Here, the doctrine of exhaustion of administrative remedies precludes the court's review of Commerce's decision not to examine the applicability of 19 U.S.C. § 1677(5B)(C) to the PSI program. As Jindal concedes, it did not raise the argument in the administrative proceeding. *See* Pl.'s Reply Br. at 1–4. Further, none of the exceptions to the doctrine apply. Even though the applicability of section 1677(5B)(C) entails a legal question—of whether or not the PSI program constituted a noncountervailable subsidy—it also requires development of a factual record. *See* Pl.'s Reply Br. at 2–3. Section 1677(5B)(C) provides that "[a] subsidy provided, pursuant to a general framework of

[10] This Court has recognized other limited exceptions to the doctrine of exhaustion of administrative remedies such as: "where exhaustion would be 'a useless formality,' intervening legal authority 'might have materially affected the agency's actions,' . . .where 'clearly applicable precedent' should have bound the agency, or where the party 'had no opportunity' to raise the issue before the agency." *SeAH Steel Corp. v. United States*, 35 CIT 326, 329, 764 F. Supp. 2d 1322, 1325–26 (2011) (citing *Jiaxing Brother Fastener Co., Ltd. v. United States*, 34 CIT 1455, 1464–65, 751 F. Supp. 2d 1355–56(2010)).

regional development, to a person located in a disadvantaged region within a country shall be treated as noncountervailable, if it is not specific . . . within eligible regions and if [certain] conditions are met[.]" 19 U.S.C. § 1677(5B)(C). By its plain language, the provision's application is conditioned on a subsidy not being specific and on meeting certain conditions. *See id.* Those are factual determinations that require resolution by Commerce, not a pure legal question that could, at this juncture, invite the court's review. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003–04 (Fed. Cir. 2003). Given that Jindal failed to raise this issue to Commerce, the court will not now address that question here.[11]

IV. Commerce's Determination to Countervail Certain State Tax Incentive Programs

Jindal argues that Commerce erroneously treated Jindal as the recipient of benefits under certain state tax incentive programs rather than its suppliers. *See* Pl.'s Br. at 17–18. Defendant and Defendant-Intervenors counter that Jindal is precluded from raising this argument, because Jindal failed to raise this issue to Commerce during the administrative proceeding. *See* Def.'s Br. at 17–19; Def. Intervenors' Br. at 11. Jindal, again, failed to exhaust its administrative remedies.

Although Jindal contends that Commerce "was on full notice" that its suppliers and sellers, as opposed to Jindal itself, received benefits, Jindal's only discussion of this issue appears in its initial questionnaire response. *See* Pl.'s Reply Br. at 7 (citing Jindal Poly Questionnaire Resp. at 81–87, Ex. 88, CD 9, 45, barcodes 3660266–01, 3660266–37, Jan. 10, 2018 ("Jindal QR")). However, Jindal's questionnaire response merely explains that, in certain cases, its suppliers did not charge sales tax because of an exemption granted to the seller,[12] *see* Jindal QR at 81–87, and details purchases with the sales

[11] Although the court does not reach the issue, Defendant-Intervenors note 19 U.S.C. §1677(5B)(C) expired in 2000, 66 months after the WTO Agreement entered into force in January 1995. Def.-Intervenors' Br. at 7; *see also* 19 U.S.C. § 1677(5B)(G)("Subparagraphs (B), (C), (D), and (E) shall not apply on or after the first day of the month that is 66 months after the WTO Agreement enters into force[.]"); *AG der Dillinger Huttenwerke v. United States*, 28 CIT 94, 105–106, 310 F. Supp. 2d 13471358 (2004). Thus, Defendant-Intervenors argue Commerce had no statutory obligation to analyze the applicability of this provision, which is no longer in force. Def.-Intervenors' Br. at 7.

[12] Jindal invokes *Zhaoqing Tifo New Fibre Co., Ltd. v. United States*, 39 CIT __, 60 F. Supp. 3d 1328 (2015), to claim that an exception to the doctrine of exhaustion applies because Commerce was fully on notice that Jindal's suppliers, rather than Jindal itself, received benefits from certain sales tax exemption programs. *See* Pl.'s Reply Br. at 7. However, the facts of *Zhaoqing* are readily distinguishable. Although the court in *Zhaoqing* held that the exhaustion doctrine did not apply—with regard to alleged double-counting of certain energy costs in using different financial statements from the preliminary and final determinations—it also considered, arguendo, whether an exception would have applied

tax exemption and the amount of sales tax otherwise due. *Id.* at 82–87, 88. Given that Jindal neither applied for an exemption itself "nor is aware of the type of program[,]" it concludes that the sales tax exemption "cannot be a benefit enjoyed by Jindal." *Id.* at 81–82. A conclusory statement, without any further elaboration in the questionnaire response or in any other part of the record or proceeding, does not, as Jindal avers, "set forth this argument in detail[.]" *See* Pl.'s Reply Br. at 7. Jindal did not contest Commerce's preliminary determination that the sales tax exemption conferred a benefit and its calculation of Jindal's countervailable duty rate under the program, *see* Prelim. Decision Memo. at 27; *see also* Jindal Poly Case Br., PD 128, bar code 3765104–01 (Oct. 24, 2018), when it had an opportunity to do so. *See* 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results."). Jindal failed to alert Commerce to its position that the state tax incentive programs did not confer benefits, and, therefore, did not exhaust its administrative remedies such that the court will now review Jindal's claim.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's *Final Results* is sustained. Judgment will enter accordingly.

Dated: April 22, 2020
New York, New York

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

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were the doctrine applicable. *Id.*, 39 CIT at __, 60 F. Supp. 3d at 1350–51. The court explained that Commerce would have had an opportunity to consider the double-counting issue, because the domestic producer had warned Commerce of potential double-counting in connection to the financial statements in its case brief and, further, Commerce itself considered the potential for double-counting at least for some energy inputs in the proceeding. *Id.*, 39 CIT at __, 60 F. Supp. 3d at 1356. Here, Jindal's cursory reference to the alleged recipient of benefits in a questionnaire response is insufficient to put, as Jindal alleges, Commerce on "full notice of [Jindal's] position concerning the sales tax." Pl.'s Reply Br. at 7.