U.S. Court of International Trade

Slip Op. 22–104

VANDEWATER INTERNATIONAL INC., Plaintiff, and SIGMA CORPORATION, AND SMITH-COOPER INTERNATIONAL, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and ISLAND INDUSTRIES, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Court No. 18–00199

[Sustaining Commerce's *Remand Results*.]

Dated: September 8, 2022

Richard P. Ferrin, *D. Alicia Hickok*, and *Douglas J. Heffner*, Faegre Drinker Biddle & Reath, LLP of Washington, D.C., for Plaintiff Vandewater International, Inc.

Lucius B. Lau, *Walter Spak*, and *Ron Kendler*, White & Case LLP of Washington, D.C., for Plaintiff-Intervenor SIGMA Corporation.

Gregory S. McCue and *Zachary Simmons*, Steptoe & Johnson LLP of Washington, D.C., for Plaintiff-Intervenor Smith-Cooper International, Inc.

Joshua E. Kurland, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Saad Y. Chalchal*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, D.C.

Matthew J. McConkey, Mayer Brown LLP of Washington, D.C., for Defendant-Intervenor Island Industries.

OPINION

Gordon, Judge:

This action involves the scope of the antidumping duty order on Carbon Steel Butt-Weld Pipe Fittings ("BWPFs") from the People's Republic of China that covers:

> carbon steel butt-weld pipe fittings, having an inside diameter of less than 14 inches, imported in either finished or unfinished form. These formed or forged pipe fittings are used to join sections in piping systems where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (*e.g.*, threaded, grooved, or bolted fittings). Carbon steel butt-weld pipe fittings are currently classified under subheading 7307.93.30 of the Harmonized Tariff Schedule (HTS). Although the HTS subheading is provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, 57 Fed. Reg. 29,702 (Dep't of Commerce July 6, 1992) ("*China BWPFs Order*"). Plaintiff Vandewater International Inc. ("Vandewater") sought a scope ruling from the U.S. Department of Commerce ("Commerce") as to whether its products, steel branch outlets used to join sections in fire sprinkler systems, were covered by the *China BWPFs Order*. Commerce determined that these products were within the scope of the *China BWPFs Order*. *See Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China*, ECF No. 25–4 (Dep't of Commerce Sept. 10, 2018) (final scope ruling on Vandewater's steel branch outlets) ("*Final Scope Ruling*"). Plaintiff-Intervenors SIGMA Corporation ("SIGMA") and Smith-Cooper International, Inc. ("SCI") similarly sought scope rulings from Commerce excluding their respective outlet products from the *China BWPFs Order*. And, as with Vandewater, Commerce determined that SIGMA and SCI's outlet products were covered by the *China BWPFs Order*. *See Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China*, Court No. 19–00003, ECF No. 29–4 (Dep't of Commerce Dec. 11, 2018) (final scope ruling on SIGMA's fire-protection weld outlets); *Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China*, Court No. 19–00011, ECF No. 29–4 (Dep't of Commerce Dec. 10, 2018) (final scope ruling on SCI's cooplet weld outlets). Plaintiffs collectively now challenge Commerce's determinations that their respective outlet products fall under the scope of the *China BWPFs Order*.[1]

The court presumes familiarity with the history of this action. *See Vandewater Int'l, Inc. v. United States*, 44 CIT ___, 476 F. Supp. 3d 1357 (2020) ("*Vandewater I*"). In *Vandewater I*, the court held that "Commerce unreasonably concluded that the sources in 19 C.F.R. § 351.225(k)(1) were dispositive on the inclusion of Plaintiff's steel branch outlets within the *Order*," and remanded the matter to Commerce "to conduct a full scope inquiry and evaluate the factors under 19 C.F.R. § 351.225(k)(2)." *Vandewater I*, 44 CIT at ___, 476 F. Supp. 3d at 1359.

Before the court are Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 112 ("*Remand Results*"), filed pursuant to *Vandewater I*. On remand, Commerce "continue[d] to find that Vandewater's outlets are within the scope of the *China BWPFs Order* pursuant to an analysis under the (k)(2) criteria." *See Remand*

[1] Plaintiffs all commenced their own individual actions—Vandewater (Court No. 18–00199); SIGMA (Court No. 19–00003); and SCI (Court No. 19–00011). Because each action had its own administrative record, the court did not consolidate the three actions. However, for litigation efficiency, the court permitted SIGMA and SCI to intervene in this action and brief the merits.

Results at 2. Plaintiffs challenge that determination. *See* Comments of Vandewater in Opp'n to Commerce's Remand Redetermination, ECF No. 133 ("Vandewater Comments"); SIGMA's Comments in Opp'n to Remand Results, ECF No. 132 ("SIGMA Comments"); Comments of SCI in Opp'n to Commerce's Remand Redetermination, ECF No. 134 ("SCI Comments"); *see also* Defendant's Response to Comments on the Remand Results, ECF No. 144 ("Def.'s Resp."); Defendant-Intervenor's Response to Comments on the Remand Results, ECF No. 146. SCI's comments focused on challenging as unlawful Commerce's determination that it would "continue" to suspend liquidation of Plaintiffs' entries that pre-date the initiation of the underlying scope inquiry. *See* SCI Comments at 2–14. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi)[2], and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court sustains Commerce's analysis and scope determination in the *Remand Results*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, (1966).

Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2022). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2022).

II. Discussion

A. Framework of 19 C.F.R. § 351.225(k)

Scope proceedings are governed by 19 C.F.R. § 351.225. Commerce may self-initiate a scope proceeding, *see* § 351.225(b), or an interested party may submit a request for a scope ruling, *see* § 351.225(d). In determining whether a product is covered by the scope of an order, Commerce will consider the "language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of the merchandise expressly excluded from the scope, is dispositive." 19 C.F.R. § 351.225(k)(1). Additionally, Commerce may consider the following interpretive sources in making its determination—the descriptions of the merchandise contained in the petition pertaining to the subject order, the initial investigation, and Commerce's prior or concurrent determinations, including prior scope determinations pertaining to the subject order, and other orders with similar language, and determinations of the U.S. International Trade Commission ("ITC") regarding the subject order. § 351.225(k)(1)(i). If the (k)(1) sources are not dispositive, then Commerce is to conduct a full scope inquiry and consider the additional criteria in § 351.225(k)(2)—namely, (1) the product's physical characteristics, (2) ultimate purchasers' expectations, (3) the ultimate use of the product, (4) trade channels in which the product is sold, and (5) the manner in which the product is advertised and displayed. § 351.225(k)(2). At the conclusion of its scope inquiry, Commerce will issue a final scope ruling. § 351.225(h). As noted previously, the court, in *Vandewater I*, rejected Commerce's determination that the (k)(1) sources were dispositive, and directed Commerce to conduct a full scope inquiry and evaluate the additional criteria provided under § 351.225(k)(2). *See Remand Results* at 9–10.

B. Commerce's Analysis Under 19 C.F.R. § 351.225(k)(2)

After evaluating the (k)(2) criteria, Commerce determined that Vandewater's steel branch outlets are sufficiently similar to unambiguous examples of subject merchandise and that the record supported the determination that Vandewater's products fell within the *China BWPFs Order*. *See Remand Results* at 45–96. Specifically, Commerce found that:

(i) steel branch outlets possess physical characteristics that are similar to other subject merchandise because they are formed or forged, made of carbon steel, have a diameter of less than 14 inches, and are designed to have at least one end with a beveled edge for permanent attachment to a pipe or fitting (*id.* at 45–54);

(ii) the expectations of ultimate purchasers of steel branch outlets and other subject merchandise are similar because they expect both to be welded into permanent, fixed piping systems for gases or liquids, and fire sprinkler systems are a contemplated application for subject merchandise (*id.* at 54–57);

(iii) the ultimate uses of steel branch outlets and other subject merchandise are similar because both are permanently welded to piping systems to change or divide the flow of liquids, *e.g.*, redirecting water in an automatic fire sprinkler system (*id.* at 58–60);

(iv) steel branch outlets and other subject merchandise are sold in similar channels of trade because they are both sold through distributors and to fabricators and contractors (*id.* at 60); and

(v) steel branch outlets and other subject merchandise are similarly advertised and displayed in online catalogs (*id.* at 60–62).

Plaintiffs challenge Commerce's findings on each of the (k)(2) criteria as unreasonable. *See* Vandewater Comments; SIGMA Comments; SCI Comments.

1. Physical Characteristics

Commerce found that "the physical characteristics of outlets and BWPFs subject to the *China BWPFs Order* are similar." *Remand Results* at 45. Specifically, Commerce concluded that the scope language in the *China BWPFs Order* "indicates that subject merchandise must be formed or forged, made of carbon steel, and have a diameter of less than 14 inches." *Id.* Commerce further found that "to be an in-scope 'butt-weld pipe fitting,' the merchandise must be designed to have at least one end with a beveled edge, whether contoured or not, for permanent attachment to at least one pipe or fitting and may have a temporary connection on another end." *Id.* Based on the record, Commerce determined that Vandewater's outlets meet

these criteria. *Id.* at 46 ("the record demonstrates that Vandewater's outlets are consistent with BWPFs in terms of manufacturing method (*i.e.*, formed/forged), material (*i.e.*, carbon steel forged steel bars or welded pipe), and size requirements (*i.e.*, less than 14 inches in inside diameter). Like all BWPFs, the outlets feature a beveled edge for permanent attachment to a pipe or fitting.")).

Plaintiffs argue that the physical characteristics of subject BWPFs are distinct from Vandewater's outlets. Plaintiffs focus much of their argument, both in the proceeding below and in this action, on the differences between the physical characteristics of their outlets and the subject BWPFs, as this prong of the (k)(2) analysis is critical. *See* 19 C.F.R. § 351.225(k)(2)(ii) (providing that "[i]n the event of a conflict between the factors under paragraph (k)(2)(i) of this section, [the physical characteristics factor] will normally be allotted greater weight than the other factors").

a. End-to-End Connection

Plaintiffs first contend that a "butt weld is—by definition—an end-to-end welded connection," and maintain that Commerce cannot reasonably defend its finding that "contoured edges that connect to the midsection of a pipe [constitute] butt-weld pipe fittings." *See* Vandewater Comments at 3, 11. Plaintiffs further maintain that Commerce disregarded evidence supporting the conclusion that a BWPF is "intended to be an end-to-end connection." *See id.* at 9–11. They emphasize that information in the Petition, as well as the ITC's 2016 Sunset Review of the *China BWPFs Order*, supports their position. *Id.*; *see also Vandewater I*, 44 CIT at ___, 476 F. Supp. 3d at 1362 (agreeing with Plaintiffs that product descriptions of covered merchandise from 2016 ITC Sunset Review and Petition, particularly as to "beveling on both parts of the assembled piping," did not reasonably support Commerce's conclusion that (k)(1) sources dispositively demonstrated that steel branch outlets are covered by *China BWPFs Order*). With respect to the product catalogs and specification sheets relied on by Commerce, Plaintiffs argue that this "out-of-context" information cannot serve as a reasonable basis for Commerce's conclusion that BWPFs do not require end-to-end connections. *Id.* at 11–15. Plaintiffs stress that various distinctions in the wording and description of outlets as compared to BWPFs demonstrate that the sources relied upon by Commerce cannot reasonably provide a "sufficient basis for determining the meaning of a 'butt-welded' pipe fitting, as found within the scope." *Id.* at 12.

Plaintiffs also dispute Commerce's reading of the term "butt-weld" in those sources, maintaining that off-hand references to the term "butt-weld" is not indicative of industry recognition that outlets are BWPFs that would fall under the scope of the *China BWPFs Order*. *Id.* at 12–14. Ultimately, Plaintiffs ask the court to hold that Commerce erred in determining the meaning of "butt-weld" (*i.e.*, that BWPF may have a "contoured edge that connects [the product] to the midsection of the header or run pipe") on the basis of an inference from the use of that term in product catalogs and specification sheets found in the record. Instead, Plaintiffs would have Commerce determine that a BWPF may only involve an "end-to-end connection" on the basis of a reasonable inference from other information on the record, including the offered opinion of an expert submitted by Vandewater and the findings by the ITC in its 2016 Sunset Review. *Id.*

In rejecting Plaintiffs' arguments, Commerce found that "the record evidence establishes that products with a contoured edge that are designed to connect to the mid-section of a pipe can be BWPFs." *Remand Results* at 47. Specifically, Commerce found that "[i]n its product specification sheets, Aleum USA, a U.S.-based distributor of outlets, describes its female threaded outlet and grooved outlet as having "[b]utt welding ends." *Id.* (further noting that "[l]ike Vandewater's outlets, Aleum USA's outlets have one threaded or grooved end and a contoured edge on the other end that is connected to the middle of another pipe."). Commerce also highlighted that "[t]he exhibits accompanying the Petition included a product catalog from a U.S. producer of the domestic like product with illustrations of basic shapes of BWPFs (under the heading 'seamless welded fittings') and among them is a product that is referred to as a saddle, which, like Vandewater's outlets, has a contoured edge and is connected to the midsection of a pipe." *Id.* (adding that "the current version of the same U.S. producer's product catalog continues to include saddles as a type of 'seamless welded fitting,' and the product is displayed side-by-side with a full range of other BWPFs" and that "the product catalog for a major U.S. distributor of pipes and fittings also includes a saddle as one of the various 'standard butt weld fitting types.'"). Consequently, Commerce determined that "the contoured edge that connects Vandewater's outlets to the midsection of the header or run pipe is not a physical characteristic that distinguishes the outlets from BWPFs that are subject to the scope of the *China BWPFs Order*, such as saddles." *Id.* at 48. Given the record, the court cannot agree with Plaintiffs that Commerce's determination here was unreasonable.

Plaintiffs further contend that Commerce failed to appreciate the importance of the angle of the beveled edges in analyzing the physical characteristics of subject outlets and BWPFs. *See* Vandewater Comments at 11 (arguing that BWPFs are required to have end-to-end connections that "impact[ ] the very shape of the fitting itself, requiring ends that are beveled at a 37.5 degree angle"). To the contrary, Commerce found that the *China BWPFs Order* contains no specifications as to any particular bevel angle for subject BWPFs. Remand Results at 48.

Plaintiffs now argue that Commerce's reasoning is "detached from reality and the record evidence." Vandewater Comments at 11. The court disagrees. While Commerce agreed that the "Petition and prior ITC determinations state that the beveled edges of BWPFs distinguish BWPFs from other pipe fittings," Commerce highlighted that "none of these sources indicate that the edge must be beveled at a particular angle for the fitting to be considered a BWPF." *Remand Results* at 48. Commerce explained that adopting Plaintiffs' suggestion that a BWPF requires a specific bevel angle for proper installation would result in an "end-use requirement for subject merchandise" that would inappropriately be based on the "physical characteristics of the recipient pipe, rather than on the physical characteristics of the outlets in question." *Id.* at 49. Since Plaintiffs ultimately fail to demonstrate that Commerce's determination is unreasonable, the court rejects their arguments that Commerce did not reasonably account for the importance of the bevel angle in analyzing the subject outlets and BWPFs.

b. Forged Steel Fittings Comparison

Plaintiffs further maintain that Commerce's finding that a BWPF need not have an end-to-end connection is unreasonable in light of Commerce's finding in a prior proceeding that "butt weld fittings can only have butt welded end connections." *See* Vandewater Comments at 15–16 (quoting final scope decision memorandum from investigations of *Forged Steel Fittings from China, Italy, and Taiwan*, PR[3] 21 at Tab 8 (Dep't of Commerce July 13, 2018)). As Commerce explained, to qualify as "butt weld outlets" or "butt weld fittings" that would be excluded from the scope of the *Forged Steel Fittings* investigations, "butt weld outlets must be butt welded at both end connections to be excluded from the scope of the investigations." *Id.* at 15 (further quoting with emphasis Commerce's statement that "*[o]utlets with a socket-weld or threaded end connection, or with only one butt weld end*

[3] "PR ___" refers to a document contained in the public administrative record, which is found in ECF No. 131–1 unless otherwise noted.

connection, are not considered a butt weld fitting and, therefore, are not excluded from the scope of the investigations"). Plaintiffs maintain that Commerce's "detailed discussion" of the nature of butt weld fittings in that prior scope memorandum "should be the end of the matter" as "Vandewater's grooved and threaded welded outlets are not butt-weld pipe fittings because their end connections on the run side are grooved or welded, not butt-weld end connections." *Id.* at 16.

Plaintiffs' argument falls short, however, because the scope exclusion guidelines Commerce determined in the *Forged Steel Fittings* investigation do not neatly correspond to the scope of products covered under the *China BWPFs Order*. *See Remand Results* at 85 n.539 (noting that "construction of an exclusion in a separate proceeding is not determinative here" and further finding "that Vandewater's outlets do, in fact, feature a butt-welded connection to the run pipe."). As Plaintiffs acknowledge, Commerce found that products such as caps and lap joint stub ends, which would not meet the narrow definition of BWPFs under the *Forged Steel Fittings* exclusion guidelines, nevertheless are plainly within the scope of the *China BWPFs Order*. *See* Vandewater Comments at 16–17.

Plaintiffs argue that Commerce may not differ in defining what constitutes BWPFs in its *Forged Steel Fittings* analysis versus the (k)(2) analysis here. However, that argument ignores the different purposes and records undergirding the two analyses. As Commerce noted, accepting Plaintiffs' narrow definition of BWPFs and strictly abiding by the *Forged Steel Fittings* analysis would require it to ignore the product catalogs on the record that plainly support the finding that there is broader understanding of the term "butt-weld" and BWPFs intended to be covered by the *China BWPFs Order*. *See Remand Results* at 85. Accordingly, Commerce's analysis of butt weld fittings in the *Forged Steel Fittings* investigations does not control here, nor did Commerce act unreasonably in determining a broader definition for BWPFs in this matter than was used to determine scope exclusions in the *Forged Steel Fittings* investigations.

c. Product Comparisons

Much of the parties' disagreement about physical characteristics stems from Commerce's comparison of the subject outlets to other products described in the record that appear to be covered as BWPFs by the *China BWPFs Order*, including caps, lap joint stub ends, and saddles. *See Remand Results* at 83–89 ("We also find that outlets have a variety of characteristics in common with other common BWPFs, such as having one butt-welded end (similar to caps and lap joint stub ends) and also attach to a header pipe via a butt-weld (similar to

saddles).”). Though Plaintiffs maintain that various physical characteristics of outlets make them unique from BWPFs, Commerce addressed each potentially distinguishable physical characteristic raised and found that other products covered by the *China BWPFs Order* also had the physical characteristics that Plaintiffs claimed were exclusive to outlets and not found in BWPFs. Commerce explained why it rejected Plaintiffs’ preferred findings, noting that:

> this line of argument, downplaying the similarity between outlets and caps, for instance, reflects a broader flaw in the importers’ arguments throughout their comments – they continue to attempt to artificially narrow the scope of the *China BWPFs Order* by pointing to subsets of subject merchandise (or subsets of uses/expectation, as discussed below) in their analysis. This is incorrect. In our (k)(2) analysis, we must assess physical similarities between outlets and other in-scope merchandise; this includes cap, lap joint stub ends, elbows, and the variety of fittings that fall within the greater heading of BWPFs.

Remand Results at 88.

In their remand comments, Plaintiffs continue to attempt to distinguish subject outlets from caps, lap joint stub ends, saddles, and other similar products considered to be BWPFs based on their physical characteristics, *see* Vandewater Comments at 16–17, while maintaining that Commerce erred in assuming saddles to be BWPFs. *Id.* at 17–18 (“While it is dispositive that Vandewater’s threaded and grooved outlets have zero connections capable of being butt welded, it merits emphasis that a saddle is *not* a butt-weld pipe fitting.”).[4] In arguing that saddles are not a type of BWPF, Vandewater focuses on the distinct “function” of saddles from other BWPFs. In so doing, Vandewater fails to engage with evidence on the record plainly supporting Commerce’s finding that saddles are a type of BWPF. *See, e.g.*, *Remand Results* at 47 n.335 (noting that Petition identifies that “Butt-weld fittings come in several basic shapes: ‘elbows’, ‘tees’, ‘caps’, and ‘reducers’... Illustrations of the various types of butt-weld fittings are attached at Appendix B,” and that Appendix B includes “an illustration of ‘saddles’ as a type of BWPF”). Commerce specifically explained that it disagreed with “Vandewater[’s assertion] that saddles are not BWPF, and that it was merely coincidence that the

[4] Notably, here there appears to be some disagreement between Vandewater and SIGMA that saddles may constitute BWPFs. Vandewater maintains that saddles are not BWPFs, while SIGMA acknowledges that saddles are BWPFs, but does not agree that any physical similarities between outlets and saddles reasonably justifies a finding that outlets share the same physical characteristics as BWPFs. *See* Vandewater Comments at 17–18; SIGMA Comments at 7–8.

image of a saddle was included among BWPFs in the petition." *Id.* (explaining that "[t]he catalog page in the Petition displays numerous products that are unambiguously BWPFs, including products shown before and after saddles, *e.g.*, elbows," and further noting that "the subsection of the image containing the saddle illustration also contains an image of a cap, which is clearly an in-scope BWPF."). In light of the record, the court concludes that Commerce reasonably identified saddles as a type of BWPF that has physical characteristics comparable to the subject outlets.

d. Sperko Report

Plaintiffs also contend that Commerce failed to fully consider the report of Walter Sperko, President of Sperko Engineering Services, Inc., who provided his expert opinion in support of Plaintiffs' position that the subject outlets are not BWPFs. *See* Vandewater Comments at 3–9; *Remand Results* at 27 n.185 (identifying Mr. Sperko). Plaintiffs maintain that "Commerce's disregard of the substance and sources relied on in the Sperko Declaration, except for ... two offhand and inaccurate references ... show that Commerce's conclusion was not based on substantial evidence." Vandewater Comments at 9; *see also* SIGMA Comments at 7 ("the *Redetermination* contains no meaningful discussion of the expert report of Walter Sperko, P.E. – to which SIGMA, Vandewater, and SCI *all cited* in their comments prior to Commerce's issuance of the remand."). Plaintiffs' arguments, however, do not address other evidence on the record that supports Commerce's determination. As Commerce explained:

> Ultimately, the importers ask us to ignore the product catalog of Aleum USA and Bonney Forge (the latter of which was placed on the record by Vandewater) and to place greater weight on the expert affidavit provided in support of Vandewater's scope request and an affidavit placed on the record for the purpose of this litigation. We decline to do so, and we note that Commerce regularly considers whether documents are prepared in the ordinary course of business—or prepared specifically for the administrative proceeding—in determining the appropriate weight to accord to record evidence. Moreover, as discussed elsewhere in these final results, we find that portions of the affidavits support our conclusion regarding the scope status of Vandewater's outlets.

Remand Results at 85–86. While Plaintiffs criticize Commerce for failing to adopt the position recommended by Mr. Sperko, the court does not agree that Commerce "disregarded" or otherwise failed to

consider the information in the Sperko report. *See* Vandewater Comments at 4 n.2 (arguing that "Commerce addresses the Sperko Declaration only superficially in footnote 542..."). Rather, it appears that Commerce repeatedly referenced the Sperko report, highlighting that various aspects of the report actually supported Commerce's ultimate findings on the factors. *See, e.g.*, *Remand Results* at 49, 86, 88, 91.

As noted above, Commerce refused to afford dispositive weight to Mr. Sperko's views, explaining that the agency would not "place greater weight on the expert affidavit provided in support of Vandewater's scope request and an affidavit placed on the record for the purpose of this litigation" than on the other evidence on the record. *Id.* at 85–86. Plaintiffs maintain that Commerce unreasonably failed to credit Mr. Sperko's affidavit, despite its preparation in anticipation of litigation, as such a rationale is "inconsistent with Federal Rule of Evidence 702." *See* Vandewater Comments at 4–6. Plaintiffs offer no explanation, however, for why or how the Federal Rules of Evidence apply to Commerce's administrative determinations or its discretionary decision-making in determining the appropriate weight to accord the evidence on the record. *See id.* at 5 n.3 ("Although F.R.E. 702 is not binding on the factfinder here (Commerce), the underlying principles should guide Commerce, and this Court in its role in vetting Commerce's fact-finding for substantial evidence."). Accordingly, the court sustains Commerce's consideration of the Sperko report.

e. Industry Standards

Vandewater argues that "[t]hroughout the administrative proceeding, Vandewater has consistently emphasized that a critical difference between outlets and butt-weld pipe fittings is that outlets meet the MSS-SP-97 industry standard, which is different from the ANSI/ASME B16.9 specification that governs butt-weld pipe fittings." Vandewater Comments at 18–19. Commerce rejected Plaintiffs' proposed distinction of outlets from in-scope BWPFs on the basis of these different industry standards, finding that adopting Plaintiffs' position would give "undue significance" to these industry standards. *See Decision Memorandum* at 91. Commerce further noted that "MSS SP-97 is a 'non-exclusive standard' and, in fact, several aspects of the standard incorporate by reference the standards established by ASTM and ANSI/ASME." *Id.* at 94. Commerce emphasized that it found the two standards at issue to "reflect substantial overlap in terms of attributes, and in turn expectations, for outlets and BWPFs." *Id.* at 91.

Plaintiffs maintain that Commerce's conclusion that a product could conform to both ANSI/ASME B16.9 and MSS SP-97 standards "would render those standards meaningless," and is therefore unreasonable. *See* Vandewater Comments at 20; SIGMA Comments at 3–7 ("Industry standards exist to define distinct products; the idea that a product could conform to multiple industry standards, thereby recategorizing that product, would effectively render those standards meaningless."). Plaintiffs also highlight that Commerce has previously relied on distinctions in industry standards for excluding products from the *China BWPFs Order*. *See* SIGMA Comments at 5 (noting that "the CAFC has affirmed Commerce's reliance on discrete industry standards in a separate scope proceeding concerning the *exact same order* as the one at issue in this appeal" (citing *King Supply Co., LLC v. United States*, 674 F.3d 1343 (Fed. Cir. 2012))).

The court again disagrees. Plaintiffs' arguments reflect an unwillingness to engage with Commerce's uncontradicted finding that the MSS SP-97 is a "non-exclusive standard" with "substantial overlap" of the ANSI/ASME B16.9 standard. Though Plaintiffs are correct that Commerce has relied on industry standards as one relevant consideration in concluding that certain products should be included under the *China BWPFs Order*, Plaintiffs ignore the fact that Commerce also found that the merchandise at issue to be "physically identical to the products described in the first sentence of the [*China BWPFs Order*]." *See* SIGMA Comments at 5 (quoting *King Supply Co., LLC*, 674 F.3d at 1347). Additionally, while *King Supply* supports the proposition that Commerce does consider industry standards in reaching its determinations as to the scope of the *China BWPFs Order*, it does not support Plaintiffs' follow-on proposition that products that do not fall within the industry standards should automatically be excluded from the *China BWPFs Order*. *See id.* at 6 (arguing that "[i]t follows that, where a product is neither physically identical to the products described in the *Order*, nor produced according to these industry standards, it will *not* fall within the scope of the *Order*."). Ultimately, Plaintiffs urge the court to conclude that Commerce should have reached a different conclusion based on an inference that the different industry standards serve to establish distinct product categories. Commerce refused to draw Plaintiffs' preferred inference, and instead determined that the "substantial overlap" in the similarities of those standards did not support a distinction between the subject outlets and BWPFs. *Decision Memorandum* at 91, 94.

Plaintiffs offer what may well be a reasonable conclusion. This issue presents a close question. However, for Plaintiffs to establish that

Commerce's analysis of the physical characteristics of BWPFs and outlets was unreasonable, they must demonstrate that their preferred outcome was the "one and only reasonable" conclusion Commerce could reach in light of the record. *See Pokarna Engineered Stone Ltd. v. United States*, 45 CIT ___, ___ 547 F. Supp. 3d 1300, 1308 (2021) ("A party's ability to point to an alternative, reasonable finding on the agency record does not provide a basis for the court to set aside an agency's determination."); *see also Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (quoting *Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 229 (1938)). This Plaintiffs did not do. Accordingly, the court cannot agree that Commerce unreasonably rejected Plaintiffs' arguments seeking to distinguish outlets from BWPFs based on industry standards.

f. HTSUS Subheadings

Plaintiffs also challenge Commerce's finding that their outlets and BWPFs have similar physical characteristics even though their outlets are imported under a separate HTSUS subheading from BWPFs. *See Remand Results* at 54. Commerce first noted that "HTSUS subheadings listed in the scope are not dispositive." *Id.* (citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 687 (Fed. Cir. 1990), as well as the language of the *China BWPFs Order* stating: "Although the {HTSUS} subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive"). Commerce further explained that it did consider this distinction in HTSUS classifications in its analysis, but ultimately found that "the mere fact that Vandewater's outlets are imported under a different subheading within the same chapter and heading of the HTSUS as the subheading listed in the scope does not necessarily require Commerce to conclude that the outlets have physical characteristics that are distinguishable from subject merchandise." *Id.* While Commerce acknowledged that Plaintiffs' position was supported by a prior Customs Ruling, it determined that "in light of our broader analysis regarding physical characteristics of in-scope merchandise – including the characteristics of Vandewater's outlets in particular – [the] ruling does not warrant arriving at a different conclusion here." *Id.* Plaintiffs maintain that the HTSUS classifications are "corroborating evidence that confirms" the correctness of their position that outlets are outside of the scope of the *China*

BWPFs Order. *See* Vandewater Comments at 22. Thus, in Plaintiffs' view, Commerce unreasonably "disregard[ed]" the different HTSUS classifications in conducting its (k)(2) analysis. *Id.*

Plaintiffs' argument is not sustainable. Commerce expressly acknowledged that it considered the relevance of the different HTSUS classifications but concluded that this distinction was insufficient in light of the totality of the record to support a determination that "the outlets have physical characteristics that are distinguishable from subject merchandise." *See Remand Results* at 54. In reaching its conclusion, Commerce explained that "with respect to physical characteristics, we find that Vandewater's outlets are formed or forged, made of carbon steel, have a diameter of less than 14 inches, and have one butt-welded end with a beveled edge suitable for permanent attachment to a piping system that conveys gas or liquid. We also find that outlets have a variety of characteristics in common with other common BWPFs, such as having one butt-welded end (similar to caps and lap joint stub ends) and also attach to a header pipe via a butt-weld (similar to saddles)." *Remand Results* at 89. Thus, given the record, the physical characteristics factor supports the reasonableness of Commerce's scope determination.

2. Expectations of Ultimate Purchasers

Commerce found that "the ultimate purchaser's expectations regarding the uses of outlets and other BWPFs are similar." *Remand Results* at 55. Specifically, Commerce observed that "[b]oth outlets and BWPFs are used in fire sprinkler systems (among other types of piping systems), are subject to similar, and in some cases overlapping, industry standards, and are sold according to standard sizes." *Id.* at 57. Commerce also determined that "the record does not reveal that customers would have a significantly different expectation regarding the installation costs for outlets and BWPFs." *Id.* During the remand, Plaintiffs challenged the reasonableness of these findings, highlighting "four main expectations of ultimate purchasers that purportedly differ across the products: (1) compliance with a particular industry standard; (2) custom vs. standard sizing; (3) whether the product can be used in fire sprinkler systems; and (4) installation costs." *Id.*

Contrary to Plaintiffs' argument, Commerce found consistency across the expectations of ultimate purchasers of outlets and other BWPFs. Specifically, Commerce noted that "[o]utlets and other BWPFs are, similarly, expected to be welded into permanent, fixed piping systems for gases or liquids in plumbing, heating, refrigeration, air conditioning, and fire sprinklers systems." *Id.* at 90. Commerce further observed that "the fact that Vandewater's outlets have

a temporary connection on one end is not a feature that distinguishes outlets from other in-scope merchandise, and, therefore, does not change consumer's expectations regarding the product." *Id.* Commerce also rejected Vandewater's argument that Commerce should defer to the opinion of Vandewater's expert witness, Walter Sperko, "rather than the other sources on the record, such as the ITC report, to ascertain the expectations of consumers and users." *Id.* As noted previously, Commerce refused to afford significant weight to the expert opinion affidavit submitted by Vandewater, explaining that Commerce did not "find that the affidavit represents more reliable evidence than other record evidence...." *Id.*

Plaintiffs now challenge Commerce's finding that "*[o]utlets and other BWPFs are, similarly*, expected to be welded into permanent, fixed piping systems for gases or liquids," as unreasonable. *See* Vandewater Comments at 23 (quoting with emphasis *Remand Results* at 90). In particular, Vandewater contends that the record "demonstrates conclusively that Vandewater's outlets are used only for functions in which its customers do *not* want and cannot use permanent connections." *Id.* Vandewater further argues that "[t]he reason that outlets are used, and the reason that lower pressure is necessary, is because the outlets are used for functions such as sprinkler heads, which must be capable of removal and replacement. Butt-weld pipe fittings cannot be used for those functions." *Id.*

The court disagrees with Plaintiffs that Commerce's findings on this factor are unreasonable. Commerce concluded that the record did not support Vandewater's arguments. Rather, it found that "[a]lthough certain types of BWPFs may be designed to handle high-pressure systems, fire protection sprinkler systems are a contemplated application of BWPFs. This is the intended application for Vandewater's product. Therefore, we find that outlets and other BWPFs are, similarly, expected to be welded into permanent, fixed piping systems for gases or liquids in plumbing, heating, refrigeration, air conditioning, and fire sprinklers systems." *Remand Results* at 56. While Plaintiffs urged Commerce to focus on the prevalence of BWPFs in high pressure systems rather than low-pressure sprinkler systems, Commerce highlighted that "Vandewater itself acknowledges that '[s]ome sprinkler systems may, however, use butt-weld pipe fittings for the run pipes, to which the branch connections are attached.'" *Id.* As a result, Commerce reasonably found that Plaintiffs were "simply incorrect that BWPFs are used exclusively in high-pressure settings, while outlets are used in distinct, low-pressure piping systems." *Id.* at 56.

3. Ultimate Use

Commerce determined that "the uses of Vandewater's outlets and other BWPFs are similar." *Id.* at 58. Specifically, Commerce noted that "Vandewater's outlets are designed to be permanently welded to a fire sprinkler system, which is a recognized application for BWPFs subject to the scope of the *China BWPFs Order*. Furthermore, even though Vandewater emphasized that its outlets are designed for fire sprinkler systems, Vandewater acknowledges that other outlets with physical characteristics that are similar to its outlets are used in a range of applications, including those that the importers identify as fundamental BWPF uses, *e.g.*, piping connections used in the oil and gas industry." *Id.*

Plaintiffs challenge Commerce's finding as unreasonable, highlighting that the "ultimate purchasers of Vandewater's steel branch outlets are all fabricators of fire *sprinkler* systems." Vandewater Comments at 24 (further adding that "Commerce does not (and cannot) deny this fact."). Plaintiffs maintain that this detail is critical, as "no fire sprinkler uses any butt-weld pipe fittings for branch connections to sprinkler leads, because a butt-weld pipe fitting does not have the ability to accept a sprinkler head with threads." *Id.* Plaintiffs also emphasize that the ITC "has explained the use and expectation of ultimate users of butt-weld pipe fittings by stating that '[b]utt-weld pipe fittings are used to connect pipe sections where conditions require permanent, welded connections.'" *Id.* (citing 2016 ITC Sunset Review at I-4).

Commerce acknowledged that Vandewater's outlets are designed for a specific use within fire sprinkler systems, but found that BWPFs are also used in fire sprinkler systems and that the minor difference in specific uses within a sprinkler system did not indicate a significant difference in the ultimate use of subject outlets as compared to BWPFs. *Remand Results* at 58–59 ("Such use variation is found throughout the range of BWPFs"). In disagreeing with Plaintiffs that the ITC's findings support a distinction between outlets and BWPFs, Commerce highlighted that the ITC found that BWPFs are commonly found in automatic fire sprinkler systems. Despite Plaintiffs' arguments emphasizing the different in-system uses of outlets and BWPFs, Commerce determined that "[e]ven if it is the case that the outlets and other BWPFs do not have identical or complete overlap of functions, the fact remains that the uses of outlets and other BWPFs are similar because, as explained above, both are permanently welded into automatic fire sprinkler systems to change or divide the flow of water." *Id.* at 59. Plaintiffs' argument demonstrating that the subject outlets may have specific uses within automatic fire sprinkler

systems does not undermine the reasonableness of Commerce's conclusion that the ultimate use of BWPFs and subject outlets are similar given that both BWPFs and subject outlets are used in automatic fire sprinkler systems. Accordingly, the court concludes that Commerce reasonably found that the ultimate uses of outlets and BWPFs are similar.

4. Channels of Trade

Commerce ultimately found that "the channels of trade for outlets and other BWPFs are similar." *Remand Results* at 60. Commerce noted that "both [outlets and other BWPFs are] sold through distributors and to fabricators and contractors." *Id.* Plaintiffs challenge Commerce's conclusion that the record, and in particular the Shyman[5] Declaration, supports a finding that the expectations of purchasers of BWPFs and outlets are similar based on the fact that both products are sold through distributors like Neill Supply. *See* Vandewater Comments at 24 (citing *Remand Results* at 93–94).

Once again, the court disagrees. Commerce rejected Vandewater's argument that the agency should rely on other parts of the Shyman Declaration, emphasizing "differences in the ultimate consumer of the products." *Remand Results* at 93. Commerce noted that it considered the Shyman Declaration, and highlighted that Mr. Shyman acknowledged that "welded branch outlets and butt-weld fittings are both sold to distributors like Neill Supply." *Id.* at 93–94. Vandewater maintains that Commerce's simplistic analysis on this issue misses the point and fails to engage with the record. *See* Vandewater Comments at 24–25 (noting that "Home Depot sells paint and flowers, but that says nothing about whether ultimate purchasers deem them to be the same product.").

Commerce acknowledged the distinction highlighted by Plaintiffs, but overall found it unpersuasive in demonstrating that outlets and BWPFs subject to the *China BWPFs Order* involve different channels of trade. As Commerce explained:

> We agree that Vandewater's outlets are typically sold to a particular type of contractor given their targeted application, when compared to BWPFs more generally – which cover a wide range of products and applications. However, this is true in any circumstance when comparing a particular product to a broad class of products. Outlets and other BWPFs are sold to distributors

[5] Vandewater submitted this declaration to Commerce as part of its remand comments, noting that "Mr. Neil Shyman was Vice President and General Manager of Neill Supply from May 1968 to January 2011. Neill Supply is a fabricator and supplier of fire sprinkler and industrial piping and sells Vandewater's steel branch outlets." *See Remand Results* at 27 n.186.

> and then to contractors and users involved in constructing piping systems, even if the particular type of contractor/customer for Vandewater's outlets focuses on certain types of systems, *i.e.*, fire protection and other low-pressure applications.

Remand Results at 94. In the court's view, Plaintiffs' arguments about the overbreadth of Commerce's analysis under this factor go to the weight that the agency should assign this factor in its overall (k)(2) analysis and not the reasonableness of its determination. While the court understands that this factor provides limited assistance in comparing BWPFs and subject outlets, it cannot agree with Plaintiffs that Commerce's findings under this factor were unreasonable.

5. Manner of Advertisement and Display

As to the final criterion, Commerce found that "outlets and other BWPFs are advertised in a similar manner, *i.e.*, via online catalogs in company websites or affiliated or third-party online sources." *Remand Results* at 60–61. Commerce observed that "[t]hese sources identify the size, weight, and other technical specifications of the merchandise, including pressure resistance, materials used, and industry standard." *Id.* at 61. Commerce highlighted that "outlets (and similar products, such as saddles) and BWPFs are displayed side by side. In some instances, outlets are explicitly referenced in advertising materials as having butt-weld ends." *Remand Results* at 94. Commerce disagreed with Plaintiffs, emphasizing the fact that certain advertising materials for subject merchandise referenced particular industry standards, and further noting that "simply because the advertising materials reference particular standards (*i.e.*, ANSI/ASME B16.9 for certain products) and or references particular uses, [Commerce does not agree] that this reflects a clear dividing line between the method of advertising for each product." *Id.* at 95.

Plaintiffs maintain that Commerce's analysis sidesteps the critical significance of industry standards in advertising the products, which "draw a clear dividing line between butt-weld pipe fittings on one hand and steel branch outlets on the other." SIGMA Comments at 13. Plaintiffs argue that Commerce "failed to give this evidence due regard," and contend that Commerce's finding that Plaintiffs' afforded "undue significance" to industry standards is unreasonable in light of "repetition and centrality of these standards in the advertisements." *Id.* Again, Plaintiffs' arguments focusing on the importance of industry standards in advertising ignores contrary evidence in the record, namely that "the record supports Island's proffered explanation:

[namely, that] the term 'butt-weld' itself is not a standard term nor commonly used, and, therefore, Island does not use it in its advertising." *See Remand Results* at 61.

Plaintiffs also contend that Commerce's finding that outlets and BWPFs are "displayed side by side" was unreasonable. Vandewater Comments at 25 (quoting *Remand Results* at 95 & n.577). Plaintiffs maintain that the sources relied on by Commerce to support such a finding do not actually include "traditional butt-weld pipe fittings." *Id.* at 26. Plaintiffs' arguments here again focus on a narrow subset of BWPFs, discounting the variety of BWPFs covered by the *China BWPFs Order* that Commerce found to be advertised in the same product catalogs along with outlets. *See Remand Results* at 61 ("First, the 'Fire Sprinkler Pipe Fabrication' section of the Aleum USA catalog shows outlets with a branch side that is threaded or grooved along with 'butt welding ends.' Second, product catalogs on the record show outlets and similar products and other BWPFs advertised side by side. For instance, the Petition shows 'elbows,' 'reducers,' 'lap joint stub ends,' 'saddles,' and 'multiple outlet fittings' in the same product catalog; the Shin Tech catalog advertises two outlet products – one with a beveled edge that allows for a permanent connection only on the branch end, and one with such edges on both the branch and contoured ends – in a similar manner."). Given these findings, the court concludes that Commerce reasonably found that outlets and other BWPFs are advertised in a similar manner.

C. Suspension of Liquidation Instructions

As a result of Commerce's new analysis on remand, the parties disputed whether Commerce was required to revise its instructions to U.S. Customs and Border Protection regarding suspension of liquidation and cash deposits. *See Remand Results* at 96–103. This issue was resolved with respect to Vandewater after the conclusion of briefing on the merits of the *Remand Results*. *See* Letter, ECF No. 151 (seeking clarification about potential mootness given that existing statutory injunctions already suspend liquidation of unliquidated entries of subject merchandise dating back to 1992 and requesting additional information as to this issue); Def.'s Initial Resp. to Letter, ECF No. 152; Conference Call, ECF No. 157; Def.'s Second Resp. to Letter, ECF No. 159; Second Conference Call, ECF No. 164; Order Amending Statutory Injunction, ECF No. 166. As to SIGMA, this was not an issue.

SCI, though, maintains that this is a live issue. While SCI initially presented arguments challenging the legal basis for Commerce's instructions to "continue" suspension of liquidation, SCI's arguments

appear to have evolved significantly after conferencing with the court. Specifically, SCI maintains that this issue is not moot because certain of its entries contain both subject merchandise and non-subject merchandise ("mixed entries"), and argues that these mixed entries may be inappropriately subject to duties as a result of Commerce's instructions as applied to a suspension of liquidation covering the non-subject merchandise. SCI now attempts to formally raise these arguments for the first time in the context of "responding" to Vandewater's consent motion to amend its statutory injunction. *Compare* SCI Resp. to Vandewater's Mot. for Amended Order for Statutory Injunction, ECF No. 166 (noting that SCI has no objection to Vandewater's revision of the statutory injunction covering its entries, but adding that "SCI files this response to state that it does not agree with the statement in this motion that the Government should be able to apply antidumping duties to welded outlets contained in entries 'that were previously suspended' for reasons unrelated to the underlying proceeding at issue in this appeal (*i.e.*, entries that were previously suspended because they contained unrelated products subject to suspension pursuant to an unrelated AD/CVD order as of the effective date of Commerce's scope determination on Vandewater's welded outlets (September 10, 2018)).''), *with* SCI Comments & *Remand Results* (discussing parties' disagreement as to Commerce's authority to "continue" suspension of liquidation under the regulatory framework, but making no reference to particular mixed entries, or any issues involving inappropriately assessed duties). As noted previously, these arguments regarding "mixed entries" do not appear in SCI's remand comments nor do they appear to have been raised before Commerce in the course of the remand. *See* SCI Resp. to Vandewater's Mot. for Amended Order for Statutory Injunction, ECF No. 166 (noting that SCI's arguments in the response reflect SCI's arguments "stated during [the August 10, 2022] conference call").

Given these circumstances and its discussions with the parties, the court concludes that SCI's additional arguments on this issue are not properly before the court and are deemed forfeited. *See United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *Dorbest Ltd, v. United States*, 604 F.3d 1363, 1375–77 (Fed. Cir. 2010) (affirming waiver of arguments not raised until after remand); *see also In re Google Tech. Holdings LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020) (explaining the distinction between "forfeiture" and "waiver" and acknowledging that "[b]y and large, in reviewing this court's precedent, it is evident that the court mainly uses the term 'waiver' when applying the doctrine of

'forfeiture.'"); *Saha Thai Steel Pipe Pub. Co. v. United States*, 46 CIT ___, Slip Op. 22–99, 2022 WL 3681263 at *4 (Aug. 25, 2022) (exploring precedent addressing forfeiture and waiver, and explaining that "[f]ailing to raise an argument in a previous proceeding thus forfeits the argument after the matter has been remanded and is back on appeal."). The court also notes that SCI's additional arguments on this issue may well be moot in light of the existing statutory injunction that enjoins liquidation of SCI's imports of unliquidated entries of subject merchandise dating back to July 6, 1992. *See* Order Entering Form 24 Statutory Injunction, Court No. 19–00011, ECF No. 17 (Jan. 28, 2019).

III. Conclusion

Despite their arguments supporting an alternative reasonable conclusion, Plaintiffs have failed to demonstrate that the record supports Plaintiffs' preferred outcome as the one and only reasonable determination Commerce could have made. *See, e.g.*, *supra* p. 20. Although Plaintiffs have demonstrated that information on the record *could* reasonably support a finding that outlets are excluded from the scope of the *China BWPFs Order*, the court cannot agree that Commerce acted unreasonably in reaching its findings to the contrary under each of the (k)(2) factors. The court therefore sustains Commerce's determination that outlets and other BWPFs are sufficiently similar such that the subject outlets should be included under the scope of the *China BWPFs Order*. Judgment will enter accordingly.

Dated: September 8, 2022
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 22–105

BOTH-WELL (TAIZHOU) STEEL FITTINGS, CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and BONNEY FORGE CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 21–00166

[Sustaining Commerce's remand results on its administrative review of its countervailing duty order covering forged steel fittings from the People's Republic of China.]

Dated: September 13, 2022

Peter J. Koenig and *Jeremy W. Dutra*, Squire Patton Boggs (US) LLP, of Washington, D.C., for plaintiff Both-Well (Taizhou) Steel Fittings, Co., Ltd.

Roger B. Schagrin, *Benjamin J. Bay*, *Christopher T. Cloutier*, *Elizabeth J. Drake, Jeffrey D. Gerrish*, *Kelsey M. Rule*, *Luke A. Meisner*, *Michelle R. Avrutin*, *Nicholas J. Birch*, and *William A. Fennell*, Schagrin Associates, of Washington, D.C., for defendant-intervenor Bonney Forge Corporation.

Kara M. Westercamp, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and of counsel *Jared M. Cynamon*, Chief Counsel of Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C. for defendant United States.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand results filed pursuant to the court's order in *Both-Well (Taizhou) Steel Fittings, Co., Ltd. v. United States*, 557 F. Supp. 3d 1327 (Ct. Int'l Trade 2021) ("*Both-Well*") in connection with Commerce's final determination in administrative review of the countervailing duty ("CVD") order on forged steel fittings ("FSF") from the People's Republic of China ("China"). Final Results of Redetermination Pursuant to Ct. Remand, C-570–068 (Dep't Commerce July 8, 2022), ECF No. 40–1 ("Remand Results"); *see [FSF] From [China]*, 86 Fed. Reg. 14,722 (Dep't Commerce Mar. 18, 2021) (final results of [CVD] Admin. Review; 2018), ECF No. 194, and accompanying Issues & Decision Memo., C-570–068 (Mar. 10, 2021), ECF No. 19–5; *[FSF] from [China]*, 83 Fed. Reg. 60,396 (Dep't Commerce Nov. 26, 2018) ([CVD] Order).

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to Commerce, and now only recounts those facts relevant to the court's review of the Remand Results. *See Both-Well*. For the following reasons, Commerce's Remand Results are sustained.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[1] and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of a CVD 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). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274 (2008).

DISCUSSION

In *Both-Well*, the court remanded Commerce's final determination, in which Commerce applied facts available with an adverse inference to calculate Both-Well (Taizhou) Steel Fittings, Co., Ltd.'s ("Both-Well") CVD rate, for further explanation or reconsideration. *Both-Well* at 1337. The court found Commerce's determination that there was a gap in the record, due to the Government of China's ("GOC") failure to cooperate with Commerce's review, warranting the application of AFA, unsupported by substantial evidence. *Id.* at 1331–37. Specifically, the court held that Commerce may not determine that unrebutted evidence submitted by Both-Well and its U.S. customers showing they did not use China's Export Buyer's Credit Program ("EBCP") during the period of review constituted a gap in the record without attempting to verify the non-use certifications provided. *Id.* at 1335–37. The court explained that, if Commerce wished to continue using facts available with an adverse inference on remand, "it must attempt to verify the non-use certifications by either asking Both-Well to have its U.S. customers explain in detail how the customers were able to certify that they did not either directly or indirectly benefit from the EBCP, or through some other alternative means of verifying the non-use certifications." *Id.* at 1337.

On remand, Commerce issued questionnaires and supplemental questionnaires to Both-Well and its U.S. customers to verify non-use of the EBCP. Remand Results at 7. The customers provided a reconciliation of their financing during the period of review, "including complete audited financial statements, general ledgers, trial bal-

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 Edition.

ances, charts of accounts, loan documentation including details of the loan specifics and purpose, as well as screenshots from the customers' accounting systems." *Id.* at 7. Upon review of these responses, Commerce determined there is no evidence that the customers applied for or used, directly or indirectly, the EBCP during the period of review; therefore, the use of facts available with an adverse inference was not warranted. *Id.* at 7–8. Commerce revised its subsidy rate calculations for Both-Well for the period of review, from 25.90 percent to 15.36 percent *ad valorem*. *Id.* at 8–9. No party objects to Commerce's Remand Results, the Remand Results are reasonable, and the Remand Results comply with the court's Remand Order. *See Xinjiamei*, 968 F. Supp. 2d at 1259.

CONCLUSION

For the foregoing reasons, the Remand Results are supported by substantial evidence, comply with the court's order in *Both-Well*, and are therefore sustained. Judgment will enter accordingly.

Dated: September 13, 2022
New York, New York

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

Slip Op. 22–107

FUJIAN YINFENG IMP & EXP TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION OF AMERICAN MILLWORK PRODUCERS, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 21–00088

[Denying Plaintiff's motion for judgment on the agency record and granting judgment on the agency record to Defendant and Defendant-Intervenor.]

Dated: September 13, 2022

Gregory S. Menegaz, *J. Kevin Horgan*, *Judith L. Holdsworth*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, on the briefs for Plaintiff.

Brian M. Boynton, Assistant Attorney General; *Patricia M. McCarthy*, Director; *Claudia Burke*, Assistant Director; and *Ioana Cristei*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Leslie Lewis*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein LLP of Washington, DC, on the brief for Defendant-Intervenor.

OPINION

Baker, Judge:

Plaintiff Fujian Yinfeng challenges the Department of Commerce's final determination in a countervailing duty investigation of wood mouldings and millwork products from China. For the reasons set forth below, the court sustains that determination.

Statutory and Regulatory Background

The Tariff Act of 1930 provides that when Commerce determines that a foreign government is providing a "countervailable subsidy" as to goods imported into the United States, and the International Trade Commission further determines that such imports injure U.S. domestic industry, the Department will impose a "countervailing duty" on the relevant merchandise "equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a).

To conclude that a foreign producer received a subsidy, Commerce must determine that "(1) a foreign government provide[d] a financial contribution (2) to a specific industry and (3) a recipient within the industry receive[d] a benefit as a result of that contribution." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677(5)(B)); *see also* 19 U.S.C. § 1677(5)(A). "Analyzing all three factors is therefore necessary for Commerce to determine whether a [countervailing duty] must be

imposed." *Fine Furniture*, 748 F.3d at 1369.

As relevant here, the statute defines "benefit" as including the provision of "goods or services . . . for less than adequate remuneration . . . ." 19 U.S.C. § 1677(5)(E)(iv). The statute further provides that "[f]or purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review." *Id.* § 1677(5)(E).

The consideration of "prevailing market conditions" requires an examination of "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *Id.*; *see also Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1374 (CIT 2015). The Department measures the adequacy of remuneration by comparing the respondent's actual price paid for an input to an adjusted benchmark figure representing the market price for the good at issue. *See* 19 C.F.R. § 351.511(a)(2)(i).

In its antidumping and countervailing duty investigations, the Department seeks and relies upon relevant information from interested parties and other sources. Sometimes that information is not available, and other times an interested party's informational and other responses to the Department's investigation are deficient in some way. The statute provides a tool for Commerce in those situations called "facts otherwise available":

> (a) In general. If—
>
> (1) necessary information is not available on the record, *or*
>
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by [Commerce] . . . under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> [Commerce] . . . *shall*, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a) (emphasis added).

If the Department determines that it is required to apply facts otherwise available, it "*may* use an inference that is adverse to the interests of that party in selecting from among" those facts if it "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." *Id.* § 1677e(b)(1) (emphasis added). An interested party's failure to cooperate to "the best of its ability" is determined by "assessing whether [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).

In trade parlance, Commerce's use of an adverse inference in applying facts otherwise available is known as "adverse facts available," or "AFA."[1]

Factual and Procedural Background

In 2020, in response to a petition from the Coalition of American Millwork Producers, Commerce opened a countervailing duty investigation of millwork products imported from China during calendar year 2019. *See Wood Mouldings and Millwork Products from China: Initiation of Countervailing Duty Investigation*, 85 Fed. Reg. 6513, 6513–14 (Dep't Commerce Feb. 5, 2020). The Department selected Yinfeng as a mandatory respondent. *See* Appx1001, Appx1402.

Commerce issued initial and supplemental questionnaires to the government of China and Yinfeng. *See* Appx1402. Both responded. *See* Appx5896–10429; Appx11268–11300; Appx5332–5541.

After reviewing this and other information, Commerce published a preliminary determination assessing a 13.61% countervailing duty rate. *See Wood Mouldings and Millwork Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 85 Fed. Reg. 35,900, 35,901 (Dep't Commerce June 12, 2020); Appx 1605–06. Two aspects of its accompanying explanation are relevant here.

First, after repeated stonewalling by the Chinese government, the Department chose to apply facts otherwise available with an adverse inference with respect to China's Export Buyer's Credit Program

[1] For a more in-depth discussion of the intricacies of adverse facts available, *see Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1336–39 (CIT 2020).

(EBCP). Appx1414.[2] Commerce chose to do this even though Yinfeng reported no receipt of EBCP benefits and submitted certifications of non-use from its customers. Appx1025, Appx1027.

Second, Commerce selected benchmarks to measure the adequacy of remuneration for the provision of sawnwood and plywood. *See* Appx1428–1434. The lumber inputs are shipped to China, so the Department attempted to establish an ocean freight benchmark price reflective of the world market price in order to determine a fair cost of shipping. *See* Appx1433–1434. As part of this calculation, Commerce relied on an average of all the data submitted by the parties. Specifically, the Department used the Maersk and Descartes freight price datasets submitted by Yinfeng, and the Descartes dataset submitted by the Coalition. Appx1063; Appx1433–1434.

The Department also stated that it could not rely on market or world market benchmark prices to measure the adequacy of remuneration for land-use rights in China. *See* Appx1431–1432. So Commerce instead relied on data from the "Asian Marketview Reports" by CB Richard Ellis (CBRE) for Thailand for 2010 along with inflation data for Thailand. *See* Appx1431–1432.

Roughly contemporaneously with publication of its preliminary determination, Commerce expanded the investigation to include the Chinese government's alleged provision of primer for less than adequate remuneration. *See* Appx12167–12172.[3] To that end, the Department requested information to determine whether acrylic polymer could be used as a primer. *See* Appx12938.

In response, the Coalition provided industry definitions and products for sale indicating that acrylic polymers are considered primers. *See* Appx13118–13136. Yinfeng, however, argued that acrylic polymer could not be used as a stand-alone primer and was instead merely a raw material used to make gesso, a type of primer. *See* Appx12944–13091.

Based on the results of this expanded investigation, the Department released a post-preliminary decision memorandum in which it determined that acrylic polymer could be used as a stand-alone

[2] Specifically, Commerce determined that it was required to apply facts otherwise available because necessary information was not available on the record, the Chinese government withheld information, and the Chinese government significantly impeded the investigation. Appx1416; *see also* 19 U.S.C. § 1677e(a)(1), (2)(A), (2)(C). Those findings mandated the application of facts otherwise available.

The Department further determined that by withholding information and significantly impeding the investigation, the Chinese government failed to cooperate to the best of its ability. Appx1416; *see also* 19 U.S.C. § 1677e(b)(1). Commerce then exercised its discretion to apply an adverse inference in selecting among facts otherwise available. Appx1416.

[3] The Coalition's assertion of this new subsidy allegation prompted the Department's expansion of the investigation to include primer. Appx1608; Appx12070; Appx14743.

primer. *See* Appx1619–1620. Commerce therefore included acrylic polymer purchases in the benefit calculation for the Chinse government's primer program. *Id*.

The Department published its final determination assessing a 20.56% countervailing duty rate. *See Wood Mouldings and Millwork Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 67, 68 (Jan. 4, 2021); Appx1394–1395.[4]

In its accompanying explanation, as relevant here Commerce continued to apply adverse facts available to China's EBCP for essentially the same reasons as in the Department's preliminary determination. Appx1019–1030.

Commerce also continued to find that acrylic polymer could be used as a primer, and therefore included acrylic polymer purchases in the calculation of the Chinese government's primer subsidy program. Appx1049–1052.

Finally, Commerce again averaged different commercially available world market price datasets provided by Yinfeng and the Coalition, after removing what the Department considered unsupported shipping route estimates from the universe of prices. Appx1005; Appx1061. Relatedly, Commerce also continued to use 2010 Thai prices as reported in the CBRE "Asian Marketview Reports," after adjusting for inflation, as the land-use price benchmark. Appx1056–1058.

Yinfeng then brought this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (B)(i) to contest the Department's final determination. ECF 6. The Coalition intervened to defend that determination. ECF 13. Yinfeng moved for judgment on the agency record. ECF 22; *see* USCIT R. 56.2. The government (ECF 28) and the Coalition (ECF 27) opposed, and Yinfeng replied (ECF 30). As no party requested oral argument, the court decides the matter on the papers.

Jurisdiction and Standard of Review

The court has subject-matter jurisdiction under 28 U.S.C. § 1581(c).

"[T]he Court of International Trade must sustain 'any determination, finding[,] or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in

[4] Commerce thereafter issued an order imposing the duties specified in its final determination. *See Wood Mouldings and Millwork Products from the People's Republic of China: Countervailing Duty Order,* 86 Fed. Reg. 9484–85 (Feb. 16,20201); Appx1398–1399. The parties have not addressed the extent to which the increase in countervailing duty rate in the Department's final determination resulted from the expansion of the investigation to include primer.

accordance with the law.'" *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). "[S]pecific factual findings . . . are conclusive unless unsupported by substantial evidence." *United States v. Eurodif S.A.*, 555 U.S. 305, 316 n.6 (2009).

Substantial evidence is "more than a mere scintilla." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). Furthermore, "substantial evidence" must be measured by a review of the record as a whole, "including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

Still, a party challenging Commerce's determination under the substantial evidence standard "has chosen a course with a high barrier to reversal." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (cleaned up). The court must weigh the entire record and must sustain the Department's determination if the evidence on the record is enough that "a reasonable mind might accept as adequate to support a conclusion." *Atl. Sugar*, 744 F.2d at 1562.

Discussion

Yinfeng objects to three aspects of Commerce's final determination. First, the company challenges the Department's application of adverse facts available based on the Chinese government's failure to provide information about its EBCP. ECF 22–2, at 5–19. Second, the company argues that substantial evidence does not support the Department's determination that acrylic polymer subsidized by the Chinese government could be used as a primer. *Id*. at 19–30. Finally, Yinfeng objects to Commerce's calculation of the value of shipping rates and land-use values. *Id.* at 30–39.

I

There is no dispute in this case that the government of China declined to provide information about the EBCP sought by Commerce in its countervailing duty investigation. It is also undisputed, as Yinfeng puts it, that the administrative record "contains no evidence that [the company] or its customers used or benefitted from" that program. ECF 22–2, at 13–14.

Yinfeng argues that Department has not sufficiently justified its application of facts otherwise available based on the Chinese government's stonewalling, characterizing (without any further elaboration) Commerce's explanation as a "vague claim." ECF 22–2, at 14. The company relies on several decisions where this court has rejected Commerce's application of adverse facts available based on the with-

holding of information about the EBCP. *See, e.g.*, *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1359–60 (CIT 2019) (holding that Commerce "failed to say how the information it sought" concerning the EBCP "is necessary" to determine "whether the manufacture, production, or export" of the imported merchandise "has been subsidized").

Clearon and similar decisions by this court recognize that the statute does not allow the Department to apply facts otherwise available merely because "information is not available on the record." *See Clearon Corp. v. United States*, 474 F. Supp. 3d 1339, 1353 (CIT 2020) ("[I]t is not clear that any of the missing information was 'necessary' . . . ."). The missing information must be "*necessary*," meaning at least reasonably related to the subject of the investigation such that "the missing information actually created a gap that mattered." *Id.*; *see also* 19 U.S.C. § 1677e(a)(1).

Similarly, the statute does not allow Commerce to apply facts otherwise available merely because an "interested person" has withheld information requested by the Department, 19 U.S.C. § 1677e(a)(2)(A); failed to provide "such information" in a timely manner or in the format requested by Commerce, *id*. § 1677e(a)(2)(B); "significantly" impeded a proceeding, *id*. § 1677e(a)(2)(C); or provided "such information" but it was unverifiable, *id.* § 1677e(a)(2)(D). The common thread to each of these possible grounds for applying facts otherwise available is that both the "information" requested by the Department and the "proceeding" for which the information is sought must be "*under this subtitle*." *Id*. § 1677e(a)(2)(A), (C) (emphasis added).

Therefore, if Commerce engages in a fishing expedition for information that is beyond the scope of its regulatory jurisdiction or not reasonably related to the proper subject of its investigation, the application of facts otherwise available is unlawful. *Cf. Dalian Meisen Woodworking Co. v. United States*, 571 F. Supp. 3d 1364, 1377 (CIT 2021) (Commerce's request that a respondent explain why it lied to its U.S. customers was not made "under this subtitle" and thus "exceeded [the Department's] regulatory writ"). It's thus incumbent upon Commerce to explain how an interested party's asserted deficiencies under 19 U.S.C. § 1677e(a) properly relate to an antidumping or countervailing duty investigation.

Here, Commerce explained at length why the missing information it sought was necessary to confirm EBCP non-use by Yinfeng's customers. For example, the Department explained that in 2013 the Chinese government had modified the program in various ways, including possibly by eliminating a $2 million minimum business contract requirement for the provision of the EBCP loans. Appx1020. The

status of this requirement was "critical" to the Department's understanding of the program, because "if the program is no longer limited to $2 million contracts, this increases the difficulty of verifying loans without any such parameters." Appx1021. In the absence of this $2 million filter, Commerce would have to examine all loans received by Yinfeng's U.S. customers.

Commerce further explained that the 2013 changes appeared to have modified the EBCP in various ways, including by the disbursement of loans to foreign customers through intermediary banks. Appx1021. The Department therefore asked the Chinese government to provide a list of all partner banks involved in disbursement of EBCP funds. *Id*. Commerce needed that information because those bank names, "not the name 'China Ex-Im Bank,' " would "appear in the subledgers of the U.S. customers if they received the credits." Appx1023. This list of banks was thus "critical for [the Department] to perform verification at the U.S. customers." Appx1024.

But even the list of participating banks was only a starting point. The Department explained that it needed to know EBCP loan documentation requirements to look for "indicia of China Ex-Im involvement." Appx1024. Absent an understanding of those requirements, Commerce could not "verify which loans were normal loans versus EBC[P] loans." *Id*.

In short, Commerce reasonably explained that absent the EBCP information it requested from the Chinese government, the Department's attempt to verify whether Yinfeng's U.S. customers were EBCP recipients (and thus the beneficiaries of subsidies) amounted to "looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found." Appx1025.

Yinfeng responds to these points by noting that the Chinese government claims to have searched official records to confirm that none of the company's customers received EBCP credits during the period of investigation. ECF 22–2, at 9. But this representation by the Chinese government failed to provide any documentation to show on what basis the purported search was conducted—or even if it really was. Appx1415.[5]

The Department's thorough explanation of exactly why the missing information was necessary to verify EBCP non-use distinguishes this case from other cases where this court has held that Commerce failed to properly explain the need for the absent information. *See, e.g.*, *Clearon*, 474 F. Supp. 3d at 1353 (holding after remand that substan-

[5] Commerce understandably doesn't take the Chinese government's representations on faith.

tial evidence did not support applying adverse facts available where Commerce did not analyze whether the missing information actually impacted its ability to verify).

Accordingly, substantial evidence supports Commerce's application of facts otherwise available due to the Chinese government's stonewalling and impeding the investigation. Substantial evidence also supports the Department's determination to apply an adverse inference in selecting that information because of that government's failure to cooperate. *Cf. Fine Furniture*, 748 F.3d at 1373 (upholding the application of adverse facts available based on, *inter alia*, the Chinese government's failure to provide requested information and cooperate with the Department's investigation).

II

Yinfeng argues that Commerce's determination that acrylic polymer can be used as a stand-alone primer is not supported by substantial evidence. ECF 22–2, at 23–27.[6] The company points to certifications by its affiliate[7] and the relevant supplier that acrylic polymer could not be used as a primer or paint. *Id*. at 25. It further points to third-party information that acrylic polymer "on its own is a chemical binder and must be further processed to be used as a primer" such as acrylic gesso. *Id*. at 26. It notes that the Harmonized Tariff Schedule (HTS) classifies acrylic polymer under chapter 39 rather than the relevant chapters for paint (32) and plasters (25). *Id*. at 27.

The Coalition, however, provided industry definitions and products for sale indicating that single-ingredient acrylic polymers, such as those purchased by Yinfeng's affiliate, are considered primers by industry standards and are used as primers in practice. Appx1049, Appx1619.

Commerce weighed this evidence and agreed with the Coalition. Appx1049–1052. In so doing, the Department explained why it discounted Yinfeng's evidence and credited the Coalition's.

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[6] Yinfeng also argues at length that Commerce's inclusion of acrylic polymer in the primer program investigation unlawfully expanded the scope of the Department's investigation, ECF 22–2, at 19–22, and in so doing departed from past practice and World Trade Organization standards, *id*. at 28–30. The company does not dispute, however, that Commerce properly undertook the primer investigation inresponse to the Coalition's new subsidy allegations. Nor does the company dispute that if substantial evidence supports Commerce's determination that acrylic polymer *can* be used as a stand-alone primer, the Department properly included the subsidized acrylic polymer in calculating countervailing duties. Hence, the dispositive question is whether substantial evidence supports that factual determination; Yinfeng's other arguments are irrelevant.

[7] Yinfeng's affiliate Mangrove purchased the acrylic primer in question.

First, in response to the Department's inquiries, the company only discussed its affiliate's processing of acrylic polymers to manufacture gesso and provided no factual support for its contention that the acrylic polymers its affiliate purchased could *not* be used a standalone primer. Appx1049.

Second, the HTS classifications invoked by Yinfeng only established that the acrylic polymer purchased by its affiliate was not classified as paint. Appx1050.

Third, the Customs rulings provided by Yinfeng established that the HTS classification applicable to acrylic polymers could include both granular inputs *and* finished products that could be used as primers. *Id.*

Finally, none of the third-party sources submitted by the company established that acrylic polymers could *never* be used without further processing. *Id*.

This weighing of the evidence suffices to provide substantial evidence to support Commerce's final determination that acrylic polymer can be used as a stand-alone primer. Yinfeng's arguments show at most that the Department could possibly have reasonably reached a contrary conclusion. But the substantial evidence standard requires "less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). The Department's determination must be sustained so long as it is supported by substantial evidence—as, here, it was.

III

After its investigation, Commerce averaged all freight routes on the record to establish a world market benchmark for ocean freight pursuant to 19 C.F.R. § 351.511(a)(2)(ii). Appx1060–1062. These benchmarks were used for countervailing duty calculations in Commerce's final determination. *See* Appx1059–1064.

Yinfeng argues that Commerce should have relied solely on its submissions for ocean freight calculations, and ignored datasets submitted by the Coalition, because—according to Yinfeng—the Coalition's datasets are not appropriately comparable to the routes that Yinfeng uses. *See* ECF 22–2, at 30–34. Specifically, Yinfeng argues that the Coalition's Descartes data submitted based on a route from Norfolk, Virginia, to Tianjin, China, were improperly calculated. Allegedly, the data use the wrong size container, contain atypical charges, and focus on a non-major shipping route because "Norfolk is not a major world port." *Id*.

As in other aspects of this case, this court "must sustain 'any determination, finding[,] or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu*, 88 F.3d at 1038 (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). And while substantial evidence remains the standard, this court grants the Department "tremendous deference" that is "both greater than and distinct from that accorded the agency in interpreting the statutes it administers" when Commerce exercises its technical expertise to select and apply methodologies to implement the dictates of the trade statute. *Id.* at 1039. Particularly regarding technical matters, it is not the role of this court to "weigh the adequate quality or quantity of the evidence for sufficiency." *Timken Co. v. United States*, 699 F. Supp. 300, 306 (CIT 1988).

Here, the record shows why the Department reasonably relied on data from the Norfolk-to-Tianjin route. Commerce found no evidence that it contained surcharges inconsistent with market conditions, that the route was inappropriate, or that it had an unusual shipping rate. Appx1062. That weighing and explanation by the Department suffices for substantial evidence purposes.

Yinfeng also challenges the Department's use of 2010 Thai data to calculate the cost of land. The company argues that these data are too old and that Thailand is not economically comparable to China. ECF 22–2, at 34–39. Yinfeng argues that Commerce instead should have relied upon more recent price data in the record from Malaysia, especially when the Department has found that nation comparable to China in antidumping proceedings. *Id*. at 37–39. Yinfeng also argues that another option was global data from CBRE. *Id*.

The Department explained it adjusted the Thai data for inflation, Appx1058, and that it viewed Thailand as more economically comparable to China than Malaysia under its regulatory criteria such as population density and producers' perceptions. *Id*. Moreover, Yinfeng's characterization of the Malaysia as economically comparable failed to consider those criteria. As far as the global CBRE data referred to by Yinfeng, the Department noted that it included data from several countries that were not reasonable alternatives to China, such as Germany. *Id*.

There is no doubt Commerce could have calculated the land cost benchmark differently, as Yinfeng argues. But Yinfeng must show more than this to overcome the deference due to Commerce on a highly technical matter. *See generally Fujitsu*, 88 F.3d at 1038–39. Yinfeng has not met this burden, nor has Yinfeng shown that its preferred benchmarking approaches would be free of other problems. In view of the deference the court owes to the Department on this

most technical subject, the court sustains the land benchmarking approach used in Commerce's final determination.

Conclusion

It's easy to read this record and be sympathetic to Yinfeng. The company is disadvantaged by an adverse inference caused by the noncooperation of the Chinese government over which it has no control, an expanded investigation into a product Yinfeng argues can't be used as a primer in the first place, and benchmarks that could easily have been calculated differently.

But it isn't the court's job to micromanage the Commerce Department, whose challenged determinations here are reasonable and supported by substantial evidence. The court therefore denies Yinfeng's motion for judgment on the agency record, sustains the final determination, and grants judgment on the agency record to the government and the Coalition. *See* USCIT R. 56.2(b). The court will enter a separate judgment. *See* USCIT R. 58(a).

Dated: September 13, 2022
New York, New York

/s/ M. Miller Baker
JUDGE

Slip Op. 22–108

ASOCIACIÓN DE EXPORTADORES E INDUSTRIALES DE ACEITUNAS DE MESA, ACEITUNAS GUADALQUIVIR, S.L.U., AGRO SEVILLA ACEITUNAS S. COOP. AND., AND ANGEL CAMACHO ALIMENTACIÓN, S.L., Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE IN RIPE OLIVES, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 18–00195
PUBLIC VERSION

[Commerce's Second Remand Results are sustained.]

Dated: September 14, 2022

Matthew P. McCullough, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for Plaintiffs Asociación De Exportadores E Industriales De Aceitunas De Mesa, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Angel Camacho Alimentación, S.L.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Sonia W. Murphy*, Trial Attorney. Of counsel on the briefs were *Elio Gonzalez* and *Saad Y. Chalchal*, Senior Attorneys, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

David J. Levine and *Raymond Paretzky*, McDermott Will & Emery LLP, of Washington, D.C., argued for Defendant-Intervenor Coalition for Fair Trade in Ripe Olives.

OPINION

Katzmann, Judge:

The court again returns to an investigation by the United States Department of Commerce ("Commerce") into subsidies received by the Spanish olive industry. The U.S. domestic olive industry claims that the Government of Spain and European Union unfairly subsidized Spanish olives that were then imported into the United States to the detriment of the U.S. industry. Before the court are Commerce's *Final Results of Remand Redetermination* (Dep't Commerce Nov. 3, 2021), Nov. 3, 2021, ECF No. 73–1 ("*Second Remand Results*"), which the court ordered in *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 45 CIT __, 523 F. Supp. 3d 1393 (2021) ("*Asemesa II*"). In *Asemesa II*, the court determined that Commerce's interpretations of 19 U.S.C. § 1677(5A)'s de jure specificity test and 19 U.S.C. § 1677–2's substantial-dependence requirement were unreasonable and not in accordance with law, and remanded Commerce's *Final Results of Remand Redetermination* (Dep't Commerce May 29, 2020), June 1, 2020, ECF No. 47–1 ("*First Remand Results*") for reconsideration. 523 F. Supp. 3d at 1407–08. Commerce's

Second Remand Results accordingly apply a revised interpretation of each statutory provision.

Plaintiffs Asociación de Exportadores e Industriales de Aceitunas de Mesa, Aceitunas Gudalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Angel Camacho Alementación, S.L. (collectively, "Plaintiffs" or "Asemesa") now challenge the *Second Remand Results*, arguing that the subsidy program at issue is not de facto specific under 19 U.S.C. § 1677(5A)(D)(iii), and that Commerce's determination that demand for certain raw olive varietals is substantially dependent on the demand for table olives pursuant to 19 U.S.C § 1677–2 is unsupported by substantial evidence and contrary to law. Pls.' Cmts. on Commerce's Second Remand Redetermination at 3–4, 6, Dec. 3, 2021, ECF No. 76 ("Pls.' Br."). Defendant United States ("the Government") and Defendant-Intervenor Coalition for Fair Trade in Ripe Olives ("Coalition") request that the court affirm Commerce's *Second Remand Results*. Def.'s Reply to Cmts. on the Second Remand Redetermination at 33, Jan. 12, 2022, ECF No. 79 ("Def.'s Br."); Reply Cmts. of Def.-Inter. Addressing Second Remand Results at 24, Jan. 12, 2022, ECF. No. 81 ("Def.-Inter.'s Br."). The court concludes that Commerce's findings of de facto specificity and substantial dependence are supported by substantial evidence and in accordance with law, and sustains the *Second Remand Results*.

BACKGROUND

The court set out the legal and factual background of the proceedings in further detail in its previous opinions, *Asemesa I* and *Asemesa II*. *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 44 CIT __, __, 429 F. Supp. 3d 1325, 1330–38 (2020) ("Asemesa I"); *Asemesa II*, 523 F. Supp. 3d at 1397–1401. Information relevant to the instant opinion is set forth below.

I. Legal and Regulatory Framework

To empower Commerce to offset economic distortions caused by countervailable subsidies and dumping, Congress promulgated the Tariff Act of 1930. *Sioux Honey Ass'n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012); *ATC Tires Private Ltd. v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1365, 1366 (2018). Under the Tariff Act, Commerce may — upon petition by a domestic producer or sua sponte — initiate an investigation into potential countervailable subsidies and, where such subsidies are identified, issue orders imposing duties on the subject merchandise. *Sioux Honey*, 672 F.3d at 1046–47; *ATC Tires*, 322 F. Supp. 3d at 1366–67; 19 U.S.C. §§ 1671, 1673. A countervailable subsidy exists when (1) a government or public authority has provided a financial contribution; (2) a benefit is

thereby conferred upon the recipient of the financial contribution; and (3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. 19 U.S.C. § 1677(5).

Where, as here, a domestic subsidy is at issue, such subsidy may be either de jure or de facto specific. 19 U.S.C. § 1677(5A)(D). A domestic subsidy is de jure specific "[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." 19 U.S.C. § 1677(5A)(D)(i). It is de facto specific if:

> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>
> (II) An enterprise or industry is a predominant user of the subsidy.
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
>
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

19 U.S.C. § 1677(5A)(D)(iii). In assessing these factors, Commerce must "take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation." *Id.*

If Commerce determines that the government of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, sold, or likely to be sold for import, into the United States, and the International Trade Commission ("ITC") determines that an industry in the United States is materially injured or threatened with material injury thereby, then Commerce imposes CVDs upon the merchandise equal to the amount of the net countervailable subsidy. *See* 19 U.S.C. § 1671(a). When the investigated merchandise involves a processed agricultural product, Commerce also considers subsidies received by producers or processors of the raw agricultural product, and imputes the benefit of those subsidies to the manufacture, production, or export of the processed product where (1) the demand for the prior stage, or raw, product is substantially depen-

dent on the demand for the processed product, and (2) the processing operation adds only limited value to the raw commodity. 19 U.S.C. § 1677–2.

II. Procedural History

On July 12, 2017, Commerce initiated a CVD investigation into ripe olives from Spain in response to a petition from Coalition. *Ripe Olives from Spain: Initiation of Countervailing Duty Investigation*, 82 Fed. Reg. 33,050 (Dep't Commerce July 19, 2017), P.R. 126; Petition for Imposition of AD and CVD Duties, Vol. I (June 21, 2017), P.R. 7 ("Pet. Vol. I"). Plaintiffs Guadalquivir, Agro Sevilla, and Angel Camacho were selected as mandatory respondents.[1] In its petition, Coalition alleged that the European Union ("EU"), through the Government of Spain ("GOS"), provided countervailable subsidies to raw olive growers that should properly be attributed to processors of ripe olives. Petition for the Imposition of Antidumping and Countervailing Duties, Vol. III at 10 (June 21, 2017), P.R. 58 ("Pet. Vol. III"). Ripe olives — the product at issue in this litigation — are a type of edible table olive produced by curing, rinsing, and brining raw olives. *Asemesa I*, 429 F. Supp. 3d at 1335. Raw olives are a raw and unprocessed agricultural product which can be transformed into an edible consumer product through processing into table olives or olive oil. *Id.*

Through its investigation, Commerce determined that countervailable subsidies indeed existed with respect to ripe olive producers from Spain. *See id.* at 1337–38; *see also* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (Dep't Commerce June 11, 2018), P.R. 1300

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[1] In CVD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(e)(2), which provides:

> If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may—
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or
>
> (B) determine a single country-wide subsidy rate to be applied to all exporters and producers.
>
> The individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5) of this title.

("IDM"); *Ripe Olives From Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. 37,469 (Dep't Commerce August 1, 2018), P.R. 1417 ("*Amended Final Determination*"). Commerce further found that the subsidies provided to olive growers through the EU's Common Agricultural Policy ("CAP") were de jure specific domestic subsidies under 19 U.S.C. § 1677(5A) and could be attributed to the production of table olives (as a latter-stage product of raw olives) under 19 U.S.C. § 1677–2. IDM at 33.

As discussed in *Asemesa I*, the CAP subsidies at issue are provided to Spanish olive growers through the Basic Payment Scheme ("BPS"): the most recent iteration of EU agricultural subsidy programs. 429 F. Supp. 3d at 1333. Because portions of the current BPS subsidy program are based on prior EU (and European Community) subsidy programs, Commerce "traced the history of these programs in making its determination that the current program is de jure specific." *Id.* That history begins in 1997 with the Common Organization of Market in Oils and Fats ("the Common Market Program"), which was an annual grant-to-farmer program applicable to Spanish olive growers. *Id.* In 2003, the Single Payment Scheme ("SPS") replaced the Common Market Program and remained in effect until 2014. *Id.* The SPS program was replaced in 2015 by the current BPS program, which provides subsidies to those Spanish olive growers both that meet the eligibility requirements and apply for subsidies. *Id.*

While the BPS program provides subsidy payments based on geographical indicators of farmland productivity, those indicators are based on data collected by the GOS under the Common Market Program. *First Remand Results* at 7. This data reflects the hectares of farmland, quantity of crop produced per hectare, and type of crop produced in each hectare, for each qualifying farm. *Id.*; Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain at 19–22 (Dep't Commerce Nov. 20, 2017), P.R. 1075 ("PDM"). For olive growers, a value per hectare was calculated depending on whether the olives were grown for olive oil production or table olive production. PDM at 22–23. Under the SPS, this value was multiplied by a farm's area in hectares to determine the amount of aid that a particular farmer would receive. *Id.* at 22; *First Remand Results* at 8. The BPS then relied upon data collected under the SPS to allocate subsidy payments using regional rates based on the "productive potential and . . . productive orientation" of a particular region. *First Remand Results* at 8. The rates ultimately assigned to participating farmers do not expressly vary with the type and volume of crop produced but

do reflect historic data regarding the agronomic practices carried out in the region, including whether a specific region historically produced permanent crops — among them, olives. IDM at 33–34.

Commerce concluded that because the SPS program relied upon Common Market Program data, and in turn provided the basis for the BPS program, "the annual grant amount provided under BPS [is] based on annual grant amounts that were crop-specific," and the BPS subsidy payments are de jure specific to olive growers. PDM at 24. Commerce further determined that the relevant "prior stage product" for purposes of its investigation was raw olives, and that demand for raw olives is substantially dependent upon demand for table olives because table olives constitute 8 percent of the market for raw olives. *Id.*; *see* 19 U.S.C. § 1677–2. Upon determining that the BPS subsidies were both specific to olive growers and properly attributable to the production of table olives, Commerce imposed countervailing duties. *First Remand Results* at 20–21.

Plaintiffs challenged Commerce's determination on September 28, 2018, arguing in relevant part that that the subsidies are not de jure specific (and therefore are not countervailable), and that the demand for raw olives is not substantially dependent upon the demand for table olives (such that subsidies to olive growers cannot be imputed to table olive production). *Asemesa I*, 429 F. Supp. 3d at 1339. The court concluded that Commerce's finding that the subsidies at issue were de jure specific and thus countervailable failed to include a reviewable interpretation of 19 U.S.C. § 1677(5A). *Id.* at 1340–41. The court also determined that Commerce applied an impermissible interpretation of the statutory term "substantially dependent," and that its interpretation of the term constituted an unexplained and arbitrary deviation from past practice, such that Commerce's interpretation of 19 U.S.C. § 1677–2 was arbitrary and not in accordance with law. *Id.* at 1339, 1344. Accordingly, the court remanded to Commerce for further proceedings consistent with its opinion. *Id.* at 1352.

On June 1, 2020, Commerce submitted its *First Remand Results* to the court. On remand, Commerce first reiterated and clarified its finding that the EU subsidy payments at issue are de jure specific to olive growers, and thus countervailable. *First Remand Results* at 10. Consistent with the *Amended Final Determination*, Commerce then determined that "the demand for the prior stage product is substantially dependent on the demand for the latter stage product," but clarified that it interprets "'prior stage product' to be the raw agricultural product that the industry under examination considers principally suitable for use in the prior stage of production of the latter stage product" — in this case, raw olives "principally suitable for . . .

the production of table olives." *First Remand Results* at 27, 29.

The court remanded Commerce's *First Remand Results*, concluding that they were in accord with neither 19 U.S.C. § 1677(5A) nor 19 U.S.C. § 1677–2. Reviewing Commerce's finding of de jure specificity, the court concluded that its interpretation of 19 U.S.C. § 1677(5A)'s de jure specificity inquiry "reduce[d] the de jure specificity test to a general finding of non-uniform treatment, without any determination that the subsidy in question be explicitly limited to a specific enterprise or industry by the administering authority or its implementing legislation," and thus diverged from the unambiguous text of the statute. *Asemesa II*, 523 F. Supp. 3d at 1403. The court likewise rejected Commerce's interpretation of 19 U.S.C. § 1677–2. *Id.* at 1407. In so doing, the court first affirmed Commerce's determination that "'prior stage product' and 'raw agricultural product' are not coextensive in the context of [19 U.S.C. § 1677–2]." *Id.* at 1406–07. However, the court explained that by defining "prior stage product" as "the raw agricultural product that the industry under examination considers principally suitable for use in the prior stage of production of the latter stage product," Commerce impermissibly rendered the substantial-dependence test self-fulfilling. *Id.* at 1407. Accordingly, the court remanded Commerce's determination for further proceedings consistent with its opinion. *Id.* at 1408.

On November 3, 2021, Commerce submitted its *Second Remand Results* to the court. In response to the court's instructions in *Asemesa II*, Commerce reconsidered both "its de jure specificity finding" and "its interpretation of 'raw agricultural product' and 'prior stage product.'" *Second Remand Results* at 2. On remand, Commerce first determined "that the subsidies provided by the GOS to olive growers are de facto specific pursuant to [19 U.S.C. § 1677(5A)(D)(iii)(III)]," given the disproportionately greater subsidy payments awarded to olive farmers. *Id.* at 2, 19–22. Consistent with its substantial-dependence findings in the *Amended Final Determination* and *First Remand Results*, Commerce then determined that the demand for "four table and dual-use raw olive varietals," namely "manzanilla, gordal, hojiblanca, and carrasquena," is "substantially dependent on [the demand for] processed table olives." *Id.* at 32, 36.

Following the issuance of the *Second Remand Results*, Plaintiffs filed comments on December 3, 2021, opposing Commerce's finding that the at-issue subsidy program is de facto specific and reiterating their position that Commerce has failed to identify substantial dependence as required by law. Pls.' Br. The Government and Coalition each submitted replies to Plaintiffs' comments on January 12, 2022,

requesting that the court sustain the *Second Remand Results*. Def.'s Br.; Def.-Inter.'s Br. On January 6, 2021, the court issued questions prior to oral argument. Letter Concerning Qs. for Oral Arg., Apr. 26, 2022, ECF No. 89. The parties filed their responses to the oral argument questions on May 6, 2022. Pls.' Resps. to Ct.'s Written Qs. Before Oral Arg., ECF No. 92 ("Pls.' OAQ Resps."); Def.'s Resps. to Qs. in Adv. of Oral Arg, ECF 93 ("Def.'s OAQ Resps."); Resp. of Def.-Inter. to Apr. 26, 2022 Qs. for Oral Arg., ECF No. 94 ("Def-Inter.'s OAQ Resps."). Oral argument was held on May 11, 2022. Oral Arg., ECF No. 96. On May 19, 2022, the parties filed supplemental briefs following oral argument. Pls.' Final Cmts. After Oral Arg., ECF No. 97 ("Pls.' Post-Arg. Br."); Def.'s Post Oral Arg. Submission, ECF. No. 99 ("Def.'s Post-Arg. Br."); Post-Arg. Subm. of Def.-Inter., ECF No. 98 ("Def.-Inter.'s Post-Arg. Br.").

JURISDICTION, STANDARD OF REVIEW, AND INTERPRETIVE FRAMEWORK

The court has jurisdiction over this action pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c). The standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) which provides "[t]he court should hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." "A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). The court also reviews the determinations pursuant to remand "for compliance with the court's remand order." *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

As laid out in *Asemesa I*, 429 F. Supp. 3d at 1338–39, and *Asemesa II*, 523 F. Supp. 3d at 1401, the court reviews Commerce's interpretation of a statute by application of the two-step *Chevron* test. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984); *see also Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005). Under *Chevron*, the court first determines "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. However, "if the statute is silent or ambiguous with respect to the specific issue," the court must then determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's interpretation of the statute is reasonable, it must be up-

held. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994).

DISCUSSION

Plaintiffs argue that Commerce's de facto specificity finding is unsupported by substantial evidence because it relies on data from "past programs" and because its attempt at corroboration fails to support its analysis. Pls.' Br. at 3–6. Plaintiffs also oppose Commerce's finding of substantial dependence, arguing that the consumption ratio used by Commerce is unsupported by substantial evidence and, even if it were not, fails to rise to the level of substantial dependence. *Id.* at 16–32. The Government and Coalition contend that Commerce's de facto specificity finding is adequately supported by the record, and that Commerce reasonably concluded from consumption data that the demand for certain varietals of raw olives is substantially dependent on the demand for table olives. Def.'s Br. at 7–15, 17–26; Def.-Inter.'s Br. at 4–7, 8–22. The court concludes that Commerce's findings of de facto specificity and substantial dependence are supported by substantial evidence and in accordance with law and accordingly sustains the *Second Remand Results*.

I. De Facto Specificity Finding

On remand, Commerce "examined whether the BPS program is de facto specific" and determined that it is. In reaching this conclusion, Commerce requested certain information from the GOS: namely, "the number of recipient companies and industries and the amount of assistance approved under [the BPS] program for the year in which any mandatory respondent was approved for assistance, as well as each of the preceding three years." *Second Remand Results* at 17. The GOS "replied with general information regarding the amount of total assistance" but declined to provide any per-industry data, noting instead that "the payments are decoupled" such that such specific data was unavailable. *Id.* at 17–18 (quoting Resp. of GOS to the Dept's Aug. 3, 2017 Initial Questionnaire at 16 (Sept. 18, 2017), P.R. 836 ("GOS IQR")). Commerce, finding that information regarding "amounts of assistance provided to the agricultural sector . . . on an industry basis is necessary to determine whether the BPS [program] is de facto specific," resorted to facts otherwise available to support its analysis. *Id.* at 18–19; *see generally* 19 U.S.C. § 1677e.

The information relied upon by Commerce as facts otherwise available is drawn from Coalition's petition and corroborated by the general information provided by the GOS. *See Second Remand Results* at 19–22 (citing Pet. Vol. III at 9–17, Exs. III-13, III-15). Commerce highlighted Coalition's estimate of BPS payments received by olive

growers (€ 1.28 billion annually) in comparison to the approximate total BPS payments (€ 5 billion annually), and the resultant conclusion that "the olive industry in Spain received about one-fourth of all [BPS] payments" during the period of investigation. *Id.* at 21. In corroboration of this estimate, Commerce relied on the usage data provided by GOS, including "the total amount of assistance provided under the BPS program during the [period of investigation] and the total number of approved applications," in combination with Plaintiffs' reported subsidy usage during that same period. *Id.* at 21–22. Because Commerce calculated the approximate average BPS assistance per applicant to be [[ ]], while the average assistance reported by Plaintiffs Guadalquivir, Agro Sevilla, and Angel Camacho was between [[ ]] and [[ ]], Commerce determined that record information supported Coalition's allegations and concluded that the BPS program was "de facto specific within the meaning of [19 U.S.C. § 1677(5A)(D)(iii)(III)]." *Id.* at 22.

Section 1677e of Chapter 19 of the U.S. Code provides, in relevant part, that if:

> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person –
>
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle, [or]
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested,
>
> . . .

then Commerce "shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a). Section 1677m(d) provides that, to the extent deficient information is provided, Commerce "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d). Where Commerce "relies on secondary information rather than information obtained in the course of an investigation or review" in making its determination, it must also, "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C § 1677e(c)(1).

It is not contested that the GOS failed to provide the information requested by Commerce: namely, data reflecting the amount of BPS assistance distributed on a per-recipient and per-industry basis during the period of review. *Second Remand Results* at 17–18, *see also* Pls.' OAQ Resps. at 2 (summarizing the information provided by GOS). It is also apparent that Commerce provided an opportunity for GOS to explain or remedy its deficient submission. *See* GOS Suppl. Questionnaire (Dep't Commerce Oct. 25, 2017), P.R. 240. Accordingly, Commerce was permitted by 19 U.S.C § 1677e to rely upon facts otherwise available on the record to determine whether BPS subsidy payments to olive growers were de facto specific. Because "the only information on the record regarding the distribution of assistance under the BPS on an industry basis" was therefore Coalition's petition, Commerce reasonably relied upon the petition as facts otherwise available. Def.'s Br. at 10 (quoting *Second Remand Results* at 41); *see also* Pls.' OAQ Resps. at 2.

Commerce's analysis of the facts otherwise available is sufficient to support its finding of de facto specificity. Although the facts available consisted of secondary information — namely, estimations by Coalition of the current industry-wide BPS subsidy payments — Coalition supported its estimates with publicly available information, including statements by the European Commission that BPS funding would remain stable from 2014 (under the SPS program) to 2020. *Second Remand Results* at 20–21 (citing Pet. Vol. III at Ex. III-15). Commerce likewise confirmed Coalition's estimates "to the extent practicable" using the GOS's submissions, which suggested that the olive farmers under investigation — together the three most-prolific producers of ripe olives during the period of investigation — received many times the average BPS subsidy payments during that period. *Id.* at 22 (citing GOS IQR at 53–54); *Asemesa I*, 429 F. Supp. 3d at 1332. Accordingly, Commerce satisfied its statutory obligation to corroborate Coalition's petition. *See* 19 U.S.C. § 1677e(c)(1).

Nor is it the case that, as Plaintiffs argue, Commerce improperly relied upon data relating to "past programs." Pls.' Br. at 4. While Coalition's petition incorporates the publicly reported subsidy data regarding the SPS program and the Common Market Program, it expressly assesses, and Commerce expressly considered, that data as it informs the current BPS program. *See Second Remand Results* at 20–21 (citing Pet. Vol. III at Ex. III-15). Nor does Commerce's conclusion that Guadalquivir, Agro Sevilla, and Angel Camacho received "between double and 83 times the average amount of assistance" facially support a proportionate allocation of benefits on a per-hectare basis or undermine the assertions in the petition. Pls.' Br. at 5.

Rather, as Commerce concludes, the markedly higher subsidies received by key players in the Spanish olive industry could just as easily indicate that the industry as a whole receives a disproportionate amount of the total BPS subsidy payments.[2] *Second Remand Results* at 21; *see* Def.'s Br. at 13–15 (explaining in relevant part that the GOS data was used for purposes of corroboration, not an initial specificity analysis). As there is no basis to conclude that Commerce's analysis or corroboration of the petition was in error, and as "a reasonable mind might accept" the petition as sufficient to support Commerce's de facto specificity finding, that finding is supported by substantial evidence and sustained. *Maverick Tube*, 857 F.3d at 1359 (citing *Consol. Edison Co.*, 305 U.S. at 229).

II. Substantial Dependence

Applying 19 U.S.C. § 1677–2 on remand, Commerce again concluded that table olives satisfied the statute's substantial-dependence analysis such that BPS subsidy payments to olive growers can be attributed to producers of table olives. *Second Remand Results* at 36. However, in light of the court's conclusion in *Asemesa II* that "prior stage product" cannot be defined as "the raw agricultural product that the industry under examination considers principally suitable for use in the prior stage of production of the latter stage product," Commerce revised its application of the statute. 523 F. Supp. 3d at 1400. Specifically, Commerce determined that the "prior stage product" in this case is "table and dual-use raw olive varietals that are biologically distinct from other raw olive varietals" — namely, the manzanilla, gordal, hojiblanca, and carrasquena varietals — while the latter stage product is all table olives. *Second Remand Results* at 30. Commerce then concluded that "[b]ecause 55.28 percent of the manzanilla, gordal, hojiblanca, and carrasquena varietals, the prior stage product, were processed into table olives, the latter stage product, we find that the demand for these varietals is substantially dependent on processed table olives." *Id.* at 36.

Plaintiffs oppose Commerce's substantial-dependence determination, arguing that Commerce's consumption ratio (calculated by comparing the total amount of manzanilla, gordal, hojiblanca and carrasquena olive varietals processed into table olives with the total amount harvested) does not reflect substantial dependence, and in any case is not supported by substantial evidence. Pls.' Br. at 6–7. The

[2] Indeed, as both the Government and Defendant-Intervenor note, the fact that olive production constitutes only three percent of Spain's agricultural output further supports Commerce's conclusion and is notably not addressed by the Plaintiffs in their comments on the *Second Remand Results*. *See Second Remand Results* at 19–20 n.86; Def.'s Br. at 11, Def.-Inter.'s Br. at 6–7.

Government and Defendant-Intervenor argue in favor of Commerce's determination, contending that Commerce reasonably identified specific olive varietals as the prior stage product, and reasonably assessed the dependence of those varietals on the production of table olives. Def.'s Br. at 17–21; Def.-Inter.'s Br. at 13–22.

A. The Legal Standard is Satisfied

As a threshold matter, the court reiterates its conclusions in *Asemesa I*, where it determined that the plain meaning of 19 U.S.C. § 1677–2 requires a finding of substantial dependence where the demand for raw olives is "'largely, but not wholly,' 'contingent' on the demand for table olives." *See* 429 F. Supp. 3d at 1341–42 (citations omitted). The court further determined that Commerce's practice is to treat as substantially dependent any raw agricultural product for which at least half of the demand depends on the relevant latter stage product. *See id.* at 1341–46 (noting that Commerce has developed a practice of finding substantial dependence where the latter-stage product comprises "almost exclusively, almost all, most, or substantially all the demand" for the prior-stage product); *see also Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada*, 54 Fed. Reg. 30,774 (Dep't Commerce July 24, 1989) ("*Pork from Canada 1989*"); *Rice from Thailand; Final Results of Countervailing Duty Administrative Review*, 59 Fed. Reg. 8,906 (Dep't Commerce Feb. 24, 1994) ("*Rice from Thailand 1994*").

In light of the plain meaning of the statute and Commerce's established past practice, Plaintiffs are not correct that Commerce's 55.28 percent consumption ratio cannot reflect substantial dependence. Pls.' Br. at 21–22. Where more than half of a prior stage product is dedicated to the production of a latter stage product, demand for the prior stage product is largely but not wholly dependent on the latter stage product. Indeed, Commerce has expressly concluded that where "most" of a prior stage product is dedicated to the production of a latter stage product, demand for each is "inextricably linked" such that a finding of substantial dependence is appropriate. *Pork from Canada 1989* at 30,775. Accordingly, Plaintiffs' argument that "[e]ven assuming" the accuracy of Commerce's consumption ratio, "its stated 55 percent figure does not meet the legal standard" is unavailing.[3] Pls.' Br. at 20.

[3] The court likewise rejects Plaintiffs' argument that a "single continuous line of production" is required for a finding of substantial dependence. Pls.' Br. at 32. Plaintiffs identify no statutory basis for this alleged requirement, and like the threshold for substantial dependence, the court has already addressed the treatment of substantial dependence where there is no single continuous line of production in its prior opinion. *Asemesa I*, 429 F. Supp. 3d at 1345; *see also First Remand Results* at 70; *Second Remand Results* at 58–59.

B. Commerce's Consumption Ratio is Supported by Substantial Evidence and in Accordance with Law

Having concluded that the legal standard would be satisfied by Commerce's 55.28 percent consumption ratio, the court next assesses whether the calculation of that ratio was supported by substantial evidence and in accordance with law. In the *Second Remand Results*, Commerce first reassessed the appropriate prior stage product for its substantial-dependence analysis, concluding that "[b]ecause manzanilla, gordal, hojiblanca, and carrasquena account for 87 percent of olive production grown for table during the [period of investigation], we are relying on these four table and dual-use raw olive varietals as the 'prior stage product.'" *Second Remand Results* at 32. It rejected as potential prior stage products "strictly mill varietals," as "typically only 1 percent of mill olives are sent to table" as well as dual-use cacerena olives, as "the production volume of cacarena comprises a small percentage of the total volume of olive varietals grown for table." *Id.* at 32–33. Next, Commerce calculated a consumption ratio where the "492,244 tons of manzanilla, gordal, carrasquena, and hojiblanca grown for table, plus the 71,814 tons of hojiblanca grown for mill but used for table olive production" constituted the numerator (i.e., the amount of prior stage product used in the production of the latter stage product) and the "1,020,426 tons of manzanilla, gordal, carrasquena, and hojiblanca olive varietals" grown for any purpose (i.e., the total amount of prior stage product) constituted the denominator. *Id.* at 33–36. These numbers were drawn from Plaintiffs' responses and comments on the draft remand redetermination and adjusted (1) to exclude non-hojiblanca mill olives used for table olive production in the numerator, and (2) to include hojiblanca mill olives used for mill olive production in the denominator. *Id.* These adjustments were intended to accurately reflect the dual-use nature of hojiblanca olives and to avoid incorporating in Commerce's analysis any dual-use olive varietals for which there was inadequate evidence on the record. *Id.* at 33–34. Using the adjusted numerator and denominator, Commerce's consumption ratio indicated that 55.28 percent of the manzanilla, gordal, hojiblanca, and carrasquena varietals were processed into table olives. *Id.* at 36.

The court first concludes that Commerce's reassessment of the appropriate prior stage product on remand is supported by substantial evidence and in accordance with law. In *Asemesa II*, the court rejected Commerce's conclusion that the prior stage product, for purposes of a substantial-dependence analysis, was such raw olives "[as] the industry under examination considers principally suitable for use in" the production of table olives. 523 F. Supp. 3d at 1407. The court

noted that such a definition would render 19 U.S.C. § 1677–2 "largely self-fulfilling" such that the section would have little remaining meaning. *Id.* On remand, Commerce identified specific varietals as the appropriate prior stage product and explained that the excluded varietals were biologically distinct. *Second Remand Results* at 31. Specifically, Commerce explained that the "table olive varietals" it identified "have a lower oil content, are larger in size, are more symmetrical in shape, and generally are characterized as having a higher pulp-to-bone ratio." *Id.* This revised approach remedies the statutory inconsistency identified by the court in *Asemesa II*, and is supported by record evidence, including by the submissions of the GOS. *Id.*; *see also* Musco's February 25 Resp. at Ex. 2A (Feb. 25, 2020), R.P.R. 4; GOS Suppl. Questionnaire (Dep't Commerce Oct. 25, 2017), P.R. 240.

That there is a degree of fungibility between table and mill olives does not invalidate Commerce's determination. As Plaintiffs acknowledge, it is an undisputed fact that "almost all" of certain varietals are used for either mill or table olive production. Pls.' OAQ Resps. at 10–11. Furthermore, Commerce directly addresses the risk that fungibility might muddy the waters of its substantial-dependence analysis by adjusting the raw numbers of manzanilla, gordal, hojiblanca, and carrasquena olives incorporated in the numerator and denominator of its consumption ratio to avoid distorting that ratio by overestimating the dependence of dual-use olives (like hojiblanca) on table olive production. *Second Remand Results* at 33–36. Accordingly, the court concludes that Commerce's reevaluation of the appropriate prior stage product is supported by substantial evidence and complies with the court's determination in *Asemesa II*. *See Beijing Tianhai Indus.*, 106 F. Supp. 3d at 1346–47 (citations omitted) (setting out standard for compliance with court remand).

Next, the court considers Commerce's reliance on a consumption ratio to determine substantial dependence. Plaintiffs argue that 19 U.S.C. § 1677–2 requires that "but for demand for table olives, largely all of the raw olive varietals [Commerce] identifies as substantially dependent would not exist," and that the use of a consumption ratio therefore erroneously fails to "emphasize[] the relationship between demand and dependence, not demand and use." Pls.' Br. at 16–17. This is incorrect. First, the statute requires that "demand for the prior stage product [be] substantially dependent on the demand for the latter stage product," not that a prior stage product could only ever be employed to produce the latter stage product at issue. 19 U.S.C. § 1677–2. As noted above, such requirement is satisfied where more than half of a prior stage product is dedicated to the production

of a latter stage product. Second, where — as here — a prior stage product is used almost exclusively in the production of latter stage products, and not sold in its raw form, it is not apparent on what basis "demand" is distinct from "use" for purposes of a substantial dependence analysis. Finally, as Defendant-Intervenors note, "Commerce's use of consumption as a proxy for . . . demand is consistent with . . . its past practice." Def.-Inter.'s Br. at 13. For example, Commerce has found substantial dependence where "almost all . . . paddy or unmilled rice is dedicated to the production of milled rice," *Rice from Thailand 1986* at 8,909, and where "most swine" is dedicated to slaughter, and "pork constitutes the primary product of the slaughtered pig," *Pork from Canada 1989* at 30,775. Commerce's use of a consumption ratio to assess substantial dependence is thus in accordance with law.

Finally, the court considers the calculations underlying Commerce's consumption ratio. Addressing Commerce's adjustments to the consumption ratio, discussed *supra*, Plaintiffs argue "Commerce's analysis is built upon a series of mischaracterizations and unsupported assumptions that bias the results, all in reliance on data that do not permit a true varietal analysis." Pls.' Br. at 22. Plaintiffs specifically contest both Commerce's exclusion of certain non-hojiblanca dual-use varietals (namely cacerena) from the denominator of the ratio, and Commerce's inclusion of hojiblanca olives grown for mill in the numerator.[4] *Id.* at 27–32. Plaintiffs further argue that Commerce unreasonably decided not to rely on certain record data, including GOS's hectare data. *Id.* at 32–34.

Again, Plaintiffs' arguments are unavailing. First, as both the Government and Defendant-Intervenor explain, Commerce excluded the cacerena olives from its analysis because, while it had access to data conveying "the total tonnage of cacerena olives used to produce table olives," it lacked any information regarding the amount of cacerena olives *not* used to produce table olives. Def.'s Br. at 30; see Def.-Inter.'s Br. at 18; *Second Remand Results* at 66. Thus, inclusion of the cacerena data would have inflated the numerator of the consumption ratio (amount of table and dual-use varietals used for table olive production) without similarly accurately increasing the denominator (total amount of such varietals produced). Second, Commerce adequately explained its inclusion of the hojiblanca data and its adjustment of that data to include in the ratio denominator hojiblanca

[4] As the Government notes, Plaintiffs have waived their argument that Commerce should have derived the total tonnage of cacerena olives used to produce olive oil using the hojiblanca ratio by failing to raise such argument before Commerce. Def.'s Br. at 31; Pls.' Br. at 28. Accordingly, the court need not address Plaintiffs' argument.

grown for both table and mill. *Second Remand Results* at 33–36. Plaintiffs' argument that the hojiblanca grown for mill but used for table should nevertheless be subtracted from the ratio numerator would render Commerce's inclusion of the hojiblanca olives grown for mill in the ratio numerator unnecessary and inaccurate. *Id.*; *see also* Def.-Inter.'s Br. at 20. Finally, with respect to Plaintiffs' arguments that Commerce was obligated to rely upon specific record data — namely the GOS's hectare production data and the GOS agency (AICA) consumption data — Commerce reasonably declined to rely on both the GOS hectare data and AICA data to adjust its consumption ratio. The GOS hectare data was considered by Commerce, but ultimately rejected because it was unpublished, non-contemporaneous, and lacked any supporting documentation. *Second Remand Results* at 66. Similarly, the AICA data could not have been used (as Plaintiffs argue) to alter Commerce's consumption ratio because it represents olive production data only, and would therefore require Commerce to make the unsupported assumption that all olives grown for table are ultimately consumed in the production of table olives. Pls.' Br. at 25–26; Def.'s Br. at 32. Commerce thus reasonably supported its calculation of the 55.28 percent consumption ratio with record evidence, and its substantial-dependence determination must be sustained.

CONCLUSION

For the foregoing reasons, Commerce's *Second Remand Results* are sustained. Judgment will enter accordingly in favor of the Government.

SO ORDERED.

Dated: September 14, 2022
New York, New York

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

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