U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A WHITE NOISE MACHINE

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of a white noise machine.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of a white noise machine under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 5, on February 8, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 4, 2023.

FOR FURTHER INFORMATION CONTACT: Michael Thompson, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at michael.f.thompson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

gation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 5, on February 8, 2023, proposing to revoke one ruling letter pertaining to the tariff classification of a white noise machine. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N283732, dated March 21, 2017, CBP classified a white noise machine in heading 8479, HTSUS, specifically in subheading 8479.89.94, HTSUS, which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other: Other." CBP has reviewed NY N283732 and has determined the ruling letter to be in error. It is now CBP's position that the white noise machine is properly classified, in heading 8509, HTSUS, specifically in subheading 8509.80.50, HTSUS, which provides for "Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof: Other appliances: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking N283732 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H328381, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H328381
March 21, 2023
CLA-2 OT:RR:CTF:EMAIN H328381 MFT
CATEGORY: Classification
TARIFF NO.: 8509.80.50

MR. KYL J. KIRBY
KYL J. KIRBY, ATTORNEY AND COUNSELOR AT LAW, P.C.
1400 LIPSCOMB STREET
FORT WORTH, TX 76104

MR. MATTHEW SNYDER
SNOOZ, INC.
60 BONDS DRIVE
BOURBONNAIS, IL 60914

RE: Revocation of NY N283732; Tariff classification of a white noise machine

DEAR MESSRS. KIRBY AND SNYDER:

This letter is in reference to New York Ruling Letter (NY) N283732, issued to SNOOZ, Inc. on March 21, 2017, pertaining to the tariff classification of a certain white noise machine under the Harmonized Tariff Schedule of the United States (HTSUS). We find NY N283732 to be in error and are therefore revoking it for the reasons set forth below.

Pursuant to section 625(c)(1) , Tariff Act of 1930 (19 U.S.C § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on February 8, 2023, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

The merchandise at issue in NY N283732 is described as follows:

> The imported product, called the SNOOZ, is used to create white noise sounds for sleeping or noise masking. The device produces these sounds with a small brushless DC motor used to spin a fan blade that is inside a plastic acoustic enclosure. The SNOOZ fan is designed to create maximum sound with minimal air movement. It does not reproduce the sound electronically but it creates the noise using a fan and the double wall adjustable housing.
>
> The device includes an AC adapter, decorative fabric wrap, printed circuit board and a touch control surface to control the volume of the fan speed inside the device. The device will also be able to be controlled by a smart phone application.

In addition to the above facts, we have learned that the subject merchandise weighs two pounds.

NY N283732 classified the subject merchandise under subheading 8479.89.94, HTSUS, which provided for "Machines and mechanical appli-

ances having individual functions, not specified or included elsewhere in this chapter, parts thereof: Other machines and mechanical appliances: Other: Other."[1]

ISSUE:

Whether the subject white noise machine is properly classified in heading 8479, HTSUS, which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof," or in heading 8509, HTSUS, which provides for "Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof."

LAW AND ANALYSIS:

Classification under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods will be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 will then be applied in order.

The HTSUS headings under consideration are as follows:

8479 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof:

* * * * *

8509 Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof:

Note 1(f) to Chapter 84, HTSUS, provides, *inter alia*, that the chapter excludes electromechanical domestic appliances of heading 8509, HTSUS. Note 4 to Chapter 85, HTSUS, defines the scope of heading 8509, HTSUS, as follows:

> Heading 8509 covers only the following electromechanical machines of the kind commonly used for domestic purposes:
>
> (a) Floor polishers, food grinders and mixers, and fruit or vegetable juice extractors, of any weight;
>
> **(b) Other machines provided the weight of such machines does not exceed 20 kg, exclusive of extra interchangeable parts or detachable auxiliary devices.**
>
> The heading does not, however, apply to fans or ventilating or recycling hoods incorporating a fan, whether or not fitted with filters (heading 8414), centrifugal clothes dryers (heading 8421), dishwashing machines (heading 8422), household washing machines (heading 8450), roller or other ironing machines (heading 8420 or 8451), sewing machines (heading 8452), electric scissors (heading 8467) or to electrothermic appliances (heading 8516).

(**Emphasis** added).

[1] Effective January 27, 2022, subheading 8479.89.94, HTSUS, was removed from the schedule and renumbered as subheading 8479.89.95, HTSUS.

Thus, if the subject white noise machine constitutes an "electromechanical domestic appliance" of heading 8509, HTSUS, classifiable under that heading, it cannot be classified under heading 8479, HTSUS.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 85.09 provides, in pertinent part, the following guidance:

> This heading covers a number of domestic appliances in which an electric motor is incorporated. The term "domestic appliances" in this heading means appliances normally used in the household. These appliances are identifiable, according to type, by one or more characteristic features such as overall dimensions, design, capacity, volume. The yardstick for judging these characteristics is that the appliances in question must not operate at a level in excess of household requirements.

We find that the subject white noise machine constitutes an electromechanical domestic appliance under heading 8509, HTSUS. First, the device includes a self-contained, DC motor and thus incorporates an electric motor per the requirement of the legal text. Second, the device produces sound electromechanically; i.e., the electric motor powers the fan within the acoustic housing. Third, the device weighs only two pounds, well below the 20 kg threshold provided in Note 4(b), *supra*. Furthermore, there is no indication that the device exhibits functions or characteristics beyond those required for common household use. Therefore, the subject white noise machine constitutes an electromechanical domestic appliance under heading 8509, HTSUS.[2]

Because the device is classifiable under heading 8509, HTSUS, it is precluded from classification under heading 8479, HTSUS, in accordance with Note 1(f), *supra*.

HOLDING:

By application of GRIs 1 (Note 4 to Chapter 85) and 6, the subject white noise machine is classified in heading 8509, HTSUS, specifically in subheading 8509.80.50, HTSUS, which provides for "Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof: Other appliances: Other." The general, column one rate of duty is 4.2 percent *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at https://hts.usitc.gov/current.

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[2] The subject merchandise is not classifiable under heading 8519, HTSUS, because it creates sound electromechanically via a fan powered by an electric motor; it does not reproduce an original sound wave. *Cf.* NY N042716 (dated Nov. 14, 2008) (classifying a white noise machine that reproduced sound via "Mask ROM-chip technology" under heading 8519, HTSUS).

EFFECT ON OTHER RULINGS:

NY N283732 (March 21, 2017) is hereby revoked.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Sincerely,

GREGORY CONNOR
for

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 23–34

MTD Products Inc., Plaintiff, v. United States, Defendant, and Briggs & Stratton, LLC, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 21–00264

[The court denies Plaintiff's motion for judgment on the agency record and instead grants judgment for Defendant and Defendant-Intervenor.]

Dated: March 16, 2023

Alex Schaefer, Crowell & Moring LLP of Washington, DC, argued for Plaintiff. With him on the briefs was *Michael Bowen*.

Henry N.L. Smith, Office of the General Counsel, U.S. International Trade Commission of Washington, DC, argued for Defendant. With him on the brief was *Andrea C. Casson*, Assistant General Counsel for Litigation.

Clint Long, King & Spalding LLP of Washington, DC, argued for Defendant-Intervenor. On the brief for Defendant-Intervenor was *Stephen J. Orava*.

OPINION

Baker, Judge:

In this case stemming from antidumping and countervailing duty investigations of small vertical shaft engines from China, a domestic importer challenges the International Trade Commission's finding that a surge in imports shortly before duties took effect warranted retroactive application of such duties. For the reasons set out below, the court sustains the Commission's determination.

I

Under the Tariff Act of 1930, as amended, the Commerce Department ordinarily imposes antidumping and countervailing duties prospectively. *See* 19 C.F.R. § 351.206(a) (explaining that antidumping and countervailing duties normally apply to entries of merchandise "made on or after the date on which the Secretary first imposes provisional measures (most often the date on which notice of an affirmative preliminary determination is published in the Federal Register)"); *see also* 19 U.S.C. §§ 1671b(d)(2)(B) (countervailing duties), 1673b(d)(2)(B) (antidumping duties).

But the statute also contains a procedure allowing for retroactive application of duties in certain situations. If the petitioner whose allegations sparked the investigation alleges "critical circumstances,"

the Department must also determine whether "there have been massive imports of the subject merchandise over a relatively short period." 19 U.S.C. §§ 1671d(a)(2) (countervailable subsidies), 1673d(a)(3) (dumping).

If Commerce finds such critical circumstances, the Commission must then determine whether the imports in question "are likely to undermine seriously the remedial effect" of the order to be issued. *Id.* §§ 1671d(b)(4)(A)(i) (countervailable subsidies), 1673d(b)(4)(A)(i) (dumping). In making that determination, the Commission must consider

> (I) the timing and volume of the imports,
>
> (II) a rapid increase in inventories of the imports, and
>
> (III) any other circumstances indicating that the remedial effect of the [countervailing or antidumping] duty order will be seriously undermined.

Id. §§ 1671d(b)(4)(A)(ii), 1673d(b)(4)(A)(ii).

If the Commission finds that the surge in imports is likely to undermine the remedial effect of the countervailing duty and antidumping orders, duties may be imposed retroactively. The procedure varies depending on the facts of any given case, but as relevant here, the duties may apply retroactively "to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after 90 days before the date on which suspension of liquidation was first ordered." *Id.* §§ 1671b(e)(2)(A), 1671d(c)(4), 1673b(e)(2)(A), 1673d(c)(4). The mechanism's purpose is to prevent clever importers from circumventing impending antidumping and countervailing duties by rushing in their shipments before the duties take effect. *See* H.R. Rep. 96–317, 96th Cong., 1st Sess. at 63 (1979).

II

A

Briggs & Stratton, LLC, is an American producer of "small vertical shaft engines." Such engines are typically used in lawn mowers, pressure washers, and other outdoor power equipment. Appx2306–2307. In 2020, Briggs & Stratton petitioned the Commission and Commerce for relief against alleged Chinese dumping of these engines, which the company asserted injured domestic industry.

In response, the Commission opened both antidumping and countervailing duty investigations to determine whether a domestic in-

dustry was injured by imports of such engines from China "that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Government of China." *Small Vertical Shaft Engines from China; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations*, 85 Fed. Reg. 16,958, 16,958 (ITC Mar. 25, 2020). Commerce likewise found the petition sufficient to justify launching investigations. *Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 85 Fed. Reg. 20,667, 20,667 (Dep't Commerce Apr. 14, 2020); *Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 85 Fed. Reg. 20,670 (Dep't Commerce Apr. 14, 2020). MTD Products Inc., a domestic importer of small vertical shaft engines from China, participated in these proceedings before both agencies.

Shortly after the agencies began the investigations, Briggs & Stratton filed an amended petition alleging that critical circumstances existed. *See Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof from the People's Republic of China: Preliminary Affirmative Determination of Critical Circumstances, in Part, in the Countervailing Duty Investigation*, 85 Fed. Reg. 68,851, 68,851 (Dep't Commerce Oct. 30, 2020) (discussing Briggs & Stratton's critical circumstances allegation).

B

In both the antidumping and countervailing duty investigations, Commerce preliminarily found critical circumstances existed as to imports of certain (but not all) small vertical engines from China. *Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof, from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Affirmative Determination of Critical Circumstances, in Part*, 85 Fed. Reg. 66,932, 66,933 (Dep't Commerce Oct. 21, 2020) (antidumping duty); 85 Fed. Reg. at 68,851–52 (countervailing duty).

In its final determinations, Commerce continued to find that critical circumstances existed for imports of small vertical engines from a group of related entities known as the "Zongshen Companies" (collectively, Zongshen) and, in the antidumping duty investigation, for the China-wide entity.[1] *Certain Vertical Shaft Engines Between 99cc and*

[1] For an overview of the "country-wide rate" applicable in non-market economy matters, such as those involving China, see *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1340–41 (CIT 2020).

up to 225cc, and Parts Thereof, from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part, 86 Fed. Reg. 14,077, 14,078 (Dep't Commerce Mar. 12, 2021) (antidumping duty); Appx1210 (countervailing duty).

C

For its part, the Commission found "that imports subject to Commerce's affirmative critical circumstances determinations in the antidumping and countervailing duty investigations are likely to undermine seriously the remedial effect of the antidumping and countervailing duty orders." *Small Vertical Shaft Engines from China*, 86 Fed. Reg. 22,975, 22,975 n.2 (ITC Apr. 30, 2021).

In so doing, the Commission cited the statutory standard and explained that as to "the timing and volume of the imports," 19 U.S.C. §§ 1673d(b)(4)(A)(ii)(I) and 1671d(b)(4)(A)(ii)(I), its "practice is to consider[2] import quantities prior to the filing of the petition [that is, pre-petition import quantities] with those subsequent to the filing of the petition [post-petition quantities] using data on the record regarding those firms for which Commerce has made an affirmative critical circumstances determination." Appx3091. The Commission treated November 2019 through March 2020 as the "pre-petition period" and April through August 2020 as the "post-petition period." Appx3093.

The agency emphasized that there was a surge of imports during the summer of 2020, "an off-season portion of the year" during which imports do not normally increase. Appx3095. "These imports also increased relative to apparent U.S. consumption at a time when consumption was declining, and the volumes associated with the increase were large . . . ." Appx3095; Appx3099–3100 (same findings as to countervailing duty order).

The Commission rejected MTD's argument that COVID-19 shutdowns artificially depressed pre-petition import volumes, citing data showing that Zongshen exported more small vertical shaft engines to the United States in January–March 2020—the period for which MTD cited COVID-related shutdowns—than it did during the same period in 2019. Appx3096. The agency also found that Zongshen's total imports in June and July 2020 were not just higher than any month during the pre-petition period—"they were the largest monthly export volumes to the United States from . . . Zongshen" over the entire period investigated. Appx3096–3097; Appx3100 (same findings as to countervailing duty order).

[2] The court presumes the Commission intended this word to be "compare."

Finally, the Commission concluded that the increased imports created "a large stockpile of imports prior to the imposition of provisional duties, at levels that were higher than all U.S. importers' annual end-of-year inventories from 2017 through 2019," and that import prices bottomed out during the second and third quarters of 2020. Appx3097. The result was that U.S. purchasers had less need to buy small vertical shaft engines from the domestic engine industry for the 2021 season. Appx3101. "[W]e find that this massive surge of imports and rapid inventory buildup is likely to protract the adverse impact of the subject imports on the domestic industry and thereby undermine seriously the remedial effect of the countervailing duty order." *Id.*; Appx3097–3098 (same conclusion as to antidumping duty order).

D

After the Commission issued its determination that imports threatened to undermine the remedial effects of the antidumping and countervailing duty orders, Commerce issued the orders at issue here. The Department imposed antidumping duties on "unliquidated entries of small vertical engines from China entered, or withdrawn from warehouse, for consumption on or after July 23, 2020," i.e., 90 days before Commerce's preliminary determination, as to entries from Zongshen and the China-wide entity. *Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof from the People's Republic of China: Antidumping and Countervailing Duty Orders*, 86 Fed. Reg. 23,675, 23,676 (Dep't Commerce May 4, 2021).

The countervailing duty portion similarly provided that as to entries from Chongqing Zongshen General Power Machine Co.—one of the Zongshen entities—countervailing duties would be assessed on "unliquidated entries of small vertical engines which are entered, or withdrawn from warehouse, for consumption on or after May 26, 2020," i.e., 90 days before Commerce's preliminary determination. *Id.* at 23,677.

III

MTD sued to challenge the Commission's determination that the surge in imports threatened to undermine the orders' remedial effect. *See generally* ECF 4.[3] Briggs & Stratton intervened to defend the Commission's determination. ECF 19.

MTD filed the pending motion for judgment on the agency record. ECF 31 (motion); ECF 41 (brief). The government (ECF 39, confiden-

[3] MTD does not challenge the agencies' findings about dumping or countervailable subsidies. Nor does the company challenge either the dumping or subsidy margins or Commerce's critical circumstances determination.

tial; ECF 40, public) and Briggs & Stratton (ECF 44) opposed; MTD replied (ECF 42, confidential; ECF 43, public). The court then heard argument.

IV

MTD sues under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and 1516a(a)(2)(B)(i). The court has subject-matter jurisdiction via 28 U.S.C. § 1581(c).

In § 1516a(a)(2) actions, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

V

MTD raises two theories to challenge the Commission's determination that the imports in question were likely to seriously undermine the remedial effect of the antidumping and countervailing duty orders. First, MTD asserts that the agency used faulty data. ECF 41, at 10–19. Second, the company quarrels with how the Commission weighed the data. *Id*. at 20–28.

A

MTD contends that the Commission based its determination on (1) "export data subject to significant lead times," (2) "incongruous and inaccurate comparison periods," and (3) "artificial apparent increases in volume due in large part to the Covid-19 pandemic." *Id.* at 10. MTD also argues that in "any case," the agency (4) "failed to sufficiently explain how these issues impacted the timing and volume of apparent

imports, the first statutory criterion under the critical circumstances analysis." *Id*. at 11.

1

The court begins with MTD's fourth and final contention, which the company barely made in passing in its opening brief and then fully developed in its reply as a statutory argument. *Compare* ECF 41 (opening brief), at 11, *with* ECF 43 (reply), at 1–5. While ordinarily the court would decline to address an argument only pressed for the first time on reply, the government took the bait and joined the issue in its brief. ECF 40, at 46. Thus, the court will entertain MTD's late-blooming statutory argument.

MTD contends that the Commission's determination "must be based on . . . the information expressly required by the statute—*import* data. A finding based on anything else is inherently speculative, suspect, and unsustainable." ECF 43, at 3 (emphasis in original). As the government argues, however, the Act simply directs the Commission to "consider" the "factor" of the "timing and volume of imports" and does not restrict what *data* the Commission may consider in so doing. ECF 40, at 46 ("[I]t is reasonable to interpret this language as permitting the Commission to consider several key points along the timeline of an import—such as order date, shipment date, export date, date of importation, or delivery date—as would be relevant under the circumstances of any particular investigation."); *see also* 19 U.S.C. §§ 1673d(b)(4)(A)(ii), 1671d(b)(4)(A)(ii). Nothing in the statute restricts the Commission's broad discretion to consider *data* reasonably relevant to determining the "timing and volume of imports." Reinforcing this discretion, the Act directs the agency to consider—"among other factors it considers relevant"—"*any other circumstances* indicating that the remedial effect of the [orders] will be seriously undermined." ECF 40, at 46 (emphasis and brackets the government's) (quoting 19 U.S.C. §§ 1671d(b)(4)(A)(ii)(III) and 1673d(b)(4)(A)(ii)(III)). The court therefore turns to whether the agency's reliance on the data in question was reasonable.

2

MTD argues that the Commission's use of Chinese export data "would not account for the demonstrated 90- to 120[-]day lead times applicable to exports of the subject merchandise." ECF 41, at 12. The company contends that the use of "export data which is subject to lead times of three-to-four months" could be "problematic" because portions of the export data would "likely reflect imports ultimately subject to provisional measures." *Id.* at 12–13. MTD also argues that engine shipments through July 2020 "reflected purchase commit-

ments under contracts that had been inked in 2019, long before the filing of the Petition." ECF 43, at 9. It contends that the company "did not—and as a practical matter could not—both order and import such a massive quantity of engines" in the period after Briggs & Stratton filed its petition but before the agencies' imposition of provisional measures. *Id.* at 9–10.

The government responds that the Commission took note that MTD itself "reported that lead times for imports in 2020 varied widely because of shipment disruptions related to COVID-19." ECF 40, at 34. It argues that because of such variations, "which covered most of the pre-petition period and all of the post-petition period, it was reasonable for the Commission to rely on export data, as export data was not as subject to variability in shipment times and, therefore, was a more comparable and reliable data source for evaluating the timing and volume of any post-petition increases." *Id.* at 34–35.

The administrative record shows that the agency responded to MTD's argument by calling it "inapposite": "Our critical circumstances data are based on monthly exports to the United States reported by [Zongshen], not on monthly U.S. imports, and therefore do not reflect shipment times from [Zongshen] . . . on which the estimated 90 to 120 day produced-to-order lead times are based." Appx2347 n.256. The Commission also noted that MTD acknowledged placing orders during the spring of 2020 after Briggs & Stratton filed its petition and that the imports resulting from those orders "began arriving in the United States in the May–June period and continued in July and August." Appx2347.

The agency thus considered MTD's arguments and gave a reasonable explanation for rejecting them based on the evidence in the record. Under the substantial evidence standard of review, that suffices. Although MTD asks the court to re-weigh the evidence, the standard of review does not allow the court to do so. *See Guangdong Alison Hi-Tech Co. v. Int'l Trade Comm'n*, 936 F.3d 1353, 1365 (Fed. Cir. 2019).

3

MTD argues that the comparison periods the Commission used were inappropriate. The company notes that Briggs & Stratton filed its petitions on March 18, 2020, and that the agency therefore included March in the "pre-petition period": "[T]he Commission used the entirety of volume data for the months November 2019–March 2020 as the 'pre-petition' period and that for April 2020–August 2020 as the 'post-petition' period. This resulted in 12 days' worth of data

wrongly included in the 'pre-petition' comparison period, and 7 days incorrectly included in the 'post-petition' period." ECF 41, at 11.

The agency explained that it chose to place March 2020 in the pre-petition period "in light of the specific circumstances of these investigations," Appx2343, because Briggs & Stratton filed the petitions "towards the middle of the month," Appx2343 n.241. The Commission further explained that its choice of August 2020 for the end of the post-petition period was based on Commerce issuing its preliminary determination in the countervailing duty investigation on August 24, 2020, "within the fifth month of the post-petition period we are using here." Appx2343 n.243. The Commission referred to its "practice" as being to use the same pre- and post-petition periods for both the antidumping and countervailing duty matters. *Id.*

The agency thus gave a reasonable explanation for its choice of pre- and post-petition periods. MTD admits that it is "unclear exactly how much of the volume data for each [of] these two months [i.e., March and August 2020] fall within these erroneously included periods." ECF 41, at 11–12. MTD's arguments about the time periods leading to erroneous results are therefore speculative.

4

Finally, MTD argues that the Commission wrongly based its determination partially on "artificial apparent increases in volume due in large part to the COVID-19 pandemic." *Id.* at 10. The company contends that the agency's finding that monthly exports of subject merchandise hit their highest levels of the period of investigation from April to July 2020—that is, during the "post-petition" analysis period—was inappropriate because of the combination of "lead times" and the ripple effect of COVID-related production shutdowns in China between January and March 2020. *Id.* at 14–15. "[I]t is likely that a substantial portion of the exports reflected in this period would have been ordered prior to the filing of the petitions," *id.* at 15, and MTD contends that the surge in imports was caused by Chinese manufacturers' efforts to clear out a backlog of pending orders, *id.*

The Commission considered MTD's arguments and acknowledged that Zongshen was indeed affected by COVID-related shutdowns in January through March 2020, but the agency found that "those shutdowns did not appear to affect its exports to the United States" because those exports "were higher in January through March 2020 than during the same period in 2019. Thus, to the extent MTD's argument is that the increase in the post-petition period is to make up for exports delayed due to the COVID-19 pandemic, the record evidence on [Zongshen's] exports to the United States contradicts this

argument." Appx2347 (footnote reference omitted). The Commission also noted that MTD acknowledged placing orders with Zongshen after the petition was filed and that those imports arrived in the U.S. during May through August 2020. *Id.*

The record shows that the Commission considered MTD's argument, weighed the evidence, and found that argument unconvincing. The agency's explanation is reasonable, and the court will not second-guess its findings.

B

Emphasizing the views of the Commissioner who partially dissented, *see* Appx2356 (Separate Views of Commissioner David S. Johanson), MTD challenges the Commission's conclusion that imports before the imposition of provisional relief seriously undermined the remedial effect of the antidumping and countervailing duty orders. As the company observes, the Act's critical circumstances mechanism seeks to prevent accelerated imports from circumventing duty orders. ECF 41, at 20–21. MTD contends, however, that such is not the situation here because its imports consisted of "custom-made, non-fungible products" which were not stockpiled and thus were unavailable for such tactics. *Id.*

The government responds that the Commission found that Briggs & Stratton was able to produce, and did produce, small vertical shaft engines suitable for MTD's products. ECF 40, at 66 (citing Appx2313–2314). The government further observes that the Commission determined that even though MTD does not ordinarily resell small engines from its inventory, "the additional inventories of imported [small vertical shaft engines] nevertheless represented orders that the domestic industry did not have an opportunity to obtain." *Id.* (citing Appx2349, Appx2354). In that regard, the Commission also found that the inventory buildup associated with the surge in imports meant there would be less need for power tool manufacturers to purchase small engines for the next year's season. Appx2349, Appx2353–2354.

The Commission also noted the unusual timing of the surge in imports (or Chinese exports) of subject merchandise during a time of year when such imports do not normally increase and at a time when U.S. consumption of subject merchandise was apparently declining. Appx2345–2346. The agency placed significance on (1) the surge in imports coinciding with the time of year when domestic purchasers would be negotiating prices for engines to be delivered during the next year's lawn mower season and (2) the imports arriving during the surge having among the lowest prices of any imports during the

period of investigation. Appx2349. The Commission concluded that this combination of facts demonstrated that the surge of imports would "protract the adverse impact of the imports subject to the affirmative critical circumstances finding on the domestic industry and thereby undermine seriously the remedial effect of the antidumping order." *Id.*; *see also* Appx2353–2354 (same analysis for countervailing duty order).

MTD, however, argues that later events show that "the remedial effects of the Orders were not, in fact, seriously undermined by the apparent increase in imports over the post-petition period." ECF 41, at 22; *see also* ECF 43, at 17 ("The remedial effects of the orders were not seriously undermined") (point heading), 18 ("MTD submits that . . . the record evidence demonstrates that the remedial effect of the Orders was not undermined, seriously or otherwise.").

The statute, however, requires the Commission to assess whether subject imports "*are likely* to undermine seriously the remedial effect[s]" of the antidumping and countervailing duty orders "*to be issued*." 19 U.S.C. §§ 1673d(b)(4)(A)(i) (emphasis added), 1671d(b)(4)(A)(i) (same). In other words, the Commission makes an informed judgment *in advance*. The court need not decide whether the import surge *did*, in fact, seriously undermine the orders' remedial effects because even if it did not, that fact would not invalidate the Commission's finding under the statute.

The Commission amply explained the reasons for its conclusion that a surge in subject imports threatened to seriously undermine the duty orders' remedial effects. And although MTD disputes the evidentiary sufficiency of those findings, and urges the court to adopt the dissenting views of Commissioner Johanson, substantial evidence review does not permit the court to re-weigh the evidence as MTD proposes. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1372 (Fed. Cir. 2015) (cleaned up) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). Although the court agrees with MTD that the conclusion drawn by Commissioner Johanson is supported by the record, the conclusion drawn by the Commission majority—considering the record as a whole and the evidence that detracts from that conclusion—is also supported by the record. Under the substantial evidence standard, ties go to the agency.

* * *

For all these reasons, the court denies MTD's motion for judgment on the agency record and grants judgment on the agency record to the

government and Briggs & Stratton. *See* USCIT R. 56.2(b). A separate judgment will issue. *See* USCIT R. 58(a).

Dated: March 16, 2023
New York, New York

/*s*/ *M. Miller Baker*
JUDGE

Slip Op. 23–35

IN RE SECTION 301 CASES

Before: Mark A. Barnett, Claire R. Kelly, and Jennifer Choe-Groves, Judges
Court No. 21–00052–3JP

[Sustaining *Final List 3* and *Final List 4* as amended on remand by the Office of the United States Trade Representative; granting Defendants' second motion to correct the administrative record.]

Dated: March 17, 2023

Pratik Shah, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for Plaintiffs HMTX Industries LLC, et al. With him on the brief were *Matthew R. Nicely*, *James E. Tysse*, *Devin S. Sikes*, *Daniel M. Witkowski*, and *Sarah B. W. Kirwin*.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendants United States, et al. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, *Sosun Bae*, Senior Trial Counsel, and *Jamie L. Shookman*, Trial Attorney. Of Counsel on the brief were *Megan Grimball*, Associate General Counsel, *Philip Butler*, Associate General Counsel, and *Edward Marcus*, Assistant General Counsel, Office of General Counsel, Office of the U.S. Trade Representative, of Washington, DC, and *Paula Smith*, Assistant Chief Counsel, *Edward Maurer*, Deputy Assistant Chief Counsel, and *Valerie Sorensen-Clark*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

Alexander W. Koff, Venable LLP, of Baltimore, MD, argued for Amici Curiae VeriFone, Inc., et al. With him on the brief were *Ashleigh J. F. Lynn* and *Nicholas M. DePalma*, Venable LLP, of Tysons Corner, VA.

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OPINION AND ORDER

Barnett, Chief Judge:

Plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC commenced the first of approximately 3,600 cases[1] ("the Section 301 Cases") contesting the imposition of a third and fourth round of tariffs by the Office of the United States Trade Representative ("USTR" or "the Trade Representative") pursuant to section 307 of the Trade Act

[1] This figure reflects the approximate number of cases assigned to this panel. Cases raising similar claims filed on or after April 1, 2021, are stayed without an order of assignment. *See* U.S. Ct. of Int'l Trade Admin. Order 21–02.

of 1974 ("the Trade Act"), 19 U.S.C. § 2417 (2018).[2] *See generally* Am. Compl., *HMTX Indus. LLC v. United States,* No. 20-cv-177 (CIT Sept. 21, 2020), ECF No. 12 ("20–177 Am. Compl."). USTR imposed the contested duties, referred to herein as "List 3" and "List 4A," in September 2018 and August 2019, respectively. *See Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018) ("*Final List 3*"); *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,* 84 Fed. Reg. 43,304 (Aug. 20, 2019) ("*Final List 4*").[3] Plaintiffs alleged that USTR exceeded its statutory authority and violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), when it promulgated List 3 and List 4A. 20–177 Am. Compl. ¶¶ 63–75.

In *In Re Section 301 Cases*, 46 CIT __, 570 F. Supp. 3d 1306 (2022), the court rejected Defendants' ("the Government") argument that Plaintiffs' claims were non-justiciable and addressed Plaintiffs' substantive and procedural challenges.[4] Although the court sustained USTR's statutory authority to impose the tariffs pursuant to section 307(a)(1)(b) of the Trade Act, *id.* at 1323–35, the court remanded the matter for USTR to comply with the APA requirement for a reasoned

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[2] Citations to the United States Code are to the 2018 version, unless otherwise specified. Section 307 provides, *inter alia*:

> (a) In general
>
> (1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—
>
> (A) any of the conditions described in section 2411(a)(2) of this title exist,
> (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
> (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

19 U.S.C. § 2417(a)(1). The Section 301 Cases are named in recognition of the fact that claims raised therein contest modifications of tariffs initially imposed pursuant to section 301 of the Trade Act, 19 U.S.C. § 2411.

[3] Within *Final List 4*, USTR segregated the tariff subheadings into List 4A and List 4B with staggered effective dates (September 1, 2019, and December 15, 2019, respectively). 84 Fed. Reg. at 43,305. USTR promulgated List 3 and List 4A as modifications of two prior rounds of tariffs, referred to herein as "List 1" and "List 2." *See Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 28,710 (June 20, 2018) (promulgating List 1); *Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 40,823 (Aug. 16, 2018) (promulgating List 2).

[4] The court presumes familiarity with *In Re Section 301 Cases,* which sets forth in detail background on the imposition of List 3 and List 4A duties, and the case management procedures the court employed to handle the Section 301 Cases.

response to comments submitted during the List 3 and List 4A rulemaking proceedings. *Id.* at 1335–45.[5]

This matter is now before the court following USTR's filing of its remand redetermination. *See* Further Explanation of the Final List 3 and Final List 4 Modifications in the Section 301 Action: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation, Pursuant to Ct. Remand Order ("Remand Results"), ECF No. 467. In the Remand Results, USTR (1) identified the documents underlying its response to comments; (2) provided additional explanation supporting the removal or retention of certain tariff subheadings from List 3 and List 4A; (3) addressed comments concerning the level of duties to be imposed and the aggregate level of trade subject to the duties; and (4) addressed comments concerning potential harm to the domestic economy, the legality and efficacy of the tariffs, and suggested alternative measures. *See id.* at 23–89.

Plaintiffs and *Amici*[6] filed comments opposing the Remand Results and seeking vacatur of List 3 and List 4A. *See* Pls.' Cmts. on the [USTR's Remand Results] ("Pls.' Cmts."), ECF No. 474; Pls.' Reply Regarding the Remand Determination ("Pls.' Reply Cmts."), ECF No. 482; Br. of Amici Curiae Retail Litig. Ctr., Inc., Nat'l Retail Fed'n, Am. Apparel and Footwear Assoc., Consumer Tech. Assoc., Footwear Distributors and Retailers of Am., Juvenile Prods. Mfrs. Assoc., and Toy Assoc. ("RLC's Br."), ECF No. 472; Br. of Amici Curiae Verifone, Drone Nerds, and Specialized in Supp. of Pls.' Cmts. on the [Remand Results] ("Verifone's Br."), ECF No. 471–2. The Government filed responsive comments in support of the Remand Results. *See* Defs.' Resp. to Cmts. on the [Remand Results] ("Defs.' Resp. Cmts."), ECF No. 479. The Government also filed its second motion to correct the record. Defs.' Second Mot. to Correct the R. ("2nd Mot. Correct R."), ECF Nos. 466, 466–1. The court heard oral argument on February 7, 2023. Docket Entry, ECF No. 488.

For the following reasons, the court sustains *Final List 3* and *Final List 4* as amended by the Remand Results and grants the Government's second motion to correct the record.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) (2018 & Supp. II 2020), which grants the court "exclusive jurisdiction

[5] Finding authority pursuant to section 307(a)(1)(B), the court declined to address USTR's authority pursuant to section 307(a)(1)(C). *In Re Section 301 Cases*, 570 F. Supp. 3d at 1334–35. The court rejected Plaintiffs' remaining APA claims and granted in part the Government's motion to correct the record. *Id.* at 1345–49.

[6] The court authorized additional plaintiffs in the Section 301 Cases to participate in this litigation as *amici curiae*. Std. Procedural Order 21–02 at 4, ECF No. 82.

of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue."

The APA directs the court to "hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . . (C) in excess of statutory . . . authority; [or] . . . (E) unsupported by substantial evidence." 5 U.S.C. § 706(2).

DISCUSSION

Plaintiffs and *Amici* challenge the Remand Results on two grounds. They first assert that USTR's Remand Results constitute impermissible *post hoc* reasoning pursuant to *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020). Next, to the extent that USTR's Remand Results survive *Regents*, Plaintiffs challenge the substantive adequacy of USTR's response to certain comments. Following disposition of these issues, the court addresses the Government's second motion to correct the record.

I. The Rule Against *Post Hoc* Rationalization

A. Parties' Contentions

Plaintiffs contend that USTR contravened the court's remand order by undertaking a new review and analysis of the comments. Pls.' Cmts. at 9–10. Plaintiffs argue that, instead, judicial precedent limits USTR to elaborating on a "prior response to comments" located somewhere in the administrative record. *Id.* at 10; *see also id.* at 13–14 (arguing that USTR failed to demonstrate consideration of comments contemporaneous with the issuance of *Final List 3* and *Final List 4* upon which it now seeks to elaborate). Having failed to do so, Plaintiffs assert that vacatur is merited. Pls.' Reply Cmts. at 2–4.

The Government contends that Plaintiffs' view of the permissible limits of the remand finds no support in *Regents* or subsequent cases remanding actions for an agency to respond to comments. Defs.' Resp. Cmts. at 10; *see also id.* at 11–12 (citing *Bloomberg L.P. v. SEC*, 45 F.4th 462, 477 (D.C. Cir. 2022); *Env't Health Trust v. FCC*, 9 F.4th 893, 909, 914 (D.C. Cir. 2021)). The Government further contends that taking Plaintiffs' argument to its logical conclusion would require any agency that fails to address significant comments to undertake a new agency action on remand. *Id.* at 11. Instead, the Government maintains that USTR's Remand Results constitute permissible elaboration on the underlying justifications for the actions taken, namely, "the

President's direction and [the Trade Representative's] predictive judgment that the tariffs were 'appropriate' within the meaning of the statute." *Id.* at 12; *see also id.* at 20.

B. USTR's Response to Comments is Not Impermissibly *Post Hoc*

The APA requires agencies conducting notice and comment rulemaking to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). "The basis and purpose statement is inextricably intertwined with the receipt of comments." *Action on Smoking & Health v. Civ. Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (footnote citation omitted). An agency "must respond in a reasoned manner to those [comments] that raise significant problems." *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quotations and citation omitted). "Significant comments are those 'which, if true, raise points relevant to the agency's decision *and which, if adopted, would require a change in an agency's proposed rule*.'" *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)).

The court previously found that "USTR's statements of basis and purpose . . . indicate why the USTR deemed China's ongoing and retaliatory conduct actionable," namely, "China's unfair practices" and "the specific direction of the President." *In Re Section 301 Cases*, 570 F. Supp. 3d at 1340 (citing *Final List 3*, 83 Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05). The court further found, however, that although USTR's notices of proposed rulemaking ("NPRMs")[7] indicated the Trade Representative's "willingness to consider factors other than the President's direction," the contested final actions "do not explain whether or why the President's direction constituted the only relevant consideration nor do those determinations address the relationship between significant issues raised in the comments and the President's direction." *Id.* at 1341.[8] In explaining

[7] For the NPRMs, see *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 33,608 (July 17, 2018) ("*List 3 NPRM*"), and *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 84 Fed. Reg. 22,564 (May 17, 2019) ("*List 4 NPRM*").

[8] *Final List 3* referenced the removal of tariff subheadings in response to comments. 83 Fed. Reg. at 47,975 (noting that USTR, "at the direction of the President, has determined not to include certain tariff subheadings listed in the Annex to the [List 3 NPRM]"). *Final List 4* asserted that "The Trade Representative's determination takes account of the public comments and the testimony from the seven-day public hearing, as well as the advice of the interagency Section 301 committee and appropriate advisory committees." 84 Fed. Reg. at 43,305.

its decision to remand without vacatur, the court observed that "*Regents* . . . constitutes a warning to agencies regarding the impermissibility of *post hoc* reasoning as much as it constrains the court's review of such reasoning provided pursuant to a remand." *Id.* at 1344 (citing *Regents*, 140 S. Ct. at 1908).

When "reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). When the grounds invoked by an agency "are inadequate, a court may remand for the agency" to pursue one of two options. *Regents*, 140 S. Ct. at 1907.[9] Option one permits the agency to provide "a fuller explanation of the agency's reasoning *at the time of the agency action*." *Id.* (quoting *Pension Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)). Option one "has important limitations," such that "[w]hen an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Id.* at 1908 (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)) (second alteration in original). Option two permits an agency to "'deal with the problem afresh' by taking *new* agency action." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)). An agency acting in accordance with option two "is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.*

Plaintiffs argue that USTR's response to comments is impermissibly *post hoc* pursuant to *Regents* insofar as USTR undertook a new review and analysis of the comments on remand and failed to identify analysis of the comments contemporaneous with the issuance of *Final List 3* and *Final List 4*. *See, e.g.*, Pls.' Cmts. at 9–11. USTR's analysis of the comments, Plaintiffs contend, required a new rulemaking. *See* Pls.' Reply Cmts. at 1 ("If USTR wishes to assess and address the significant comments, evaluate the costs of further tariff actions, and then impose the List 3 and List 4A tariffs going forward,

[9] *Regents* concerns the U.S. Department of Homeland Security's ("DHS") rationale for rescinding the program referred to as "Deferred Action for Childhood Arrivals," or "DACA." 140 S. Ct. at 1901. DHS did not engage in "notice and comment" rulemaking pursuant to 5 U.S.C. § 553(b)–(c). Instead, DHS attempted to rescind DACA through the issuance of two consecutive executive memoranda. *Id.* at 1901, 1903–04. After the D.C. District Court held that the first memorandum, issued by DHS Acting Secretary Elaine C. Duke, was too "conclusory . . . to explain the change in [DHS's] view of DACA's lawfulness," the Acting Secretary's "successor, Secretary Kirstjen M. Nielsen," issued a new memorandum purporting to elaborate on the reasoning provided in Acting Secretary Duke's Memorandum. *Id.* at 1904. Despite this characterization, the Court held that "Secretary Nielsen's reasoning bears little relationship to that of her predecessor" and was instead "impermissible post hoc rationalization[]." *Id.* at 1908–09.

it may take new action."). Plaintiffs seek to distinguish an agency's failure to address comments, which they assert can be remedied by further explanation on remand (i.e., *Regents*' option one), from an agency's failure to analyze or consider comments, which they assert cannot be remedied without a new rulemaking (i.e., *Regents*' option two). Oral Arg. (Feb. 7, 2023) at 59:30–1:00:50 (time stamp from the recording), *available at* https://www.cit.uscourts.gov/sites/cit/files/020723–21–00052–3JP.mp3.

Plaintiffs' distinction is unsupported. Since *Regents*, as in this case, courts have ordered remands for agencies to respond to significant comments. *See, e.g.*, *Bloomberg*, 45 F.4th at 477–78; *Env't Health*, 9 F.4th at 909, 914; *AT&T Servs., Inc. v. FCC*, 21 F.4th 841, 843, 853 (D.C. Cir. 2021). Such cases do not distinguish between failures of explanation and failures of consideration. *See, e.g.*, *AT&T Servs.*, 21 F.4th at 853 ("The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based *on a consideration* of the relevant factors.") (citation omitted) (emphasis added); *see also W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 954 (D.C. Cir. 2021) (likening the failure to respond to comments to the "fail[ure] to consider an important aspect of the problem") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Accordingly, USTR's Remand Results are not impermissibly *post hoc* simply because USTR analyzed and addressed the comments on remand. *Cf. FBME Bank Ltd. v. Mnuchin*, 249 F. Supp. 3d 215, 223 (D.D.C. 2017) (reviewing an agency's response to comments on remand). Nevertheless, the court must reconcile USTR's response to comments with *Regents* and the rule against *post hoc* rationalization.

To begin with, the court remanded the matter for USTR to respond to the comments it had already received. *See In Re Section 301 Cases*, 570 F. Supp. 3d at 1338–43.[10] In discussing the limits of option one, *Regents* cites to an opinion from the U.S. Court of Appeals for the D.C. Circuit for the proposition that an agency may provide an "amplified

[10] In this respect, the underlying case is different from *Regents*. In the context of this case, taking new agency action would require USTR to issue new NPRMs, which would appear to be an inefficient mechanism for responding to comments USTR already received. Other courts have likewise grappled with *Regents*' formulation of the rule against *post hoc* rationalization and its application in circumstances dissimilar from those before the *Regents* court. In *Doe v. Lieberman*, 2022 WL 3576211 (D.D.C. Aug. 11, 2022), the D.C. District Court addressed whether an agency's explanation on remand for an earlier evidentiary determination survived *Regents*' rule against *post hoc* rationalization. *Id.* at *1, 5. The court found that *Regents* did not apply because although *Regents* cabins an agency's reasoning on remand to its initial determinative reason(s), there, the agency did not provide a determinative reason for its evidentiary decision in its initial determination. *Id.* at *5. Further, in addressing the plaintiff's arguments, the court explained that requiring the agency to reconsider the termination afresh based on a conclusory evidentiary ruling did not make sense "in the context of evidentiary rulings in agency adjudications." *Id.* at *6.

articulation" of a prior "conclusory" rationale. *Regents*, 140 S. Ct. at 1908 (quoting *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 5–6 (D.C. Cir. 2006)). Consistent with this notion, although USTR's reasons for agreeing or disagreeing with certain comments are more expansive than what it previously offered, USTR does not offer new determinative reasons for its actions.[11]

Since *Regents*, some courts have questioned *Alpharma*'s formulation of the rule; in particular, its apparent focus on the author rather than the timing of the supplemental explanation. *See Doe*, 2022 WL 3576211, at *5; *United Food and Com. Workers Union, Local No. 663 v. U.S. Dep't of Ag.*, 532 F. Supp. 3d 741, 779 (D. Minn. 2021); *cf. IAP Worldwide Servs., Inc. v. United States*, 160 Fed. Cl. 57, 76–77 (2022) (rejecting similar language from a pre-*Alpharma* case). However, as indicated by the *Regents* court's citation, *Alpharma* remains good law to the extent that it requires any supplemental decision to be prepared by the appropriate decisionmaker and tethered to the original justification for the action.

Moreover, while *Alpharma* does not involve an agency's response to comments,[12] it is analogous to the extent that it discusses judicial review of an agency's response, on remand, to concerns raised on the record during the adjudication and prior to the final agency action at issue. *See* 460 F.3d at 5–7.[13] Here, as in *Alpharma*, USTR's Remand Results provide an "amplified articulation" of the grounds for its actions. USTR further explained the removal or retention of certain tariff subheadings, its decision to set the level of duties on the specified aggregate level of trade notwithstanding the stated concerns, and its decision to proceed despite the proffered alternatives. In so doing, USTR responded to significant concerns within the context of China's

[11] In explaining USTR's decision to remove certain critical inputs for manufactured goods from List 3, USTR stated that, "[t]hrough the interagency process the Department of Commerce recommended USTR remove eight tariff subheadings." Remand Results at 51. Plaintiffs argue that "[t]his is the first time that detail has been revealed publicly" and that "Commerce's recommendation and underlying reasoning are nowhere in the record." Pls.' Cmts. at 13. The confidential administrative record ("CR") index provided to the court indicates that CR-1 constitutes a "Confidential Summary of Confidential Advisory Committee Advice," the production of which is "subject to 19 U.S.C. § 2155(g)." ECF No. 298 at 4. Following oral argument on the remand determination, the Government provided a redacted version of CR-1, which was previously included in the public administrative record ("PR") as PR-9057. *See* Defs.' Notice of Filing Doc. Referenced During Oral Arg., ECF Nos. 489, 489–1. Even accepting Plaintiffs' premise that this input is newly shared, it does not suggest a new determinative reason for USTR's decision.

[12] *Alpharma* addresses the U.S. Food and Drug Administration's adjudication of a petition to revoke the agency's approval of a generic animal drug. 460 F.3d at 4.

[13] This court previously recognized the instructiveness of "judicial precedent from the D.C. Circuit . . . in light of the court's expertise in the area of administrative law." *In Re Section 301 Cases*, 570 F. Supp. 3d at 1324 n.7.

actionable conduct and the specific direction of the President. Thus, while USTR provided a fuller explanation of its reasoning, it was "a fuller explanation of [its] reasoning *at the time of the agency action*." *Regents*, 140 S. Ct. at 1907–08 (quoting *Pension Benefit Guar. Corp.*, 496 U.S. at 654).[14] Without anything new to propose in new NPRMs, the court is not convinced by Plaintiffs' arguments to require USTR to conduct new notice-and-comment rulemakings.

II. USTR's Response to Comments

The court previously held that "[h]aving requested comments on a range of issues, USTR had a duty to respond to the comments in a manner that enables the court to understand 'why the agency reacted to them as it did.'" *In Re Section 301 Cases*, 570 F. Supp. 3d at 1341 (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). The court now turns to the question whether, through the Remand Results, USTR has fulfilled that requirement.

A. Parties' Contentions

Plaintiffs contend that USTR's reliance on Presidential direction to explain its lack of discretion is legally insufficient given the breadth of USTR's request for comments. Pls.' Cmts. at 12–13; Pls.' Reply Cmts. at 5. Plaintiffs fault USTR for failing to explain why it agreed with the President's direction or how it arrived at the conclusion that the actions were "appropriate" within the meaning of the statute. Pls.' Reply Cmts. at 4–5.

Plaintiffs further contend that USTR responded to major policy concerns raised in the comments in an inadequate and conclusory manner. Pls.' Cmts. at 15–17. Plaintiffs assert that USTR failed to explain why the benefits of the actions outweighed their costs in terms of economic harm. *Id.* at 17; Pls.' Reply Cmts. at 7–8. Plaintiffs also argue that USTR failed to address concerns about the perceived ineffectiveness of the tariffs or proposed alternatives to the increased

[14] Plaintiffs cite two cases supporting their view that "courts regularly have held that an agency failed to provide non-conclusory, non-*post hoc* reasoning sufficient to sustain agency action—even after remanding to give the agency a second chance to cure its APA violation." Pls.' Reply Cmts. at 3 (citing *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009); *Tex Tin Corp. v. EPA*, 992 F.2d 353, 355 (D.C. Cir. 1993)). Neither case is analogous. In *Comcast*, the D.C. Circuit vacated a rule when the agency had failed to consider important concerns the court raised in prior litigation involving an earlier iteration of the same rule. 579 F.3d at 8–10. In *Tex Tin*, the court held that an agency impermissibly based its decision on remand "on a new theory." *Id.* at 355 (citing *Anne Arundel Cty., Md. v. EPA*, 963 F.2d 412, 418 (D.C. Cir.1992)). As discussed above, USTR did not do so here.

tariffs. Pls.' Cmts. at 18–20; Pls.' Reply Cmts. at 8–9. *Amici* advance similar arguments. *See* RLC's Br. at 5–10; Verifone's Br. at 2–5.[15]

The Government contends that USTR adequately explained the role that Presidential direction played in its decision-making. Defs.' Resp. Cmts. at 17–19. The Government also argues that the entirety of the Remand Results—not just the final few pages—reflects USTR's consideration of the potential for disproportionate economic harm. *Id.* at 21–22. The Government further asserts that Plaintiffs' additional arguments "amount to mere disagreement" with USTR's explanation, *id.* at 22–23, and USTR was not required to consider each alternative because USTR tailored its NPRMs specifically to modifying the original section 301 actions, *id.* at 23–24.

B. USTR's Response to Comments Meets APA Requirements

The standard that an agency's response to comments must meet "is not particularly demanding." *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (per curiam) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)). For "judicial review . . . to be meaningful," the agency's explanation must enable the court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." *Auto. Parts & Accessories Ass'n*, 407 F.2d at 338. The court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Nat'l Mining Ass'n*, 116 F.3d at 549 (quoting *State Farm*, 463 U.S. at 43). With these principles in mind, the court considers the matters it required USTR to address on remand.

1. Presidential Direction

The court previously held that the imposition of List 3 and List 4A duties constituted agency—not Presidential—action. *In Re Section 301 Cases*, 570 F. Supp. 3d at 1323–26. The court also recognized, however, that "the President's specific direction, if any, is a statutory consideration for which the agency must account." *Id.* at 1339. The court faulted USTR for relying on Presidential direction without explaining "the relationship between significant issues raised in the comments and the President's direction." *Id.* at 1341.

The Remand Results demonstrate USTR's adherence to the specific direction of the President in terms of the level of duty increase and

[15] Verifone's arguments appear to digress into complaints about USTR's decisions regarding specific exclusions. *See* Verifone's Br. at 6–7 (discussing USTR's decisions to grant, but not thereafter to reinstate, certain exclusions). Specific exclusion decisions are not, however, at issue in this case.

the aggregate level of trade affected by the actions. *See* Remand Results at 27–28, 74, 77. While it is clear from the Remand Results that USTR did not interpret the statute to accord USTR much discretion to deviate from the President's direction, *see id.* at 77–78, USTR also explained that the judgments reflected in the construction of *Final List 3* and *Final List 4A* were its own, *see id.* at 80–81.

USTR explained that "[t]he aggregate level of trade included in the President's directive and reflected in *Final List 3* . . . reflected the need to cover a substantial percentage of U.S. imports from China," *id.* at 80, and that "[t]he Trade Representative determined that covering a substantial percentage of U.S. goods exported from China was appropriate to obtain the elimination of China's harmful acts, policies, and practices," *id.* at 81. Likewise, USTR stated that "*Final List 4* reflected the judgment that covering essentially all products not covered by previous actions was needed to obtain the elimination of China's acts, policies and practices." *Id.* USTR explained that the levels of duties imposed reflected its judgment regarding "the appropriate balance" to strike "between exerting an appropriate amount of pressure on China to eliminate its harmful practices, while encouraging China to meaningfully engage in negotiations, against comments suggesting additional duties would result in severe economic harm to U.S. consumers and industries." *Id.* at 77. USTR also explained its exercise of discretion to determine the tariff subheadings that would be subject to List 3 and List 4A duties and establish an exclusion process for products subject to List 4A duties. *See id.* at 77–78.[16]

Plaintiffs fail to persuade the court that USTR was required to provide additional explanation regarding its reasons for agreeing with the President that the chosen actions were "appropriate." Pls.' Reply Cmts. at 5. The court discusses USTR's response to comments raising policy concerns below and considers this explanation responsive to the question of whether the actions were appropriate. Moreover, the court recognizes that USTR's consideration of significant comments must account for "section 301's statutory purpose to eliminate the burden on U.S. commerce from China's unfair acts, policies, and practices" and any "specific direction [from] the President." *In Re Section 301 Cases*, 570 F. Supp. 3d at 1340. In remanding *Final List*

[16] While USTR ultimately established an exclusion process for products subject to List 3 duties, *see Procs. for Requests to Exclude Particular Prods. From the Sept. 2018 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 84 Fed. Reg. 29,576 (June 24, 2019), it did not do so initially because USTR "had greater flexibility" to exempt products from the outset, Remand Results at 78.

3 and *Final List 4*, the court admonished USTR for its failure to respond to comments "within the context of the specific direction provided by the President." *Id.* at 1340–41. The court did not order USTR to analyze the President's directives.[17] In contrast to the conclusory treatment of comments in *Final List 3* and *Final List 4*, the Remand Results reflect USTR's conclusion that statutory language linking any modification to the specific direction of the President constrained USTR's ability to depart from that direction and explained USTR's position vis-à-vis the President's direction. Nothing more was required.

2. Harm to the U.S. Economy

Plaintiffs assert that the Remand Results reflect no weighing of the costs of the actions, identifying such concerns as "increased costs on U.S. businesses," additional "Chinese retaliation," and impacts on U.S. businesses that export inputs or technology to China. Pls.' Cmts. at 17.[18] While USTR must explain how it "resolved any significant problems raised by the comments," it "need not respond to every comment." *Action on Smoking*, 699 F.2d at 1216. In the Remand Results, the court readily discerns USTR's attempts to balance commenters' concerns about economic harm with the specific direction it had received from the President and the ongoing need to respond to China's acts, policies and practices burdening U.S. commerce.

In responding to such comments, USTR explained that it "shared the view that mitigating harm to U.S. consumers was an important consideration in developing and finalizing lists of products that would be subject to additional duties." Remand Results at 82. USTR pointed to prior tariff actions (i.e., List 1 and List 2) in which USTR sought to avoid consumer impact. *Id.* For List 3, USTR noted that "the selection process" considered "likely impacts on U.S. consumers, and involved the removal of subheadings identified by analysts as likely to cause

[17] Plaintiffs previously conceded that they do not contest "subjective determination[s] of what is 'appropriate' (or any other discretionary determination[s])." Pls.' Mem. in Supp. of Pls.' Cross-Mot. for J. on the Agency R. and Resp. to Defs.' Mot. to Dismiss/Mot. for J. on the Agency R. at 51, ECF No. 358; *see also* Oral Arg. (Feb. 1, 2022) at 1:17:50–1:18:12, *available at* https://www.cit.uscourts.gov/sites/cit/files/020122–21–00052–3JP.mp3 (during the first hearing on the merits, Plaintiffs explained that they do not seek to challenge "the dollar amount" of tariffs and that USTR retains "vast discretion" regarding such determinations). The court is therefore circumspect in requiring further explanation from USTR regarding such discretionary matters that are likely not judicially reviewable. *Cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (explaining that the political question doctrine precludes judicial review of "policy choices" committed to the Executive Branch).

[18] Plaintiffs also fault USTR for relying on documents that predate the imposition of List 3 and List 4 duties. Pls.' Cmts. at 16. USTR did not cite such documents as evidence of its contemporaneous response to comments. Rather, USTR cited such documents as evidence of USTR's ongoing consideration of harm. *See* Remand Results at 82–84.

disruptions to the U.S. economy." *Id.* at 83 (citing *List 3 NPRM*, 83 Fed. Reg. at 33,609). USTR further noted that concerns about economic harm prompted USTR "to initially set the duties at 10 percent for three months." *Id.* at 77 (citing *Final List 3*, 83 Fed. Reg. at 47,975).

USTR acknowledged that List 4A resulted in additional "duties on essentially all remaining imports from China, thus necessitating the need for USTR to include consumer products." *Id.* at 83. USTR noted, however, that by segregating certain goods into List 4B, it "would delay additional duties for products where China's share of imports from the world is 75 percent or greater to 'provide a longer adjustment period.'" *Id.* (quoting *Final List 4*, 84 Fed. Reg. at 43,305). USTR also pointed to the announcement of an exclusion process as responsive to these concerns. *Id.* at 84 (citing *Final List 4*, 84 Fed. Reg. at 43,305).

In addition to these broader considerations, USTR's decisions at the subheading level reflect USTR's weighing of economic harm. *See, e.g.*, Remand Results at 27–28 (discussing USTR's requirement for a "clear showing" of ineffectiveness or harm to remove subheadings from List 3 in order to retain the $250 billion aggregate level of trade directed by the President); *id.* at 31 (weighing costs and benefits of including rare earths and critical minerals and deciding to remove those subheadings); *id.* at 33 (same for U.S.-caught seafood); *id.* at 62–63 (same for child safety seats).

While framing the issue as a procedural failure to explain, Plaintiffs effectively take issue with the conclusions USTR reached. *See* Pls.' Reply Cmts. at 7 (arguing that "the fundamental point commenters raised was that USTR's proposed cure for China's unfair acts was worse than the disease" and that "[n]o regulation is 'appropriate' if it does significantly more harm than good") (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).[19] Mere disagreement with USTR's actions is not a basis for the court to overturn them. *See Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 439 (9th Cir. 2021) ("[W]e cannot overturn the agency's decision based on mere disagreement."). It is not the court's role to reweigh the evidence or opine on USTR's (or the President's) policy choices, such as the appropriate "cure" for China's conduct. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015). As discussed above, USTR accounted

[19] *Michigan* addressed a provision in the Clean Air Act that "instructed EPA to add power plants to [a] program if (but only if) the Agency finds regulation 'appropriate and necessary.'" *Michigan*, 576 U.S. at 752. Citing administrative practice when deciding whether to regulate such matters, the *Michigan* Court considered cost "an important aspect of the problem" that EPA had to address in the context of that case. *Id.* at 752–53. The Court acknowledged, however, that "the phrase 'appropriate and necessary' does not [always] encompass cost." *Id.* at 752.

for concerns regarding the potential for economic harm within the context of the statutory factors it was required to consider and adequately explained how it did so.[20]

3. Efficacy of the Tariffs

USTR explained that it was not persuaded by "comments which suggested that negotiations alone could be successful in obtaining the elimination of the harmful practices without accompanying economic pressure through additional tariffs." Remand Results at 86–87. USTR acknowledged "that previous actions were not sufficient to encourage China to change its acts, policies, and practices" but nevertheless found "that more substantial trade actions were needed to encourage negotiations" with China. *Id.* at 87. USTR also accounted for concerns of inefficacy in its decisions regarding inclusion or omission of certain subheadings. *See, e.g.*, *id*. at 29, 33, 34, 55; *cf. List 3 NPRM*, 83 Fed. Reg. at 33,609 (seeking comments on "whether imposing increased duties *on a particular product* would be practicable *or effective* to obtain the elimination of China's acts, policies, and practices") (emphasis added).

Plaintiffs accuse USTR of "deflect[ing]" by contextualizing the choice as one "between 'negotiations alone'" and "placing tariffs on virtually all of Chinese trade." Pls.' Cmts. at 18. That is not an accurate summation of USTR's response. USTR's statements were responsive to commenters seeking to dissuade USTR from imposing *any* increased duties and instead to persuade USTR to adopt other courses of action, including negotiations with China. *See* Remand Results at 86.

Plaintiffs further argue that USTR effectively admitted that prior section 301 actions were ineffective and still failed to respond to concerns that List 3 and List 4A duties would likewise be ineffective. Pls.' Cmts. at 19; Pls.' Reply Cmts. at 8. It is unclear, however, what more USTR could state on this point. Absent contrary record evidence, USTR was not bound to agree with commenters characterizing tariffs as an ineffective option simply because List 1 and List 2 duties were deemed insufficient. Section 307(a) authorizes USTR to modify

[20] Although commenters objecting to the tariffs based on economic harm may have been guided by their respective experiences with List 1 and List 2 duties, concerns about the future impact of the List 3 and List 4A duties were, to some extent, speculative. USTR therefore had a limited record with which to balance such harm against the harm caused by China's ongoing unfair trade practices. It is also worth noting that the statute accounts for economic harm caused by section 301 tariffs in the context of USTR's four-year review of necessity. When deciding whether to continue a section 301 action beyond the specified four-year timeframe, the statute requires USTR to consider the effectiveness of the action, alternatives to such action, and "the effects of such actions on the United States economy, including consumers." 19 U.S.C. § 2417(c)(3).

prior actions precisely when they have been ineffective in reducing "the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action." 19 U.S.C. § 2417(a)(1)(B).

4. Alternatives to the Tariffs

On remand, USTR pointed, by way of example, to comments suggesting alternative action under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. Remand Results at 88. USTR responded to such comments by explaining that section 337 could not address the "broader set of issues" identified as the basis for the underlying section 301 investigation. *Id.* USTR further explained that it "did not intend to invite comments on alternative measures" because the President directed USTR to act under sections 301 and 307 of the Trade Act. *Id.* at 89.

Plaintiffs argue that USTR engaged with just one of many proposed alternatives, which is insufficient given the invitation for "comments on 'any aspect' of its proposed actions." Pls.' Cmts. at 20. Considering alternatives, Plaintiffs argue, was also necessary for USTR to determine whether additional action was "appropriate." *Id.*

As USTR explained, however, it *was* pursuing additional courses of action, such as initiating a dispute at the World Trade Organization, requesting consultations with China, and proceeding with negotiations. *See, e.g.*, Remand Results at 6 n.2, 87. Moreover, in the NPRMs, USTR did not seek comments generally on how to respond to China's acts, policies and practices, but instead requested comments on "any aspect *of the proposed supplemental action*," and provided comment topics relevant to such action. *List 3 NPRM*, 83 Fed. Reg. at 33,609 (emphasis added); *cf. List 4 NPRM*, 84 Fed. Reg. at 22,565. Thus, while USTR's request was broad to the extent that it requested comments on "any aspect" of the proposal, it was also more limited in scope than Plaintiffs suggest. Accordingly, USTR adequately explained its disinclination to consider each alternative. *Cf. Nat'l Mining Ass'n*, 116 F.3d at 549 (finding adequate an agency's brief dismissal of certain proposed safety standards as "outside the scope of this rulemaking" based on the court's understanding "that the agency was choosing to impose some standards without addressing 'every-

thing that could be thought to pose any sort of problem'") (citation omitted).[21]

In view of the foregoing, the court finds that USTR has complied with the court's remand order and has supplied the necessary explanation supporting the imposition of duties pursuant to *Final List 3* and *Final List 4*.

III. Defendants' Second Motion to Correct the Record

The Government moves to correct the record to include several *Federal Register* notices, USTR press releases, and one Presidential memorandum, all marked as Exhibits C through K, respectively. 2nd Mot. Correct R. at 1–2, Exs. C–K.[22] "Plaintiffs [took] no position on the motion, on the understanding that the Government has forfeited reliance on documents not cited in its previous merits briefing to this Court." *Id.* at 2.[23]

For purposes of APA review, the administrative record consists of "all documents and materials directly or indirectly considered by agency decisionmakers." *Ammex, Inc. v. United States*, 23 CIT 549, 556, 62 F. Supp. 2d 1148, 1156 (1999) (quoting *Thompson v. U. S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). Additionally, CIT Rule 73.3(a)(1) requires an agency to file, *inter alia*, "[a] copy of the contested determination and the findings or report on which such determination was based."

Exhibits C, E, G and H constitute *Federal Register* notices regarding the initial investigation, determination, and actions taken with respect to List 1 and List 2. 2nd Mot. Correct R. at 3, Exs. C, E, G, H. Exhibit D constitutes a Presidential memorandum issued in conjunction with USTR's section 301 investigation findings. *Id.* at 3, Ex. D. Exhibit F is a USTR press release concerning List 1 and List 2. *Id.* at 3, Ex. F. These documents all predate USTR's issuance of *Final List 3* and "were indirectly considered." *Id.* at 4. Exhibit J is a conforming amendment published in the Federal Register regarding List 3 previously included in the record in an unpublished form as PR 5. *Id.* at 3, 5, Ex. J. Inclusion of these documents is appropriate.

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[21] Actions under section 337 rest with the U.S. International Trade Commission, not the Trade Representative. *See* 19 U.S.C. § 1337(a)(1), (b)(1). Thus, Plaintiffs' reliance on cases concerning an agency's failure to consider options within its purview is misplaced. *See* Pls.' Reply Cmts. at 8–9 (citing *Spirit Airlines, Inc. v. U.S. Dep't of Trans. and FAA*, 997 F.3d 1247, 1255 (D.C. Cir. 2021); *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005)).

[22] There were no Exhibits A or B attached to the motion, presumably because two prior documents USTR sought to include in the record were labeled as such. *See* Defs.' Mot. to Correct the R., Exs. A–B, ECF No. 441.

[23] To the extent that Plaintiffs' position is based on their arguments concerning *post hoc* rationalization, the court disagrees with Plaintiffs' position for the reasons stated above. *Supra*, Discussion Section I.B.

Exhibits I and K constitute press releases published a few days prior to USTR's publication of *Final List 3* and *Final List 4*, respectively. *Id.* at 3, Exs. I, K. The Government argues that the press releases are properly before the court pursuant to CIT Rule 73.3(a)(1) because they were "issued in conjunction with" *Final List 3* and *Final List 4*. *Id.* at 4–5. Consistent with the Government's representations regarding the relationship of these documents to the contested determinations, and their contemporaneous preparation with those determinations, the court finds that the documents are part of the record and will allow the Government to amend the record accordingly.

Accordingly, the Government's second motion to correct the record will be granted.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that the tariff actions imposed by the Office of the United States Trade Representative and styled as *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018), and *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,* 84 Fed. Reg. 43,304 (Aug. 20, 2019), as amended on remand by Further Explanation of the Final List 3 and Final List 4 Modifications in the Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Pursuant to Court Remand Order, ECF No. 467, are **SUSTAINED**; and it is further

ORDERED that Defendants' second motion to correct the record, ECF No. 466, is **GRANTED**; and it is further

ORDERED that, on or before March 27, 2023, the Government shall file updated administrative record indices reflecting corrections granted herein and in Slip Op. 22–32.

The court will enter judgment in *HMTX Indus. LLC v. United States,* No. 20-cv-177, accordingly.

Dated: March 17, 2023
New York, New York

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

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

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

Slip Op. 23–36

BRAL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 20–00154

[Denying Plaintiff's motion for summary judgment and denying Defendant's cross-motion for summary judgment.]

Dated: March 20, 2023

Robert Kevin Williams, Clark Hill PLC, of Chicago, IL, for Plaintiff BRAL Corporation.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, *Aimee Lee*, Assistant Director, and *Alexander J. Vanderweide*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Sabahat Chaudhary*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff BRAL Corporation ("Plaintiff" or "BRAL") filed this action pursuant to 28 U.S.C. § 1581(a) contesting the denial of its protests by U.S. Customs and Border Protection ("Customs") concerning the assessment of duties on twelve entries of plywood imported from the People's Republic of China ("China"). *See* Compl. at 1, ECF No. 7. Before the Court is Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion"). Pl.'s Mot. Summary J., ECF No. 27. Also before the Court is Defendant's Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Cross-Motion"). Def.'s Cross-Mot. Summary J. Resp. Opp'n Pl.'s Mot. Summary J. ("Def.'s Cross-Mot."), ECF No. 28. Plaintiff filed Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment. Pl.'s Resp. Opp'n Def.'s Cross-Mot. Summary J., ECF No. 29. Defendant filed Defendant's Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment. Def.'s Reply Pl.'s Opp'n Def.'s Cross-Mot. Summary J., ECF No. 30. For the following reasons, the Court denies Plaintiff's Motion for Summary Judgment and denies Defendant's Cross-Motion for Summary Judgment.

PROCEDURAL BACKGROUND

The Court presumes familiarity with the procedural history and recounts briefly the procedural history relevant to this opinion. *See BRAL Corp. v. United States*, 45 CIT __, __, 527 F. Supp. 3d 1358, 1360 (2021). This action concerns twelve entries of plywood imported from China by Plaintiff between 2017 and 2018. *See* Summons at 1–3, ECF No. 1; Compl. at 1. Plaintiff filed Protest No. 4101–19–100494 challenging the liquidation of three entries. Protest No. 4101–19–100494, ECF No. 6–1. Plaintiff filed Protest No. 4101–19–100808 challenging the liquidation of nine entries. Protest No. 4101–19–100808, ECF No. 6–2. Both protests alleged that the subject plywood imported from China had a latent defect that caused a melamine coating to separate from the subject plywood, warranting a reduced value due to defective merchandise pursuant to 19 C.F.R. § 158.12(a). *Id.*; Protest No. 4101–19–100494. Customs denied both protests on March 5, 2020. Protest No. 4101–19–100494; Protest No. 4101–19–100808; *see also* Summons at 3.

UNDISPUTED FACTS

The Parties have submitted separate statements of undisputed material facts. Pl.'s R. 56.3 Statement Material Facts Not in Dispute ("Pl.'s SMF"), ECF No 27–2; Def.'s R. 56.3 Statement Undisputed Material Facts ("Def.'s SMF"), ECF No. 28. Upon review of Plaintiff's Rule 56.3 Statement of Material Facts Not in Dispute, Defendant's Rule 56.3 Statement of Undisputed Material Facts, and supporting exhibits, the Court finds the following undisputed material facts:

Plaintiff imported the subject plywood from a Chinese manufacturer. Pl.'s SMF ¶ 3 at 1; Def.'s SMF ¶¶ 1–2 at 1–2; Def.'s Resp. Pl.'s R. 56.3 Statement Material Facts Not in Dispute ("Def.'s SMF Resp.") ¶ 3 at 1, ECF No. 28; Pl.'s Resp. Def.'s R. 56.3 Statement Material Facts Not in Dispute ("Pl.'s SMF Resp.") ¶¶ 1–2 at 1, ECF No. 29–1. The subject plywood consisted of seven-ply eucalyptus with the layers adhered by glue applied by heat and pressure, a hardwood face, and a melamine coating applied to the face by an exterior glue. Pl.'s SMF ¶ 2 at 1; Def.'s SMF ¶ 1 at 1; Def.'s SMF Resp. ¶ 2 at 1; Pl.'s SMF Resp. ¶ 1 at 1. The Chinese manufacturer made, laminated, applied a hardwood face, and sanded the plywood to the desired dimensions. Def.'s SMF ¶ 2 at 1–2; Pl.'s SMF Resp. ¶ 2 at 1. The Chinese manufacturer used a subcontractor for additional laminating and gluing the melamine coating to the face of the plywood. Def.'s SMF ¶ 2 at 1–2; Pl.'s SMF Resp. ¶ 2 at 1. Plaintiff expected that the glue used to apply the melamine coating would be a waterproof phenolic resin, but the specific type of glue used was unknown to the Parties. Def.'s SMF

¶¶ 3–4 at 2; Pl.'s SMF Resp. ¶¶ 3–4 at 1. The subject plywood was produced in three sizes: 48" x 98" x ¾" ("48" sheets"), 15" x 98" x ¾" ("15" panels"), and 11" x 98" x ¾" ("11" panels"). Pl.'s SMF ¶ 1 at 1; Def.'s SMF ¶ 8 at 3; Def.'s SMF Resp. ¶ 1 at 1; Pl.'s SMF Resp. ¶ 8 at 1; *see* Pl's SMF at Ex. A ("Sample Invoices"), ECF No. 27–2. After importation, Plaintiff sold the subject plywood to Transglobal Door, Inc. ("Transglobal") for use in the manufacturing of aftermarket roll-up doors and door panels for trucks, trailers, commercial vehicles, and delivery vehicles. Pl.'s SMF ¶¶ 3–5 at 1; Def.'s SMF ¶ 6 at 2; Def.'s Resp. ¶¶ 3–5 at 1–2; Pl.'s SMF Resp. ¶ 6 at 1.

Development of the Chinese-made plywood began in approximately 2015 as a replacement for more expensive domestic plywood previously used by Transglobal in the manufacture of aftermarket roll-up doors and door panels. Pl.'s SMF ¶ 6 at 2; Def.'s SMF ¶ 12 at 3; Def.'s SMF Resp. ¶ 6 at 2; Pl.'s SMF Resp. ¶ 12 at 2. The development process involved the testing of a variety of plywood samples of various components and woods, including poplar, birch, and pine, produced by the Chinese manufacturer. Def.'s SMF ¶ 14 at 4; Pl.'s SMF Resp. at ¶ 14 at 2. Testing occurred over a six-month period and included subjecting the plywood samples to hundreds of hours in a salt-spray cabinet, hanging samples outside for multiple months, and manufacturing the samples into roll-up doors and installing the doors on trucks used by community organizations to gauge performance. Pl.'s SMF ¶¶ 9–11 at 2; Def.'s SMF ¶ 14 at 4; Def.'s Resp. ¶ 9–11 at 2–3; Pl.'s SMF Resp. ¶ 14 at 2. A sample was selected by the end of 2016 for production, though Plaintiff and Transglobal continued to import and test alternative samples of Chinese-made plywood after importation of the subject eucalyptus plywood began. Def.'s SMF ¶¶ 15–16 at 4–5; Pl.'s SMF Resp. ¶¶ 15–16 at 2.

Plaintiff did not open or inspect containers of the subject plywood when the containers arrived in the United States and forwarded the containers to Transglobal. Def.'s SMF ¶ 18 at 5; Pl.'s SMF Resp. ¶ 18 at 2. Transglobal inspected the subject plywood for correct thickness and size but did not test samples of the subject plywood in a salt-spray cabinet or for quality of glue. Def.'s SMF ¶ 18 at 5; Pl.'s SMF Resp. ¶ 18 at 2. Manufacturing replacement roll-up doors and door panels required Transglobal to drill into the subject plywood's laminated face and to rivet hardware onto the plywood. Def.'s SMF ¶ 19 at 5; Pl.'s SMF Resp. ¶ 19 at 3. Roll-up doors and door panels were measured, inspected for surface defects, packaged, and shipped to customers within five days of completion. Def.'s SMF ¶ 19 at 5; Pl.'s SMF Resp. ¶ 19 at 3. Installation was done by the individual customer. Def.'s SMF ¶ 19 at 5; Pl.'s SMF Resp. ¶ 19 at 3. Transglobal

offered a warranty on the roll-up doors and door panels manufactured with the subject plywood covering any delamination issue that occurred within one year of installation. Def.'s SMF ¶ 20 at 5; Pl.'s SMF Resp. ¶ 20 at 3.

Transglobal began selling roll-up doors and door panels made from Chinese manufactured plywood in January 2017. Def.'s SMF ¶ 21 at 6; Pl.'s SMF Resp. ¶ 21 at 3. In approximately July 2017, Transglobal began using the subject plywood at issue in this litigation to manufacture roll-up doors and door panels. Pl.'s SMF ¶ 14 at 2; Def.'s SMF Resp. ¶ 14 at 3. In May 2017, Transglobal began to receive warranty claims from customers complaining that melamine faces were detaching from roll-up doors and door panels. Pl.'s SMF ¶ 16 at 3; Def.'s SMF ¶¶ 22–23 at 6; Def.'s SMF Resp. ¶ 16 at 3; Pl.'s SMF Resp. ¶¶ 22–23 at 3; *see also* Pl.'s SMF ¶ 15 at 3; Def.'s SMF Resp. ¶ 15 at 3. Between May 9, 2017 and February 3, 2021, Transglobal received 161 warranty claims for delaminated doors and 171 warranty claims for delaminated panels. Def.'s SMF ¶ 23 at 6; Pl.'s SMF Resp. ¶ 23 at 3. The manufacturing of the roll-up doors and door panels associated with the warranty claims used 1,298 11" and 15" panels and 432⅔ 48" sheets. Def.'s SMF ¶ 23 at 6; Pl.'s SMF Resp. ¶ 23 at 3. Transglobal speculated that the allegedly defective plywood began to arrive in the United States in May or July 2017 and was manufactured into roll-up doors and door panels that were first sold in October or November 2017. Def.'s SMF ¶ 22 at 6; Pl.'s SMF Resp. ¶ 22 at 3. Transglobal did not become aware of problems with the subject plywood until March or April 2018. Def.'s SMF ¶ 24 at 6; Pl.'s SMF Resp. ¶ 24 at 3. Transglobal continued to manufacture and sell roll-up doors and door panels made with Chinese-manufactured plywood until as late as October 2018. Def.'s SMF ¶ 25 at 6; Pl.'s SMF Resp. ¶ 25 at 3.

There were neither purchase orders for the subject plywood nor documents or communications from Plaintiff to the Chinese manufacturer providing the specific quantity and sizes or the requirements and components of the subject plywood. Def.'s SMF ¶ 10 at 3; Pl.'s SMF Resp. ¶ 10 at 2. The twelve entries at issue in this litigation included 7,889 48" sheets, 30,238 15" panels, and 5,616 11" panels. Def.'s SMF ¶ 32 at 8; Pl.'s SMF Resp. ¶ 32 at 3. Transglobal used 5,900.86 48" sheets, 10,334.44 15" panels, and 680.30 11" panels to manufacture roll-up doors or door panels. Def.'s SMF ¶ 32 at 8; Pl.'s SMF Resp. ¶ 32 at 3.

Plaintiff and Transglobal believed that the delamination issue was the result of Plaintiff's Chinese manufacturer or its subcontractor changing to a lower quality glue to attach the melamine coating to the subject plywood that became ineffective after being subjected to the

freezing temperatures of winter and the subsequent thaw and drying of spring. Def.'s SMF ¶ 26 at 6–7; Pl.'s SMF Resp. ¶ 26 at 3. An undated "Letter of Statement" from Linyi Feixian Plywood Factory[1] to Transglobal conceded that Linyi Feixian Plywood Factory had determined that "the glue supplier" had lowered the quality of glue due to increasing costs. Pl.'s SMF ¶ 18 at 3; Def.'s SMF ¶ 27 at 7; Def.'s SMF Resp. ¶ 18 at 4; Pl.'s SMF Resp. ¶ 27 at 3; Pl.'s SMF at Ex. L ("Linyi Feixian Plywood Factory's Letter of Statement"). Plaintiff ceased to import plywood from China in June 2018. Def.'s SMF ¶ 28 at 7; Pl.'s SMF Resp. ¶ 28 at 3.

Though the Chinese manufacturer offered to replace the delaminated plywood, which is customary in the industry, neither Plaintiff nor Transglobal requested replacement plywood. Def.'s SMF ¶ 29 at 7–8; Pl.'s SMF Resp. ¶ 29 at 3. Plaintiff and Transglobal did not recover any costs from and did not file a legal action against the Chinese manufacturer or the supplier of the glue. Def.'s SMF ¶ 30 at 8; Pl.'s SMF Resp. ¶ 30 at 3. The subject plywood was not insured and Transglobal did not make a claim to its product liability insurer for the products manufactured with the subject plywood. Def.'s SMF ¶ 31 at 8; Pl.'s SMF Resp. ¶ 31 at 3. At the direction of counsel, Plaintiff and Transglobal did not attempt to resell any of the unused subject plywood. Def.'s SMF ¶ 36 at 9; Pl.'s SMF Resp. ¶ 36 at 3. Plaintiff claimed an 18 percent salvage value based on the value provided to Transglobal's President, Mark Schroeder, by Transglobal's domestic lumber supplier for the cost to purchase non-grade marine lumber for the making of crates and skids. Def.'s SMF ¶ 34 at 8–9; Pl.'s SMF Resp. ¶ 34 at 3. Schroeder later conceded that the wholesale or retail salvage value of the imported plywood would likely be 25–30 percent higher today. Def.'s SMF ¶ 35 at 9; Pl.'s SMF Resp. ¶ 35 at 3; Def.'s Cross-Mot. at Ex. C Deposition Transcript of Mark Schroeder ("Schroeder Depo.") at 166–67, ECF No. 28–3.

Customs liquidated the entries and appraised the subject plywood on the basis of transaction value pursuant to 19 U.S.C. § 1401a(a)(1)(A), assessing an *ad valorem* duty rate. Pl.'s SMF ¶ 22 at 3; Def.'s SMF Resp. ¶ 22 at 5. Plaintiff protested the liquidation, arguing that the appraisal should be made with an allowance for the value of the defective merchandise pursuant to 19 C.F.R. § 158.12(a). Pl.'s SMF ¶ 23 at 4; Def.'s SMF Resp. ¶ 23 at 5; Protest No. 4101–19–100494; Protest No. 4101–19–100808. Customs denied Plaintiff's protests. Pl.'s SMF ¶ 27 at 4; Def.'s SMF Resp. ¶ 27 at 6.

[1] It is not clear from the evidence before the Court if Linyi Feixian Plywood Factory is the Chinese manufacturer of the plywood.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The Court will grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

LEGAL STANDARD

Plaintiff entered the subject plywood based on transaction value pursuant to 19 U.S.C. § 1401a(a)(1)(A). Compl. at 3. Plaintiff's Complaint argues that Customs erred in denying Plaintiff's protests and in not granting an allowance pursuant to 19 C.F.R. § 158.12(a) reducing the appraised value of the subject plywood to 18 percent of the original value. *Id.* at 3. 19 C.F.R. § 158.12(a) provides that: "[m]erchandise which is subject to *ad valorem* or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage." 19 C.F.R. § 158.12(a). The U.S. Court of Appeals for the Federal Circuit ("CAFC") has recognized that latent manufacturing defects can qualify as "'damage' for purposes of the regulation." *Volkswagen of Am., Inc. v. United States*, 540 F.3d 1324, 1331 (Fed. Cir. 2008); *see also Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1371 (Fed. Cir. 2006). In order to claim an allowance under 19 C.F.R. § 158.12(a), "an importer must: (1) show that it contracted for 'defect-free' merchandise; (2) link the defective merchandise to specific entries; and (3) prove the amount of the allowance for each entry." *Saab Cars USA, Inc.*, 434 F.3d at 1364–65 (citing *Samsung Elecs. Am., Inc. v. United States* ("*Samsung Electronics I*"), 106 F.3d 376, 379–80 (Fed. Cir. 1997) and *Samsung Elecs. Am., Inc. v. United States* ("*Samsung Electronics II*"), 195 F.3d 1367, 1368–69 (Fed. Cir. 1999)).

DISCUSSION

Plaintiff argues that it can satisfy each of the required elements for an allowance under 19 C.F.R. § 158.12(a). Pl.'s Mem. Points & Auth. Supp. Pl.'s Mot. Summary J. ("Pl.'s Br.") at 4–7, ECF No. 27–1. Defendant contends that Plaintiff is unable to satisfy any of the requirements for an allowance under 19 C.F.R. § 158.12(a) and that

this action should be dismissed. Def.'s Mem. Supp. Cross-Mot. Summary J. Resp. Opp'n to Pl.'s Mot. Summary J. ("Def.'s Br.") at 12–25, ECF No. 28.

I. Contracted for Defect-Free Merchandise

The first element of 19 C.F.R. § 158.12(a) requires Plaintiff to establish that it contracted for defect-free merchandise. Though no written contract has been provided detailing the specifications desired by Plaintiff for the subject plywood, Plaintiff contends that the Court can infer from the facts of the case that Plaintiff expected the Chinese manufacturer to provide defect-free plywood. Pl.'s Br. at 5–6; Pl.'s Resp. Opp'n Def.'s Cross-Mot. Summary J. ("Pl.'s Resp.") at 2, ECF No. 29. Plaintiff argues that the process of selecting a specific Chinese manufacturer and plywood involved testing and the installation of roll-up doors made with the sample plywood on vehicles to monitor performance under actual environmental conditions. Pl.'s Br. at 5–6. Plaintiff asserts that orders of larger quantities of plywood from the Chinese manufacturer following these tests relied on an expectation that subsequent plywood would meet the same standards as the samples. *Id.* at 6.

Defendant argues that no documents exist providing product specifications communicated between Plaintiff, Transglobal, and the Chinese manufacturer. Def.'s Br. at 14–15. Defendant contends that even after Plaintiff and Transglobal completed testing of the plywood samples, there was no memorialization in writing that future shipments would exactly match those tested in every specification. *Id.* at 15–16. Defendant contends that Plaintiff's testing of plywood samples was not conducted under all actual environmental conditions and did not include exposure to a winter freeze or spring thaw. Def.'s SMF Resp. ¶ 10 at 2–3.

Plaintiff asserts that the Court should infer that Plaintiff contracted for defect-free merchandise when the samples were tested and orders were placed based on those tests. Plaintiff essentially asks the Court to determine if a contract for defect-free merchandise existed between Plaintiff and the Chinese manufacturer based on an implied contract not memorialized in writing. "Whether a contract exists is a mixed question of law and fact." *See Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1368 (Fed. Cir. 2004). In this case, a genuine issue of material fact exists regarding whether there was a contract, implied or otherwise, for defect-free plywood. In *Samsung Electronics America, Inc. v. United States* ("*Samsung I*"), 106 F.3d 376 (Fed. Cir. 1997), the CAFC noted in considering whether a

contract for defect-free goods existed that "[i]n interpreting a written contract, the intent of the parties, for instance as evidenced by the written instruments forming the contract, is of primary concern." *Id.* at 379. Giving similar weight to the intentions of the Plaintiff and the Chinese manufacturer in this case and considering their actions, the facts are disputed as to whether Plaintiff and the Chinese manufacturer intended for the subject plywood to conform to certain specifications, to remain unchanged throughout the term of the agreement, and to be defect-free. The Parties agree that the subject merchandise was developed according to certain specifications, was tested extensively, and was produced based on samples. Pl.'s SMF ¶ 9–11 at 2; Def.'s SMF ¶¶ 14–16 at 4–5; Def.'s Resp. ¶¶ 9–11 at 2–3; Pl.'s SMF Resp. ¶¶ 14–16 at 2. The Parties disagree, however, as to whether an agreement existed that the subject merchandise would be manufactured according to certain specifications. Thus, because a genuine issue of material fact exists as to whether Plaintiff contracted for defect-free goods, summary judgment is not warranted for either Party on the first element.

II. Linking Defective Merchandise to Specific Entries

The second element of 19 C.F.R. § 158.12(a) requires Plaintiff to link the defective merchandise to specific entries. Plaintiff contends that it is not required to link specific products to specific entries because Plaintiff alleges that all plywood imported after May 2017 was defective. Pl.'s Br. at 6. Plaintiff claims that record evidence shows that the only plywood Plaintiff imported was the subject plywood and the quantity of that plywood remaining after production was halted. *Id.*; Pl.'s SMF at Ex. Q ("Item Stock Inquiry Reports"). Plaintiff argues that all of the plywood included in the protested entries was linked to the defect. Pl.'s Br. at 6.

Defendant argues that Plaintiff has not connected any of the alleged defects to the specific entries covered by Plaintiff's protests. Def.'s Br. at 17–23. Defendant alleges that Plaintiff imported five shipments of plywood from China prior to the first entry covered by Plaintiff's protests. *Id.* at 18–20 (citing Item Stock Inquiry Reports). Defendant contends that Plaintiff received two shipments after the first entry covered by Plaintiff's protests that were not included in Plaintiff's protests. *Id.* at 20 (citing Item Stock Inquiry Reports). Defendant argues that Plaintiff has provided no explanation as to why allowances under Section 158.12(a) were not sought for these entries if all entries after May 2017 were presumed to be defective. *Id.* at 20–21. Defendant asserts that the number of warranty claims

received by Plaintiff complaining of delamination was relatively small in comparison to the amount of plywood covered by the protested entries. *Id.* at 21–22; *see* Def.'s Cross-Mot. at Ex. H ("Warranty Claims"). Defendant notes that a small number of delamination complaints pre-dated the entries covered by Plaintiff's protests or fell within a period in which it was unlikely that products made from the subject plywood were available for market. *Id.* at 22.

Section 158.12(a) requires a party seeking an allowance to show a link between the defective merchandise and specific entries. *Saab Cars USA, Inc.*, 434 F.3d at 1363–64. Because Customs appraises the value of entries individually at the time of importation and assesses duties based on the appraised value before liquidation, establishing a link is necessary for appropriate refunds to be assigned to duties made. *Samsung Electronics II*, 195 F.3d at 1371.

In *Fabil Manufacturing Co. v. United States* ("*Fabil*"), 237 F.3d 1335 (Fed. Cir. 2001), the CAFC considered a similar question of whether a party alleging that entries were defective in their entirety must link specific defective merchandise to specific entries. *Fabil*, 237 F.3d at 1339. *Fabil* involved jackets bearing a corporate logo that were ordered to be "machine washable." *Id.* at 1336. After the jackets were imported, Fabil discovered a latent defect that caused the logos to disintegrate and their colors to run when washed. *Id.* Because of the defect, Fabil's customers returned the jackets, which were disposed of at a loss. *Id.* The CAFC held that under the facts of *Fabil*, there was no reason to require the plaintiff "to tie the allegedly defective merchandise to any entries or group of entries without which proof the Court (and Customs) cannot determine whether contested merchandise actually contained a defect at the time of 'importation.'" *Id.* at 1339 (internal quotation and edit omitted).

Similar to *Fabil*, Plaintiff alleges that all of the imported merchandise was defective. Pl.'s Br. at 6. The Parties agree that a portion of the roll-up doors and door panels manufactured with the subject plywood were the subject of warranty claims or delamination complaints. *See* Pl.'s SMF ¶ 16 at 3; Def.'s SMF ¶¶ 22–23 at 6; Def.'s SMF Resp. ¶ 16 at 3; Pl.'s SMF Resp. ¶¶ 22–23 at 3; *see* Pl.'s SMF ¶ 15 at 3; Def.'s SMF Resp. ¶ 15 at 3. The Parties dispute whether all of the plywood was defective. Because genuine issues of material fact exist as to whether all of the subject merchandise was defective, the Court cannot determine as a matter of law that Plaintiff connected the allegedly defective plywood to the subject entries. Summary judgment is not appropriate for either Party on the second element of Section 158.12(a).

III. Amount of Allowance for Each Entry

The third element of 19 C.F.R. § 158.12(a) requires Plaintiff to establish the amount of allowance for each entry. Plaintiff alleges that it is entitled to an allowance for all merchandise covered by the subject entries in the amount of a reduction in the appraised value to 18 percent of the original value of the subject plywood. Pl.'s Br. at 6–7; Compl. at 2–3. Plaintiff contends that 18 percent represents the salvage value for the plywood if used to build crates and skids. Pl.'s Br. at 6–7. Defendant alleges that Plaintiff has not substantiated its claim of an 18 percent salvage value. Def.'s Br. at 23–25. Defendant also argues that even if 18 percent were an appropriate salvage value, Plaintiff has not established that it should be applied to all of the imported plywood included in the subject entries. *Id.* at 25.

Plaintiff's claim for an 18 percent salvage value is based on a representation made by Transglobal's domestic lumber supplier to Transglobal's President, Mark Schroeder, regarding the cost to purchase non-grade marine lumber for the making of crates and skids. Def.'s SMF ¶ 34 at 8–9; Pl.'s SMF Resp. ¶ 34 at 3; Def.'s Cross-Mot. at Ex. B Deposition Transcript of Alison Dunbar ("A. Dunbar Depo.") at 11, 29–33, ECF No. 28–2; Schroeder Depo. at 158–59. No other support has been offered for the 18 percent value and Plaintiff did not attempt to resell the unused plywood. Def.'s SMF ¶ 36 at 9; Pl.'s SMF Resp. ¶ 36 at 3; A. Dunbar Depo. at 26–27; Schroeder Depo. at 85–86, 160–61. During his deposition for this case, however, the Court observes that potentially contrary evidence was elicited in Schroeder's statement that the value of the plywood had likely increased by 25 to 30 percent. Schroeder Depo. at 166–67. Because there remain genuine issues of material fact as to the value of the subject plywood and whether an allowance should be applied to all subject merchandise, summary judgment is not appropriate for either Party on the third element.

CONCLUSION

For the foregoing reasons, the Court concludes that genuine issues of material fact exist and that summary judgment is not warranted. Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment, ECF No. 27, is denied; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment, ECF No. 28, is denied; and it is further

ORDERED that a status conference will be scheduled with the Parties to discuss pre-trial matters.

Dated: March 20 2023
New York, New York

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

Slip Op. 23–37

MARMEN INC., MARMEN ÉNERGIE INC., AND MARMEN ENERGY CO., Plaintiffs, and WIND TOWER TRADE COALITION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and WIND TOWER TRADE COALITION, MARMEN INC., MARMEN ÉNERGIE INC., AND MARMEN ENERGY CO., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 20–00169

[Sustaining the U.S. Department of Commerce's remand redetermination in the 2018–2019 antidumping duty investigation of utility scale wind towers from Canada.]

Dated: March 20, 2023

Jay Charles Campbell, *Allison Jessie Gartner Kepkay*, and *Ron Kendler*, White & Case, LLP, of Washington, D.C., for Plaintiffs and Defendant-Intervenors Marmen, Inc., Marmen Energy Co., and Marmen Energie Inc.

Alan Hayden Price, *Derick G. Holt*, *Elizabeth Seungyon Lee*, *John Allen Riggins*, *Laura El-Sabaawi*, *Maureen Elizabeth Thorson*, *Robert Edward DeFrancesco, III*, *Tessa Victoria Capeloto*, and *Theodore Paul Brackemyre*, Wiley Rein, LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Wind Tower Trade Coalition.

Reginald T. Blades, Jr., Assistant Director, and *Joshua Ethan Kurland*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Jesus N. Saenz*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Choe-Groves, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination in the antidumping duty investigation of utility scale wind towers from Canada, filed pursuant to the Court's Remand Order in *Marmen Inc. v. United States* ("*Marmen I*"), 45 CIT __, 545 F. Supp. 3d 1305 (2021). *See Final Results of Redetermination Pursuant to Court Remand* ("*Remand Redetermination*"), ECF Nos. 61, 62; *see also Utility Scale Wind Towers from Canada* ("*Final Determination*"), 85 Fed. Reg. 40,239 (Dep't of Commerce July 6, 2020) (final determination of sales at less than fair value and final negative determination of critical circumstances; 2018–2019), accompanying Issues and Decision Mem. for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada, ECF No. 18–5 (June 29, 2020) ("Final IDM").

In *Marmen I*, the Court remanded for Commerce to reconsider the rejection of the cost reconciliation information of Plaintiffs Marmen

Inc., Marmen Energy Co., and Marmen Energie Inc. (collectively, "Marmen") and Commerce's use of the differential pricing average-to-transaction ("A-to-T") method to calculate Marmen's dumping margin. *Marmen I*, 45 CIT at __, 545 F. Supp. 3d at 1315–20. On remand, Commerce reconsidered the additional cost reconciliation information and the use of the Cohen's *d* test in light of *Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021). *See generally*, *Remand Redetermination*. Marmen filed comments in opposition to the *Remand Redetermination*. Pls.' Comments Opp'n Final Results of Redetermination Pursuant to Court Remand ("Pls.' Cmts."), ECF Nos. 66, 67. Defendant United States ("Defendant") responded to Plaintiffs' Comments. Def.'s Resp. Pls.' Comments Commerce' Remand Redetermination ("Def.'s Resp."), ECF Nos. 70, 71 (superseded by ECF Nos. 79, 80). Defendant-Intervenor Wind Tower Trade Coalition ("Defendant-Intervenor") filed comments in support of the *Remand Redetermination*. [Def.-Interv.'s] Comments Supp. Remand Redetermination ("Def.-Interv.'s Cmts."), ECF Nos. 72, 73. For the following reasons, the Court sustains the *Remand Redetermination*.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Remand Redetermination*. *See Marmen I*, 45 CIT at __, 545 F. Supp. 3d at 1311–12. In August 2019, Commerce initiated an antidumping duty investigation into wind towers from Canada for the period covering July 1, 2018 through June 30, 2019. *Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam*, 84 Fed. Reg. 37,992, 37,992–93 (Dep't of Commerce Aug. 5, 2019) (initiation of less-than-fair-value investigations). Commerce selected Marmen, Inc. and Marmen Energie Inc. as mandatory respondents. *See* Decision Mem. for the Prelim. Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada (Feb. 4, 2020) ("Prelim. DM") at 1–2, PR 146.[1] In the *Final Determination*, Commerce assigned weighted-average dumping margins of 4.94 percent to Marmen, Inc. and Marmen Energie Inc.[2] *Final Determination*, 85 Fed.

[1] Citations to the administrative record reflect public record ("PR") and public remand record ("PRR") document numbers filed in this case, ECF Nos. 46, 75.

[2] The Court notes that, although Marmen Energy Co. was not included as a mandatory respondent alongside Marmen, Inc. and Marmen Energie Inc., comments and questionnaire responses were submitted collectively by the three Plaintiffs during Commerce's investigation. The Court herein refers to their assigned weighted-average dumping margins collectively as "Marmen's dumping margin."

Reg. at 40,239. Commerce determined the all-others weighted average dumping margin of 4.94 percent based on Marmen's dumping margin. *Id.*

In the *Final Determination*, Commerce determined that Marmen's steel plate costs did not reasonably reflect the costs associated with the production and sale of the products and weight-averaged Marmen's reported steel plate costs. Final IDM at 4–6. Commerce rejected a portion of the supplemental cost reconciliation information submitted by Marmen as untimely, unsolicited new information. *Id.* at 7–9. Commerce applied a differential pricing analysis using the Cohen's *d* test and determined that there was a pattern of export prices that differed significantly. *Id.* at 10–11. As a result, Commerce calculated Marmen's weighted-average dumping margin by using the alternative average-to-transaction method. *Id.*

The Court remanded for Commerce to explain its use of the Cohen's *d* test in light of *Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021), and for Commerce to further explain or consider Marmen's supplemental cost reconciliation information. *Marmen I*, 45 CIT at __, 545 F. Supp. 3d. at 1317–21.

On remand, Commerce accepted the previously rejected information from Marmen. *Remand Redetermination* at 4–11. Commerce examined the additional cost reconciliation information together with other information on the record, and Commerce determined that the purported corrections were already reflected in Marmen's audited financial statements. *Id.* Commerce did not adjust Marmen's cost of manufacturing or cost of production. *Id.* Commerce also reconsidered the differential pricing analysis and determined that the assumptions of normality and roughly equal variances at issue in *Stupp* were not relevant to Commerce's application of the Cohen's *d* test on remand. *Id.* at 12–50.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an antidumping duty investigation. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Commerce's Rejection of Marmen's Additional Cost Reconciliation Information

In order to determine whether certain products are being sold at less than fair value in the United States, Commerce compares the export price, or constructed export price, with normal value. 19 U.S.C. § 1673. Export price and constructed export price are the price at which the subject merchandise is being sold in the U.S. market, while normal value is the price at which a "foreign like product" is sold in the producer's home market or in a comparable third-country market. *Id.* §§ 1677a(a)–(b), 1677b(a)(1)(B). Before calculating a dumping margin, Commerce must identify a suitable "foreign like product" with which to compare the exported subject merchandise. *See* § 1677b(a)(1)(B). A "foreign like product," in order of preference, is:

> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise —
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise —
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16); *NSK Ltd. v. United States*, 26 CIT 650, 657–58, 217 F. Supp. 2d 1291, 1299–1300 (2002).

When determining costs of production, 19 U.S.C. § 1677b states that:

> costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles ["GAAP"] of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A). The statute requires that "reported costs must normally be used only if (1) they are based on the records . . . kept in accordance with the GAAP *and* (2) reasonably reflect the costs of producing and selling the merchandise." *See Dillinger France v. United States*, 981 F.3d 1318, 1321 (Fed. Cir. 2020) (emphasis in original) (internal quotation marks and citations omitted). Commerce is not required to accept the exporter's records. *Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358, 1365 (Fed. Cir. 2014). Commerce may reject a company's records if it determines that accepting them would distort the company's true costs. *See Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1377 (Fed. Cir. 2001). Commerce is directed to consider all available evidence on the proper allocation of costs. 19 U.S.C. § 1677b(f)(1)(A). Physical characteristics are a prime consideration when Commerce conducts its analysis. *Thai Plastic Bags*, 746 F.3d at 1368. If factors beyond the physical characteristics influence the costs, however, Commerce will normally adjust the reported costs in order to reflect the costs that are based only on the physical characteristics. *See id.*

To determine whether the subject merchandise wind towers from Canada were sold in the United States at less than fair value under section 733 of the Tariff Act of 1930, Commerce first considered all products produced and sold by Marmen in Canada during the period of investigation for the purpose of determining the appropriate product comparisons to U.S. sales. Prelim. DM at 13. Commerce determined that there were no sales of identical merchandise in the ordinary course of trade in Canada that could be compared to U.S. sales. *Id.*

Commerce did not dispute whether Marmen's records were kept properly, noting that "the record is clear that the reported costs are derived from the Marmen Group's normal books and records and that those books are in accordance with Canadian GAAP." Final IDM at 5; *see also* Marmen's Utility Scale Wind Towers from Canada: Response to Question 14.g of the Supplemental Section Questionnaire (Dec. 13, 2019) at 2–4, PR 123–25. Commerce focused on the second prong of 19

U.S.C. § 1677b(f)(1)(A), calling into question whether Marmen reasonably reflected the costs of producing and selling the merchandise. Final IDM at 5.

In *Marmen I*, this Court remanded for Commerce to reconsider the rejection of Plaintiffs' cost reconciliation information. *Marmen I*, 45 CIT at __, 545 F. Supp. 3d at 1315–17. On remand, Commerce accepted and reconsidered Marmen's cost reconciliation information that Commerce had previously rejected. *See Remand Redetermination* at 4–11. Commerce explained that on remand it evaluated the information provided by Plaintiffs and determined that one portion of the information should be rejected because the information adjusted for amounts already accounted for in the costs that were reported to Commerce. *Id.* Commerce determined that Plaintiffs' overall cost reconciliation difference remained outstanding and attributed the amount to Marmen's cost of production. *Id.* Defendant-Intervenor supports Commerce's determination. *See* Def.-Interv.'s Cmts. at 10–16.

Marmen argues that Commerce's rejection of the information was unreasonable because the information was a "minor correction to Marmen Inc.'s cost reconciliation worksheet based on incorrect and confused claims that are unsupportable." Pls.' Cmts. at 2. Marmen challenges Commerce's characterization that the information would double count an exchange rate adjustment already reflected in the audited cost of goods sold and reported cost of production. *Id.*

A party may submit factual information to rebut, clarify, or correct questionnaire responses. 19 C.F.R. § 351.301(c). The regulations state that

> [i]f the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify, or correct, including the name of the interested party that submitted the information and the date on which the information was submitted.

Id. § 351.301(b)(2).

Commerce has a duty "to determine dumping margins as accurately as possible." *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (internal quotation marks and citation omitted). "[A]ntidumping laws are remedial not punitive." *Id.* (citation omitted). The U.S. Court of Appeals for the Federal Circuit ("CAFC") has stated that "Commerce is obliged to correct any errors in its calculations during the preliminary results stage to avoid an imposition of

unjustified duties." *Fischer S.A. Comercio, Industria & Agricultura v. United States*, 471 Fed. App'x 892, 895 (Fed. Cir. 2012) (citation omitted). Further, "Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections." *Timken United States Corp. v. United States* ("*Timken*"), 434 F.3d 1345, 1353 (Fed. Cir. 2006). The Court reviews whether Commerce abused its discretion when rejecting submitted information. *See Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir 2016) ("Commerce abused its discretion in refusing to accept updated data when there was plenty of time for Commerce to verify or consider it.") (citations omitted). When reviewing Commerce's determination to reject corrective information, this Court may consider factors such as Commerce's interest in ensuring finality, the burden of incorporating the information, and whether the information will increase the accuracy of the calculated dumping margins. *Bosun Tools Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1359, 1365 (2019) (citations omitted).

On remand, Commerce accepted and considered the numerous revisions presented by Marmen. *Remand Redetermination* at 4–11, 38–46. Marmen argues that the information submitted consisted of minor corrections and not new information. *See* Pls.' Cmts. at 2. Commerce agreed that several of the revised reconciliations were "minor errors," such as cell formatting errors and other small clerical errors, which Commerce accepted because they did not alter the data presented in the audited financial statements. *Remand Redetermination* at 6–7. Commerce stated in the *Remand Redetermination*, however, that "there was one non-clerical revision that Marmen explained it found while reviewing its records for purposes of preparing the revised cost reconciliations. This revision resulted from an alleged discovery of certain expenses that Marmen claims were not converted from [U.S. dollars] to [Canadian dollars]." *Id.* at 7 (citing Marmen's Utility Scale Wind Towers from Canada: Second Supp. Section D Resp. (Feb. 7, 2020) ("Marmen's Second Supplemental Section D Response") at 14, PR 151–54). Commerce determined that:

> In short, the increase to the [cost of manufacturing] (*i.e.*, the increase in the unreconciled difference) driven by the restatement of the audited financial statements was offset by this new change to Marmen's cost reconciliation. According to Marmen, this new reconciling item represents non-booked exchange losses that Marmen Inc. incurred on purchases of wind tower

> sections from affiliate Marmen Energie. This explanation is parallel to the adjusting entry to restate Marmen Inc.'s other purchases to the [Canadian dollar] equivalent values, as discussed above, as an auditor amendment to the financial statements.

Id. (citing Marmen's Utility Scale Wind Towers from Canada: Request for Additional Information Concerning Second Supp. Section D Resp. (Dec. 8, 2021) ("Marmen's Second Supplemental Remand Section D Response") at Attachment 1), PRR 2. Commerce rejected Marmen's cost reconciliation information because "Marmen did not further explain how, if at all, this error and correction related to the restated financial statements, or whether it was one of the adjustments brought up by the external auditor, Deloitte. The record does not provide any actual support that this new change is required, nor that it is not already accounted for within Marmen's normal books." Id.

Defendant asserts that the new cost reconciliation information had the effect of duplicating the adjustments for exchange gains and losses already reflected in Marmen's financial statements. Def.'s Resp. at 24. Defendant contends that Commerce correctly determined that the information in the cost reconciliation spreadsheet, viewed in conjunction with Marmen's representations regarding its auditor's adjustments, indicated that Marmen's auditor had already made any necessary adjustment in restating Marmen's financial statements that produced the cost of goods sold figure used in the reconciliation. *Id.*

In support of its determination that the new cost reconciliation information was already accounted for in Marmen's costs, Commerce cited record evidence comparing an Excel spreadsheet in the Supplemental Remand Section D Response at Attachment 1 with Marmen's Initial Section D Response at pages D-15 and D33 and Exhibit D-3.[3] *Remand Redetermination* at 8–9; *see* Marmen's Second Supplemental Remand Section D Response at Attachment 1; Marmen's Utility Scale Wind Towers from Canada: Sections B, C, and D Response (Oct. 11, 2019) ("Marmen's Initial Section D Response") at D-15, D-33, PR 89–97; Marmen's Utility Scale Wind Towers from Canada: Supplemental Section D Response (Dec. 6, 2019) ("Marmen's December 6, 2019 Supplemental Section D Response") at Ex. Supp. D-3, PR 114–19. Marmen's Initial Section D Response reviewed by Commerce

[3] Exhibit D-3 to Marmen's Initial Section D Response is not included in the record before the Court. Exhibit Supp. D-3 to Marmen's December 6, 2019 Supplemental Section D Response appears to correspond to the information referenced by Commerce in the *Remand Redetermination*. *See* Marmen's Utility Scale Wind Towers from Canada: Supplemental Section D Response (Dec. 6, 2019) ("Marmen's December 6, 2019 Supplemental Section D Response") at Ex. Supp. D-3, PR 114–19.

shows that Marmen recorded amounts in its normal books and records in its home currency of Canadian dollars using an alternative exchange rate. *Remand Redetermination* at 8–9 (citing Marmen's Initial Section D Response at Exhibit D-3). Citing Marmen's Initial Section D Response at page D-15, for example, Commerce determined that for purchases in U.S. dollars, Marmen reported that its normal books reflected a cost system conversion from U.S. dollar purchases to Canadian dollars at specific conversion rates. *Id.* at 8–9. Commerce cited Marmen's December 6, 2019 Supplemental D Response at D-17 and D-18 to support its determination that Marmen's auditors periodically adjusted the already converted purchases, and that in preparing Marmen's original 2018 audited financial statements, the auditors had already made adjustments to reflect actual exchange rates during 2018. *Id.* at 9; *see* Marmen's December 6, 2019 Supplemental Section D Response at D-17–D-18. Based on its review of these record documents, Commerce determined that Marmen's prior statements and reported calculations established that the exchange gains and losses were already accounted for in Marmen's costs. *Remand Redetermination* at 9, 38–46. Thus, Commerce determined that "the record evidence thereby demonstrates that the reported costs, including those of the sections purchased from Marmen Energie, were, in fact, already correctly inclusive of exchange rate differences, and it would be inappropriate to adjust them again for those exchange gains and losses." *Id.* at 11.

Because record evidence, including Marmen's Initial Section D Response with exhibits, Marmen's December 6, 2019 Supplemental Section D Response with exhibits, and Marmen's Second Supplemental Remand Section D Response at Attachment 1, shows that Marmen's auditors already adjusted the reported costs to account for exchange rate differences, the Court concludes that Commerce's determination that another adjustment would be inappropriate is supported by substantial evidence. The Court holds that Commerce did not abuse its discretion by rejecting Marmen's proposed corrective information, recognizing that Commerce has an interest in ensuring finality and increasing the accuracy of the calculated dumping margins. *Bosun Tools*, 43 CIT at __, 405 F. Supp. 3d at 1365.

II. Commerce's Use of the Cohen's *d* Test

In *Stupp*, the CAFC directed the Court to remand Commerce's use of the Cohen's *d* test for further explanation because the data Commerce used may have violated the assumptions of normality, sufficient observation size, and roughly equal variances. 5 F.4th at 1357–60. Before the CAFC, Commerce argued that concerns of nor-

mality and population were misplaced because, unlike sampling data used in determining probability or statistical significance, Commerce's review considered a complete universe of data. *Id.* at 1359–60. The CAFC expressed concern with Commerce's explanation because it failed to "address the fact that Professor Cohen derived his interpretive cutoffs under the assumption of normality." *Id.* at 1360.

On remand, Commerce reconsidered the use of the Cohen's *d* test in light of *Stupp* as this Court directed in *Marmen I*. *See Remand Redetermination* at 12–37, 46–50; *Marmen I*, 45 CIT at __, 545 F. Supp. 3d at 1320. The standard of review for considering Commerce's differential pricing analysis is reasonableness. *Stupp*, 5 F.4th at 1353. The CAFC and the U.S. Court of International Trade have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. *See e.g.*, *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 670–74 (Fed. Cir. 2019) (discussing zeroing and the 0.8 threshold for the Cohen's *d* test); *Apex Frozen Foods Priv. Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1314–37 (2016) (discussing application of the A-to-T method, the Cohen's *d* test, the meaningful difference analysis, zeroing, and the "mixed comparison methodology" of applying the A-to-A method and the A-to-T method when 33–66% of a respondent's sales pass the Cohen's *d* test), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017); *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1322, 1330–34 (Fed. Cir. 2017) (affirming zeroing and the 0.5% *de minimis* threshold in the meaningful difference test); *Stupp Corp. v. United States*, 47 CIT __, __, 2023 WL 2206548, at *6–10 (2023) (discussing the reasonableness of the Cohen's *d* test as one component of Commerce's differential pricing analysis). However, the CAFC has stated that "there are significant concerns relating to Commerce's application of the Cohen's *d* test . . . in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances." *Stupp*, 5 F.4th at 1357.

The Cohen's *d* test is "a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group." *Apex Frozen Foods*, 862 F.3d at 1342 n.2. The Cohen's *d* test relies on assumptions that the data groups being compared are normal, have equal variability, and are equally numerous. *See Stupp*, 5 F.4th at 1357. Applying the Cohen's *d* test to data that do not meet these assumptions can result in "serious flaws in interpreting the resulting parameter." *See id.* at 1358.

Commerce determined on remand that "the assumptions of normality and roughly equal variances" are not relevant to Commerce's

application of the Cohen's *d* test. *Remand Redetermination* at 18. Commerce explained that its dumping analysis in this case assessed the pricing behavior of Marmen in the entire United States market, stating:

> The U.S. sale price data on which this analysis is based constitute the entire population of sales data and are not a sample of a respondent's sales data (*i.e.*, the data are for *all* sales in the United States of subject merchandise by a company during the period of investigation or review). The basis for this analysis is the respondent's U.S. sales of the subject merchandise for a given period of time. By definition, these U.S. sales comprise the universe of sales on which the respondent's weighted-average dumping margin depends. The Differential Pricing Analysis examines all sales to determine whether the A-to-A method is the appropriate approach on which to base this calculation. Therefore, in the context of the calculation of the weighted-average dumping margin, the data used are not a sample, but rather constitute the entire population of a respondent's sales of subject merchandise during the period under examination for the calculation of the weighted-average dumping margin.

Id. at 22.

Commerce determined on remand that the statistical criteria, such as the number of observations, a normal distribution, and approximately equal variances, are related to the statistical significance of sampled data and establish the reliability of an estimated parameter based on the sample data. *Id.* at 23. Commerce explained further that:

> However, for the Cohen's *d* test applied in the context of the Differential Pricing Analysis, there is no estimation of the parameters (*i.e.*, mean, standard deviation, and effect size) of the test group or of the comparison group as the calculation of these parameters is based on the complete universe of sale prices to the test and comparison groups. Unlike with a sample of data where the estimated parameters will change with each sample selected from a population, each time these parameters would be calculated as part of Commerce's Cohen's *d* test, the exact same results would be found because the calculated parameters are the parameters of the entire population and not an estimate of the parameters based on a sample. Accordingly, the means, standard deviations, and Cohen's *d* coefficients calculated are not estimates with confidence levels or sampling errors as would be associated with sampled data, but, rather, are the actual

> values which describe a company's pricing behavior. Consequently, the statistical significance of the results of the Cohen's *d* test is not relevant in Commerce's application of the differential pricing analysis, which measures practical significance.

Id. at 23–24. Commerce determined, therefore, that:

> [i]n Commerce's application of the Cohen's *d* test, such additional analysis is not relevant because the data in both the test group and the comparison group use the full population of sales in each group and are not determined based on controlled random and independent samples of the population. Rather, the results of the Cohen's *d* test are based on the entire population of sale price data for comparable merchandise for the test and comparison groups.

Id. at 26.

The Court concludes that Commerce's use of a population, rather than a sample, in the application of the Cohen's *d* test sufficiently negates the questionable assumptions about thresholds that were raised in *Stupp*. Based on Commerce's explanation, this Court concludes that Commerce's application of the Cohen's *d* test to determine whether there was a significant pattern of differences was reasonable because Commerce applied the Cohen's *d* test to a population rather than a sample. Because Commerce adequately explained how its methodology is reasonable, the Court holds that Commerce's use of the Cohen's *d* test applied as a component of its differential pricing analysis is in accordance with law.

CONCLUSION

For the foregoing reasons, Commerce's remand results are supported by substantial evidence, are in accordance with law, and comply with the Court's Order, Oct. 22, 2021, ECF No. 51, and are therefore sustained. Judgment will enter accordingly.

Dated: March 20, 2023
New York, New York

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

Slip Op. 23–38

PIRELLI TYRE CO., LTD., PIRELLI TYRE S.P.A., AND PIRELLI TIRE LLC, Plaintiffs, and SHANDONG NEW CONTINENT TIRE CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 20–00115

[Sustaining the U.S. Department of Commerce's remand results and final results in the antidumping duty administrative review of certain passenger vehicle and light truck tires from the People's Republic of China.]

Dated: March 20, 2023

Daniel L. Porter, *James P. Durling*, *James C. Beaty*, and *Ana M. Amador Gil*, Curtis, Mallet-Prevost, Colt & Mosle, LLP, of Washington, D.C., for Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC.

Ned H. Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y., and *Andrew T. Schutz*, *Brandon M. Petelin*, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for Plaintiff-Intervenor Shandong New Continent Tire Co., Ltd.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of Counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Nicholas J. Birch and *Roger B. Schagrin*, Schragrin Associates, of Washington, D.C., for Defendant-Intervenors United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises from the results of the U.S. Department of Commerce ("Commerce") in the antidumping administrative review of certain passenger vehicle and light truck tires from the People's Republic of China ("China") for the period of August 1, 2017 through July 31, 2018 ("Period of Review 3"). Compl. at 1, ECF No. 6. Plaintiffs Pirelli Tyre Co., Ltd. ("Pirelli China"), Pirelli Tyre S.p.A., and Pirelli Tire LLC ("Pirelli USA") (collectively, "Plaintiffs" or "Pirelli") filed this action pursuant to 28 U.S.C. § 1581(c) contesting Commerce's final results in *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China* ("*Final Results*"), 85 Fed. Reg. 22,396 (Dep't of Commerce Apr. 22, 2020) (final results of antidumping duty

admin. review; 2017–2018). *See id.* Plaintiffs bring this suit to challenge: (1) whether Commerce had statutory authority to issue a China-wide entity rate; (2) whether Commerce properly applied the applicable legal criteria for analyzing Plaintiffs' separate rate eligibility; and (3) Commerce's determination that Plaintiffs were controlled by the Chinese government through the ownership of China National Chemical Corporation ("Chem China"). *See id.* at 5–7.

Before the Court is Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. Pls.' R. 56 Mot. J. Agency R. ("Plaintiffs' Motion" or "Pls.' Mot."), ECF Nos. 65, 66. Defendant United States ("Defendant") and Defendant-Intervenor the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Defendant-Intervenor" or "Def.-Interv.") filed Defendant's Response to Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record and the Response Brief of Defendant-Intervenor. Def.-Interv.'s Resp. Br. ("Def.-Interv.'s Resp."), ECF Nos. 71, 72; Def.'s Resp. Pls.' R. 56.2 Mot. J. Agency R. ("Def.'s Resp."), ECF Nos. 74, 75. Plaintiffs filed Plaintiffs' Reply Brief in Support of Motion for Judgment on the Agency Record. Pls.' Reply Br. Supp. Mot. J. Agency R. ("Pls.' Reply"), ECF Nos. 79, 80.

Also before the Court are Defendant-Intervenor's Comments in Opposition to Remand Results. Def.-Interv.'s Cmts. Opp'n Remand Results ("Defendant-Intervenor's Comments" or "Def.-Interv.'s Cmts."), ECF Nos. 62, 63. Defendant-Intervenor opposes Commerce's redetermination on remand in the *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"), ECF Nos. 55–1, 56–1, determining that the sole mandatory respondent in Commerce's review, Shandong New Continent Tire Co., Ltd. ("New Continent"), reported sales information accurately and was not involved in fraud. *Id.* at 18–26. Defendant and Plaintiff-Intervenor New Continent filed Defendant's Response to Comments on Remand Redetermination and Plaintiff-Intervenor's Comments in Support of Remand Redetermination supporting the *Remand Results*. Def.'s Resp. Cmts. Remand Redetermination ("Defendant's Comments" or "Def.'s Cmts."), ECF Nos. 69, 70; Pl.-Interv.'s Cmts. Remand Results ("Plaintiff-Intervenor's Comments" or "Pl.-Interv.'s Cmts."), ECF Nos. 73, 76.

For the following reasons, the Court sustains Commerce's *Final Results* and *Remand Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination that New Continent provided accurate information during the administrative review was supported by substantial evidence;
2. Whether Plaintiffs have waived their challenge to Commerce's authority to impose a China-wide entity antidumping duty rate by not raising the issue in Plaintiffs' Motion; and
3. Whether Commerce's determination that Pirelli failed to rebut the presumption of *de facto* government control was in accordance with the law and supported by substantial evidence.

BACKGROUND

In June 2015, Commerce issued an antidumping duty order covering certain passenger vehicle and light truck tires from China. *See Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 80 Fed. Reg. 34,893 (Dep't of Commerce Jun. 18, 2015) (final determination of sales at less than fair value and final affirmative determination of critical circumstances, in part). Commerce initiated an administrative review on October 4, 2018 of multiple companies, including Pirelli China. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 50,077, 50,081 (Dep't of Commerce Oct. 4, 2018).

Pirelli China and Pirelli USA filed a separate rate application with Commerce. Pls.' Separate Rate App., PJA 3, CJA 1.[1] In its *Preliminary Results*, Commerce determined that Pirelli China had not demonstrated an absence of *de jure* and *de facto* government control and denied Pirelli's Separate Rate Application. *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China* ("*Prelim. Results*"), 84 Fed. Reg. 55,909, 55,912 (Dep't of Commerce Oct. 18, 2019) (preliminary results of antidumping duty admin. review and rescission, in part; 2017–2018), and accompanying Issues and Decisions Memorandum ("Preliminary IDM" or "Prelim. IDM") at 13, 15, PJA 13. Pirelli China was assigned the China-wide antidumping margin of 87.99 percent. Prelim. IDM at 13. Pirelli China and Pirelli USA filed an administrative case brief ("Pirelli's Administrative Case Brief") with Commerce requesting that Commerce reverse the *Preliminary Results* and grant Pirelli China separate rate status. Pls.' Admin. Case Br., PJA 15, CJA 10.

[1] Citations to the administrative record reflect the public joint appendix ("PJA") and confidential joint appendix ("CJA") tab numbers filed in this case, ECF Nos. 81, 82.

Commerce published on April 15, 2020 the *Final Results* and accompanying Issues and Decision Memorandum ("Final IDM"), PJA 17. In the *Final Results*, Commerce assigned mandatory respondent New Continent a zero percent weighted-average dumping margin, which was used as the basis for assigning dumping margins to non-individually examined respondents that qualified for separate rate status. *Final Results*, 85 Fed. Reg. at 22,397. Commerce also continued to determine that Pirelli China had not rebutted the presumption of *de facto* government control and was not entitled to a separate rate. *Id.* at 22,399; Final IDM at 13. Commerce determined that Pirelli China did not establish its "autonomy from the [Chinese] government in making decisions regarding the selection of management." Final IDM at 14–18.

Pirelli commenced this action on May 21, 2020. Summons, ECF No. 1; Compl. After initiating this case, Plaintiffs filed Plaintiffs' Unopposed Motion to Stay the Proceedings pending the final determination by the United States Court of Appeals for the Federal Circuit ("CAFC") in *China Manufacturers Alliance, LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021). Pls.' Unopposed Mot. Stay Proceedings, ECF No. 23. The Court granted the motion and stayed the case. Order (Aug. 6, 2020), ECF No. 25.

On May 20, 2021, prior to the CAFC's decision in *China Manufacturers Alliance*, U.S. Customs and Border Protection ("Customs") notified Commerce that it had observed inconsistencies between the Section A Questionnaire Responses submitted by New Continent to Commerce and the corresponding prices reported to Customs at the time of entry that resulted in an undervaluation of approximately $2.6 million. Def.'s Mot. Lift Stay Voluntary Remand ("Defendant's Remand Motion" or "Def.'s Remand Mot.") at Att. 1 ("Customs' Referral Letter"), ECF No. 29. Defendant requested that the Court remand the administrative review results to Commerce for further examination. *Id.* at 3–4. The Court remanded the case on September 20, 2021 to Commerce. *Pirelli Tyre Co. v. United States*, 45 CIT __, 539 F. Supp. 3d 1257 (2021).

Commerce published on October 27, 2021 a notice of remand proceedings and reopened the administrative record of the 2017–2018 antidumping administrative review. *Remand Results* at 3; *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China* ("*Notice of Remand*"), 86 Fed. Reg. 59,367 (Dep't of Commerce Oct. 27, 2021) (notice of remand proceeding and reopening of 2017–2018 antidumping duty admin. review record). Commerce placed Customs' Referral Letter on the record and provided interested parties with an opportunity to submit factual information and com-

ments. *Remand Results* at 3; *Notice of Remand*, 86 Fed. Reg. at 59,368. Commerce received comments from interested parties and solicited supplemental questionnaire responses from New Continent and NBR Wheels and Tires LLC. *Remand Results* at 3–4.

Commerce issued its *Remand Results* on April 28, 2022, in which Commerce determined that export price and constructed export price information reported by New Continent in the administrative review was accurate. *Id.* at 11–22. Commerce also determined that the record did not support that New Continent was affiliated with two other companies considered in the review. *Id.* at 22–23. Commerce did not adjust New Continent's antidumping margin, the rate for individually examined respondents, or Pirelli's separate rate status. *See id.* at 24. Plaintiffs filed their Rule 56.2 Motion for Judgment on the Agency Record on July 11, 2022. *See* Pls.' Mot. J. Agency R.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Remand Results

The Court remanded the *Final Results* to Commerce to address new information provided to Commerce by Customs regarding inaccuracies in the reported sales prices on imports of passenger vehicle tires from China during Period of Review 3. *Pirelli Tire Co.*, 45 CIT at __, 539 F. Supp. 3d at 1261–62. Specifically, Customs compared the Section A Questionnaire Responses provided by New Continent to Commerce in the underlying investigation with Customs' import records and found a potential undervaluation of approximately $2.6 million. *See Notice of Remand*, 86 Fed. Reg. at 59,368. This information raised concerns regarding the accuracy of New Continent's reporting to Commerce. *Id.*

On remand, Commerce issued supplemental questionnaires to New Continent and NBR Wheels and Tires LLC seeking clarification of information on the administrative record. *See Remand Results* at 4; Commerce's Supp. Questionnaire New Continent, PJA 27, CJA 18;

Commerce's Second Supp. Questionnaire New Continent, PJA 30, CJA 21. In response, New Continent provided more than 20,000 pages of information. *Remand Results* at 4–5; New Continent's Supp. Questionnaire Resp., PJA 28, CJA 19; New Continent's Second Supp. Questionnaire Resp., PJA 31, CJA 22.

In the *Remand Results*, Commerce focused its analysis on the invoices submitted to Commerce rather than the invoices submitted to Customs in weighing the accuracy of the U.S. sales information provided by New Continent during the administrative review. *Remand Results* at 5–7, 15. Commerce considered the invoices provided to Customs relevant only to the extent that they prompted the remand. *Id.* at 20. Commerce analyzed information on the record pertaining to almost all of the transactions identified by Customs and determined that payment amounts were tied to the U.S. sales values reported by New Continent in the administrative review. *Id.* at 7–8, 19–20. Commerce was also able to match price and quantity data between invoices under consideration and corresponding invoices in New Continent's Section C database. *Id.* at 8. Based on its review of record evidence, Commerce determined that New Continent accurately reported export price and constructed export price sales during the administrative review. *Id.* at 8, 23–24. Commerce also determined that New Continent was not affiliated with the entities responsible for providing the allegedly inaccurate information to Customs. *Id.* at 10–11, 23–24.

Defendant-Intervenor asserts that Commerce failed to consider contradictory record evidence that called into question the accuracy of New Continent's reporting and failed to address the relevance of the alleged fraud on Customs. Def.-Interv.'s Cmts. at 18–23. Defendant and Plaintiff-Intervenor support Commerce's *Remand Results*. *See* Def.'s Cmts.; Pl.-Interv.'s Cmts.

Commerce analyzed documents relating to nearly all of the transactions identified by Customs and expressed that it was:

> able to tie the payment amounts to the U.S. sales value reported by New Continent in its U.S. sales database from the underlying review as well as New Continent's financial statements [for most of the sales]. More specifically, we compared the prices and quantities of the invoices under question to those same invoices in the section C database and were able to fully match the values.

Remand Results at 7–8. In its Supplemental Questionnaire Response, New Continent explained that for the majority of its submitted invoices, it was not possible to a make a one-to-one link between the

payment and the invoice because New Continent's accounting was based on a running debt and credit balance that was reconciled annually. New Continent's Supp. Questionnaire Resp. at 21–22. Defendant-Intervenor contends that Commerce must provide an explanation of its methodology for assigning payments to sales information in its analysis. Def.-Interv.'s Cmts. at 18–20.

Commerce's analysis did not rely solely on New Continent's Supplemental Questionnaire Response, and Commerce cited to record documents containing payment information for invoices and accounting subledgers. *Remand Results* at 19; *see also* New Continent's Sub. New Factual Info. at Exs. 18 (worksheet linking Section C database invoice values with invoice values submitted by New Continent), 19 (invoices contained in Section C database), PJA 23, CJA 15; New Continent's Supp. Questionnaire Resp. at Ex. S-9 ("New Continent's Payment Package"). Commerce also noted that its review during the remand covered significantly more transactions than were considered during Commerce's standard verification. *Remand Results* at 19–20. Commerce's remand analysis covered most of the invoices identified by Customs, and Commerce explained that it compared "prices and quantities of the invoices under question to those same invoices in the section C database." *Id.* at 7–8.

Defendant-Intervenor asserts that Commerce disregarded the argument that certain record information was inaccurate and contradicted by other record documents. Def.-Interv.'s Cmts. at 20–21. Though Commerce did not directly address inconsistencies between specific documents, the *Remand Results* make clear that Commerce considered information covering most of the relevant transactions. *See Remand Results* at 19; *see also* New Continent's Sub. New Factual Info. at Exs. 18, 19; New Continent's Payment Package. Commerce focused on the accuracy of the information submitted in the administrative review in order to calculate the antidumping margin, not inconsistencies with information submitted to Customs. *Remand Results* at 20–21. Based on record evidence, Commerce determined that the U.S. price information reported to Commerce by New Continent was accurate. *Id.* at 21.

In its review, Commerce compared invoices submitted by New Continent during the administrative review and corresponding invoices submitted during the remand. *Id.* at 15. Commerce determined that relevant information, including sales price, quantity, and U.S. sales values, were consistent between the invoices. *Id.* Defendant-Intervenor contends that the record does not support Commerce's determination regarding New Continent's reproduction of invoices and includes examples of inconsistent information. Def.-Interv.'s

Cmts. at 21–23. In comparing invoices submitted in both the administrative review and remand, Commerce determined that the consistency of the relevant information:

> supports New Continent's claim that while electronic versions of its sales documents cannot be reproduced exactly, the differences between the reproduced documents for this remand and the documents submitted during the administrative review are superficial. New Continent is an experienced exporter having participated in the underlying administrative review as a mandatory respondent. We note that in an ongoing administrative review or investigation, we would expect an experienced exporter like New Continent to provide original sales documentation, as it did during the underlying administrative review. However, New Continent was not aware of the [Customs] Referral until May 2021, nor involved in litigation for this administrative review until September 2021. Thus, we are not persuaded by the petitioner's claim that New Continent would have known that "Commerce would call upon it in a review to produce information such as original copies of invoices," because it is unclear how New Continent could have anticipated that Commerce would request for a remand to reexamine its U.S. sales information some seventeen months after previously uncontested final results, or that the Court would grant that request. Therefore, we find there is no evidentiary basis to conclude that the quantity and value information . . . have been modified.

Remand Results at 18.

Defendant-Intervenor contends that Commerce did not address a specific example raised during the remand in which multiple versions of an invoice were included on the record reflecting different information. Def.-Interv.'s Cmts. at 22. The *Remand Results* do not directly address this example; however, in relation to the number of transactions considered in Commerce's review, it is reasonable to conclude that potentially inconsistent details in a single set of invoices does not undermine the accuracy of the greater body of information reviewed by Commerce. It is clear from the *Remand Results* that Commerce considered a large volume of record submissions, including over 20,000 pages of documents from New Continent, and determined that any inconsistencies were minor and did not significantly impact the calculation of the antidumping duty. The Court agrees that Commerce's review of a voluminous number of record documents was reasonable and accounted for any potential inconsistencies in a few invoices.

Defendant-Intervenor argues that Commerce did not properly consider the issue of potential fraud in its determination. Def-Interv.'s Cmts. at 23–26. Defendant-Intervenor contends that the record contained evidence that New Continent was aware of the inaccurate information submitted to Customs because a certain nomenclature was used in both the challenged invoices and documents prepared by New Continent. *Id.* at 23. Commerce addressed this issue in the *Remand Results* by discussing New Continent's explanation that the numbers were inadvertently copied by a manager working with information provided by an affiliate in preparing the Section C database. *Remand Results* at 17–18. Commerce determined this explanation to be consistent with the steps taken by New Continent to ensure that material information in finalized invoices was not changed after issuance, which included sales managers creating a commercial invoice using Excel with information downloaded from a sales system. *Id.* Commerce also determined that New Continent's explanation was supported by Commerce's comparison of invoices between the administrative review and remand. *Id.* at 18.

The issue before Commerce on remand was whether the information submitted by New Continent in the administrative review was accurate, while the issue of fraudulent representations to Customs was within Customs' statutory authority. 19 U.S.C. § 1592. The Court concludes that Commerce was reasonable in limiting its determination to the accuracy of New Continent's information submitted during the administrative review. *See Remand Results* at 11–22.

In the *Remand Results*, Commerce addressed whether New Continent was affiliated with the entities that made alleged misrepresentations to Customs. *Id.* at 22–23. Upon consideration of record documents, including declarations from a New Continent employee, Commerce determined that New Continent did not satisfy the requirements for affiliation under 19 U.S.C. § 1677(33) and 19 C.F.R. § 351.102(b)(3). *Id.* at 23. Commerce also determined that the record did not show that the considered entities had a relationship that might impact relevant decision making. *Id.* Commerce determined that New Continent was not affiliated with the considered entities. *Id.* at 23–24. No Party opposes this determination before the Court.

The arguments raised by Defendant-Intervenor are unavailing. Because Commerce conducted a review of the voluminous record evidence presented and verified the accuracy of the relevant information submitted by New Continent during the administrative review, the Court concludes that Commerce's determination that the information submitted by New Continent was accurate is supported by substantial record evidence.

II. Commerce's Authority to Issue a China-Wide Entity Rate

Defendant-Intervenor argues that Plaintiffs abandoned and waived Count I of their Complaint. Def.-Interv.'s Resp. at 7–8. In Count I of the Complaint, Pirelli argued that Commerce lacked the statutory authority to impose a China-wide entity antidumping duty rate. Compl. at 5. Pirelli did not renew this argument in its motion for judgment on the agency record and conceded that "the Federal Circuit has recently ruled that Commerce does in fact have the authority to apply a 'China-Wide Rate' under the statute." Pls.' Mot. J. Agency R. at 13–14 (citing *China Mfrs. All.*, 1 F.4th at 1039). Pirelli also does not address Defendant-Intervenor's waiver assertion in its reply. *See* Pls.' Reply. Because Pirelli failed to raise its argument regarding Commerce's authority to impose a China-wide entity rate in its opening brief and did not meaningfully assert the argument in its reply, the argument is waived. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived.").

III. Pirelli's Separate Rate Status

The Court previously considered Pirelli's separate rate status in an earlier administrative review that covered the period from January 27, 2015 to July 31, 2016 ("Period of Review 1"). *See Shandong Yongtai Grp. Co. v. United States* ("*Shandong Yongtai I*"), 43 CIT __, __, 415 F. Supp. 3d 1303, 1315–18 (2019); *Shandong Yongtai Grp. Co. v. United States* ("*Shandong Yongtai II*"),44 CIT __, __, 487 F. Supp. 3d 1335, 1344–46 (2020); *Qingdao Sentury Tire Co. v. United States* ("*Qingdao Sentury I*"), 45 CIT __, __, 539 F. Supp. 3d 1278, 1282–85 (2021); *Qingdao Sentury Tire Co. v. United States* ("*Qingdao Sentury II*"), 46 CIT __, __, 577 F. Supp. 3d 1343, 1347–49 (2022). Pirelli China was established as a Sino-foreign joint venture between the Dutch subsidiary of Pirelli & C. S.p.A. ("Pirelli Italy") and Hixih Group in 2005. *Shandong Yongtai I*, 43 CIT at __, 415 F. Supp. 3d at 1315–16. Chem China, a company owned by the Chinese government, acquired Pirelli S.p.A. in October 2015. *Id.* at __, 415 F. Supp. 3d at 1316. Following the acquisition, Pirelli Italy was delisted from the Milan Stock Exchange. *Id.*

Before this Court, Pirelli challenged Commerce's determination that Pirelli was ineligible for separate rate status during Period of Review 1 for both the periods before and after Pirelli S.p.A.'s acquisition by Chem China. *See Shandong Yongtai II*,44 CIT at __, 487 F. Supp. 3d at 1344–46; *Qingdao Sentury II*, 46 CIT at __, 577 F. Supp. 3d at 1347–49. Commerce considered record documents, including Pirelli's articles of association, purchase agreements, Board of Direc-

tors meeting minutes, resolutions, and company financial statements, and concluded that Chem China and the Silk Road Fund, both Chinese government-controlled entities, owned a majority of Pirelli China and exercised control through Pirelli's Board of Directors and ownership structure. *Shandong Yongtai II*, 44 CIT at __, 487 F. Supp. 3d at 1346. Commerce determined that for the period following Pirelli S.p.A.'s acquisition by Chem China, Pirelli did not have autonomy from the Chinese government in its decision making and was unable to demonstrate a lack of *de facto* government control. *Id.* The Court sustained Commerce's determination. *Id.*

It is unclear from the record whether Pirelli applied for separate rate status during Commerce's administrative review for the period of August 1, 2016 through July 31, 2017 ("Period of Review 2"). *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 Fed. Reg. 35,754, 35,755 (Dep't of Commerce Aug. 1, 2017). Relevant to this case, Pirelli applied for separate rate status for Period of Review 3, which covered August 1, 2017 through July 31, 2018. *See* Pls.' Separate Rate App.

Pirelli's Separate Rate Application reflected certain changes in Pirelli's ownership and management structure between the end of Period of Review 1 and the end of Period of Review 3. For example, Pirelli Italy relisted on the Milan Stock Exchange on October 4, 2017. *Id.* at 18. At the time of relisting, Chem China and the Silk Road Fund had decreased their combined indirect majority ownership in Pirelli Italy and Pirelli China to indirect minority ownership. *Id.* at 13–14, 18–19. Commensurate with the relisting on the Milan Stock Exchange, Pirelli ceased public management and coordination activities with its holding company, Marco Polo International Italy S.p.A. ("Marco Polo"), and all other companies, including Chem China. *Id.* at 19–20; Pls.' Separate Rate App. at Ex. 9.1 ("Pirelli Group's 2017 Annual Report") at 205, PJA 6, CJA 4; Pls.' Separate Rate App. at Ex. 11 ("Pirelli Italy's August 2017 Press Release"), PJA 8, CJA 6. Pirelli Italy also altered the composition of its Board of Directors to require a majority of directors to be designated as "independent." Pls.' Separate Rate App. at Ex. 10 ("Pirelli's 2017 Shareholders Agreement") § 4.2.2, PJA 8, CJA 6. Despite these changes to Pirelli's ownership and management structures, Commerce determined that Pirelli did not demonstrate "autonomy from the [Chinese] government in making decisions regarding the selection of management" and did not rebut the presumption of *de facto* government control. *Final Results*, 85 Fed. Reg. at 22,399; Final IDM at 13–18. Commerce denied Pirelli's Separate Rate Application. *Final Results*, 85 Fed. Reg. at 22,399.

Plaintiffs raise two primary arguments challenging Commerce's denial of Pirelli's Separate Rate Application. First, Plaintiffs contend that Commerce's determination was unlawful because Commerce failed to apply the proper standard of review for a company that is minority-owned by a government-controlled entity, failed to connect suspected government control to Pirelli's export activities, and did not apply relevant provisions of Italian law. Pls.' Br. at 12–22. Second, Plaintiffs argue that Commerce's determination that Pirelli failed to rebut the presumption of *de facto* government control was unsupported by record evidence because Commerce failed to appreciate that changes to Pirelli's ownership and management structure purportedly insulated Pirelli from external influences of Chinese government control. *Id.* at 23–49.

A. Legal Framework

Commerce has the authority to designate a country as a nonmarket economy pursuant to 19 U.S.C. § 1677(18). 19 U.S.C. § 1677(18). Commerce employs a rebuttable presumption that all companies within a nonmarket economy country are subject to government control and should be assigned a single, country-wide rate by default, unless the exporter requests an individualized antidumping margin and demonstrates affirmatively that the exporter maintains both *de facto* and *de jure* independence from the government. *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). The burden of proving the absence of government control rests with the exporter. *Id.* at 1405–06. Exporters that are unable to demonstrate both *de facto* and *de jure* independence from government control do not qualify for a separate rate. *China Mfrs. All.*, 1 F.4th at 1032; *Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002).

Commerce has identified three factors that it considers when determining whether an exporter enjoys independence from *de jure* government control: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 1085, 1090 n.21, 925 F. Supp. 2d 1315, 1320 n.21 (2013) (citation omitted).

Commerce considers four factors in determining whether an exporter is free of *de facto* government control: (1) whether the export prices are set by or are subject to the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has

autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See id.*; Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries (Apr. 5, 2005) ("Policy Bulletin 05.1" or "Policy Bull. 05.1") at 2.

The CAFC has sustained Commerce's application of the rebuttable presumption of government control for nonmarket economies. *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017); *see also Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017). All four factors of the *de facto* test must be satisfied to rebut the presumption of government control. *See Yantai CMC Bearing Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1317, 1325–26 (2017). The *de facto* test is therefore conjunctive, and an exporter must satisfy all four factors to rebut the presumption of government control. *See Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1308, 1321 (2018). Commerce determined in the *Final Results* that Pirelli failed to satisfy the third criterion of the *de facto* test, whether the respondent has autonomy from the government in making decisions regarding the selection of management. *Final Results*, 85 Fed. Reg. at 22,399; Final IDM at 13–18; *see also* Prelim. IDM at 13; Commerce's Prelim. Separate Rate Mem. ("Preliminary Separate Rate Memo" or "Prelim. Separate Rate Mem.") at 2–3, PJA 14, CJA 9.

B. Lawfulness of Commerce's Analysis

Plaintiffs contend that Commerce's analysis of Pirelli's separate rate eligibility was unlawful because Commerce failed to apply a lesser burden of proof for a minority foreign-owned company, failed to require actual, rather than potential control, and failed to link its findings to Pirelli's export activities. Pls.' Br. at 12–22. Specifically, Plaintiffs argue that Commerce's past practice and the precedent of this Court reflect that a lower burden of proof should be required in instances in which government-controlled entities hold only a minority interest in the respondent exporter. *Id.* at 14–15. Plaintiffs contend that Commerce failed to make this distinction in practice and held Pirelli to the higher standard applicable to a majority government-owned company. *Id.* Defendant-Intervenor contends that Plaintiffs are incorrect in their assertion that a lower burden of proof is applicable to rebut the presumption of government control when the government is a minority owner. Def.-Interv.'s Resp. at 10–17. Defendant-Intervenor also asserts that Plaintiffs' argument has been

waived because Pirelli did not raise it before Commerce. *Id.* at 10–11. Defendant contends that the standard applied by Commerce in this case was not higher than the standard normally applied in instances of minority government ownership. Def.'s Resp. at 10–17.

Plaintiffs offer three cases in support of the position that Commerce may impose a higher burden of proof on exporters seeking a separate rate when a government-controlled entity has a direct or indirect majority interest in the exporter: *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, 350 F. Supp. 3d 1308 (2018), *Shandong Rongxin Import & Export Co. v. United States*, 43 CIT __, 415 F. Supp. 3d 1319 (2019), and *Yantai CMC Bearing Co. v. United States*, 41 CIT __, 203 F. Supp. 3d 1317 (2017). Pls.' Br. at 14–15. Plaintiffs ask the Court to recognize as a corollary to this rule that "minority ownership by a government-controlled entity, as is the case here, requires a lower burden of proof and it should be more likely that Commerce will grant a separate rate in those situations." *Id.* at 15 (emphasis in original).

In *Zhejiang Quzhou Lianzhou Refrigerants Company*, the Court recognized that though evidence of legal separation between an exporter and its government-controlled parent may rebut the presumption of *de facto* government-control when the government holds a minority stake in the exporter, such separation would not rebut the presumption when the government holds a majority stake in the exporter "because of the ever-present potential for the government to exert *de facto* control over the exporter's operations and management selection, and the expectation that it would do so." *Zhejiang Quzhou Lianzhou Refrigerants Co.*, 42 CIT at __, 350 F. Supp. 3d at 1318. Similarly, in *Shandong Rongxin Import & Export Company*, the Court noted that "the presumption of *de facto* government control is quite strong for respondents with a government majority shareholder." *Shandong Rongxin Imp. & Exp. Co.*, 43 CIT at __, 415 F. Supp. 3d at 1323–25. Finally, in *Yantai CMC Bearing Company*, the Court observed that particular facts, such as majority ownership, may be sufficient to support a determination of *de facto* government control, but the fact alone does not make the presumption of control irrebuttable. *Yantai CMC Bearing Co.*, 41 CIT at __, 203 F. Supp. 3d at 1325–26.

The Court does not agree with Plaintiffs' assertion that there is a different standard of proof based on the degree of the government's ownership stake in a respondent exporter. Commerce employs a rebuttable presumption that all companies within a nonmarket economy country are subject to government control and should be

assigned a single, country-wide entity rate by default, unless the exporter requests an individualized antidumping margin and demonstrates affirmatively that the exporter maintains both *de facto* and *de jure* independence from the government. 19 U.S.C. § 1677(18); *Sigma Corp.*, 117 F.3d at 1405. As an exporter from China, Pirelli had the burden of rebutting the presumption of Chinese government control. *Sigma Corp.*, 117 F.3d at 1405. The cases cited by Plaintiffs recognize that Commerce may consider evidence of majority government ownership as strong support for the presumption, but the cases do not alter the exporter's burden of proof.

In this case, Commerce acknowledged that Pirelli had a minority indirect ownership by government-controlled entities and explained that Commerce would consider additional facts relating to Pirelli's independence. Final IDM at 15. Commerce reviewed record evidence showing Pirelli's organization, ownership, and Board of Directors. *Id.* at 14–18. Commerce also addressed arguments raised by Pirelli based on Italian law, the degree of authority held by Pirelli's CEO, and the transfer and disposal of proprietary know-how. *Id.* at 15–17.

Because Plaintiffs had the burden of rebutting the presumption of government-control through proffered evidence, and there is no indication that Commerce imposed a higher burden upon Pirelli nor legal support for a lesser burden to be imposed, the Court concludes that Commerce's application of the burden of proof was in accordance with the law.

Plaintiffs argue further that Commerce's determination was unlawful because it was based on the presumption of theoretical potential government control rather than evidence of actual government control, resulting in an unlawful irrebuttable presumption. Pls.' Br. at 16–19. Neither Defendant nor Defendant-Intervenor directly respond to the merits of Plaintiffs' argument regarding Commerce's theory of control. *But see* Def.'s Resp. at 15 n.6 (summarily arguing that if the argument is not deemed waived, it should be rejected). Defendant-Intervenor contends that Commerce properly considered the ability of government-controlled entities to influence Pirelli's management and operations in denying Pirelli's Separate Rate Application. Def.-Interv.'s Resp. at 12–17. Defendants argue that Plaintiffs are foreclosed from raising this issue before the Court because Pirelli failed to exhaust available administrative remedies by first raising the issue before Commerce. Def.'s Resp. at 13–15.

The Court first addresses Defendant's failure to exhaust argument. Congress has directed that this Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. §

2637(d). The statute "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)). Commerce's regulations specifically require that a party raise all arguments in a timely manner before the agency. *Corus Staal*, 502 F.3d at 1379 (citing 19 C.F.R. § 351.309(c)(2)). "[G]eneral policies underlying the exhaustion requirement— protecting administrative agency authority and promoting judicial efficiency"—would be vitiated if the court were to consider arguments raised for the first time in judicial proceedings. *See id.* (internal quotation and citation omitted); *see also Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1346, 1353 (2017). The exhaustion requirement is not absolute and the Court has recognized limited exceptions to the doctrine: (1) futility in raising the issue; (2) a subsequent court decision that may impact the agency's decision; (3) a pure question of law; or (4) when plaintiff had no reason to believe the agency would not follow established precedent. *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (citing authorities). Defendant asserts that Pirelli did not raise the issue of potential and actual control before Commerce and cannot assert any of the recognized exceptions to the exhaustion requirement. Def.'s Resp. at 13–15. Plaintiffs did not respond to Defendant's exhaustion argument. *See* Pls.' Reply at 5.

When considering the exhaustion requirement, the determinative question for the Court is whether Commerce was put on notice of the argument. *See Trust Chem. Co. v. United States*, 35 CIT 1012, 1023 n.27, 791 F. Supp. 2d 1257, 1268 n.27 (2011). Commerce gave no indication prior to the *Final Results* that its analysis would consider potential, rather than actual control. Despite this, Pirelli made numerous arguments in Pirelli's Administrative Case Brief addressing Pirelli China's independence from the actual control of Pirelli Italy and the minority owners. *See* Pls.' Admin. Case Br. at 32–43. Because Commerce should have been aware that Pirelli was arguing that actual control was absent, Plaintiffs' arguments are not now barred.

In antidumping proceedings involving a nonmarket economy, Commerce presumes that all respondents are government-controlled and subject to a single country-wide antidumping rate. *Diamond Sawblades Mfrs. Coal.*, 866 F.3d at 1311. The percentage of government ownership of a responding company is relevant to Commerce's analysis because majority ownership is viewed as actual control,

regardless of whether such control is actually exercised. *See Can Tho Imp.-Exp. Joint Stock Co. v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1300, 1305–06 (2020); *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 42 CIT __, __, 284 F. Supp. 3d 1350, 1359 (2018). When a respondent company is minority government owned, potential control does not necessarily equate to actual control. *See Zhejiang Quzhou Lianzhou Refrigerants Co.*, 42 CIT at __, 350 F. Supp. 3d at 1318; *An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359. In such situations, "Commerce has required additional indicia of control prior to concluding that a respondent company could not rebut the presumption of *de facto* government control where the government owns, either directly or indirectly, only a minority of shares in the respondent company." *An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359.

In its determination, Commerce explained:

> When conducting a separate rate analysis for a company with less than a majority of [state owned enterprise] ownership, Commerce has considered whether the record contains additional indicia of control sufficient to demonstrate that the company lacks independence and therefore should receive the China-wide rate. Commerce's practice is to examine whether the government might also be able to exercise, or have the potential to exercise, control of a company's general operations through minority government ownership under certain factual scenarios.

Final IDM at 15. Though Commerce's use of the term "potential" in explaining its practice might arguably create some ambiguity in what degree of government control Commerce is considering, *see An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359, Commerce recognized the need in a case of minority government ownership, such as this, for additional indicia of control. Final IDM at 15. This need is further supported by Commerce's subsequent consideration and discussion of Pirelli's ownership, the composition and independence of Pirelli's Board of Directors, common board members between Pirelli entities and government-controlled entities, statements in Pirelli's 2017 Annual Report, the authority of Pirelli's CEO, Marco Tronchetti Provera, and the transfer and/or disposal of proprietary know-how. *Id.* at 15–18. The Court concludes that it was reasonable for Commerce to consider the potential for control together with additional indicia, and its analysis was in accordance with the law.

Plaintiffs argue that Commerce's determination was not in accordance with the law because Commerce failed to link Pirelli's export

activities or export functions with the separate rate analysis. Pls.' Br. at 19–21. Defendant argues that Commerce is not required to specifically discuss export activities or export functions in the context of the third factor of the *de facto* control analysis, which asks whether a respondent has autonomy in making decisions regarding the selection of its management. Def.'s Resp. at 15–17. Defendant-Intervenor similarly argues that the *de facto* control analysis does not require consideration of export activities or export functions in addition to the factors enumerated in Policy Bulletin 05.1. Def.-Interv.'s Resp. at 25–26.

Policy Bulletin 05.1 states that the purpose of Commerce's control analysis is "[t]o establish whether a firm is sufficiently independent from governmental control in its export activities to be eligible for separate rate status." Policy Bulletin 05.1 at 2. Separate rate status is granted "only if an exporter can demonstrate the absence of both *de jure* and *de facto* governmental control over its *export activities*." *Id.* (emphasis added). Policy Bulletin 05.1 further provides that:

> [Commerce] considers four factors in evaluating whether each respondent is subject to *de facto* governmental control *of its export functions*: 1) whether the export prices are set by, or subject to the approval of, a governmental authority; 2) whether the respondent has authority to negotiate and sign contracts and other agreements; 3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

Id. at 2 (emphasis added).

Plaintiffs assert that "[t]he Court has consistently ruled that Commerce must give meaning to the words 'export activities' in Commerce's discussion of its separate rate test." Pls.' Br. at 19. The only case offered by Plaintiffs in support of this contention, however, is *Guizhou Tyre Co., Ltd. v. United States*, 46 CIT __, 557 F. Supp. 3d 1302 (2022), an ongoing litigation. *Id.* at 20. Plaintiffs have not cited any authority that would support a requirement in the third factor for Commerce to connect an exporter's autonomy in selecting management with specific export activities or export functions.

Separate rate status is granted if an exporter can demonstrate the absence of *de facto* governmental control according to the four-factor test. The Court notes that the first factor examines whether "export prices" are set by or are subject to government approval, and the

fourth factor examines whether the respondent retains the proceeds of its "export sales" and makes independent financial decisions. Policy Bull. 05.1 at 2. In contrast, the Court observes that neither the second nor third factors mention export activities or export functions. *Id.* Specifically the third factor of the *de facto* control analysis relevant to this case—"3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management"—does not mention export activities or export functions. *Id.* The Court declines to adopt the approach asserted by Plaintiffs and alter the third factor of the *de facto* control test to read an additional requirement for Commerce to assess whether respondent has autonomy from government control in respondent's export activities or export functions.

Plaintiffs argue also that Commerce's determination is unlawful because Commerce refused to consider provisions of Italian law on which Pirelli relied. Pls.' Br. at 44–46. Commerce rejected Pirelli's argument that Italian law requires that certain directors be independent of shareholders, concluding that "[t]he [Italian Finance Code] is not on the record of this review. As such, we are not convinced that the majority of Pirelli [Italy's] board are 'independent directors' who are part of the legal structure aimed to protect the interests of the minority shareholders [of] Pirelli [Italy]." Final IDM at 15. Commerce used similar language in considering Pirelli's argument that Italian law required Pirelli Italy to acknowledge indirect control by Chem China in Pirelli's 2017 Annual Report:

> Neither the Italian Finance Code (Art. 93 TUF) or the dictates of Italian Finance Code (TUF D. Lgs. 58/1998) are on the record of this review. As such, we are not convinced that Pirelli [Italy] must report that it is controlled by Chem China mainly for accounting purposes pursuant to the Italian Finance Code (Art. 93 TUF) or the dictates of Italian Finance Code (TUF D. Lgs. 58/1998).

Id. at 16. In both instances, Commerce refused to consider Pirelli's arguments based on provisions of Italian law that were not included on the record.

Commerce has discretion in the manner in which it conducts its administrative proceedings. *See PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012); *see also Yantai Timken Co., Ltd. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370 (2007) ("Commerce has broad discretion to establish its own rules governing administrative procedures . . ."). "Commerce's role in an administrative proceeding is to weigh the evidence established in the

record." *Yantai CMC Bearing Co.*, 41 CIT at __, 203 F. Supp. 3d at 1324. The respondent bears the burden of creating the record for Commerce's review. *Id.* Pirelli did not provide to Commerce the relevant portions of Italian law on which its arguments relied. In this case, the Court concludes that Commerce's rejection of Pirelli's unsupported interpretations of Italian law was reasonable.

IV. Whether Commerce's Determination was Supported by Substantial Evidence

Plaintiffs argue that Commerce's determination that Pirelli failed to rebut the presumption of *de facto* government-control is not supported by substantial evidence. Pls.' Br. at 23–49. Specifically, Plaintiffs contend that Commerce's determination that the Pirelli Group's shareholder structure allowed the government-controlled minority owners to assert control over Pirelli China's operational activities was not supported by substantial evidence. Pls.' Br. at 25–31. Plaintiffs argue that Commerce's determination that government-controlled minority shareholders were able to influence Pirelli China's export activities was unsupported by substantial evidence. *Id.* at 46–49. In addition, Plaintiffs argue that Commerce ignored contrary record evidence that Pirelli China's day-to-day operations were insulated from shareholder control. *Id.* at 32–44. Plaintiffs contend that Commerce unreasonably ignored provisions of Italian law in reaching its determination. *Id.* at 44–46.

Because China is a nonmarket economy, Commerce employs a rebuttable presumption that all companies operating in China are subject to government-control unless an individual exporter can demonstrate its *de facto* and *de jure* independence from the government. 19 U.S.C. § 1677(18); *Sigma Corp.*, 117 F.3d at 1405. As discussed above, Commerce denied Pirelli separate rate status based on the third factor of the *de facto* government test and determined that Pirelli had not rebutted the presumption as to its autonomy from government control over the selection of management. Final IDM at 13–18.

Based on a review of Pirelli's Corporate Organization Chart in evidence, Commerce determined that under Pirelli's organizational structure for most of Period of Review 3, Chem China and the Silk Road Fund, two Chinese government-owned entities, jointly controlled 36.9 percent of Pirelli China. *Id.* at 14; Pls.' Separate Rate App. at Ex. 5 ("Pirelli's Corporate Organization Chart"), PJA 4, CJA 2. Because these state-owned entities accounted for only minority indirect ownership of Pirelli China, Commerce looked for additional indicia of government-control. Final IDM at 15; *see An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359.

Commerce examined Pirelli's Separate Rate Application on the record as additional indicia of government-control and determined based on this evidence that Pirelli Italy was the indirect majority shareholder of Pirelli China and selected members of Pirelli China's Board of Directors. Final IDM at 15, 17; Pls.' Separate Rate App. at 23–24. Based on a review of Plaintiffs' separate rate application, Commerce also determined that during Period of Review 3, Pirelli Italy and Chem China shared a common chairperson. Final IDM at 15; Pls' Separate Rate App. at Ex. 16D ("Pirelli Italy's Board of Directors and Key Managers Info."), PJA 10, CJA 8. Citing the Pirelli Group's 2017 Annual Report, Commerce determined that Chem China was the largest individual shareholder of Pirelli Italy and the only party to hold more than three percent of Pirelli Italy's shares. Final IDM at 15–16; Pirelli Group's 2017 Annual Report at 231. Despite Pirelli's argument that a majority of Pirelli Italy's Board of Directors members held no office with Chem China or China National Tire & Rubber Corporation, Ltd. and that a minority of Pirelli Italy's Board of Directors members were Chinese nationals, Commerce determined that Pirelli's corporate documents demonstrated to the contrary that China National Tire & Rubber Corporation, Ltd. (a Chinese government-controlled entity) was involved in the selection of a majority of Pirelli Italy's Board of Director's members. Final IDM at 16–17; Pirelli's 2017 Shareholders Agreement § 4.2.2.

Pirelli contends that certain Board of Directors members were free from government influence because they were designated as "independent" under provisions of Italian corporate law, which Commerce noted were not submitted on the administrative record. Pls.' Br. at 28–31, 44; Final IDM at 17. Notwithstanding whether Plaintiff should have been required to place the Italian law provisions on the record, the Court concludes that Commerce's rejection of Pirelli's argument that Pirelli Italy's directors should be deemed "independent" under Italian law was reasonable, particularly because such designation as "independent" under Italian law would not be dispositive in this case, and because Commerce sufficiently cited substantial evidence on the record such as the separate rate application, the 2017 Annual Report, and the 2017 corporate by-laws to support Commerce's determination that Pirelli Italy was still under Chinese-government control. For example, citing language in the Pirelli Group's 2017 Annual Report, Commerce determined that Pirelli Italy had not established its independence from government-controlled entities. *Id.* at 16. Commerce quoted the 2017 Annual Report that stated: "[Pirelli Italy was] directly controlled by Marco Polo International Italy S.p.A. . . . and [was] in turn therefore indirectly controlled

by [Chem China], a state-owned enterprise [] governed by Chinese law with registered office in Beijing, and which report[ed] to the Central Government of the People's Republic of China." *Id.* at 16 (quoting Pirelli Group's 2017 Annual Report at 300). The Pirelli Group's 2017 Annual Report also stated that Pirelli Italy was "indirectly controlled, pursuant to art. 93 [Italian Finance Code], by Chem China via [China National Tire & Rubber Corporation, Ltd.] and certain of its subsidiaries, including Marco Polo." *Id.* (quoting Pirelli Group's 2017 Annual Report at 205). The Court observes that because Pirelli's own 2017 Annual Report confirmed that Pirelli Italy was indirectly controlled by Chem China, a Chinese government-controlled entity, via China National Tire & Rubber Corporation, another Chinese government-controlled entity, Commerce's determination that Pirelli Italy was indirectly controlled by Chinese government entities is supported by substantial evidence.

Commerce rejected Plaintiffs' argument that Pirelli Italy's CEO, Marco Tronchetti Provera, had exclusive authority to select Pirelli Italy's management and was insulated from the influence of Board of Directors members. Final IDM at 17; Pls.' Br. at 34–37. Rather, Commerce determined based on a review of Pirelli's 2017 By-laws on the record that Pirelli Italy was managed by its Board of Directors and that Provera reported to the Board of Directors and derived his authority from the Board of Directors. Final IDM at 17; Pirelli's 2017 Shareholders' Agreement § 4.4 ("The Pirelli CEO and Executive Chairman shall be *delegated* the exclusive power and authority concerning the ordinary management of Pirelli and of the Pirelli Group"); Pls.' Separate Rate App. at Ex. 10B ("Pirelli's 2017 By-laws") § 10.1, PJA 8, CJA 6 ("The Company shall be managed by a Board of Directors composed of up to fifteen members who shall remain in office for three financial years and may be re-elected."); *see also* Pirelli's 2017 Shareholders' Agreement § 4.7. The Court also notes that based on Pirelli's Separate Rate Application and a Letter of Appointment of Pirelli China's Directors, Commerce determined that Pirelli Italy indirectly owned shares of Pirelli China and that Pirelli Italy had the ability to appoint members of Pirelli China's Board of Directors. Final IDM at 17; Pls.' Separate Rate App. at 24; Pls.' Separate Rate App. at Ex. 16A ("Pirelli's Letter of Appointment of Pirelli China's Directors"), PJA 9, CJA 7. The Court agrees that Commerce's determination was reasonable because these documents established that the Board of Directors could be appointed by entities within Chinese government control.

The Court concludes that substantial evidence supports Commerce's determination that Pirelli failed to rebut the presumption of

de facto government control. The Court sustains Commerce's assignment of the China-wide entity rate to Pirelli.

CONCLUSION

For the foregoing reasons, the Court concludes that Commerce's determination that New Continent provided accurate information during the administrative review was supported by substantial record evidence. The Court also concludes that Commerce's assignment of the China-wide entity rate to Pirelli was in accordance with the law and supported by substantial record evidence. The Court sustains the *Final Results* and *Remand Results*. In accordance with this opinion, judgment will be entered.

Dated: March 20, 2023
New York, New York

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

Slip Op. 23–39

PT. ZINUS GLOBAL INDONESIA, Plaintiff, and BROOKLYN BEDDING, LLC, CORSICANA MATTRESS COMPANY, ELITE COMFORT SOLUTIONS, FXI, INC., INNOCOR, INC., KOLCRAFT ENTERPRISES INC., LEGGETT & PLATT, INCORPORATED, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC, CORSICANA MATTRESS COMPANY, ELITE COMFORT SOLUTIONS, FXI, INC., INNOCOR, INC., KOLCRAFT ENTERPRISES INC., LEGGETT & PLATT, INCORPORATED, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 21–00277

[Sustaining in part and remanding in part the U.S. Department of Commerce's final affirmative determination of sales at less than fair value on mattresses from Indonesia.]

Dated: March 20, 2023

J. David Park, *Henry D. Almond*, *Daniel R. Wilson*, *Leslie C. Bailey*, *Kang Woo Lee*, and *Gina Marie Colarusso*, of Arnold & Porter Kaye Scholer, LLP, Washington, D.C., for Plaintiff PT. Zinus Global Indonesia. With them on the brief were *Phyllis L. Derrick* and *Eric Johnson*.

Yohai Baisburd, *Jeffery B. Denning*, *Chase J. Dunn*, and *Nicole Brunda*, of Cassidy Levy Kent (USA) LLP, Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Incorporated, International Brotherhood of Teamsters, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO.

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

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff PT. Zinus Global Indonesia ("Plaintiff" or "Zinus Indonesia") challenges the final affirmative determination of the U.S. Department of Commerce ("Commerce") in the antidumping duty investigation on mattresses from Indonesia. *Mattresses from Indonesia* ("*Final Determination*"), 86 Fed. Reg. 15,899 (Dep't of Commerce Mar. 25, 2021) (final affirmative determination of sales at less than fair

value). Before the Court is Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record of Plaintiff PT. Zinus Global Indonesia ("Plaintiff's Motion").Pl.'s R. 56.2 Mot. J. Agency R., ECF Nos. 22, 23. Defendant United States and Consolidated Plaintiffs and Defendant-Intervenors Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises, Inc., Leggett & Platt, Inc., the International Brotherhood of Teamsters, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (collectively, "Brooklyn Bedding") oppose Plaintiff's Motion. Brooklyn Bedding's Resp. Br. Opp'n Pl.'s Mot. J. Agency R. ("Brooklyn Bedding's Resp."), ECF Nos. 29, 30; Def.'s Resp. Pl.'s Mots. J. Agency R. ("Def.'s Resp."), ECF Nos. 33, 34. Also before the Court is Brooklyn Bedding's Motion for Judgment on the Agency Record ("Brooklyn Bedding's Motion"). Brooklyn Bedding's Mot. J. Agency R., ECF Nos. 24, 25. Plaintiff and Defendant oppose Brooklyn Bedding's Motion. Pl.'s Resp. Br. Opp'n Consol. Pl.'s Mot J. Agency R. ("Pl.'s Resp."), ECF Nos. 31, 32; Def.'s Resp.

For the reasons discussed below, the Court grants in part and remands in part Plaintiff's Motion and grants in part and remands in part Brooklyn Bedding's Motion.

ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's use of a quarterly ratios sales methodology and rejection of Zinus Indonesia's proposed first-in-first-out methodology for determining the quantity of Indonesian mattresses sold during the period of investigation was supported by substantial evidence;
2. Whether Commerce's use of Emirates Sleep Systems Private's financial statements rather than the financial statements of Indonesian producers in the calculation of constructed value was supported by substantial evidence;
3. Whether Commerce's calculation of a profit cap was in accordance with the law;
4. Whether Commerce's adjustments to the reported sales deductions of Zinus, Inc. ("Zinus U.S.") were supported by substantial evidence;
5. Whether Commerce's decision to adjust selling expenses attributable to Zinus, Inc. ("Zinus Korea") to account for actual selling expenses only was supported by substantial evidence;
6. Whether Commerce's use of Indonesian Global Trade Atlas ("GTA") import data to value input purchase transactions in-

volving an affiliated supplier in a non-market economy was supported by substantial evidence and in accordance with the law; and

7. Whether Commerce's decision to not require Zinus Indonesia to submit a U.S. sales reconciliation was supported by substantial evidence.

BACKGROUND

On March 30, 2020, an antidumping duty petition concerning imports of mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam was filed with Commerce by Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises, Inc., Leggett & Platt, Inc., the International Brotherhood of Teamsters, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. Antidumping Countervailing Duty Pet. ("Petition") (Mar. 31, 2020), PR 1–4, CR 1–10.[1] In response to the Petition, Commerce initiated on April 24, 2020 an antidumping investigation on mattresses imported from Indonesia. *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam*, 85 Fed. Reg. 23,002 (Dep't of Commerce Apr. 24, 2020) (initiation of less-than-fair-value investigations). The period of investigation was January 1, 2019 through December 31, 2019, the four most recent financial quarters prior to the filing of the March 2020 Petition. *Id.* at 23,003; Commerce's Decision Mem. Prelim. Affirmative Determination and Postponement Final Determination Less-Than-Fair-Value Investigation Mattresses from Indonesia ("Preliminary Determination Memo" or "PDM") at 5, PR 226; *see also* 19 C.F.R. § 351.204(b)(1). Zinus Indonesia was selected as the sole mandatory respondent in the investigation. *See* Less-Than-Fair-Value Investigation Mattresses Indonesia Respondent Selection Mem. ("Selection Memo"), PR 66, CR 32.

Prior to the investigation, Zinus Korea and Zinus U.S. participated in an antidumping duty investigation covering mattresses produced in the People's Republic of China ("China"). *See Mattresses from the People's Republic of China* ("*Mattresses from China*"), 84 Fed. Reg. 56,761 (Dep't of Commerce Oct. 23, 2019) (final affirmative determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part). Commerce requested that Zinus Indonesia place on the record certain business proprietary

[1] Citations to the administrative record reflect the public record ("PR") and confidential record ("CR") document numbers filed in this case, ECF Nos. 39, 40.

information submitted by Zinus Xiamen in the *Mattresses from China* investigation. *See* Commerce's Request Additional Information at 3, PR 207.

On November 3, 2020, Commerce published its preliminary determination. *Mattresses from Indonesia* ("*Preliminary Determination*"), 85 Fed. Reg. 69,597 (Dep't of Commerce Nov. 3, 2020) (preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures); *see also* PDM. In the *Preliminary Determination*, Commerce applied a quarterly ratios sales methodology proposed by Brooklyn Bedding to determine the quantity of Zinus Indonesia's U.S. sales. *See* PDM at 9–10; *see also* Commerce's Prelim. Determination Margin Calculation Zinus Indonesia at 1–3 (Oct. 27, 2020), PR 229, CR 258.

In calculating constructed value profit and selling expenses in the *Preliminary Determination*, Commerce used the financial statements of Emirates Sleep Systems Private ("Emirates"), a producer that manufactured mattresses in India. PDM at 13. Commerce's calculation did not include the costs of certain inputs purchased by Zinus Indonesia from two affiliated Chinese suppliers. PDM at 12; Commerce's Cost Calculation Mem. (Oct. 27, 2020) at 1–2, PR 231, CR 262. Commerce calculated the cost of inputs using the average of GTA data for Brazil, Indonesia, Malaysia, Mexico, Romania, Russia, and Turkey. Commerce's Cost Calculation Mem. at 1–2, Att. 2a. Commerce also calculated constructed export price based on Zinus U.S.' expenses, increasing the starting price by the amount of billing adjustments and making deductions for rebates, movement expenses, and selling expenses. PDM at 10. Commerce calculated a dumping margin of 2.61 percent for Zinus Indonesia. *Preliminary Determination*, 85 Fed. Reg. at 69,598.

Following the *Preliminary Determination*, Commerce issued supplemental questionnaires to Zinus Indonesia. Commerce's Post-Prelim. Supp. Questionnaire (Dec. 2, 2020), PR 249, CR 267. The parties to the investigation submitted additional briefing. Zinus Indonesia's Admin. Case Br. (Feb. 10, 2021), PR 275, CR 292; Brooklyn Bedding's Admin. Case Br. (Feb. 9, 2021), PR 274, CR 291; Brooklyn Bedding's Rebuttal Admin. Case Br. (Feb. 16, 2021), PR 276, CR 293; Zinus Indonesia's Rebuttal Admin. Case Br. (Feb. 17, 2021), PR 277, CR 294. Commerce published its *Final Determination* on March 25, 2021. *See Final Determination*, 86 Fed. Reg. at 15,899; Issues and Decision Memo Final Affirmative Determination Less-Than-Fair-Market Value Investigation Mattresses from Indonesia ("IDM"), ECF No. 15–4.

In the *Final Determination*, Commerce continued to apply the quarterly ratios methodology for assigning country of origin to mattresses sold from Zinus U.S.' constructed export price inventory and continued to calculate constructed value profit and selling expenses based on the financial statements of Emirates. IDM at 8–9, 20–25. Commerce also made adjustments to constructed export price sales based on sales deductions of Zinus U.S. and Best Price Mattress, Inc. ("Best Price Mattress"), an affiliated company, during the period of investigation. *Id.* at 15. Zinus Indonesia's antidumping margin was calculated at 2.22 percent. *Final Determination*, 86 Fed. Reg. at 15,900.

The antidumping duty order was published on May 14, 2021. *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam* ("*Antidumping Duty Order*"), 86 Fed. Reg. 26,460 (Dep't of Commerce May 14, 2021) (antidumping duty orders and amended final affirmative antidumping determination for Cambodia). Zinus Indonesia timely filed this action. *See* Summons, ECF No.1; Compl., ECF No. 5.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Framework

Commerce imposes antidumping duties on foreign goods if "(1) it determines that the merchandise 'is being, or is likely to be, sold in the United States at less than its fair value,' and (2) the International Trade Commission determines that the sale of the merchandise at less than fair value materially injures, threatens, or impedes the establishment of an industry in the United States." *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Antidumping duties are calculated as the difference between the normal value of subject merchandise and the export price or the constructed export price of the subject merchandise. 19 U.S.C. § 1673.

Normal value is ordinarily determined using the sales price of the subject merchandise in the seller's home market. 19 U.S.C. § 1677b(a)(1)(B)(i). If Commerce determines that normal value cannot be reliably calculated using home market or third-country sales, Commerce may use the subject merchandise's constructed value as an

alternative to normal value. *Id.* § 1677b(a)(4). The method for calculating constructed value is defined by statute. *Id.* § 1677b(e). When calculating constructed value, Commerce must utilize the respondent's actual selling, general, and administrative expenses, and profits in the respondent's home market or a third-country market. *Id.* § 1677b(e)(2)(A). If Commerce cannot rely on those data, it may look to:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

Id. § 1677b(e)(2)(B).

Commerce must also calculate export price or constructed export price (collectively, "U.S. price"). Export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States,

subject to certain adjustments. *Id.* § 1677a(a). Constructed export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of

> such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter,

subject to certain adjustments. *Id.* § 1677a(b). The price used to calculate export price and constructed export price is reduced by commissions, selling expenses, further manufacturing expenses, and the profit allocated to these expenses. *Id.* § 1677a(d).

II. Quantity of Mattresses Methodology

During the period of investigation, Zinus U.S. purchased mattresses produced in Indonesia and three other countries, which were comingled in warehouses maintained by Zinus U.S. or third parties. IDM at 8; Zinus Indonesia's Section A Questionnaire Resp. (Jun. 19, 2020) at A-5–A-6, PR 97–102, CR 36–39. Zinus Indonesia reported to Commerce that Zinus Korea was able to track the country of origin for mattresses sold and shipped directly to unaffiliated United States customers, but Zinus U.S. did not track the country of origin for sales of mattresses held in its United States warehouses. IDM at 8; Zinus Indonesia's Section A Questionnaire Resp. at A-4–A-7.

In order to calculate a quantity of subject mattresses sold from its United States inventory, Zinus Indonesia advocated for Commerce to adopt a first-in-first-out methodology, which Zinus Indonesia used in its responses. IDM at 8; *see also* Zinus Indonesia's Section A Questionnaire Resp. at A-6–A-7; Zinus Indonesia's Supp. Section C Questionnaire Resp (Sept. 21, 2020). at SC1–10–SC1–11, PR 193, CR 167. In support of this methodology, Zinus Indonesia provided Commerce with a monthly breakdown of mattresses imported into the United States, which identified imports by country of origin, month, and model. *See* Zinus Indonesia's Second Supp. Section C Questionnaire Resp. (Sept. 28, 2020), Ex. SC2–1, PR 200, CR 214. Brooklyn Bedding argued during the administrative investigation that the first-in-first-out methodology was distortive of total constructed export price inventory sales and proposed that Commerce apply a quarterly ratios methodology in which the quantity of mattresses purchased by Zinus U.S. for each quarter under review was apportioned based on country. IDM at 8; Brooklyn Bedding's Pre-Prelim. Cmts. (Oct. 9, 2020) at 610, 1517, PR 210, CR 219. The percentage assigned to Indonesia-origin mattresses was applied to Zinus U.S.' total sales for the corresponding quarter. IDM at 9; PDM at 10; *see also* Brooklyn Bedding's Pre-Prelim. Cmts. at 15.

In the *Preliminary Determination*, Commerce adopted the quarterly ratios methodology. PDM at 10. In discussing the first-in-first-

out methodology, Commerce stated that "[q]uestions remain about the accuracy of this methodology with respect to [constructed export price] sales reporting" and that Commerce would "continue to examine this issue for purposes of the final determination." *Id.* In the *Final Determination*, Commerce continued to apply the quarterly ratios methodology, finding it to be the preferrable methodology because "it applies quarterly ratios grounded in purchase data to the full universe of Zinus U.S.' sales from inventory during the [period of investigation], it is neutral in terms of determining which sales to report as subject merchandise sales," and "is less susceptible to manipulation." IDM at 8–9.

Plaintiff argues that Commerce erred in adopting a quarterly ratios methodology for determining the quantity of subject constructed export price inventory sales over Plaintiff's proposed first-in-first-out methodology. Pl.'s Mem. Supp. Pl.'s Mot. J. Agency R. ("Pl.'s Br.") at 12–26, ECF Nos. 22–1, 23–1. Plaintiff presents two arguments. *Id.*

First, Plaintiff contends that Commerce's decision to adopt the quarterly ratios methodology proposed by Brooklyn Bedding over the first-in-first-out methodology proposed by Plaintiff was not supported by substantial evidence. *Id.* at 15–20. Plaintiff argues that Commerce failed to address the merits of the first-in-first-out methodology and misconstrued the record evidence in weighing the reimbursement of warranty claims and the payment of commissions. *Id.* at 16–19. Plaintiff contends that it provided evidence on the record demonstrating that the first-in-first-out methodology was accurate, reasonable, and "vastly superior to [the] quarterly import ratios, which do not correlate to the model-and time-specific import patters [sic] and result in widespread distortions and inaccuracies." *Id.* at 18–19. Plaintiff further argues that Commerce acted unreasonably in rejecting the first-in-first-out methodology without soliciting additional information and documentation related to Commerce's concerns. *Id.* at 19–20. Plaintiff contends that record evidence demonstrated that commissions and warranties were not paid on subject mattresses during the period of investigation because Zinus Indonesia did not use selling agents for the subject mattresses and warranties were not offered, only "defective allowances." *Id.* at 16–17.

Defendant and Brooklyn Bedding raise multiple arguments in opposition to Plaintiff's position. First, Defendant and Brooklyn Bedding contend that Plaintiff was given an opportunity to defend the first-in-first-out methodology and failed to carry its burden of convincing Commerce. Brooklyn Bedding's Resp. at 12–17; Def.'s Resp. at 24–25. Specifically, issues regarding the first-in-first-out methodology were raised by Brooklyn Bedding during the investigation and Com-

merce solicited responses to two questionnaires following the *Preliminary Determination*. Brooklyn Bedding's Resp. at 12–17; Def.'s Resp. at 24. Second, Defendant and Brooklyn Bedding argue that Plaintiff did not adequately explain how the first-in-first-out methodology functions or address record evidence that the methodology was distortive. Def.'s Resp. at 22–23; Brooklyn Bedding's Resp. at 14–17. Third, Defendant and Brooklyn Bedding argue that Plaintiff's opposition to Commerce's focus on the payment of warranties and commissions ignores the relevant point of whether Plaintiff was capable of tracking the country of origin for constructed export price inventory sales. Def.'s Resp. at 23–24; Brooklyn Bedding's Resp. at 17–19. Regardless of whether commissions were paid and if certain payments were classified as "warranties" or "defective allowances," Defendant and Brooklyn Bedding contend that the record did not explain how Zinus U.S. could seek reimbursement from its suppliers or grant commissions on non-subject merchandise without tracking the country of origin. Def.'s Resp. at 23–24; Brooklyn Bedding's Resp. at 17–19.

Second, Plaintiff argues that even if Commerce's use of the quarterly ratios methodology was supported by substantial evidence, the inclusion of mattresses still in-transit from Indonesia to the United States at the end of the period of investigation was unreasonable. Pl.'s Br. at 21–26. Plaintiff contends that Brooklyn Bedding's calculations, which were adopted by Commerce, were based on the quantity of mattresses shipped from Indonesia and not the quantity of mattresses that entered the United States during the period of investigation. *Id.* at 21–23. Plaintiff submitted evidence showing that mattresses were sold by Zinus Korea to Zinus U.S. using free on board shipping terms, under which title passed from Zinus Korea to Zinus U.S. at the time of shipment. Zinus Indonesia's Second Supp. Section C Questionnaire Resp. at 1–2. Plaintiff contends that any identification of constructed export price inventory sales must be limited to the inventory actually received by Zinus U.S. and that substantial record evidence does not support the inclusion of in-transit mattresses. Pl.'s Br. at 23–25. Plaintiff also argues that Commerce failed to consider and address Plaintiff's arguments regarding the inclusion of in-transit mattresses or to explain its reasoning for adopting the figures offered by Brooklyn Bedding. *Id.* at 25–26.

Brooklyn Bedding argues that Plaintiff has provided no factual or legal support for its position that mattresses in-transit could not have been sold from Zinus U.S.' inventory. Brooklyn Bedding's Resp. at 22. Defendant and Brooklyn Bedding contend that record evidence demonstrates that sales were made of mattresses before the mattresses

entered the United States. *Id.* at 22–23; Def.'s Resp. at 26. Brooklyn Bedding notes that Zinus Korea never took physical possession of mattresses before shipment to Zinus U.S. and that "back-to-back" sales were reported using a date based on shipment from Indonesia to the United States. Brooklyn Bedding's Resp. at 23. Brooklyn Bedding also notes that Plaintiff has offered no internal policy precluding the sale of mattresses before importation, which is seemingly permitted under Plaintiff's accounting practices. *Id.* at 24. Defendant and Brooklyn Bedding cite the language of 19 U.S.C. § 1677a(b), which defines "constructed export price," and contemplates sales to purchasers within the United States before the physical importation of goods. *Id.* at 23; Def.'s Resp. at 26; *see also* 19 U.S.C. § 1677a(b).

In determining whether subject merchandise was sold at less than fair value, Commerce compares "the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). Because Zinus Indonesia did not have home market or third country sales, normal value was based on constructed value. *Id.* § 1677b(a)(1); *see also* Zinus Indonesia's Notification Non-Viable Home Market (May 28, 2020), PR 82; PDM at 8–9, 12–13. Constructed export price is the price at which subject merchandise is first sold in the United States by a seller affiliated with the producer or exporter to a non-affiliated purchaser. 19 U.S.C. § 1677a(b).

Calculation of constructed export price requires Commerce to identify sales of subject merchandise in the United States during the period of investigation. *See id.* The relevant statutes and regulations provide little guidance on how to allocate merchandise within an inventory that comingles subject and non-subject merchandise. Commerce has discretion in determinations "involv[ing] complex economic and accounting decisions of a technical nature." *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citation omitted). Commerce still "must [ ] explain [cogently] why it has exercised its discretion in a given manner." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (citation omitted). The methodology adopted by Commerce must be a reasonable means of effectuating the statutory purpose. *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1301 (2016), *aff'd*, 741 F. App'x 801 (Fed. Cir. 2018) (citing *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)). A party proposing a methodology bears the burden of establishing that the allocation is "as specific a basis as is feasible, and . . . does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2); *see also Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1293 (Fed. Cir. 2008)

(importer has the burden to prove its proposed methodology is "calculated on as specific a basis as is feasible" and is free of distortions). The Court will affirm Commerce's choice of a methodology even if substantial evidence supports multiple options. *See Fujitsu Gen. Ltd.*, 88 F.3d at 1044.

Commerce has discretion in selecting the methodology for allocating goods in an investigation but must base its methodology on the best available information in order to establish antidumping margins as accurately as possible. *Tri Union Frozen Prods.*, 40 CIT at __, 163 F. Supp. 3d at 1267; *see also Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Commerce justified its adoption of the quarterly ratios methodology by explaining that the methodology "applies quarterly ratios grounded in purchase data to the full universe of Zinus U.S.' sales from inventory during the [period of investigation]," "is neutral in terms of determining which sales to report as subject merchandise sales," and "is less susceptible to manipulation." IDM at 9. In support of its determination, Commerce stated that it agreed with Brooklyn Bedding's Pre-Preliminary Comments regarding the accuracy of the quarterly ratios methodology. *Id.* (citing Brooklyn Bedding's Pre-Prelim. Cmts. at 15–17). In the cited submission, Brooklyn Bedding explained the process of calculating the quarterly ratios methodology as beginning with quantities reported in Zinus Indonesia's Section C Questionnaire Response and adjusting the quantities to reflect the total number of mattresses shipped by Zinus Indonesia to Zinus Korea during the period of investigation based on Zinus Korea's sales reconciliation. Brooklyn Bedding's Pre-Prelim. Cmts. at 15. Using these figures, Brooklyn Bedding calculated the ratios of Indonesian-origin mattresses to the total product shipped for each quarter and applied the ratios to the constructed export price inventory reported by Zinus Indonesia. *Id.* Brooklyn Bedding explained that the quarterly ratios methodology was more accurate and less susceptible to variation than a first-in-first-out approach or last-in-last-out approach. *Id.* at 16–17.

With respect to the alternative first-in-first-out methodology proposed by Plaintiff, Commerce explained that the first-in-first-out methodology did "not accurately or appropriately capture a sufficient number of sales of subject merchandise" and there were inconsistencies between Plaintiff's ability to offer warranties and commissions and Plaintiff's claimed inability to track the country of origin for mattresses sold. IDM at 9. In questioning the reliability of Zinus Indonesia's reporting, Commerce determined that the first-in-first-out methodology:

> [did] not accurately or appropriately capture a sufficient number of sales of subject merchandise. To come to any other conclusion would be inconsistent with the commercially realistic business practices of a multinational company engaged in the production and sale of a consumer product such as mattresses that provides commissions on certain sales from its inventory.

Id.

The Court concludes that Commerce expressed reasonable concerns regarding the accuracy of the first-in-first-out methodology. The Court notes that Commerce was not required to adopt the first-in-first-out methodology proposed by Plaintiff over the valid alternative quarterly ratios methodology. *See Fujitsu Gen. Ltd.*, 88 F.3d at 1044. Commerce explained that the quarterly ratios methodology was preferable because it was grounded in Zinus U.S.' purchase data, was applied to the totality of the subject mattresses available for sale during the period of investigation, and was neutral in determining which sales to designate as subject merchandise. IDM at 9 (citing Brooklyn Bedding's Pre-Prelim. Cmts. at 15-17). In the absence of accurate records maintained by Zinus Indonesia and Zinus U.S., the Court concludes that Commerce's use of the quarterly ratios methodology was reasonable because Commerce determined that it more accurately identified the quantity of subject mattresses sold than the alternate proposed method that Commerce deemed questionable. The Court sustains Commerce's use of the quarterly ratios methodology.

Plaintiff argues that if the Court were to sustain the use of the quarterly ratios methodology, it should remand this case to Commerce with instructions to exclude from the constructed export price calculation mattresses that had not yet arrived in the United States at the end of the period of investigation. Pl.'s Br. at 21–26. Plaintiff contends that Commerce's inclusion of mattresses in-transit from Indonesia at the end of the period of investigation was unsupported by record evidence that demonstrated that mattresses classified as in-transit could not have been shipped to customers during the period of investigation. *Id.* Brooklyn Bedding and Defendant argue that Commerce was correct to include mattresses in-transit because the relevant statute contemplates sales before importation into the United States and the record supports that mattresses were sold to United States customers despite being classified as in-transit. Brooklyn Bedding's Resp. at 22-24; Def.'s Resp. at 26–27.

Section 1677a(b) of title 19 defines "constructed export price" as:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States *before or after the date of importation* by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).

19 U.S.C. § 1677a(b) (emphasis added). This statutory definition expressly contemplates the potential for goods to be sold in the United States before physical importation. *Id.*

Commerce acknowledged Zinus Indonesia's objection to the inclusion of mattresses still in-transit from Indonesia at the end of the period of investigation but did not provide express reasons for or specific record evidence in support of rejecting the argument, stating only that "[w]e therefore agree with the petitioners that the quarterly ratio sales reporting methodology used in the Preliminary Determination, along with the quantity of mattresses that Zinus U.S. purchased from [Zinus Korea], is preferable in this case." IDM at 8-9. Though inclusion of goods sold or agreed to be sold in-transit prior to importation might be permissible under 19 U.S.C. § 1677a(b), Commerce failed to provide sufficient explanation or citations to record evidence to support its inclusion of in-transit pre-importation goods sold in this case. The Court remands to Commerce for further consideration and explanation of its determination to include mattresses in-transit in the calculation of constructed export price.

III. Constructed Value Profit Calculations

Commerce based the calculation of normal value on constructed value. IDM at 21. Because Zinus Indonesia lacked a viable home or third-country market, Commerce calculated constructed value profit and selling expenses under 19 U.S.C. § 1677b(e)(2)(B), which provides three methods:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a

> foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

19 U.S.C. § 1677b(e)(2)(B). Commerce eliminated options (i) and (ii) because "[Zinus Indonesia did] not have sales of the general category of merchandise in the home market and there [were] no other respondents being investigated in this proceeding" and applied option (iii). IDM at 21; *see also* Zinus Indonesia's Notification Non-Viable Home Market.

Commerce considered financial statements for eight companies provided by the parties to the investigation: PT Graha Seribusatu Jaya ("Graha"), an Indonesian producer of mattresses; PT Ecos Jaya Indonesia ("Ecos"), an Indonesian producer of mattress and sleep products; PT Inocycle ("Inocycle"), an Indonesian producer of mattress and sleep products; PT Inocycle ("Inocycle"), an Indonesian producer of non-woven and staple fiber and materials recycling; PT Chitose International ("Chitose International"), an Indonesian producer of furniture for homes, schools, restaurants, and hospitals; PT Boston Furniture Industries ("Boston Furniture"), an Indonesian producer of wood furniture and special construction or repairs; Luxury Sleep Products, a Malaysian producer of bedroom furniture; Slarafija Trade, a Serbian producer of mattresses; and Emirates, an Indian producer of mattresses. IDM at 21–24. Upon consideration of the submitted financial statements, Commerce selected Emirates to be the best available surrogate for calculating constructed value profit. *Id.* at 25.

Commerce also determined that it was unable to calculate a profit cap in accordance with section 1677b(e)(2)(B)(iii) "because the record [did] not contain any information for making such a calculation." *Id.* at 25. Noting that Commerce may apply section 1677b(e)(2)(B)(iii) on the basis of facts available, Commerce determined Emirates to be "the best option for determining the profit cap as facts available" and adopted Emirates' profit information as a "reasonable profit cap." *Id.* Plaintiff challenges Commerce's (A) use of Emirates financial statements as surrogate date; (B) rejection of Indonesian manufactures in

selecting surrogate financial data; and (C) calculation, or lack of calculation, of the statutorily required profit cap. Pl.'s Br. at 26–36.

A. Emirates Sleep Systems Private Limited

Plaintiff argues that Commerce's selection of Emirates as a surrogate data source was unsupported because Emirates' financial statement was not specific to the subject merchandise, the respondent, foreign market, or period of investigation. Pl.'s Br. at 30; *see* Brooklyn Bedding's Submission Concerning Constructed Value Profit Selling Expenses (Aug. 17, 2020) at Att. 2-B ("Emirates' Financial Statement"), PR 154, CR 136. Specifically, Plaintiff points to Emirates' lack of sales in Indonesia and Emirates' lack of business operations, products, and a customer base similar to that of Zinus Indonesia. Pl.'s Br. at 29. Plaintiff also notes that Emirates generated roughly 25 percent of its revenue through the sale of services and had missing annexures from its financial statements. *Id.* at 29–30.

Brooklyn Bedding argues that Commerce's use of Emirates was permissible under 19 U.S.C. § 1677b(e)(2)(B) and consistent with existing precedent. Brooklyn Bedding's Resp. at 38. Brooklyn Bedding argues that Commerce has greater freedom in selecting a surrogate under 1677b(e)(b)(iii) than under subsections (i) and (ii). *Id.* at 38–39. Brooklyn Bedding also disputes Plaintiff's contentions regarding the portion of Emirates' business related to services, noting that Commerce determined the services in question to be of a nature appropriate for a company engaged in the manufacture and sale of mattresses. *Id.* at 39–40. Brooklyn Bedding highlights that Commerce addressed the issue of Emirates' missing annexures at the time of the *Final Determination* and determined Emirates' Financial Statement to be complete. *Id.* at 40.

Defendant contends that Commerce's use of Emirates' Financial Statement was supported by the record. Def.'s Resp. at 39–40. Defendant argues that Commerce was not required to select a company from Indonesia and acted within its authority in selecting financial statements deemed more accurate and reliable, even when the financial statements were not fully contemporaneous. *Id.* at 40–44.

In selecting a surrogate data source, Commerce considered four criteria:

> (1) similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; (2) the extent to which the financial data of the surrogate company reflect sales in the home market and do not reflect sales to the United States; (3) the contemporaneity of the

> data to the [period of investigation]; . . . [and (4)] the extent to which the customer base of the surrogate company and that of the respondent are similar.

IDM at 22; *see also Mid Continent Steel & Wire, Inc. v. United States* ("*Mid Continent II*"), 941 F.3d 530, 542–43 (Fed. Cir. 2019) (concluding that Commerce's analysis applying the four part framework was a reasonable interpretation of the statute). Commerce also reviewed the provided financial statements to ensure that they "(1) reflect[ed] a net profit; (2) [were] complete (i.e., all of the financial statements [were] included with the auditor's report showing an unqualified opinion and all accompanying footnotes were provided); and (3) [were] fully translated." IDM at 22. Based on these criteria, Commerce eliminated all financial statements other than those of Emirates and Inocycle. *Id.* at 23.

In comparing the financial statements of Emirates and Inocycle, Commerce noted that "[t]he specific language of both the preferred and alternative methods [(19 U.S.C. § 1677b(e)(2)(A) & (B))] appear to show a preference that the profit and selling expenses reflect: (1) production and sales in the foreign country; and (2) the foreign like product, i.e., the merchandise under consideration." *Id.* at 23. Emirates is an Indian-based manufacturing company that primarily manufactures mattresses, bases, and other sleep-related products and derives the majority its revenue from manufacturing mattresses. *Id.* at 23–24; Emirates' Financial Statement. Inocycle is an Indonesian-manufacturer that derives six percent of its revenue from the production of mattresses. IDM at 23; Zinus Indonesia's Constructed Value Profit Submission at Ex. 3 ("Inocycle's Financial Statement"), PR 156–63, CR 137–44.

In its administrative case brief before Commerce, Zinus Indonesia argued that Emirates' Financial Statement was not sufficiently contemporaneous to the period of investigation. Zinus Indonesia's Admin. Case Br. at 33–38. That a financial statement does not fully overlap the period of investigation does not defeat its contemporaneity for purposes of section 1677b(e)(b)(iii). *See DuPont Teijin Films China Ltd. v. United States*, 38 CIT 1282, 129-192, 7 F. Supp. 3d 1338, 1349 (2014) (Commerce's decision to rely on data that overlapped with two months only of the period of investigation was reasonable). Commerce may opt to prioritize factors such as accuracy or reliability over contemporality as long as the adopted financial statement overlaps with the period of investigation. *See Qingdao Sea-Line Trading Co., Ltd. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (Commerce's decision to use more accurate but less contemporaneous data

was reasonable). In this case, the period of investigation was January 1, 2019 through December 31, 2019. IDM at 2. Emirates' Financial Statement covered fiscal year April 2018 through March 2019. *See* Emirates' Financial Statement at 1. Because Emirates' Financial Statement overlapped the first three months of the period of investigation, the Court concludes that Commerce was reasonable in its determination that the financial statement was sufficiently contemporaneous.

Commerce considered Zinus Indonesia's argument that Emirates was not a comparable business because 23.29 percent of its revenue was derived from advertising, marketing, and promotional services. IDM at 24; *see* Emirates' Financial Statement at Annexure A. Emirates was "a manufacturing company basically into the manufacturing of all types and kinds of mattresses, bases, and other sleep related products and systems. The company [was] also into trading both wholesale and retail, of such manufactured products. The company provide[d] advertising, marketing, and promotional services to its holding company." Emirates' Financial Statement at Independent Auditor's Report, note 1. Commerce observed that the majority of Emirates' activities related to the manufacturing of mattresses and concluded that "marketing, promotion, and trading activities related to mattresses and sleep systems [was] a completely appropriate activity for a company engaged in the manufacturing and sale of mattresses." IDM at 24. Commerce also determined that the record did not include any evidence suggesting that the expenses related to these activities was not properly included in Emirates' profit calculation. *Id.* Commerce limited its calculation of constructed value selling expenses to transportation expenses and excluded costs associated with retail, marketing, advertising services, and commissions. *Id.*

Emirates' business activities related to the wholesale and retail sale of mattresses and the majority of Emirates' business activities were the same as those of Zinus Indonesia. IDM at 23-25; *see also* PDM at 13. The only other candidate determined acceptable by Commerce, Inocycle, was predominantly engaged in the processing of non-woven fibers and the manufacture of artificial stable fibers. IDM at 23-25; *see* Inocycle's Financial Statement. Inocycle's manufacture of homeware products, including pillows, bolsters, mattresses, blankets, carpets, mattress protectors, and bed cover sets for sale in the Indonesian market was a minority of its business operations. IDM at 23-24; *see* Inocycle's Financial Statement. The Court concludes that Commerce's determination that the products and business operations of

Emirates were sufficiently similar to those of Zinus Indonesia, and were preferable over Inocycle, was reasonable and supported by the record.

Missing from Emirates' Financial Statement were annexures referenced in the auditor's notes. IDM at 25; *see* Emirates' Financial Statement at Independent Auditor's Report, notes 6, 8, 12, 13. In a footnote in its administrative case brief, Zinus Indonesia argued before Commerce that the missing annexures rendered the financial statement incomplete. IDM at 25; Zinus Indonesia's Admin. Case Br. at 36, n.51. Commerce reviewed Emirates' Financial Statements, including the Independent Auditor's Report. IDM at 24–25; Emirates' Financial Statement at Independent Auditor's Report. Upon its review, Commerce determined that the information provided for Emirates included a full audit report, each of the financial statements, and all of the accompanying footnotes. *Id.* at 25. Commerce also determined that none of the referenced annexures referred to information that would call into question the amounts on the income statement or the related profit and selling expenses and that the annexures were referenced in the auditor's notes that already detailed the corresponding balance sheet items. *Id.*; *see* Emirates' Financial Statement at Independent Auditor's Report, notes 6, 8, 12, 13.

Commerce reasonably rejected Plaintiff's annexure argument because Emirates provided a full audit report, financial statements, and accompanying footnotes and none of the missing annexures called into question the reflected profit and selling expenses. IDM at 25. Because the annexures did not undermine the reliability or accuracy of Emirates' Financial Statement, the Court concludes that Commerce's acceptance of the financial statements was reasonable.

As Commerce determined, Emirates was a mattress producer with similar business operations, products, and customer base to Zinus Indonesia. *Id.* at 25. Commerce reasonably determined that Emirates' financial documents were sufficiently contemporaneous to the period of investigation and the record did not include any reason to question the financial documents' reliability or accuracy. *Id.* at 24. Commerce's determination that Emirates provided the best option for calculating constructed value was consistent with its established criteria. The Court concludes that Commerce's choice of Emirates as an acceptable surrogate data source was supported by substantial evidence.

B. PT Graha Seribusatu Jaya and PT Ecos Jaya Indonesia

Plaintiff argues that Commerce erroneously rejected the financial statements of two Indonesian mattress producers, Graha and Ecos. Pl.'s Br. at 31–34. Commerce considered Graha's 2018 and 2019 financial statements. IDM at 23; *see* Zinus Indonesia's Constructed Value Profit Submission at Ex. 1; Brooklyn Bedding's Submission Concerning Constructed Value Profit Selling Expenses at Att. 1; Graha's Section A Questionnaire Resp. (Jun. 19, 2020) at Ex. A-27–A32, PR 103, CR 44. Commerce rejected Graha's 2018 financial statement as not contemporaneous to the period of investigation and Graha's 2019 financial statement as not audited. IDM at 23. Plaintiff contends that even if Commerce's rejection of Graha's 2019 financial statement as incomplete was reasonable, Commerce should have adopted Graha's 2018 financial statement over Emirates' 2018–2019 financial statement because the specificity of Graha's information for the Indonesian market should have outweighed the limited contemporaneity of the three months of overlap of Emirates' Financial Statement with the period of investigation. Pl.'s Br. at 32–33. Commerce considered and rejected Ecos' 2019 financial statement because it contained a qualified opinion by the auditor relating to estimated future liabilities pertaining to post-employment benefit obligations. *Id.* at 22; *see* Zinus Indonesia's Constructed Value Profit Submission at Ex. 2. Plaintiff argues that Commerce failed to consider the significance of the auditor's comment on the calculation of Ecos' profit and the auditor's indication that Ecos would meet its obligations. *Id.* at 33–34.

Brooklyn Bedding and Defendant contend that Commerce's rejection of the financial statements of Graha as not contemporaneous and unaudited was consistent with Commerce's established practice and that the applicable statute does not impose an obligation on Commerce to prioritize geographic proximity. Brooklyn Bedding's Resp. at 41; Def.'s Resp. at 44–45. Brooklyn Bedding and Defendant also argue that Commerce's rejection of Ecos' financial statements because of a qualified auditor's report was consistent with Commerce's existing practice of not looking beyond surrogate financial statements and was reasonable in light of Commerce's inability to seek clarification from the company or auditor. Brooklyn Bedding's Resp. at 42–43; Def.'s Resp. at 45–46. Brooklyn Bedding and Defendant do not agree with Plaintiff's suggestion that the qualification was trivial and unable to adversely affect the dumping margin calculation, and they note that Commerce addressed the point in the *Final Determination*. Brooklyn Bedding's Resp. at 42–43; Def.'s Resp. at 45–46. Finally, Brooklyn

Bedding notes that Plaintiff advanced no arguments before the Court rebutting Commerce's analysis rejecting the other considered Indonesia companies: Inocycle, Chitose International, and Boston Furniture. Brooklyn Bedding's Resp. at 43.

Commerce is tasked with approximating a respondent's home market experience and selecting data that permits it "to estimate, reasonably and fairly, a profit rate that [the respondent] would have realized from sales in its home market." *Mid Continent Steel & Wire, Inc. v. United States* ("*Mid Continent I*"), 41 CIT __, __, 203 F. Supp. 3d 1295, 1310 (2017). As discussed above, Commerce identified multiple factors that it considered in determining what surrogate financial information to use in its calculation, including the contemporaneity of the available financial information with the period of investigation. IDM at 22; *see Mid Continent II*, 941 F.3d at 542–43. The administrative record included two financial statements for Graha covering the year ending on December 31, 2018 and the year ending on December 31, 2019. *See* Graha's Section A Questionnaire Resp. at Exs. A-27–A-28; Zinus Indonesia's Constructed Value Profit Submission at Ex. 1A. Commerce disregarded Graha's 2018 financial statement as not contemporaneous with the period of investigation. IDM at 23.

Commerce rejected Graha's 2019 financial statement because it was not audited and Ecos' financial statement because its audit included a qualified opinion. *Id.* Commerce noted that the qualification in Ecos' financial statement, which concerned a deviation from the requirements of the generally accepted accounting principles ("GAAP") of Indonesia, had the potential to impact the constructed value calculation. *Id.* Because an audit supports the reliability of the financial data, Commerce was within its discretion to favor an audited opinion over an unaudited opinion. *See SeAH Steel VINA Corp. v. United States*, 41 CIT __, __, 269 F. Supp. 3d 1335, 1351–52 (2017). Similarly, Commerce was within its discretion to favor an unqualified auditor's opinion over a qualified auditor's opinion. *See Golden Dragon Precise Copper Tube Grp., Inc. v. United States*, 40 CIT __, __, 2016 WL 4442163, at *5 (2016).

In selecting a constructed value surrogate, Commerce was tasked with comparing the options presented and their "comparative deficiencies." *See Mid Continent II*, 941 F.3d at 544 (in determining a surrogate for constructed value, "[t]he size of any subsidies would obviously be relevant, as would the comparative deficiencies of the alternative sources."). Plaintiff argues that Commerce, despite the deficiencies in the reported data of Graha and Ecos, should have prioritized the manufacturers from Indonesia over an out-of-country

manufacturer in order to reach a more accurate constructed value calculation. Though option (ii) of § 1677b(e)(2)(B) contains a geographic restriction for data from the home country market, no similar restriction is included in option (iii). *Compare* 19 U.S.C. § 1677b(e)(2)(B)(ii) *with id.* § 1677b(e)(2)(B)(iii); *see also Thai I-Mei Frozen Foods Co. v. United States*, 31 CIT 334, 345–46, 477 F. Supp. 2d 1332, 1343 (2007). In fact, to impose such a requirement on section (iii) would effectively nullify the language "any other reasonable method." The language of the statute provides Commerce with discretion to weigh the individual factors and to identify the best available information. Because Commerce is not required to select a manufacturer from the respondent's home market and the record supports the rejection of the financial statements provided for Graha and Ecos, the Court concludes that Commerce's determination was reasonable and supported by substantial evidence.

C. Profit Cap

Commerce determined that the record did not contain information necessary to calculate a profit cap as required by 19 U.S.C. § 1677b(e)(2)(B)(iii). IDM at 25. In the alternative, Commerce applied facts available and adopted Emirates' profit information as a profit cap for the *Final Determination*. *Id.* Using Emirates' information, a constructed value profit rate of 18.36 percent was calculated. *See* PDM at 13; Prelim. Cost Calculation Mem. at 2, PR 231, CR 262; Final Cost Calculation Mem. at 1–2, PR 286, CR 295.

Plaintiff contends that Commerce's failure to apply a profit cap in accordance with section 1677b(e)(2)(B)(iii) caused the calculation of constructed value to be unlawful. Pl.'s Br. at 34–36. Plaintiff argues that Commerce could have utilized the financial records of the considered Indonesian companies to establish a profit cap and that the information provided by Ecos suggests that the ceiling for profit in the Indonesian market for mattresses was only 10.78 percent. *Id.* at 34. In recognizing a profit rate of 18.36 percent, Plaintiff argues, Commerce ignored its obligation to apply an accurate and representative profit cap. *Id.* at 34–35.

Brooklyn Bedding and Defendant dispute Plaintiff's argument that Commerce failed to apply a profit cap in accordance with section 1677b(e)(2)(B)(iii) and note that Commerce did apply a profit cap based on the financial statements of Emirates. Brooklyn Bedding's Resp. at 44; Def.'s Resp. at 47. Defendant contends that it would have been inappropriate for Commerce to use the rejected financial statements of the Indonesian companies because usable information existed on the record in the form of Emirates' Financial Statement.

Def.'s Resp. at 47–48. Brooklyn Bedding and Defendant contend that Commerce complied with its statutory obligations in establishing a profit cap and that the use of Emirates' profit data was supported by substantial evidence on the record. Brooklyn Bedding's Resp. at 44–47; Def.'s Resp. at 48.

Section 1677b(e)(2)(B)(iii) of title 19 instructs that if Commerce relies on "any other reasonable method" for determining a respondent's expenses and profits in calculating constructed value, the amount allowed for profit is limited to "the amount normally realized by exporters or producers ...in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." 19 U.S.C. § 1677b(e)(2)(B)(iii). This section requires that Commerce apply an "upward limit for profit commonly termed the 'profit cap.'" *SeAH Steel Corp. v. United States*, 45 CIT __, __, 513 F. Supp. 3d 1367, 1398 (2021) (quoting *Atar S.r.l. v. United States*, 730 F.3d 1320, 1322 (Fed. Cir. 2013)). The statute provides that the profit cap should be based on the profit on sales in the foreign country of merchandise in the same general category of products as the subject merchandise. 19 U.S.C. § 1677b(e)(2)(B)(iii). Commerce cannot sidestep its obligation without providing an adequate explanation. *Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 3d 1315, 1348 (2015). When Commerce determines that it cannot calculate a profit cap because the record lacks relevant information of sales in respondent's home country of merchandise in the same general category of the subject merchandise by home country producers, it must attempt to calculate a profit cap based on facts available. *Id*.

As an initial matter, Plaintiff's argument is incorrect that Commerce did not calculate a profit cap. In the *Final Determination*, Commerce determined that it was:

> unable to calculate the amount realized by exporters or producers in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category of products as the subject merchandise (i.e., the "profit cap"), in accordance with section 773(e)(2)(B)(iii) of the Act, because the record does not contain any information for making such a calculation.

IDM at 25. In order to establish a profit cap, Commerce resorted to facts available. *Id.* Commerce determined that the financial statements of Indonesian manufacturers on the record could not be used because "[n]one of the suggested financial statements reflect profit only on sales of the general category of products in the foreign country

under investigation." *Id.* After eliminating the Indonesian companies, Commerce concluded that Emirates provided the best available information and that Emirates' profits served as a reasonable profit cap. *Id.*

The record included financial statements from five Indonesian producers: Graha, Ecos, Inocycle, Chitose, and Boston Furniture. Graha's Section A Questionnaire Resp. at Ex. A-27–A-28; Zinus Indonesia's Constructed Value Profit Submission at Exs. 2–5. Chitose was an Indonesian producer of multiple types of furniture for use in homes, schools, and hospitals. IDM at 22; *see* Zinus Indonesia's Constructed Value Profit Submission at Ex. 4. Boston Furniture was an Indonesian producer of wood furniture and special construction or repairs. IDM at 22; *see* Zinus Indonesia's Constructed Value Profit Submission at Ex. 5. Commerce determined that both Chitose and Boston Furniture produced goods not comparable to Zinus Indonesia. IDM at 23. Similarly, mattress manufacture and sales represented only a minority of Inocycle's business, which was predominantly dedicated to the production of fiber. *Id.*; *see* Zinus Indonesia's Constructed Value Profit Submission at Ex. 3. Commerce acknowledged that Graha's financial statements might have reflected the necessary production and sales in Indonesia, but the statements suffered from a lack of contemporaneity and a lack of an accompanying audit, and it was unclear if Graha made sales predominantly to the United States. IDM at 25, n.153.

Plaintiff argues that Commerce should have adopted the profit information of Ecos in determining a profit cap, despite the qualified opinion of the auditor. Pl.'s Br. at 34–35. Commerce disregarded the financial statement of Ecos because it contained a qualified audit. IDM at 22–23. The qualification was due to Ecos not calculating its estimated liabilities for post-employment employee benefits in accordance with Indonesian accounting standards. *Id.*; *see also* Zinus Indonesia's Constructed Value Profit Submission at Ex. 2. Plaintiff contends that Ecos' employment benefit liability was understated and translated into an overstatement of profits. Pl.'s Br. at 33–34; *see also* Zinus Indonesia's Admin. Case Br. at 39–40. Plaintiff argues that if Commerce had used the financial statements of Ecos, it would have calculated a profit cap of 10.78 percent, which should represent the ceiling for Indonesian profit rates. Pl.'s Br. at 34; *see also* Zinus Indonesia's Admin. Case Br. at 42–43. Plaintiff contends that Commerce's calculation of an 18.36 percent profit rate using Emirates' data was unreasonable. Pl.'s Br. at 34–35.

The Court notes that Plaintiff has not provided record support for its assertion that the 10.78 percent profit rate derived from Ecos' data

is more representative of the Indonesian market than the 18.36 percent profit rate derived from Emirates' data, beyond Plaintiff's preference for Ecos' financial report that Commerce determined to be flawed. Commerce expressly disagreed with Zinus Indonesia's contention that the qualified opinion would not impact the calculation of period costs, revenues, expenses, cash flow, profits, or selling expenses, and concluded that because the opinion relates to future obligations, Ecos' qualified financial report could either increase or decrease the current costs of Ecos. IDM at 23. Even if Emirates' profit rate was higher than those of the other companies considered, Commerce identified reasonable grounds for determining that the profit rates of the Indonesian companies did not represent merchandise in the same general category of the subject merchandise.

Based on its review of the financial statements on the record, Commerce determined that Emirates provided the best available option for the profit cap using facts available. *Id.* at 25. The Court observes that Commerce chose between several imperfect options. The Court does not review whether Commerce used the best available information, but rather whether Commerce's determination of the best available information was reasonable. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011). Because Commerce examined numerous financial statements on the record and explained its determination sufficiently, Commerce has satisfied its statutory requirement to apply a profit cap and has articulated a reasonable justification for using Emirates' profit data. The Court sustains Commerce's use of Emirates' Financial Statement for the calculation of constructed value and the profit cap.

IV. Adjustment to Zinus U.S.' Report of Sales Deductions

During the investigation, Brooklyn Bedding alleged that Zinus Indonesia attempted to mask dumping of subject mattresses by shifting sales deductions to non-subject merchandise sold through Best Price Mattress. *See* Brooklyn Bedding's Pre-Prelim. Cmts. at 2–3. Commerce determined that "questions remain as to the commercial practicality of [Zinus Indonesia's] reporting of its sales practices with regard to commissions and certain other sales allowances" and that a price adjustment to U.S. sales was appropriate. IDM at 13–14. Commerce calculated the adjustment by combining the sales deductions, net of discounts, and returns of Zinus U.S. and Best Price Mattress, and dividing the sum by the combined gross sales of Zinus U.S. and Best Price Mattress. *Id.* at 15. Commerce applied the resulting ratios

to the gross unit price of all constructed export price sales. *Id.* Plaintiff contends that Commerce's application of the price adjustment was unlawful and unsupported by the record. Pl.'s Br. at 36–46.

A. Facts Available

Plaintiff argues that Commerce unlawfully relied upon facts available in reaching its determination to apply the adjustment to Zinus U.S.' constructed export price sales prices without satisfying the statutory prerequisites. Pl.'s Br. at 36, 39–41. Plaintiff alleges that Commerce could not have relied on facts available because Zinus Indonesia provided all requested information relating to sales allowances, commissions, and deductions, and Commerce did not advise Zinus Indonesia of any reporting deficiencies prior to the *Final Determination*. *Id.* at 38, 39–41.

Brooklyn Bedding and Defendant contend that Plaintiff claims incorrectly that Commerce relied on facts available in its determination to apply the price adjustment. Brooklyn Bedding's Resp. at 25, 29–30; Def.'s Resp. at 31–32. Brooklyn Bedding and Defendant assert that Commerce instead adjusted its methodology. Brooklyn Bedding's Resp. at 27, 30–34; Def.'s Resp. at 31–32. Brooklyn Bedding argues that Commerce was not required to solicit additional information because Commerce's use of the phrase "questions remain" did not relate to necessary information missing from the record. Brooklyn Bedding's Resp. at 25–26, 29–30.

Commerce may apply "facts available" 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,
>
> (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.

19 U.S.C. § 1677e(a). The statute provides two paths through which Commerce can rely on facts otherwise available. The first is when information is absent from the administrative record, regardless of the reason for the absence. *Id.* § 1677e(a)(1). The second requires a party's act or omission to negatively impact the administrative record

or impede the proceeding. *Id.* § 1677e(a)(2). Before Commerce can rely on facts otherwise available, it must notify the party responsible for submitting the relevant information of the deficiency and afford, to the extent practicable, the party an opportunity to cure the deficiency. *Id.* § 1677m(d).

Plaintiff alleges that Commerce's use of Best Price Mattress' cost data constituted a facts available approach to the assessment of the price adjustment. Pl.'s Br. at 39-41; Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("Pl.'s Reply") at 22-23, ECF Nos. 37, 38. Plaintiff has not identified what facts Commerce relied upon that were not in the administrative record. Commerce issued supplemental questionnaires following the *Preliminary Determination* that included requests for information on commission costs for Zinus Indonesia, Zinus U.S., and Zinus Korea; sales and business records of Zinus U.S. and Best Price Mattress; changes in commissions practices following the *Mattresses from China* investigation; and tracking inventory and country of origin. *See* Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. (Dec. 15, 2020), PR 256, CR 271; Commerce's Post-Prelim. Supp. Questionnaire in-lieu of Verification (Jan. 19, 2021), PR 262; CR 277. Commerce acknowledged that Zinus Indonesia fully responded to the questionnaires but determined that "questions remain as to the commercial practicality of Zinus' reporting of its sales practices with regard to commissions and certain other sales allowances." IDM at 14; *see also* Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. (Dec. 15, 2020), PR 256, CR 271; Zinus Indonesia's Supp. Verification Questionnaire Resp. (Jan 28, 2021), PR 269; CR 278-79, 281.

Commerce identified multiple elements of Zinus Indonesia's responses that it found inconsistent or suspicious:

> First, with respect to [constructed export price] inventory sales, as noted above in Comment 1, it is not clear how Zinus is able to identify which of the non-subject mattresses it sold from inventory earned commissions if it does not know the country of origin of the merchandise sold out of inventory. In our Post-Preliminary Supplemental Questionnaire, we asked Zinus to explain why the company apparently changed its selling practices with respect to commissions on U.S. sales of the subject merchandise though Zinus U.S. since the time of the *Mattresses from China* investigation. In response, Zinus stated that "Zinus U.S.'s customers to whom it paid a commission in the China investigation simply did not purchase Indonesian mattresses during the [period of investigation], and thus did not earn commissions under the terms of the agreements based on sales of

> subject mattresses." However, Zinus did not explain why some of Zinus U.S.'s customers would agree to purchase mattresses of Indonesian origin on which they would earn no commissions when they could receive commissions from Zinus U.S. on mattresses manufactured in other countries.
>
> Moreover, in its response to our Post-Preliminary Supplemental Questionnaire, Zinus also stated that Zinus U.S. sold subject merchandise to corporate customers whose affiliates purchased nonsubject merchandise from both Zinus U.S. and [Best Price Mattress] and earned commissions on these sales. Furthermore, for a particular customer, Zinus stated that, as of March 2019 (i.e., a month before Zinus U.S. began purchasing mattresses from Zinus), it no longer paid commissions to this customer and that Zinus began selling Indonesian mattresses to this customer in November 2019. Zinus again did not explain why it ceased paying commissions to this customer or whether the sourcing of the mattresses had any influence on this decision.
>
> The fact that [Best Price Mattress'] financial statements on the record show disproportionate changes between [Best Price Mattress'] overall sales deductions and its revenues between 2018 and 2019 raises further questions about the reliability of Zinus' reporting with respect to its sales practices regarding the payment of commissions. For these reasons, we find it appropriate to make an adjustment to the prices of Zinus' [constructed export price] sales to ensure that all sales allowances and deductions are accounted for in the margin calculation.

IDM at 14. Commerce did not indicate that it was looking beyond the information on the administrative record to make its determination. In fact, during the investigation, Brooklyn Bedding argued for the application of facts otherwise available before Commerce, Brooklyn Bedding's Admin. Case Br. at 13–17; IDM 10–11, but Commerce declined to adopt this proposal in the *Final Determination*. IDM at 14–15.

The Court observes that Commerce's reference to the phrase "questions remain" did not relate to factual information missing from the record but to "the commercial practicality" of Zinus Indonesia's reporting. IDM at 14. Because no factual information was absent from the record necessary for Commerce to reach its determination to apply an adjustment, Commerce did not unlawfully apply facts otherwise available and was not required to solicit additional information.

B. Reasonableness of Commerce's Adjustment

Plaintiff contends that Commerce's application of the price adjustment was unsupported by the record. Plaintiff argues that Commerce was provided with all of Zinus Indonesia's requested sales and rebate information, but that Commerce disregarded this evidence and concluded without support that Zinus U.S. shifted expenses to Best Price Mattress. Pl.'s Br. at 41–44. Plaintiff challenges Commerce's characterization that Best Price Mattress' financial statements showed disproportionate changes in sales deductions and revenue between 2018 and 2019 and that these changes suggested impropriety. *Id.* at 42. Plaintiff argues that the sales deductions and revenue of Best Price Mattress were irrelevant to the matter before Commerce and should not have been considered in applying the adjustment. *Id*. Even if the information was relevant, Plaintiff contends that it does not call into question the reliability of Zinus Indonesia's reporting. *Id.* at 43–44. Plaintiff further contends that Commerce should alter its calculation to consider only mattress-specific sales information and not company-wide sales information. *Id.* at 45–46.

Brooklyn Bedding and Defendant contend that Commerce's determination to apply a price adjustment was reasonable and supported by evidence, suggesting that Zinus Indonesia shifted costs between Zinus U.S. and Best Price Mattress in order to lower Zinus Indonesia's dumping margin. Brooklyn Bedding's Resp. at 27–36; Def.'s Resp. at 27–30. Brooklyn Bedding argues that Commerce has broad discretion in imposing adjustments and that Commerce acted reasonably based on the record evidence. Brooklyn Bedding's Resp. at 27, 30–34. Defendant argues that the record reflected suspicious changes in Zinus U.S. and Best Price Mattress' commissions policy and payments between the *Mattresses from China* investigation and the period of investigation. Def.'s Resp. at 28–29. Defendant asserts that Zinus Indonesia's claimed inability to track country of origin is inconsistent with Zinus Indonesia's claim that commissions were only paid on non-subject merchandise. Def.'s Resp. at 31. Brooklyn Bedding and Defendant also contend that Plaintiff's implication that its customers agreed to purchase subject mattresses on which no commissions were offered when those customers could have earned commissions on non-subject mattresses is commercially impractical. *Id.* at 29–30; *see* Brooklyn Bedding's Resp. at 27. Defendant further argues that Commerce did not disregard certain sales data but determined that the data did not reflect a proper allocation based on other record evidence. Def.'s Resp. at 32–33.

Brooklyn Bedding and Defendant assert that Commerce acted within its available discretion in using company-wide data, rather

than mattress-specific data, and that the use of company-wide data was reasonable. Brooklyn Bedding's Resp. at 34–36; Def.'s Resp. at 33–34. Defendant asserts that Plaintiff's suggestion to use only mattress-specific sales is not practical because Commerce used the total sales deductions and sales of both Zinus U.S. and Best Price Mattress in order to put the companies in an equivalent position. Def.'s Resp. at 33. Defendant contends that artificially reducing the denominator of the ratio to only Zinus U.S.' sales of subject mattresses would distort the allocation. *Id.*

In calculating constructed export price, Commerce makes a deduction of costs and expenses related to selling subject merchandise in the United States. 19 U.S.C. § 1677a(d)(1). The statute is silent as to how Commerce is to calculate those expenses and Commerce has discretion in developing methodologies for administering antidumping laws. *See Vicentin S.A.I.C. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1227, 1238 (2020). The methodology adopted by Commerce must be reasonable and not distortive, but Commerce need not exclude all non-subject merchandise. *United States Steel Corp. v. United States*, 34 CIT 252, 257, 712 F. Supp. 2d 1330, 1337 (2010); *Acciai Speciali Terni S.p.A. v. United States*, 25 CIT 245, 277–78, 142 F. Supp. 2d 969, 1000–01 (2001); *see also* 19 C.F.R. § 351.401(g)(4).

The adjustment methodology adopted by Commerce combined Zinus U.S.' and Best Price Mattress' 2019 sales deductions, net of discounts, and returns,and divided the sum by the companies' combined gross sales. IDM at 15; Final Sales Calculation Mem. at 5–6, Att. 2, PR 287, CR 296. The resulting ratio was applied to all gross sales made by Zinus U.S. IDM at 15; Final Sales Calculation Mem. at 5–6. This methodology was designed to "tak[e] into consideration the sales deduction experience of both [Zinus U.S. and Best Price Mattress] during the [period of investigation]." IDM at 15.

Commerce agreed with Brooklyn Bedding that a price adjustment was appropriate because evidence showed that Zinus Indonesia was:

> masking dumping of Indonesian mattresses during the [period of investigation] by shifting sales deductions that would have been incurred by Zinus U.S. for sales of Indonesian mattresses to sales of non-subject merchandise made through a different affiliated reseller, [Best Price Mattress], the U.S. reseller at issue in the *Mattresses from China* investigation.

IDM at 13; *see also* Brooklyn Bedding's Post-Prelim. Cmts. (Nov. 19, 2020) at 7–9, PR 240, CR 265; Brooklyn Bedding's Admin. Case Br. at 7–11. Commerce's discussion of this issue focused on reported commissions paid by Zinus U.S. and Best Price Mattress. IDM at 13–14.

During the *Mattresses from China* investigation, commissions were paid on the sales of mattresses to certain United States customers. *See* Brooklyn Bedding's Post-Prelim. Cmts. at 7–9; Zinus Indonesia's Resp. Brooklyn Bedding's Post-Prelim. Cmts. (Nov. 30, 2020) at 4–6, PR 243, CR 266; *see also* Zinus Indonesia's Sub. Zinus Xiamen's Proprietary Info. *Mattresses from China* Investigation (Oct. 14, 2020), PR 212, CR 222–27, 247. During the period of investigation, only Zinus Korea, Zinus U.S., and Keetsa made sales of subject mattresses to the United States, though Best Price Mattress continued to sell other mattresses produced by Zinus affiliates. Zinus Indonesia's Section A Questionnaire Resp. at A-1-A-2, A8-A-9. Zinus Indonesia claimed that commissions were paid only on non-subject mattresses during the period of investigation. *See* Zinus Indonesia's Resp. Brooklyn Bedding's Post-Prelim. Cmts. at 5–6. In response to Commerce's request to explain the change in commissions policy between the *Mattresses from China* investigation, which covered January through June 2018, and the period of investigation, Zinus Indonesia stated that "Zinus U.S.' customers to whom it paid a commission in the China investigation simply did not purchase Indonesian mattresses during the [period of investigation], and thus did not earn commissions under the terms of the agreements based on sales of subject mattresses." IDM at 13–14; Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 4. Commerce also noted one instance in which Zinus U.S. ceased paying commissions without explanation to a particular customer shortly before that customer began to purchase subject mattresses. IDM at 14; Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 5.

Corresponding to the apparent change in commissions policy, Commerce observed disproportionate changes between Best Price Mattress' sales deductions and revenues between 2018 and 2019. IDM at 14. Commerce noted that these discrepancies called into question Zinus Indonesia's reporting with regard to Zinus Indonesia's sales practices. *Id.* (citing Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 11). Plaintiff argues that Best Price Mattress' sales information for 2018 and 2019 was irrelevant to Commerce's considerations because Best Price Mattress was not involved in the manufacture and sale of the subject mattresses. Pl.'s Br. at 42; Pl.'s Reply at 21–23. Best Price Mattress, like Zinus U.S., was wholly-owned by Zinus Korea and was involved in the selling of mattresses to customers in the United States. *See* IDM at 13–14; Zinus Indonesia's Section A Questionnaire Resp. at A-9, Ex. A-3. Because Zinus U.S. and Best Price Mattress shared a common parent and were involved in similar or identical sales of mattresses in the United States under the direc-

tion of that parent, it was reasonable for Commerce to include Best Price Mattress in its consideration of whether Zinus U.S. was shifting costs in order to mask dumping.

Plaintiff contends that even if Commerce's consideration of Best Price Mattress was appropriate, the record did not support Commerce's conclusion that costs were being shifted. Pl.'s Br. at 42–44. Commerce relied on information contained in a chart titled "Total Sales of [Best Price Mattress] by Product Group" included in Zinus Indonesia's Post-Preliminary Supplemental Questionnaire Response. IDM at 14; Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 11. The chart reflected a sizable disparity between the change in total sales claimed by Best Price Mattress between 2018 and 2019 and the change in sales deductions during the same period. IDM at 14; *see* Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 11. Citing to Zinus Indonesia's Ministerial Error Comments, Plaintiff alleges that Commerce mischaracterized the chart data in light of other information on the record. Pl.'s Br. at 44 (citing Zinus Indonesia's Ministerial Error Cmts. (Mar. 30, 2021), PR 293, CR 299).

The record included two relevant sources of Best Price Mattress' financial information in 2018 and 2019: Best Price Mattress' June 2018 Balance Sheet and Best Price Mattress' 2019 Financial Statement. Zinus Indonesia's Supp. Section A Questionnaire Resp. at Ex. SA-4c ("Best Price Mattress' 2019 Financial Statement"), PR 165, CR 154; Zinus Indonesia's Sub. Zinus Xiamen's Proprietary Info. *Mattresses from China* Investigation at Att. 1, Ex. A-10m ("Best Price Mattress' 2018 Balance Sheet"). Plaintiff contends that a review of these documents showed that Best Price Mattress' commission payments fell as a percentage of both merchandise sales and total revenue between 2018 and 2019, eliminating Commerce's reasoning for applying the price adjustment. Pl.'s Br. at 43–44; *see also* Zinus Indonesia's Ministerial Error Cmts. at 11–15.

The Court observes that Commerce's determination regarding the inconsistencies in Best Price Mattress' reported sales deductions and revenues between 2018 and 2019 was based on Zinus Indonesia's submission in direct response to Commerce's request for information regarding the change in Best Price Mattress' sales between 2018 and 2019. *See* IDM at 14; Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 10–11. The Total Sales of Best Price Mattress by Product Group chart included in Zinus Indonesia's response to Commerce showed a significant change between the period of investigation and the prior year. IDM at 14; Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 11. Commerce did not discuss the other sources of Best Price Mattress' financial information available on the

record, but those sources covered different durations of time and treated "sales deductions" differently than the Total Sales of Best Price Mattress by Product Group chart. *Compare* Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at 11, *with* Best Price Mattress' 2018 Balance Sheet, *and* Best Price Mattress' 2019 Financial Statement. Because Commerce's decision to apply a price adjustment was based on record information provided by Zinus Indonesia in response to Commerce's inquiry into Best Price Mattress' 2018 and 2019 sales experience, the Court concludes that Commerce's determination was supported by substantial record evidence.

Plaintiff argues that if Commerce's application of the price adjustment was correct, it should still be required to revise its calculation to consider only mattress-specific sales and not company-wide sales. Pl.'s Br. at 45–46. In Commerce's calculation, the adjustment to U.S. sales deduction was represented as the variable DEDUCT and served as the denominator in the ratio applied to the gross unit price of all sales made by Zinus U.S. Final Sales Calculation Mem. at 2, 6, Att. 2; *see* IDM at 15. The calculation of the DEDUCT variable incorporated total sales by Zinus U.S. and Best Price Mattress, including non-mattress merchandise. IDM at 15; Final Sales Calculation Mem. at Att. 2.

Commerce has discretion in the methodology it adopts in calculating adjustments under 19 U.S.C. § 1677a(d) but the chosen methodology must be reasonable. *United States Steel Corp.*, 34 CIT at 257, 712 F. Supp. 2d at 1337. Commerce made an adjustment with a goal of "ensur[ing] that all sales allowances and deductions [were] accounted for in the margin calculation." IDM at 14. Commerce expressly rejected a methodology proposed by Brooklyn Bedding because it used the sales deductions of only one company. *Id.* at 14–15. Commerce instead "calculated a different adjustment that [took] into consideration the sales deduction experiences of both [Zinus U.S. and Best Price Mattress] during the [period of investigation]." *Id.* at 15.

Selling expenses, such as commissions, are costs incurred by a company as a whole and are typically not distinguishable to a singular product. In fact, though the 2018 and 2019 financial statements provided by Zinus Indonesia for Best Price Mattress treated commissions differently, neither separated commissions paid or other sales expenses by type of merchandise. *See* Best Price Mattress' 2018 Balance Sheet; Best Price Mattress' 2019 Financial Statement; Zinus Indonesia's Post-Prelim. Supp. Questionnaire Resp. at Ex. SQ-2. Commerce's methodology used the combined sales deductions, net of discounts, and returns of Zinus U.S. and Best Price Mattress as its numerator. IDM at 15. Reducing the denominator to consider only

sales related to mattresses would create a distortion to the allocation. The Court concludes that Commerce's inclusion of Zinus U.S.' and Best Price Mattress' company-wide sales was reasonable and supported by substantial evidence. The Court sustains Commerce's price adjustment.

V. Zinus Korea's Selling Expenses

Brooklyn Bedding contends that Commerce failed to consider record evidence of Zinus Korea's selling activities and argues for an adjustment to U.S. price to account for Zinus Korea's selling expenses. Brooklyn Bedding's Mem. Points Law Fact Supp. R. 56.2 Mot. J. Agency R. ("Brooklyn Bedding's Br.") at 8–22, ECF No. 24, 25. Zinus Indonesia and Defendant argue that Commerce properly limited the selling expenses attributable to Zinus Korea's actual selling expenses. Def.'s Resp. at 48–52; Pl.'s Resp. Br. Opp'n Brooklyn Bedding's Mot. J. Agency R. ("Pl.'s Resp.") at 13–28, ECF Nos. 31, 32.

Commerce considered Zinus Korea to be an affiliate of Zinus Indonesia and determined that Commerce's practice is to not view price markups between affiliates as commissions and to not deduct those adjustments from U.S. price. IDM at 32; *see also Oil Country Tubular Goods from Mexico*, 64 Fed. Reg. 13,962 (Dep't of Commerce Mar. 23, 1999) (final results of antidumping duty admin. review) and accompanying Issues and Decision Mem. at cmt. 4. Commerce determined that it is Commerce's practice to deduct only the actual expenses incurred by the affiliate. IDM at 32. Commerce must consistently apply methodologies across administrative reviews and provide a reasoned explanation for deviating from its past practice. *Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1447 (2005).

Commerce stated that its calculation included three categories of selling expenses for Zinus Korea: advertising expenses, rebates, and bank charges. IDM at 32 n.213. Commerce explained that this information was solicited by Commerce and was considered "consistent with respect to [Zinus Korea's] reportedly limited role as an invoicing party in Zinus' U.S. sales process." *Id.* at 32; *see* Commerce's Initial Section C Questionnaire at C-21, PR 67. Brooklyn Bedding contends that Commerce failed to consider record evidence demonstrating that Zinus Korea had more than a minimal role in the selling of subject mattresses. Brooklyn Bedding's Br. 12–16. Commerce's determination is not supported by substantial evidence when Commerce fails to consider and address record evidence that clearly supports an alternative result. *See SeAH Steel VINA Corp. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1316, 1336 (2016).

Commerce stated that Zinus Indonesia reported Zinus Korea's actual expenses incurred on behalf of U.S. sales in the U.S. sales database, but Commerce did not cite any record evidence to support this statement. IDM at 32. Commerce stated that Zinus Indonesia reported that Zinus Korea's general and administrative expenses were an element of Zinus Indonesia's expenses, citing Zinus Indonesia's questionnaire response at SD-25 and exhibit SD-25. IDM at 32. Commerce determined that "the reporting of such expenses [was] also consistent with respect to Zinus [Korea]'s reportedly limited role as an invoicing party in Zinus' U.S. sales process," without citing any evidence to support this statement. *Id.* Notably, the Court observes that Commerce did not provide an explanation or cite record evidence to support its determination that Zinus Korea had a limited role as an invoicing party in Zinus U.S.' sales process.

Brooklyn Bedding contends that Commerce ignored potentially contrary evidence on the record showing that Zinus Korea engaged in more significant selling activities than the preparation of invoices. Brooklyn Bedding's Br. at 16–17. During the administrative proceeding, Brooklyn Bedding identified several facts within the record supporting its contention. For example, Brooklyn Bedding noted that Zinus Korea and Zinus U.S. shared a common senior official. Brooklyn Bedding's Admin. Case Br. at 23–38; *see also* Zinus Indonesia's Section A Questionnaire Resp. at Ex. A-6. In a chart of office locations provided to Commerce, the functions of both Zinus Korea and Zinus U.S. were identified as "Sale and Marketing." Brooklyn Bedding's Admin. Case Br. at 23; Zinus Indonesia's Section A Questionnaire Resp. at Ex. A-4. In its Section A Questionnaire Resp., Zinus Indonesia advised Commerce that "[w]ith respect to business relationships among the companies, [Zinus Korea] as the parent company, and its wholly/majority owned subsidiaries, closely coordinate[d] with one another to manage global manufacturing, operational, and sales activities." Brooklyn Bedding's Admin. Case Br. at 24; Zinus Indonesia's Section A Questionnaire Resp. at Ex. A-11. Zinus Indonesia also asserted in a response to Commerce "[a]gain, as Zinus has made clear throughout its responses . . . the Zinus entities actually making the U.S. sales to unaffiliated customers reported in the sales database are [Zinus Korea] or Zinus U.S." Brooklyn Bedding's Admin. Case Br. at 24; Zinus Indonesia's 8/20 Rebuttal Cmts. at 5, PR 166, CR 158.

Brooklyn Bedding also suggests that record evidence showed that Zinus Korea was directly responsible for handling sales to unaffiliated customers of mattresses purchased from Zinus Indonesia. Brooklyn Bedding's Br. at 14–16; *see* Zinus Indonesia's Section A Questionnaire Resp. at Exs. A-7b (purchase order from customer to

Zinus Korea), A-9 (master sales agreement); Zinus Indonesia's Supp. Section A Questionnaire Resp. at Ex. SA-8A (purchase order from customer to Zinus Korea and purchase order from Zinus Korea to Zinus Indonesia). Commerce acknowledged Brooklyn Bedding's arguments in the final determination but did not discuss or consider any of the identified facts or arguments. *See* IDM at 30–32.

Commerce determined that Zinus Indonesia provided all requested information relating to Zinus Korea's selling expenses, but Commerce failed to provide sufficient explanations or citations to record evidence to support Commerce's determination that Zinus Korea had a minimal role in the U.S. sales of mattresses. Moreover, the Court agrees with Defendant-Intervenors that Commerce did not discuss or consider record evidence suggesting that Zinus Korea's role in the sale of the subject mattress was potentially more significant than the mere processing of invoices. Because Commerce did not support its statements with sufficient citations to record evidence and did not consider potentially contrary record evidence concerning Zinus Korea's selling activities, the Court concludes that Commerce's determinations regarding Zinus Korea's selling activities and adjustments to U.S. price to account for Zinus Korea's selling expenses were not supported by substantial evidence.

Brooklyn Bedding also argues that Commerce failed to apply appropriate accounting rules to Zinus Korea's financial information. Brooklyn Bedding's Br. at 17–19. Commerce normally calculates costs and expenses using the records of the party if those records are maintained in accordance with GAAP. *See* 19 U.S.C. § 1677b(f)(1); *Husteel Co. v. United States*, 45 CIT __, __, 520 F. Supp. 3d 1296, 1306 (2021). Commerce may depart from this practice if it determines that the GAAP-compliant records do not "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1); *Husteel Co.*, 45 CIT at __, 520 F. Supp. 3d at 1306.

The Korean-version International Financial Reporting Standards ("K-IFRS") Part 1115 provides:

> An entity is an agent if the entity's performance obligation is to arrange for the provision of the specified good or service by another party. . . . When (or as) an entity that is an agent satisfies a performance obligation, the entity recognises revenue in the amount of any fee or commission to which it expects to be entitled in exchange for arranging for the specified goods or services to be provided by the other party. An entity's fee or commission might be the net amount of consideration that the

> entity retains after paying the other party the consideration received in exchange for the goods or services to be provided by that party.

K-IFRS, Part 1115; Zinus Indonesia's Section C Supp. Resp. at SC2–5, PR 199, CR 213. Brooklyn Bedding contends that under K-IFRS, Zinus Korea qualified as an agent and that Commerce was obligated to include commissions received for its role in selling the subject mattresses in calculating selling expenses. Brooklyn Bedding's Br. at 18–19. Specifically, Brooklyn Bedding contends that any markup to the price of mattresses sold by Zinus Korea that would normally be excluded from Zinus Korea's actual expenses should be included. *Id.*

Commerce did not address Brooklyn Bedding's arguments on the application of K-IFRS to Zinus Korea's selling expenses and it is unclear how Commerce accounted for costs considered "commissions and fees" in Zinus Korea's reporting. Because Commerce did not provide any explanation, the Court remands this issue to Commerce for further consideration of record evidence or explanation regarding the extent of Zinus Korea's involvement in the sale of subject mattresses and the application of K-IFRS.

VI. GTA Import Data Pursuant to the Transactions Disregarded Rule

When calculating cost of production for purposes of normal value, Commerce may adjust prices between affiliates under the "transactions disregarded" rule, which permits prices of inputs from affiliated suppliers "if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." 19 U.S.C. § 1677b(f)(2). Commerce's practice is to adjust the price of the transferred input or service to reflect the market price. *See Rebar Trade Action Coal. v. United States*, 42 CIT __, __, 337 F. Supp. 3d 1251, 1259 (2018). In order to determine "the amount usually reflected in sales of merchandise under consideration in the market under consideration," Commerce looks to any purchases of the same inputs or services by the respondent from an unaffiliated supplier and any sales by the supplier of the same inputs or services to an unaffiliated buyer. *See Unicatch Indus. Co. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1229, 1248–49 (2021); *Diamond Sawblades Mfrs. Coal. v. United States*, 38 CIT __, __, 2014 WL 5463307 at *2 n.4 (Oct. 29, 2014). If such transactions are not available, the statute provides that Commerce may consider "information available as to what the

amount would have been if the transaction had occurred between persons who are not affiliated." 19 U.S.C. § 1677b(f)(2).

During the period of investigation, Zinus Indonesia received inputs from affiliated suppliers in China. IDM at 16–17; *see* Final Cost Calculation Mem. at Att. 1a. The majority of these inputs were received only from affiliated suppliers. IDM at 16–17; *see* Final Cost Calculation Mem. at Att. 1a; Zinus Indonesia's Supp. Section D Resp. at Ex. SD-8 (schedule of inputs purchased from affiliated suppliers by item code). In the *Preliminary Determination*, for those inputs that Zinus Indonesia received from both affiliated and unaffiliated suppliers, Commerce analyzed the prices paid for the same inputs from the unaffiliated suppliers. *See* Prelim. Cost Calculation Mem. at 1–2. Commerce continued this approach in the *Final Determination*. *See* Final Cost Calculation Mem. at 1–2.

Commerce was faced with a challenge in analyzing the remaining transactions that were only sourced from affiliates in China. Because China is a non-market economy, Commerce stated that it was not able to consider the affiliated suppliers' cost of production. IDM at 17. In order to make a determination based on information available, Commerce solicited surrogate input price information. *Id.* Commerce determined that GTA import data was the most reliable information for Commerce's purposes because it was "readily available and reasonably specific to the voluminous number of affiliated [non-market economy] inputs." *Id.* Commerce requested GTA data from countries considered economically similar to China: Brazil, Malaysia, Mexico, Romania, Russia, and Turkey. *Id.* At Commerce's request, Zinus Indonesia also placed GTA data for Indonesia on the record. *Id.*; Zinus Indonesia's Section D Supp. Resp. at SD6–SD13, Exs. SD-8, SD-9, PR 196, CR 204–05. In the *Preliminary Determination*, Commerce calculated and applied an average of the market prices of GTA import data for Brazil, Malaysia, Mexico, Romania, Russia, and Turkey. IDM at 17–18; Prelim. Cost Calculation Mem. at 1–2. In the *Final Determination*, Commerce changed its approach and considered only GTA data from Indonesia. IDM at 18.

Commerce explained its change in approach by citing 19 U.S.C. § 1677b(f)(2), which states that "[a] transaction . . . between affiliated persons may be disregarded if ...the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." *Id.* (quoting 19 U.S.C. § 1677b(f)(2)). Commerce interpreted this language to direct it to consider only the market under investigation—Indonesia—when testing an affiliated supplier's price against a market price. IDM at 18. Brooklyn Bedding argues that

Commerce's determination under the Transactions Disregarded Rule is not in accordance with the law and not supported by substantial evidence. Brooklyn Bedding's Br. at 27–37.

Brooklyn Bedding draws a distinction between the two sentences of 19 U.S.C. § 1677b(f)(2). *Id.* The first sentence reads "[a] transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, *the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration*." 19 U.S.C. § 1677b(f)(2) (emphasis added). The second sentence reads: "[i]f a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, *the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated*." *Id.* (emphasis added). Brooklyn Bedding argues that the first sentence relates to situations in which the considered inputs were provided by both affiliated and unaffiliated suppliers and "instructs Commerce to use the values of 'sales of merchandise under consideration in the market under consideration' when such data is available on the record." Brooklyn Bedding's Br. at 29. The second sentence concerns situations in which unaffiliated transactions are not available and "instructs Commerce to determine a market price based on 'the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.'" *Id.* Brooklyn Bedding contends that the phrase "in the market under consideration" used in the first sentence should not be read to limit the "information available" under the second sentence. *Id.* at 30.

Brooklyn Bedding argues that applying Commerce's limitation to only the country under investigation was inconsistent with prior investigations in which Commerce adopted a broader reading of "information available," *see Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea*, 86 Fed. Reg. 35,060 (Dep't of Commerce July 1, 2021) (final results of antidumping duty admin. review: 2018–2019) and accompanying Issues and Decisions Mem. at cmt. 7 (interpreting "information available" to include "an affiliate's total cost of providing the service [or input]"), and in which it considered costs of production for affiliates located in a different country from the respondent, *see Stainless Steel Sheet and Strip in Coils from Mexico*, 70 Fed. Reg. 3677 (Dep't of Commerce Jan. 26, 2005) (final results of antidumping duty admin. review) and accompanying Issues and Decisions Mem. at cmt. 14 (using cost of production of a United States affiliate to estimate market value transactions

with a Mexican respondent in the context of the major input rule, 19 U.S.C. § 1677b(f)(3)). Brooklyn Bedding's Br. at 30. Brooklyn Bedding contends further that Commerce's approach in this case was inconsistent with its practice of relying on a supplier's cost of production when unaffiliated transaction data was not available. *Id.* at 31–32 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 62 Fed. Reg. 2081 (Dep't of Commerce Jan. 15, 1997) (final results of antidumping duty admin. review) and accompanying Issues and Decisions Mem. at sec. d, cmt. 1).

Plaintiff and Defendant disagree with Brooklyn Bedding's proposed bifurcation of the statutory language. Pl.'s Resp. at 32; Def.'s Resp. at 57–59. Plaintiff argues for an interpretation of the statute in which the first and second sentences are read together to allow "Commerce to craft a surrogate price based on information available from the same market, in the absence of identical inputs purchased in that market from unaffiliated suppliers." Pl.'s Resp. at 32. Plaintiff contends "that the statute directs [Commerce] to assess whether the input purchases reflected market value in Indonesia." *Id.* at 32–33. Plaintiff asserts that Commerce has previously read 19 U.S.C. § 1677b(f)(2) to create a preference for the price that a respondent paid to an unaffiliated supplier. *Id.* at 33 (citing *Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 Fed. Reg. 73,196 (Dep't of Commerce Dec. 29, 1999) (notice of final determination of sales at less than fair value); *Low Enriched Uranium from France*, 70 Fed. Reg. 54,359 (Dep't of Commerce Sept. 14, 2005) (notice of final results of antidumping duty admin. review) and accompanying Issues and Decisions Mem. at cmt. 3). Defendant argues that reading "in the market under consideration" into the second sentence of the provision allows Commerce to determine the amounts paid by the manufacturer of the subject merchandise and furthers the goal of the provision to allow Commerce to determine the manufacturing and cost experience of the respondent to determine if dumping has occurred. Def.'s Resp. at 58–59.

This court has considered the Transactions Disregarded Rule as follows:

> Commerce has expressed a preference for how to establish market value. First, it looks at whether respondent purchased the input from an unaffiliated supplier; if unavailable, it looks to sales of the input between an affiliate supplier and an unaffiliated party, and as a final resort, to a reasonable source for market value available on the record.

Rebar Trade Action Coal. v. United States, 43 CIT __, __, 398 F. Supp. 3d 1359, 1372 (2019) (internal citation omitted). The Court has specified that when resorting to a "reasonable source for market value," if "a market price is not available, Commerce has developed a consistent and predictable approach whereby it may use an affiliate's total cost of providing the [good or service] as information available for a market price." *Best Mattresses Int'l Co. Ltd. v. United States* ("*Best Mattresses*"), 47 CIT __,__ , 2023 WL 2198803, at *21 (2023) (quoting *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea*, 86 Fed. Reg. 35,060 and accompanying Issues and Decisions Mem. at cmt. 24). The Court has explained that the phrase "market under consideration" is purposefully broad to allow Commerce to choose a market that allows for a "reasonable source for market value" to confirm that the affiliated prices reflect arm's length transactions. *Id.* at __ , 2023 WL 2198803, at *21 (citing *Rebar Trade Action Coal.*, 43 CIT at __, 398 F. Supp. 3d at 1372 and *Diamond Sawblades Mfrs. Coal.*, 38 CIT at __, 2014 WL 5463307, at *2 n.2). Here, Commerce determined that "the statute indicates that the item being tested should reflect a market price in the country under consideration, which is Indonesia in the instant case." IDM at 18. The Court concludes that Commerce's interpretation of "market under consideration" as only the market under investigation is unreasonably narrow and not in accordance with the law. Similar to *Best Mattresses*, in which the Court noted that the "holding does not prevent Commerce from selecting Cambodia as the 'market under consideration' for purposes of the Transactions Disregarded Rule on remand," *Best Mattresses*, 47 CIT at__ , 2023 WL 2198803, at *21, here Commerce might choose Indonesia as the "market under consideration" on remand after the agency explains its reasoning.

The Court concludes that Commerce's determination regarding the Transactions Disregarded Rule was not in accordance with the law or supported by substantial evidence, and remands for Commerce to provide further explanation or to reconsider whether Commerce's selection of Indonesia constituted a reasonable method to confirm that the affiliated prices reflect arm's length transactions under 19 U.S.C. § 1677b(f)(2).

VII. Sales Reconciliation

Brooklyn Bedding argues that Commerce erred in not requiring Zinus Indonesia to submit a sales reconciliation of its reported U.S. sales and its audited financial statement. Brooklyn Bedding's Br. at 33–42. Plaintiff and Defendant argue that Brooklyn Bedding waived

this argument by failing to raise it in the administrative case brief. Pl.'s Resp. at 38; Def.'s Resp. at 61–62.

Commerce issued to Zinus Indonesia its standard antidumping questionnaire, which requested that Zinus Indonesia provide "a reconciliation of the sales reported in your U.S. sales databases to the total sales listed in your financial statements (profit and loss/income statement)." Commerce's Initial Section C Questionnaire at C-4. In response, Zinus Indonesia provided only reconciliations for Zinus Korea and Zinus U.S. Zinus Indonesia's Section C Questionnaire Resp. at C-7, Exs. C-2A, C-2B, PR 119–20, CR 117–20. During the investigation, Brooklyn Bedding raised the lack of Zinus Indonesia's U.S. sales reconciliation multiple times. Brooklyn Bedding's Deficiency Cmts. re Zinus Section C Questionnaire Resp. at 3–5, 26, PR 147, CR 130–31; Brooklyn Bedding's Resp. Zinus Cmts. at 4–5, PR 170, CR 161; Brooklyn Bedding's Post-Prelim. Cmts. at 11–13. Brooklyn Bedding did not raise this argument in its administrative case brief. *See* Brooklyn Bedding's Admin. Case Br.

A party is generally prohibited from raising arguments with the Court that were not first raised with the administrative agency. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Dillinger France S.A. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1349, 1371–72 (2018); *see also* 28 U.S.C. § 2637(d) ("In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."). Commerce's regulations provide parties to an antidumping investigation an opportunity to raise arguments through administrative case briefs. 19 C.F.R. § 351.309. The regulation is clear that administrative case briefs "must present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." *Id.* § 351.309(c)(2).

In its Reply Brief filed in this case on appeal, Brooklyn Bedding argues that the futility exception should excuse its failure to exhaust administrative remedies. Brooklyn Bedding's Reply Br. ("Brooklyn Bedding's Reply") at 16–20, ECF No. 35, 36. The futility exception is narrow and "requires a party to demonstrate that exhaustion would require it to go through obviously useless motions in order to preserve its rights." *Zhongce Rubber Grp. Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1276, 1279 (2018). When additional comment would serve no purpose, exhaustion is not required. Brooklyn Bedding raised the issue of Zinus Indonesia's U.S. sales reconciliation multiple times throughout the administrative process and Commerce was put

on notice of the issue. Brooklyn Bedding also notes that briefing before Commerce was completed after verification and 30 days before the statutory deadline for Commerce's final determination. Brooklyn Bedding's Reply at 16, 19. Nonetheless, Brooklyn Bedding could have raised the issue in its administrative case brief, the Court is not convinced that doing so would have been a fruitless endeavor, and the Court concludes that Brooklyn Bedding has not met the stringent requirements to apply the narrow exception to administrative exhaustion. Because Brooklyn Bedding failed to raise its argument in its administrative case brief, Brooklyn Bedding's arguments are waived in this Court by the failure to exhaust its administrative remedies.

Defendant contends that even if the issue were not waived, the argument is unconvincing. Def.'s Resp. at 62–63. Brooklyn Bedding argues that in not requiring Zinus Indonesia to submit a U.S. sales reconciliation, Commerce broke from a "longstanding practice" of requiring named parties to submit a reconciliation of U.S. sales. Brooklyn Bedding's Br. at 37. It is true that Commerce must provide consistent treatment across investigations or provide an explanation for deviating from established practice. *See Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004). Commerce routinely requests sales reconciliations in its antidumping questionnaire. *See* Commerce's Initial Section C Questionnaire at C-4. Brooklyn Bedding has not demonstrated that Commerce has an established practice of requiring a named party to provide a reconciliation when alternate reconciliations are provided by affiliates responsible for selling the subject merchandise in the United States. In this case, Zinus Indonesia advised Commerce that sales of the subject mattresses within the United States were performed by Zinus Korea and Zinus U.S. *See* Zinus Indonesia's Section C Questionnaire Resp. at C-7; *see also* Zinus Indonesia's 8/20 Rebuttal Cmts. at 5. Zinus Indonesia provided U.S. sales reconciliations for these entities. Zinus Indonesia's Section C Questionnaire Resp. at Exs. C-2A, C-2B. These reconciliations provided the information requested by Commerce, "a reconciliation of the sales reported in your U.S. sales databases to the total sales listed in your financial statements (profit and loss/income statement)." *See* Commerce's Initial Section C Questionnaire at C-4. Zinus Indonesia notes that in the *Mattresses from China* investigation, similar to this case, Commerce was satisfied with only reconciliations from Zinus Korea and Zinus U.S. and did not require a separate reconciliation from the named respondent. Pl.'s Resp. at 39; *see also* Zinus Indonesia's Sub. Zinus Xiamen's Proprietary Info. *Mattresses from China* Investigation.

Aside from the administrative exhaustion issue, the Court is not convinced that Commerce deviated from its established practice in not requiring Zinus Indonesia to provide a financial reconciliation. Commerce was reasonable in not requiring Zinus Indonesia to provide a reconciliation of its U.S. sales when reconciliations were provided for Zinus Korea and Zinus U.S. that supplied the information sought by Commerce. Nonetheless, the Court holds that Commerce's determination to not require Zinus Indonesia to file a U.S. sales reconciliation is not properly before the Court due to Brooklyn Bedding's waiver of the issue through its failure to exhaust its administrative remedies.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff's motion for judgment on the agency record is granted in part and remanded in part; and it is further

ORDERED that Brooklyn Bedding's motion for judgment on the agency record is granted in part and remanded in part; and it is further

ORDERED that the Court sustains Commerce's use of a quarterly ratios methodology to determine the quantity of subject mattresses sold; and it is further

ORDERED that the Court sustains Commerce's determination to use Emirates Sleep Systems Private's financial information in calculating constructed value; and it is further

ORDERED that the Court sustains Commerce's calculation and application of a profit cap; and it is further

ORDERED that the Court sustains Commerce's adjustment to reported sales deductions of Zinus U.S.; and it is further

ORDERED that the *Final Determination* is remanded to Commerce to reconsider consistent with this opinion the inclusion of mattresses in-transit from Indonesia at the end of the period of investigation; and it is further

ORDERED that the *Final Determination* is remanded to Commerce to reconsider consistent with this opinion Commerce's adjustments to the selling expenses of Zinus Korea to account for actual selling expenses; and it is further

ORDERED that the *Final Determination* is remanded to Commerce to reconsider consistent with this opinion Commerce's application of the Transactions Disregarded Rule; and it is further

ORDERED that that this case shall proceed according to the following schedule:

(1) Commerce shall file its remand determination on or before May 19, 2023;

(2) Commerce shall file the administrative record on or before June 2, 2023;

(3) Comments in opposition to the remand determination shall be filed on or before July 18, 2023;
(4) Comments in support of the remand determination shall be filed on or before August 17, 2023; and
(5) The joint appendix shall be filed on or before August 31, 2023.

Dated: March 20, 2023
New York, New York

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

Slip Op. 23–40

REPWIRE LLC, Plaintiff, and JIN TIONG ELECTRICAL MATERIALS MANUFACTURER PTE, LTD, Consolidated Plaintiff, v. UNITED STATES, Defendant, SOUTHWIRE COMPANY LLC, AND ENCORE WIRE CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00016

[Sustaining the final results of the administrative review by the U.S. Department of Commerce in the antidumping duty investigation of aluminum wire and cable from the People's Republic of China.]

Dated: March 20, 2023

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiff Repwire LLC and Consolidated Plaintiff Jin Tiong Electrical Materials Manufacturer PTE, Ltd.

Reginald T. Blades, Jr., Assistant Director, and *Eric J. Singley*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of Counsel was *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Sydney H. Mintzer, Mayer Brown LLP, of Washington, D.C., for Defendant-Intervenor Southwire Company, LLC.

Jack A. Levy, *James E. Ransdell, IV*, and *Myles S. Getlan*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor Encore Wire Corporation.

OPINION AND ORDER

Choe-Groves, Judge:

This action concerns the import of aluminum wire and cable from the People's Republic of China ("China"), subject to the administrative determination by the U.S. Department of Commerce ("Commerce") in *Aluminum Wire and Cable from the People's Republic of China* ("*Final Results*"), 86 Fed. Reg. 73,251 (Dep't of Commerce Dec. 27, 2021) (final results of antidumping duty admin. review; 2019–2020); *see also* Issues and Decision Mem. for the Final Results of Antidumping Duty Administrative Review of Aluminum Wire and Cable from the People's Republic of China ("Final IDM"), ECF No. 24–5.

Before the Court is the Motion for Judgment on the Agency Record Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade and Memorandum of Law in Support of the Rule 56.2 Motion of Plaintiff Repwire LLC and Consolidated Plaintiff Jin Tiong Electrical Materials Manufacturere [sic] PTE LTD for Judgment Upon the Agency Record, filed by Plaintiff Repwire LLC ("Repwire") and Consolidated Plaintiff Jin Tiong Electrical Materials Manufacturer PTE,

Ltd. ("Jin Tiong"), challenging Commerce's *Final Results*. Pl.'s R. 56.2 Mot. J. Agency R. and Mem. Supp. ("Pl.'s Br."), ECF No. 34. Defendant United States ("Defendant") filed Defendant's Response to Plaintiff's and Consolidated Plaintiffs' [sic] Motion for Judgment Upon the Agency Record. Def.'s Resp. Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("Def.'s Resp. Br."), ECF No. 37. Defendant-Intervenor Southwire Company, LLC filed Defendant-Intervenor Southwire Company, LLC's Opposition to Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. Def.-Interv.'s Resp. Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R., ECF No. 38. Repwire and Jin Tiong filed their Reply of Plaintiff and Consolidated Plaintiff to Responses of Defendant and Defendant Intervenor. Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("Pl.'s Reply Br."), ECF No. 42.

The Court reviews Commerce's determination to reject Jin Tiong's questionnaire response and apply the China-wide entity antidumping duty rate to Jin Tiong. For the reasons discussed below, the Court sustains Commerce's determination.

BACKGROUND

Commerce initiated an administrative review of the antidumping order *Aluminum Wire and Cable from the People's Republic of China* on February 4, 2021. *Initiation of Antidumping and Countervailing Duty Administrative Reviews* ("*Initiation Notice*"), 86 Fed. Reg. 8166 (Dep't of Commerce Feb. 4, 2021). Commerce initiated a review of two companies, ICF Cable and Jin Tiong, for the period of June 5, 2019 to November 30, 2020. *Id.* at 8167. Commerce instructed in the *Initiation Notice* that all firms subject to the review, including ICF Cable and Jin Tiong, that wished to seek a separate rate must complete and submit a separate rate application or certification no later than thirty (30) days from the publication of Commerce's *Initiation Notice*. *Id.* Relevant to this case, Jin Tiong did not submit a separate rate application or certification by the 30-day deadline. Memo From USDOC to File Pertaining to Jin Tiong Electrical Materials Manufacturer Recission of Questionnaire (July 28, 2021) ("Jin Tiong Questionnaire Recission Memo") at 1–2, PR 21.

Subsequently, Commerce issued a questionnaire to Jin Tiong on July 15, 2021. *Id.* at 1**.** On July 28, 2021, Commerce rescinded Jin Tiong's questionnaire, explaining that Commerce had issued the questionnaire in error. *Id.* at 1–2.

On July 30, 2021, Jin Tiong objected to Commerce's withdrawal of the questionnaire, and on August 5, 2021, Jin Tiong submitted a Section A questionnaire response. Rejection Memo From USDOC to File Pertaining to Jin Tiong Rejection of Jin Tiong's Unsolicited Sec A Response (Aug. 16, 2021) ("Jin Tiong Questionnaire Rejection Memo")

at 1, PR 29 (citing Jin Tiong's Letter, "Aluminum Wire and Cable from the People's Republic of China, A-570–095; Objection to Withdrawal of Questionnaire," dated July 30, 2021). On August 16, 2021, Commerce rejected Jin Tiong's submission, stating that the questionnaire response was unsolicited. *See generally id.*

Commerce determined that Jin Tiong was not eligible for examination in the administrative review because Jin Tiong failed to submit a timely separate rate application. *Aluminum Wire and Cable from the People's Republic of China* ("*Preliminary Results*"), 86 Fed. Reg. 49,306 (Dep't of Commerce Sep. 2, 2021) (preliminary results of antidumping duty administrative review; 2019–2020). Commerce confirmed its determination in the *Final Results* that Jin Tiong was not eligible for examination. *See Final Results*. 86 Fed. Reg. at 73,251.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Repwire filed a Complaint challenging: (1) Commerce's determination to withdraw the questionnaire and reject Jin Tiong's questionnaire response; and (2) Commerce's assignment of an antidumping duty rate based on adverse facts available. Pl.'s Compl. at 5–6, ECF No. 9.

Commerce is authorized by statute to calculate and impose a dumping margin on imported subject merchandise after determining that it is sold in the United States at less than fair value. 19 U.S.C. § 1673. Commerce determines an estimated weighted average dumping margin for each individually examined exporter and producer and one all-others separate rate for non-examined companies. 19 U.S.C. § 1673d(c)(1)(B). The U.S. Court of Appeals for the Federal Circuit ("CAFC") has upheld Commerce's reliance on this method for determining the estimated all-others separate rate in § 1673d(c)(5) when "determining the separate rate for exporters and producers from nonmarket economies that demonstrate their independence from the government but that are not individually investigated." *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1011 (Fed. Cir. 2017) (citing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016)).

An exporter in a non-market economy must "affirmatively demonstrate" its entitlement to a separate, company-specific margin by showing "an absence of central government control, both in law and in fact, with respect to exports." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 935, 806 F. Supp. 1008, 1013–14 (1992)). A company that fails to affirmatively demonstrate its entitlement to a separate rate through the absence of government control is not eligible for an individual rate and is subject to the "country-wide" rate. *See Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2002); *China Mfrs. All., LLC v. United States*, 1 F.4th 1028, 1039 (Fed. Cir. 2021) (holding that Commerce may impose a country-wide rate).

I. Commerce's Determination to Withdraw the Questionnaire and Reject Jin Tiong's Questionnaire Response

Repwire argues that Commerce's determination to withdraw the questionnaire issued to Jin Tiong and reject Jin Tiong's questionnaire response was unlawful and an abuse of discretion. Pl.'s Br. at 2.

19 C.F.R. § 351.301(c)(1) provides that Commerce may issue questionnaires to any person during a proceeding and Commerce will not consider unsolicited or untimely questionnaire responses. 19 C.F.R. § 351.301(c)(1). "Commerce has discretion both to set deadlines and to enforce those deadlines by rejecting untimely filings." *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 122, 815 F. Supp. 2d 1342, 1365 (2012) (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–07 (Fed. Cir. 1995)). Agency decisions on acceptance or rejection of documents submitted for the record are reviewed for abuse of discretion. *Id.*; *see also Maverick Tube Corp. v. United States*, 39 CIT __, __, 107 F. Supp. 3d 1318, Court No. 21–00173 Page 8 1331 (2015) ("Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision."). "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (citation omitted).

In its *Initiation Notice*, Commerce instructed that all firms listed (including Jin Tiong, who was identified in the *Initiation Notice*) that wished to seek a separate rate must complete and submit a separate rate application within 30 days of publication of the *Initiation Notice* in the Federal Register. *Initiation Notice*, 86 Fed. Reg. at 8167. Jin Tiong was on notice of the 30-day deadline as an interested party because Jin Tiong was identified in the *Initiation Notice* published in

the Federal Register. *See* 44 U.S.C. § 1507 (publication in the Federal Register is sufficient to give notice of the contents of the document to a person subject to or affected by it). Pursuant to the *Initiation Notice*, Jin Tiong's separate rate application was due 30 days after publication in the Federal Register, but Jin Tiong failed to submit a separate rate application by the 30-day deadline. Jin Tiong does not dispute that it did not file a separate rate application. Pl.'s Br. at 10.

On July 15, 2021, Commerce issued a questionnaire to Jin Tiong. Jin Tiong Questionnaire Recission Memo at 1. Commerce rescinded the questionnaire on July 28, 2021 (approximately two weeks after issuing the questionnaire and before Jin Tiong responded), explaining that the questionnaire had been issued in error. *Id.* at 1–2. Following recission, Jin Tiong objected on July 30, 2021, and subsequently filed a Section A response on August 5, 2021. Jin Tiong Questionnaire Rejection Memo at 1. Jin Tiong argues that it should have been permitted to retain its questionnaire response on the record because Jin Tiong relied on Commerce's issuance of the erroneous questionnaire. Defendant explains Commerce's mistake, stating that:

> By failing to submit a separate rate application, Jin Tiong did not attempt to establish its eligibility for a separate rate; therefore, Commerce should not have proceeded to "other aspects of a review that are only warranted for a company entitled to individual examination," including the issuance of a section A questionnaire.

Def.'s Resp. Br. at 6. In the Final IDM, Commerce stated that it did not receive a separate rate application from Jin Tiong and was, therefore, without "the submission of the required information necessary to establish whether [Jin Tiong] is independent from the control of the government[.]" Final IDM at 4–5. For this reason, Commerce continued to determine that Jin Tiong was not eligible for individual examination in this administrative review. *Id.* at 5.

While Commerce's erroneous issuance and subsequent recission of the questionnaire was unfortunate, the Court recognizes that Commerce admitted its mistake within two weeks and withdrew the questionnaire before Jin Tiong filed a response. The Court concludes that Commerce's recission of the erroneous questionnaire was not an abuse of discretion, particularly when Commerce withdrew the questionnaire prior to Jin Tiong submitting a response.

Repwire also contends that Commerce's determination to reject Jin Tiong's questionnaire response was unlawful and an abuse of discretion, Pl.'s Br. at 2, apparently because Jin Tiong submitted the ques-

tionnaire response at Commerce's request (even though Commerce rescinded the questionnaire prior to Jin Tiong's submission of its response). Under 19 C.F.R. § 351.301(c)(1), Commerce has discretion to reject unsolicited filings. Under 19 C.F.R. § 351.302(d), "the Secretary will not consider or retain in the official record of the proceedings . . . unsolicited questionnaire responses[.]" It is apparent to the Court that Commerce considered Jin Tiong's submission to be unsolicited because Commerce rescinded the questionnaire prior to receiving the submission. The Court holds that because Commerce's rescission of the erroneous questionnaire was reasonable, Commerce's subsequent determination that Jin Tiong's submission was unsolicited was also reasonable, since the questionnaire was rescinded before the response was submitted. The Court concludes, therefore, that Commerce did not abuse its discretion by rejecting Jin Tiong's unsolicited questionnaire response. *Consol. Bearings Co.*, 412 F.3d at 1269.

Because Commerce did not abuse its discretion, the Court sustains Commerce's recission of the questionnaire to Jin Tiong and Commerce's rejection of Jin Tiong's questionnaire response.

II. Commerce's Application of the China-wide Entity Rate to Jin Tiong

Repwire argues that in the *Final Results*, Commerce determined unlawfully that Jin Tiong was not eligible for a separate rate and applied the China-wide entity rate. Pl.'s Br. at 11. Specifically, Repwire argues that Commerce unlawfully rescinded Jin Tiong's questionnaire, then used the absence of a questionnaire response as justification for its determination that Jin Tiong was not entitled to a separate rate. *Id.* Repwire argues that the "circular reasoning was that since Jin Tiong had not provided such evidence of a separate rate status, it was not entitled to separate rate status, notwithstanding that the [Commerce] Department had rejected, and refused to accept the very information which would have provided evidence of such separate rate status." *Id.* Repwire complains that "[adverse facts available] applied to Jin Tiong because it did not reply to a questionnaire because the Department withdrew such questionnaire." *Id.*

Defendant argues, however, that Plaintiffs mischaracterize Commerce's determination and assert that "Commerce did not apply an adverse factual inference to Jin Tiong." Def.'s Resp. Br. at 9. Defendant contends that, "[i]nstead, Commerce simply did not find Jin Tiong to be eligible for individual examination, and it applied a rebuttable presumption that applies to all companies within nonmarket economy countries." *Id.* (citing Final IDM at 7). More specifically, Commerce determined that "because Jin Tiong did not timely file [a separate rate application] to attempt to demonstrate its eligi-

bility for a separate rate, the presumption of government control is applicable, and . . . it was not appropriate for Commerce to issue a questionnaire[.]" Final IDM at 7.

The Court observes that Commerce determined in the *Preliminary Results* that Jin Tiong was subject to the review, that Jin Tiong failed to submit a timely separate rate application, and that, "absent the submission of the required information necessary to establish whether any exporter is independent from the control of the government of the subject [non-market economy], i.e., China, Jin Tong [sic] was not eligible for individual examination in this administrative review." *Preliminary Results*, 86 Fed. Reg. at 49,307. Commerce determined that the applicable antidumping duty rate was 52.79 percent, the rate established in the final determination of the less-than-fair-value investigation. *Id.* The Court observes that Commerce confirmed its determination in the *Final Results* that Jin Tiong was "not eligible for a separate rate, and, therefore, [is] part of the China-wide entity." *Final Results*, 86 Fed. Reg. at 73,251.

As discussed earlier, an exporter in a non-market economy must "affirmatively demonstrate" its entitlement to a separate, company-specific margin by showing "an absence of central government control, both in law and in fact, with respect to exports." *Sigma Corp.*, 117 F.3d at 1405. Companies that fail to do so in a non-market economy are not eligible for an individual rate and are subject to the "country-wide" rate. *See Transcom, Inc.*, 294 F.3d at 1382.

Because Jin Tiong failed to file a timely separate rate application or certification within the 30-day deadline of the *Initiation Notice* that could have potentially demonstrated its independence from Chinese government control in order to be entitled to an individual rate, *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997), the Court concludes that Commerce's determination that Jin Tiong was not eligible for a separate rate was reasonable and supported by substantial evidence. The Court concludes also that Commerce was reasonable in assessing the China-wide entity rate in light of Jin Tiong's failure to demonstrate its independence from government control.

CONCLUSION

For the foregoing reasons, the Court sustains the *Final Results*. Judgment will issue accordingly.

Dated: March 20, 2023
New York, New York

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

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