U.S. Customs and Border Protection

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS OF CUSTOMS DUTIES

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

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning April 1, 2023, the interest rates for overpayments will be 6 percent for corporations and 7 percent for non-corporations, and the interest rate for underpayments will be 7 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of April 1, 2023.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the

Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2023–04, the IRS determined the rates of interest for the calendar quarter beginning April 1, 2023, and ending on June 30, 2023. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (4%) plus two percentage points (2%) for a total of six percent (6%). For overpayments made by non-corporations, the rate is the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties remain unchanged from the previous quarter. These interest rates are subject to change for the calendar quarter beginning July 1, 2023, and ending on September 30, 2023.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Underpayments (percent)	Overpayments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
100188	033189	11	10	.....
040189	093089	12	11	.....
100189	033191	11	10	.....
040191	123191	10	9	.....
010192	033192	9	8	.....
040192	093092	8	7	.....
100192	063094	7	6	.....
070194	093094	8	7	.....
100194	033195	9	8	.....
040195	063095	10	9	.....
070195	033196	9	8	.....
040196	063096	8	7	.....
070196	033198	9	8	.....
040198	123198	8	7	.....
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3
070122	093022	5	5	4
100122	123122	6	6	5
010123	063023	7	7	6

Dated: April 6, 2023.

CRINLEY S. HOOVER,
Acting Chief Financial Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, April 13, 2023 (88 FR 22466)]

U.S. Court of Appeals for the Federal Circuit

AL GHURAIR IRON & STEEL LLC, Plaintiff-Appellant v. UNITED STATES, UNITED STATES STEEL CORPORATION, NUCOR CORPORATION, STEEL DYNAMICS, INC., Defendants-Appellees

Appeal No. 2022–1199

Appeal from the United States Court of International Trade in No. 1:20-cv-00142-TMR, Judge Timothy M. Reif.

Decided: April 12, 2023

ROBERT GOSSELINK, Trade Pacific PLLC, Washington, DC, argued for plaintiff-appellant.

KELLY GEDDES, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, CLAUDIA BURKE, MOLLIE LENORE FINNAN, PATRICIA M. MCCARTHY; ELIO GONZALEZ, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

THOMAS M. BELINE, Cassidy Levy Kent (USA) LLP, Washington, DC, for defendant-appellee United States Steel Corporation. Also represented by CHASE DUNN, JAMES EDWARD RANSDELL, IV, SARAH E. SHULMAN.

ALAN H. PRICE, Wiley Rein, LLP, Washington, DC, for defendant-appellee Nucor Corporation. Also represented by THEODORE PAUL BRACKEMYRE, TESSA V. CAPELOTO, ADAM MILAN TESLIK, MAUREEN E. THORSON, CHRISTOPHER B. WELD.

BENJAMIN JACOB BAY, Schagrin Associates, Washington, DC, argued for defendant-appellee Steel Dynamics, Inc. Also represented by MICHELLE ROSE AVRUTIN, NICHOLAS J. BIRCH, CHRISTOPHER CLOUTIER, ELIZABETH DRAKE, WILLIAM ALFRED FENNELL, JEFFREY DAVID GERRISH, LUKE A. MEISNER, KELSEY RULE, ROGER BRIAN SCHAGRIN.

Before NEWMAN, REYNA, and CUNNINGHAM, *Circuit Judges*.

REYNA, *Circuit Judge*.

Al Ghurair Iron & Steel LLC appeals a Court of International Trade judgment affirming a circumvention determination by the U.S. Department of Commerce ("Commerce"). Commerce determined that United Arab Emirates ("UAE") producers of certain corrosion-resistant steel ("CORE") were circumventing antidumping ("AD") and countervailing duty ("CVD") orders on CORE from China. In making its determination, Commerce analyzed the circumvention factors and subfactors provided by 19 U.S.C. § 1677j(b). AGIS argues that Commerce erroneously analyzed several of these factors and subfactors.

We find that Commerce's circumvention determination is reasonable and supported by substantial evidence. We conclude that Com-

merce's analysis of the "value added" subfactor is erroneous because Commerce did not reasonably explain why it rejected AGIS's financial data that were purported to show a significant value added. We find that this error was harmless because it was limited to a single factual finding within a multi-factor test. We thus affirm the Court of International Trade's judgment.

BACKGROUND

The China CORE AD and CVD Orders

On June 3, 2015, Commerce received petitions from domestic producers requesting that Commerce impose AD and CVD duties on CORE exports from China. *Initiation of Less-Than-Fair-Value Investigations,* 80 Fed. Reg. 37,228 (Dep't of Commerce June 30, 2015). Commerce initiated AD and CVD investigations on June 30, 2015. *Id*.; *Initiation of Countervailing Duty Investigations*, 80 Fed. Reg. 37,223 (Dep't of Commerce June 30, 2015). In July 2016, Commerce published AD and CVD orders on CORE from China. *Antidumping Duty Orders*, 81 Fed. Reg. 48,390 (Dep't of Commerce July 25, 2016); *Countervailing Duty Orders*, 81 Fed. Reg. 48,387 (Dep't of Commerce July 25, 2016).

CORE is a type of steel that is clad, plated, or coated with corrosion-resistant metals. *Affirmative Preliminary Determination of Circumvention Involving the United Arab Emirates*, 85 Fed. Reg. 8841 (Dep't of Commerce Feb. 18, 2020) and accompanying Memo ("Preliminary Determination") at 5–7. CORE is used, for example, to make appliances and vehicle parts. *Id*. at 14, 17; Op. Br. at 4. The exact manner in which CORE is manufactured depends on the CORE's intended application, but it is generally as follows.

CORE production typically begins with one of two methods for producing molten steel. Preliminary Determination at 14. The first method uses an electric arc furnace to melt metallic raw material, including scrap steel, pig iron, and direct-reduced iron. *Id*. The second method uses a blast furnace to melt iron ore, coke, and smaller amounts of scrap steel. *Id*. Once the molten steel is produced, it is cast into a "slab." *Id*. The slab is then reheated and rolled on a mill to produce hot-rolled steel, which is typically reeled into a coil. *Id*. The hot-rolled steel is then uncoiled and passed through vats of acid to remove oxide scale. *Id*. Next, the hot-rolled steel may be processed into cold-rolled steel by cold-rolling (to reduce its thickness) and annealing (to harden it). *Id*.

The substrate for CORE is usually cold-rolled steel, but hot-rolled steel may be used to produce some CORE products. *Id*. at 13. The hot-dip and electrolytic processes are the two most common processes for producing the final CORE product from the hot-rolled steel or cold-rolled steel. *Id*. at 14. The hot-dip process passes the substrate through a bath of molten zinc or aluminum. *Id*. The electrolytic process passes the substrate through electrolytic cells to plate zinc or other metals onto the substrate's surface. *Id*.

Al Ghurair Iron & Steel ("AGIS") is a steel manufacturer based in the UAE. AGIS began producing CORE in 2008. Op. Br. at 11. AGIS does not manufacture hot-rolled steel but purchases it from steel manufacturers in China and other countries. *Id*. at 5, 8, 18–19. AGIS sometimes purchases cold-rolled steel from China and other countries and other times makes it in house. *Id*. AGIS's facilities create the end CORE products by further processing the hot-rolled steel and cold-rolled steel as discussed above and by completing any additional post-processing steps necessary to meet customer demands (recoiling, cutting to size, etc.). *See id*. at 6–7.

Commerce's Circumvention Determinations

"The Tariff Act of 1930, as amended, permits Commerce to impose two types of duties on imports that injure domestic industries. . . ." *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1196 (Fed. Cir. 2014); *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 913 (Fed. Cir. 2019). First, Commerce may impose an antidumping duty on goods "sold in the United States at less than . . . fair value." 19 U.S.C. § 1673(1). Second, Commerce may impose a countervailing duty on goods that receive "a countervailable subsidy" from a foreign government. *Id*. § 1671(a). Antidumping duties remedy unfair trade acts on the part of importers, while countervailing duties are directed towards the unfair trade acts of foreign governments. *Guangdong Wireking Housewares & Hardware*, 745 F.3d at 1196.

Often, when AD and CVD orders are imposed, the marketplace reacts to the requirement for the payment of the additional AD and CVD duties. One such reaction is the circumvention of the duty orders. 19 U.S.C. § 1677j allows Commerce to initiate investigations and make determinations that prevent companies from circumventing AD and CVD orders, such as by transshipping the goods subject to duties through another country.

In August 2019, Commerce initiated investigations to determine whether exports of CORE from the UAE were circumventing the China CORE AD and CVD orders. Preliminary Determination at 1. In

February 2020, Commerce issued its preliminary determination. Commerce preliminarily determined that the UAE's CORE exports to the U.S. made from hot-rolled steel or cold-rolled steel manufactured in China were circumventing the AD and CVD orders. Thereafter, Commerce received comments from interested parties, including AGIS. AGIS argued that Commerce's preliminary determination was flawed in several aspects. In July 2020, Commerce issued its final affirmative determination, rejecting AGIS's arguments and concluding that CORE from the UAE circumvented the AD and CVD orders. *Affirmative Final Determination of Circumvention Involving the United Arab Emirates*, 85 Fed. Reg. 41,957 (Dep't of Commerce July 13, 2020) and accompanying Memo ("Final Determination").

In its preliminary and final determinations, Commerce analyzed each Section 1677j(b) factor and subfactor. Relevant here are Commerce's findings as to the Section 1677j(b)(3) factor of UAE's "pattern of trade." Also relevant are Commerce's findings as to the "level of investment," "nature of the production process," "extent of production facilities," and "value added" subfactors for determining whether UAE processing is "minor or insignificant" under Section 1677j(b)(1)(C).

For the "pattern of trade" factor, Commerce chose to analyze 49 months before and after the date Commerce initiated the investigations that led to the China CORE AD and CVD orders. Final Determination at 12–13. Commerce explained that this allowed it "to compare the trade patterns prior to the discipline of any AD and CV[D] duties with the trade patterns present when parties were aware that they could potentially have to pay AD and CV[D] duties." *Id*. at 13. Commerce also explained that the period was consistent with prior determinations. *Id*. at 13 n.51 (collecting cases).

Commerce made several findings before concluding that the "pattern of trade" factor evidenced circumvention. Commerce analyzed data concerning the UAE as a whole and found that after the initiation of the CORE investigations, the average monthly volume of imports of cold-rolled steel and hot-rolled steel into the UAE from China increased by 47.01% and 35.01%, respectively. *Id*. at 12; Preliminary Determination at 24 (citing Global Trade Atlas data). Commerce further found that the average monthly volume of exports of CORE from the UAE to the United States increased by 5,752.06% (almost four hundred thousand metric tons) during the same period. Preliminary Determination at 25.

Commerce also considered AGIS's data for the "pattern of trade" factor.[1] Commerce explained that AGIS's purchases of cold-rolled and hot-rolled steel from China increased thousands of percent in the 49-month period after the CORE investigation began. In that same period, AGIS's exports to the U.S. of CORE made from Chinese substrate substantially increased. Commerce found that these data indicated a "pattern of trade" evidencing circumvention. Final Determination at 8, 11–13.

Commerce also analyzed whether the UAE's processing of hot-rolled and cold-rolled steel into CORE was "minor or insignificant" compared to making the substrates in China. For the "level of investment" subfactor, Commerce found that "the average expenditure for construction of an integrated steel mill in China is [$3.6 billion,] roughly 15 times greater than that required to build [] facilities" present in the UAE. *Id*. at 17 (comparing investments in Chinese integrated steel facilities to that invested by a UAE manufacturer); Preliminary Determination at 15. Commerce looked at AGIS's investment data and likewise found that AGIS's facilities required significantly less investment than the average integrated steel mill in China. Commerce explained that its conclusions regarding these findings were consistent with prior CORE cases involving circumvention. Preliminary Determination at 15–16; Final Determination at 18.

Commerce also determined that the "nature of the production process" and "extent of production facilities" sub-factors supported an affirmative finding of circumvention. Commerce explained that the UAE's CORE manufacturing process—which includes thinning, coating, and cutting to make the final CORE product—was insignificant compared to the much more numerous, complicated, and expensive processes completed in China to make the substrate. Final Determination at 18–19. Again, Commerce found its analysis consistent with prior CORE determinations. *Id*. at 19; Preliminary Determination at 18–19.

Commerce concluded that the "value added" subfactor supported circumvention. Commerce found that AGIS increased the products' value by an amount it deemed insignificant. In making this calculation, however, Commerce did not adopt AGIS's argument that Commerce should limit its data set to just U.S. sales.

Commerce additionally analyzed global data from MEPS International's World Carbon Steel price database and found that from 2013 to 2016 "the value-added by CORE producers . . . [was] approximately 10 percent to 31 percent, depending on whether the underlying sub-

[1] AGIS's data that Commerce relied on are confidential and have not been included in this opinion.

strate was already cold-rolled." Preliminary Determination at 21. Commerce found that MEPS data from 2018 indicated that processing hot-rolled and cold-rolled steel to CORE increased the products' value by 13 to 22 percent. *Id*. at 21–22. Commerce explained that, although these data were not specific to the UAE, they were still probative because methods used to process hot-rolled or cold-rolled steel to CORE did not substantively vary across different countries. *Id*.

Commerce concluded that "the value of the [hot-rolled and/or cold-rolled steel] produced in China . . . is a significant portion of the total value of the completed . . . CORE[] exported to the United States." Final Determination at 9. Commerce explained that this determination was consistent with prior cases involving different countries, which likewise concluded that processing hot-rolled or cold-rolled steel to CORE did not add significant value to the imported good. Preliminary Determination at 21.

Commerce reached a final affirmative circumvention determination, finding that UAE exports of CORE made from Chinese hot-rolled steel or cold-rolled steel circumvented the AD and CVD orders covering shipments of CORE from China. Preliminary Determination at 27–28; Final Determination at 25.

AGIS challenged Commerce's findings in the Court of International Trade, which affirmed Commerce's determination. *Al Ghurair Iron & Steel v. United States*, 536 F. Supp. 3d 1357 (Ct. Int'l Trade 2021). AGIS appeals to this court. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

We review a judgment of the Court of International Trade de novo, reapplying the same standard of review applied by that court in its review of Commerce's affirmative circumvention determination. *See NEXTEEL Co. v. United States*, 28 F.4th 1226, 1233 (Fed. Cir. 2022). As such, we review Commerce's findings for substantial evidence. *Id*. Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion." *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020) (citation omitted); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) ("Commerce's special expertise in administering the anti-dumping law entitles its decisions to deference from the courts").

DISCUSSION

Under Section 1677j(b)(1), Commerce may find and address circumvention if:

> (A) [the] merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of . . . [an AD and/or CVD order],
>
> (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which. . . is subject to [the] order . . . or . . . is produced in the foreign country . . . to which such order . . . applies,
>
> (C) the process of assembly or completion in the foreign country . . . is minor or insignificant,
>
> (D) the value of the merchandise produced in the foreign country . . . is a significant portion of the total value of the merchandise exported to the United States, and
>
> (E) . . . action is appropriate . . . to prevent evasion of such order.

To determine whether the process of assembly or completion is "minor or insignificant" (element C above), Commerce "shall take into account:"

> (A) the level of investment in the foreign country,
>
> (B) the level of research and development in the foreign country,
>
> (C) the nature of the production process in the foreign country,
>
> (D) the extent of production facilities in the foreign country, and
>
> (E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

19 U.S.C. § 1677j(b)(2)(A)–(E).

Under Section 1677j(b)(3), Commerce is also required to consider "(A) the pattern of trade, including sourcing patterns, (B) whether the manufacturer or exporter of the merchandise . . . is affiliated with the person who uses the merchandise . . . to assemble or complete in the foreign country the merchandise that is subsequently imported into the United States, and (C) whether imports into the foreign country of the merchandise . . . have increased after the initiation of the [AD/CVD] investigation."

We conclude that substantial evidence supports Commerce's determinations as to "pattern of trade," "level of investment," "nature of the production process," and "extent of production facilities." Commerce erred by failing to explain its factual findings for the "value added" subfactor, as applied to AGIS's financial data. But because

Commerce's preliminary and final determinations provide multiple other reasons supporting its circumvention finding, we conclude that this error is harmless.

1. "Pattern of Trade"

AGIS argues that substantial evidence does not support Commerce's determination that there is a "pattern of trade" indicating that the UAE is circumventing the China CORE AD and CVD orders. Op. Br. at Section V. We disagree.

First, AGIS argues that Commerce erred because it was "arbitrary" for Commerce to rely on the 49 months before and after the China CORE investigations began. *Id*. at 43–44.

Commerce's timeframe selection was not arbitrary. Commerce reasonably explained that the period allowed it to analyze whether the trade patterns changed in reaction to the AD and CVD orders' investigations, when parties learned that "they could potentially have to pay AD and CV[D] duties." Final Determination at 13. Commerce also reasonably found that this period was consistent with its prior determinations. *Id*. at 13 n.51 (collecting cases).

Second, AGIS contends that the 49-month timeframe was "contrary to law." Op. Br. at 43. But AGIS has provided no legal authority supporting this argument. In fact, AGIS concedes that the statute "does not identify any particular time periods at all for Commerce to consider for this factor." *Id*. at 44.

Third, AGIS identifies data specific to AGIS that it argues show that Commerce's decision is unsupported by substantial evidence. *Id*. at 43–48. For instance, AGIS claims that it has not shipped CORE to the United States made from Chinese hot-rolled or cold-rolled steel since December 2017. *Id*. at 45–46. Commerce reasonably explained that its analysis was country-wide, so AGIS-specific data were less probative than the data concerning the UAE as a whole. Final Determination at 9–13. AGIS does not challenge Commerce's findings as to the "pattern of trade" that it based on UAE data. To the extent that AGIS is asserting that Commerce should have found AGIS-specific data more probative than UAE data, we recognize that substantial evidence review does not permit us to reweigh the evidence. *See Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999) (substantial evidence review does not "allow the parties to retry factual issues before us de novo").

In addition, while some of AGIS's data arguably support AGIS's position, other evidence does not. *SolarWorld Americas, Inc. v. United States*, 910 F.3d 1216, 1222 (Fed.Cir. 2018) ("Commerce's finding may still be supported by substantial evidence even if two inconsistent

conclusions can be drawn from the evidence." (citation omitted)). AGIS does not dispute Commerce's factual finding that immediately after the initiation of the CORE investigation, AGIS's purchases of cold-rolled and hot-rolled steel from China skyrocketed. Nor does AGIS dispute Commerce's factual finding that AGIS exported significantly more CORE into the U.S. made from Chinese substrate during that same timeframe. Commerce reasonably relied on these data as a "pattern of trade."[2]

Thus, substantial evidence supports Commerce's finding that the Section 1677j(b)(3)(A) "pattern of trade" factor evidenced circumvention.

2. "Level of Investment"

AGIS argues that Commerce erroneously analyzed the UAE's "level of investment" in determining that the UAE's contribution was "minor or insignificant." Op. Br. at Section III (discussing 19 U.S.C. §§ 1677j(b)(1)(C),1677j(b)(2)(A)). We find that substantial evidence supports Commerce's decision as to this subfactor.

First, AGIS asserts that since it "was established in 2005, it has continued to make sustained investments and re-investments in its production capabilities, significantly adding to its assets and expanding its production operations." Op. Br. at 27–28. AGIS asserts that its company's assets are worth a significant amount. *Id*. AGIS argues that its value is comparable to the value of the smallest Chinese steel mills. *Id*. at 35–36.

These factual disputes do not establish a lack of substantial evidence. *Inland Steel*, 188 F.3d at 1359. Commerce reasonably rejected these arguments when it determined that AGIS's investments were vastly lower than the amount needed to construct the *average* steel mill in China. Preliminary Determination at 15; Final Determination at 17. Commerce did not err simply because AGIS's valuation is similar to Chinese steel mills on the extremely low end of the valuation spectrum.

Second, AGIS argues that Commerce legally erred by comparing AGIS's investment to make CORE with Chinese manufactures' investment to make hot-rolled or cold-rolled steel. Op. Br. at 32–33. AGIS argues that Commerce should have only compared AGIS's CORE investment to the investments of Chinese CORE producers. *Id*.

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[2] Commerce declined to determine whether AGIS intended to circumvent the AD and CVD orders, because "intent is not a necessary element of a finding of circumvention." Final Determination at 13–14. No party challenges this decision.

AGIS provides no binding authority supporting this argument. Commerce reasonably explained that its comparison "indicate[d] what portion of the total value of the merchandise subject to these inquiries is accounted for by the last step of processing." Final Determination at 18.

Third, AGIS argues that Commerce erred by failing to conform its analysis to its past practices. *See* Op. Br. at 29–30, 32, 34–35. We disagree.

Commerce is not bound by its prior determinations. *Hyundai Elec. & Energy Sys. Co. v. United States*, 15 F.4th 1078, 1089 (Fed. Cir. 2021) ("We have rejected the notion that Commerce is forever bound by its past practices. Instead, each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." (citations omitted)); Reply. Br. at 20 (conceding that "Commerce must make circumvention determinations on a case-by-case basis."). Commerce must, however, explain itself, which it did for this subfactor. *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) ("[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom."). And Commerce's analysis here *is* consistent with its prior determinations. Commerce correctly identified multiple other cases—including prior CORE cases—where Commerce analyzed the imported goods in terms of the entire manufacturing process, not just the final steps. *See* Preliminary Determination at 16 nn.68–69 (collecting cases); Final Determination at 18 n.80.

We disagree with AGIS that Commerce erred by acting contrary to its determination in *Hot-Rolled Lead. See, e.g.*, Op. Br. at 34–35 (discussing *Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom; Negative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders*, 64 Fed. Reg. 40336 (Dep't of Commerce July 26, 1999)). That is a non-binding decision from 1999, and the products considered were different from those at-issue here.

In sum, substantial evidence supports Commerce's determination that the UAE's "level of investment" is minor and insignificant.

3. "Nature of the Production Processes" and "Extent of the Production Facilities"

AGIS asserts that Commerce erroneously analyzed the "nature of the production processes" and "extent of production facilities" in the UAE to determine that the UAE's contribution was "minor or insignificant," evidencing circumvention. Op. Br. at Section III (discussing

19 U.S.C. §§ 1677j(b)(1)(C), 1677j(b)(2) (C)–(D)). We disagree and find that substantial evidence supports Commerce's decision for these subfactors.

AGIS argues that Commerce erred because the nature of AGIS's processes and the extent of its facilities are significant. *See, e.g.*, Op. Br. at 29 ("AGIS's production process requires multiple sub-stages and different equipment. . .."); *id*. at 30 ("AGIS's situation hardly involves unskilled labor and limited and minor production."); *id*. at 31 ("AGIS's operations are extensive and sophisticated. . . .").We reject these arguments as improper attempts to relitigate facts on appeal. *Inland Steel*, 188 F.3d at 1359. Commerce reasonably found that the UAE's CORE manufacturing processes and facilities, including those at AGIS, are insignificant as compared to the more numerous, complicated, and expensive processes and facilities in China. Preliminary Determination at 18–20; Final Determination at 8, 18. Its determination is supported by substantial evidence.

Next, citing *Certain Tissue Paper Products*, AGIS argues that Commerce is acting contrary to its prior applicable determinations. Op. Br. at 29–30 (discussing *Certain Tissue Paper Products from China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 78 Fed. Reg. 14514 (Dep't of Commerce Mar. 6, 2013) and accompanying Memo)). In *Certain Tissue Paper Products*, in finding circumvention, Commerce determined that most of the processing occurred in China—the paper was essentially made there. *Certain Tissue Paper Products Memo* at 5–6 ("[W]e preliminarily find that the production process conducted by ARPP in converting the . . . jumbo rolls to cut-to-length tissue paper is limited and minor"). The investigated Indian company merely completed the final manufacturing steps, such as cutting the paper. *Id*.

We find that *Certain Tissue Paper Products* is consistent with Commerce's analysis here. In this case, Commerce similarly found that the most complex processing occurred in China and that the UAE producers merely completed final, relatively minor processing steps.[3] Preliminary Determination at 14, 18–19.

Thus, substantial evidence supports Commerce's determinations as to the "nature" and "extent" subfactors.

[3] Even if *Certain Tissue Paper Products* involved a different analysis by Commerce, it is non-binding. *Hyundai Elec. & Energy Sys.*, 15 F.4th at 1089. Commerce's findings as to this subfactor are reasonably explained and consistent with findings in prior cases involving CORE produced in other countries. *See* Preliminary Determination at 19–20 (collecting cases).

4. "Value Added"

AGIS argues that substantial evidence does not support Commerce's decision that the UAE's processing steps add an insignificant "value" to its CORE products. *See* Op. Br. at Section IV (discussing 19 U.S.C. §§ 1677j(b)(1)(C),1677j(b)(2)(E)). AGIS asserts that "Commerce ignored AGIS's calculations and failed to explain why it was appropriate to use in its calculations company-wide profit amounts instead of the actual profit on U.S. sales of CORE produced with Chinese [hot-rolled and cold-rolled steel] substrate." *Id*. at 42. AGIS states that had Commerce adopted the narrower U.S.-only dataset, Commerce would have calculated AGIS's "value added" to be much higher than the percentage Commerce determined.[4] *Id*.

Appellees argue that Commerce did not have to explain why AGIS's calculations were wrong. The government asserts that if Commerce were required to explain why AGIS's calculations were wrong "there might be no end to the analyses [Commerce] would have to perform." Oral Arg. at 32:20–32:45 (government's counsel); *see also id*. at 38:50–39:10 (Steel Dynamics' counsel making a similar argument).

Appellees also contend that the following passage from Commerce's preliminary determination is a sufficiently adequate explanation:

> Commerce preliminarily finds that the formula AGIS used in its analyses is unpersuasive because Commerce is determining what the further processing cost is as a percentage of the total U.S. sales price; the statute does not require use of AGIS's preferred formulas and its analyses do not override Commerce's conclusion with respect to this factor.

Preliminary Determination at 22.

While Commerce must reasonably explain its findings, its explanations are not required to reach a certain level, only that they are sufficient to afford adequate review. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("[W]hile its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). Without a reasonable explanation, this court cannot "meaningful[ly] review"

[4] AGIS also argues that Commerce's final circumvention determination is unsupported by substantial evidence because Commerce failed to explain why it considered the percentage of value added by AGIS to be insignificant. Op. Br. at 40–41. We reject this argument because Commerce's explanation—that the value added was insignificant in view of prior CORE cases making similar findings and the other facts of the case—was reasonable and supported by substantial evidence. Preliminary Determination at 20–21; Final Determination at 17–20. AGIS also fails to identify anything Commerce could or should have said. Op. Br. at 38, 40–41; Reply Br. at 9 (conceding that "Commerce should not be held to a numerical or 'bright-line' test in considering the value added in third-country processing").

Commerce's decision. *OSI Pharms., LLC v. Apotex Inc.*, 939 F.3d 1375, 1382 (Fed. Cir. 2019) (citation omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[C]ourts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review."). Nor can we "supply a reasoned basis for [Commerce's] action that [Commerce] itself has not given." *NEXTEEL*, 28 F.4th at 1237 (citation omitted).

This does not mean that Commerce's written decision must address "every argument raised by a party or explain every possible reason supporting its conclusion." *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016); *see also Yeda Rsch. v. Mylan Pharms. Inc.*, 906 F.3d 1031, 1046 (Fed. Cir. 2018) ("[F]ailure to explicitly discuss every . . . minor argument does not alone establish that the [agency] did not consider it."). But we must be able to determine that Commerce at least considered counter arguments to its position. *Id.*; *see also BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1302 (Fed. Cir. 2019) (finding that Commerce erred when it "largely ignored" a party's counterargument and failed to articulate any rational for a finding).

Commerce erred here because it did not reasonably explain why it rejected AGIS's calculations. We disagree with Appellees' hyperbole that it would have been impossible or highly burdensome for Commerce to explain why AGIS's calculations were wrong. This case involved only a few active participants. *See* Final Determination at 2–3; *see also* Oral Arg. at 37:40–50 (Steel Dynamics' counsel explaining that the case involved "one company that was an active participant as a respondent"). This was one of AGIS's main arguments and was squarely before Commerce. *See Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1386 (Fed. Cir. 2022) (finding that substantial evidence did not support Commerce's decision to invoke adverse inferences and apply partial facts where Commerce provided "[n]o reasonable justification" to do so). AGIS's calculations apparently used the same formulas as Commerce but only included a smaller subset of data. Op. Br. at 37–43; Reply Br. at 5–6; Oral Arg. at 35:48–36:40 (Steel Dynamics' counsel conceding that all Commerce had to do was explain why using U.S.-only data in the formulas was misleading).

We agree that Commerce's explanation was insufficient. We are unable to conclude that Commerce even considered AGIS's argument, and Commerce's discussion is limited to a single paragraph that is vague and conclusory and wholly fails to explain why Commerce

believed that using AGIS's dataset would be improper.[5] In fact, Commerce's meager explanation suggests that it may have misunderstood AGIS's position because Commerce stated that it did not need to use "AGIS's preferred formulas"—but AGIS used the same formulas as Commerce. Preliminary Determination at 22. In sum, substantial evidence does not support Commerce's determination as to AGIS's "value added."

5. Harmless Error

Because we find that substantial evidence does not support Commerce's determination as to the "value added" subfactor, we must consider the overall effect of this error and whether a remand is necessary. *Suntec Indus. Co., Ltd. v. United States*, 857 F.3d 1363, 1372 (Fed. Cir. 2017) (applying a harmless error analysis); *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings."). We conclude that Commerce's error was harmless. Commerce's finding of circumvention involved a multi-factor test and was supported by many findings other than its calculation of AGIS's value added.

Commerce's determination was country-wide, so its analysis of AGIS's value added data was only one part of the broader inquiry for this subfactor. AGIS does not appeal Commerce's determination that global data indicated a value added of 10% to 31% and that this data accurately described the value added by UAE production. Preliminary Determination at 21. Thus, we conclude that Commerce's overall determination does not require reversal or correction on remand.

CONCLUSION

Commerce's determination as to the UAE's "pattern of trade," "level of investment," "nature of the production process," and "extent of production facilities" is supported by substantial evidence. While Commerce's analysis for the "value added" subfactor is not reviewable and is therefore not supported by substantial evidence, this error was harmless in view of Commerce's other supported findings. We have considered AGIS's remaining arguments and find them unpersuasive. We affirm the Court of International Trade's judgment and Commerce's affirmative determination of circumvention.

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[5] The government also argued at oral argument that Commerce explained itself by stating, "even if AGIS's profit, financial expenses, and SG&A were added to the value-added percentage calculation, the percentage of value added does not materially change." Final Determination at 20; Oral Arg. at 31:30–32:20. This explanation does not address the relevant question of why Commerce declined to use AGIS's narrower dataset.

AFFIRMED

COSTS

No costs.

U.S. Court of International Trade

Slip Op. 23–46

NAGASE & CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and GEO SPECIALTY CHEMICALS, INC.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21-cv-00574

Granting in-part and denying in-part Plaintiff's Motion for Judgment on the Agency Record.

Dated: April 11, 2023

Neil Ellis, Neil Ellis PLLC, of Washington, DC, for Plaintiff. With him on the brief was *Jay C. Campbell,* White & Case LLP, of Washington, DC.

Kelly Geddes, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director, Commercial Litigation Branch; *Claudia Burke*, Assistant Director, Commercial Litigation Branch; and *Mykhaylo A. Gryzlov*, Of Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance.

OPINION

Vaden, Judge:

On April 12, 2022, Plaintiff Nagase & Co., Ltd. (Plaintiff or Nagase) filed a Motion for Judgment on the Agency Record challenging the final results of the U.S. Department of Commerce's (Commerce) first administrative review of the antidumping order on glycine from Japan. *Glycine from Japan: Final Results of Antidumping Duty Administrative Review; 2018–2020*, 86 Fed. Reg. 53, 946 (Dep't of Com. Sept. 29, 2021); *Glycine from Japan: Final Results of the Antidumping Administrative Review; 2018–2020* (Final Results), as corrected in 86 Fed. Reg. 57,127 (Dep't of Com. Oct. 14, 2021). Nagase argues that Commerce's decision to include certain expense items in Nagase's cost of production was unsupported by substantial evidence. Plaintiff's Memo. in Supp. of Its Mot. for J. on the Agency Record (Pl.'s Br.), ECF No. 34. Nagase further argues that Commerce abused its discretion by declining to correct an error in Nagase's assessment rate that Nagase raised nineteen days after publication of the Final Results. *Id.* The United States (Defendant or the Government) and GEO Specialty Chemicals, Inc. (Defendant-Intervenor or GEO) oppose Na-

gase's Motion. *See* Def.'s Resp. in Opp. To Pl.'s Mot. for J. upon the Admin. Record (Def.'s Br.), ECF No. 50; Def.-Int.'s Resp. to Pl.'s Mot. for J. on the Agency Record (Def.-Int.'s Br.), ECF No. 39. For the reasons that follow, the Court **GRANTS IN-PART** and **DENIES IN-PART** Nagase's Motion for Judgment on the Agency Record and **REMANDS** for reconsideration by the Department of Commerce.

BACKGROUND

Nagase is a Japanese manufacturer of chemicals, plastics, and related goods. On August 6, 2020, Commerce began an administrative review of the antidumping duty order on glycine from Japan. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 47,731 (Dep't of Com. Aug. 6, 2020). Glycine is an amino acid that has broad industrial and chemical uses. Commerce provided that its order covered:

> [G]lycine at any purity level or grade. This includes glycine of all purity levels, which covers all forms of crude or technical glycine including, but not limited to, sodium glycinate, glycine slurry and any other forms of aminoacetic acid or glycine . . . Glycine has the Chemical Abstracts Service (CAS) registry number of 56–40–6. Glycine and glycine slurry are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2922.49.43.00. Sodium glycinate is classified in the HTSUS under 2922.49.80.00.

Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Glycine from Japan; 2018–2020 (IDM) at 2 (Sept. 22, 2021), J.A. at 2917, ECF No. 45. Commerce's administrative review covered the period from October 31, 2018 through May 31, 2020 (the Period of Review) and included Nagase as one of two mandatory respondents.[1]

I. The Disputed Administrative Review

After receiving questionnaire responses and comments from Nagase, Commerce issued its preliminary results on June 30, 2021, and assigned Nagase a dumping margin rate of 27.71%. *Glycine from Japan: Preliminary Results of Antidumping Administrative Review; 2018–2020* (Preliminary Results), 86 Fed. Reg. 36,105 (Dep't of Com. July 8, 2021); *see* Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Glycine from Japan (June

[1] During the administrative review at issue, Nagase and its affiliate, Yuki Gosei Kogyo Co., Ltd., submitted joint responses; and Commerce treated them as a single entity. *See* IDM at 2, J.A. at 2,917, ECF No. 45.

30, 2021) (PDM) at 1–15, J.A. at 2,653–67, ECF No. 45. In addition to assigning Nagase a dumping margin, Commerce calculated an assessment rate for Nagase's constructed export price (CEP) sales.[2] *Id.* at 7–15; YGK/Nagase Preliminary Margin Calculation Output at 123, J.A. at 102,781, ECF No. 44.

The dumping margin and the assessment rate are the two most important numbers calculated in any antidumping review. The dumping margin is "the total amount by which the price charged for the subject merchandise in the home market (the 'normal value') exceeds the price charged in the United States[.]" *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed. Cir. 2001). It applies prospectively to future entries of the subject merchandise, which the importer will cover with cash deposits that are held by U.S. Customs and Border Patrol (Customs) until the completion of the next administrative review. *Id.* A "calculational problem" then arises. *Id.* Although the dumping margin represents the difference between sales prices in the producer's home market and the United States, dumping duties ultimately need to be imposed on entries of merchandise before they are sold. *Id*. Because the declared value of merchandise at entry is typically lower than the value for which it is sold, applying the dumping margin rate to the declared "entered value" would result in the under-collection of duties. For example, if the dumping margin is $100,000 on a sales value of $1,000,000, that would yield a dumping margin rate of 10%. But if the *entered value* of the merchandise is $800,000, Customs would collect only $80,000 if it assessed those entries at 10%, short of the $100,000 of duties owed. *See* Pl.'s Br. at 34 n. 17, ECF No. 34.

To reconcile the cash deposits with duties owed, Commerce calculates an assessment rate, which applies retrospectively to entries made during the Period of Review of the current administrative review. *See* 19 C.F.R. § 351.212. Commerce calculates the assessment rate by dividing the dumping margin by the entered value of the subject merchandise and then applies the resulting rate "uniformly on all entries each importer made during the [period of review.]" *Koyo Seiko*, 258 F.3d at 1343 (quoting *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan: Final Results of Antidumping Duty Adminis-*

[2] Constructed export price (CEP) sales are sales made by a United States entity affiliated with the foreign producer to an unaffiliated United States customer. They differ from export price sales, which are made by the foreign producer directly to an unaffiliated United States customer. Commerce distinguishes between the two because CEP sales must undergo certain deductions to compensate for the presence of an affiliate middleman. *See AK Steel Corp. v. United States*, 226 F.3d 1361, 1364–65 (Fed. Cir. 2000). The assessment rate at issue applied only to Nagase's CEP sales.

trative Reviews, 63 Fed. Reg. 63,860, 63,875 (Nov. 17, 1998)) (alteration in original). In the example, Commerce would ensure it collected the $100,000 dumping margin by dividing that figure by $800,000, yielding an assessment rate of 12.5% for entries awaiting liquidation.

Commerce determined that entries of glycine sold in CEP transactions during the Period of Review should be liquidated at many multiples of the dumping margin rate and transmitted this proposed assessment rate as part of a 126-page "Margin Output" of calculations provided to Nagase alongside the Preliminary Results. *See* YGK/Nagase Preliminary Margin Calculation Output at 123, J.A. at 102,781, ECF No. 44. Nagase and Defendant-Intervenor GEO Specialty Chemicals submitted case briefs to Commerce challenging aspects of the Preliminary Results. Despite the enormous proposed rate, Nagase's case brief did not challenge or mention the assessment rate. *See* Case Brief of Yuki Gosei Kogyo Co., Ltd. and Nagase & Co., Ltd. (Nagase Case Brief) (Aug. 9, 2021), J.A. at 102,804–23, ECF No. 44.

Instead, Nagase disputed the manner in which Commerce calculated Nagase's general and administrative (G&A) expenses. *Id.* In an antidumping review, Commerce determines the respondent's cost to produce the subject merchandise and must include as part of that cost "an amount for selling, general, and administrative expenses[.]" 19 U.S.C. § 1677b(3)(B). General and administrative expenses "relate to the activities of the company as a whole rather than to [the] production process." *LG Chem, Ltd. v. United States*, 534 F. Supp. 3d 1386, 1402 (CIT 2021) (quoting *U.S. Steel Grp. A Unit of USX Corp. v. United States*, 22 CIT 104, 106 (1998)) (alteration in original). Commerce's usual practice is to exclude expenses related to the production of non-subject merchandise from its calculation of general and administrative expenses if the expenses are allocated properly in the producer's normal books and records. Nagase claimed that Commerce wrongly included two items in its calculation of general and administrative expenses: (1) certain research and development (R&D) expenses and (2) a "compensation for payment" expense that Nagase made to a third party. Nagase Case Brief, J.A. at 102,808, ECF No. 44. Nagase asserts that, because these expenses were specific to non-subject merchandise, Commerce should have excluded them from its general and administrative cost calculations. *Id.*

Nagase first argued that its normal books and records allocated research and development costs across three product categories; and because only one category was related to glycine, costs from the other two categories should have been excluded from the expense calcula-

tion. *Id.* at 102,817–19. In support of its claim, Nagase provided internal worksheets that began recording research and development costs by product category in April 2019. *Id.* at 102,817; *see also* Response of Yuki Gosei Kogyo Co., Ltd. and Nagase & Co., Ltd. to the First Supplemental Questionnaire (First Supplemental Questionnaire Response) at Ex. S-20 (Jan. 22, 2021), J.A. at 84,969–73, ECF No. 44. Nagase pointed out that these worksheets reconciled to its trial balance accounts. *Id.* at 102,819. For the first two trial balance periods that Nagase reported — October 2018 through March 2019 and April 2019 through September 2019 — "R&D expenses" only appeared as a single-line item with no allocation by product category. *See* Response of Yuki Gosei Kogyo Co., Ltd. and Nagase & Co., Ltd. to the Section D Questionnaire (Section D Questionnaire Response) at Ex. D-4 (Nov. 23, 2020), J.A. at 84,035, ECF No. 44. But for the final trial balance account period, October 2019 through March 2020, Nagase broke out its research and development expenses into the three product categories with three separate account totals. *Id.*

Nagase also objected to the inclusion of the "compensation for payment" expense that it argued was related to the production of non-subject merchandise. Nagase Case Brief, J.A. at 102,809, ECF No. 44. Nagase explained that the expense was "incurred to compensate a customer that had consigned production of a pharmaceutical product to [Nagase] for losses due to a delay in the approval of the pharmaceutical by the relevant governmental entity." *Id.* at 102,812 (quoting First Supplemental Questionnaire Response at 20, J.A. at 84,168, ECF No. 44). More plainly stated, a pharmaceutical company paid Nagase to produce a drug;[3] but when Nagase's production facility failed inspection, Nagase agreed to compensate the company for its costs and dispose of the product it had already produced. *See* Response of Yuki Gosei Kogyo Co., Ltd. and Nagase & Co., Ltd. to the Second Supplemental Questionnaire (Second Supplemental Questionnaire Response) at Ex. SS-7 (May 6, 2021), J.A. at 92,781–86, ECF No. 44. To support its contention that the expense was related to the production of non-subject merchandise, Nagase cited both a memorandum of understanding signed by the parties to the transaction (the Compensation Memo) and an invoice issued by the customer. Nagase Case Brief, J.A. at 102,813–14, ECF No. 44. The Compensation Memo stated that the payment was to compensate the customer for "cost of materials paid, processing costs for raw materials . . . processing costs for this product, storage costs and disposal costs." *Id*.

[3] At oral argument, the parties agreed that the drug in question was not glycine. Oral Arg. Tr. at6:3–10, ECF No. 54.

The invoice billed Nagase for the same. *Id.* at 102,814; *see also* Second Supplemental Questionnaire Response at Ex. SS-8, J.A. at 92,788–89, ECF No. 44.

GEO addressed these points in its rebuttal brief, claiming that both the research and development costs and the "compensation for payment" expense related to the general operations of the company and were properly included in Commerce's expense calculation. *See* GEO Specialty Chemicals' Rebuttal Brief at 2–7 (Aug. 16, 2021), J.A. at 102,832–37, ECF No. 44. Nagase submitted its own rebuttal brief that, like its case brief, made no mention of the assessment rate. *See* Glycine From Japan: Rebuttal Brief (Aug. 16, 2021) J.A. at 102,839–102,863, ECF No. 44. After considering the parties' arguments, Commerce issued its Final Results, which continued to find that Nagase's research and development expenses and the "compensation for payment" expense were properly included in Nagase's general and administrative expense calculation. *See* Final Results, 86 Fed. Reg. 53,946–47; *see also* IDM at 1–6, J.A. 2916–22, ECF No. 45.

Commerce first concluded that Nagase did not allocate research and development costs to specific products and instead recognized these costs as a general expense. *See* IDM at 6, J.A. at 2,921, ECF No. 45. Commerce noted its practice to allocate research and development expenses to specific products if they are reported that way in the company's normal books and records. *Id.* However, Nagase's GAAP-compliant,[4] audited financial statements for fiscal years 2018 and 2019 recorded research and development expenses as "selling, general, and administrative expenses" with no allocation to specific products. *See* Glycine From Japan: Response to Section A of the Questionnaire (Section A Questionnaire Response) at Ex. A-19 (Oct. 30, 2020), J.A. at 80,170–71, 80,203, ECF No. 44. These financial statements collectively covered all but the final two months of the Period of Review.[5] *See Id.* Although Nagase provided "trial balance accounts" and "worksheets" that allocated research and development costs to product categories, Commerce found that these allocations were made during the Period of Review and characterized them as "'after-the-fact' allocation[s] of company-wide R&D costs to broad product categories using headcount or hours." IDM at 6, J.A. at 2,921, ECF

[4] "GAAP" stands for generally accepted accounting principles. 19 U.S.C. § 1677b(f)(1)(A) provides that Commerce shall normally calculate general and administrative expenses on the basis of the records of the exporter, as long as those records are kept in accordance with the GAAP of the exporting country.

[5] Nagase provided two audited financial statements, one for fiscal year 2018 and one for fiscal year 2019. The former covered the period between April 2018 and March 2019; the latter covered the period between April 2019 and March 2020. *See* Section A Questionnaire Response at Ex. A-19, J.A. at 80,155, 80,190–91, ECF No. 44; *see also* Pl.'s Br., at 8, ECF No. 34 at 8.

No. 45. Commerce was skeptical that these broad product categories matched non-subject merchandise, noting that "we do not find that the R&D expense is . . . solely attributable to [non-subject merchandise] or that an R&D project's research is of the type assignable only to a limited category of products." *Id.* Finally, Commerce cited to Nagase's cost verification report from the original investigation, which Nagase had included as an exhibit in its Section D questionnaire response during the administrative review. *See* Section D Questionnaire Response at Ex. D-4, J.A. at 83,998, ECF No. 44. There, Commerce recounted that "[Nagase] officials further explained that [Nagase] does not assign R&D expenses to specific products in the normal course of business because researchers do R&D work as a seed for future products, and so it is difficult to attach R&D expenses to existing products." *Id*. at 84,014. Commerce therefore decided to rely on Nagase's financial statements, which recognized the research and development expenses as a general expense. IDM at 6, J.A. at 2,921, ECF No. 45.

Commerce similarly concluded that the compensation for payment expense "[did] not relate directly to the production of non-subject merchandise" and explained that Commerce "allocates expenses of this nature (*e.g.*, penalties, litigation accruals, fines, *etc.*) over all products because they do not relate to a production activity, but to the company as a whole." *Id.* at 4. In support of that conclusion, Commerce cited to a press release that Nagase had issued when disclosing the payment. *See* First Supplemental Questionnaire Response at Ex. S22 (Press Release) (Feb. 18, 2020) J.A. at 84,977–79, ECF No. 44. The Press Release reported, in flawed English translation, that:

> When a customer's application for a drug was made to use the raw materials manufactured by the Company, the application was put on hold by the authorities. Accordingly, we have received a request from our customers to pay . . . the consignment processing costs we have already received for the drug.

Id. at 84,979. The Final Results did not discuss or provide an interpretation of the statements in the Press Release but did observe that "one-time charges like this are ultimately a cost of doing business for the company." IDM at 4, J.A. at 2,919, ECF No. 45.

Because the parties' case briefs did not raise any issues relating to the assessment rate, Commerce did not discuss it. *See id.* at 1–11, ECF No. 45. The assessment rate remained unchanged, and on September 23, 2021, Commerce transmitted a Final Results Margin Calculation to Nagase that included the calculations and an un-

changed triple-digit assessment rate. *See* Final Results Margin Calculation for Yuki Gosei Kogyo Co., Ltd./Nagase & Co. Ltd. at 123 (Sept. 22, 2021), J.A at 103,299, ECF No. 44.

At some point in October 2021, Nagase's counsel discovered that the assessment rate had been calculated using erroneous data.[6] *See* Pl.'s Br. at 15, ECF No. 34. Nagase determined that "the per-unit amounts of regular U.S. duties paid on Nagase's imports corresponding with CEP sales were inadvertently duplicated and reported as the entered values for those sales." Pl.'s Reply at 15, ECF No. 42. In other words, Nagase had mistakenly supplied Commerce with the dollar value of duties it had paid rather than the value of its sales during the Period of Review. *See* Pl.'s Reply at 15, ECF No. 42. The value of its sales was more than eighteen times the value of the duties paid. When Commerce calculated Nagase's assessment rate, it did so by using Nagase's erroneously supplied information. *See id.* at 35. Nagase's error resulted in its receiving a bill for sixteen times the amount it alleges it owed — a difference amounting to millions of dollars. *Id.* at 36; *see also* Liquidation Instructions for Glycine from Japan: Yuki Gosei Kogyo Co., Ltd. and Nagase & Co., Ltd. for the Period 10/31/2018 through 5/31/2020 (Liquidation Instructions) (Nov. 24, 2021), J.A. at 103,307–10, ECF No. 44 (instructing Customs to liquidate the entries at the contested assessment rate).

Commerce's regulations provide a five-day window for parties to seek correction of ministerial errors following disclosure of the final calculations in an administrative review. *See* 19 U.S.C. § 1675(h); 19 C.F.R. § 351.224(c). Nagase missed this last chance to catch its error. On October 18, 2021, nineteen days after the release of the final calculations, Nagase's counsel called Dana Mermelstein at Commerce to alert the agency to the assessment rate error. *See* Memorandum re: Final Results of Administrative Review of the Antidumping Duty Order on Glycine from Japan; 2018–2020; Telephone Conversation with Counsel for Respondent (Oct. 19, 2021), J.A. at 3,068, ECF No. 45. According to Mermelstein's memorialization of the call, Commerce explained that "this administrative review is complete, the record is closed, and there is no mechanism for Commerce to change the results or the manner of duty assessment." *Id*. On November 24, 2021, Commerce instructed Customs to liquidate Nagase's CEP entries made during the Period of Review at the determined assessment rate. *See* Liquidation Instructions, J.A. at 103,308, ECF No. 44.

[6] The record reflects that Neil Ellis of Neil Ellis PLLC was not involved in the case at the agency stage.

II. The Present Dispute

Nagase filed a complaint contesting the Final Results that same day. *See* Compl. ¶ 1, ECF No. 7. The Complaint made three allegations: (1) Commerce's decision to include certain research and development expenses in its general and administrative expense calculations was unsupported by substantial evidence and otherwise not in accordance with law; (2) Commerce's decision to include the "compensation for payment" expense in Nagase's general and administrative expenses was unsupported by substantial evidence and otherwise not in accordance with law; and (3) the assessment rate calculated by Commerce for Nagase's CEP sales was unsupported by substantial evidence and otherwise not in accordance with law. *Id.* ¶¶ 28, 33, 36. On April 12, 2022, Nagase moved for judgment on the agency record with an accompanying brief. *See* Pl.'s Br., ECF No. 34. Nagase's brief differed in an important respect from its Complaint — it changed its theory regarding the assessment rate and described Commerce's refusal to correct it as an "abuse [of] discretion" rather than as unsupported by substantial evidence. *Compare* Pl.'s Br. at 6, ECF No. 34 ("Commerce abused its discretion in instructing CBP to collect duties pursuant to the erroneous and vastly inflated assessment rate . . . ."), *with* Compl. ¶ 36, ECF No. 7 ("Accordingly, the assessment rate calculated by the Department for Nagase's CEP sales is unsupported by substantial evidence and is otherwise not in accordance with law.").

The Government and Defendant-Intervenor filed response briefs on July 1, 2022, and Nagase filed its reply on August 29, 2022. *See* Def.'s Br., ECF No. 50; Def.-Int.'s Br., ECF No. 39; Pl.'s Reply, ECF No. 42. Both the Government and Defendant-Intervenor argue that (1) Commerce properly included all of Nagase's research and development costs in its general and administrative expenses; (2) Commerce properly included Nagase's compensation for payment expense in its expense calculations; and (3) Commerce lawfully exercised its discretion when it refused Nagase's request to correct the assessment rate. *See* Def.'s Br. at 6–7, ECF No. 50; Def.-Int.'s Br. at 6–8, ECF No. 39.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiff's challenge to the Final Results 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 final determinations in antidumping reviews. The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). If they

are unsupported by substantial evidence or not in accordance with the law, then the Court must "hold unlawful any determination, finding, or conclusion found[.]" *Id.* "[T]he 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." *See New American Keg v. United States*, No. 2000008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Nagase's General and Administrative Expense Calculations

A. Legal Framework

The Tariff Act of 1930 requires Commerce to determine whether a foreign producer is selling merchandise for less than the cost of producing it. 19 U.S.C. § 1677b(b)(1). That requires Commerce to calculate the "cost of production" for the subject merchandise. *Id.* § 1677b(b)(3). The statute recognizes that production costs go beyond the direct expenses of materials and labor and thus directs Commerce to include "an amount for selling, general, and administrative expenses" — so-called "G&A" expenses. *Id.* § 1677b(b)(3)(B). In order to ensure that general and administrative expenses are reflected in the per-unit cost it calculates for the subject merchandise, Commerce calculates a "G&A expense ratio." This ratio consists of total general and administrative expenses divided by the company-wide cost of goods sold. *See* Section D Questionnaire Response at 30, J.A. at 83,980, ECF No. 44. Commerce then multiplies the G&A expense ratio by the cost to produce each product tracked in the antidumping proceeding and adds that amount to the cost of production. As general and administrative expenses increase, the cost of production for the subject merchandise necessarily will as well, making it more likely that Commerce will find dumping.

Unfortunately, "G&A expenses are not defined in the statute[.]" *Coal. of Am. Millwork Producers v. United States*, 581 F. Supp. 3d 1295, 1312 (CIT 2022). General and administrative expenses "are generally understood to mean 'expenses which relate to the activities of the company as a whole rather than to the production process,'" but Commerce ultimately must make specific determinations about which expenses to count as general and administrative. *Torrington Co. v. United States*, 25 CIT 395, 431 (2001) (quoting *U.S. Steel Group a Unit of USX Corp. v. United States*, 22 CIT 104, 106 (1998)). The Court affords these determinations heightened deference because they "involve complex economic and accounting decisions of a technical nature." *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). However, that deference is not unlimited. Statutes guide the inquiry. As with all cost calculations in an antidumping proceeding, general and administrative expenses "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 of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). The statute further provides that Commerce "shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer . . . ." *Id.* A cost allocation is historical if it has been used prior to the relevant Period of Review. *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA), H.R. Doc. No. 103–316, 103rd Cong. at 835 (1994) (Commerce "will consider whether the producer historically used its submitted cost allocation methods to compute the cost of the subject merchandise prior to the investigation or review and in the normal course of its business operation."); *see also* 19 U.S.C. § 3512(d) ("The statement of administrative action . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

B. Nagase's Research and Development Expenses

Commerce determined that Nagase's research and development costs were "company-wide expenses" and therefore properly included within its general and administrative expense calculation. IDM at 6, J.A. at 2,921, ECF No. 45. It did so on the basis of three pieces of evidence from Nagase's records: the trial balance accounts and sup-

porting worksheets; the audited financial statements; and the cost verification report from the original dumping investigation, which Nagase attached to its Section D Questionnaire Response during the administrative review. *See id*. Nagase argues that Commerce's treatment of this evidence was defective. The Court disagrees and holds that Commerce's decision to include research and development costs in the calculation of Nagase's general and administrative expense ratio was supported by substantial evidence on the record.

Nagase's theory is that, because its worksheets and trial balance accounts segmented research and development costs into three product categories, Commerce was required to reflect that segmentation in its general and administrative expense calculations and deduct those expenses from product categories unrelated to glycine. *See* Pl.'s Br. at 8, ECF No. 34. Instead, Commerce "disregarded its past practice and included R&D costs specific to non-subject pharmaceutical products in [Nagase's] G&A expense ratio for the subject product (glycine)." *Id*. at 23. In support of its view of Commerce's past practice, Nagase cited to *Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 52,055 (Dep't of Com. Sept. 12, 2007) and its accompanying Issues & Decision Memorandum for the proposition that "[i]n determining whether expenses associated with R&D activities should be included in the reported costs, we look at whether these expenses relate specifically to individual products or are general in nature." Pl.'s Br. at 21, ECF No. 34. In Nagase's view, Commerce may only disregard a respondent's "product-specific R&D cost records" if it finds that these were either inconsistent with Japanese GAAP or failed to reasonably reflect Nagase's costs. *Id.* at 27–28; *see also* 19 U.S.C. § 1677b(f)(1)(A) (directing that "[c]osts shall normally be calculated based on the records of the exporter . . . if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise."). Because Commerce made neither finding, Nagase believes Commerce "must rely on those costs as recorded in the normal course of business." Pl.'s Br. at 27–28; *see* 19 U.S.C. § 1677b(f)(1)(A).

Nagase, however, acknowledges that the other pieces of evidence Commerce considered — the financial statements and the cost verification report — show something different. Nagase had "reported a total R&D cost amount in its financial statements[.]" Pl.'s Br. at 25, ECF No. 34. Indeed, Nagase's audited and GAAP-compliant financial statements for fiscal years 2018 and 2019, which collectively cover all

but the final two months of the Period of Review, categorized research and development expenses as "selling, general, and administrative expenses" with no segmentation by product category. *See* Section A Questionnaire Response at Ex. A19, J.A. at 80,170–71; 80,203, ECF No. 44. Nagase also noted that its cost verification report — published on December 18, 2018, as part of the original dumping investigation — stated that "[Nagase] does not assign R&D expenses to specific products in the normal course of business because researchers do R&D work as a seed for future products, and so it is difficult to attach R&D expenses to existing products." Pl.'s Br. at 26, ECF No. 34.

The record, taken together, tells a story. Before the Period of Review, Nagase had never associated research and development expenses with specific products because its research functioned "as a seed for future products" rather than existing ones. *See* Section D Questionnaire Response at Ex. D-4, J.A. at 84,014, ECF No. 44. Its accounting reflected that, treating research and development expenses as a single, general expense — until about two-thirds of the way through the Period of Review. At that point, Nagase switched its accounting method. *See id.* at Ex. D-11, J.A. at 84,035. It began reporting research and development expenses under three "research themes," relying on worksheets that used researcher headcount and hours worked to derive a monthly amount spent on each theme. *See* First Supplemental Questionnaire Response at Ex. S-20, J.A. at 84,969–73, ECF No. 44. Because the nature of its research had not actually changed, Nagase remained unable to associate research and development costs with specific products. Further, although the new research and development worksheets reported data from April 2019 onward, the accounting shift took place too late during the Period of Review to be reflected in Nagase's financial statements, which continued to account for research and development costs as a single, general expense. *See* Section A Questionnaire Response at Ex. A-19, J.A. at 80,170–71; 80,203, ECF No. 44.

That story, clear in the record, was also reflected in Commerce's determination. Commerce agreed that its normal practice "has been to allocate R&D expenses to products consistent with the company's normal books and records[.]" IDM at 6, J.A. at 2,921, ECF No. 45. It further agreed that, during the Period of Review, "[Nagase] allocated its total R&D costs to 'product categories'" and that "[t]he record demonstrates that [Nagase] has separate trial balance accounts for R&D." *Id.* But Commerce quoted the cost verification report, in which Nagase explained that its research and development costs were not attributable to specific products. *Id.* Commerce then found two problems with the trial balance accounts and their supporting work-

sheets. First, the worksheets failed to demonstrate that costs were incurred on a product-specific basis and instead assigned costs only to "broad product categories." *Id.*

Second, Commerce took issue with the timing of the product-category allocations. It found that the separate product-category trial balance accounts and worksheets represented "an 'after the fact' allocation of company-wide R&D costs" that only came into being during the Period of Review. *Id.* Such a finding was significant because the antidumping statute permits Commerce to consider an exporter's evidence on cost allocation only "if such allocations have been historically used by the exporter or producer . . . ." 19 U.S.C. § 1677b(f)(1)(A). In order for an allocation to qualify as "historically used," it must have been in place before the Period of Review. *See* SAA at 835 (Commerce "will consider whether the producer historically used its submitted cost allocation methods to compute the cost of the subject merchandise prior to the investigation or review and in the normal course of its business operation."). By its own admission, Nagase did not begin allocating research and development expenses to product categories until April 2019, several months into the Period of Review. *See* Pl.'s Reply at 9, ECF No. 42 ("[Nagase] began recording R&D expenses by project and by product category in April 2019 (*i.e.*, for 12 of the 19 months of the POR[.])"). Its allocations therefore could not meet the statutory requirement of historical use. *See* 19 U.S.C. § 1677b(f)(1)(A). Commerce thus appropriately concluded that Nagase did not "allocate R&D expenses on a product-specific basis . . . in its normal books in records [*sic*]." IDM at 6, J.A. at 2,921, ECF No. 45. Commerce instead chose to rely on Nagase's GAAP-compliant financial statements, which reported research and development expenses as a single, general expense. *Id.*

Nagase suggests that, under the antidumping statute, the trial balance accounts and supporting worksheets must be credited absent a specific finding that they were either inconsistent with Japanese GAAP or that they failed to reasonably reflect Nagase's costs. *See* Pl.'s Br. at 27–28, ECF No. 34; 19 U.S.C. § 1677b(f)(1)(A). But Commerce complied with the statute, which provides that "[c]osts 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 of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Commerce calculated Nagase's general and administrative costs on the basis of its audited, GAAP-compliant financial statements — which are, of course, "the

records of the exporter or producer of the merchandise." *Id.* Nagase's argument forgets the statutory requirement that, in order to merit Commerce's consideration, cost allocation records must be historical, meaning they must predate the Period of Review. *See* SAA at 835. Nagase's preferred records did not. That ends the matter.

Commerce's decision took place in the context of the cost verification report, which recorded Nagase's statement to Commerce that its research and development activities were not tied to existing products. Nagase attempts to cordon off this report from the rest of the administrative review, arguing that it constituted "obsolete evidence from a prior proceeding (the original investigation)" and reflected only its "R&D cost recording practices . . . for the period of investigation (2017) – not the evidence of [Nagase's] R&D cost accounting practice during the fiscal year covered by the current Period of Review (April 2019 to March 2020)." Pl.'s Br. at 19, 25, ECF No. 34. In fact, it was entirely proper to consider the cost verification report during the administrative review. Nagase itself placed the report on the record by attaching the report to its questionnaire response. *See* Section D Questionnaire Response at Ex. D-4, J.A. at 83,998, ECF No. 44; *see also* IDM at 6, J.A. at 2,921, ECF No. 45. Further, the report did not merely discuss Nagase's former cost accounting method, as Nagase claims. Rather, it quoted Nagase officials making categorical statements about the nature of their research practices, specifically that "researchers do R&D work as a seed for future products, and so it is difficult to attach R&D expenses to existing products." Section D Questionnaire Response at Ex. D-4, J.A. at 84,014, ECF No. 44; *see also* IDM at 6, J.A. at 2,921, ECF No. 45. Nagase supplied no evidence that this statement stopped being true, which entitled Commerce to look askance at Nagase's mid-Period-of-Review shift in accounting method and characterize it as "after the fact." IDM at 6, J.A. at 2,921, ECF No. 45. Nagase may not add a document to the record and then fault Commerce for considering its contents when they bear on the question before the agency. *See Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (noting that an agency cannot "refus[e] to consider evidence bearing on the issue before it").

Nagase's records that segmented research and development costs by product category were appropriately discounted by Commerce. They did not conform to 19 U.S.C. § 1677b(f)(1)(A)'s requirement that such records reflect historical cost allocations. Those records that did comply with the statute did not segment research and development costs. Commerce's determination that Nagase treated its research and development costs as a general expense in the normal course of

business, rather than attributing them to specific products, was thus supported by substantial evidence on the record.

C. Nagase's "Compensation for Payment" Expense

The same cannot be said for Commerce's decision to include Nagase's "compensation for payment" expense in the general and administrative cost calculations. In a brief paragraph that was shorter than the agency's recitation of the parties' contrasting arguments, Commerce found that the compensation for payment expense related to the general operations of the company and was properly included as a general and administrative expense. IDM at 4, J.A. at 2,919, ECF No. 45. In support, Commerce cited to a single document from the record, the Press Release, claiming without any analysis that it demonstrated "the fact that the expenses relate to the company as a whole[.]" *Id.* The Court holds that this minimal explanation does not suffice.

In its brief, Nagase argued that Commerce "labeled" and "classified" the expense but did not actually "explain how that expense related to [Nagase's] general operations." Pl.'s Br. at 29–30, ECF No. 34. Rather, Nagase contended the record demonstrated that the expense was directly related to the production of non-subject merchandise. Citing to its response to Commerce's Second Supplemental Questionnaire, Nagase reported that the expense stemmed from a contract with a non-glycine customer that consigned production of a non-glycine pharmaceutical product to Nagase. *Id.* at 30. Nagase began production of the product, but two years later, Nagase was forced to halt production and dispose of the already produced inventory. *Id.* Nagase signed the Compensation Memo with its customer, agreeing to pay an invoice the customer issued for the "cost of materials paid, processing costs for raw materials . . . storage costs and disposal costs[.]" *Id.* at 31. Nagase argues that this record evidence demonstrates that the compensation for payment expense was "directly related to the provision of a non-subject service (*i.e.*, [Nagase's] production of a non-subject pharmaceutical product)," and that Commerce failed to address this evidence. *Id.* at 30.

The substantial evidence standard requires that Commerce "articulate [a] rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962). Further, "[t]he substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.*, 340 U.S. at 488. Commerce must provide a reasonable explanation for its actions and address information on the record that significantly detracts from its conclusion.

Here, Commerce's determination amounted to three statements. First, it found that "the record indicates that the 'compensation for payment' expenses do not relate directly to the production of non-subject merchandise, but rather, relate indirectly to the general operation of the company." IDM at 4, J.A. at 2,919, ECF No. 45. Commerce then analogized the expense to "penalties, litigation accruals, fines, *etc*.," which similarly do not relate to a production activity. *Id.* Commerce concluded by observing that "one-time charges," such as the compensation for payment expense, "are ultimately a cost of doing business for the company." *Id*. Commerce's sole support in the record for these findings was the Press Release. Although Commerce did not quote from or discuss the contents of the Press Release, it states that:

> When a customer's application for a drug was made to use the raw materials manufactured by the Company, the application was put on hold by the authorities. Accordingly, we have received a request from our customers to pay . . . the consignment processing costs we have already received for the drug.

Press Release, J.A. at 84,979, ECF No. 44. Each of Commerce's findings is conclusory and contradicted by record evidence that it failed to address.

First, it is unclear how Commerce determined that the expense "do[es] not relate directly to the production of non-subject merchandise" from the Press Release alone. IDM at 4, J.A. at 2,919, ECF No. 45. That document reports that a pharmaceutical company sought to use "raw materials manufactured by [Nagase]," but Nagase ultimately had to reimburse the company for the "processing costs we have already received for the drug." Press Release, J.A. at 84,979, ECF No. 44. When asked directly at oral argument, Government counsel did not dispute that the product in question was not glycine. *See* Oral Argument Transcript at 6:1–7, ECF No. 54 (The Court: "Is there any dispute that the customer in question . . . was not a glycine customer of Nagase's?" Ms. Geddes: "No, Your Honor."); *see also* Second Supplemental Questionnaire Response at 6, J.A. at 92,718, ECF No. 44 (identifying the product in question as other than glycine). The Press Release therefore provided facial support for Nagase's contention that the compensation for payment expense related directly to the production of non-subject merchandise. Other information on the record — the Compensation Memo and Nagase's Second Supplemental Questionnaire Response — corroborated Nagase's claim that the payment related to a non-glycine product. *See* Second Supplemental Questionnaire Response at 6, J.A. at 92,718, ECF No. 44; *see also id.* at 92,785. Commerce ignored both in its decision. Commerce declined

to address evidence that "fairly detract[ed]" from its conclusion and failed to "articulate[] [a] rational connection" between what the Press Release said and the choice Commerce made. *Universal Camera Corp.*, 340 U.S. at 488 (first quote); *Burlington Truck Lines,* 371 U.S. at 168 (second quote). Instead, Commerce stated its legal conclusion, declared that the Press Release supported it, and moved on.

Commerce did attempt to explain that it "allocates expenses of this nature (*e.g.*, penalties, litigation accruals, fines, *etc.*) over all products because they do not relate to a production activity, but to the company as a whole[.]" IDM at 4, J.A. at 2,919, ECF No. 45. Its sole support for this statement was — again — a citation to the Press Release. One can squint and see similarities between the compensation for payment expense and these other kinds of expenses, as the triggering event for Nagase's payment was a negative regulatory finding that rendered Nagase's promised services to its client impossible. Yet the compensation payment was not a regulatory penalty, nor a litigation accrual, nor a fine. It could be covered by Commerce's convenient "etc." at the end of that list, but one cannot know because Commerce did not explain why it believed the compensation for payment expense shared a "nature" with the listed expenses or why the Press Release "demonstrated" such a fact. *See id.* Indeed, Commerce offered no fact or reason — such as the existence of pending litigation — to support its classification and instead treated it as self-evident. That oversight was legally significant because the record evidence Commerce cited suggests that the compensation for payment expense did in fact "relate to a production activity." *See, e.g.*, Press Release, J.A. at 84,979, ECF No. 44 (explaining that Nagase was reimbursing "processing costs" it received for manufacturing a client's product). Commerce needed to explain why the compensation payment was a member of a class of expenses that did not relate to production. Instead, Commerce merely "labeled" and "classified" without explaining its conclusion or addressing important evidence that cut against it. *See* Pl.'s Br. at 29–30, ECF No. 34.

The Government offered a rationale for Commerce's finding that the expense did not relate to a production activity; namely, that the drug Nagase tried to produce never generated any revenue. In its brief, the Government explained that Commerce generally excludes expenses from the general and administrative category if they are tied to the production of non-subject merchandise. Def.'s Br. at 14, ECF No. 50. However, if the non-subject product does not create a revenue stream, its expenses must necessarily be paid out of the company's general revenues; and the expense ceases to be specific to non-subject mer-

chandise. *Id.* The Government asserts that, because the compensation payment in question was made before Nagase's drug generated any revenue, the payment must have been made out of Nagase's general revenues and thus was properly included in the general and administrative expenses. *Id.*

This is an interesting explanation. Unfortunately, it is not Commerce's. The agency made none of these arguments in its final determination, and "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Compare* IDM at 4, J.A. at 2,919, ECF No. 45, *with Burlington Truck Lines*, 371 U.S. at 168. Perhaps Commerce declined to do so because the record in this case did not support it. In its reply brief, Nagase cited to the record and demonstrated that, although consigned production of this particular drug ceased, custom manufacturing of pharmaceutical products remained an active business line during the Period of Review — a fact to which all parties agreed at oral argument. *See* Pl.'s Reply at 12, ECF No. 42; *see also* Section A Questionnaire Response at Ex. A-29, J.A. at 80,375, 80,378, ECF No. 44; Oral Arg. Tr. 6:11–18, ECF No. 54. Therefore, Nagase argued, the other merchandise produced by its custom manufacturing business could cover the compensation for payment expense. Pl.'s Reply at 13, ECF No. 42. Whether that was true as an accounting matter was not established. But the fact that custom manufacturing was a normal business activity that Nagase maintained during the Period of Review undercuts the Government's *post hoc* assertion that the expense was "not a production cost tied to the *ongoing production* of any *revenue-generating* non-subject merchandise." Def.'s Br. at 18, ECF No. 50.

Commerce will have an opportunity to reconsider the issue on remand. There, it should reconsider the entire record of evidence regarding the compensation for payment expense; allow Nagase an opportunity to respond to the arguments Commerce makes; and then make a final, informed decision linking the facts found to the choice made. *See Burlington Truck Lines*, 371 U.S. at 168. The current record before the Court and Commerce's lack of an explanation of the competing evidence in that record do not support its finding that the expense should be categorized as a general and administrative expense. Similarly, the Court may not credit the Department of Justice's late attempt to craft an acceptable rationale supporting Commerce's determination because *post hoc* rationalizations are not permitted. *Id*. The Court therefore must **GRANT** Nagase's Motion for Judgment on the Agency Record and **REMAND** the issue of the categorization of the compensation for payment expense to Commerce for further consideration.

II. Nagase's Assessment Rate

The Court must finally decide if Commerce acted lawfully when it declined Nagase's untimely request to correct its assessment rate. Nagase argues that Commerce abused its discretion by instructing Customs to liquidate its sales at a triple-digit assessment rate because this rate "incorporated an enormous error, which, if not corrected, will result in the over-collection of . . . millions of dollars of dumping duties." Pl.'s Br. at 32, ECF No. 34.

However, Nagase admits that the enormous error in question stemmed from its own submission of an inaccurate entered-value figure for its CEP sales. *See* Pl.'s Reply at 15, ECF No. 42. Although the error was detectable starting at the latest from the issuance of Commerce's Preliminary Results, Nagase further admits that it did not seek correction of the error until nineteen days after the publication of the Final Results and fourteen days after the five-day window for ministerial error comments had closed. *Compare* 19 C.F.R. § 351.224(c)(2) (requiring comments concerning ministerial errors, including calculation errors, to be filed within five days of the disclosure of the final results of an administrative review), *with* Final Results, 86 Fed. Reg. 53,946 (published Sept. 29, 2021), *and* Pl.'s Br. at 15, ECF No. 34 ("Nagase's counsel discovered the error in the Department's Margin Output in mid-October 2021 . . . . They promptly contacted the Department personnel, and discussed the issue by telephone on October 18, 2021."). Nagase nonetheless maintains that it was an abuse of Commerce's discretion to direct liquidation at the uncorrected rate. Despite acknowledging "issues of the finality of administrative decisions and timeliness of objections," Nagase believes that these concerns are outweighed by the error's impact; its clerical nature; its apparentness on the face of Commerce's calculations; and the fact that it is, in Nagase's view, correctible using information already on the record. Pl.'s Br. at 38, ECF No. 34. Although the correct figure for the entered value of CEP sales is *not* part of the record, Nagase argues that Commerce could instead calculate a per-kilogram assessment rate or alternatively "reverse engineer" the entered value by dividing Nagase's erroneous entered value figure by the ordinary customs duty rate for glycine. Pl.'s Br. at 36–37, ECF No. 34. Under these circumstances, Nagase argues that "it would be highly punitive — contrary to the 'remedial' nature of the [antidumping] law — for the error to go uncorrected and for Nagase to be compelled to pay . . . millions of dollars in excess duties." *Id.* at 38–39. The Court disagrees and holds that Commerce did not exceed its lawful discretion by denying Nagase's untimely request to correct the assessment rate error.

Commerce "certainly has the authority to act to correct ministerial errors in the course of judicial review of the final results of its determinations[.]" *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1376 (Fed. Cir. 2010). Indeed, Commerce's discretionary power to correct ministerial errors ends only "after judicial review is completed." *Id.* That is not the question before the Court. Rather, the question is whether the Court may *force* Commerce to correct an error after it has refused a party's untimely request to do so. Such a decision by Commerce is evaluated under an abuse of discretion standard. *See id.* ("[T]here is no dispute here that Commerce has discretion to fix the error; instead, the question is whether Commerce's failure to fix the error is an abuse of that discretion."). Nagase did not discuss the legal standard for abuse of discretion in its brief, choosing instead to remind the Court of its equitable powers. *See* Pl.'s Br. at 39, ECF No. 34; *see also* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."). Yet courts evaluating Commerce's rejection of requests for ministerial error correction have done so under an abuse of discretion standard by asking whether Commerce appropriately balanced "'the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (quoting *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961)).

Neither this Court nor the Court of Appeals for the Federal Circuit has ever found an abuse of discretion where Commerce has declined to correct a ministerial error that was detectable during the original proceedings but was not raised until after publication of the final results and the closure of the five-day window for ministerial error comments. *See Dorbest*, 604 F.3d at 1377. The error that gave rise to Nagase's assessment rate became discoverable at the latest on June 30, 2021, when Commerce issued the Preliminary Results. *See* YGK/Nagase Preliminary Margin Calculation Output at 123, J.A. at 102,781, ECF No. 44; *see also* Oral Arg Tr. 59:8–15, ECF No. 54 (Plaintiff counsel's agreement that the assessment rate was published to Nagase as part of the Preliminary Results). Nagase subsequently submitted a case brief challenging aspects of the Preliminary Results but not the assessment rate despite 19 C.F.R. § 351.309(c)(2)'s requirement that "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination[.]" The assessment rate therefore remained unchanged in the Final Results, and Nagase failed to file any comment alerting Commerce to ministerial errors in its determination within

the five-day window provided by 19 C.F.R. § 351.224(c)(2). Despite multiple opportunities, Nagase missed every chance to flag the error — an error originally caused by and then compounded by Nagase's inattention to the data it submitted and the calculations that resulted. In such circumstances, the Court may not force Commerce to disturb the finality of the administrative decision. *See Chengde Malleable Iron General Factory v. United States*, 31 CIT 1253, 1260 (2007) ("[B]ecause Chengde delayed requesting correction until after [Commerce] had issued the *Final Results*, the requirement of administrative finality necessarily outweighed its belated concern for correctness.").

Nagase cites no authority to the contrary. Although courts have found that Commerce may abuse its discretion by denying a party's request to correct a ministerial error, these errors were all raised within the appropriate deadline. In *NTN Bearing*, the respondent raised clerical errors following Commerce's preliminary determination and before publication of the final determination. 74 F.3d at 1208. The same is true of the clerical errors at issue in *Tehnoimportexport v. United States*, 15 CIT 250, 258 (1991), which the respondent raised "eleven days prior to the issuance of the final determinations." Lastly, in *Koyo Seiko Co., Ltd. v. United States*, 14 CIT 680, 681 (1990), Commerce used its discretion to grant all parties an extra two weeks following the publication of the final results to submit error correction requests after it "became apparent . . . that the determination was tainted by numerous ministerial errors." Commerce provided that, following these submissions, "an amended determination would be published," and the respondent raised all errors within Commerce's deadline. *Id.* These cases recognize a principle stated clearly in *Alloy Piping Products, Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1292–93 (Fed. Cir. 2003): Commerce is required to correct a respondent's error that is apparent on the face of the final determination only where the respondent has exhausted its administrative remedies. "Under the regulation, this means applying to Commerce to correct the error within five days of the release of the final calculations or, if an extension is granted, within five days after the publication of the final determination." *Id.* at 1293. This Nagase did not do.

Nagase proffers work-around methodologies that it claims Commerce can use to derive the correct figure for entered value despite that figure's absence from the record. *See* Pl.'s Br. at 36–37, ECF No. 34. But without that figure, the Court has no way of determining whether Commerce can do what Nagase claims. The record does not

contain the target at which Commerce should be aiming, and this Court is limited to facts on the record when it reviews Commerce's determinations. *See* 19 U.S.C. §§ 1516a(b)(1)–(2). "The burden of creating an adequate record lies with the interested parties and not with Commerce." *Qingdao Sea-Line Trading Co., Ltd. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citing *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Nor is the adequacy of Nagase's alternative methodologies a stipulated fact — the other interested parties do not accede to Nagase's understanding of the correct entered value total or to Commerce's use of nonstandard means to derive it.[7] *See* Oral Arg. Tr. 76:7–13, ECF No. 54 (Defendant-Intervenor: "I want to make this assertion that [Nagase's entered value figure] is something they made in the brief totally post-hoc and [they] say if you look at the duty rate, you can reverse engineer the total enter[ed] value, which Commerce never had a chance to even review and we never . . . got a chance to comment or object to it."). The Court is therefore powerless to consider Nagase's argument that the error can be corrected with information already on the record.

Nagase's last refuge is its argument that the Court may require Commerce to correct the assessment rate when remanding its determination on a separate issue in the case. *See* Pl.'s Reply at 22, ECF No. 42 (citing *Jinan Yipin Corp. v. United States*, 33 CIT 934, 951–52 (2009)). Nagase's argument assumes this Court has a free-floating power to command Commerce to alter its Final Results on remand without a finding of legal error. Such a power does not exist. Courts may only set aside unlawful agency action. *See In re Clean Water Act Rulemaking*, 60 F.4th 583, 594 (9th Cir. 2023) (interpreting the Administrative Procedure Act to "foreclos[e] any authority of courts to vacate agency actions not first held unlawful."). *Compare* 5 U.S.C. § 706(2)(A) (directing a reviewing court to set aside agency action, findings, and conclusions "found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law"), *with* 19 U.S.C. § 1516a(b)(1)(B)(i) (directing the same in an antidumping review "for any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law"). Nor, for that matter, does such a power reside in equity. *In re Clean Water Act*, 60 F.4th at 594 (finding no authority "suggesting that courts of equity were empowered to vacate an executive action not first held to violate the law[.]"). Equity "aids the vigilant, not

[7] Nagase, applying its alternative methodology, describes the resulting rate as "a far more realistic figure" but noticeably does not call it the correct figure. Pl.'s Br. at 37, ECF No. 34.

those who slumber on their rights." *Cornetta v. United States*, 851 F.2d 1372, 1375 (Fed. Cir. 1988). Because Nagase has not shown that Commerce acted unlawfully, this Court cannot *order* the agency to make a different decision.

Despite its failure to exhaust its administrative remedies, Nagase is not wholly without remedy. It can take action against the employees who were responsible for the error, or it can pursue a malpractice claim against the attorneys who failed to notice one of two crucial numbers that Commerce issues in every antidumping review: the assessment rate. Nagase may even continue to request that Commerce correct the assessment rate, as Commerce retains the discretionary power to do so until after judicial review is completed. *See Dorbest*, 604 F.3d at 1376. What Nagase cannot do is commit an error, fail to exhaust its remedies, and then ask the Court to force a correction.

CONCLUSION

Nagase brings three errors of differing dimensions before the Court. Commerce's decision to use the GAAP-compliant research and development cost records in place of trial balances that were not used historically is supported by both the law and substantial evidence. Its conclusory determination that the compensation for payment expense is properly categorized as a general and administrative expense is not and must be remanded for further analysis and consideration. Finally, Nagase waited too late in discovering its own error regarding the assessment rate to invoke the Court's power to force a correction from Commerce. The Court therefore **GRANTS IN-PART** and **DENIES IN-PART** Nagase's Motion for Judgment on the Agency Record and **REMANDS** Commerce's determination for additional proceedings consistent with this opinion.

Commerce shall file its Remand Redetermination with the Court within 120 days of today's date. Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Remand Redetermination. Plaintiff shall have thirty days from the filing of the Remand Redetermination to submit comments to the Court; and Defendant shall have fifteen days from the date of Plaintiff's filing of comments to submit a reply. Defendant-Intervenor shall then have fifteen days from the date of Defendant's filing of comments to submit its reply.

SO ORDERED.

Dated: April 11, 2023
New York, New York

/*s*/ *Stephen Alexander Vaden*
JUDGE

Slip Op. 23–47

KEIRTON USA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 21–00452

[Denying plaintiff's application for attorney fees and other expenses incurred in its action against the United States for excluding its merchandise from entry into the United States.]

Dated: April 11, 2023

Bradley P. Thoreson, Buchalter, of Seattle, WA, for plaintiff Keirton USA, Inc.

Luke Mathers, Trial Attorney, and *Aimee Lee*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney in Charge, International Trade Field Office, and *Guy R. Eddon*, Trial Attorney. Of counsel on the brief were *Alexandra Khrebtukova* and *Mathias Rabinovitch*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION AND ORDER

Kelly, Judge:

Before the court is Keirton USA, Inc.'s application for fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"). Appl. for Fees and Other Expenses Pursuant to the [EAJA], Jan. 17, 2023, ECF No. 33 ("Pl. Mot."); *see* EAJA, 28 U.S.C. § 2412 (2018); *see also* Pl.'s Pet. for Att'ys' Fees and Costs, Jan. 17, 2023, ECF No. 33–1 ("Pl. Br."); USCIT R. 54.1. Keirton requests fees and expenses in the amount of $487,198.31 it incurred as the prevailing party in its action against U.S. Customs and Border Protection ("CBP"). Pl. Mot. at 1–2; *see Keirton USA, Inc. v. United States*, 600 F. Supp. 3d 1270, 1276 (Ct. Int'l Trade 2022) ("*Keirton I*"). Defendant denies that Keirton is entitled to its fees and expenses under the EAJA. Def.'s Mem. Opp. [Pl. Mot.] at 5–17, Mar. 17, 2023, ECF No. 36 ("Def. Br.").

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion holding that Keirton's possession and importation of marijuana paraphernalia was lawful, *see Keirton I*, 600 F. Supp. 3d at 1276, and now recounts only those facts relevant to the court's review of Keirton's application for fees and expenses. Keirton alleges that, from October to December 2020, CBP seized fourteen shipments of its merchandise claiming that merchandise would be used for an unlawful purpose. Compl. ¶ 12, Aug. 19, 2021, ECF No. 2.

In April 2021, CBP excluded from entry merchandise Keirton entered under No. SQ4–03475065 (the "subject merchandise"), citing the Controlled Substances Act of 1970, 21 U.S.C. § 801 et seq., after Keirton confirmed that the subject merchandise could be used in the cannabis industry. Compl. ¶¶ 27, 30; Answer ¶¶ 27, 30, Nov. 17, 2021, ECF No. 14. Keirton protested CBP's exclusion of the subject merchandise on June 15, 2021. Compl. ¶ 23; Answer ¶ 23. CBP did not allow or deny Protest No. 3002–21–103719, rendering it denied by operation of law. Compl. ¶¶ 23, 31; Answer ¶¶ 23, 31. Keirton filed the present action for release of the subject merchandise before this court in August 2021. Compl. at 5–6. On October 20, 2022, the court issued judgment for Keirton.[1] *Keirton I*, 600 F. Supp. 3d at 1276; J., Oct. 20, 2022, ECF No. 32. Keirton requests $479,299.00 in attorney fees and $7,899.31 in expenses for a total of $487,198.31.[2] Pl. Mot. at 2; Pl. Br. at 19.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2018) over Keirton's challenge to CBP's denial of its protest of a deemed exclusion made pursuant to section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514(a)(4) (2018).[3] The court retains jurisdiction after issuing judgment to adjudicate parties' timely application for fees and expenses. *See* 28 U.S.C. § 2412(b), (d)(1)(A) (fees and other expenses awardable "in any civil action" brought against the United States "in any court having jurisdiction of that action"); USCIT R. 54.1 (applications for attorney fees and expenses "must be filed within 30 days after the date of final judgment").

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[1] For its application of fees and expenses, Keirton describes three "discreet parts" of the case against Defendant. *See* Pl. Br. at 15–18. First, Keirton alleges it settled with CBP to turn over the fourteen shipments of components CBP seized in 2020. *Id.* at 3–4. Second, Keirton requested a temporary restraining order in November 2020 from the U.S. District Court for the Western District of Washington for CBP to release the subject merchandise CBP seized or detained in 2020. *Keirton USA, Inc. v. U.S. Customs and Border Protection*, Case No. 20–1734, 2020 WL 6887871, at *1 (W.D. Wash. Nov. 24, 2020). That court later concluded it lacked subject matter jurisdiction. *Keirton USA Inc. v. U.S. Customs and Border Protection*, Case No. 21224, 2021 WL 1516169, at *6 (W.D. Wash. Apr. 16, 2021). Third, Keirton filed for declaratory judgment that the subject merchandise in this case should have been admitted under 21 U.S.C. § 863(f)(1). Compl. at 5.

[2] Keirton describes the attorney fees billed for each phase of the litigation and includes a table breaking down its fees. However, the fees in the table do not match those Keirton describes. Keirton describes fees incurred at each of the three phases of the litigation as $113,192.10, $120,708.90, and $151,003.01, respectively. Pl. Br. at 15–16. The fee subtotals in the table for each of the three phases of the litigation are $147,348.00, $157,446.50, and $174,504.50, respectively. *Id.* at 16–18. It is unclear why these amounts differ in the same brief.

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

Under the EAJA, the court may grant attorney fees and other expenses to the prevailing party in an action against the United States. 28 U.S.C. § 2412(a)(1), (d)(1)(a). The burden is on the government to demonstrate that the position it took in the action was substantially justified or that special circumstances exist making it unjust to grant the prevailing party fees and other expenses. *Scarborough v. Principi*, 541 U.S. 401, 414–15 (2004); *Brewer v. Am. Battle Monuments Comm'n*, 814 F.2d 1564, 1569 (Fed. Cir. 1987). The government meets its burden by a preponderance of the evidence. *De Allende v. Baker*, 891 F.2d 7, 12 (1st Cir. 1989); *Sumecht NA, Inc. v. United States*, 437 F. Supp. 3d 1316, 1321 (Ct. Int'l Trade 2020). The EAJA limits the court's review to the record of the civil action for which fees and other expenses are sought and the agency's action "upon which the civil action is based." 28 U.S.C. § 2412(d)(1)(B), (2)(D).

DISCUSSION

Keirton argues that Defendant's position was not substantially justified and that no special circumstances exist making an award of attorney fees and expenses unjust. Pl. Br. at 7–9. Defendant argues that its position was substantially justified because the government's position was reasonable and the matter in the case was one of first impression. Def. Br. at 7–12. For the following reasons, the court denies Keirton's application for fees and other expenses.

Under the EAJA, an eligible party seeking an award of fees and other expenses must make a proper application to the court within thirty days of final judgment. 28 U.S.C. § 2412(d)(1)(B). The party applying for fees and other expenses must have prevailed in court and allege that the United States' position was not substantially justified.[4] *Id.* Once a prevailing party makes a proper application, the burden is on the government to prove that its position in the action was substantially justified. *Scarborough*, 541 U.S. at 414–15. Alternatively, the court may find that special circumstances exist making it unjust to grant fees and other expenses to the prevailing party. 28

[4] An application for fees must include itemized statements of the time expended and the rate at which the fees and expenses were computed for any attorney or expert witness representing or appearing on behalf of the party. 28 U.S.C. § 2412(d)(1)(B). Additionally, the prevailing party must be eligible to receive an award under the EAJA. Specifically, a party that is a corporation must have a net worth that did not exceed $7,000,000 at the time the civil action was filed. 28 U.S.C. § 2412(d)(2)(B). Further, the corporation must have had no more than 500 employees at the time the action was filed. *Id.* Keirton is a business with fewer than 500 employees and is worth less than $7,000,000. Decl. Jay Evans ¶ 2, Jan. 17, 2023, ECF No. 33–5. It is undisputed that Keirton and its application meet these criteria. *See* Pl. Br. at 5–7; *see generally* Def. Br. (not disputing that Keirton prevailed or that Keirton does not exceed the EAJA's limits on net worth and number of employees).

U.S.C. § 2412(d)(1)(A).[5] The EAJA defines the "position of the United States" as not only the position the United States took in the lawsuit, but also the agency action upon which the lawsuit is based. *Id.* § 2412(d)(2)(D); *see Brewer*, 814 F.2d at 1569.

Substantial justification is a test of reasonableness in both law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Substantial justification means justification "that could satisfy a reasonable person." *Id.*; *Norris v. S.E.C.*, 695 F.3d 1261, 1265 (Fed. Cir. 2012). Even if a court ultimately disagrees with the government's reading of the law and facts, the court considers whether the government's position, as a whole, was substantially justified. *Pierce*, 487 U.S. at 566 n.2, 569–71; *see Norris*, 695 F.3d at 1265–66 (Fed. Cir. 2012) (holding government's position was substantially justified where the government offered a reasonable legal argument on an "unsettled and difficult" issue "over which reasonable minds could differ"). When evaluating whether the government's position was substantially justified the court considers whether, *inter alia*: (i) the issue is novel or a matter of first impression, i.e., the matter has not been clearly decided, (ii) the government had a reasonable basis in law and fact for litigating the issue, and (iii) there is a split in applicable authority.[6] *See Norris*, 695 F.3d at 1265–66; *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1342 (Fed. Cir. 2012) (concluding the government's position was justified where there were differing interpretations among the three branches of government as to statute's meaning); *Devine v. Sutermeister*, 733 F.2d 892, 898 (Fed. Cir. 1984) (concluding government's position on timeliness substantially justified where issue was novel and subject to conflicting judicial pronouncements in other circuits), *superseded by statute on other grounds Doty v. United States*, 71 F.3d 384, 385 (Fed. Cir. 1995); *Gava v. United States*, 699 F.2d 1367, 1371 (Fed. Cir. 1983) (substantial justification where issue was one of first impression and government had a reasonable basis

[5] Special circumstances include novel and credible legal theories the government raised in good faith. *Devine v. Sutermeister*, 733 F.2d 892, 895–96 (Fed. Cir. 1984). In contrast, relitigating a settled issue does not constitute special circumstances that would make awarding attorney fees and expenses unjust. *See Fakhri v. United States*, 31 C.I.T. 1287, 1294 (2007) (concluding the government's position was not novel and that this Court and the Court of Appeals twice rejected its position as lacking merit). Because the government's position here was substantially justified, the court does not address whether special circumstances apply.

[6] The Court of Appeals has articulated the query as both whether the government's position was "reasonable" or "clearly reasonable." *See, e.g., Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) ("We hold that 'substantial justification' requires that the Government show that it was *clearly* reasonable in asserting its position . . ." (emphasis in the original)). Whether the court labels its analysis as reasonable or clearly reasonable, the query centers around whether the issue is settled as a matter of law, or whether reasonable arguments can be made for different outcomes based on either the facts or the law. *Norris*, 695 F.3d at 1265–66.

for litigating issue), *superseded by statute on other grounds PCI/RCI v. United States*, 37 Fed. Cl. 785 (1997); *Jazz Photo Corp. v. United States*, 31 C.I.T. 1101, 1109–11 (2007) (even if an issue is one of first impression the government may not advocate for a position that is unsupportable); *Change-All Souls Housing Corp. v. United States*, 1 Cl. Ct. 302, 304 (1982) (government substantially justified in case of first impression where its position was supported by statute's legislative history).

Here, the position of the United States was substantially justified because the issue was a novel issue, of first impression, and the government had a reasonable basis in law and fact to litigate the issue. Both in its protest before the CBP and in this court, Keirton did not dispute that the subject merchandise could be used in the cannabis industry and stipulated that the subject merchandise met the definition of marijuana paraphernalia under federal law. *See* Protest, Aug. 19, 2021, ECF No. 21; Mem. Points and Authorities Supp. Pl.'s Mot. J. Pleadings at 1, Jan. 5, 2022, ECF No. 17 ("Pl. Merits Br.). The parties only disputed whether Washington State's repeal of its prohibition on marijuana paraphernalia met the exception in 21 U.S.C. § 863(f)(1) authorizing possession of marijuana paraphernalia under federal law. *See* Pl. Merits Br. at 4–5; Def.'s Memo. Supp. Cross-Mot. J. Pleadings at 16–18, Mar. 28, 2022, ECF No. 21 ("Def. Merits Br."). Specifically, the statute exempts from § 863(a)'s proscription "any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items." *21 U.S.C.* § 863(f)(1).

Whether Washington State "authorized" possession of marijuana paraphernalia within the meaning of the federal statute was a matter of first impression, which implicated an important question of federalism. Prior to Keirton filing its complaint, no court had ruled on whether Washington State's repeal of its prohibition on marijuana paraphernalia constituted "authorization" under § 863. Although the Court ultimately ruled on this issue in *Eteros Technologies USA, Inc. v. United States*, 592 F. Supp. 3d 1313 (Ct. Int'l Trade 2022), that September 21, 2022 ruling was issued only after the parties filed their motions for judgment here.[7] *See* Pl.'s Mot. J. Pleadings, Jan. 5, 2022, ECF No. 17; Def.'s Cross-Mot. J. Pleadings, Mar. 28, 2022, ECF No. 21. Therefore, at the time the government took its position in this case, no court had held that Washington law authorized importation of marijuana paraphernalia under the exception to the federal pro-

[7] Even had *Eteros* been issued earlier, it would not have bound this Court and the government may still have been substantially justified in pursuing the matter before this Court. *See Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989) (trial court decisions do not bind other trial courts).

hibition on drug paraphernalia. *See Bowey v. West*, 218 F.3d 1373, 1377 (Fed. Cir. 2000) (noting "substantial justification is measured . . . against the case law that was prevailing at the time the government adopted its position").

The Supreme Court's holding in *Murphy* does not undermine the nature of the issue as one of first impression here or the reasonableness of the government in litigating the issue. *See Murphy v. NCAA*, 138 S. Ct. 1461 (2018). In *Murphy*, the Supreme Court held the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3702, violated the Tenth Amendment's anti-commandeering doctrine by prohibiting states from authorizing sports gambling. *Id.* at 1485. There, the New Jersey Legislature enacted a law partially repealing the state prohibition on sports gambling. *Id.* at 1472. The Court found that the partial repeal of that prohibition effectively authorized sports gambling in the state. *Id.* at 1474. The Court reasoned that although a State does not authorize "everything that it does not prohibit or regulate," where it repeals old laws, "it authorizes that activity." *Id.* (internal quotations omitted). Keirton argues that the position of the government here was not substantially justified because *Murphy* had interpreted the word "authorized." Pl. Br. at 3, 7. However, neither § 863 nor the Washington statute was before the *Murphy* Court. *See generally Murphy*, 138 S. Ct. 1461. Therefore, despite *Murphy*'s interpretation of "authorized," the issue here was one of first impression. *See Keirton I*, 600 F. Supp. 3d at 1274–75 (interpreting Washington state law's authorization of marijuana paraphernalia possession under § 863).[8]

Further, the government did not advocate for an unsupportable position under the applicable law. Section 863(a) makes it unlawful for a person to, *inter alia*, import or export drug paraphernalia.[9] 21 U.S.C. § 863(a). However, the statute exempts from § 863(a)'s proscription "any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items." *Id.* § 863(f)(1). Thus, unless the importer has been authorized by local, State, or Federal

[8] Had the holding in *Murphy* made the Defendant's position here unreasonable, Keirton would certainly have relied on that case in its initial brief supporting its motion for judgment. However, because it did not rely on *Murphy*, *see generally* Pl. Merits Br., Keirton's argument that *Murphy* was dispositive of the only issue in this case, *see* Pl. Br. at 4, 7, rings hollow. *See Norris*, 695 F.3d at 1266 (noting the failure to cite a case suggests the precedent's application was neither "immediately apparent" nor "controlling").

[9] The statute defines drug paraphernalia:

> The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter.

21 U.S.C. § 863(d).

law to manufacture, possess, or distribute such items, 19 U.S.C. § 1595a(c)(2)(A)[10] allows CBP to prevent the importation of such items. The Washington referendum repealed portions of its law criminalizing the possession of marijuana paraphernalia. *See* Initiative Measure 502, 2013 Wash. Sess. Laws ch. 3. At issue in *Keirton I* was whether "any person authorized" in § 863(f)(1) extends the exemption from the requirements of § 863 to all persons affected by the repeal of prior State prohibitions. *See Keirton I*, 600 F. Supp. 3d at 1273–75. The government argued that Washington's repeal was not an authorization under § 863. *See* Def. Merits Br. at 15.

Keirton I acknowledged that § 863 does not define the word "authorized." *Keirton I*, 600 F. Supp. 3d at 1274. The government supported its position that a repeal of prior law was insufficient "authorization" under § 863 by arguing that authorization under § 863 was limited to a narrow class of actions by local state or federal governments. *See* Def. Merits Br. at 15–16. The government relied upon *United States v. Assorted Drug Paraphernalia Valued at $29,627.07*, 2018 WL 6630524, at *1, 8 (D.N.M. Dec. 19, 2018), which noted § 863(f)(1)'s exemption of "any person from prosecution" and § 863(f)(2)'s exemption of "any item from the definition of drug paraphernalia" and concluded that Congress did not intend to shield drug paraphernalia itself from lawful forfeiture. *See* Def. Merits Br. at 23. The government also argued that the neighboring provisions in § 863 and the Controlled Substances Act require "deliberate, affirmative approval for an individual or entity" to act. Def. Merits Br. at 20. Although the government's arguments were not ultimately persuasive, they were nevertheless reasonable arguments at the time they were advanced.

CONCLUSION

Even though the government's arguments regarding the law and the facts in *Keirton I* were unsuccessful, its position was substantially justified. For the foregoing reasons, it is

ORDERED that Keirton's application for fees and other expenses is denied.

Dated: April 11, 2023
New York, New York

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

[10] "The merchandise may be seized and forfeited if . . . its importation or entry is subject to any restriction or prohibition which is imposed by law relating to health, safety, or conservation and the merchandise is not in compliance with the applicable rule, regulation, or statute . . . ." 19 U.S.C. § 1595a(c)(2)(A); *see also id.*§ 1595a(c)(5)(B) (which allows for the exclusion of such merchandise).

Slip Op. 23–48

RISEN ENERGY CO., LTD., PLAINTIFF, JINGAO SOLAR CO., LTD., et al., Consolidated Plaintiffs, SHANGHAI BYD CO., LTD., TRINA SOLAR CO., LTD., et al., Intervenor Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 20–03912

[Commerce's Remand Results in the Sixth Administrative Review of Commerce's Countervailing Duty order on crystalline silicon photovoltaic cells from the People's Republic of China are remanded for reconsideration consistent with this opinion.]

Dated: April 11, 2023

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, argued for Plaintiffs. With them on the brief was *James K. Horgan*.

Sarah M. Wyss, Mowry & Grimson, PLLC, of Washington, DC, argued for Consolidated Plaintiffs. With her on brief were *Jeffrey S. Grimson*, *Bryant P. Cenko*, *Jill A. Cramer*, *Kristin H. Mowry*, *Yixin (Cleo) Li*.

Craig A. Lewis and *Jonathan T. Stoel*, Hogan Lovells US LLP, of Washington, DC, for Intervenor Plaintiffs Shanghai BYD Co., Ltd.

Jonathan M. Freed, *Kenneth N. Hammer*, *MacKensie R. Sugama*, and *Robert G. Gosselink*, Trade Pacific PLLC, of Washington, DC, for Intervenor Plaintiffs Trina Solar Co., Ltd.

Joshua E. Kurland, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Brian M. Boynton*, *Patricia M. McCarthy*, and *Reginald T. Blades, Jr.* Of counsel on the brief was *Spencer Neff*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Restani, Judge:

Before the court are the remand results of the U.S. Department of Commerce ("Commerce") pursuant to the court's order in *Risen Energy Co. v. United States*, 46 CIT __, __, 570 F. Supp. 3d 1369, 1382 (2022), in the Sixth Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells"), from the People's Republic of China, covering the period from January 1, 2017, to December 31, 2017. *See* Redetermination Pursuant to Court Remand Order, ECF Nos. 93–94 ("Remand Results"). Plaintiff Risen Energy Co., Ltd. ("Risen Energy") and Consolidated Plaintiff Jingao Solar Co, Ltd. ("JA Solar") (collectively, "Plaintiffs")[1] challenge the Remand Results

[1] Intervenor Plaintiffs Shanghai BYD Co., Ltd. ("Shanghai BYD") and Trina Solar Co., Ltd. ("Trina") are non-examined parties who seek the benefits of whatever relief the court grants. *See* Remand Results at 4; Trina Comments on Remand Results, ECF No. 99 (Nov. 7, 2022); Shanghai BYD Comments on Remand Results, ECF No. 100 (Nov. 7, 2022) ("Shanghai BYD Brief").

as unsupported by substantial evidence or otherwise not in accordance with law.

BACKGROUND

While the court presumes familiarity with the facts as set out in *Risen*, the court briefly summarizes the relevant record evidence for ease of reference. In March 2019, Commerce began the Sixth Administrative Review of the countervailing duty order on solar cells from the People's Republic of China. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 9,297, 9303–04 (Dep't Commerce Mar. 14, 2019). On November 5, 2019, the U.S. International Trade Administration selected JA Solar and Risen Energy as mandatory respondents ("Mandatory Respondents") in this review. *See Dep't Commerce, Resp't Selection Mem.* at 1–2, P.R. 98 (Nov. 5, 2019).

Commerce published its preliminary results on February 11, 2020, *see Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017*, 85 Fed. Reg. 7,727 (Dep't Commerce Feb. 11, 2020), along with the accompanying Preliminary Issues and Decision Memorandum, *Decision Memorandum for the Preliminary Results of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2017–12/31/2017 (Dep't Commerce Jan. 31, 2020) ("*PDM*").

Commerce published its final determination on December 9, 2020. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 79,163 (Dep't Commerce Dec. 9, 2020); *see also Issues and Decision Memorandum for Final Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2017–12/31/2017 (Dep't Commerce Nov. 27, 2020) ("*I&D Memo*").

In *Risen*, the court upheld Commerce's determination that Plaintiffs received regionally specific electricity subsidies subject to countervailing duties. *See* 570 F. Supp. 3d at 1382. The court remanded to Commerce to reconsider (1) the benchmark for land prices in China and (2) the benchmark for determining the cost of ocean freight for subsidy calculations involving provisions of raw materials for less

than adequate remuneration. *Id.* at 1376, 1379. Additionally, the court granted the United States' ("Government") request for remand on the Government of China's ("GOC") Export Buyer's Credit Program ("EBCP") but instructed Commerce to attempt to verify or to explain the reason that the court "should not provide some form of equitable relief." *Id.* at 1373.

Following remand, Commerce recalculated (1) the land benchmark by averaging the prior dataset with new data placed on the remand record and (2) the ocean freight benchmark by adjusting the previous average to correct the overreliance on data related to United States to China routes. *See* Remand Results at 1–2. Finally, Commerce attempted to verify nonuse of the EBCP by the Mandatory Respondents, finding that JA Solar did not use the program but concluding that Risen could not show nonuse. Remand Results at 1.

The Remand Results do not adequately address all of the court's concerns in *Risen* and they are not supported by substantial evidence. Accordingly, the court once again remands with further instructions.

JURISDICTION & STANDARD OF REVIEW

The court's jurisdiction continues pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The court sustains Commerce's final redetermination results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(a)(2)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *U.S. Steel Corp. v. United States*, 41 CIT __. __, 219 F. Supp. 3d 1300, 1307 (2017) (internal quotations and citations omitted).

DISCUSSION

I. Export Buyer's Credit Program

The GOC's EBCP promotes exports by providing credit at preferential interest rates to qualifying foreign purchasers of GOC goods. *See Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1347 (2019). During the investigation, Risen reported that none of its customers used the EBCP during the period of review ("POR") and confirmed that it had never been involved in assisting customers in obtaining loans under the program; it also provided certifications of nonuse from its U.S. customers attesting to this fact. *See Risen Energy Section III Questionnaire Response,* at 23–24, Ex. 19, P.R. 144–162, C.R. 109–276 (Dec. 30, 2019); *Risen Unaffiliated Supplier II, Section III Questionnaire Response* at 23, Ex. 15, P.R. 164, C.R. 277

(Jan. 6, 2020). JA Solar similarly reported that none of its affiliated or unaffiliated customers received assistance under the EBCP and that it did not assist any customers in using the program. *See Questionnaire Response of JA Solar and Affiliates*, at Volume 1, III 38–40, P.R. 132–138, C.R. 31–103 (Dec. 30, 2019). JA Solar provided customer declarations certifying nonuse of the EBCP. *Id.* at Ex. 25.

The GOC did not provide all of the initially requested information to Commerce, stating that the questions were inapplicable because "the GOC believes that none of the respondents under review applied for, used, or benefitted from the alleged program." *GOC Initial Questionnaire Response* at 126, P.R. 140–143, C.R. 104–108 (Dec. 30, 2019); *see I&D Memo* at 27. Consistent with the certifications of the Mandatory Respondents, the GOC, by searching the China Ex-Im Bank's loan database, corroborated that Mandatory Respondents and their customers did not use the EBCP. *GOC Initial Questionnaire Response* at 126–28.

Following remand, Commerce explained that it was changing its practice relating to EBCP, and, going forward, would issue supplemental questionnaires if a respondent provided complete customer declarations of EBCP nonuse. Remand Results at 18–19. Commerce explained that it would require respondents to provide customer financial records constituting "complete gap-filling information." Remand Results at 19. If the respondents could not provide complete gap-filling information, Commerce would be "left only with the GOC's non-cooperation," and thus would apply an adverse inference as to the available facts ("AFA") based on that non-cooperation. Remand Results at 19. Applying the new practice on remand, Commerce sent questionnaires to JA Solar and Risen requesting information about loans, financing, and record keeping by U.S. customers to determine if customers received EBCP assistance. Remand Results at 6. JA Solar provided complete information for its sole importer, JA Solar USA, Inc. for Commerce to review and verify nonuse. Remand Results at 6–7. Commerce verified that JA Solar USA received no loans or financing connected with the GOC. Remand Results at 7; *see also JA Solar Verification Report* Rem. P.R. 27, Rem. C.R. 24 (Aug. 31, 2022). Commerce removed the previously applied EBCP subsidy rate from JA Solar's total rate. Remand Results at 7.

Commerce reached a different result with respect to Risen. Remand Results at 7–9. Risen had 12 U.S. customers but provided Commerce's requested information for only 6 of the customers, which Risen estimated were responsible for roughly 95% of its POR sales. Remand Results at 7. Risen's other six customers either did not respond, had ceased operations since the POR, or answered that they

did not use the EBCP. Remand Results at 7–8. As a result, Commerce found that Risen had failed to provide sufficient information to fill the evidentiary gap in the record. Remand Results at 8–9. Commerce reasoned that verification based on only a portion of customers would provide Risen with "an opportunity to evade Commerce's scrutiny" by providing responses only from customers who did not use the EBCP. Remand Results at 9. Ergo, Commerce concluded that Risen failed to fill the gap created by GOC's failure to cooperate, and thus used AFA to determine that Risen benefited from the EBCP. Remand Results at 9. Although Risen suggested that Commerce adjust the AFA rate to account for customers who did provide requested information, Commerce declined because there was no "precedent for doing so" and it had "no way of knowing the size of the subsidies received by customers." Remand Results at 20.

Now, Risen objects to the Remand Results, arguing that the record contains sufficient information to verify nonuse of the EBCP. Risen Comments on Remand Results, ECF Nos. 97–98 (Nov. 7, 2022) ("Risen Br."). Risen points to the fully cooperating customers, whose responses showed that they did not benefit from the EBCP, and asserts that there is no record evidence to the contrary. Risen Br. at 3. Risen contends that these 6 customers, representing roughly 95% of Risen's sales, are a sufficient sample to verify nonuse. Risen Br. at 4. Risen argues that, at worst, Commerce should modify the rate to account for the fact that there is record evidence demonstrating that roughly 95% of sales were not benefited by the EBCP. Risen Br. at 7–8.

If "necessary information is not available on the record" or if a responding party "withholds information" requested by Commerce, Commerce shall "use the facts otherwise available in reaching the applicable determination[.]" 19 U.S.C § 1677e(a). Commerce may use AFA only when information is missing from the record because a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. 19 U.S.C. § 1677e(b). The application of adverse facts that collaterally impact a cooperating party is disfavored. *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1212 n.10, 865 F. Supp. 2d 1254, 1262 n.10 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014). "When Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to the exporter/producer, however, it is expected to consider such evidence." *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 58–59, 893 F. Supp. 2d 1296, 1332 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015); *see also Guizhou Tyre Co., Ltd. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261,

1270 (2018) ("To apply AFA in circumstances where relevant information exists elsewhere on the record — that is, solely to deter non-cooperation or 'simply to punish' — . . . that is a fate this court should sidestep.") (citation omitted).

Information submitted by parties is subject to verification by Commerce. 19 U.S.C. § 1677m(i)(1). Commerce need not consider unverifiable information, but Commerce must show that such information is not reasonably verifiable before it applies AFA. *See Changzhou Trina Solar Energy Co., Ltd. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1327 (2018) (citing 19 U.S.C. § 1677m(e)); *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1382–83 (Fed. Cir. 2016) (holding that if the requirements of § 1677m(e) are not met, Commerce need not consider information submitted by an interested party).

As Commerce makes plain, it is using AFA based on a gap in the record about the EBCP that occurred when the GOC declined to provide all the information Commerce sought regarding the program. Remand Results at 9. Although the GOC did not provide all of the information it should have, another party, such as a mandatory respondent, may be in a position to provide the information sought or to render that information irrelevant, so that no adverse inference need be drawn. *See Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333 (2019); *GPX Int'l Tire*, 37 CIT at 58–59, 893 F. Supp. 2d at 1332. Here, Risen has supplied information so that there is no relevant missing information about the EBCP. Not only has Risen provided sworn declarations from each of its customers stating that they did not use financing from the EBCP, *see Risen Unaffiliated Supplier II, Section III Questionnaire Response*, at 23, Ex. 15, P.R. 164, C.R. 277 (Jan. 6, 2020), but, after remand, Risen supplied financial, loan, and record information regarding 6 of its 12 customers, representing roughly 95% of sales during the POR. *See Risen EBC Questionnaire Response* at 1–2, Rem. P.R. 12, Rem. C.R. 2–4 (July 8, 2022) ("*Risen EBC Questionnaire Response*"); *see also* Remand Results at 7–8. Commerce's refusal to verify the customer data and continued application of other facts available is not supported by substantial evidence on this record because the information necessary to the determination, assuming it is verified, is not lacking.

This case involves a specific agency record that drives the court's conclusion. During the review, and before remand, as other respondents had done in other cases, Risen provided declarations from all of its nonaffiliated customers, which stated that they did not use the

EBCP. *See Risen Unaffiliated Supplier II, Section III Questionnaire Response* at 23, Ex. 15, P.R. 164, C.R. 277 (Jan. 6, 2020). At the time, Commerce concluded that these declarations could not be verified to show nonuse. *See* Remand Results at 5. During the proceedings at the court, however, Commerce shifted its EBCP policy, instead choosing to send supplemental questionnaires requesting extensive customer financial documents whenever a respondent provided the declarations of nonuse. *See* Remand Results at 6, 18–19. After remand, years after the POR and the sales at issue were made, Commerce required Risen to coordinate sensitive and voluminous financial records from all of its nonaffiliated customers to show that it did not receive a benefit from the EBCP. *See Commerce's Letters, "Export Buyer's Credit Supplemental Questionnaire,"* at 3–4, Volume 1, Rem. P.R. 1–2 (July 7, 2022). Risen had to do this to attempt to avoid the collateral impact of the GOC's failure to cooperate, despite Risen's cooperation at every step along the way. That brings the court to this decision.

Commerce has stated that it cannot verify that Risen did not benefit from the EBCP because 6 of Risen's 12 customers did not provide sufficient financial information. *See* Remand Results at 7–9. Of the missing six customers, three did not respond to Risen's requests, one responded that its loans "had nothing to do with the EBC program or Risen," another that "it did not use any financing," and a final company that had ceased operating during the POR. *See Risen EBC Questionnaire Response* at 2. But the parties agree that Risen provided financial information for its other 6 customers, who collectively represented roughly 95% of Risen's sales during the POR. *See* Remand Results at 7; Risen Br. at 1.

Commerce claims that it cannot verify nonuse based on these responses because Risen could evade Commerce's scrutiny by hiding EBCP usage in data from the noncooperating companies. *See* Remand Results at 9. And, Commerce explains, because Risen did not provide "complete gap-filling information," Commerce declined to attempt to verify Risen's supplied information. *See* Remand Results at 18, 20. Commerce concluded that there is still a gap in verifiable information caused by the GOC's failure to supply full information about the EBCP. *See* Remand Results at 19–20. Ultimately, the question before the court is whether Commerce's explanation is reasonable. *Cooper (Kunshan) Tire Co., Ltd. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1316, 1333 (2021); *see also Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (stating that the court should uphold the agency determination as long as "its factual findings are reasonable and supported by the

record as a whole") (citations omitted), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003).

Commerce cannot reasonably conclude that Risen did not supply information that rendered the missing data from the GOC irrelevant and essentially eliminated any gap in the record. Risen substantially complied with Commerce's investigation efforts and provided near complete data for Commerce to review even after the long passage of time. *See Risen EBC Questionnaire Response* at 1. The missing financial data from roughly 5% of sales involved smaller importers who likely did not have enough of an interest to justify sharing the sensitive financial information with Commerce years after the POR.[2] Considering that the POR was five years ago, that Commerce changed its policy, and that Risen complied to the best of its ability, the court concludes it is unreasonable for Commerce to require perfection. All of the record evidence points to nonuse of the program at issue. Commerce's concern about potentially hiding the use of EBCP in the nonresponding companies is not reasonable when considering the collateral impact of AFA on the fully cooperating Risen, the age of this case, and the still-relevant initial complete set of nonuse declarations, which has not been seriously undermined. Substantial evidence does not support Commerce's continued application of AFA to Risen's detriment on this record. On remand, Commerce should attempt to verify Risen's submissions to the extent Commerce finds appropriate, and if that is successful, it should either accept the *pro rata* adjustment sought by Risen or conclude that the EBCP was not used at all.

II. Land Benchmark

When remanding, the court questioned Commerce's continual reliance on data from 2010 Coldwell Banker Richard Ellis Asian Marketview Report ("2010 CBRE Report") for Thailand land prices to calculate the tier-three benchmark for the value of land-use rights. *Risen*, 570 F. Supp. 3d at 1375–76. Commerce indexed the 2010 Thai prices to the POR when calculating the benchmark. *I&D Memo* at 51. The court expressed concerned as to why Commerce gave controlling weight to geographic proximity in evaluating land data and why

[2] Commerce based the subsidy rate for EBCP on another program in a past proceeding. *See PDM* at 38–39. Because Commerce has not obtained evidence of the use of the program at hand, it has established no actual rate for the EBCP. It seems consistent with the record evidence of nonuse that the possibly small benefit involved has not motivated customers in the United States to pursue financing through the GOC's export import bank. Whatever the motivation or lack therof, as indicated, there is no evidence that this program was used by the customers involved in the sales at issue.

Commerce rejected more contemporaneous data from other countries, such as Mexico and Brazil, or the supplemental Nexus reports in favor of using index data from 2010. *Risen*, 570 F. Supp. 3d at 1375–76; *Letter on Behalf of JA Solar to Dep't of Commerce re: Land Benchmark Submission*, at Ex. 1, P.R. 192 (Feb. 18, 2020) ("Nexus Reports").[3]

After remand, Commerce placed Malaysian land values from the Malaysian Investment Development Authority Cost of Doing Business Report on the record as well as additional information on the comparability of Malaysia and Thailand to China. *See Dept. Mem. Re. Upcoming Draft Remand Results – The Provision of Land for Less Than Adequate Remuneration – Malaysia: Costs of Doing Business*, Rem. P.R. 16 (Aug. 8, 2022); *see also Dept. Mem. Re. Benchmark Analysis of the Government Provision of Land-Use Rights in China for Countervailing Duty Purposes* at 30, P.R. 203 (Jan. 31, 2020) ("*Land Use Memo*"); *Dept. Mem. Re. "Upcoming Draft Remand Results – Population Densities of Countries"*, Rem. P.R. 17 (August 8, 2022) ("*Commerce Population Density Data*"); *Dept. Memo. re. Upcoming Draft Remand Results – Level of Economic Development*, Rem. P.R. 18 (August 8, 2022) ("*Commerce Economic Development Information*").

Commerce considered the *Commerce Population Density Data* because it indicated that Thailand and Malaysia had similar population densities to China's. Remand Results at 11. China had a population density of 140 persons per square kilometer (K^2) while Malaysia had 99/K^2 and Thailand had 130/K^2. *See Commerce Population Density Data* at 1, 6–7. Further, Commerce considered that China, Malaysia, and Thailand were classified as "upper middle income" countries by the World Bank. Remand Results at 11; *Commerce Economic Development Information* at 5–7. Based on these factors, Commerce concluded that data from Thailand and Malaysia would best approximate a benchmark for land in China. Remand Results at 11–13. Acknowledging, however, the court's concern that the Thailand data was stale, Commerce calculated a simple average of the Malaysian and Thai datasets to construct the benchmark. Remand Results at 11.[4]

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[3] The parties are not pursuing arguments related to Brazil, Mexico, or the Nexus Reports. Instead, the Mandatory Respondent seek use of Malaysian data without averaging it with the Thai data. JA Solar Comments on Remand Results, ECF No. 96 (Nov. 7, 2022) ("JA Solar Br.") at 7–9; Risen Br. at 8–9. Accordingly, the court will not address these matters further.

[4] Commerce explained that although this was a tier-three benchmark, "its approach is consistent with the methodology it employs for tier two, under which Commerce will average together available prices when more than one are available." Commerce's Resp. to Comments, ECF No. 105 (Jan. 18, 2023); *see* 19 C.F.R. § 351.511(a)(2)(ii).

JA Solar presented data that showed that the difference between Thailand's and China's gross national income per capita ("GNI") was almost twice that of the difference between Malaysia's and China's GNI. *See JA Solar Rebuttal Comments on Level of Economic Development* at Ex. 1, Rem. P.R. 21 (Aug. 16, 2022). Commerce declined to adjust the benchmark because Commerce does not "prioritize the closeness of per capita GNI in selecting a benchmark." Remand Results at 22. Once again at the court, Plaintiffs challenge the use of the 2010 CBRE Report for Thailand data, now arguing that Commerce should rely solely on the contemporary Malaysia dataset. JA Solar Br. at 7–9; Risen Br. at 8–9.

Under 19 U.S.C. § 1677(5)(E)(iv), Commerce must set benchmarks that reflect "prevailing market conditions." The statute further defines prevailing market conditions as including "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E)(iv). 19 C.F.R. § 351.511(a)(2) provides additional guidance on how Commerce sets benchmarks, setting out three methodological tiers. 19 C.F.R. § 351.511(a)(2).

A tier-three benchmark "measure[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii). "If Commerce determines that the government price is not consistent with market principles it will look to construct an external benchmark." *Risen Energy*, 570 F. Supp. 3d at 1374. When Commerce has multiple datasets available, it "will average such prices to the extent practicable, making due allowance for factors affecting comparability." 19 C.F.R. § 351.511(a)(2)(ii).

Commerce, however, fails to provide sufficient reasons to continue relying on the stale data from Thailand when it has the contemporary data from Malaysia. As Commerce explained, it selected the Malaysian land values because Malaysia also had a comparable level of economic development to China and was similarly grouped as an upper-middle income country with Thailand. *See* Commerce's Resp. to Objections, ECF No. 105 (Jan. 18, 2023) at 15–16; Remand Results at 12; *see also Commerce Economic Development Information*. Although Commerce decided to average the datasets together for the benchmark, Commerce offered no rationale for the decision to utilize both data and conceded that "nowhere on remand did [it] pursue a comparison between the two sources." Commerce's Response to Objections at 17. As long as both countries satisfy basic comparability standards, Commerce does not have to decide whether Malaysia is more, less or equally comparable to China as Thailand is. It has to decide if it has such defective data that it should be rejected in favor of better data. The Malaysian data is contemporaneous while the

Thai data is outdated by seven years and requires inflationary adjustments. Commerce fails to address the court's concern regarding the staleness of the 2010 CBRE Report regarding Thailand. Thus, Commerce did not comply with the court's remand instructions. Because the Malaysian data is useable and the Thai appears to be defective, at this late stage, Commerce must provide a compelling reason for its continued use of the stale 2010 CBRE report or otherwise use the Malaysian data only.

III. Ocean Freight

In its original determination, Commerce calculated a tier-two benchmark for the price of ocean freight for bringing solar glass, polysilicon, and aluminum extrusions to China from various cities as a world market price, pursuant to 19 C.F.R. § 351.511(a)(2)(ii). *I&D Memo* at 55–56. In order to calculate the benchmark, Commerce used a simple average of two submitted data sets, one from Descartes and the other from Xeneta. *I&D Memo* at 55. The Xeneta data reflected prices from "monthly ocean freight data for shipping a 20-foot standard container to Shanghai" from various ports across the world including Barcelona, Busan, Singapore, Jakarta, Los Angeles, Rotterdam, and Mumbai. *JA Solar, Benchmark Submission* at Ex. 7C, C.R. 284–96, P.R. 166–68 (Jan. 13, 2020). At the same time, the Descartes data consisted of freight rates from various American cities, including Los Angeles, Portland, San Francisco, Seattle, Chicago, Murrieta, and Atlanta, to Shanghai. *Petitioner, Submission of Benchmark Information* at Exs. 5–7, P.R. 170–75 (Jan. 13, 2020). Many of the shipments had the same "Tariff Code" and freight forwarder code, and some of the data also stated that the container size was less than a container load. *Id.*

In *Risen*, the court remanded the benchmark calculation to reconsider flaws in the Descartes data raised by Plaintiffs. 570 F. Supp. 3d at 1379. The court was concerned whether the potentially flawed Descartes data was necessary to arrive at a "world market price" when the Xeneta data provided global routes compared to the Descartes data's U.S.-focused routes. *Id.* The court also considered that the Descartes data might be flawed because it appeared to be sourced from limited samples based on the codes, was for less than a container load, and some of the routes were from inland American cities, which could incur additional fees. *Id.* As a result, the court remanded to Commerce to reconsider these flaws before determining if any use of the Descartes data was appropriate. *Id.* Further, the court instructed Commerce that, if it used the Descartes data, it should average it only

with the Xeneta's United States to China routes data instead of using it in a simple average with world-wide data to prevent data limited to U.S. routes from improperly ballooning the benchmark. *Id.*

On remand, Commerce excluded the double counting of inland freight by omitting that data and averaged the Descartes route values with the Xeneta values for shipments from the United States. Remand Results at 14. Regarding the other alleged flaws in Descartes data, Commerce did not agree that they warranted excluding the dataset. Remand Results at 14–15. Commerce stated that it did not believe that "a hypothetical importer would as a rule not buy less than a container." Remand Results at 15. Commerce also concluded that the record did not show that a hypothetical importer would not use these shipments based on the tariff codes and freight forwarder codes. Remand Results at 15. Commerce therefore continued to rely upon the Descartes data in determining the benchmark, only with the modifications requested by the court. Remand Results at 15.

Plaintiffs challenge the Remand Results, arguing that Commerce did not adequately address the flaws in the Descartes data. *See* JA Solar Br. at 9–10; Risen Br. at 9–10; Shanghai BYD Br. at 7–8. Plaintiffs assert that Commerce failed to consider the tariff codes and freight forwarder codes. JA Solar Br. at 9; Risen Br. at 9. Plaintiffs suggest that the codes indicate that the Descartes data is derived from limited route samples because each shared the same codes. JA Solar Br. at 9; Risen Br. at 9. JA Solar contends that Commerce failed to explain what the Descartes data added that the Xeneta data did not already include in the benchmark calculation. JA Solar Br. at 10. Plaintiffs agree, however, that Commerce complied with the remand instructions when omitting the inland routes from the Descartes dataset. *See* JA Solar Br. at 9–10; Risen Br. at 9–10; Shanghai BYD Br. at 7–8.

For a tier-two benchmark, Commerce compares "the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). When there is more than one dataset representing the world market price, then Commerce "will average such prices to the extent practicable, making due allowance for factors affecting comparability." *Id.* "This means that Commerce must at least consider the factors in the course of evaluating potential benchmark sources." *RZBC Grp. Shareholding Co. Ltd. V. United States*, 40 CIT __, __, 2016 WL 3880773 at *9 (2016) (quotation marks omitted). Further, Commerce will "adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported

the product." *Id.* § 351.511(a)(2)(iv). This requires that Commerce calculate the benchmark based on a hypothetical importer of the given product. *See Changzhou Trina Solar Energy Co., Ltd. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1338 (2018) ("As the court has indicated, however, Commerce has determined that benchmark calculations are assessed based on a hypothetical importer making a market-price purchase . . . ." (citation omitted)). But the court has been hesitant to endorse benchmarks that use simple averages that give "undue weight" to small samples. *See RZBC Grp. Shareholding Co., Ltd. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1308–11 (2015) (holding that a simple average between a quantity unknown dataset and a high-cost, low-quantity dataset may have distorted the benchmark by giving undue weight to small shipments).

Commerce did not sufficiently comply with the court's remand order. In the remand order, the court expressed a concern that the Descartes data "appear[ed] to be sourced from limited samples because many of the shipments use the same tariff codes and freight forwarder codes." *Risen*, 570 F. Supp. 3d at 1379. On remand, however, Commerce only responded that it could not conclude that these codes "indicate a shipment method that an importer of the materials at issue would be unlikely to use." Remand Results at 15. The court's concern was not about whether this was a shipping method a Chinese company would use, but instead about whether the Descartes data was a high-cost, low-quantity dataset that improperly ballooned the benchmark when averaging. *See Risen*, 570 F. Supp. 3d at 1379; *see also RZBC Grp. Shareholding*, 100 F. Supp. 3d at 1308–11. Commerce did not fully consider the potential impact that a small sample size could have when affecting the comparability of the Descartes and Xeneta datasets. *See* 19 C.F.R. § 351.511(a)(2)(ii). Although Commerce may calculate the benchmark based on a hypothetical importer of a product, the source must still be appropriate, and until Commerce addresses whether the tariff codes and freight forwarder codes indicate a small sample size, the court cannot sustain Commerce's benchmark calculation. Thus, Commerce did not comply with the court's remand instructions, and the determination is not supported by substantial evidence. The Xeneta data seems to provide a broadly based average. If Commerce cannot supply a convincing reason as to why the Descartes data improves accuracy, Commerce should not use it.

CONCLUSION

As to EBCP, the Remand Results set standards not appropriately applied to this particular factual record. As to land value and ocean

freight, Commerce did not properly consider the quality of data sets it averaged. Defects in data are not cured by averaging with better data. For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion on all three issues. The remand shall be issued within 60 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

Dated: April 11, 2023
New York, New York

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

Slip Op. 23–49

ENVIRONMENT ONE CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE; KATHERINE TAI, U.S. TRADE REPRESENTATIVE; U.S. CUSTOMS AND BORDER PROTECTION; CHRIS MAGNUS, COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION Defendants.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00124

[Granting Plaintiff's motion to amend summons; denying Defendants' motion to dismiss for lack of subject matter jurisdiction with respect to the 23 entries for which the court's jurisdiction is claimed pursuant to 28 U.S.C. § 1581(a); granting Defendants' motion to dismiss for lack of subject matter jurisdiction with respect to the eight entries for which the court's jurisdiction is claimed pursuant to 28 U.S.C. § 1581(i); granting without prejudice Defendants' motion to dismiss the action for failure to state a claim upon which relief may be granted.]

Dated: April 11, 2023

Christopher M. Kane, *Daniel J. Gluck*, and *Mariana del Rio Kostenwein*, Simon Gluck & Kane LLP, of New York, NY, for Plaintiff Environment One Corporation.

Jamie L. Shookman, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendants. With her on the brief were *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Valerie Sorensen-Clark*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Barnett, Chief Judge:

This case involves a challenge to the liquidation of 31 entries upon which additional duties pursuant to section 301 of the Trade Act of 1974 ("section 301 duties") were levied.[1] Plaintiff Environment One Corporation ("Plaintiff" or "Environment One") claims it is entitled to a refund of section 301 duties because the imported merchandise was the subject of an exclusion from the section 301 duties that U.S. Customs and Border Protection ("Customs" or "CBP") did not apply at liquidation. The merits of Plaintiff's case are not yet before the court. Instead, what is pending before the court are procedural motions regarding the initial pleadings and the justiciability of this case.

[1] Plaintiff's initial complaint listed 34 entries; however, Plaintiff subsequently acknowledged that one entry was listed in error and that Plaintiff received a refund of disputed duties for two of the entries. *See* Pl.'s Mem. in Supp. of its Mot. for Summ. J. and Pl.'s Mot. to Am. the Summons in Resp. to Defs.' Opp'n Thereto and Defs.' Mot. to Dismiss ("Pl.'s Resp.") at 23, ECF No. 20. The present status of these three entries is not in dispute.

OVERVIEW[2]

For purposes of resolving the pending motions, details regarding the applicability of the section 301 duties are less relevant than the timeline of events, up to and including the filing of this case and the form in which such filing was made. The imports in question entered under a tariff heading allegedly covered by section 301 duties. Following imposition of section 301 duties, the Office of the United States Trade Representative ("USTR") granted exclusions from section 301 duties to certain merchandise otherwise covered by some of the identified tariff headings. Plaintiff asserts that its imports were covered by such an exclusion.

The 31 entries at issue were made after the exclusion in question was granted. The importer made entry under what was otherwise a duty-free subheading and claimed an exclusion from section 301 duties. The entries in question occurred between October 11, 2019, and July 20, 2020, and CBP liquidated the entries between September 4, 2020, and June 25, 2021. In each case, CBP assessed section 301 duties at 25 percent *ad valorem*.

Following liquidation, Plaintiff filed several protests. Plaintiff timely filed four protests covering 23 liquidated entries, which protests CBP subsequently denied. Plaintiff did not protest the liquidation of five entries and filed a single protest covering the liquidation of three entries more than 180 days after liquidation occurred.

Plaintiff challenges the assessment of section 301 duties on all 31 entries and the denial of the four protests with respect to the 23 entries covered therein. Plaintiff made its initial court filing on April 15, 2022. On that date, Plaintiff concurrently filed a Form 4 summons and a complaint. *See* Summons, ECF No. 1; Compl. A Form 4 summons is known as a general summons and is used in cases asserting jurisdiction pursuant to 28 U.S.C. § 1581(i) (2018),[3] the court's residual jurisdiction. In the accompanying complaint, Plaintiff asserted jurisdiction pursuant to 28 U.S.C. §§ 1581(a) and (i). Compl. ¶¶ 10–12. Attached to that complaint is an exhibit titled "Entries for 1581(a) and/or 1581(i) claims." *Id.*, Ex. The exhibit identifies the entry number for each of the entries at issue, the entered value and duty for each entry, and two additional columns labelled "Liquidation/Protest (x=1581(i) only)" and "Date Denied." *Id.* For ease of reference, the column headings are reproduced below:

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[2] Background information is drawn from Plaintiff's initial complaint and first amended complaint, including their respective exhibits. *See generally* Compl., ECF No. 2; Am. Compl., ECF No. 16.

[3] Citations to the U.S. Code are to the 2018 version unless otherwise stated.

				Date
Entry #	Sum Entered Value	Sum of Prov/Prog. Duty	Liquidation/Protest (x=1581(i) only)	Denied

Id.

For the 23 entries covered by timely protests, the first of those additional columns indicates asserted liquidation dates, protest numbers, and protest dates and the second column asserts the date the protest was denied. *Id.* For the three entries covered by an untimely protest, the first column indicates asserted liquidation dates, protest number, protest date, that the protest was filed "past 180 days," and that the protest was denied. *Id.* For the five entries that were not protested, the first column indicates the asserted liquidation dates and states "past 180 days" with no reference to a protest number or protest date. *Id.* For these eight entries that were not protested or were covered by an untimely protest, the second column contains an "x." *Id.*

Following receipt of the initial summons and complaint, the court noted the absence of a Form 1 summons used in cases filed under 28 U.S.C. 1581(a). On May 10, 2022, Plaintiff filed a motion to amend the summons proposing to add a Form 1 summons to its previously filed Form 4 summons. *See* Mot. to Amend Summons ("Mot. to Amend"), ECF No. 11. On June 21, 2022, prior to the extended deadline for Defendants[4] to respond to that motion, Plaintiff filed a "consent motion" seeking both to amend its motion to amend the summons and to amend the complaint. *See* Consent Mot. to Amend Mot. to Amend Summons and Amend Compl. ("Consent Mot."), ECF No. 14. This motion sought to (a) amend the motion to amend the summons to change the word "complaint" to "summons" on page 2 of the motion, and (b) amend the complaint to provide a revised exhibit "that provides a clearer listing of the entries in the case and Plaintiff's claims with respect to those entries" and delete the three entries not relevant to the dispute.[5] As stated in the motion, the Government consented "to the filing of this [m]otion . . ., however, the Government does not consent to the ultimate relief requested by the motion." *Id.* at 3.

On June 23, 2022, the court granted the Consent Motion, thereby accepting the amended motion to amend the summons and the amended complaint, and confirmed the deadline for the Government

[4] Defendants are also referred to herein as "the Government."

[5] These three entries are discussed in more detail above. *See supra* note 1.

to respond to the motion to amend the summons (as amended).[6] Order (June 23, 2022), ECF No. 15.

On July 15, 2022, the Government filed a brief opposing Plaintiff's motion to amend the summons and in support of the Government's motion to dismiss. *See* Defs.' Mot. to Dismiss. Therein, the Government argued that the court should deny Plaintiff's motion to amend the summons as time-barred and dismiss the case for lack of jurisdiction or, alternatively, dismiss this case based on Plaintiff's failure to state a claim upon which relief can be granted. *See id.* at 15–34. Both Plaintiff's motion to amend the summons and Defendants' motion to dismiss are fully briefed.[7] For the reasons that follow, the court grants the motion to amend the summons; grants, in part, Defendants' motion to dismiss for lack of subject matter jurisdiction; and grants, without prejudice, Defendants' alternative motion to dismiss for failure to state a claim.

STANDARD OF REVIEW

In order to adjudicate a case, a court must have subject matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety."); *see generally* U.S. Court of Int'l Trade ("USCIT") Rule 12(b)(1).

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[6] In the Government's pending motion to dismiss, the Government states that while it consented to Plaintiff revising the motion to amend the summons, it did not consent to the filing of either an amended summons or amended complaint. *See* Mem. in Supp. of Defs.' Opp'n to Pl.'s Mot. to Amend the Summons and Defs.' Mot. to Dismiss ("Defs.' Mot. to Dismiss") at 11, ECF No. 19. The Government explains that, "[f]or purposes of this motion . . . the first amended complaint is the operative pleading in this case" and reiterates its objection to amending the summons. *Id.* While the court understood the Government's position with respect to amending the summons and its objection to the court granting the "ultimate relief" requested relevant thereto, the Government's consent to the filing of the Consent Motion suggested the Government's consent to amending the complaint. This is so, because Plaintiff did not seek to convert the motion to amend the summons into a joint motion to amend the summons and complaint, but, instead, sought to make two separate amendments: one to the motion to amend the summons and another to amend the complaint, and the Government consented to that filing. As discussed below, even limiting the court's analysis to the initial complaint, the court finds that the complaint was sufficiently clear to establish the court's jurisdiction in this case. Thus, any objection to the filing of the first amended complaint is moot.

[7] In addition to opposing Defendants' motion to dismiss, Plaintiff moved for summary judgment pursuant to USCIT Rule 12(d), asserting that Defendants relied on materials outside the pleadings in seeking dismissal. *See* Pl.'s Mot. for Summ. J., ECF No. 20–1; Pl.'s Resp. at 1, 6. Defendants subsequently filed an unopposed motion to stay consideration of the merits and deny Plaintiff's request to convert Defendant's motion to dismiss into a motion for summary judgment, Defs.' Req. to Stay Consideration of the Merits of Pl.'s Claims, to Deny the Request to Convert Defs.' Mot. to Dismiss, and to Extend the Time to File a Reply in Further Supp. of the Mot. to Dismiss, ECF No. 21, which the court granted, Order (Aug. 29, 2022), ECF No. 22.

Plaintiff bears the burden of establishing subject matter jurisdiction. *See Norsk Hydro Can., Inc. v. United State* s, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When, as here, the plaintiff asserts jurisdiction pursuant to 28 U.S.C. § 1581(i), it "bears the burden of showing that another subsection is either unavailable or manifestly inadequate." *Erwin Hymer Group N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citation omitted).

Because the pending motion to dismiss rests on the availability of jurisdiction pursuant to another subsection, and therefore challenges the existence of jurisdiction, "the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true." *See Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012).

Additionally, with respect to Defendants' motion to dismiss for failure to state a claim, "any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000); *see generally* USCIT Rule 12(b)(6). "A court may properly dismiss a case pursuant to USCIT Rule 12(b)(6) only if Plaintiff's allegations of fact are not 'enough to raise a right to relief above the speculative level.'" *VoestAlpine USA Corp. v. United States*, 46 CIT __, __, 578 F. Supp. 3d 1263, 1276 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Courts generally consider the allegations contained in the complaint but may also consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (alteration in original) (citation omitted). At the same time, a complaint's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

DISCUSSION

I. Whether the Court Has Subject Matter Jurisdiction

Plaintiff seeks to invoke the court's jurisdiction pursuant to 28 U.S.C. § 1581(a) or, in the alternative, pursuant to 28 U.S.C. § 1581(i), for the 23 entries covered by four protests.[8] Compl. ¶¶ 10–12, Ex.[9]

[8] The four protests and their filing dates are protest numbers 460121127895 (May 29, 2021), 460121127966 (June 4, 2021), 460121128225 (June 15, 2021), and 460121128666 (July 14, 2021). Compl. Ex.

[9] As discussed below, the jurisdictional inquiry in this case depends upon the information provided in the initial complaint, not the first amended complaint. Thus, the court cites to that initial pleading in this section.

Additionally, Environment One seeks to invoke the court's jurisdiction pursuant to 28 U.S.C. § 1581(i) alone on eight additional entries. *Id*. ¶¶ 7, 10–11, Ex. Of these eight entries, Plaintiff did not file a protest for five entries and its protest for the three remaining entries (protest no. 460121127894 (Sept. 9, 2021)) was denied as untimely by CBP. *Id*. ¶ 7, Ex.

A. Legal Framework

Pursuant to 28 U.S.C. § 1581(a), the court has jurisdiction to review a protest denied pursuant to 19 U.S.C. § 1515. *See* 28 U.S.C. § 1581(a). A civil action contesting the denial of a protest is barred unless commenced "within one hundred and eighty days after the date of mailing of notice of denial of a protest under [19 U.S.C. § 1515(a)]." *Id*. § 2636(a)(1). Additionally, "[a] civil action in the Court of International Trade under [19 U.S.C. §§ 1515 or 1516] shall be commenced by filing with the clerk of the court a summons, with the content and in the form, manner, and style prescribed by the rules of the court." *Id.* § 2632(b).

Alternatively, 28 U.S.C. § 1581(i) provides the court jurisdiction to entertain "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—. . . (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "(D) administration and enforcement with respect to the matters referred to in paragraphs (A) through (C) of this paragraph and subsections (a)–(h) of this section." *See id*. § 1581(i)(1)(B), (D) (2018 & Supp. II 2020). Section 1581(i) "embodies a 'residual' grant of jurisdiction[ ] and may not be invoked when jurisdiction under another subsection of [section] 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (citation omitted). Thus, if jurisdiction pursuant to section 1581(a) is or could have been available with respect to Plaintiff's entries, jurisdiction pursuant to section 1581(i) is not available.

B. Whether the Court Has Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1581(a) or (i) for the 23 Timely Protested Entries

1. Parties' Contentions

The Government's motion to dismiss focuses on the initial Form 4 summons, notes that the summons identified no protests, and con-

cludes, therefore, that Plaintiff has failed to establish the court's subject matter jurisdiction over any denied protests. Defs.' Mot. to Dismiss at 18–19; *see also* Defs.' Reply in Supp. of Their Mot. to Dismiss ("Defs.' Reply") at 4–5, ECF No. 31. The Government argues that the court's jurisdiction cannot be established by contemporaneously filed documents. Defs.' Mot. to Dismiss at 18–19; *see also* Defs.' Reply at 5–6, 10–11. The Government further contends that, even if Plaintiff had identified the denied protests in the contemporaneously filed complaint, the complaint does not explicitly state which protests Plaintiff challenges pursuant to 28 U.S.C. § 1581(a). Defs.' Mot. to Dismiss at 19–20; *see also* Defs.' Reply at 6. According to the Government, Plaintiff's motion to amend is time-barred, because the initial summons did not establish the court's jurisdiction pursuant to 28 U.S.C. § 1581(a) and Plaintiff filed the motion to amend more than 180 days after CBP's denial of the protests. Defs.' Mot. to Dismiss at 20–22; *see also* Defs.' Reply at 4–5.

Plaintiff contends that the protests listed in its contemporaneously filed complaint establish jurisdiction pursuant to section 1581(a). *See* Pl.'s Resp. at 36–37. Plaintiff further contends that, pursuant to USCIT Rule 3(e), the court should allow Plaintiff to amend the summons because no material prejudice to the government will result from the amendment. Mot. to Amend at 2.

2. Analysis of Jurisdiction

The U.S. Court of Appeals for the Federal Circuit ("the Federal Circuit") has interpreted 28 U.S.C. §§ 2632(b) and 2636(a) as imposing two jurisdictional requirements: "that a suit be instituted by filing a summons and that the suit be filed within 180 days after the denial of a protest." *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1317 (Fed. Cir. 2006) (quoting *Pollak Im.-Ex. Corp. v. United States*, 52 F.3d 303, 306 (Fed. Cir. 1995)).

Plaintiff filed both the initial summons and complaint on April 15, 2022, 178 days after CBP denied Plaintiff's timely-filed protests on October 19, 2021. *See* Summons; Compl. Plaintiff's initial summons, filed using a Form 4 summons, did not identify the challenged protests or protested entries. *See* Summons. In the complaint, however, Plaintiff asserted that the court had jurisdiction pursuant to 28 U.S.C. § 1581(a) or (i) over the entries subject to timely protests denied by CBP. *See* Compl. ¶¶ 10–12, Ex. Attached to the complaint was a spreadsheet identifying the 23 entries covered by four denied protests and the basis of jurisdiction for each entry. *See id*. Ex.

While Plaintiff's initial summons and complaint were filed within 180 days of CBP's denial of the four protests, Plaintiff filed the motion to amend on May 10, 2022, more than 180 days after CBP denied the protests. *See* Mot. to Amend. at 2. Defendants argue that "the summons must establish the court's jurisdiction," Defs.' Mot. to Dismiss at 17 (quoting *DaimlerChrysler*, 442 F.3d at 1318), and that jurisdiction "attaches only to protests identified on the summons," *id.* (quoting *Otter Prods., LLC v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1345, 1350 (2021), in turn citing *DaimlerChrysler*, 442 F.3d at 1318). Framing the issue in terms of notice, Defendants argue that "[a] summons only provides notice if it identifies a protest with particularity." *Id.*; *see also* Defs.' Reply at 6 (arguing that notice is inadequate when it "requires inference and analysis"). Defs.' Reply at 6. Defendants further contend that, even if the court looks at contemporaneously filed documents to establish jurisdiction, the initial complaint does not explicitly state what protests it challenges pursuant to 28 U.S.C. § 1581(a). *See* Defs.' Mot. to Dismiss at 19–20. Defendants therefore conclude that because these documents failed to establish jurisdiction, Plaintiff cannot amend the summons to add time-barred protests to this action. *See id*. at 20–22.

While Defendants rely on *DaimlerChrysler* to support their motion, that case involved a different factual scenario from the case before the court. In *DaimlerChrysler*, the plaintiff challenged CBP's denial of certain protests and claimed jurisdiction pursuant to 28 U.S.C. § 1581(a). 442 F.3d at 1315–16. The plaintiff, however, filed an initial summons which omitted seven protests. *Id.* The plaintiff moved to amend its summons to add the seven omitted protest numbers more than 180 days after those protests were denied. *Id.* However, unlike here, no documents contemporaneously filed in that case referenced the omitted protest numbers. *See id.* at 1320. Thus, *DaimlerChrysler* does not resolve the present case. What *DaimlerChrysler* does make clear, however, is the importance of an initial pleading putting the government on notice of what protest decisions are being contested. *See id.* at 1320–21.[10]

Plaintiff responds by citing *Zenith Electronics Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993), in support of its assertion of jurisdiction over the denied protests. Pl.'s Resp. at 36. In *Zenith*, the plaintiff listed an incorrect antidumping duty determination number in the summons. 988 F.2d at 1580. Nevertheless, the plaintiff correctly identified the antidumping determination and determination

[10] While *DaimlerChrysler* explained that the summons, and not the complaint, is the initial pleading in cases brought pursuant to section 1581(a), *see* 442 F.3d at 1317–18, it expressly left open the question of whether "the court may look to other contemporaneously filed documents to determine the correct protest number[s]," *see id*. at 1320.

number on other contemporaneously filed documents and, on that basis, the USCIT granted the plaintiff's motion to amend the summons, and the Federal Circuit affirmed. *See id.*

In granting the motion, the USCIT reasoned that the plaintiff filed a summons "sufficient to satisfy the requirements of the law" and the court "should not be as concerned with the technical nomenclature of the documents which are filed as with basic considerations of justice." *NEC Corp. v. United States* , 12 CIT 399, 400, 685 F. Supp. 258, 259 (1988). Further, from "the totality of the documents filed with the court," it was "possible for a person reasonably familiar with these matters" to deduce the determination for which the plaintiff sought judicial review. *Id.*

Defendants' attempts to distinguish *Zenith* are unavailing. Defendants contend that Plaintiff failed to list any denied protest numbers in the summons whereas, in *Zenith*, the plaintiff listed the incorrect antidumping determination number in the summons. Defs.' Reply at 7–8. However, analogous with *Zenith* and *NEC*, in this case, the summons and contemporaneously filed complaint together identify the entries and denied protest numbers that Plaintiff challenges and indicate the jurisdictional basis for Plaintiff's challenges with sufficient particularity. For the 23 entries in question, the complaint asserts this court's jurisdiction pursuant to 28 U.S.C. § 1581(a) over denied protests. Compl. ¶¶ 6, 12. The table of entries attached to the complaint also indicates the claimed jurisdictional basis for each denied protest. *Id*. Ex (indicating the jurisdictional basis in column G). Further, Plaintiff identified the specific protests at issue by providing the denied protest number and entry numbers at issue, the date the protest was filed, the date the protest was denied, the entered value of the merchandise at issue, the date of liquidation, and the amount of duties for each entry. *Id*. Ex.[11]

The court acknowledges that the summons and complaint filed here did not include certain information otherwise required in a Form 1 summons; however, the defects of the filing do not make the summons and complaint a nullity. *See NEC*, 12 CIT at 400, 685 F. Supp. at 259. To the contrary, the summons and complaint, with its exhibit, make

[11] As indicated by the court's citations to the initial complaint, that version of the complaint and the table of entries attached thereto are sufficiently detailed to put the Government on notice of the denied protests being challenged. While the addition of the "Claim" column in the amended complaint improves the clarity of the table, the initial version was sufficiently clear. *Compare* Compl. Ex. *with* Am. Compl. Ex. The original table indicates "x=1581(i) only" and contains eight entries designated with an "x." Compl. Ex. The remaining 23 entries each provide information identifying the denied protests at issue. *Id.* Thus, the original table of entries indicates that Plaintiff claims jurisdiction "only" pursuant to 28 U.S.C. § 1581(i) with respect to these eight entries accompanied by the "x" and pursuant to 28 U.S.C. § 1581(a) and (i) with respect to the remaining 23 entries. The amended table of entries does not alter this understanding.

it possible for a person reasonably familiar with these matters to determine the denied protests being challenged and the asserted jurisdictional basis for the challenge. Plaintiff's mistaken filing of the incorrect summons is the type of technicality that the court should not concern itself with at the expense of "basic considerations of justice." *Id.*[12] Thus, the court finds that it has jurisdiction pursuant to 28 U.S.C. § 1581(a) to review CBP's denial of the four timely filed protests covering the 23 entries at issue.

3. Analysis of Motion to Amend the Summons

Having found that Plaintiff sufficiently invoked the court's jurisdiction pursuant to section 1581(a), the court now considers the pending motion to amend the summons. Pursuant to USCIT Rule 3(e), "the court may allow a summons to be amended at any time . . . unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed." Defendants argue that USCIT Rule 3(e) does not apply in this case because Rule 3(e) "does not cure the jurisdictional defects in [P]laintiff's summons, nor does it expand the [c]ourt's jurisdiction to the time-barred protests that [P]laintiff seeks to add to its amended summons." Defs.' Reply at 7; *see also* Defs.' Mot. to Dismiss at 22 & n.7.

The court disagrees that the amended summons would introduce time-barred determinations to the litigation. As discussed above, the initial summons and complaint were timely filed and sufficiently identified the four protests and 23 entries at issue. The proposed amended summons would simply conform the information previously provided into the appropriate format to facilitate CBP's provision of the relevant entry records. Allowing Plaintiff to amend its summons would not result in any material prejudice to Defendants and the court grants Plaintiff's motion to amend the summons.

[12] Defendants also contend that "[b]ecause [28 U.S.C.] § 2636(a)(1) operates as a waiver of sovereign immunity, this court must 'strictly construe [this statute] in favor of the sovereign.'" Defs.' Mot. to Dismiss at 21 (quoting *DaimlerChrysler*, 442 F.3d at 1317). To satisfy the requirements of 28 U.S.C. § 2636(a)(1), a plaintiff need only file a summons within 180 days of a denial of a protest. *See Autoalliance Int'l, Inc. v. United States*, 357 F.3d 1290, 1293 (Fed. Cir. 2004). Plaintiff met this requirement here. While the summons filed by Plaintiff did not identify the denied protests it sought to contest, as discussed above, the concurrently filed complaint remedied this deficiency.

C. Whether the Court Has Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1581(i)

1. Parties' Contentions

The Government contends that the court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) over all of the entries at issue because jurisdiction pursuant to 28 U.S.C. § 1581(a) is or could have been available and would not be manifestly inadequate. Defs.' Mot. to Dismiss at 22–33.

Plaintiff argues that the court has jurisdiction pursuant to section 1581(i) because Plaintiff seeks to challenge Customs' allegedly unlawful expansion of 19 U.S.C. § 1514 by requiring importers to protest entries in order to claim exclusions from section 301 duties. *See* Pl.'s Resp. at 4–5, 30–33. Plaintiff contends that a protest is not necessary to receive a refund, and the court can order reliquidation through its equitable powers, even if a protest was never filed. *Id*. at 43.[13]

2. Analysis

It is well settled that "[a] party may not expand a court's jurisdiction by creative pleading." *Sunpreme*, 892 F.3d at 1193 (quoting *Norsk Hydro Can.*, 472 F.3d at 1355). Instead, the court must "look to the true nature of the action . . . in determining jurisdiction of the appeal." *Id*.

Here, Plaintiff seeks to challenge Customs' assessment of section 301 duties on Plaintiff's entries and Customs' failure to refund such duties. Compl. ¶¶ 1–7. Customs liquidated Plaintiff's entries, classifying the merchandise under subheading 8536.50.7000, U.S. Harmonized Tariff Schedule ("HTSUS"), and assessing section 301 duties at a rate of 25 percent *ad valorem*. Pl.'s Resp. at 19–20.

For eight of the entries at issue, Plaintiff did not protest, or did not timely protest, Customs' assessment of those duties. Compl. ¶¶ 4–5, 7–8. Section 1514 of title 19 provides:

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[13] Plaintiff also contends: 1) that Customs' failure to publish the procedures for obtaining a refund of section 301 duties in the Federal Register represented a violation of the Administrative Procedures Act ("APA") and implicated due process requirements pursuant to the 5th Amendment to the U.S. Constitution; and 2) citing *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), that Customs' administration of USTR's exclusion of section 301 duties is an issue involving the "major questions doctrine." Pl.'s Resp. at 37–46. The Government replies that Plaintiff did not plead claims pursuant to the APA, the due process clause, or the major questions doctrine in its complaint. Defs.' Reply at 14, 18. Defendants are correct that Plaintiff did not plead violations of the APA or the 5th Amendment to the U.S. Constitution in its complaint. "[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000) (alteration in original) (citation omitted). Moreover, Plaintiff's desire to invoke the "major questions doctrine" does not obviate the jurisdictional or claim deficiencies of its complaint.

> Except as provided in subsection (b) of this section, . . . decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> . . .
>
> (2)the classification and rate and amount of duties chargeable; [or]
>
> . . .
>
> (5)the liquidation or reliquidation of an entry
>
> . . .
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade.

With respect to these eight entries, Plaintiff could have filed timely protests challenging Customs' classification and liquidation of the contested entries, and, if denied, could have challenged those denials pursuant to the court's section 1581(a) jurisdiction.

As stated above, section 1581(i) jurisdiction is unavailable "when jurisdiction under another subsection of [section] 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme*, 892 F.3d at 1191. To establish that jurisdiction pursuant to another subsection of section 1581 would be "manifestly inadequate," a party must demonstrate that the remedy provided by that subsection is "an 'exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'" *Id.* at 1193–94 (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008)); *see also Nat'l Nail Corp. v. United States*, 42 CIT__, __, 335 F. Supp. 3d 1321, 1327 (2018).

The court finds the Federal Circuit's decision in *ARP Materials, Inc. v. United States*, 47 F.4th 1370 (Fed. Cir. 2022), to provide relevant guidance in determining whether judicial review pursuant to section 1581(a) of Customs' exclusion determinations would be "manifestly inadequate." There, Customs liquidated one plaintiff's entries with section 301 duties prior to the granting of any exclusion by USTR. *Id.* at 1375. USTR subsequently granted an exclusion from those duties that allegedly applied retroactively to the entries in question; however, USTR's publication of the exclusion occurred more than 180

days after CBP liquidated certain of plaintiffs' entries. *See id.* at 1375–76. Customs denied certain of the plaintiff's protests of those liquidations as untimely because they were filed more than 180 days after liquidation, including the protest filed a mere five days after USTR's exclusion was published. *Id*. The Federal Circuit held that had plaintiff timely protested Customs' classification decisions, jurisdiction would have been available pursuant to 28 U.S.C. § 1581(a), and because the relief provided by section 1581(a) was not manifestly inadequate, jurisdiction pursuant to section 1581(i) was not available. *Id.* at 1379–80.

Similar to *ARP Materials*, the source of Plaintiff's harm here is Customs' classification decision and Plaintiff's path to relief is to challenge Customs' classification decision through the protest procedure. In this case, USTR published the exclusion *prior* to liquidation, so the availability of the protest procedure is even more evident than it was in *ARP Materials*. Accordingly, Plaintiff has failed to establish that jurisdiction under section 1581(a) was unavailable or manifestly inadequate.

Plaintiff's contention that Customs unlawfully expanded 19 U.S.C. § 1514 by requiring importers to protest entries as a prerequisite to claiming exclusions from section 301 duties is unavailing. Pl.'s Resp. at 4–5. Customs applies section 301 exclusions through classification determinations and the protest procedure is available to dispute Customs' classification determinations.

Furthermore, Plaintiff's request that the court consider ordering reliquidation through its equitable powers is unavailing. *See id*. at 43. An importer cannot rely on an equitable remedy pursuant to 28 U.S.C. § 1581(i) to circumvent the requirement of a timely filed protest. *See Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995) (importer "cannot circumvent the timely protest requirement by claiming that its own lack of diligence requires equitable relief").

For these reasons, the court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) over the eight entries for which Plaintiff did not file a timely protest because it had an adequate remedy pursuant to such a protest and 28 U.S.C. § 1581(a). For these eight entries, Defendants' motion to dismiss for lack of jurisdiction will be granted. For the 23 entries for which Plaintiff asserts jurisdiction pursuant to both 28 U.S.C. § 1581(a) and (i) and for which CBP denied timely protests, as discussed above in part I.B., the court has jurisdiction pursuant to 28 U.S.C. § 1581(a) and Defendants' motion to dismiss for lack of jurisdiction will be denied. Because jurisdiction

pursuant to 28 U.S.C. § 1581(a) exists for these entries, jurisdiction pursuant to 28 U.S.C. § 1581(i) is unavailable.

II. Whether Environment One Has Stated a Claim Upon which Relief May Be Granted

A. Parties' Contentions

The Government contends that Plaintiff's amended complaint fails to state a claim upon which relief may be granted. Defs.' Mot. to Dismiss at 33. Specifically, the Government argues that the amended complaint lacks "facts describing the merchandise at issue" and fails to "demonstrate why CBP's denials of [P]laintiff's protests were erroneous." *Id*. at 34.

Plaintiff contends that the facts and legal predicates contained in the amended complaint are sufficiently specific and form the bases on which this case can proceed. Pl.'s Resp. at 26–27.

B. Analysis

With respect to the 23 entries for which the court found jurisdiction pursuant to 28 U.S.C. § 1581(a), the amended complaint fails to state a claim for relief sufficient to survive Defendants' motion to dismiss.[14] The allegations in Plaintiff's amended complaint are insufficient to raise a right to Customs' refund of section 301 duties above the speculative level; instead they constitute no more than a threadbare recital of the elements of the cause of action. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555–56.

To determine whether Plaintiff's amended complaint states a claim upon which relief can be granted, the court must first consider the factual allegations necessary to raise a right to a refund of section 301 duties "above the speculative level." *Twombly*, 550 U.S. at 555. Included with the court's rules is an Appendix of Forms, along with narratives titled General Instructions, Specific Instructions, and Complaint Allegations. *See* U.S. Ct. Int'l Trade, Complaint Allegations ("Complaint Guidance"), U.S. CT. INT'L TRADE, https://www.cit.uscourts.gov/sites/cit/files/Complaint_Allegation.PDF (last visited Apr. 11, 2023). This Complaint Guidance provides that, in 28 U.S.C. § 1581(a) actions, a complaint should include, among other things, "a description of the merchandise involved" and "a specification of the contested customs decision or decisions." *Id.* at 1. When a plaintiff seeks to challenge the classification of the imported goods, as Environment One does here, the Complaint Guidance further indi-

[14] Because the other eight entries are being dismissed for lack of jurisdiction, the court may not consider whether Plaintiff stated a claim upon which relief could be granted with respect to these eight entries.

cates that the complaint should set forth the HTSUS classification, the tariff description, and concise allegations of the plaintiff's contentions of fact and law. *Id*. at 1–2.

The amended complaint is devoid of the information discussed in the Complaint Guidance. The amended complaint generally alleges that USTR implemented section 301 duties, as well as exclusions that allegedly applied to Plaintiff's imports; that Plaintiff claimed exclusions from section 301 duties upon importation; and that CBP assessed section 301 duties against Plaintiff, which Plaintiff timely protested and CBP denied. *See* Am. Compl. ¶¶ 3–4, 6. These facts alone are not enough to raise a right to relief above the speculative level. *See Twombly*, 550 U.S. at 555. The amended complaint fails to allege (1) the HTSUS classification or tariff description of the subject merchandise at issue; (2) the specific errors Customs allegedly made in the contested protest denials; and (3) the section 301 exclusion Plaintiff alleges is applicable to the subject imports. While the court, in ruling on a motion to dismiss, also considers documents incorporated into the complaint, exhibits attached to the complaint, and other matters of which the court may take judicial notice, *see, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007), the exhibit attached to the amended complaint does not cure these deficiencies. Without these factual allegations, Plaintiff's statements are merely conclusions of law and fail to provide even a threadbare recital of the elements of a cause of action.

For these reasons, the court will grant, without prejudice, Defendants' motion to dismiss for failure to state a claim with respect to the four protests covering the 23 entries for which the court has found jurisdiction pursuant to 28 U.S.C. § 1581(a). Plaintiff has already filed one amended complaint and has been on notice for several months regarding the asserted deficiencies with its complaint. Therefore, the court will grant the Defendants' motion, with prejudice, within ten days of the publication of this opinion and order absent Plaintiff docketing a second amended complaint providing sufficient factual allegations to establish a claim for relief.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's motion to amend the summons, ECF No. 11, is granted and the amended summons is accepted for filing; it is further

ORDERED that Defendants' motion to dismiss for lack of subject matter jurisdiction, ECF No. 19, is **GRANTED**, in part, with respect to the eight entries for which the court's jurisdiction is claimed only

pursuant to 28 U.S.C. § 1581(i) and **DENIED**, in part, with respect to the four denied protests covering 23 entries for which the court's jurisdiction exists pursuant to 28 U.S.C. § 1581(a); it is further

ORDERED that Defendants' motion to dismiss for failure to state a claim, ECF No. 19, is rendered moot with respect to the eight entries for which the court's jurisdiction is claimed only pursuant to 28 U.S.C. § 1581(i); and it is further

ORDERED that Defendants' motion to dismiss for failure to state a claim, ECF No. 19, is **GRANTED,** without prejudice, with respect to the four denied protests covering 23 entries for which the court's jurisdiction exists pursuant to 28 U.S.C. § 1581(a); and it is further

ORDERED that if Plaintiff fails to file a second amended complaint within ten days of the publication of this opinion and order, Defendants' motion to dismiss, ECF No. 19, will be **GRANTED** with prejudice.

Dated: April 11, 2023
New York, New York

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

Slip Op. 23–50

HANGZHOU AILONG METAL PRODUCTS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00116

[Sustaining Commerce's final results in the 2019–2020 administrative review of the antidumping duty order on light-walled rectangular pipe and tube from the People's Republic of China.]

Dated: April 11, 2023

Daniel J. Cannistra and *Pierce J. Lee*, Crowell & Moring LLP, of Washington, DC, for Plaintiff Hangzhou Ailong Metal Products Co., Ltd.

Kristin E. Olson, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, *Robert E. DeFrancesco, III*, *Maureen E. Thorson*, and *Nicole C. Hager*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Tubular Products Inc.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the 2019–2020 administrative review of the antidumping duty order on light-walled rectangular pipe and tube ("LWRPT") from the People's Republic of China ("China") for the period of review August 1, 2019, through July 31, 2020. *See Light-Walled Rectangular Pipe and Tube From the People's Republic of China*, 87 Fed. Reg. 13,968 (Dep't Commerce Mar. 11, 2022) (final results of antidumping duty admin. review; 2019–2020) ("*Final Results*"), ECF No. 21–1, and accompanying Issues and Decision Mem., A-570–914 (Mar. 7, 2022) ("I&D Mem."), ECF No. 21–2.[1]

Plaintiff Hangzhou Ailong Metal Products Co., Ltd. ("Plaintiff") raises several challenges regarding Commerce's surrogate value se-

[1] The administrative record filed in connection with the Final Results is divided into a Public Administrative Record ("PR"), ECF No. 21–4, and a Confidential Administrative Record ("CR"), ECF No. 21–5. Parties filed joint appendices containing record documents cited in their briefs. *See* Public J.A., ECF No. 42–1; Confid. J.A. ("CJA"), ECF Nos. 42–1 through 42–4. Citations are to the CJA unless stated otherwise.

lection for raw square tube. *See* Confid. Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Mem."), ECF No. 25–1; Confid. Pl.'s Reply Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Reply"), ECF No. 39.

Defendant United States ("the Government") and Defendant-Intervenor Nucor Tubular Products Inc. ("Nucor") filed response briefs in support of Commerce's determinations regarding each contested issue. *See* Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Def.'s Mem."), ECF No. 38; Confid. Resp. to Mot. for J. on the Agency R. ("Nucor's Mem."), ECF No. 33.

For the following reasons, the court sustains Commerce's *Final Results*.

BACKGROUND

On October 6, 2020, Commerce initiated the 2019–2020 administrative review of the antidumping duty order on LWRPT from China at Plaintiff's request. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 85 Fed. Reg. 63,081, 63,092 (Dep't Commerce Oct. 6, 2020); Req. for Admin. Review (Aug. 20, 2020), at 1, PR 1, CJA Tab 8. On October 22, 2020, Commerce issued an initial questionnaire to Plaintiff. *See* Req. for Info. (Oct. 22, 2020), PR 9, CJA Tab 9.

Pertinent to the matter before the court, the initial questionnaire requested that Plaintiff identify the raw materials that it used to produce the merchandise in question. *See id.* at D-1. In response, Plaintiff identified that the subject merchandise it produced had only one raw material—raw square tube. *See* Section D Quest. Resp. (Dec. 7, 2020) ("SDQR") at 18, PR 24, CR 11–15, CJA Tab 12. Commerce then issued a supplemental questionnaire requesting Plaintiff to clarify whether its reported factor of production—the raw square tube—was within the scope of the antidumping duty order on LWRPT that Plaintiff's exported merchandise was subject to. *See* Resp. to Section D. Suppl. Quest. (Mar. 30, 2021) ("Suppl. SDQR") at 7, PR 39, CR 23, CJA Tab 19. Plaintiff responded that the raw square tubes met the description of products within the scope of the antidumping order on LWRPT. *Id*. at 7–8. Plaintiff went on to explain that the raw square tubes were "intermediate inputs" and were subject to "significant further processing," such that the value of the exported subject merchandise substantially exceeded the price of the raw material input, and requested that Commerce calculate normal value based on its usage of this intermediate input. *Id.* at 8.

Commerce issued further supplemental questions requesting Plaintiff to identify the factors of production used to produce the raw square tube inputs and provide the consumption quantity for each. *See* Resp. to Section C&D Suppl. Quest. (Apr. 27, 2021) ("Second Suppl. SDQR") at 13, PR 60, CR 27–30, CJA Tab 26. Plaintiff identified hot-rolled carbon steel plates as the factor of production used to make the raw square tubes and provided databases that reported the consumption rate of hot-rolled carbon steel plates to produce one metric ton of the final subject merchandise. *See id.* at 13–14, Ex. D-26.

Because China is considered a non-market economy country for purposes of the antidumping duty law, Commerce requested comments on the selection of a primary surrogate country from which to value the factors of production. Req. for Econ. Dev., Surrogate Country, and Surrogate Value Cmts. and Info. (Mar. 18, 2021), PR 34, CJA Tab 15. Nucor urged Commerce to select either Malaysia or Brazil as the primary surrogate country and submitted Malaysian import data to value raw square tube. Cmts. on Surrogate Country Selection (Mar. 29, 2021) at 2–4, PR 38, CJA Tab 18; Submission of Surrogate Values (Apr. 5, 2021) at 2, Ex. 1, PR 47, CR 24–25, CJA Tab 21. Plaintiff did not initially advocate for any particular primary surrogate country, but provided Commerce with certain Romanian surrogate value data, including import data for raw square tube. *See* Submission of Surrogate Values (Apr. 5, 2021) at 1, Ex. SV-1, PR 40–46, CJA Tab 20. Following Commerce's request that Plaintiff identify the factors of production for the raw square tube, Plaintiff submitted Russian surrogate value data for hot-rolled carbon steel plate obtained from Datamyne's Global Trade Analytics ("Datamyne") and urged Commerce to select Russia as the primary surrogate country. *See* 2nd Submission of Surrogate Values (Aug. 2, 2021) at 1, Ex. SV-12, PR 63–69, CJA Tab 27.

Nucor submitted rebuttal information regarding surrogate values and comments purporting to show the unreliability of the Russian surrogate value data. *See* Rebuttal Surrogate Value Info. (Aug. 12, 2021), PR 83, CJA Tab 30; Cmts. in Advance of the Dep't's Prelim. Results. (Aug. 6, 2021), PR 82, CR 31, CJA Tab 29. Specifically, Nucor provided five months of surrogate value data for Russian hot-rolled carbon steel plate obtained from the Global Trade Information Services database, commonly known as Global Trade Atlas ("GTA"), and the United Nations Commodity Trade Statistics database ("COMTRADE"). *See* Rebuttal Surrogate Value Info. at 2, Ex. 3.

For the preliminary results, Commerce selected Malaysia as the primary surrogate country because only the Malaysian data was sourced from GTA, "Commerce's preferred source for surrogate value

data." Decision Mem. for the Prelim. Results of the 2019–2020 Antidumping Duty Admin. Review, A-570–914 (Aug. 31, 2021) ("Prelim. Decision Mem.") at 9–10, PR 103, CJA Tab 5 (stating that the submitted data was otherwise "equal in terms of being publicly available, contemporaneous with the period of review, broad market averages, from an appropriate surrogate country, and tax and duty-exclusive). Additionally, Commerce noted that the Malaysian data was more specific to Plaintiff's factor of production because it contained surrogate value data for "square tube," *id.* at 9, while the Russian data contained only surrogate value data for hot-rolled carbon steel plate, *see* Prelim. Surrogate Value Mem. (Aug. 31, 2021) at 2, PR 105, CJA Tab 7.

In its case brief to Commerce, Plaintiff contested certain findings in the preliminary results. *See* Case Br. (Oct. 14, 2021), PR 114, CR 50, CJA Tab 32. Plaintiff contended that: (1) Commerce erred in using a surrogate value for raw square tube to value hot-rolled carbon steel plate; (2) in-scope merchandise, such as raw square tube, may not be designated as a factor of production; and (3) Commerce should select Russia as the primary surrogate country. *Id*. at 1–8.

For the *Final Results*, Commerce continued to determine normal value by using Plaintiff's consumption of raw square tube and a surrogate value for that input. I&D Mem. at 4. Commerce explained that it found the Russian Datamyne data to be unreliable and the Malaysian data for raw square tube to be the best available information to calculate normal value. *Id*. at 5. Commerce further explained that although the Malaysian data for square tube potentially included further processed square tube in addition to raw square tube, any potential double counting of processing factors of production was outweighed by the unreliability of the Russian Datamyne data. *Id*. at 6.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2018).[2] The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

[2] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise specified.

DISCUSSION

I. Legal Framework for Surrogate Value Selection

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce generally determines normal value by valuing the factors of production[3] used in producing the subject merchandise and adding "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses" in a surrogate market economy country. *Id*. § 1677b(c)(1). However, if Commerce finds it is unable to determine the normal value using the factors of production with available information, the agency determines normal value on the basis of the price of comparable merchandise that is produced in one or more market economy countries that are at a comparable level of economic development as the nonmarket economy country. *Id*. § 1677b(c)(2).

In valuing the factors of production, Commerce must, "to the extent possible," use data from a market economy country that is "at a level of economic development comparable to that of the nonmarket economy country" and is a "significant producer" of comparable merchandise. *Id*. § 1677b(c)(4). Commerce generally values all factors of production in a single country, *see* 19 C.F.R. § 351.408(c)(2) (excepting labor); *Jiaxing Brother Fastener Co. v. United States* ("*Jiaxing II*"), 822 F.3d 1289, 1294 & n.3 (Fed. Cir. 2016), and "only resort[s] to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable," *Jiaxing Brother Fastener Co. v. United States*, 38 CIT 1404, 1412, 11 F. Supp. 3d 1326, 1332–33 (2014) (citation omitted), *aff'd*, *Jiaxing II*, 822 F.3d at 1289. Commerce "generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Jiaxing II*, 822 F.3d at 1293 (citing *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014)); 19 C.F.R. § 351.408(c)(1), (4) (directing Commerce to select "publicly available," "non-proprietary information" to value factors of production).

There is no hierarchy for applying the surrogate value selection criteria. *See, e.g., United Steel & Fasteners, Inc. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1390, 1398–99 (2020); *Hangzhou Spring Washer Co. v. United States*, 29 CIT 657, 672, 387 F. Supp. 2d 1236,

[3] The factors of production include, but are not limited to, hours of labor required; quantities of raw materials employed; amounts of energy and other utilities consumed; and representative capital cost, including depreciation. 19 U.S.C. § 1677b(c)(3).

1250–51 (2005) (stating that "the [c]ourt does not decide . . . whether contemporaneity should be valued over specificity"). Commerce therefore has discretion to choose which criteria to emphasize in selecting "the best available information," so long as it does so in conformity with the substantial evidence standard. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). Commerce must articulate "a rational and reasonable relationship" between the surrogate value and "the factor of production it represents." *Globe Metallurgical, Inc. v. United States*, 28 CIT 1608, 1622, 350 F. Supp. 2d 1148, 1160 (2004) (citing *Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998)). Consistent with the court's standard of review and the discretionary, fact-specific nature of Commerce's determination, the court does not address "whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Jiaxing II*, 822 F.3d at 1300–01.

II. Commerce's Surrogate Value Selection

Plaintiff raises a series of issues with the *Final Results*, but its contentions may be reduced to one discrete question: Was Commerce's determination to use Malaysian data to value raw steel tube supported by substantial evidence? To answer this question the court addresses two subsidiary decisions: (1) Commerce's decision to value raw steel tube as the main factor of production; and (2) Commerce's choice of data to value the raw steel tube.

A. Whether "In-Scope" Materials May Be a Factor of Production

Plaintiff contends that 19 U.S.C. § 1677b does not permit Commerce to value as an input a product that is itself within the scope of the proceeding. *See* Pl.'s Mem. at 11–13; Pl.'s Reply at 12–18. The Government and Nucor argue that the statute does not limit what information Commerce may use to determine normal value. *See* Def.'s Mem. at 12–13; Nucor's Mem. at 10.

As the parties acknowledge, 19 U.S.C. § 1677b does not provide an exhaustive definition of "factors of production" or "raw materials." Nevertheless, Plaintiff contends that the statutory language and structure of the statute do not permit Commerce to select merchandise that would fall within the scope of the antidumping proceeding as a factor of production. Pl.'s Reply at 14. The court understands Plaintiff to argue that because the "factors of production" of subject merchandise include "raw materials," those raw materials necessarily cannot be materials that would fall within the description of merchandise subject to the antidumping proceeding. Plaintiff further

contends that because the statute contains a separate provision to calculate normal value based on the market price of merchandise comparable to the subject merchandise, subject merchandise itself may not be a factor of production. *Id.* at 14–15. Plaintiff's arguments are unconvincing.[4]

First, nothing about the statutory language leads the court to find that the "raw materials" identified as a factor of production cannot be intermediate merchandise that also falls within the scope of the particular antidumping proceeding.[5] Merriam Webster Dictionary defines "raw material" as "crude or processed material that can be converted by manufacture, processing or combination into a new and useful product." *Raw Material*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/raw%20material (last visited Apr. 11, 2023). Merchandise that falls within the scope of an antidumping proceeding, but is then further processed, falls within the dictionary definition of raw material and may be considered a factor of production.

Second, the fact that the exception to using factors of production involves using the market price of merchandise *comparable to the subject merchandise* does not preclude Commerce's approach. As Plaintiff concedes, the raw square tube it used to manufacture the imported subject merchandise was subject to "significant further processing," such that the value of the subject merchandise substantially exceeded the cost of the raw input material, and Plaintiff initially requested that Commerce calculate normal value using raw square tube as a factor of production. Suppl. SDQR at 8. To be clear, Commerce did not determine that the raw square tube used by Plaintiff as an input was comparable to the subject merchandise Plaintiff exported. The exception to the factors of production methodology involves determining the price at which merchandise comparable to the subject merchandise is sold in other countries and using that *as the normal value*, rather than to value an input for further processing. *See* 19 U.S.C. § 1677b(c)(1)–(2).

Plaintiff contends that it is Commerce's practice to value the factors of production of the "ultimate producer"—that is, the agency values the raw materials used by the producer that manufactures the intermediate in-scope merchandise that is further processed by a respon-

[4] As discussed above, Plaintiff *itself* reported raw square tube as a factor of production of the subject merchandise it exported to the United States. *See* SDQR at 18.

[5] Plaintiff's argument focuses on the dictionary definition of "factor of production" and the statutory inclusion of "raw materials" as an example of a "factor of production" to argue that a factor of production cannot itself fall within the scope of an antidumping order. Pl.'s Reply at 13–14. As discussed herein, the court does not find this argument compelling.

dent before export to the United States. *See* Pl.'s Mem. at 11– 12; Pl.'s Reply at 6–9. In support of this position, Plaintiff relies on Commerce's determinations in the tenth administrative review of the antidumping duty order on activated carbon from China ("*Activated Carbon From China*") and the sixth administrative review of the antidumping duty order on pasta from Italy ("*Pasta From Italy*"). *See* Pl.'s Reply at 6–9; *see also* Issues and Decision Mem. for Certain Activated Carbon From China, A-570–904 (Oct. 16, 2018) ("Activated Carbon I&D Mem."), https://access.trade.gov/Resources/frn/summary/prc/2018–22969–1.pdf (last visited Apr. 11, 2023); Issues and Decision Mem. for Certain Pasta from Italy, A-475–6818 (Feb. 3, 2004) ("Pasta I&D Mem."), https://access.trade.gov/Resources/frn/summary/italy/04–2862–1.pdf (last visited Apr. 11, 2023). Both of these determinations are inapposite.

In *Activated Carbon from China*, Commerce relied on adverse facts available ("AFA") when a respondent failed to provide the factors of production from the "ultimate producer" of subject merchandise. In that case, the respondent purchased its activated carbon from "Supplier X." Activated Carbon I&D Mem. at 5. Commerce requested that the respondent identify all producers of the merchandise under consideration, including the producers that sold to its suppliers (i.e., the "ultimate producers"). *Id*. at 5. The respondent reported activated carbon as a factor of production used by Supplier X, which purchased and further processed the activated carbon. *Id*. Commerce requested, but the respondent did not provide, the factors of production for the upstream supplier to Supplier X. *See* Decision Mem. for the Prelim. Results, A-570904, (May 3, 2017) at 17, https://access.trade.gov/Resources/frn/summary/prc/201810649–1.pdf (last visited Apr. 11, 2023). Because the respondent failed to supply the requested information, the agency determined to apply adverse facts available. Activated Carbon I&D Mem. at 5–6. Consequently, rather than supporting Plaintiff's argument, *Activated Carbon from China* stands for the proposition that Commerce may rely on AFA when a respondent fails to provide information requested by the agency but does not require the agency to rely on such information in all cases.

In *Pasta From Italy*, Commerce interpreted the term "cost of production" as used in 19 U.S.C. § 1677b(b)(1) to mean "the cost to produce . . . merchandise, not the cost of purchasing . . . merchandise." Pasta I&D Mem. at 51. Plaintiff's use of this Commerce determination to support its argument that the term "production" as used in the statute requires "transformation of the merchandise outside the scope of the order to merchandise within the scope of the order," Pl.'s Reply at 8, is unavailing for two reasons. First, Commerce was ap-

plying a different subsection of 19 U.S.C. § 1677b applicable to market economy countries and, thus, is not indicative of Commerce's understanding of the term "factors of production" or its practice with regard to non-market economy countries. *See* Pasta I&D Mem. at 50–51. Second, Commerce's reason for excluding costs associated with purchased merchandise was that the respondent was "merely acting as a reseller" and did not further process the purchased product. *Id*. at 51. Here, it is undisputed that the raw square tube used by Plaintiff is subject to significant further processing. Suppl. SDQR at 8; *see also* Pl.'s Reply at 11.

Plaintiff also contends that *Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 617 F. Supp. 2d 1281 (2009), supports its interpretation of 19 U.S.C. § 1677b(c). *See* Pl.'s Reply at 12, 15–17. In *Zhengzhou Harmoni*, however, the court found that the scope of the antidumping order covering fresh garlic did not include the "intermediate input," i.e., the raw garlic bulb. 33 CIT at 464–65, 617 F. Supp. 2d at 1294. The court did, however, explain that when Commerce uses an "intermediate input" to calculate normal value, the agency "must find a surrogate [value] representative of that intermediate product." *Id*. at 472, 617 F. Supp. 2d at 1300.[6] With that in mind, the court turns to whether Commerce's selection of Malaysian import data to value Plaintiff's raw square tube was supported by substantial evidence.

B. Whether Commerce's Use of Malaysian Surrogate Data to Value Raw Square Tube is Supported by Substantial Evidence and Otherwise In Accordance with Law

Plaintiff raises a number of issues with respect to Commerce's selection of Malaysian surrogate data to value raw square tube, none of which are convincing. Plaintiff first contends that the Malaysian data is not representative of the raw square tube it uses to produce

[6] In *Zhengzhou Harmoni*, the court addressed two distinct issues, both of which are relevant to this case. For the first issue, the court rejected the plaintiff's challenge to Commerce's decision to value the intermediate input, raw garlic bulb. *Id*. at 463–64, 617 F. Supp. 2d at 1293. Commerce determined to value the intermediate input because, although the respondents cultivated and harvested the raw garlic bulbs, Commerce found that the respondents did not accurately track and report all factors of production involved in cultivation and harvesting. *Id.* at 460–61, 617 F. Supp. 2d at 1291. Relevant here, respondents also objected that the intermediate input fell within the scope of the order. *Id.* at 464, 617 F. Supp. 2d. at 1293–94. The court disagreed, finding that the raw garlic bulb was not within the scope of the antidumping order. *Id*. at 464–65, 617 F. Supp. 2d at 1294. The second issue concerned whether Commerce's selection of a surrogate value for the raw garlic bulb was supported by substantial evidence. *Id*. at 466–73; 617 F. Supp. 2d at 1295–1301. The court found that when valuing an intermediate product, Commerce must select a surrogate value that is representative of that intermediate product. *Id*. at 472, 617 F. Supp. 2d at 1300. The court will return to this holding below, in section B.i.

subject merchandise. Pl.'s Mem. at 15–18; Pl.'s Reply at 11–12. Plaintiff next contends that use of the Malaysian data results in "double counting" of general expenses and profit. Pl.'s Mem. at 18–20. Finally, Plaintiff argues that Commerce should have used the Russian Datamyne data for hot-rolled carbon steel plate to calculate normal value. *Id*. at 20–21; Pl.'s Reply at 18–24.[7]

i. Whether the Malaysian Surrogate Value Data is "Representative" of Plaintiff's Input

In addition to relying on *Zhengzhou Harmoni* to support its interpretation of 19 U.S.C. § 1677b(c), Plaintiff contends that the case holds that "a surrogate value for the final product is *not representative* of the value of any factor of production utilized in producing the final product" and, thus, Commerce should not have used the Malaysian import data for raw square tube to value the raw square tube used by Plaintiff to produce the subject merchandise. Pl.'s Reply at 17. Plaintiff misunderstands *Zhengzhou Harmoni*. In *Zhengzhou Harmoni*, the court remanded to Commerce its selection of a surrogate value for an intermediate garlic product. *See* 33 CIT at 467–73, 617 F. Supp. 2d at 1296–1301. The court remanded this determination not because it found that an intermediate product within the scope of the antidumping order could *never* be a surrogate value for a factor of production of the subject merchandise, but because its selection "was largely speculative and conclusory, and lack[ed] adequate [record] support." *Id*. at 470, 617 F. Supp. 2d at 1298. In other words, the court was unable to find that the surrogate value selected was applicable to the factor of production Commerce sought to value.

Here, there is no reason to believe that the Malaysian data is not representative of the raw square tube used by Plaintiff to manufacture the subject merchandise. Plaintiff concedes that the raw square tube Plaintiff used to manufacture its LWRPT would be included in the import data under Malaysian HTS subheading 7306.61. *See* Pre-

[7] Plaintiff contends that Commerce erred by first determining that the best available surrogate value information was the Malaysian raw square tube data and then selecting raw square tube as the factor of production. *See* Pl.'s Reply at 4–5. To the contrary, Commerce explained that it was appropriate to utilize the factors of production "as reported by" Plaintiff and that the subject merchandise "was a finished product produced by [Plaintiff] from square tube material." I&D Mem. at 4; *see also* Prelim. Surrogate Value Mem. at 2 (explaining that because Plaintiff "described its [factor of production]" as "raw square tube," Russian import data "for [Harmonized Tariff Schedule ("HTS")] code 7208.54" covering "flat-rolled iron or nonalloy steel" was not specific to Plaintiff's input). Commerce acknowledged that it had asked for, and Plaintiff had provided, factor data for hot-rolled carbon steel plates; however, Commerce noted that it "did not utilize this database in the *Preliminary Results*"—supporting the inference that Commerce determined which factor of production to use before determining what data was the "best available" to value that factor. I&D Mem. at 5–6.

lim. Surrogate Value Mem. at Attach. 1; *see also* Pl.'s Mem. at 16 ("[B]oth the unprocessed LWRPT and the processed LWRPT are classified under [HTS subheading] 7306.61 . . . .").

ii. Whether Commerce Impermissibly "Double Counted" General Expenses and Profit

Plaintiff next contends that Commerce inflated Plaintiff's dumping margin by "double counting" general expenses and profit because those values were also included in the surrogate value for raw square tube. *See* Pl.'s Mem. at 18–19. The fact that the Malaysian surrogate value data for raw square tube may include both raw square tube and further processed square tube is not contested. What is contested is whether Commerce acted within its discretion in selecting this imperfect data set as the best available information when compared to other record data.

The court finds that despite the deficiency in the Malaysian data, Commerce's selection is supported by substantial evidence. Although Commerce's explanation is not as thorough as it could be, the court can discern the agency's path of reasoning. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Having found that the Russian data was completely unreliable due to discrepancies in that data discussed in the next section, Commerce reasonably determined that the possibility of "double counting" general expenses and profit associated with selection of the Malaysian data would not be as distortive in the calculation of normal value as would use of the Russian data. *See* I&D Mem. at 6.

iii. Whether Commerce Impermissibly Rejected the Russian Datamyne Data

Finally, Plaintiff contends that Commerce unlawfully rejected the Russian surrogate value data for hot-rolled carbon steel plate. Pl.'s Mem. at 20–21; Pl.'s Reply at 18–25. Plaintiff first argues that this was the only record information for valuing its factors of production because surrogate value data for raw square tube is not lawful. Pl.'s Mem. at 20. As discussed above in section II.A, this contention is meritless.

Furthermore, Plaintiff has waived its argument that the Datamyne data must be used because it was the only available information on the record with which to value hot-rolled carbon steel plates. Plaintiff first made this argument in its reply brief; thus, Plaintiff failed to raise the issue in its opening brief before this court. *See Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ("Raising the issue for the first time in a reply brief does not suffice; reply briefs

reply to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration."). Plaintiff merely stated in its moving brief that "[e]ven if *arguendo* Commerce could justify its rejection of the Russian [surrogate value], such rejection would have resulted in an inadequate record for calculating the normal value under the default method." Pl.'s Mem. at 21. Rather than raising a substantive argument regarding the Datamyne data, this passing mention set up Plaintiff's argument that Commerce should have determined normal value using the alternative method, i.e., the price of comparable merchandise from a surrogate country. *See id*.

Even if Plaintiff had properly raised this issue, the argument fails on its merits because Commerce's determination to reject the Russian data is supported by substantial evidence. Parties submitted three sets of Russian steel plate data to Commerce: Datamyne, GTA, and COMTRADE. *See* I&D Mem. at 5. The GTA and COMTRADE data matched precisely with respect to the declared value and quantity of steel, while the Datamyne data differed significantly. *Id*. The declared value of the Datamyne data was "much lower" than the value of the GTA and COMTRADE data. *Id*.; *see also* [Nucor's] Rebuttal Br. (Oct. 25, 2021) at 9, PR 117, CR 51, CJA Tab 33 (detailing that the declared value of the Datamyne data was less than two thirds of the value of the declared value in the GTA and COMTRADE data). Given the inconsistencies in the Datamyne data, Commerce reasonably found this data unreliable.

CONCLUSION

For the foregoing reasons, the court will sustain Commerce's *Final Results*. Judgment will enter accordingly.

Dated: April 11, 2023
New York, New York

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

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