U.S. Customs and Border Protection

DEFERRAL OF DUTY ON LARGE YACHTS IMPORTED FOR SALE

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

ACTION: 60-Day notice and request for comments; extension without change of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than April 17, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0080 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Deferral of Duty on Large Yachts Imported for Sale.

OMB Number: 1651–0080.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the estimated burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses and Individuals.

Abstract: This collection of information is required to ensure compliance with 19 U.S.C. 1484b, which provides that an otherwise dutiable yacht that exceeds 79 feet in length, is used primarily for recreation or pleasure, and had been previously sold by a manufacturer or dealer to a retail customer, may be imported without the payment of duty if the yacht is imported with the intention to offer it for sale at a boat show in the United States. The statute provides for the deferral of payment of duty until the yacht is sold but specifies that the duty deferral period may not exceed 6 months. This collection of information is provided for by 19 CFR 4.94a and 19 CFR 4.95, which requires the submission of information to CBP such as the name and

address of the owner of the yacht, the dates of cruising in the waters of the United States, information about the yacht, and the ports of arrival and departure.

Type of Information Collection: Deferral of Duty on Large Yachts Imported for Sale.

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 50.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 50 hours.

Dated: February 10, 2023.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, February 15, 2023 (88 FR 9890)]

DECLARATION OF OWNER AND DECLARATION OF CONSIGNEE WHEN ENTRY IS MADE BY AN AGENT

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

ACTION: 60-Day notice and request for comments; extension without change of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than April 17, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0093 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Declaration of Owner and Declaration of Consignee When Entry is made by an Agent.

OMB Number: 1651–0093.

Form Number: CBP Form 3347, 3347A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the estimated burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses and Individuals.

Abstract: CBP Form 3347, *Declaration of Owner,* is a declaration from the owner of imported merchandise stating that he/she agrees to pay additional and increased duties, therefore releasing the importer of record from paying such duties. This form must be filed within 90 days after the date of entry. CBP Form 3347 is provided for by 19 CFR 24.11 and 141.20.

When entry is made in a consignee's name by an agent who has knowledge of the facts and who is authorized under a proper power of attorney by that consignee, a declaration from the consignee on CBP Form 3347A, *Declaration of Consignee When Entry is Made by an Agent,* shall be filed with the entry documentation or entry summary. If this declaration is filed, then no bond to produce a declaration of the consignee is required. CBP Form 3347A is provided for by 19 CFR 141.19(b)(2).

CBP Forms 3347 and 3347A are authorized by 19 U.S.C. 1485(d) and are accessible at *http://www.cbp.gov/newsroom/publications/forms*.

Type of Information Collection: Declaration of Owner (Form 3347).

Estimated Number of Respondents: 900.

Estimated Number of Annual Responses per Respondent: 6.

Estimated Number of Total Annual Responses: 5,400.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 540.

Type of Information Collection: Declaration of Importer Form (3347A).

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 6.

Estimated Number of Total Annual Responses: 300.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 30.

Dated: February 10, 2023.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, February 15, 2023 (88 FR 9889)]

FORCED LABOR TECHNICAL EXPO

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Notice of Forced Labor Technical Expo.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) will convene the Forced Labor Technical Expo in Washington, DC, on Tuesday, March 14, 2023, and Wednesday, March 15, 2023. The event will feature industry presentations on the latest technologies in supply chain transparency, as well as panel discussions on topics such as forced labor initiatives and future technologies, with the U.S. Department of Homeland Security (DHS), CBP personnel, and other U.S. Government agencies. Members of the international trade community and other interested parties are encouraged to attend.

DATES: Tuesday, March 14, 2023 (opening remarks and industry presentations, including a DHS-led panel discussion, 8 a.m. to 5 p.m., EST), and Wednesday, March 15, 2023 (opening remarks and industry presentations, including a CBP-led panel discussion, 8 a.m. to 5 p.m., EST).

ADDRESSES: The Forced Labor Technical Expo will be held at the Ronald Reagan Building Atrium located at 1300 Pennsylvania Avenue NW, Washington, DC 20004.

Registration: Members of the public who intend to participate in person should register using the online instructions at *https://www.cbp.gov/trade/forced-labor-technical-expo-2023* by 5 p.m., EST, on March 1, 2023. Space is limited. A registration fee will not be required for this event.

The Forced Labor Technical Expo will also be available globally through a live stream. For complete coverage of the event, interested parties can locate the live stream link on the CBP website at *https://www.cbp.gov/trade/forced-labor-technical-expo-2023*.

Members of the public who are registered to attend and who need to cancel should do so by 5 p.m. EST on March 8, 2023, using the online instructions at *https://www.cbp.gov/trade/forced-labor-technical-expo-2023*. For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the Office of Trade Relations at *tradeevents@cbp.dhs.gov* as soon as possible.

FOR FURTHER INFORMATION CONTACT: Ms. Johanna Estes, Office of Trade, at (202) 594–7933 or via email at *tradeevents@cbp.dhs.gov*. The most current Forced Labor Technical

Expo information can be found at *https://www.cbp.gov/trade/forced-labor-technical-expo-2023*.

SUPPLEMENTARY INFORMATION: This document announces that U.S. Customs and Border Protection (CBP) will convene the Forced Labor Technical Expo in Washington, DC, on Tuesday, March 14, 2023, and Wednesday, March 15, 2023. The Forced Labor Technical Expo offers a forum for industry to provide the international trade community with information about the latest technologies that can aid in securing and managing the flow of goods. The event will showcase the latest innovations in supply chain technology to help improve trade transparency and compliance with trade laws, with an emphasis on compliance with 19 U.S.C. 1307, as amended, and the Uyghur Forced Labor Prevention Act, Public Law 117–78.

The Forced Labor Technical Expo will feature panels composed of U.S. Department of Homeland Security and CBP personnel, as well as representatives from other U.S. Government agencies. The panel discussions will address U.S. Government agency initiatives and future innovations in supply chain transparency.

Technology providers interested in sharing relevant technologies should visit *https://www.cbp.gov/trade/forced-labor-technical-expo-2023* for details.

The Forced Labor Technical Expo agenda can be found on the CBP website at *https://www.cbp.gov/trade/forced-labor-technical-expo-2023.*

Dated: February 10, 2023.

ANNMARIE R. HIGHSMITH,
Executive Assistant Commissioner,
Office of Trade.

[Published in the Federal Register, February 15, 2023 (88 FR 9891)]

SECTION 321 DATA PILOT: MODIFICATION OF DATA ELEMENTS, EXPANSION OF PILOT TO INCLUDE ADDITIONAL TEST PARTICIPANTS, AND EXTENSION OF PILOT

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

ACTION: General notice.

SUMMARY: This notice announces that U.S. Customs and Border Protection (CBP) is modifying the Section 321 Data Pilot by adding optional data elements that may be submitted by any participant. CBP is also expanding the Section 321 Data Pilot to accept applications for additional participants in this test from all parties that meet the eligibility requirements. This notice also announces that CBP is extending the Section 321 Data Pilot through August 2025.

DATES: The voluntary pilot initially began on August 22, 2019, and will run through August 2025. The modifications of the data elements and expansion of the test to include additional participants set forth in this document are effective as of the date of publication of this notice in the **Federal Register**.

ADDRESSES: Prospective pilot participants should submit an email to *ecommerce@cbp.dhs.gov*. In the subject line of your email please state, "Application for Section 321 Data Pilot." For information on what to include in the email, see section II.D (Application Process and Acceptance) of the notice published in the **Federal Register** on July 23, 2019 (84 FR 35405).

FOR FURTHER INFORMATION CONTACT: Christopher Mabelitini, Director, Intellectual Property Rights & E-Commerce Division at *ecommerce@cbp.dhs.gov* or 202–325–6915.

SUPPLEMENTARY INFORMATION:

I. Section 321 Data Pilot

Section 321(a)(2)(C) of the Tariff Act of 1930, as amended, provides for an exemption from duty and taxes for shipments of merchandise imported by one person on one day having an aggregate fair retail value in the country of shipment of not more than $800. *See* 19 U.S.C. 1321(a)(2)(C). On July 23, 2019, U.S. Customs and Border Protection (CBP) published a general notice in the **Federal Register** (84 FR 35405) (July 2019 notice) introducing a voluntary Section 321 Data Pilot with a limit of nine participants. In accordance with the pilot, participants agree to transmit electronically certain data in advance of arrival for shipments potentially eligible for release under section 321 of the Tariff Act of 1930, as amended (Section 321 shipments).

The data pilot tests the feasibility of collecting certain advance data, beyond those required by current regulations, and of collecting data from non-traditional entities, such as online marketplaces, in order to effectively identify and target high-risk shipments in the e-commerce environment. With the expansion of the data pilot, CBP intends to increase the number of trade participants who are transmitting advance data elements on Section 321 *de minimis* shipments for trade facilitation and risk management purposes, as well as add optional data elements that may be submitted by any participant.

The purpose of this data pilot is to improve CBP's ability to identify and target high-risk shipments in the e-commerce environment, in addition to enhancing CBP's ability to facilitate trade and manage risks of shipments potentially eligible for release under Section 321 more effectively and efficiently. The increase in the number of participants transmitting data, as well as the addition of new optional data elements, will provide CBP with additional data needed to measure the success of the pilot.

The July 2019 notice provided a comprehensive description of the data pilot, its purpose, eligibility requirements, the application process for participation, and specifically stated that the data pilot applied only to Section 321 shipments arriving by air, truck, or rail (84 FR 35405). In December 2019, the pilot was expanded to include Section 321 shipments arriving by ocean and international mail covered in 19 CFR part 145 and extended through August 2021; CBP also provided clarification with respect to the misconduct portion of the data pilot (84 FR 67279) (December 2019 notice). On August 30, 2021, CBP extended the pilot for an additional two years through August 2023 to continue evaluation of the pilot and the risks associated with Section 321 shipments (86 FR 48435).

II. Modification to Section 321 Data Elements

This notice announces that CBP is modifying the Section 321 Data Pilot to include optional data elements that may be submitted by any participant. The modification will enable CBP to test further the feasibility of collecting advance data from individuals or entities that may possess the most relevant information relating to an e-commerce shipment's supply chain. It will also enable CBP to better direct resources used in inspecting and processing these shipments, so that CBP can more accurately and efficiently target Section 321 shipments to assess potential associated security risks. By expanding the pilot to include new optional data elements that can be submitted by any participant, the results of the pilot will inform possible future rulemakings, trade facilitation benefits, and other CBP initiatives affect-

ing Section 321 shipments. For these reasons, CBP is modifying the Section 321 Data Pilot to include optional data elements.

Data Elements

Participants in the Section 321 Data Pilot must transmit certain information for any Section 321 shipment destined for the United States for which the participant has information (84 FR 35405). The required data elements differ slightly depending on the entity transmitting the data. In general, the required data relates to the entity initiating the shipment (*e.g.,* the entity causing the shipment to cross the border, such as the seller, manufacturer, or shipper); the product in the package; the listed marketplace price; and the final recipient (*e.g.,* the final entity to possess the shipment in the United States). The data elements are as follows:

1. All participants. All participants, regardless of filer type, must electronically transmit the following elements:

- Originator Code of the Participant (assigned by CBP)
- Participant Filer Type (*e.g.,* carrier or online marketplace)
- One or more of the following:
  - Shipment Tracking Number
  - House Bill Number
  - Master Bill Number
- Mode of Transportation (*e.g.,* air, truck, ocean, or rail).

2. Participating carriers. In addition to the data elements listed above in paragraph 1, participating carriers must also electronically transmit the following data elements:

- Shipment Initiator Name and Address (*e.g.,* the entity that causes the movement of a shipment, which may be a seller, shipper, or manufacturer, but not a foreign consolidator)
- Final Deliver to Party Name and Address (*e.g.,* the final entity to receive the shipment once it arrives in the United States, which may be a final purchaser or a warehouse, but not a domestic deconsolidator)
- Enhanced Product Description (*e.g.,* a description of a product shipped to the United States more detailed than the description on the manifest, which should, if applicable, reflect the advertised retail description of the product as listed on an online marketplace)

- Shipment Security Scan (*e.g.,* verification that a foreign security scan for the shipment has been completed, such as an x-ray image or other security screening report)
- Known Carrier Customer Flag (*e.g.,* an indicator that identifies a shipper as a repeat customer that has consistently paid all required fees and does not have any known trade violations).

3. Participating online marketplaces. In addition to the data elements listed above in paragraph 1, participating online marketplaces must electronically submit the following data elements:

- Seller Name and Address (*e.g.,* an international or domestic company that sells products on marketplaces and other websites), and, if applicable, Shipment Initiator Name and Address
- Final Deliver to Party Name and Address
- Known Marketplace Seller Flag (*e.g.,* an indicator provided by a marketplace that identifies a seller as an entity vetted by the marketplace and has no known trade violations)
- Marketplace Seller Account Number/Seller ID (*e.g.,* the unique identifier a marketplace assigns to sellers)
- Buyer Name and Address, if applicable (*e.g.,* the purchaser of a good from an online marketplace. This entity is not always the same as the final deliver to party.)
- Product Picture (*e.g.,* picture of the product presented on an online marketplace), Link to Product Listing (*e.g.,* an active and direct link to the listing of a specific product on an online marketplace), or Enhanced Product Description (as defined in paragraph 2)
- Listed Price on Marketplace (*e.g.,* the retail price of a product that a seller lists while advertising on an online marketplace. For auction marketplaces, this price is the price of final sale.).

4. Optional Data Elements. In addition to the data elements listed above, participants, regardless of filer type, may electronically submit the following data elements:

- Harmonized Tariff Schedule of the United States (10-digit HTSUS)
- Retail Price in Export Country
- Shipper Name

- Shipper Address
- Shipper Phone Number
- Shipper Email Address
- Consignee Name (*e.g.,* the final deliver to party)
- Consignee Address
- Consignee Phone Number
- Consignee Email Address
- Buyer Name
- Buyer Address
- Buyer Phone Number
- Buyer Email Address
- Buyer Account Number
- Buyer Confirmation Number
- Shipment Initiator Phone Number
- Seller Phone Number
- Marketplace Name
- Marketplace website
- Carrier Name
- Known Carrier Customer Flag
- Merchandise/Product Weight
- Merchandise/Product Quantity
- Listed Price on Marketplace
- Manufacturer Identification Number (*e.g.,* the MID)
- Manufacturer Name
- Manufacturer Address.

The optional data elements may be submitted as of the publication of this notice in the **Federal Register**.

III. Expansion of Section 321 Applicant Participation

Effective Immediately, CBP is expanding the test to accept applications for additional participants in this test from all parties that meet the eligibility requirements. If selected for participation, par-

ticipants will be onboarded in the order in which their applications are received in phases averaging three participants per month. CBP will aim to onboard an average of three additional participants each month. This expansion will allow CBP to continue evaluating the feasibility of the 321 Data Pilot program and the risks associated with Section 321 shipments.

CBP seeks participation from stakeholders in the e-commerce environment, including carriers, brokers, freight forwarders, and online marketplaces. There are no restrictions regarding organizational size, location, or commodity type. Additionally, online marketplaces do not need to offer delivery logistic services to participate in the pilot. However, participation is limited to those parties with sufficient information technology infrastructure and support, as described below. All prospective pilot participants must fulfill the following eligibility requirements:

- Participants must use MQ connectivity capability, a messaging solution component, to submit data electronically to CBP and to receive messaging responses via an existing point-to-point connection with CBP. Alternatively, participants may authorize a carrier or broker that already participates in the pilot and has an existing point-to-point connection with CBP to transmit the information on their behalf.
- Participants establishing a new point-to-point connection with CBP will need to sign an Interconnect Security Agreement (ISA) or amend their existing ISA, if necessary, and adhere to security policies defined in the DHS 4300a security guide.
- Participants must send the mandatory data elements required for their filer type, as described above.

IV. Extension of the Section 321 Data Pilot Period

CBP will extend the pilot to continue evaluation of the 321 Data Pilot program and the risks associated with section 321 shipments. The pilot will run through August 2025.

V. Authority

This pilot is conducted pursuant to 19 CFR 101.9(a), which authorizes the Commissioner to impose requirements different from those specified in the CBP regulations for the purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise.

VI. Privacy

CBP will ensure that all Privacy Act requirements and applicable policies are adhered to during the implementation of this pilot.

VII. Paperwork Reduction Act

The collection of information gathered under this test has been approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) and assigned OMB control number 1651–0142. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

VIII. Misconduct Under the Pilot

A pilot participant may be subject to civil and criminal penalties, administrative sanctions, liquidated damages, or discontinuance from participation in the Section 321 Data Pilot for any of the following:

(1) Failure to follow the rules, terms, and conditions of this pilot;

(2) Failure to exercise due care in the execution of participant obligations; or

(3) Failure to abide by applicable laws and regulations.

If the Director, Intellectual Property Rights and E-Commerce Division, Office of Trade, finds that there is a basis for discontinuance of pilot participation privileges, the pilot participant will be provided a written notice which may be transmitted electronically proposing the discontinuance with a description of the facts or conduct warranting the action. The pilot participant will be offered the opportunity to appeal the decision in writing within ten (10) business days of receipt of the written notice. The appeal of this determination must be submitted to the Executive Director, Trade Policy and Programs, Office of Trade, by emailing *ecommerce@cbp.dhs.gov.*

The Executive Director, Trade Policy and Programs, Office of Trade, will issue a decision in writing which may be transmitted electronically on the proposed action within 30 business days after receiving a timely filed appeal from the pilot participant. If no timely appeal is received, the proposed notice becomes the final decision of the Agency as of the date that the appeal period expires. A proposed discontinuance of a pilot participant's privileges will not take effect unless the appeal process under this paragraph has been concluded with a written decision adverse to the pilot participant.

In cases of willfulness or those in which public health, interest, or safety so require, the Director, Intellectual Property Rights and

E-Commerce Division, Office of Trade, may immediately discontinue the pilot participant's privileges upon written notice which may be sent electronically to the pilot participant. The notice will contain a description of the facts or conduct warranting the immediate action. The pilot participant will be offered the opportunity to appeal the decision within ten (10) business days of receipt of the written notice providing for immediate discontinuance. The appeal of this determination must be submitted to the Executive Director, Trade Policy and Programs, Office of Trade, by emailing *ecommerce@cbp.dhs.gov.*

The immediate discontinuance will remain in effect during the appeal period. The Executive Director, Trade Policy and Programs, Office of Trade, will issue a decision in writing on the discontinuance within 15 business days after receiving a timely filed appeal from the pilot participant. If no timely appeal is received, the notice becomes the final decision of the Agency as of the date that the appeal period expires.

IX. Applicability of Initial Test Notice

All other provisions found in the July 2019, December 2019, and August 2021, notices remain applicable, subject to the expansion of applicants provided herein. Furthermore, CBP reiterates that it is not waiving any regulations for purposes of the pilot. All existing regulations continue to apply to pilot participants.

X. Signing Authority

Troy Miller, Acting Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: February 13, 2023.

ROBERT F. ALTNEU,
Director, Regulations & Disclosure,
Law Division.
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, February 16, 2023 (88 FR 10140)]

FACIAL COMPARISON FOR APIS COMPLIANCE TEST

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) plans to conduct a voluntary test in which participating commercial airlines and vessels use CBP's Traveler Verification Service (TVS) facial comparison service to comply with certain regulatory requirements regarding the Advance Passenger Information System (APIS). CBP regulations currently require an appropriate official of commercial aircraft and commercial vessels (collectively "carriers") to submit electronic manifests to CBP listing crew, non-crew, and passenger (collectively "travelers") information upon arrival and departure of aircraft and vessels. The carrier is required to compare the travel documents presented by the travelers with the information the carrier submits to CBP to, among other things, ensure that the information is correct and that each traveler is the person to whom the travel document was issued. Additionally, the carrier is required to ensure that the travel document presented is valid for travel to the United States. Participation in this pilot does not remove this requirement for carriers. During this test, participating carriers will use the existing TVS facial comparison service to ensure the manifest information transmitted to CBP is correct and to perform the required identity verification. The use of TVS technology for APIS verification purposes has the potential to speed up the departure process for both carriers and travelers, as it enables travelers to be matched more efficiently to their travel documents. This notice provides a description of the test, sets forth requirements for participation, and invites public comment on any aspect of the test.

DATES: The test will begin no earlier than February 16, 2023 and will run for at most two years. CBP is accepting applications from carriers to participate in the test on a rolling basis throughout the two-year testing period. CBP will announce any modifications by notice in the **Federal Register**.

ADDRESSES: Applications to participate in the Facial Comparison for APIS Compliance Test must be submitted via email to *simplifytravel@cbp.dhs.gov*. Written comments concerning program, policy, and technical issues may also be submitted via email to *simplifytravel@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Natascha A. Gutermuth, Program Manager, Admissibility and Passenger

Programs, Office of Field Operations, *natascha.a.gutermuth@cbp.dhs.gov* or (202) 417–0096.

SUPPLEMENTARY INFORMATION:

Background

APIS Requirements

The Advance Passenger Information System (APIS) is an electronic data system that allows carriers to transmit traveler data to CBP. Under the relevant statutes and CBP regulations, an appropriate official[1] of each carrier arriving in or departing from the United States must transmit an electronic manifest to CBP's APIS system for all travelers within a specified timeframe (generally before the vessel or aircraft departs, though the exact timeframe varies, depending on the circumstances of the trip and type of carrier). *See* 8 U.S.C. 1221, 19 U.S.C. 1433, and 49 U.S.C. 44909; 19 CFR 4.7b(b), 4.64(b), 122.49a(b), 122.49b(b), 122.49c, 122.75a(b), and 122.75b(b). The electronic manifest must include the travelers' biographic information including name, age, gender, date of birth, citizenship, passport number if relevant, and numerous other biographic data elements depending upon the type of traveler (*e.g.,* crew or passenger), as well as such other information as determined necessary by the Secretary of the Department of Homeland Security (DHS),[2] in consultation with the Secretary of State, for flights and vessels arriving in and departing from the United States, or as determined necessary by the Administrator of the Transportation Security Administration (TSA), in consultation with the Commissioner of CBP, for flights arriving in the United States. *See* 8 U.S.C. 1221; 49 U.S.C. 44909. Among other things, the carrier must compare the travel document presented by the traveler with the information the carrier is transmitting to CBP on the electronic manifest in order to (1) verify that the manifest information transmitted to CBP is correct and (2) verify that the traveler is the person to whom the travel document was issued. These two requirements will be referred to in this document as the "APIS verification requirements". *See* 19 CFR 4.7b(d), 4.64(d), 122.49a(d), 122.49b(d), 122.75a(d), and 122.75b(d).

[1] An "appropriate official" is defined as the master or commanding officer, or authorized agent, owner, or consignee of a commercial aircraft or vessel; this term and the term "carrier" are sometimes used interchangeably within the regulations. *See* title 19 of the Code of Federal Regulations parts 4 and 122 (19 CFR parts 4 and 122).

[2] Upon the creation of the Department of Homeland Security (DHS), through the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2140 (2002), and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, the functions of the Immigration and Naturalization Service (INS) of the Department of Justice, and all authorities with respect to those functions were transferred to DHS on March 1, 2003.

The Facial Comparison for APIS Compliance Test

Description and Purpose

CBP plans to conduct a voluntary test (the "Facial Comparison for APIS Compliance Test" or the "APIS test") in which participating commercial airlines and vessels use CBP's Traveler Verification Service (TVS) facial comparison service to comply with the APIS verification requirements referenced in the background section of this document. CBP's TVS facial comparison service is part of an information technology system that provides facial matching for photos to verify the identity of travelers entering and leaving the United States pursuant to 8 CFR 215.8 and 235.1.[3] The purpose of the APIS test is to determine the feasibility of allowing carriers to use CBP's TVS facial comparison service to comply with the carrier's APIS verification requirements. The APIS TVS procedures are discussed in greater detail in the Procedures Section below.

Procedures

The APIS test is voluntary for carriers and travelers. Eligible carriers may participate in this test by following the procedures outlined below in the Eligibility and Participation Requirements Section.

Carriers who voluntarily participate in this test will collect facial images (photographs) of certain travelers at the gate or other identity check points. The carriers will then submit those facial images to CBP's TVS facial comparison service.[4] Carriers must submit photos at the time of boarding. Carriers may also submit photos at passenger check-in if the carriers elect to take photos at that identity check point. The submitted photographs will be compared to biometric templates[5] generated from pre-existing photographs that CBP

[3] TVS is used at participating ports of entry and with participating carriers to biometrically confirm the identity of noncitizens who are subject to biometric facial comparison when entering and exiting the United States pursuant to 8 CFR 215.8 and 235.1. Additionally, TVS is used for other travelers who submit their facial images voluntarily to participating carriers or at participating ports of entry. For additional information on CBP's TVS see the TVS Privacy Impact Assessment (PIA), available at: *https://www.dhs.gov/publication/dhscbppia-056-traveler-verification-service-0.*

[4] As noted in further detail below, individual travelers may opt out of the APIS test procedures if they do not wish to provide their facial image.

[5] A biometric template is a digital representation of a biometric trait of an individual generated from a biometric image and processed by an algorithm. The template is usually represented as a sequence of characters and numbers. For the TVS, templates cannot be reverse engineered to recreate a biometric image. The templates generated for the TVS are proprietary to a specific vendor's algorithm and cannot be used with another vendor's algorithms.

already maintains, known as a "gallery." When CBP receives a passenger manifest, CBP will build a gallery of photographs for the individuals identified on the manifest. These images may include photographs captured by CBP during previous entry inspections, photographs from U.S. passports and U.S. visas, and photographs from other DHS encounters.

If the TVS matches the traveler's facial image to a photograph in the gallery and the manifest information transmitted to CBP is correct, the carrier's APIS verification requirements will be considered fulfilled and the carrier will not need to perform any additional identity or passenger manifest verification.[6] If the traveler's facial image does not result in a match from TVS for any reason, the carrier will be required to verify the traveler's identity through a manual review of the traveler's travel documents pursuant to the existing APIS regulatory requirements. If a carrier identifies a traveler who has been incorrectly matched by the TVS to another passenger (referred to as a "false positive"), the carrier will manually review thetravel documents of any such false positives pursuant to current APIS requirements.[7]

The APIS test procedures described above involve the use of TVS facial comparison service, which depends on the traveler being photographed at the time of boarding or other identity checkpoints. If an individual traveler does not want to be photographed, the traveler can opt out of this procedure by notifying the carrier. CBP will require carriers to post clear and visible signs notifying travelers of their ability to opt out. Additionally, carriers may choose to give a verbal announcement during the boarding process and pass out tear sheets provided by CBP with additional information about CBP's use of facial comparison technology. If a traveler opts out of the APIS test procedures, the carrier must perform a manual review of the travel documents to ensure the manifest information sent to CBP is correct and verify the traveler's identity as required by the APIS regulations. CBP requires carriers to provide an electronic manifest listing all travelers pursuant to APIS regulations, regardless of the verification process used by the carrier.

[6] Carriers still need to ensure that each traveler has a valid passport or authorized travel document in his or her possession. This separate check for a valid passport or authorized travel document fulfills the passenger manifest requirements for the United States, but there may be additional requirements from destination or transit countries.

[7] In the unlikely event that a false positive results in the creation of an incorrect travel record, the traveler affected by the incorrect travel record can seek redress through the DHS Traveler Redress Inquiry Program (DHS TRIP) at *https://www.dhs.gov/dhs-trip* or the CBP redress process, which can be found at *https://www.cbp.gov/travel/international-visitors/i-94/traveler-compliance.*

Eligibility and Participation Requirements

Any commercial air or commercial sea carrier may apply to participate in the APIS test. In order to participate, a carrier must submit a request to participate in this test and must meet CBP requirements including those listed in the Business Requirements Document[8] and the Technical Reference Guides provided by CBP to the carriers. Upon request, CBP will provide the carrier with the full list of requirements for participation, which vary depending upon the specific circumstances of the carrier. Carriers must agree that they will not store or retain any photos taken while using TVS facial comparison services. They also must provide a method agreeable to CBP by which CBP is able to audit compliance with this requirement. Any system log files associated with a TVS enabled system must be approved by CBP to ensure compliance with DHS and CBP privacy and security policies and all applicable privacy statutes and regulations.

The carrier must also sign and return the Business Requirements Document agreement to CBP in order to participate in the APIS test. The Business Requirements Document is an acknowledgement by the carrier that it agrees to all CBP terms and technical specifications as well as any other requirements as determined by CBP.

Any carrier that wishes to participate in the APIS test may contact CBP via email at *simplifytravel@cbp.dhs.gov* to request the detailed technical requirements for participation from CBP, as well as to obtain a copy of the Business Requirements Document to be signed by the carrier. If the carrier wishes to participate in the test, they can return the signed Business Requirements document and CBP will coordinate with the carrier to ensure that the carrier's systems meet the technical and privacy requirements as determined by CBP.

It is within CBP's sole discretion to refuse test participation for any carrier.

Authorization for the Test

The test described in this notice is authorized pursuant to 19 CFR 101.9(a), which allows the Commissioner of CBP to impose requirements different from those specified in the CBP regulations for conducting a test program or procedure designed to evaluate the effectiveness of new technology or operation procedures regarding the processing of passengers, vessels, or merchandise. This test is authorized pursuant to this regulation as it is designed to evaluate whether

[8] Business Requirement Documents available at: *https://www.cbp.gov/document/specifications/exit-business-requirements-document* and *https://www.cbp.gov/document/specifications/exit-business-requirements-document.*

the use of CBP's TVS technology is a feasible way for carriers to meet their APIS verification requirements.

Waiver of Certain Regulatory Requirements

Under this test, the requirement that carriers manually review travel documents to confirm that the electronic manifest information the carrier is transmitting to CBP is correct as well as the identity of the traveler prior to submission of the manifest data to CBP will be waived if CBP's TVS returns a match of the traveler's facial image to a photograph in the gallery.[9] For carriers participating in this test, when TVS returns a match of a traveler's facial image, the carrier's APIS verification requirements under 19 CFR 122.49a(d), 122.49b(d), 122.75a(d), and 122.75b(d) will be considered fulfilled without the carrier further inspecting the traveler's travel documents.[10]

As noted above, if CBP's TVS does not return a match of the traveler's facial image, the carrier will still be required to perform the manual document check to fulfill the carrier's APIS verification requirements.

Costs

CBP will give carriers access to its TVS facial comparison service, and the carriers will choose and purchase the equipment that best fits their needs. The cost of the equipment will vary by carrier and may depend on how the equipment is used. CBP believes costs will range from $5,000 to $20,000 per departure gate, based on its experience procuring equipment for previous CBP facial comparison pilots. It is also possible that costs will go down substantially over time as carriers develop more efficient and inexpensive equipment. For example, the Washington Metropolitan Airports Authority has begun using modified iPads for its facial comparison pilot.[11] If this equipment is successful and is adopted more broadly, the cost to carriers could drop substantially.

Benefits

The goal of the APIS test procedure is to enable carriers to satisfy the APIS verification requirements more accurately and efficiently by

[9] However, in the event of a "false positive" as discussed above, the carrier will still be required to manually review the travel documents in accordance with the requirements of 19 CFR 122.49a(d), 122.49b(d), 122.75a(d), and 122.75b(d).

[10] As noted above, carriers still need to ensure each traveler has a valid passport or authorized travel document in his or her possession.

[11] Source: *https://www.washingtonpost.com/transportation/2018/09/06/officials-unveil-new-facial-recognition-system-dulles-international-airport/?noredirect=on&utm_term=.ae3fdefbd1a6.* Accessed June 4, 2020.

eliminating the manual data and identity verification process in most cases. As noted in the Evaluation section below, CBP will evaluate whether the test procedure is more accurate than the current regulatory procedure. Performing biometric identity verification can help CBP and partner stakeholders reconcile any errors or incomplete data in a traveler's biographic data. CBP anticipates that having a more accurate verification will result in more accurate border crossing records of travelers. By having more accurate border crossing records of travelers, CBP can more effectively identify overstays and noncitizens who are, or were, present in the United States without having been admitted or paroled and prevent their unlawful reentry into the United States. It will also make it more difficult for imposters to utilize other travelers' credentials. Ultimately, this provides CBP with more reliable information to verify identity and to strengthen its ability to identify criminals and known or suspected terrorists.

The use of TVS technology for APIS verification purposes has the potential to speed up the departure process for both carriers and travelers, as it enables travelers to be matched more efficiently to their travel documents. Various airlines have already partnered with CBP to test facial comparison in other contexts pursuant to regulations in Title 8 of the Code of Federal Regulations. These other programs are unrelated to APIS compliance, and participants have reported that facial comparison tests speed up the boarding process substantially.[12]

Duration of Test

This test will run for at most two years from February 16, 2023. While the test is ongoing, CBP will evaluate the results and determine whether the test should be extended or otherwise modified. CBP reserves the right to discontinue this test at any time at CBP's sole discretion. CBP will announce any modifications by notice in the **Federal Register**.

Evaluation of APIS Test

CBP will use the results of this test to assess the operational feasibility of using TVS facial comparison service for the purposes of

[12] In one test, an airline partner has been able to board an Airbus A–380 with 350 travelers in only 20 minutes. (*https://www.cntraveler.com/story/orlando-airport-first-in-the-us-to-scan-faces-of-all-international-passengers*. Accessed June 4, 2020.) Another airline partner has reported to CBP that their baseline loading time for an A–380 is 45 minutes. In the test of the integrated facial comparison service used at the Orlando Airport, travelers have experienced a 15-minute time savings. According to one news article, this is down from 30 minutes for a 240-passenger plane. (*https://www.forbes.com/sites/grantmartin/2018/06/24/orlando-airport-deploys-biometric-scanners-at-all-international-gates/#2a4a588118f9. Accessed June 4, 2020.*) In both tests, boarding times are reduced by approximately 50 percent.

compliance with the APIS verification requirements. CBP will evaluate this test based on a number of criteria, including:

- the percentage of travelers for whom CBP had a gallery photo available for matching purposes; and
- the ability of the technology to correctly match the facial images captured to the correct individuals' facial image(s) on file, including continued tracking of any differences in matching performance based on measurable demographic factors.

CBP's operational data continues to show there is no measurable differential performance in matching based on demographic factors. CBP continually monitors algorithm performance and technology enhancements to ensure we are deploying the most accurate and effective algorithm. CBP continues to partner with the National Institute of Standards and Technology (NIST) and use NIST research to ensure the continued optimal performance.[13] CBP will continue its review of matches and no-matches to determine the reason for such a match, including whether the match was based on a demographic factor (age, gender, citizenship). CBP will continue to work both internally and with partners to identify and remediate disparate impacts and other forms of bias and discrimination, if any.[14]

Misconduct Under the Test

If a carrier participating in the test fails to abide by the rules, procedures, or terms and conditions of this test, fails to exercise reasonable care in the execution of participant obligations, or otherwise fails to comply with all applicable laws and regulations, then the participant may be suspended from participation in this test and/or subjected to penalties, liquidated damages, and/or other administrative or judicial sanction under APIS regulations.

If CBP determines that a suspension is warranted, CBP will notify the participant of this decision, the facts or conduct warranting suspension, and the date when the suspension will be effective. This decision may be appealed in writing to the Executive Assistant Com-

[13] In July 2021, NIST published its Face Recognition Vendor Test (FRVT) Part 7: Identification for Paperless Travel and Immigration, available at: *https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8381.pdf.* The report demonstrates that the current biometric facial recognition technology passes the threshold for use in CBP's Biometric Exit Program, based on computer-focused simulations. In December 2019, NIST published the FRVT Part 3: Demographic Effects, available at: *https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8381.pdf.* As the report demonstrates, NEC–3, which CBP uses, is among the algorithms with an undetectable false positive differential. NIST also noted, "NEC–3, is on many measures the most accurate we have evaluated," see page 8 of the report.

[14] Information regarding biometric matching performance can be found on CBP's website at *https://biometrics.cbp.gov/privacy* which includes a link to CBP's Privacy Evaluation Report as well as the TVS Privacy Impact Assessment (PIA). The PIA is also available at *http://www.dhs.gov/privacy-documents-us-customs-and-border-protection.*

missioner, Office of Field Operations, within 15 days of notification. The appeal should address the facts or conduct charges contained in the notice and state how the participant has or will achieve compliance. CBP will notify the participant within 30 days of receipt of an appeal whether the appeal is granted. If the appeal is granted and the participant has already been suspended, CBP will notify the participant when its participation in the test will be reinstated.

Privacy

CBP will ensure that all Privacy Act requirements and applicable DHS privacy policies are adhered to during this test.[15] Pursuant to these requirements, CBP will delete photos of U.S. citizens immediately upon confirmation of U.S. citizenship.[16] CBP will retain photos of all noncitizens[17] and no-matches for up to 14 days in the Automated Targeting System (ATS). DHS may retain the facial images of in-scope[18] noncitizens for up to 75 years in DHS's Automated Biometric Identification System (IDENT) system, and any successor system.

CBP has issued a Privacy Impact Assessment (PIA) for TVS, which outlines how CBP ensures compliance with Privacy Act protections and DHS privacy policies, including DHS's Fair Information Practice Principles (FIPPs). The FIPPs account for the nature and purpose of the information being collected in relation to DHS's mission to preserve, protect and secure the United States. The PIA addresses issues such as the security, integrity, and sharing of data, use limitation and transparency. The PIA is publicly available at: *http://www.dhs.gov/privacy-documents-us-customs-and-border-protection.*

CBP has also issued the DHS/CBP–005 APIS System of Records Notice (SORN) and the APIS PIA, as well as the DHS/CBP–007 Border Crossing Information (BCI) SORN and the DHS/ CBP–006 Automated Targeting System (ATS) SORN. These documents encompass all data collected for APIS compliance, as well as data collected to create border crossing records for individuals. CBP will create new

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[15] *See* 8 U.S.C. 552a and *https://www.dhs.gov/privacy-policy-guidance.*

[16] Photos of U.S. citizens are destroyed immediately upon confirmation of U.S. citizenship, but no later than 12 hours only under specific circumstances. If there is a system or network issue, photos will reside in an inaccessible queue for up to 12 hours and will be processed once the system and/or network connectivity is re-established and proper dispositioning (confirmation of U.S. citizenship) can occur. Further information about the retention of facial images is provided in the TVS Privacy Impact Assessment (PIA). It is available at *http://www.dhs.gov/privacy-documents-us-customs-and-border-protection.*

[17] For purposes of this document, CBP uses the term "noncitizen" in place of the term "alien." However, CBP regulations use the term "alien."

[18] An "in-scope" noncitizen is any person who is required by law to provide biometrics upon entry or exit from the United States pursuant to 8 CFR 215.8(a) and 235.1(f).

documents or update these documents as needed to reflect the use of biometric data for the purposes of this test and will make these documents available at: *https://www.dhs.gov/compliance.*

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB). This information collection is covered by OMB control numbers 1651–0138 Biometric Identity and 1651–0088 Passenger and Crew Manifest.

Signing Authority

Troy A. Miller, the Acting Commissioner of CBP, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: February 13, 2023.

ROBERT F. ALTNEU,
Director, Regulations &
Disclosure Law Division,
Regulations & Rulings,
Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, February 16, 2023 (88 FR 10137)]

Slip Op. 23–14

JILIN FOREST INDUSTRY JINQIAO FLOORING GROUP CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 18–00191

[Results of remand of fifth administrative review of multilayered wood flooring from the People's Republic of China are remanded to U.S. Department of Commerce.]

Dated: February 9, 2023

Lizbeth R. Levinson, *Ronald M. Wisla*, and *Brittney R. Powell*, Fox Rothschild LLP, of Washington, D.C., for Plaintiff.

Brendan D. Jordan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Tara K. Hogan*, Assistant Director, and *Sonia M. Orfield*, Trial Attorney. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Eaton, Judge:

Before the court are the U.S. Department of Commerce's ("Commerce" or the "Department") Final Results of Redetermination Pursuant to Remand Order ("First Remand Results"), ECF No. 62–1, on remand of *Multilayered Wood Flooring From the People's Republic of China*, 83 Fed. Reg. 35,461 (Dep't Commerce July 26, 2018) ("Final Results") and accompanying Issues and Decision Memorandum (July 18, 2018), PR[1] 340 ("Final IDM"). *See Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, 519 F. Supp. 3d 1224 (2021) ("*Jilin I*").

On remand, Commerce again determined that mandatory respondent Jilin Forest Industry Jinqiao Flooring Group Co., Ltd. ("Jilin") had failed to rebut the presumption that it is state controlled. In addition, although given an opportunity to do so by the *Jilin I* order, Commerce chose not to determine an individual rate for Jilin separate from the rate established for the "China-wide entity" (also termed the Nonmarket Economy ("NME") Entity). *See* First Remand

[1] In this opinion, "PR" means the public record of the Final Results. "PRR" means the public remand record.

Results at 3–4, 34. As was the case in *Jilin I*, Jilin challenges these decisions. *See* Pl.'s Cmts. on Commerce's Final Results of Redetermination Pursuant to Remand Order, ECF No. 66 ("Pl.'s Cmts."). Defendant the United States, on behalf of Commerce, argues the First Remand Results should be sustained. *See* Def.'s Resp. to Cmts. on Remand Redetermination, ECF No. 67. The court has jurisdiction under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018) and will uphold Commerce's remand redetermination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Because the court finds that Commerce has not shown that its NME Policy (also termed the "NME presumption"[2]) is in accordance with law with respect to Jilin, the case is again remanded to Commerce.

BACKGROUND

This opinion presumes familiarity with *Jilin I*, which concerns the 2015–2016 period of review ("POR") of the antidumping duty order on multilayered wood flooring from China. The prior decision remanded, as unlawful, Commerce's determination of *de facto* government control of Jilin for the reason that Jilin had not been provided a meaningful opportunity to respond to new information that Commerce had relied on in its Final Results. *See Jilin I*, 45 CIT at __, 519 F. Supp. 3d at 1233–34. The new information, which deemed all of China's labor unions to be under state control, was contained in the memorandum "China's Status as a Non-Market Economy,"[3] dated October 26, 2017, that was part of Investigation A-570–053, involving

[2] In the First Remand Results, Commerce refers to the NME presumption, which the court called the NME Policy in *Jilin I*. For the remainder of this opinion, the court adopts Commerce's term as employed in the First Remand Results.

[3] A nonmarket economy country is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." *Id.* § 1677(18)(C)(i). "The administering authority may make a determination under subparagraph (A) with respect to any foreign country at any time." *Id.* § 1677(18)(C)(ii). Thus, in general, if "subject merchandise is exported from a nonmarket economy country," and Commerce "finds that available information does not permit the normal value of the subject merchandise to be determined" by reference to price in the usual commercial quantities and ordinary course of trade to the United States or a foreign country, then with certain exceptions (not here relevant) Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c).

aluminum foil from China.[4] *See Certain Aluminum Foil From the People's Republic of China: Notice of Initiation of Inquiry Into the Status of the People's Republic of China as a Nonmarket Economy Country Under the Antidumping and Countervailing Duty Laws*, 82 Fed. Reg. 16,162 (Dep't Commerce Apr. 3, 2017) ("*Aluminum Foil*"); *see also* Mem. from Rebecca Trainor to All Interested Parties re: Remand Redetermination Concerning the 2015–2016 Administrative Review of Multilayered Wood Flooring from the People's Republic of China (July 23, 2021), attach. III, PRR 1 ("*China NME Status Report*"). The Final Results referenced that information, but Commerce did not formally place it on the record until remand.

In addition, the court remanded to Commerce, for reconsideration or further explanation, the application of its NME Policy of presuming that every domestic Chinese exporter or producer, including Jilin, is part of the China-wide entity. *See Jilin I*, 45 CIT at __, 519, F. Supp. 3d at 1246–47. This policy results in what Commerce calls the NME presumption. *Jilin I* remanded to Commerce for explanation of its NME presumption in full, and the use of the NME presumption as to Jilin, and to "calculate an antidumping duty rate for Jilin and use it in its construction of the all-others rate or provide a reasonable explanation for why it need not." *Id.* On remand, Commerce's explanations of its NME presumption and its reasons for not calculating an individual rate for Jilin are intertwined. Because Commerce, on remand, has not explained how its policy of employing the NME presumption and the application of the NME presumption to Jilin are in accordance with law, the case is again remanded.

DISCUSSION

I. NME Presumption as Applied to Jilin

While, as shall be seen, there is considerable doubt as to whether, under the facts presented here, Commerce's NME presumption will survive this litigation with respect to Jilin, the court will nevertheless address the state control arguments. As part of its NME presumption, Commerce presumes that all Chinese exporters are part of the NME Entity—a single, country-wide concept employed by Commerce as a sort of legal fiction. The NME Entity is neither "China" nor the "Government of China," but consists of all Chinese exporters and

[4] The October 2017 issuance of the final report regarding China's NME status occurred during the fact-gathering stage of the 2015–2016 review of the antidumping duty order on multilayered wood flooring. *See* Decision Mem. for the Preliminary Results of Antidumping Duty Admin. Rev.: Multilayered Wood Flooring from the People's Republic of China; 2015–2016 (Jan. 2, 2018) at 2–4, PR 308.

producers of subject merchandise for export to the United States. Since these companies operate in a nonmarket economy, Commerce presumes that they all operate subject to government control. *See* U.S. Dep't Commerce, Import Administration Policy Bulletin 05.1 (Apr. 5, 2005) at 1, https://enforcement.trade.gov/policy/bull05–1.pdf ("Policy Bulletin 05.1") ("In an NME antidumping investigation, the Department presumes that all companies within the NME country are subject to governmental control . . . ."). The presumption is rebuttable, and Jilin sought to rebut it through its responses to section A of Commerce's questionnaire. *See* Decision Mem. for the Preliminary Results of Antidumping Duty Admin. Rev.: Multilayered Wood Flooring from the People's Republic of China; 2015–2016 (Jan. 2, 2018) at 10, PR 308.

In the Final Results, Commerce found that Jilin's labor union was state controlled. Based on this finding, Commerce did not credit Jilin's argument that its labor union was independent of the Chinese government and thus that an entity, not subject to the Chinese government, actually controlled the company (by appointing three of the five members of the board of directors and two of three supervisors). Commerce therefore concluded that Jilin failed to rebut the presumption of state control of the company. *See* Final IDM at 6–8.

Commerce's finding that Jilin's labor union was, in fact, not independent of the Chinese government relied on the *China NME Status Report*, a memorandum from the less-than-fair-value investigation of aluminum foil from China.[5] Apparently, that memorandum was never made part of Commerce's preliminary results nor placed on the record, even though it was referenced in the Final Results. *See* First Remand Results at 2–3. Because Jilin had not been provided an opportunity to comment on the *Aluminum Foil* findings in the context of this review, prior to the Final Results, the court remanded this issue. *Jilin I*, 45 CIT at __, 519 F. Supp. 3d at 1233–34.

On remand, in addition to referencing the *Aluminum Foil* proceeding—as it had in the Final Results—Commerce placed on the record the *China NME Status Report* from that proceeding and provided Jilin with the opportunity to comment on it. *See* First Remand Results at 2. Jilin did not avail itself of that opportunity and submit-

[5] The purpose of the *China NME Status Report* memorandum was to make an historical and current review of China's nonmarket economy status as a whole. *See* 19 U.S.C. § 1677(18)(C)(ii) ("The administering authority may make a determination [on whether an economy operates on market or nonmarket principles] with respect to any foreign country at any time."). The *China NME Status Report* examines six nonmarket economy factors, five of which are irrelevant here, and one that is relevant (*i.e.*, "the extent to which wage rates in the foreign country are determined by free bargaining between labor and management"). *Id.* § 1677(18)(B)(ii).

ted comments later only on the draft remand results. *See* First Remand Results at 3.

The *China NME Status Report* concluded that all of China's labor unions are controlled by the Chinese Communist Party and are not independent. *See* First Remand Results at 20–23. That conclusion expands on the findings in the *Aluminum Foil* investigation and now guides investigations or reviews of China's unfair trade practices before Commerce. *See, e.g.*, *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 45 CIT __, 521 F. Supp. 3d 1345, 1351 (2021) (sustaining Commerce's explanation of China's control over labor unions), *appeal docketed*, No. 21–2257 (Fed. Cir. Aug. 27, 2021). Thus, relying on the *China NME Status Report* from *Aluminum Foil* in the First Remand Results (as well as *Aluminum Foil* itself), Commerce found that Jilin's labor union was under the control of the Chinese government and concluded that "the role played by the labor union in the selection of the board of directors and management did not demonstrate that [Jilin] was free from government control over its export activities." First Remand Results at 10. Indeed, based on the *China NME Status Report*, Commerce reached the opposite conclusion from that argued by Jilin. Commerce found

> that when labor union ownership is taken into consideration, [Jilin] is indeed wholly controlled by the [Chinese] government. As a consequence, there is no other party outside of the government to exercise control over the company operations of [Jilin], including its export activities. [Jilin]'s argument that another, nongovernment party[, *i.e.*, its labor union,] controls its export activities is not supported by the record evidence.

First Remand Results at 41. Commerce thus again determined, on remand, that based on the Chinese government's control of its labor union, Jilin was not entitled to a separate rate.

The First Remand Results emphasize that, notwithstanding Jilin's previous separate rate certifications, this was the first time Jilin had been individually examined. This individual examination was the result of Jilin being selected as a mandatory respondent for this review. *Jilin I* discussed, at length, Commerce's original Final Results. Jilin's responses during the review indicated to Commerce that the vast majority of the ownership of Jilin was held by an organization controlled by the Government of China and that a small percentage of its shares were held by Jilin's labor union. Finding that Jilin was majority owned by the Chinese government indicated to Commerce the Chinese government's "potential" to exercise control over Jilin's export activities. First Remand Results at 11–13. On that

basis, Commerce determined that Jilin had not made the requisite affirmative demonstration to rebut the NME presumption that the Chinese government exercised *de facto* control over the company's operations. *See* First Remand Results at 13. For Commerce, the "potential or ability to exercise control, or interest in exercising control, over [Jilin]'s *company operations* extends specifically to [Jilin]'s *export activities*,[6] including the selection of management, the setting of export prices, the negotiation and signature of contracts and other agreements, and decisions regarding the disposition of profits or losses." First Remand Results at 11 (emphasis added).

In its comments on the draft remand results, Jilin relied heavily on its argument that *its independent labor union* controlled the appointment of the board of directors and management. Thus, although a majority of the stock in the company was owned by the Chinese government or its creatures, Jilin insisted that actual control rested with its independent labor union. In Jilin's view, because its independent labor union actually controlled the management of the company, and because the Chinese government did not control its labor union, it had rebutted the presumption of state control. *See* Pl.'s Cmts. at 2–3. Jilin made this argument even though its labor union owned only a fairly small proportion of the company's stock (the exact percentage being confidential information).

Before the court, Jilin continues to rely on its separate rate certification[7] and on statements in its Articles of Association and by-laws as to its labor union's control of the company's board of directors and management. *See* Pl.'s Cmts. at 2–3, 6. Also, Jilin complains that the *China NME Status Report* was issued on October 26, 2017, in the context of a completely different administrative proceeding with a distinct administrative record, while the POR of this fifth administrative review of multilayered wood flooring from China was December 2015 through November 2016. *See* Pl.'s Cmts. at 3. According to Jilin, "[t]he general status of labor unions in China is simply not

[6] In response to the court's question on its terminology, Commerce explained that it uses "export functions" and "export activities" interchangeably, in contrast to "company operations," which "refers [to] the general operations of a company and encompasses a broad range of business activities, inclusive of export functions/activities, as well as management, board meetings, manufacturing, sales, advertising, and marketing." First Remand Results at 9–10.

[7] Jilin's separate rate certification stated that: (1) the firm's export prices were not set by, or subject to the approval of any government entity; (2) the firm had independent authority to negotiate and sign export contracts and other agreements; (3) that the firm had autonomy from all levels of government in making decisions regarding the selection of management; (4) the firm did not have to submit for approval any of its candidates for managerial positions within the firm to any government entity; and (5) the firm retained the proceeds of its export sales and made independent decisions regarding the disposition of profits or the financing of losses. *See* Pl.'s Cmts. at 6.

relevant as to whether or not . . . the administrative record in this case establishes whether the [Jilin] Labor Union, acting in accordance with the provisions of [Jilin]'s Articles of Association during the [POR], operated free from Chinese government control." Pl.'s Cmts. at 4.

These arguments, however, do not address the facts Commerce drew from the *China NME Status Report* with respect to Jilin. These facts make Commerce's case. Because Jilin's labor union was just another arm of the Chinese government, Jilin's insistence that its labor union selected the board and management of the company confirms Commerce's conclusion that the company was under the complete control of the Chinese government.

Jilin asserts that "Commerce's remand results . . . failed to cite to any record evidence that would even suggest, under the circumstances of this case, that the [All-China Federation of Trade Unions ("ACFTU")] exerted control over the [Jilin] labor union's selection of [Jilin]'s management or any of its export activities during the relevant [POR]." Pl.'s Cmts. at 4.

The problem with that argument is that the *China NME Status Report* provides plenty of evidence that the ACFTU, a government-affiliated and Chinese Communist Party organ, exerts control over all Chinese labor unions. *See China NME Status Report* at 5. Importantly, the *China NME Status Report* was both an historical and then a current review of China's NME status as a whole. *See, e.g.*, *id.* at 21 (footnotes omitted) ("ACFTU has been China's official trade union since the founding of the People's Republic of China in 1949. ACFTU's legal monopoly on all trade union activities is codified in the *Trade Union Law of the People's Republic of China* ("*Trade Union Law*") adopted in 1992, and remains unchanged after amendments to the law in 2001 and 2009.. . . The *Trade Union Law* provides for ACFTU to preside over a network of subordinate trade unions that . . . subordinates lower-ranking unions to higher-ranking ones. ACFTU is subject to [Chinese Communist Party] control, and trade union leaders concurrently hold office at a corresponding rank in the [Chinese Communist Party] or the government."). The relevant POR covered by the Final Results is December 1, 2015, through November 30, 2016, or well after adoption of China's *Trade Union Law*. *See id.*

Because Commerce's review of China's labor laws and other facts in the *China NME Status Report* reasonably concludes that the ACFTU exerts control over all Chinese labor unions, Commerce has pointed to substantial evidence demonstrating that Jilin's unsupported claims that its labor union was independent cannot be credited. Moreover, this evidence is substantial evidence to support Commerce's conclu-

sion that Jilin has not rebutted the presumption of state control, because if Jilin's labor union is under state control, its appointment of a majority of Jilin's board of directors confirms that the state controls the company. Therefore, should the use of Commerce's NME presumption survive this case with respect to Jilin, its application will not be prohibited here.

II. The Mandatory Respondent Exception and the NME Presumption

As discussed in *Jilin I*, under the facts of this case, the Mandatory Respondent Exception and the NME presumption are intertwined. The use of the statutory Mandatory Respondent Exception is authorized when the number of respondents in a proceeding is so "large" that it is "not practicable to make individual weighted average dumping margin determinations."[8] 19 U.S.C. § 1677f-1(c)(2); *see Jilin I*, 45 CIT at __, 519 F. Supp. 3d at 1235 (quoting 19 U.S.C. § 1677f-1(c)(2)). If Commerce finds that this situation exists, it may determine the weighted-average dumping margins for a "reasonable" number of exporters or producers by limiting its examination: (1) to a valid statistical sample of exporters, producers, or types of products, or (2) to the "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." *Id.* (quoting 19 U.S.C. § 1677f-1(c)(2)(A), (B)). The weighted average of the rates for each mandatory respondent forms the basis of the rate for respondents not individually examined.[9] *Id.* (citing 19 U.S.C. § 1673d(c)(1)(B)(i)).

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[8] Absent this exception, the statute requires Commerce to determine individual weighted-average dumping margins for every known respondent exporter and producer of subject merchandise. *See* 19 U.S.C. § 1677f-1(c)(1).

[9] Remarkably, Commerce notes that the statute only references an "all-others" rate in the context of *investigations*, not administrative reviews—thereby seeming to imply that it is improper, unlawful, or erroneous to speak of an "all-others" rate in the context of an administrative review. *See* First Remand Results at 28 ("Commerce only calculates an 'all-others' rate in a market economy LTFV [less than fair value] investigation pursuant to [19 U.S.C. § 1673d(c)(5)]"); *see also* 19 U.S.C. § 1673d(c)(5)(A) ("[T]he estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title."). Commerce also states that when it "does not individually examine these companies [when using the Mandatory Respondent Exception], it determines an estimated weighted-average dumping margin for them normally based on the rates determined for the individually-examined companies consistent with the methodology of" 19 U.S.C. § 1673d(c)(5). That is the law for determining the "all-others" rate in investigations. *See* First Remand Results at 29. Then, Commerce points out that in administrative reviews it looks to that part of the statute covering investigations for "guidance" as to a rate for everyone else not individually examined. It is difficult to understand what Commerce is trying to get at here. Numerous cases have used the term "all-others" in the

Commerce refers to this as "limited examination." *See* First Remand Results at 15. In its Final Results, noting the "large" number of respondents in the underlying proceeding, Commerce chose to employ this Mandatory Respondent Exception and base the determination of the rate for unexamined separate rate respondents on the rate determined for two mandatory respondents. These respondents were the two largest exporters of subject merchandise by volume during the POR. *See* Respondent Selection Mem. (Apr. 7, 2017) at 1, PR 161. Jilin was one of these.[10]

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context of administrative review proceedings. *See, e.g.*, *Xi'an Metals & Mins. Imp. & Exp. Co. v. United States*, 45 CIT __, __, 520 F. Supp. 3d 1314, 1331 (2021), *aff'd*, 50 F.4th 98 (Fed. Cir. 2022) ("Separate Rate Plaintiffs note that . . . Commerce justifies 'the high all others rate in this review' . . . ."); *Husteel Co. v. United States*, 45 CIT __, __, 517 F. Supp. 3d 1342, 1345 (2021) ("In the Final Results, Commerce assigned weighted-average dumping rates of 10.91% for Husteel, 8.14% for Hyundai Steel, and the all-others rate of 9.53% for NEXTEEL and Hyundai Steel (Pipe Division)."); *Shanxi Hairui Trade Co. v. United States*, 45 CIT __, __, 503 F. Supp. 3d 1307, 1320 (2021), *aff'd*, 39 F.4th 1357 (Fed. Cir. 2022); *Bosun Tools Co. v. United States*, 45 CIT __, __, 493 F. Supp. 3d 1351, 1358 (2021) ("In calculating the all others separate rate, Commerce departed from the expected method . . . ."), *aff'd*, No. 21–1929, 2022 WL 94172 (Fed. Cir. Jan. 10, 2022); *see also, e.g.*, *Albemarle Corp. v. United States*, 821 F.3d 1345, 1352–53 (Fed. Cir. 2016) (clarifying that the methods under 19 U.S.C. § 1673d apply to administrative reviews as well as investigations).

Moreover, Commerce itself has referred to the "all-others" rate in reviews, even as it contends that the phrase should only be used when a market economy country is involved. *See* First Remand Results at 28 ("Commerce only calculates an 'all-others' rate in a market economy LTFV [less than fair value] investigation pursuant to [19 U.S.C. § 1673d(c)(5)]."). *But see, e.g.*, *Shanxi Hairui Trade Co. v. United States*, 39 F.4th 1357, 1361 (Fed. Cir. 2022) (emphasis added) (noting that "[i]n 2013, Commerce promulgated a new policy for calculating *all-others rates in administrative reviews* for NME entities," *i.e.*, *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 Fed. Reg. 65,963, 65,964 (Dep't Commerce Nov. 4, 2013) ("*2013 Change in Practice*")); *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1322 (Fed. Cir. 2020) (emphasis added) ("In the course an investigation *or review*, Commerce 'determine[s] the estimated weighted average dumping margin for each exporter and producer individually investigated' *or reviewed* and 'the estimated all-others rate for all exporters and producers not individually investigated' *or reviewed*." (quoting 19 U.S.C. § 1673d(c)(1)(B)(i))); *see also* 19 U.S.C. § 1677f-1(c) (providing for the "[d]etermination of dumping margin[s]" in investigations *and reviews* for "a reasonable number of exporters or producers"). Even here, Commerce in its First Remand Results acknowledges that when it "does not individually examine these companies, it determines an estimated weighted-average dumping margin for them normally based on the rates determined for the individually-examined companies consistent with the methodology of" § 1673d(c)(5). *See* First Remand Results at 29. As indicated, that statute provides as a general rule that "[f]or purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title," (*i.e.*, on the basis of facts available or adverse facts available). 19 U.S.C. § 1673d(c)(5)(A).

In any event, according to Commerce's First Remand Results, we have a rate in this case (and elsewhere) without a name, although how this unnamed rate differs from the "all-others" rate remains a bit of a mystery.

[10] The other mandatory respondent, Jiangsu Senmao Bamboo and Wood Industry Co., Ltd., is not a party in this case.

As noted in *Jilin I*, there is nothing in the language of the statutory Mandatory Respondent Exception that exempts Commerce from its duty to determine a weighted-average dumping margin for Jilin as a "known" exporter or producer using the company's own information. This is true, even though Commerce need not, in every circumstance, employ this rate when determining the rate for unexamined respondents. *See Jilin I*, 45 CIT at __, 519 F. Supp. 3d at 1238. *Compare* 19 U.S.C. § 1677f-1(c), *with* 19 U.S.C. § 1673d(c)(1)(B)(i) (the Department must (I) "determine the estimated weighted average dumping margin for each exporter and producer individually investigated" and (II) "determine" in accordance with the statute's methodology "the estimated all-others rate for all exporters and producers not individually investigated"[11]). This is what Congress anticipated would happen when it directed Commerce to "*calculate* individual dumping margins for those firms selected for examination and an 'all others' rate to be applied to those firms not selected for examination." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 872 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200 (emphasis added).[12]

Here, however, is where the NME presumption comes in. By employing the presumption that all exporters and producers are part of the NME Entity and thereby subject to government control (unless the mandatory respondent can demonstrate otherwise), Commerce seeks to avoid an express statutory direction to calculate an individual rate for Jilin. "The statute clearly directs that Commerce must determine an individual rate for respondents chosen for individual examination as mandatory respondents, because they are 'known' exporters or producers." *Jilin I*, 45 CIT at __, 519 F. Supp. 3d at 1244 (citing 19 U.S.C. § 1677f-1(c)). While Commerce may apply facts available or adverse facts available to a mandatory respondent when

[11] Specifically, pursuant to 19 U.S.C. § 1673d(c)(1)(B), Commerce calculates this estimated all-others rate under paragraph 1673d(c)(5). This paragraph states as the general rule, "(A)," that "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title." 19 U.S.C. § 1673d(c)(5)(A). The exception, "(B)," is that

> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, [Commerce] may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

Id. § 1673d(c)(5)(B).

[12] The Statement of Administrative Action is "an authoritative expression" of legislative intent when interpreting and applying the Uruguay Round Agreements Act. *See* 19 U.S.C. § 3512(d).

certain conditions are met (*e.g.*, to fill gaps in the record of necessary information), the statute does not indicate that Commerce can simply assign a rate to a mandatory respondent based on its relationship to an NME government. *See* 19 U.S.C. § 1677e.

A. The NME Presumption Has Never Been Fully Explained

As noted in *Jilin I*, although Commerce has used the NME presumption for years, it has never identified the source in law authorizing the presumption or even given a real reason for the NME presumption's use.[13] Unlike the Mandatory Respondent Exception, or

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[13] As observed in *Jilin I*, the closest Commerce has come to explaining its policy was in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 Fed. Reg. 22,585 (Dep't Commerce May 2, 1994) ("*Silicon Carbide*"):

> A recent analysis by the Central Intelligence Agency supports [the Ministry of Foreign Trade and Economic Cooperation]'s statement [of the People's Republic of China ("PRC")] that ownership "by all the people" is not synonymous with central government control. (*See* 1992 report to the Joint Economic Committee, Hearings on Global Economic and Technological Change: Former Soviet Union and Eastern Europe and China, Pt. 2 (102 Cong., 2d Sess[.]), 143, 196 (hereinafter, "CIA report")[)]. The report states that a state-owned enterprise was subject to central government control prior to 1980, but that "[t]he reform decade of the 1980s brought significant changes to this scheme" and that the central government devolved control of enterprises owned "by all the people". *We have, therefore, come to the conclusion that ownership "by all the people" does not require the application of a single rate*. Thus, we believe a PRC respondent may receive a separate rate if it establishes on a *de jure* and *de facto* basis that there is an absence of governmental control. We have, therefore, adapted and amplified the test set out in *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*[, 56 Fed. Reg. 20,588 (Dep't Commerce May 6, 1991) ("*Sparklers*"),] to determine whether the respondents in this case are entitled to separate rates.

59 Fed. Reg. at 22,587; *see also Sparklers*, 56 Fed. Reg. at 20,589 ("We have determined that exporters in nonmarket economy countries are entitled to separate, company-specific margins when they can demonstrate an absence of central government control, both in law and in fact, with respect to exports. Evidence supporting, though not requiring, a finding of *de jure* absence of central control includes: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies. *De facto* absence of central government control with respect to exports is based on two prerequisites: (1) Whether each exporter sets its own export prices independently of the government and other exporters; and (2) whether each exporter can keep the proceeds from its sales."). It turned out that China's "reforms" were illusory, which resulted in Commerce adopting a more stringent NME presumption with the addition of "potential" to the consideration of government control in its *de jure* and *de facto* tests as a result of the *Diamond Sawblades* litigation. *See Advanced Tech. & Materials Co. v. United States*, 37 CIT 1487, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 F. App'x 900 (Fed. Cir. 2014).

It is worth noting that, as is the case here, Commerce's announcement in the Federal Register describes the mechanics of the NME presumption but gives no hint as to how it will cure a particular problem, and the announcement neither cites a statute or regulation as the source of its authority to declare the NME presumption nor gives a reason why government control matters.

"limited examination" as Commerce terms it, the NME presumption is not found in the statute, or, for that matter, in regulations. As shall be seen later in this opinion, the policy is also unexplained. That is, Commerce has given no reason for its use. Not being provided for in either statute or regulation, the NME presumption has always been, and remains now, a policy with no identified source, as well as an unexplained policy, employed and enforced by Commerce by means of a rebuttable presumption. Policy Bulletin 05.1 states:

> This policy bulletin describes the Department's application process for separate rates status in [NME] investigations . . . .
>
> In an NME antidumping investigation, the Department presumes that all companies within the NME country are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities. If an NME entity demonstrates this independence with respect to its export activities, it is eligible for a rate that is separate from the NME-wide rate. This separate rate is usually either an individually calculated rate or a weighted-average rate based on the rates of the investigated companies, excluding any rates that are zero, *de minimis*, or based entirely on facts available. The Department's separate rates test is not concerned, in general, with macroeconomic border-type controls (*e.g.*, export licenses, quotas, and minimum export prices). Rather, the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level.
>
> To establish whether a firm is sufficiently independent from governmental control in its export activities to be eligible for separate rate status, the Department analyzes each exporting entity under a test . . . . Under this test, the Department assigns separate rate status in NME cases only if an exporter can demonstrate the absence of both *de jure* and *de facto* governmental control over its export activities.

Policy Bulletin 05.1 at 1–2 (citations omitted).[14] As is universally the case, while Commerce explains how the NME presumption works, it neglects to explain its statutory source, or even the rationale for its use, or explain what it is meant to accomplish. The *explanation* only tells respondents what they must do to rebut the presumption.[15]

Because the NME presumption is not found in the statute, its lawfulness would normally be judged through the lens of the *Chevron*, *Skidmore*, and *Auer* line of cases.[16] In other words, the degree of judicial deference to administrative practices and policies is found in judge-made law.

To start with, *Chevron* deference by judges to an administrative

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[14] Policy Bulletin 05.1 goes on to describe that for companies seeking a separate rate that can demonstrate they exported during the period of investigation (or review), the *de jure* factors Commerce considers are: "1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; and 3) any other formal measures by the government decentralizing control of companies." Policy Bulletin 05.1 at 2. The *de facto* factors Commerce typically considers when analyzing governmental control of a company's export function are:

> 1) whether the export prices are set by, or subject to the approval of, a governmental authority; 2) whether the respondent has authority to negotiate and sign contracts and other agreements; 3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

Policy Bulletin 05.1 at 2. A failure to satisfy each of these considerations denies a company its own rate, apart from the NME Entity rate.

[15] As the Supreme Court has stated:

> One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.

Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016) (first quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); then quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); and then citing 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42–43).

[16] *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *Auer v. Robbins*, 519 U.S. 452, 457–58 (1997) (on the question of whether the Secretary of Labor's "salary-basis" test for determining an employee's exempt status reflects a permissible reading of the Fair Labor Standards Act of 1938 ("FLSA") as it applies to public-sector employees, since Congress has not "directly spoken to the precise question at issue" the Court "must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute'" and "[b]ecause the FLSA entrusts matters of judgment such as

determination involves a several-step inquiry. "Step one of the *Chevron* analysis requires us to determine whether Congress has expressed an unambiguous intent using the traditional tools of statutory construction." *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1352 (Fed. Cir. 2021) (cleaned up) (citations omitted); *see Merck & Co. v. U.S. Dep't of Health & Hum. Servs.*, 385 F. Supp. 3d 81, 89 (D.D.C. 2019) (courts rely on "traditional tools of statutory construction" to determine whether Congress implicitly delegated authority to regulate), *aff'd*, 962 F.3d 531 (D.C. Cir. 2020); *see, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES (2014). If Congress has not unambiguously expressed its intent, *i.e.*, when an agency's authority to act is not expressly authorized, further analysis is required. So, for the agency to get *Chevron* deference for a policy, the question becomes whether the agency's action or presumption is based on a "permissible" construction of an identified statute (not a regulation). *See Hyundai*, 19 F.4th at 1352. Only the agency's interpretations reached through formal proceedings with the force of law qualify for *Chevron* deference, such as reasoned and published determinations or notice-and-comment rulemaking. Agency interpretations contained in opinion letters, policy statements, agency manuals, or other formats do not carry the force of law and do not warrant *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001); *see also Hyundai*, 19 F.4th at 1354–55 (rejecting argument that legislative history indicates congressional intent to leave a gap in the particular market situation statute).

Here, Commerce makes no claim either in the Final Results or in the First Remand Results for *Chevron* deference for its NME presumption. Nor does it identify any gap in any statute or identify any silence or ambiguity for which it would have lawful authority to supply a reasonable interpretation.

Specifically, Commerce does not cite any statute whose lawful interpretation would permit it to ignore the statutory provision direct-

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this to the Secretary, not the federal courts, we cannot say that the disciplinary-deduction rule is invalid as applied to law enforcement personnel" (quoting *Chevron*, 467 U.S. at 842–43)). As stated in *Skidmore*, "[t]he fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Court continued:

> [T]he rulings, interpretations and opinions of the Administrator under [the FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id.

ing it to determine a rate for any *examined* respondent. *See* 19 U.S.C. § 1677f-1(c)(1) (emphasis added) ("[T]he administering authority *shall* determine the individual weighted average dumping margin for *each known* exporter and producer of the subject merchandise.").

B. What Is the Lawful Authority for the NME Presumption?

Because Commerce makes no claim to *Chevron* deference and the First Remand Results identify no statutory source for the NME presumption, the court finds that the Department has conceded that there is no statutory source for the presumption.

Nonetheless, although Commerce itself has identified no statutory source for the NME presumption, it is useful to the court's analysis to examine the several sections of the Tariff Act of 1930 (as amended) (the "Act") that Commerce does cite in its First Remand Results. That is to say, the court will consider each of the statutes mentioned in the First Remand Results to see if any could legally be the underlying source of the NME presumption:

- Section 777A of the Act, 19 U.S.C. § 1677f-1, authorizes the use of averaging and statistically valid samples if there is a significant volume of sales of the subject merchandise or a significant number or types of products. 19 U.S.C. § 1677f-1(a). Subsection (b) requires Commerce to consult with "the exporters and producers regarding the method to be used to select exporters, producers, or types of products under this section." *Id.* § 1677f-1(b). These provisions appear straightforward and do not touch on the subject of determining rates in an NME context. For its part, Commerce has identified no pertinent gap or ambiguity in this statute with respect to the authority for its NME presumption,[17] and it is difficult to find any.
- Section 731 of the Act, 19 U.S.C. § 1673, authorizes the imposition of antidumping duties against foreign merchandise that is, or is likely to be, sold in the United States at less than its fair value that causes material injury (or threat of material injury) to a domestic industry. This is also straight-

[17] *Cf. Nippon Steel Corp. v. United States*, 26 CIT 1416, 1419 (2002) ("[T]he court must determine 'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997))); *see also* FRANCIS J. MCCAFFREY, STATUTORY CONSTRUCTION 4 (1953) ("A statute has a single meaning when its terms are plain and free from ambiguity, and do not admit of another meaning by the context." (citing *People v. Schoonmaker*, 63 Barb. 44 (N.Y. Gen. Term 1871))).

forward. The determination is made by comparing "normal value" with "export price" or "constructed export price," which are all terms defined by statute. *See* 19 U.S.C. §§ 1677a, 1677b. Again, Commerce has identified no pertinent gap or ambiguity in this statute with respect to the authority for its NME presumption, and it is difficult to find any.

- Section 751(a)(1) of the Act, 19 U.S.C. § 1675(a)(1), provides that if a request for review is received, Commerce is required to review and determine, in accordance with 19 U.S.C. § 1675(a)(2), the amount of any antidumping duty. Commerce states that "if a review is requested of the NME-wide entity in an administrative review, under its current practice (which was in effect at the time of this review), Commerce will review the NME-wide entity and determine a rate potentially different from the rate determined in the underlying investigation." First Remand Results at 26. Commerce states that while the antidumping statute (*i.e.*, 19 U.S.C. § 1675(a) and 19 U.S.C. § 1677f-1(c)) "does not specify whether the rate from the investigation or a completed review may be carried forward to subsequent periods of review in an NME proceeding," it contends that "the Act does not prohibit this practice." *Id.* That, indeed, may be a permissible construction of the statute in the context of this case. But beyond construing the statute as to a rate "carried forward to subsequent periods of review in an NME proceeding," Commerce does not identify it as the authority for any agency policy, including the NME presumption, and it is difficult to see how it could be.
- Section 751(a)(2) of the Act, 19 U.S.C. § 1675(a)(2), is straightforward as well. It provides that Commerce shall, in general (and similar to § 1673), determine the dumping margin for the purpose of assessment based on a comparison of normal value with export price or constructed export price "of each entry of the subject merchandise." 19 U.S.C. § 1675(a)(2)(A)(i). Here, of course, Commerce did not follow the straightforward direction found in the statute but assigned Jilin a rate, rather than calculate a dumping margin. Importantly, Commerce has identified no pertinent gap or ambiguity in this subsection with respect to the authority for its NME presumption, and it is difficult to see how a provision that expressly directs Commerce to calculate a rate for Jilin could be the source of the NME presumption, a presumption

applied in this instance that voids a clear congressional direction. As noted, Commerce makes no claim that this subsection is the source of the NME presumption.

- Section 735(c)(5) of the Act, 19 U.S.C. § 1673d(c)(5), provides the method for the estimated all-others rate for unexamined respondents when Commerce uses the Mandatory Respondent Exception during an investigation. The statute directs that the all-others rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins. Commerce insists that this provision "is limited to calculating an estimated weighted-average dumping margin 'for all exporters and producers not individually investigated' in a preliminary determination (section 733(d) of the Act) and in a final determination (section 735(c) of the Act) in [a less than fair value] investigation." First Remand Results at 28–29 (footnote omitted). Here, however, Commerce chose to individually examine Jilin, and Commerce has identified no statutory provision that exempts it from the duty to determine Jilin's individual rate.[18] The calculation of a rate for each mandatory respondent is clearly directed and anticipated by 19 U.S.C. § 1677f-1(c)(1) and (c)(2). *See, e.g.*, 19 U.S.C. § 1673d(c)(1)(B)(i)(I). As has been noted, Commerce cites no gap in this statute on which it could rely to construct the NME presumption. And none of the sub-provisions of § 1673d(a) or (c) contain any authority for the NME presumption.

- Section 777A(c)(1), 19 U.S.C. § 1677f-1(c)(1), provides that in determining weighted-average dumping margins Commerce "*shall* determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1). Here, of course, Commerce did not determine a rate for Jilin in the manner directed by the statute; rather, it assigned the company a

[18] *See, e.g.*, 19 U.S.C. § 1677f-1(c)(2) (emphasis added) ("If it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation or review, the administering authority may *determine the weighted average dumping margins for* a reasonable number of exporters or producers by limiting its examination to—(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or (B) *exporters and producers accounting for the largest volume of the subject merchandise from the exporting country* that can be reasonably examined.").

rate. That is, Commerce ignored the explicit direction of the statute, and the Department has identified no gap or ambiguity in the statute with respect to the authority for its NME presumption, and it is difficult to find any.

- Section 777A(c)(2), 19 U.S.C. § 1677f-1(c)(2), provides, as an exception, that if it is not "practicable" to make individual weighted-average dumping margin determinations because of the "large" number of exporters or producers involved,[19] Commerce is authorized to limit its determination of the weighted-average dumping margins to (A) a statistically valid sample of exporters, producers, or types of products or (B) the exporters or producers accounting for the largest volume of subject merchandise that Commerce can reasonably examine. Whatever ambiguity may be arguable over the terms "large" or "weighted average," they cannot be said to be ambiguous to the extent of authorizing the presumption that Jilin is part of the China-wide entity. Moreover, Commerce does not suggest that limiting the number of individually examined respondents creates a gap that could reasonably be filled by the NME presumption, nor does Commerce otherwise identify a gap or ambiguity in this statute with respect to the authority for its NME presumption. And it is not possible to find any.

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[19] Here, Commerce relied on 19 U.S.C. § 1677f-1(c)(2) to limit its examination, and it selected Jilin for individual examination as one of two mandatory respondents from among the numerous companies for which administrative review was initiated. Commerce states that pursuant to § 1677f-1(c), it can subdivide these companies into two groups: mandatory respondents selected for individual examination, and companies not selected for individual examination. *See* First Remand Results at 14. Additionally, Commerce states that when limited examination is based on § 1677f-1(c)(2)(B) (*i.e.*, accounting for the largest volume of subject merchandise), the exclusion of "a rate" for a mandatory respondent that has been found to be part of the unreviewed China-wide entity does not impact the accuracy of the weighted-average dumping margin calculated for companies not selected for individual examination. *See id.* at 30–31. Commerce maintains that it is not legally obligated to calculate an individual rate for Jilin despite having designated Jilin as a mandatory respondent. *See id.* at 27. And yet, it is undisputed that as a mandatory respondent Jilin was a "known" exporter or producer within the meaning of § 1677f-1(c) for the purpose of "determin[ing] the individual weighted average dumping margin" of such exporter or producer and thus subject to the statutory injunction that its rate be calculated. *See* 19 U.S.C. § 1677f-1(c)(1).

Also, it is again worth noting that the plain language of § 1677f-1(c)(2) (specifying that Commerce "may determine the weighted average dumping margins for a reasonable number of exporters or producers") *means* "that a 'reasonable number' is generally more than one"—as recently confirmed by the Federal Circuit. *See YC Rubber Co. (N. Am.) LLC v. United States*, No. 21–1489, 2022 WL 3711377, at *4 (Fed. Cir. Aug. 29, 2022); *see also Schaeffler Italia S.R.L. v. United States*, 35 CIT 725, 729, 781 F. Supp. 2d 1358, 1362–63 (2011).

- Section 771(18) of the Act, 19 U.S.C. § 1677(18), provides the definition of a NME country: "The term 'nonmarket economy country' means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). Any determination by Commerce that a foreign country is a nonmarket economy country remains in effect until revoked by Commerce, and Commerce can make a nonmarket economy determination with respect to any foreign country at any time. *See id.* § 1677(18)(C). The specific statutory provisions invoking "nonmarket economy" in the antidumping duty context predominately authorize their use when considering normal value. *See id.*; *id.* § 1677b(c); *cf. id.* § 1673c(*l*) (termination/suspension of investigation upon agreement with NME) (providing a "special rule" for nonmarket economy countries generally, when suspension of an investigation is contemplated). Commerce claims that "[a]s described by the [Federal Circuit], there exists a general statutory recognition of a 'close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources.'" First Remand Results at 17 (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)). Nonetheless, Commerce does not identify this statutory definition as providing the authority for the NME presumption; nor does the Department identify a gap or ambiguity in this statute that gives rise to delegated authority to presume *all* companies within the NME country are under government control, then to create a policy that "permits" respondents to escape this presumption if they make the requisite showing, and further to apply this policy to *mandatory respondents* examined pursuant to 19 U.S.C. § 1677f-1(c)(2). Commerce makes no such claim of authority, and it is difficult to see the "gap" in the statute giving rise to it.
- Section 773(c) of the Act, 19 U.S.C. § 1677b(c), provides special rules for the determination of normal value if the subject merchandise is exported from an NME country. In general, if Commerce finds that "available information" does not "permit" a typical calculation of normal value pursuant to subsection (a), then Commerce is authorized to "construct" normal value based on the factors of production and an amount for general expenses and profit, using the best avail-

able information from a surrogate country. *See* 19 U.S.C. § 1677b(c)(1). Possibly except for "available information," this provision is clear. While "available information" might be ambiguous, it is not ambiguous in the context of this case. Jilin apparently provided Commerce with all the information it needed to calculate its rate. There was no factual gap to fill with facts available (under 19 U.S.C. § 1677e). Commerce has not otherwise identified a gap or ambiguity with respect to the authority for its NME presumption from this statute, and it is difficult to find any.

- Section 776 of the Act, 19 U.S.C. § 1677e, provides, in subsection (a), that Commerce "shall" reach a determination on the basis of "the facts otherwise available" whenever necessary information is not available on the record, or an interested party or any other person "withholds" requested information or fails to provide such information by the deadlines for its submission or "significantly impedes" a proceeding or provides such information but the information cannot be verified. Subsection (b) provides that if an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. The First Remand Results state only that pursuant to these sections Commerce has determined the estimated weighted-average dumping margin for the NME Entity based on adverse facts available, and that in the underlying investigation it found the NME Entity uncooperative by not providing requested information.[20] In commenting on *Jilin I*, Commerce also states that while it relied on adverse facts available for the Final Results with respect to the NME Entity, in

[20] First Remand Results at 23 ("In the underlying LTFV [less than fair value] investigation of this proceeding, the China-wide entity was found not to have cooperated by not providing requested information, and accordingly, Commerce relied on [adverse facts available] for the *Final LTFV Determination* with respect to the China-wide entity." (citation omitted)); *see Multilayered Wood Flooring From the People's Republic of China*, 76 Fed. Reg. 64,318, 64,322 (Dep't Commerce Oct. 18, 2011) (final less-than-fair-value determination) ("Because the PRC-wide entity did not provide the Department with requested information, pursuant to section 776(a)(2)(A) of the Act, the Department continues to find it appropriate to base the PRC-wide rate on [facts available]."); *see also id.* ("The Department determines that, because the PRC-wide entity did not respond to our request for information, the PRC-wide entity has failed to cooperate to the best of its ability. Therefore, pursuant to section 776(b) of the Act, the Department finds that, in selecting from among the [facts available], an adverse inference is appropriate for the PRC-wide entity."). Commerce's application of adverse facts available to the NME Entity is not in dispute.

> other investigations the estimated weighted-average dumping margin for the NME Entity has not been based on adverse facts available. *See* First Remand Results at 23–24. Commerce does not cite 19 U.S.C. § 1677e as authorizing the NME presumption, and it difficult to see how the provision could do so.

The foregoing represents all of the statutory provisions mentioned in the First Remand Results. Importantly, Commerce has identified no statute (including any of these) as being the statutory source of its NME presumption and pointed to no statutory gap in any of these or elsewhere that it had the authority to fill with the NME presumption. The purpose of the preceding exercise is to confirm as correct Commerce's apparent finding that there is no statutory source for its NME presumption.

Commerce's entire explanation of its NME presumption in the First Remand Results consists of a few sentences.[21] It is important to bear in mind that, should Commerce appeal this case, it cannot introduce

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[21] They are as follows:

- "In a proceeding involving an NME country, Commerce maintains the rebuttable presumption that all companies within the NME country are subject to government control and, thus, should be assessed a single antidumping duty rate, *i.e.*, the NME presumption . . . ."

First Remand Results at 4 (citing Policy Bulletin 05.1).

- "It is, therefore, Commerce's *policy* to assign all exporters of the subject merchandise in an NME proceeding a single antidumping duty rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to its export activities or functions."

First Remand Results at 5 (first emphasis added) (citing Policy Bulletin 05.1 at 1–2).

- "To establish whether a company is sufficiently independent to be entitled to a separate, company-specific rate, Commerce analyzes each exporter in an NME proceeding requesting a separate rate under the test established in *Sparklers*, as amplified by *Silicon Carbide*, and further clarified by *Diamond Sawblades*."

First Remand Results at 5 (first citing *Sparklers*, 56 Fed. Reg. 20,588; then citing *Silicon Carbide*, 59 Fed. Reg. 22,585; and then citing *Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People's Republic of China* (Dep't Commerce May 6, 2013), *sustained in Advanced Tech. & Materials Co.*, 37 CIT at 1500, 938 F. Supp. 2d at 1353).

- "In order to demonstrate its eligibility for a separate rate, Commerce requires that an exporter submit either a separate rate application (SRA) or a separate rate certification (SRC). In general, a company for which a review was initiated and which, at the time of the initiation of the administrative review, has a separate rate, may submit an SRC rather than an SRA stating that it continues to meet the criteria for obtaining a separate rate. Further, if a company is issued an antidumping questionnaire, Commerce requires that a respondent provide the information required to establish its eligibility for a separate rate as part of the response to section A of the questionnaire."

First Remand Results at 5–6 (citations omitted).

"new" explanations not previously raised here. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Commerce's explanation of the NME presumption found in the First Remand Results generally states how the NME presumption *works*, but not its source. Thus, up to page fifteen of the First Remand Results, Commerce describes what the NME presumption *is*, and generally how it is applied, but not its statutory source. Nor does Commerce provide an explanation of what it hopes to accomplish or how the NME presumption accomplishes this unstated goal.

C. Questions From *Jilin I*

The Department turned as follows to questions the court posed in *Jilin I*:

> The Court first posed a series of questions related to, in the Court's terminology, the "Mandatory Respondent Exception" (*i.e.*, "limited examination"), the "NME Policy" (*i.e.*, "NME presumption") and the "all others rate" (*i.e.*, the weighted-average dumping margin determined for non-examined companies that are eligible for a separate rate) . . . . Because these questions deal with similar issues, we address them together, *beginning with an overview of Commerce's broad authority under the statutory scheme; the purpose of Commerce's NME presumption and the interplay with "limited examination" of all known producers and exporters under section 777A(c)(2) of the Act; and the relevant legal theories regarding deference to the agency*. . . .

• "Typically, in an NME proceeding, Commerce has considered four criteria in evaluating whether a respondent has affirmatively demonstrated an absence of government control in fact (*de facto*) over its export activities. These are:

(1) whether the respondent's export prices are set by or are subject to the approval of a governmental agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. Commerce has determined that an analysis of the *de facto* control criteria is critical in determining whether an exporter should receive a separate rate. When conducting our *de facto* separate rate analysis, Commerce asks an exporter requesting a separate rate questions regarding: (1) ownership of the exporter and whether any individual owners hold office at any level of the NME government; (2) export sales negotiations and prices; (3) composition of company management, the process through which managers were selected, and whether any managers held government positions; (4) the disposition of profits; and (5) affiliations with any companies involved in the production or sale in the home market, third-country markets, or the United States of merchandise which would fall under the description of merchandise covered by the scope of the proceeding."

First Remand Results at 8–9 (citations omitted).

> Section 731 of the Act [19 U.S.C. § 1673] states that, if Commerce determines that a "class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and the International Trade Commission finds a domestic industry is being injured as a result of dumping, "there shall be imposed upon such merchandise an antidumping duty." Furthermore, sections 735(a)(1) and 735(c)(1)(B)(i) of the Act state that if Commerce makes an affirmative final determination of sales at LTFV [less than fair value] in an investigation, then Commerce "shall (I) determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and (II) determine, in accordance with {section 735(c)(5)}, the estimated all-others rate for all exporters and producers not individually investigated."
>
> Section 751(a)(1) of the Act [19 U.S.C. § 1675(a)(1)] provides that if a request for review has been received, Commerce shall "review, and determine (in accordance with {section 751(a)(2) of the Act}, the amount of any antidumping duty{.}" Section 751(a)(2) of the Act provides that Commerce shall determine "(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry."
>
> Section 777A(c)(1) of the Act [19 U.S.C. § 1677f-1(c)(1)], applicable to investigations and reviews, directs Commerce to determine an individual weighted-average dumping margin for each known exporter and producer of the subject merchandise. However, when Commerce is faced with a large number of producers or exporters, and Commerce determines it is not practicable to individually examine all companies, section 777A(c)(2) of the Act [19 U.S.C. § 1677f-1(c)(2)] provides an exception to section 777(A)(c)(1) of the Act [19 U.S.C. § 1677f-1(c)(1)] *and authorizes Commerce to determine the weighted-average dumping margin for a reasonable number of such companies by limiting its examination under section 777A(c)(2)(A) or (B) [19 U.S.C. § 1677f-1(c)(2)(A) or (B)].*[22]

First Remand Results at 15–17 (emphasis added) (citation omitted).

[22] Interestingly, this paragraph of the First Remand Results states that the statute permits it to "determine *an individual* weighted-average dumping margin" for a limited number of companies. First Remand Results at 17. In other words, Commerce argues that, using the Mandatory Respondent Exception, it need only determine an individual margin for the mandatory respondents.

Jilin is a mandatory respondent here, but Commerce did not determine a dumping margin for it as the Department insists the statute directs.

These paragraphs cite the usual statutory provisions for determining a dumping margin in a review and describe the Mandatory Respondent Exception. To this point in the First Remand Results, Commerce provided no reason for not following these statutory provisions that direct the determination of "the weighted average dumping margin" for Jilin when employing the Mandatory Respondent Exception. That is, Commerce gives no reason why it fails to follow the statutory directions for determining a dumping margin for every "known" respondent, including mandatory respondents. *See* 19 U.S.C. § 1677f-1(c). In other words, Commerce does not cite a statutory reason for not calculating an individual rate for Jilin.

D. The NME Presumption Policy Origin and Development Mystery

Laws passed by Congress are not the only source for an agency policy. An agency's own regulations may provide the necessary authority.[23] *See, e.g.*, *Kisor v. Wilkie*, 588 U.S. __, __, 139 S. Ct. 2400, 2416 (2019) ("Under *Auer*, as under *Chevron*, the agency's reading [of its regulation] must fall 'within the bounds of reasonable interpretation.'" (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013))).[24] However, the ultimate source for the development of agency policy that affects rights must either be legislative or executive. *See* Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 378–79 (2002); *see, e.g.*, *Haig v. Agee*, 453 U.S. 280, 296–301 (1981) (describing regulatory evolution of policy from executive order and congressional approval of policy as developed). Here, Commerce offers neither.

Commerce's explanation in its First Remand Results cites 19 C.F.R. § 351.107(d) ("Rates in antidumping proceedings involving nonmarket economy countries"). *See* First Remand Results at 18. The explanation is that

[23] The idea here, of course, is that first there must be an identified regulation that has been adopted to lawfully implement a statute before a policy emanating from it can be employed. *Cf. N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 76 (1st Cir. 2018) (citations omitted) ("[T]he adoption of a substantive policy in a preamble added to a regulation after notice and comment is procedurally improper[; therefore], such a policy cannot be the source of an interpretation to which a court defers."); *see also Encino Motorcars*, 579 U.S. at 220 ("*Chevron* deference is not warranted where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." (quoting *Mead Corp.*, 553 U.S. at 227)).

[24] *Auer* deals with an agency's interpretation of its own regulations, and judicial "deference" applies only in cases of genuine interpretive ambiguity. To determine whether such ambiguity exists, a court must apply traditional tools of interpretation (*e.g.*, text, structure, history, and purpose of the regulation). If the regulation is ambiguous, the agency's interpretation must be reasonable, and it must reflect the agency's "authoritative" or "official" position, not simply an *ad hoc* result.

> Section 351.107(d) of Commerce's regulations, entitled "Rates in antidumping proceedings involving nonmarket economy countries," states: "In an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers." According to the CAFC in its recent *CMA* decision,[25] "binding cases (too numerous to list in their entirety) have uniformly sustained Commerce's recognition of an NME-wide entity as a single exporter for purposes of assigning an antidumping rate to the individual members of the entity."

First Remand Results at 18 (footnote omitted). Commerce elsewhere continues: "[N]ot only has the NME presumption and use of a single antidumping duty rate for the NME-wide entity been affirmed by the CAFC, but Commerce has described these policies in detail in the context of its administrative proceedings and in adopting its regulation 19 CFR 351.107(d)." *Id.* at 22 (footnote omitted). Title 19 C.F.R. § 351.107(d) itself provides that "[i]n an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers."[26] According to Commerce, this "single-rate regulation" "clarifies that in an antidumping proceeding involving imports from a nonmarket economy . . . country, the Secretary may calculate a single dumping margin applicable to all exporters and producers." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,311 (Dep't Commerce Feb. 27, 1996) (proposed rule).

Commerce is right that the regulation provides for a single rate. But, it is worth pointing out that the Department stops short of citing the regulation as the source of the NME presumption. That is, while Commerce cites to 19 C.F.R. § 351.107(d), it still avoids specifically claiming it as the legal source of its own NME presumption. So, Commerce does not claim the "single-rate regulation" as the source of

[25] *See China Mfrs. All., LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021).

[26] In passing, Commerce also confirmed that the only parties who may seek review of the NME Entity under 19 C.F.R. § 351.213(b)(1) would be a domestic interested party or an interested party described in 19 U.S.C. § 1677(9)(B) (*i.e.*, the foreign government), not, as it seemed to suggest in its papers, that Jilin as a respondent exporter could have requested review of the China-wide entity. Commerce stated in the Final Results that "no party requested a review of the China-wide entity," seemingly trying to say that Jilin brought this problem on itself. *See* Final IDM at 10. Because of that circumstance, Commerce concluded that the rate determined for the NME Entity in the investigation was the only rate available for assignment to Jilin in this review. *Id.* In its First Remand Results, however, Commerce concedes that Jilin could not have requested a review of the NME Entity. *See* First Remand Results at 32 ("[U]nder 19 CFR 351.213(b)(1) and the *2013 Change in Practice*, the only parties who may seek review of the entity would be a 'domestic interested party' or an interested party described in section 771(9)(B) of the Act [19 U.S.C. § 1677(9)(B)] (*i.e.*, the foreign government).").

the NME presumption, and more specifically for its authority not to calculate an individual rate for Jilin. This is for good reason.

First, the NME presumption predated the adoption of the "single rate" regulation, as the commentary accompanying the adoption of the regulation makes clear. *See, e.g.*, *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,304 (Dep't Commerce May 19, 1997) (final rule) (emphasis added) ("Four commenters suggested that the Department codify its *current* presumption of a single rate."). It is, of course, the case that the NME presumption cannot be found to be a reasonable interpretation of the single-rate regulation when the presumption was in use years before the regulation was adopted.

The second reason that the single-rate regulation cannot be found to be the source of the NME presumption is that Commerce specifically disavowed any idea that the regulation has anything to do with the NME presumption. This disavowal is made clear in the Federal Register commentary. The regulation was adopted in May 1997, claiming as its legislative source the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), whose purpose was to write into U.S. law statutes to implement what had been agreed to in the Antidumping Agreement that evolved out of that round of trade negotiations.[27]

Commerce's explanation for the new regulation goes on for some pages in the Federal Register, but when it came to codifying the NME presumption itself, Commerce demurred:

> *We have decided not to codify the current presumption in favor of a single rate or the so-called "separate rates test,"* which outlines the type of information that an exporter or producer must present to obtain a separate rate. Because of the changing conditions in those NME countries most frequently subject to antidumping proceedings, this test (and the assumptions underlying the test) must be allowed to adjust to such changes on a case-by-case basis.

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[27] *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,296 (emphasis added) (revising Commerce's regulations to conform to the URAA, stating, in summary: "[I]n these regulations the Department has sought to: where appropriate and feasible, translate the principles of the implementing legislation into specific and predictable rules, thereby facilitating the administration of these laws and providing greater predictability for private parties affected by these laws; simplify and streamline the Department's administration of antidumping and countervailing duty proceedings in a manner consistent with the purpose of the statute and the President's regulatory principles; and *codify certain administrative practices determined to be appropriate* under the new statute and under the President's Regulatory Reform Initiative."); *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. at 7,308 (proposed text is substantially identical). Apparently, the NME presumption was not found to be an appropriate administrative practice under the new statute.

> The Department received comments proposing changes to the separate rates test, as well as objections to the proposed changes. *Because we are codifying neither the single rate presumption nor the separate rates test, we are not addressing these comments at this time. However, we will take the comments into consideration as our policy in this area evolves*.

Antidumping Duties; Countervailing Duties, 61 Fed. Reg. at 7,311 (emphasis added). Therefore, the single-rate regulation cannot be the source of a policy that existed long before its promulgation and which Commerce explicitly denied having any effect. Moreover, nothing in the regulation explains the reason for the NME presumption or explains ignoring the statutory directive to determine a rate for a "known" respondent like Jilin.

It is worth noting that, apart from the First Remand Results, there appears to be no other reference in the record to the single-rate regulation. Importantly, nothing that Commerce cites in the First Remand Results attempts to *explain* the NME presumption or its purpose. Rather, Commerce cites only to places where the mechanics of the NME presumption are described. *See* First Remand Results at 5 nn.16–18.

It is also worth repeating that Commerce nowhere claims that the single-rate regulation is the source of its authority not to determine Jilin's rate. Even if the single-rate regulation could somehow be found to provide a potential justification for the NME presumption, it could not be said to provide a lawful justification for not determining Jilin's rate. This is because, in order to be found to provide a lawful justification, the agency (in this case, Commerce) would have to provide a reasonable explanation for (1) why the policy is within its authority and (2) why the policy is a reasonable extension of that authority with respect to Jilin. *See, e.g.*, *Garg Tube Exp. LLP v. United States*, 46 CIT __, __, 569 F. Supp. 3d 1202, 1220 (2022) ("The court cannot determine if Commerce's decision to exclude variables for fiscal, monetary, and taxation policies is reasonable because Commerce does not explain whether the variables are relevant or whether their omission introduced an unacceptable amount of bias into the regression."); *Guizhou Tyre Co. v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1302, 1326 (2022) ("Commerce has not promulgated a rule of general applicability for NME country investigations or reviews that addresses the question of whether government control of selection of board and management is either a rebuttable or irrebuttable presumption of government control over export activities. . . . [T]he discussion Com-

merce put forth in the Issues and Decision Memorandum cannot suffice as an explanation for adoption of such a rule or policy.").

E. Court Cases

Commerce next claims that the Court of Appeals for the Federal Circuit has identified general statutory recognition of a "close correlation between nonmarket economy and government control of the prices, output decisions, and the allocation of resources," and that Commerce has the "broad" authority to interpret the antidumping statute and devise procedures to carry out the statutory mandate. First Remand Results at 17–18 (citing *Sigma*, 117 F.3d at 1405–06).

This seems to be the crux of Commerce's argument, *i.e.*, that somehow, apart from other executive agencies, it has special powers that free it from the constraints placed upon other agencies that must identify a statutory or regulatory source of their actions. *Cf. Chevron*, 467 U.S. 837.

While it might be said that the cases have provided both the authority and the reasonable explanation for the NME presumption (policy), here Commerce cannot rely on them because (1) the agency, and not the courts, must supply these justifications for the policy to be lawful, and (2) any holdings (not dicta) are binding only when the facts of cases are identical. Here, as noted, we have different facts from other court holdings, even if certain similarities are present.

An examination of cases reveals why. First, this idea of "broad authority" as justification for Commerce's position seems out of step with the trend in judicial rulings dealing with administrative action. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 710 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (rejecting the argument that "the SEC actually has statutory authority to issue rules by which the SEC could give itself power to direct and supervise all Board inspections, investigations, and enforcement actions"), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477 (2010) (in accord with opinion of Kavanaugh, J.); *Griffon v. U.S. Dep't of Health & Hum. Servs.*, 802 F.2d 146, 146–47 (5th Cir. 1986) (ruling that the Secretary exceeded her authority where, in the absence of any dispositive congressional intent, by regulation, she severed and applied the procedural elements of the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, thereby inferring and implementing congressional intent to apply the statute retroactively in part, and observing that "[s]uch bootstrapping by progressively linked inferences is beyond the reach of any reasonable, interpretive powers").

Recent cases also suggest that the wind is blowing against wide-ranging claims for deference. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. __, 142 S. Ct. 2587, 2609 (2022) ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting))); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citations omitted) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

While Jilin's case might not present a "major question"[28] of doctrine on par with *West Virginia v. EPA*, at least there the question presented to the Supreme Court had a statutory basis. Commerce here claims no statutory basis or regulatory authority for failing to individually determine Jilin's rate or for applying its NME presumption. Rather, Commerce asks the court to recognize its "broad authority under the statutory scheme" and defer to its deployment to deny Jilin the statutorily directed determination of its own rate.

To repeat, Commerce cites neither statutory authorization nor the single-rate regulation nor any other regulation as the source for this denial. The most that can be said is that in its administration of the regulation Commerce has promised further explanation of the NME presumption. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,304 (in response to unsolicited comments on NME presumption and solicited comments on proposed "single-rate" regulation, "we intend to continue developing our policy in this area"); *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. at 7,311 ("The Department received comments proposing changes to the separate rates test, as well as objections to the proposed changes. Because we are codifying neither the single rate presumption nor the separate rates test, we are not addressing these comments at this time. However, we will take the comments into consideration as our policy in

[28] There is at least some argument that the court is presented with a major question. When providing the special procedure for investigations and reviews involving NME countries, Congress directed that an NME designation would effect the method of determining normal value. When providing for the special procedure though, Congress did not address, or even contemplate, the significant—or, possibly, "major"—question of whether a fully cooperative mandatory respondent can be denied an individually-determined rate (which the statute directs) simply because of the NME presumption—of which Congress made no mention, and which Commerce has failed to ground in a statutory interpretation of the antidumping law. In *West Virginia v. EPA*, the question presented to the Supreme Court had a statutory basis identified by the agency. But here, Commerce has failed to identify a statutory basis or regulatory authority for applying its NME presumption. Rather, Commerce asks the court to recognize its "broad authority under the statutory scheme" and defer to its deployment to deny Jilin the statutorily directed determination of its own rate. If Commerce is trying to hide its own elephant in a mousehole, it first must identify where in the antidumping statute such a mousehole exists.

this area evolves."); *see also* 19 C.F.R. § 351.107(d).

When distilled to its essence, Commerce's explanation for using its NME presumption, with respect to Jilin, is not from statute, nor from any regulation, but is merely a practice bolstered by Federal Circuit dicta that Commerce has "broad authority to interpret the antidumping statute and devise procedures to carry out the statutory mandate." First Remand Results at 17 (quoting *Sigma*, 117 F.3d at 1402).

Because the facts of this case are not identical to those presented in previous cases, in *Jilin I* the court concluded that Commerce's unexplained NME presumption was entitled to no deference. *Jilin I*, 45 CIT at __, 519 F. Supp. 3d at 1243. Notably, *no court may provide the explanation* for its lawful use in any case *where the Department has not supplied one itself*. *Id.* (first citing *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 212 (1988) (declining to give deference "to an agency counsel's interpretation of a statute where the agency itself has articulated no [intelligible] position on the question"); and then citing *Prime Time Com. LLC v. United States*, 43 CIT __, __ n.14, 396 F. Supp. 3d 1319, 1331 n.14 (2019) ("[I]t is not for this court to provide a rationale supporting Commerce's determination.")).

CONCLUSION AND ORDER

Upon consideration of the Final Results of the Redetermination Pursuant to Remand Order, ECF No. 62–1, from the U.S. Department of Commerce, on remand of *Multilayered Wood Flooring From the People's Republic of China*, 83 Fed. Reg. 35,461 (Dep't Commerce July 26, 2018), PR 351, and accompanying Issues and Decision Mem. (July 18, 2018), PR 340, and because Commerce has failed to provide a lawful justification for its use of the NME presumption with respect to Jilin as a cooperative mandatory respondent chosen and examined by the Department, and as ordered in *Jilin I*, it is hereby

ORDERED that Commerce calculate an individual weighted average margin for Jilin; and it is further

ORDERED that Commerce's results of second remand shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments; and it is further

ORDERED that in view of the burden of calculating an individual weighted-average margin, the court will entertain a motion for an appeal to the Court of Appeals for the Federal Circuit contesting this Opinion and Order, should a party file one with the court within 30 days from the date of the Opinion and Order.

Dated: February 9, 2023
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

Slip Op. 23–15

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, SSAB ENTERPRISES, LLC, AND STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 21–00536

[Remanding the U.S. Department of Commerce's final results in the 2018 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea.]

Dated: February 10, 2023

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas, III*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*, Morris, Manning & Martin, LLP, of Washington, D.C., for Plaintiff Hyundai Steel Company.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Hendricks Valenzuela*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price, *Christopher B. Weld*, and *Theodore P. Brackemyre*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation.

Roger B. Schagrin and *Jeffrey D. Gerrish*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors SSAB Enterprises, LLC and Steel Dynamics, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company ("Plaintiff" or "Hyundai Steel") filed this action challenging the final results in the 2018 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea ("Korea"). *Certain Hot-Rolled Steel Flat Products from the Republic of Korea* ("*Final Results*"), 86 Fed. Reg. 47,621 (Dep't of Commerce Aug. 26, 2021) (final results of countervailing duty admin. review; 2018); *see also* Issues and Decision Mem. for the Final Results of the 2018 Admin. Review of the Countervailing Duty Order on Certain Hot-Rolled Steel Flat Products from the Republic of Korea ("Final IDM"), ECF No. 21–5.

Before the Court is Plaintiff Hyundai Steel Company's Motion for Judgment on the Agency Record, ECF Nos. 33, 34. *See also* Pl. Hyundai Steel Company's Br. Supp. Its Mot. J. Agency R. ("Hyundai Steel's Br."), ECF Nos. 33–2, 34–2. Hyundai Steel challenges the determinations by the U.S. Department of Commerce ("Commerce") that the Government of Korea's provision of port usage rights to Hyundai Steel constituted a countervailable benefit and that Hyundai Steel's

payment of reduced sewerage usage fees involved a financial contribution and a countervailable benefit. Hyundai Steel's Br. at 2. Defendant United States ("Defendant") responds to Hyundai Steel's challenge regarding the provision of port usage rights, but requests a remand of the issues involving reduced sewerage usage fees. Def.'s Resp. Pl.'s Mot. J. Agency R. ("Def.'s Resp."), ECF No. 35. Defendant-Intervenors Nucor Corporation, SSAB Enterprises, LLC, and Steel Dynamics, Inc. oppose the motion. Resp. Mot. J. Agency R. ("Def.-Intervs.' Resp."), ECF Nos. 38, 39.

For the following reasons, the Court remands the *Final Results*.

BACKGROUND

Commerce initiated this second administrative review of the countervailing duty order on certain hot-rolled steel flat products from Korea for the period covering January 1, 2018 through December 31, 2018. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 84 Fed. Reg. 67,712, 67,717 (Dep't of Commerce Dec. 11, 2019). Commerce selected Hyundai Steel as the sole mandatory respondent for individual examination. *See Final Results*, 86 Fed. Reg. at 47,622.

Commerce determined in the *Final Results* that Hyundai Steel received a countervailable subsidy through the Port Usage Rights Program. *Final IDM* at 17, 19. Hyundai Steel paid for construction of a port facility at North Incheon Harbor. *Id.* at 19; Hyundai Steel's Br. at 3. Although ownership of the port facility was transferred to the Government of Korea pursuant to Korean law, Final IDM at 20; Hyundai Steel's Br. at 3, the Government of Korea did not collect fees that it would have been entitled to collect normally as the port facility owner, including port usage fees from Hyundai Steel, and Hyundai Steel received the right to use the port and collect fees instead of the Government of Korea, *see* Final IDM at 19–21; Hyundai Steel's Br. at 3. Hyundai Steel collected berthing income and other fees. Final IDM at 21; Hyundai Steel's Br. at 3. Commerce determined based on Hyundai Steel's collection of these fees that Hyundai Steel had received a countervailable benefit. Final IDM at 21.

Commerce determined also in the *Final Results* that Hyundai Steel received a countervailable subsidy through the Sewerage Usage Fees Program. *Id.* at 23, 25. Under an ordinance of Incheon Metropolitan City in Korea, users may receive a reduced water bill if the amount of sewage water discharged into the public sewerage system is less than the amount of clean water consumed from the public water supply system. *Id.* at 25; Hyundai Steel's Br. at 3–4. Hyundai Steel had reported to Commerce that it received reductions on its monthly

water bills for low wastewater levels requiring sewage treatment. Final IDM at 25–27; Hyundai Steel's Br. at 3–4. Commerce determined that the reduction in Hyundai Steel's water bill did not meet the criteria in the ordinance for a reduction and exceeded the rate adjustments provided by the ordinance. Final IDM at 26–27. Commerce determined that the reduction in Hyundai Steel's sewerage usage fees constituted a financial contribution and countervailable benefit. *Id.* at 23, 27.

Commerce calculated a final subsidy rate of 0.51% for Hyundai Steel. *Final Results*, 86 Fed. Reg. at 47,622.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of a countervailing duty order. The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

A countervailable subsidy is a financial contribution provided by an authority (a foreign government or public entity) to a specific industry when a recipient within the industry receives a benefit as a result of that contribution. *See* 19 U.S.C. § 1677(5); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014). Section 1677(5) defines a financial contribution, in relevant part, to mean "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income," "providing goods or services, other than general infrastructure," and "purchasing goods." 19 U.S.C. § 1677(5)(D).

The statute provides that "[a] benefit shall normally be treated as conferred . . . if [] goods or services are provided for less than adequate remuneration." *Id.*§ 1677(5)(E), (E)(iv); *see POSCO v. United States*, 977 F.3d 1369, 1371 (Fed. Cir. 2020). "For purposes of clause (iv), adequacy of remuneration [is] determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

I. Commerce's Determination that the Provision of Port Usage Rights Without Fee Constituted a Benefit

Commerce determined that the free provision of port usage rights associated with the Port of Incheon Program conferred a countervailable subsidy to Hyundai Steel. Final IDM at 19–23. Hyundai Steel challenges only Commerce's benefit determination and does not challenge Commerce's determinations as to financial contribution and specificity. Hyundai Steel's Br. at 6–12.

Hyundai Steel argues that Commerce should have applied its "excessive benefit" standard, by which Commerce determines that a benefit is conferred only if the period of port usage rights provided by the Government of Korea is excessive, and if Commerce had applied the "excessive benefit" standard in the *Final Results*, Commerce would have determined that a benefit was not conferred. *Id.* at 11–19. Hyundai Steel argues alternatively that Commerce's benefit determination is not supported by substantial evidence and is not in accordance with the law because the port usage rights were provided as repayment of a debt as compensation for the taking of property when ownership was conferred to the Government of Korea under Korean law. *Id.* at 19–26.

In determining that Hyundai Steel's non-payment of port usage fees accorded a countervailable benefit, Commerce considered that the Government of Korea did not collect port usage fees from Hyundai Steel that it was entitled to collect as the owner of the port and that Hyundai Steel had the right to use the port without charge. Final IDM at 20 & n.97 (citing Government of Korea's Letters, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, 01/01/2018–12/31/2018 Administrative Review, Case No. C-580–884: The Republic of Korea's Response to the Countervailing Duty Second Suppl. Questionnaire," dated Jan. 21, 2023 ("GOK Jan. 21, 2021 SQR") at 7–8, 16–17). Commerce analogized the Port of Incheon Program in this case to a program in which a government funds the building of a port for a company's benefit because both programs involved government assistance to build a port for the company's use. *Id.* at 20.

Commerce referenced and Defendant relies on *AK Steel Corp. v. United States*, 192 F.3d 1367 (Fed. Cir. 1999). Final IDM at 20; Def.'s Resp. at 7–8. In *AK Steel Corp.*, the U.S. Court of Appeals for the Federal Circuit upheld Commerce's benefit determination based on POSCO's exemption from dockyard fees. 192 F.3d at 1382. Under the program at issue in that case, POSCO built and paid for fifteen port berths when construction by the Government of Korea stalled due to

budget constraints. *Id.* POSCO ceded ownership of the port berths to the Government of Korea pursuant to Korean law when construction was completed. *Id.* As reimbursement for the cost of construction, the Government of Korea did not collect dockyard fees from POSCO and POSCO was the only company located in the port facility that did not pay dockyard fees for the use of the berths. *Id.* The U.S. Court of Appeals for the Federal Circuit sustained Commerce's rejection of the argument that the fee exemption was reimbursement for the cost of building and paying for the port berths that the Government of Korea would normally have assumed because "if the Korean Government had built the port berths, instead of having them ceded by POSCO, Commerce would have 'countervailed the construction funding as a specific infrastructure benefit.'" *Id.* The U.S. Court of Appeals for the Federal Circuit concluded that Commerce's determination was supported by substantial evidence. *Id.*

Although the salient facts recounted in *AK Steel Corp.* may be similar to the facts in this case, the standard of review is whether Commerce's benefit determination is supported by substantial evidence, and the instant case differs from *AK Steel Corp.* in the evidence on the administrative record.

The statute provides that when Commerce reviews whether a benefit is conferred, "adequacy of remuneration is determined in relation to prevailing market conditions." 19 U.S.C. § 1677(5)(E), (E)(iv). Commerce did not consider Hyundai Steel's non-payment of port usage fees in terms of adequacy of remuneration, which is to be "determined in relation to prevailing market conditions," "includ[ing] price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *Id.* § 1677(5)(E). Commerce considered that Hyundai Steel uses the port to transport raw materials for steel production. Final IDM at 19 & n.93 (citing GOK Jan. 21, 2021 SQR at 14–17). Commerce considered also that the Government of Korea is not collecting fees that it is entitled to collect. *Id.* at 20 & n.97 (citing GOK Jan. 21, 2021 SQR at 7–8, 16–17). Commerce considered that nothing on the record demonstrated that the main purpose of building the port was for the public good or any governmental functions. *Id.* at 20 & n.98 (citing Hyundai Steel's Letter, "Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580–884: Hyundai Steel's Initial Questionnaire Resp.," dated Apr. 9, 2020 ("Hyundai Steel Apr. 9, 2020 IQR") at Ex. G-1. Commerce considered that the Government of Korea agreed to provide various forms of support for the port's construction. *Id.* at 20 & n.99 (citing Hyundai Steel Apr. 9, 2020 IQR at Ex. G-1, Arts. 48–54). Commerce did not consider infor-

mation, however, regarding adequate remuneration for port usage in relation to the prevailing market conditions, such as "price, quality, availability, marketability, transportation, and *other conditions of purchase or sale*," 19 U.S.C. § 1677(5)(E) (emphasis added), and an analysis of the record evidence to determine that the Government of Korea provided usage of the port for less than adequate remuneration. Without these statutorily defined components, Commerce's determination that the provision of port usage rights constituted a benefit is not supported by substantial evidence.

The Court remands Commerce's determination that the provision of port usage rights associated with the Port of Incheon Program conferred a benefit for further consideration.

II. Partial Remand of Commerce's Determination that Hyundai Steel's Reduced Fees Pursuant to the Sewerage Usage Fees Program Constituted a Countervailable Subsidy

Commerce determined that the difference between the amount in sewerage usage fees that Hyundai Steel paid and the amount that Hyundai Steel would have paid without the Sewerage Usage Fees Program constituted a countervailable subsidy. Final IDM at 23, 25. Defendant requests a remand for Commerce to reconsider its determination in light of its better understanding of the program and the underlying Korean law that governs the reduction of sewerage usage fees. Def.'s Resp. at 13–15. Hyundai Steel supports Defendant's request for remand, but in the event that the Court does not grant the request, Hyundai Steel challenges Commerce's determinations that the Sewerage Usage Fees Program constituted a financial contribution and conferred a benefit to Hyundai Steel. Hyundai Steel's Br. at 26–27, 35–39. Defendant-Intervenors did not comment on the Sewerage Usage Fees Program issue or the remand request. *See* Def.-Intervs.' Resp.

The U.S. Court of Appeals for the Federal Circuit has recognized that the decision to remand is in the court's discretion when an agency seeks a remand without confessing error in order to reconsider its previous position. *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted). If the Court grants a remand, Commerce will reconsider its determinations regarding the Sewerage Usage Fees Program. Def.'s Resp. at 14–15. It is "prefer-[able] to allow agencies to cure their own mistakes rather than wasting the court's and the parties' resources," especially when the agency seeks to "cure the very legal defects" challenged by other parties. *See id.* at 15 (quoting *Citizens Against the Pellissippi Parkway v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004)). Because a remand will allow

Commerce to cure its own mistakes and reconsider two substantive issues raised by Plaintiff, as well as preserve court resources, the Court remands Commerce's benefit determination and financial contribution determination related to the Sewerage Usage Fees Program.

CONCLUSION

For the aforementioned reasons, the Court remands Commerce's determination that the free provision of port usage rights associated with the Port of Incheon Program conferred a benefit and Commerce's benefit and financial contribution determinations related to the Sewerage Usage Fees Program for further consideration consistent with this Opinion.

Accordingly, it is hereby

ORDERED that the *Final Results* are remanded; and it is further

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

(1) Commerce shall file the remand results on or before April 10, 2023;

(2) Commerce shall file the administrative record index on or before April 24, 2023;

(3) Comments in opposition to the remand results shall be filed on or before May 8, 2023;

(4) Comments in support of the remand results shall be filed on or before May 22, 2023; and

(5) The joint appendix shall be filed on or before June 5, 2023.

Dated: February 10, 2023
New York, New York

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

Slip Op. 23–16

CHENG SHIN RUBBER IND. CO. LTD., Plaintiff, v. UNITED STATES, Defendant, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 21–00398

[Affirming Commerce's Final Determination.]

Dated: February 13, 2023

Amrietha Nellan, Winton & Chapman PLLC, of Washington, DC, for Plaintiff Cheng Shin Rubber Ind. Co. Ltd. With her on the brief were *Jeffrey Michael Winton, Michael J. Chapman,* and *Vi N. Mai.*

Elizabeth Anne Speck, 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, *Vania Y. Wang,* Of Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Elizabeth J. Drake, Schagrin Associates, of Washington, DC, for Defendant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. With her on the brief was *Roger B. Schagrin.*

OPINION AND ORDER

Vaden, Judge:

Vladimir Lenin is reputed to have said, "When it comes time to hang the capitalists, they will vie with each other for the rope contract."[1] Plaintiff Cheng Shin Rubber Industry Co. (Cheng Shin) comes before the Court to complain that it did not receive the benefit of its bargain. It negotiated with the United Steelworkers Union (the Union) for an exclusion for certain spare tires made for light trucks from Taiwan under investigation by the Department of Commerce (Commerce). Having agreed on acceptable language with the Union, Cheng Shin expected its tires would qualify and be excluded from any

[1] The *Oxford Essential Quotations* provides the following version and possible origin of the attribution:

> The capitalists will sell us the rope with which to hang them.
> attributed to Lenin, but not found in his published works in this form; I. U. Annenkov, in 'Remembrances of Lenin' includes a manuscript note attributed to Lenin: 'they [capitalists] will furnish credits which will serve us for the support of the Communist Party in their countries and, by supplying us materials and technical equipment which we lack, will restore our military industry necessary for our future attacks against our suppliers. To put it in other words, they will work on the preparation of their own suicide', in *Novyi Zhurnal/New Review* September 1961

OXFORD ESSENTIAL QUOTATIONS (Susan Ratcliffe, ed., 6th ed. 2018), https://bit.ly/3DBto9t.

duties Commerce imposed. Instead, Commerce found that Cheng Shin's tires did not qualify for the exclusion and therefore fell within the scope of the resulting antidumping order. Cheng Shin asserts that Commerce's determination is not supported by substantial evidence. The Court disagrees. Commerce's final determination is supported by the very answers Cheng Shin gave to the questions Commerce proffered. Like Vladimir Lenin's apocryphal capitalists, Cheng Shin was done-in by its own hand. And given the deferential standard of review, that Commerce *may* have been able to reach a different result on this record does not allow the Court to compel the agency to do so. Cheng Shin's Motion for Judgment on the Agency Record will be **DENIED** and Commerce's determination will be **AFFIRMED.**

BACKGROUND

Cheng Shin is a Taiwanese producer and exporter of passenger vehicle and light truck tires. Comments on CBP Data and Respondent Selection (Respondent Selection) at 1–2 (July 2, 2020), J.A. at 82,464–65, ECF No. 61; *see Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, and Thailand: Antidumping Duty Orders and Amended Final Affirmative Antidumping Duty Determination for Thailand Final Determination* (Final Determination), 86 Fed. Reg. 38,011, 38,012 (July 19, 2021).

The products at issue in this case are two of Cheng Shin's tire models that must meet the following standards to qualify for exclusion from the investigation:

> (5) tires designed and marketed exclusively as temporary-use spare tires for light trucks which, in addition, exhibit each of the following physical characteristics:
>
> (a) The tires have a 255/80Rl7, 265/70Rl7, or 265/70R16 size designation;
>
> (b) "Temporary-use Only" or "Spare" is molded into the tire's sidewall;
>
> (c) the tread depth of the tire is no greater than 6.2 mm; and
>
> (d) Uniform Tire Quality Grade Standards ("UTQG") ratings are not molded into the tire's sidewall with the exception of 265/70Rl7 and 255/80Rl7 which may have UTQG molded on the tire sidewall[.]

Final Determination, 86 Fed. Reg. at 38,013.

I. The Disputed Final Determination

The Union filed its petition with Commerce on May 13, 2020, and Commerce began an antidumping investigation into passenger vehicle and light truck tires from Korea, Taiwan, Thailand, and Vietnam the following month. *Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations* (Initiation of Investigation), 85 Fed. Reg. 38,854 (June 29, 2020). Cheng Shin requested to be named as a mandatory respondent in the investigation on July 2, 2020. Respondent Selection at 1–2, J.A. at 82,464–65, ECF No. 61.[2] Commerce selected Cheng Shin and another company not a party to this case as mandatory respondents. Selection of Respondents for Individual Examination at 7 (July 28, 2020), J.A. at 82,584, ECF No. 61.

Commerce's initiation notice explained that, when listing product characteristics for control numbers (CONNUMs), it "attempts to list the most important physical characteristics first and the least important characteristics last." Initiation of Investigation, 85 Fed. Reg. at 38,855.[3] Here, Commerce listed tire service type first, meaning it was the most important characteristic that Commerce would consider in this investigation. *Id.* at 38,859. On July 20, 2020, Cheng Shin filed Characteristic Comments in which it proposed adding a fourth product characteristic code under the tire service type field. Cheng Shin's Product Characteristic Comments (Characteristic Comments) at 2, J.A. at 4,347, ECF No. 60. Tire service types are based on the Tire and Rim Association's (TRA)[4] Classifications and included the following three categories: 01 for passenger car, 02 for light truck, and 03 for special trailer. *Id.* Cheng Shin proposed a fourth type: "04=Light Truck Full Size Spare (with reduce tread depth) [sic]." *Id.* It wanted this fourth category added because temporary-use light truck tires were included in the investigation but had no distinct TRA Yearbook

[2] Cheng Shin was represented by different counsel during the investigation and proceedings before Commerce.

[3] The listing of characteristics in a hierarchy of importance is Commerce's standard procedure for constructing control numbers. *See Union Steel v. United States,* 823 F. Supp. 2d 1346, 1349–50 (CIT 2012) ("A 'CONNUM' is a contraction of the term 'control number,' and is simply Commerce['s term] for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding).") (quoting plaintiffs' briefing).

[4] The Tire and Rim Association is an American organization that establishes and promulgates "interchangeability standards for tires, rims and allied parts for the guidance of manufacturers and users of such products, designers and manufacturers of motor vehicles, aircraft and other wheeled vehicles and equipment, and governmental and other regulatory bodies." Petition for Imposition of Antidumping and Countervailing Duties at Ex. 7, J.A. at 1,247, ECF No. 60. "The YEAR BOOK contains all TRA Standards and related information approved by the Association for tires, rims and allied parts for ground vehicles." *Id.* at 1248.

entry. *Id.* at 3. Because its spare tires "are physically distinct from other subject merchandise," Cheng Shin argued that the additional service type was necessary. *Id.*

Cheng Shin also submitted its Scope Comments to Commerce on that same date and suggested that Commerce create an exclusion for temporary-use light truck tires. *See* Cheng Shin Scope Comments (Scope Comments) at 2–5, J.A. at 4,369–72, ECF No. 60.[5] This would complement the proposed initial scope, which contained an exclusion for tires "designed and marketed exclusively as temporary-use spare tires for passenger vehicles[.]" Initiation of Investigation, 85 Fed. Reg. at 38,860. Cheng Shin attached drawings of the temporary-use light truck tires for which it sought an exclusion and that were "[t]he tires subject to these scope comments." Scope Comments at 3, J.A. at 4,370, ECF No. 60. Cheng Shin proposed that Commerce add the following exclusion: "Excluded from the scope of these investigations are light truck spare tires that are stamped on the sidewall of the tire as temporary-use." *Id.* at 7. It argued that Commerce should create this exclusion because light truck spare tires and light truck tires for everyday use have different physical characteristics *(i.e.,* different tread depth), consumer expectations, end uses, and advertising. *Id.* at 7–11.

On July 30, 2020, the Union filed a rebuttal to Cheng Shin's proposed changes to the product characteristics of the subject merchandise under investigation. Petitioner's Product Characteristics Comments Rebuttal (Product Characteristics Rebuttal) at 1, J.A. at 6,088, ECF No. 60. The Union rejected Cheng Shin's proposed addition of a fourth service type for temporary-use light truck tires because the "only indication of difference" between these tires and other subject tires was the tread depth. *Id.* at 10. It explained that tread depth was "already accounted for" in a later number comprising the 15-digit CONNUM and creating a new category "would create opportunities for manipulation." *Id.* Most importantly, "[a]s service type is the first characteristic in the hierarchy, reporting tires as different service types would normally be determinative on matching." *Id.* at 10 n.36.

On August 5, 2020, Commerce issued its initial antidumping questionnaire to Cheng Shin. *See* Request for Information Antidumping Duty Investigation Cheng Shin (Antidumping Questionnaire), J.A. at 6,778, ECF No. 60. In its accompanying letter, Commerce explained that it was "still evaluating the information necessary for reporting

[5] Because of a numbering error in the Joint Appendix, the page range in which this document falls is repeated in an earlier section of the appendix such that there are two page 4,369s, 4,370s, etc.

the control number and physical characteristics," *i.e.,* Cheng Shin and other respondents' requests to modify the products characteristics of the investigation. Letter Accompanying Antidumping Questionnaire at 2 (Aug. 5, 2020), J.A. at 6,775, ECF No. 60 (emphasis removed). Therefore, until the product characteristics were finalized, Commerce would not assign due dates for Sections B (Sales in the Home Market or to Third Countries), C (Sales to the United States), and D (Costs of Production/Constructed Value) of the questionnaire because the due dates would depend on Commerce's determination. *Id.*

Thirteen days later, on August 18, 2020, Commerce rejected Cheng Shin's proposed fourth category. *See* Dep't of Commerce Product Characteristics at Attach., J.A. at 6,937, ECF No. 60. The first — and most important — field of the CONNUM, therefore, listed three possible choices for respondents: "0l=Passenger Car," "02=Light Truck," and "03=Special Trailer." *Id.* Tread depth was the eleventh of fifteen total fields in the product characteristics used to construct the CONNUM. *Id.* at 6,943. Commerce instructed Cheng Shin to "use these product characteristics in any response to sections B through D of the [antidumping] questionnaires issued in these investigations." *Id.* at 6,935.

On September 25, 2020, Cheng Shin filed its Section B response addressing sales in its home market and in third countries. Cheng Shin Section B & D Responses, J.A. at 85,331, ECF No. 61. On September 29, 2020, Cheng Shin filed its Section C response detailing its sales to the United States. Cheng Shin Section C Response, J.A. at 88,652, ECF No. 61. In Cheng Shin's sales databases that it submitted in its Section B and C responses, it chose the number "1," meaning passenger car, for the TRA Yearbook service type of the tires at issue here. *Id.* at Ex. C-4; Cheng Shin's Section B Response at B-11–12, J.A. at 85,352–53, ECF No. 61. Commerce had not yet decided on its exclusion request for temporary-use light truck tires, but the Union had warned two months earlier that the selection of tire service types "would normally be determinative." Product Characteristics Rebuttal at 10 n.36, J.A. at 6,097 ECF No. 60; Cheng Shin's Section B Response at B-11–12, J.A. at 85,352–53, ECF No. 61. Cheng Shin later explained that it chose the designation for passenger car because the tires were developed under the European Tyre and Rim Technical Organization's (ETRTO)[6] standards and the tires "fit into the passenger car section of the ETRTO standard." In Lieu of Verification Questionnaire Response (Questionnaire Response) at VE-12, J.A. at 97,833, ECF No. 61. In its final brief before Commerce, Cheng Shin

[6] ETRTO is the European equivalent of the TRA.

stated that the TRA Yearbook would also classify its tires as passenger tires. Administrative Case Brief at 6 n.10, J.A. at 100,574, ECF No. 61

On September 25, 2020, the Union filed rebuttal comments to Cheng Shin's request for an exclusion for temporary-use light truck tires. Petitioner's Response on Light Truck Spare Tires (Petitioner's Scope Rebuttal) at 1–2, J.A. at 8,596–97, ECF No. 60. The Union supported creating an exclusion but argued that Cheng Shin's "request should be modified to better prevent circumvention and improve administrability[.]" *Id.* Cheng Shin's requested exclusion for temporary-use light truck tires had only one requirement — having temporary-use stamped on the sidewall — but the exclusion for spare passenger tires had multiple design and marketing requirements drawn, in part, from the TRA Yearbook. *Id.* at 4–5. Because there was no separate TRA Yearbook listing for temporary-use light truck tires, the Union proposed combining the requirements of design and marketing exclusivity from the exclusion for spare passenger tires with "some of the distinguishing characteristics highlighted by Cheng Shin":

> (5) tires designed and marketed exclusively as temporary-use spare tires for light trucks which, in addition, exhibit each of the following physical characteristics:
>
> (a) are of a 255/80R17, 265/70R17, or 265/70R16 size designation;
>
> (b) "Temporary-use Only" is molded into the tire's sidewall;
>
> (c) the tread depth of the tire is no greater than 6.2 mm; and
>
> (d) Uniform Tire Quality Grade Standards ("UTQG") ratings are not molded into the tire's sidewall[.]

Id. at 5 (emphasis removed). The Union explained that "the first requirement of this exclusion ... limits the exclusion to tires that are intended and designed to be used as temporary spares, as Cheng Shin avers the tires in its request are." *Id.*

After further consultation, the parties reached agreement on draft language, which Cheng Shin proposed to Commerce with the Union's consent. *See* Cheng Shin Revised Scope Exclusion Language (Revised Exclusion) at 1 (Dec. 10, 2020), J.A. at 12,293, ECF No. 60; Petitioner's Response on Cheng Shin's Scope Request at 1 (Dec. 11, 2020), J.A. at 12,300, ECF No. 60. Cheng Shin's final proposed language largely tracked the Union's counterproposal:

> Excluded from the scope are tires designed and marke[te]d[7] exclusively as "temporary-use" or "spare" tires for light trucks which, in addition, exhibit each of the following physical characteristics:
>
> (a) are of a 265/70R17, 255/80R17, 265/70R16, 245/70R17, 245/75R17, 265/70R18, or 265/70R18 size designation;
>
> (b) "Temporary-use Only" or "Spare" is molded into the tire's sidewall;
>
> (c) the tread depth of the tire is no greater than 6.2 mm; and
>
> (d) Uniform Tire Quality Grade Standards ("UTQG") ratings are not molded into the tire's sidewall with the exception of 265/70R17 and 255/80R17 which may have UTGC molded on the tire sidewall.

Revised Exclusion at 2, J.A. at 12,294, ECF No. 60. The Union, in agreeing to the revised language, stated that it was agreeing to an exclusion only for "certain specifically defined light truck spare tires[.]" Petitioner's Response on Cheng Shin's Scope Request at 1, J.A. at 12,300, ECF No. 60. Commerce adopted this exclusion as proposed, following its "practice of providing ample deference to the petitioner with respect to the products for which it seeks relief in these investigations[.]" Preliminary Scope Memorandum at 11, J.A. at 12,897, ECF No. 60.

On December 30, 2020, Commerce issued its Preliminary Decision Memorandum (PDM) and included Cheng Shin's temporary-use light truck tires within the proposed order's scope. *See* PDM at 12–15, J.A. at 12,857–60, ECF No. 60. Cheng Shin filed comments asserting this was a ministerial error on Commerce's part on January 5, 2021. Ministerial Error Comments at 2, J.A. at 94,700, ECF No. 61. Cheng Shin argued that its temporary-use light truck tires should have been excluded because they met all the parameters laid out in the agreed-upon exclusion. *Id.* at 3–5. Cheng Shin further explained that it had previously notified Commerce that the excluded tires had been included in its sales files because Commerce had not yet decided on Cheng Shin's exclusion request when it was required to submit this data. *Id.* at 3. Commerce rejected Cheng Shin's arguments, explaining that Cheng Shin's tires did not meet the exclusion's terms because Cheng Shin's U.S. sales database listed them as having the tire service type "passenger car." Ministerial Error Memorandum at 6

[7] Cheng Shin's initial submission contained this erratum that Commerce corrected. *See* Preliminary Scope Memorandum at 11, J.A. at 12,897, ECF No. 60.

(Feb. 3, 2021), J.A. at 94,739, ECF No. 61. Commerce understood this listing to show that the tires were not "designed and marketed exclusively as temporary-use spare tires for light trucks." *Id.* at 6.

On February 25, 2021, Commerce issued a questionnaire in lieu of on-site verification to Cheng Shin. Questionnaire in Lieu of Verification (Questionnaire), J.A. at 94,814, ECF No. 61. The Questionnaire investigated Cheng Shin's ministerial error comments and asked Cheng Shin to "provide a detailed explanation as to how these CONNUMS [the two disputed tire models] meet the exclusionary criteria." *Id.* at 94,818–19. Chen Shin submitted its questionnaire responses on March 5, 2021. Questionnaire Response, J.A. at 97,821, ECF No. 61. Cheng Shin explained that a manufacturer ordered the tires as temporary-use light truck tires for specific light truck vehicle models. *Id.* at VE-10–11. It provided the purchase contracts and technical drawings that the buyer approved before the beginning of production. *Id.* at VE-11, Ex. VE-7A. Cheng Shin also provided the buyer's email confirmation, requested on February 24, 2021, that the tires were exclusively designed and marketed as temporary-use light truck tires. *Id.* at Ex. VE-7B.

Cheng Shin then explained why it had nonetheless chosen "passenger car" as the tire service type, which was the primary reason for Commerce's decision that the tires were within the scope. Ministerial Error Memorandum at 6, J.A. at 94,739, ECF No. 61. It stated that the tires were developed under the European Tyre and Rim Technical Organization's (ETRTO) standards; and under those standards, they were classified as passenger car tires. Questionnaire Response at VE-12, J.A. at 97,833, ECF No. 61. Thus, "Cheng Shin's R&D Division assigned internal product codes to these tire models accordingly." *Id.* Cheng Shin concluded this by stating that "these tire models meet the standards of passenger tire[s], but [the customer] ordered and designed them exclusively as spare tire [*sic*] of light truck [*sic*]." *Id.* at VE-13.

On March 24, 2021, Cheng Shin again argued for an exclusion for its tires in its administrative case brief before Commerce. Administrative Case Brief at 4–8, J.A. at 100,572–76, ECF No. 61. It reiterated its arguments from the Ministerial Error Comments that it had met all the exclusion's requirements. *Id.* at 5–6. Cheng Shin also reaffirmed that the TRA Yearbook would classify its tires as passenger tires. *Id.* at 6 n.10 ("To clarify, if these models had been developed under the standard of TRA, they would also be classified as 'passenger tire.'"). It once again stated that the tires met the standards of

passenger tires. *Id.* at 6–7 ("In short, these tire models meet the standards of passenger tires, but [the customer] ordered and designed these tires exclusively as spare tires of light trucks.").

Commerce rejected Cheng Shin's arguments in its Issues and Decisions Memorandum (IDM), which Commerce adopted in its Final Determination. *See* Final Determination, 86 Fed. Reg. at 38,011; IDM at 19, J.A. at 15,976, ECF No. 60. It emphasized that the exclusion required that the tires be "designed and marketed exclusively as temporary-use spare tires for light trucks." IDM at 19, J.A. at 15,976, ECF No. 60 (quoting the exclusion language) (emphasis removed). Commerce found that Cheng Shin had consistently described the tires in its submissions as not falling under the service type for light trucks. *Id.* Significantly, Commerce explained that Cheng Shin admitted that "the sizes and characteristics of these tires fit within both service types for light truck spare tires and for the other service type as reported." *Id.* at 20.

Commerce also addressed Cheng Shin's argument that the tires were in fact designed and produced exclusively to meet its customer's request for temporary-use light truck tires. *Id.* It found that the purchase agreements and business proprietary information did not show design exclusivity but further evidenced a dual-use. *Id.* Cheng Shin's customer confirmation was unpersuasive because the "email was not generated as part of Cheng Shin's normal course of business[.]" Final Calculation Memorandum, J.A. at 100,653, ECF No. 61. Cheng Shin sent the email requesting confirmation on February 24, 2021, during the pendency of the investigation and only one day before the in-lieu of verification questionnaire was sent. *Id.* The technical drawings and purchase agreements demonstrated that, under both European and American standards, the tires had a potential dual-use as passenger tires and temporary-use light truck tires. *Id.* The Final Calculation Memorandum cited a load chart included in Cheng Shin's customer contracts that listed different load bearing figures for both passenger car tires and light truck tires in support of this conclusion. *Id.* Because Commerce concluded that the tires in question had a dual classification, it determined they are within the scope of the order. *See* Final Determination, 86 Fed. Reg. at 38,012; IDM at 19, J.A. at 15,976, ECF No. 60.

II. The Present Dispute

Plaintiff Cheng Shin filed this action on August 11, 2021, seeking to overturn Commerce's decision not to exclude its temporary-use light truck tires. Summons, ECF No. 1. On February 11, 2022, Cheng Shin filed its Motion for Judgment on the Agency Record. Pl.'s Mot. for J.

on the Agency R. (PL's Mot.), ECF No. 42. Cheng Shin raises three primary arguments: (1) Its light truck spare tires were exclusively designed and marketed as such; (2) Commerce's conclusion to the contrary lacked substantial evidence; and (3) Commerce's failure to exclude the tires in question unlawfully changed the scope of the order. *Id.* at 3.

Commerce and Defendant-Intervenor responded on April 13, 2022, and April 12, 2022, respectively. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. (Def.'s Resp.), ECF No. 53; Def.-Int.'s Resp. to Pl.'s Mot. for J. on the Agency R. (Def.-Int.'s Resp.), ECF No. 49. Commerce argues that substantial evidence supports its decision that it did not unlawfully modify the scope of the investigation and that two of Cheng Shin's arguments are barred by administrative exhaustion. Def.'s Resp. at 11, 18, 21, ECF No. 53. The Union argues that Commerce's decision was supported by substantial evidence taken from Cheng Shin's own submissions to Commerce and that the scope of the proceeding was never unlawfully modified, as Cheng Shin's tires did not meet the terms of the exclusion. Def.-Int.'s Resp. at 7–9, ECF No. 49.

Cheng Shin filed its reply on May 10, 2022, and raised for the first time an alleged inconsistency between the determination at issue in this case and a subsequent scope ruling by Commerce. It appended that subsequent scope ruling to its brief. Pl.'s Reply at 15, ECF No. 58. Cheng Shin also argued that it was unlawful for Commerce to use the TRA Service Type to find that the tires were not excluded and that Commerce unlawfully modified the scope by not excluding the specific tires for which Cheng Shin had negotiated an exclusion. *Id.* at 4–6. The Court ordered Commerce to file a sur-reply addressing Cheng Shin's arguments regarding the subsequent scope determination. ECF No. 64. On August 26, 2022, Commerce did so, arguing that the alleged inconsistency between this ruling and a subsequent scope ruling was a result of the different records in each case and that Cheng Shin bore the burden of building the record before the agency. Def.'s Sur-Reply at 2, ECF No. 65.

At oral argument the Court asked the parties whether Cheng Shin had asked Commerce for advice on how to report the service type for its light truck spare tires. Oral Arg. Tr. 8:7–11, 29:11–23, ECF No. 76. The parties were unaware of Cheng Shin's asking Commerce for advice. *Id.* at 8:24–9:3, 29:24. After oral argument, the Court ordered that the parties file letter statements "regarding whether there is record evidence that Plaintiff Cheng Shin asked Commerce for advice in answering the question about product characteristics[.]" Minute Order, ECF No. 71. Commerce and Plaintiff agreed that Cheng Shin never asked Commerce for advice or assistance in designating the tire

service type for the tires in question. *See* Commerce Resp. to Court's Request/Order at 1, ECF No. 73; Pl.'s Resp. to Court's Request/Order and Def.'s Oct. 5 Letter at 2, ECF No. 74.

JURISDICTION AND STANDARD OF REVIEW

19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 158l(c) grant the Court authority to review actions contesting antidumping determinations. 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 law[.]" 19 U.S.C. § 1516a(b)(l)(B)(i). If they are unsupported by substantial evidence or not in accordance with the law, 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. 20–00008, 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. Summary

This case presents the question of whether Commerce's determination that Cheng Shin's tires did not qualify for the exclusion for temporary-use light truck tires was supported by substantial evidence. Cheng Shin argues that (1) its tires met the terms of the exclusion, (2) Commerce unlawfully modified the scope of the exclusion, and (3) the ruling in this case is inconsistent with a subsequent scope ruling. Pl.'s Reply at 4–6, 15, ECF No. 58. Commerce counters that (1) record evidence supports its decision, (2) it did not unlawfully modify the scope of the exclusion, and (3) the subsequent scope ruling is irrelevant and not on the record of this proceeding. Def.'s Resp. at 11, 21, ECF No. 53; Def.'s Sur-Reply at 2, ECF No. 65.

First, Cheng Shin provided Commerce with the substantial evidence necessary to find that its tires did not meet the negotiated exclusion. The exclusion required that tires be "designed and marketed exclusively" as temporary-use light truck tires. Cheng Shin twice affirmed to Commerce that its tires met the standards of passenger tires, including during the verification process when Cheng Shin was on full notice of the concerns Commerce had. Cheng Shin bore the responsibility of making the record before Commerce. Cheng Shin's other evidentiary objections, based on the inapplicability of the TRA Yearbook to its tires and alternative conclusions Commerce could reach are also unavailing because they improperly request that the Court reweigh the evidence.

Second, Cheng Shin's claim that Commerce unlawfully modified the scope of the exclusion fails. After placing evidence on the record that its tires were passenger car tires under the TRA Yearbook and the ETRTO standards, Cheng Shin proceeded to negotiate an exclusion that required exclusivity of design and marketing. During these negotiations, the Union never stated that Cheng Shin's tires met this requirement. Cheng Shin found itself in an unfortunate position, having negotiated an agreement its prior submitted evidence made it hard to satisfy. Buyer's remorse is insufficient for the Court to overturn Commerce's decision. Commerce did not unlawfully modify the scope of the order.

Third, the subsequent scope ruling in which Commerce found that different Cheng Shin tires qualified for the exclusion is irrelevant. By definition, any subsequent scope ruling was not on the record before Commerce when it made its decision. Commerce may only consider the record before it in making its decision. To consider the later ruling would be legal error. Commerce's subsequent scope ruling — in a separate proceeding with a different record — has no bearing on the outcome here; therefore, Cheng Shin's third argument is similarly unavailing. Because Commerce's decision is supported by substantial evidence on the record and is not otherwise contrary to law, the Court **AFFIRMS** Commerce's Final Determination.

II. Analysis

A. Substantial Evidence Supports Commerce's Decision

The first issue is whether substantial evidence supports Commerce's determination that Cheng Shin's tires were not exclusively designed and marketed as temporary-use light truck tires. The first section of the parties' agreed-upon exclusion limits its application to "tires designed and marketed exclusively as 'temporary-use' or 'spare' tires for light trucks[.]" Preliminary Scope Memorandum at 11, J.A.

at 12,897, ECF No. 60. Cheng Shin argues that Commerce erroneously concluded that its tires were not exclusively marketed and designed as temporary-use light truck tires because Commerce misunderstood its submissions. Pl.'s Mot. at 20–27, ECF No. 42. Specifically, Cheng Shin claims that its selection of the passenger car service type was because of the timing of the investigation and was not meant to signify that the tires were designed and marketed as passenger tires. *Id.* at 22–23. It also argues that Commerce erroneously interpreted a load bearing chart as showing that the tire models had a dual-use when the chart only showed the various load capacities of passenger and light truck tires. *Id.* at 25–26. Finally, Cheng Shin points to its customer agreements identifying the tires as spare tires for specific light truck models in support of its position. *Id.* at 21. Commerce counters that Cheng Shin identified the tires during the investigation as passenger tires under both the ETRTO standards and the TRA Yearbook. Def.'s Resp. at 12, ECF No. 53. It did so even after the exclusion negotiations ended and Commerce had flagged the issue in its Ministerial Error Memorandum. Ministerial Error Memorandum at 6, J.A. at 94,739, ECF No. 61. Commerce found that Cheng Shin's tires did not meet the requirements of the exclusion because Cheng Shin "clearly states that the sizes and characteristics of these tires fit within both service types for light truck spare tires and the other service type as reported." IDM at 20, J.A. at 15,977, ECF No. 60. Thus, the tires had a potential dual-use as passenger tires and temporary-use light truck tires. *Id.* Because Commerce reasonably concluded that the tires were not "designed and marketed exclusively" as temporary-use light truck tires, substantial evidence supports its determination. *See* Administrative Case Brief at 6–7, J.A. at 100,574–75, ECF No. 61; Questionnaire Response at VE-13, J.A. at 97,834, ECF No. 61.

Under the substantial evidence standard, "[i]t is not for this court on appeal to reweigh the evidence or to reconsider questions of fact anew." *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube,* 975 F.2d 807, 815 (Fed. Cir. 1992); *see Downhole Pipe & Equip., L.P. v. United States,* 776 F.3d 1369, 1376 (Fed. Cir. 2015) ("While Appellants invite this court to reweigh this evidence, this court may not do so."). A determination is supported by substantial evidence when it rests on "'more than a mere scintilla,' as well as evidence that a 'reasonable mind might accept as adequate to support a conclusion.'" *Dongtai Peak Honey Indus. Co., Ltd. v. United States,* 777 F.3d 1343, 1349 (Fed. Cir. 2015) (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "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)).

Cheng Shin argues that it was faced with a no-win situation because it had to report its tires under a TRA Yearbook listing even though the tires had no such listing. Pl.'s Reply at 8–9, ECF No. 58. But this argument is inconsistent with Cheng Shin's own admissions during the investigation. In its administrative case brief, Cheng Shin affirmed that the tires would accurately be classified as passenger tires under the TRA Yearbook. Administrative Case Brief at 6 n.10, J.A. at 100,574, ECF No. 61 ("To clarify, if these models had been developed under the standard of TRA [sic], they would also be classified as 'passenger tire.'"). Cheng Shin further noted that it developed the tires under a separate European standard where they were also classified as passenger ties. *Id.* at 6. It said without any qualification that "these tires meet the standards of passenger tires." *Id.* at 6–7.

Faced with these admissions during the investigation, Cheng Shin claimed at oral argument that its own submissions to Commerce were "irrelevant information." Oral Arg. Tr. 53:9–18, ECF No. 76. Cheng Shin's submissions during Commerce's investigation are of course relevant because "[t]he burden of creating an adequate record lies with the interested parties, not with Commerce." *Qingdao,* 766 F.3d at 1386. And Commerce is statutorily required to base its decision on the record before it. *See* 19 U.S.C. §§ 1516a(b)(l)-(2). Commerce is obligated to consider all the evidence that fairly supports or detracts from its conclusion, and Cheng Shin's own submissions provided support for Commerce's conclusion in this case. *See Butte Cnty., Cal. u. Hogen,* 613 F.3d 190, 194 (D.C. Cir. 2010) (noting that an agency cannot "reufus[e] to consider evidence bearing on the issue before it"). Commerce reasonably construed Cheng Shin's admissions as supporting the conclusion that "these tires have an intended dual use and, thus, could not have been designed and marketed exclusively for light trucks." IDM at 20, J.A. at 15,977, ECF No. 60. Indeed, it would likely have been unreasonable had Commerce taken Cheng Shin's suggestion and ignored the company's repeated claims that its tires were designed using passenger car standards. *Compare* Administrative Case Brief at 6–7 n.10, J.A. at 100,574–75, ECF No. 61 (noting that the tires "would also be classified as 'passenger tire'"), *with Allegheny Ludlum Corp. u. United States,* 112 F. Supp. 2d 1141, 1165 (CIT 2000) (noting that it would be legal error for Commerce to fail "to

consider or discus record evidence which, on its face, provides significant support for an alternative conclusion").

Cheng Shin's argument in its briefs and before Commerce attempts to have it both ways. Contrary to its statements before Commerce, Cheng Shin now asserts that, when selecting a tire service type, "none of [them] strictly applied" to Cheng Shin's tires; but during the investigation, it stated that the TRA Yearbook classified the tires as passenger tires. *Compare* Pl.'s Reply at 9, ECF No. 58, *with* Administrative Case Brief at 6 n.10, J.A. at 100,574, ECF No. 61. In its reply brief, however, Cheng Shin concedes that it chose the designation passenger tire "based on the physical characteristics of the tires, and not based on intended use[.]"[8] Pl.'s Reply at 11, ECF No. 58. Cheng Shin thus seeks to drive a wedge between the physical characteristics of the tires as indicated by their TRA Yearbook designation and their "intended use." *Id.*

Nothing in the language of the exclusion requires Commerce to ignore the physical characteristics of the tires that correspond to the TRA Yearbook classification. Commerce reasonably construed the exclusive design requirement to extend to the classification and corresponding physical characteristics of the tires in question. Without some relation to the physical characteristics, the design requirement would collapse into the exclusive marketing requirement and have no independent meaning. *Compare* Revised Exclusion at 2, J.A. at 12,294, ECF No.60 ("Excluded from the scope are tires designed and marke[te]d exclusively as "temporary-use" or "spare" tires for light trucks ...."), *with Williams v. Taylor,* 529 U.S. 362, 404 (2000) (noting that, when interpreting legal texts, "[i]t is ...a cardinal principle" to "'give effect, if possible, to every clause and word'") (quoting *Inhabitants of Montclair Tp. v. Ramsdell,* 107 U.S. 147, 152 (1883)), WEBSTER'S THIRD NEW INT'L DICTIONARY (1968) (defining "design" to include "to plan and plot out the shape and disposition of the parts of and the structural constituents of"), *and* WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1956) ("[t]o sketch as a pattern or model"). Cheng Shin does not offer an alternative interpretation of the words of the exclusion that would give effect to the word "designed," *see* Pl.'s Reply at 11–12, ECF No. 58 (equating "designed and marketed" solely with intended use), nor does it suggest that Commerce's consideration of the tires' physi-

[8] The Court also notes that Cheng Shin's representations to Commerce with respect to the tire service type were inconsistent. In its initial product characteristics comments, it claimed that the tires in question did not fit under the TRA Yearbook at all and proposed a fourth category of light truck tires with reduced tread depth. *See* Characteristic Comments at 3, J.A. at 4,348, ECF No. 60. Then, later in the investigation, Cheng Shin admitted that the tires would be classified as passenger tires under the TRA Yearbook. *See* Administrative Case Brief at 6 n.10, J.A. at 100,574, ECF No. 61.

cal characteristics was unreasonable. *Cf.* Pl.'s Mot. at 20, ECF No. 42 (observing only that Commerce's analysis was "not required by the scope language," not that it was impermissible).

Cheng Shin responds that the Union admitted temporary-use light truck tires have no TRA Yearbook listing; hence, the listing is not relevant to the exclusion. *See* Pl.'s Reply at 8, ECF No. 58. Although it is true that temporary-use light truck tires have no special heading under the TRA Yearbook, it is a non-sequitur that Cheng Shin's classification of its tires as passenger tires under the TRA Yearbook is irrelevant. If excluded temporary-use light truck tires have no classification and Cheng Shin's tires do have a classification as passenger tires, then that is only further evidence that they do not qualify for the exclusion.

Cheng Shin advances three other arguments in support of its contention that Commerce's decision was not supported by substantial evidence: (1) Commerce misinterpreted a load chart Cheng Shin included in its customer agreements; (2) the customer agreements manifest the exclusivity that the exclusion required; and (3) the tires do not have a dual-use. *See* Pl.'s Mot. at 20–21, 24–26, ECF No. 42. Given Cheng Shin's repeated affirmations during the investigation that its tires meet the standards of passenger tires, Cheng Shin's other arguments are also unavailing.

Cheng Shin explains that the load capacity chart attached to its sales contracts "reproduces the standard load capacity at different inflation pressures for tires with the particular size dimensions"; therefore, it did not manifest a dual-use. *Id.* at 25. Plaintiff also argues that the customer agreements clearly manifest an intent for its customer to use the tires exclusively as temporary-use light truck tires. *Id.* at 20–27. But Commerce's interpretation of the load capacity chart as permitting the tires to have a dual-use was not clearly erroneous based on the record before it. The chart shows load and capacity for both passenger and truck tires with no explanation provided by Cheng Shin. *See* Questionnaire Response at Exhibit VE-7-A, J.A. at 100,352, ECF No. 61. Similarly, at oral argument, counsel for the Union pointed out that only one of the contracts Cheng Shen submitted matched the characteristics of a tire that it sought to have excluded; and the chart for that one contract showed *only* load data for passenger cars. *See* Oral Arg. Tr. 34:5–16, ECF No. 76. Cheng Shin's counsel countered that the charts were just generic and that mismatches between the submitted contracts and the technical drawings of the tires were a result of discrepancies in the customer's files. *See id.* 41:19–24.

This back-and-forth only serves to emphasize that it was Cheng Shin's burden — not Commerce's — to build the record in this case. *See QVD,* 658 F.3d at 1324. Cheng Shin's proffered best evidence fails to point unambiguously in the direction of a finding that the subject tires "were designed ... exclusively" as temporary use light truck tires. Commerce must base its decisions on the record before it, and the record in this case contains evidence pointing in different directions that Commerce had to weigh. *See* 19 U.S.C. §§ 1516a(b)(l)-(2). It is not the role of the Court to reweigh the evidence. *Downhole Pipe,* 776 F.3d at 1376. Even assuming that the customer contracts unambiguously had shown an intent for Cheng Shin's customer to use the tires exclusively for light trucks, Cheng Shin's admissions to Commerce that it created the tires under a passenger car standard would still provide Commerce with substantial evidence for its determination that the tires were not designed *exclusively* as spare truck tires. Questionnaire Response at VE-12, J.A. at 97,833, ECF No. 61.

Cheng Shin's attempt to prove now to the Court that the tires are unfit for use as passenger tires or spare passenger tires is inconsistent with the repeated affirmations it made during the investigation that the tires meet the standards of passenger tires. Cheng Shin cannot use litigation to rewrite the submissions it made to Commerce during the investigation. *Cf., e.g., QVD,* 658 F.3d at 1324 ("QVD is in an awkward position to argue that Commerce abused its discretion by not relying on evidence that QVD itself failed to introduce into the record[.]"); *Linyi City Kangfa Foodstuff Drinkable Co., Ltd. v. United States,* No. 15–00184, 2016 WL 5122648 at *2 (CIT 2016) *("QVD Foods* cannot be read as requiring Commerce to act to ferret out 'necessary' information for the record."). A reasonable mind would have taken Cheng Shin's submissions at face value, and that is just what Commerce did. *See* Oral Arg. Tr. 58:15–17, ECF No. 76 (The Court: "They put 1 [indicating passenger tire] down and you took them at their word?" Ms. Speck: "Yes, Your Honor."). Because "the court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views,'" substantial evidence supports Commerce's determination. *Goldlink Indus. Co. v. United States,* 431 F. Supp. 2d 1323, 1326 (CIT 2006) (quoting *Universal Camera Corp.,* 340 U.S. at 488) (alteration in original).

B. Commerce Did Not Unlawfully Modify the Scope of the Order

Cheng Shin claims that Commerce unlawfully modified the scope of the order because the Union agreed that Cheng Shin's tires met the requirements of the exclusion that the two parties had negotiated and submitted to Commerce. Pl.'s Mot. at 27–28, ECF No. 42 Cheng Shin

also argues that the exclusion was specifically designed to "exclude the ... temporary-use light truck spare tire models identified in Cheng Shin's initial scope comments." *Id.* at 28. Commerce and the Union both deny that they made any such agreement with respect to the tires in question. Def.'s Resp. at 21–22, ECF No. 53; Def.-Int.'s Resp. at 14–15, ECF No. 49. The record does not support Cheng Shin's assertions. Commerce did not unlawfully modify the scope of the order.

Commerce has discretion to determine the scope of an order to remedy unlawful dumping. *See Mitsubishi Elec. Corp. v. United States,* 898 F.2d 1577, 1582-83 (Fed. Cir. 1990). Commerce, however, "cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Duferco Steel, Inc. v. United States,* 296 F.3d 1087, 1095 (Fed. Cfr. 2002) (quoting *Eckstrom Indus., Inc. v. United States,* 254 F.3d 1068, 1072 (Fed. Cir. 2001)); *accord Fedmet Res. Corp. v. United States,* 755 F.3d 912, 921–22 (Fed. Cir. 2014). If a question about an order's scope is "asked and answered during the underlying investigations," then that answer cannot be subsequently changed by Commerce. *Fedmet Res.,* 755 F.3d at 920. As long as these limits are respected, Commerce "'enjoys substantial freedom to interpret and clarify its antidumping orders.'" *Novosteel SA v. United States,* 284 F.3d 1261, 1269 (Fed. Cir. 2002) (quoting *Ericsson GE Mobile Communications, Inc. v. United States,* 60 F.3d 778, 782 (Fed. Cir. 1995)).

Cheng Shin cites *Fedmet Resources* in support of its argument that Commerce unlawfully changed the scope of the order, but the case is inapposite. Pl.'s Reply at 5, ECF No. 58. In *Fedmet Resources,* Commerce determined that particular magnesia alumina carbon bricks were within the scope of an antidumping order even though the petitioner requesting the order had disclaimed that view in the initial investigation. 755 F.3d at 914–18. The petitioner had "requested initiation of antidumping and countervailing duty investigations on imports of certain MCBs [magnesia carbon bricks] from China and Mexico." *Id.* at 914. It distinguished magnesia carbon bricks from other types of bricks in its petition, prompting Commerce to clarify whether the petitioner only wanted to focus on magnesia carbon bricks. *Id.* The petitioner clarified that the scope of the investigation should be confined to magnesia carbon bricks only and not extend to magnesia alumina bricks described in generic terms. *Id.* at 914–15. After the initial investigation concluded, Fedmet Resources requested a scope ruling on its magnesia alumina bricks. 755 F.3d at 916. Despite the original petitioner's explicitly excluding this category of bricks in the investigation, Commerce determined that they

were within the scope of the antidumping order. *Id.* at 917. The Federal Circuit reversed Commerce's determination because the underlying investigation "contain[ed] multiple representations made by [the petitioner] disclaiming coverage of all [magnesia alumina carbon] bricks in general." *Id.* at 919. Therefore, the question of whether magnesia alumina carbon bricks were within the scope of the order was "asked and answered during the underlying investigations." *Id.* at 920.

Fedmet Resources is distinguishable because here the Union negotiated multiple, specific requirements for the exclusion. *See* Petitioner Scope Rebuttal at 6, J.A. at 8,601, ECF No. 60 ("Petitioner requests that if Commerce does grant any exclusion for light truck temporary spare tires, it include all the requirements explained above in that exclusion."). It never agreed to exclude Cheng Shin's specific tires; only those tires that could meet each of the negotiated criteria would be excluded. *See id.* In *Fedmet Resources,* by contrast, "the Petitioner said that [it was] disclaiming coverage of *all* [magnesia alumina carbon] bricks *in general." Fedmet Res.,* 755 F.3d at 919 (emphasis added). It gave a blank check to exclude an entire product category with no other requirements. *Id.* Cheng Shin did not find as lenient a negotiating partner in the Union. Thus, Cheng Shin — unlike the plaintiff in *Fedmet Resources* — had to meet the specific requirements it negotiated as opposed to benefitting from a general exclusion for all tires used as temporary-use light truck tires.

Cheng Shin agreed to this multi-pronged exclusion after it classified its tires as passenger tires under the TRA Yearbook in its Section B and Section C responses on September 25, 2020, and September 29, 2020, respectively. Cheng Shin's Section B Response at B-11–12, J.A. at 85,352–53, ECF No. 61; Section C Response at Exhibit C-4, J.A. at 88, 770–72, ECF No. 61. It placed this information on the record despite having been warned "reporting tires as different service types would normally be determinative on matching." Product Characteristics Rebuttal at 10 n.36, J.A. 6,097, ECF No. 60. Months later, Cheng Shin agreed to the Union's revised scope exclusion language that added the "designed and marketed exclusively" requirement. *See* Revised Exclusion (Dec. 10, 2020), J.A. at 12,293–94, ECF No. 60. Cheng Shin agreed to a narrow exclusion that was in tension with the information it had already placed on the record. Then, after agreeing to language requiring exclusivity of design, it twice again affirmed that its tires met the standards of passenger tires. Administrative Case Brief at 6–7, J.A. at 100,574–75, ECF No. 61; Questionnaire Response at VE-13, J.A. at 97,834, ECF No. 61.

The Union was careful to state in its rebuttal comments to Cheng Shin's exclusion request that Cheng Shin "avers" that its tires meet the exclusivity requirements. Petitioner's Scope Rebuttal at 5, J.A. at 8,600, ECF No. 60. In its agreement to the final revised exclusion, the Union stated that "it does not oppose the request for the exclusion of light truck spare tires if the full language Cheng Shin has proposed is used." Petitioner's Response on Cheng Shin's Scope Request, at 1–2, J.A. at 12,300–01, ECF No. 60. The Union, therefore, only agreed to the specific language of the exclusion for light truck spare tires and never the application of that language to exclude Cheng Shin's tires. Unlike in *Fedmet Resources,* the question of whether the exclusion covered Cheng Shin's tires was never "asked and answered during the underlying investigation." 755 F.3d at 920. Commerce did not unlawfully modify the scope. Cheng Shin negotiated an exclusion for which its tires did not qualify based on the record it built before the agency. There is no legal error.

C. The Subsequent Scope Ruling Is Irrelevant

Finally, the Court must address whether to remand so that Commerce can reconsider its determination based on a subsequent scope ruling. *See* PL's Reply at 15, ECF No. 58. Cheng Shin appended the results of a subsequent scope ruling to its reply brief and asserts that Commerce acted unlawfully in this case because the later ruling granted an exclusion to allegedly similar tire models. *Id.* at 14–15, 21. Cheng Shin states that neither Commerce nor the Union objected to Cheng Shin's failure to provide a TRA Yearbook classification for the tires in the subsequent scope ruling. Thus, it claims that the Union's objections in this case "based on the reported TRA tire service type ... are without merit." *Id.* at 21. Commerce counters that Cheng Shin placed the TRA Yearbook service type onto the record in this investigation and did not do so in the subsequent scope ruling. Def.'s Sur-Reply at 2, ECF No. 65. Commerce also argues that prior administrative decisions do not bind it, and the different conclusions are by virtue of the different records before the agency in each investigation. *Id.* at 3. Because the subsequent decision is not on the record here, the Court holds Commerce need not have considered it.

Prior scope rulings do not bind Commerce because "each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." *Qingdao,* 766 F.3d at 1387. However, an agency must give sufficient reasons for treating similar situations differently. *SKF USA, Inc. v. United States,* 263 F.3d 1369, 1382 (Fed. Cir. 2001); *accord Torrington*

Co. v. United States, 881 F. Supp. 622, 648 (CIT 1995), *aff'd,* 127 F.3d 1077 (Fed. Cfr. 1997). Commerce's obligation to explain its different treatment of similar situations only arises, however, if the inconsistency is on the record and was presented to Commerce when it made its decision. *See Unicatch Indus. Co. v. United States,* 539 F. Supp. 3d 1229, 1249 (CIT 2021) ("Without any basis for comparing Commerce's purportedly inconsistent decisions, the court finds no reason to remand the issue in this proceeding."). "Plaintiffs generally may not supplement th[e] record on judicial review" with materials from a subsequent administrative action. *Hoogovens Staal BV v. United States,* 4 F. Supp. 2d 1213, 1218 (CIT 1998); *accord Luoyang Bearing Factory v. United States,* 240 F. Supp. 2d 1268, 1300 n.28 (CIT 2002) (citing *Hoogovens Staal*). As such, "potentially inconsistent administrative action in successive administrative reviews (if challenged), arises in the latter of the two proceedings, not the former." *Home Prods. Int'l, Inc. v. United States,* 662 F. Supp. 2d 1360, 1364 (CIT 2009).

A few points quickly illustrate that the subsequent ruling is not relevant to the resolution of this case. First, the subsequent scope ruling was not on the record before Commerce when it made its initial decision, and "the issue was not presented to Commerce in that segment of the proceeding for the agency to explain its determination." *Unicatch,* 539 F. Supp. 3d at 1248–49. Consequently, the subsequent ruling does not speak to the question of whether substantial evidence supports the prior ruling because the subsequent ruling was not before the agency when it made the decision challenged here.

Second, the purported inconsistency is "not a *prior* administrative precedent" of the challenged action. *Home Prods.,* 662 F. Supp. 2d at 1364. Cheng Shin can only challenge the purported inconsistency in the subsequent proceeding because the inconsistency is created by the subsequent decision. *Id.* The purported inconsistency, therefore, is irrelevant to the challenged decision before the Court. *See Hoogovens Staal,* 4 F. Supp. 2d at 1218 ("The Court can not [sic] consider evidence presented in the second administrative review when it reviews the first administrative review.").

Third, even if the challenged decision was relevant, it is undisputed that the record in the initial investigation and the subsequent scope rulings differed in significant respects. *See* Pl.'s Reply at 21, ECF No. 58 (stating that the TRA service type was not part of the record in the subsequent ruling); Def.'s Sur-Reply at 2, ECF No. 65 ("[T]he TRA was not on the record in the [subsequent] scope proceeding, but it was on the record in this [initial] investigation."). It is hardly surprising that, given the multiple unforced errors Cheng Shin committed in the

underlying proceedings, it changed tactics in subsequent proceedings. That it wisely chose to do so does not save it from the consequences of the answers it gave here.

CONCLUSION

Cheng Shin negotiated for an exclusion whose plain language required that any excluded tires must be "designed and marketed exclusively" as temporary-use light truck tires. It then proceeded to submit information to Commerce explaining how much like passenger car tires its truck tires were. It is not the job of the Court to save Cheng Shin from itself. That Commerce could have perhaps taken a more lenient view does not compel Commerce to do so. *Accord Universal Camera Corp.,* 340 U.S. at 488 (holding that a court cannot "displace the [agency's] choice between two fairly conflicting views"). Having given Commerce and the Union the rope with which to hang it, Cheng Shin may not now complain about the sentence. The decision of the Commerce Department is **AFFIRMED** as supported by substantial evidence and in accordance with the law. *See* 19 U.S.C. § 1516a(b)(l)(B)(i). Plaintiffs Motion for Judgment on the Agency Record is **DENIED.**

Dated: February 13, 2023
New York, New York

Stephen Alexander Vaden

STEPHEN ALEXANDER VADEN, JUDGE

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