U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

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EXTENSION AND AMENDMENT OF IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL OF CAMBODIA

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain archaeological and ethnological material of Cambodia, the addition of certain categories of archaeological and ethnological material of Cambodia to the existing import restrictions, and the clarification of certain categories of archaeological material of Cambodia. The United States has entered into an agreement with Cambodia that supersedes the existing agreement and amends the import restrictions that became effective on September 19, 2018. The restrictions, originally imposed by Treasury Decision (T.D.) 99–88 and last extended by CBP Dec. 18–11 for an additional five-year period, will continue with these amendments through September 19, 2028. The Designated List of archaeological and ethnological material of Cambodia to which the restrictions apply is reproduced below, with the amendments described.

DATES: Effective on September 19, 2023.

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SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (the Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in § 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

In certain limited circumstances, the CPIA authorizes the imposition of restrictions on an emergency basis (19 U.S.C. 2603). The emergency restrictions are effective for no more than five years from the date of the State Party's request and may be extended for three years where it is determined that the emergency condition continues to apply with respect to the covered material (19 U.S.C. 2603(c)(3)). These restrictions may also be continued pursuant to an agreement concluded within the meaning of the CPIA (19 U.S.C. 2603(c)(4)). Additionally, after any restriction enters into force, either through an agreement or emergency action, CBP will by regulation promulgate (and when appropriate revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such emergency action (19 U.S.C. 2604).

On December 2, 1999, the former United States Customs Service published Treasury Decision (T.D.) 99–88 in the **Federal Register** (64 FR 67479) amending 19 CFR 12.104g(b) to reflect the imposition of emergency restrictions on the importation of certain Khmer stone archaeological material of the Kingdom of Cambodia from the 6th century through the 16th century A.D.

On September 19, 2003, the United States entered into the "Memorandum of Understanding Between the Government of the United States of America and the Government of the Kingdom of Cambodia Concerning the Imposition of Import Restrictions on Khmer Archaeological Material" (2003 MOU). The 2003 MOU provided for import restrictions on certain Khmer archaeological material from the 6th century through the 16th century A.D. and continued to include the archaeological material then subject to the emergency restrictions.

On September 22, 2003, CBP published a final rule, CBP Decision (CBP Dec.) 03–28, in the **Federal Register** (68 FR 55000), amending 19 CFR 12.104g(a) to reflect the imposition of these restrictions and including a list designating the types of archaeological material covered by the restrictions. Consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, these restrictions were effective for a period of five years.

The import restrictions were subsequently extended three times, and the designated list amended once, in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a). On September 19, 2008, CBP published a final rule (CBP Dec. 08–40) in the **Federal Register** (73 FR 54309), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years and to revise the designated list to reflect the addition of new categories of objects (glass and bone) and additional subcategories of stone and metal objects from the Bronze Age (c. 1500–500 B.C.) and the Iron Age (c. 500 B.C.–A.D. 550), covering archaeological material from the Bronze Age through the Khmer Era (16th century A.D.). On September 16, 2013, CBP published CBP Dec. 13–15 in the **Federal Register** (78 FR 56832), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years.

On September 19, 2018, pursuant to a Memorandum of Understanding concluded on September 12, 2018 (2018 MOU), in which the Governments of the United States and Cambodia agreed to extend the import restrictions for another five years, CBP published CBP Dec. 18–11 in the **Federal Register** (83 FR 47283), which amended § 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years.

On December 21, 2022, the United States Department of State proposed in the **Federal Register** (87 FR 78184), to extend the 2018 MOU. On May 10, 2023, after consultation with and recommendation by the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the determinations necessary to extend and amend the 2018 MOU.

On August 30, 2023, the Governments of the United States and Cambodia signed a new agreement to extend the import restrictions,

include additional categories of archaeological and ethnological material, and clarify existing categories of archaeological material, titled "Agreement between the Government of the United States of America and the Government of the Kingdom of Cambodia to Extend and Amend the Memorandum of Understanding between the Government of the United States of America and the Government of the Kingdom of Cambodia Concerning the Imposition of Import Restrictions on Categories of Archaeological Material of Cambodia" (2023 Agreement). The 2023 Agreement entered into force upon signature and supersedes the 2018 MOU. Pursuant to the 2023 Agreement, the amended import restrictions continue through September 19, 2028.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the amendment of the Designated List of cultural property described in CBP Dec. 03–28 and last revised by CBP Dec. 08–40. The amendments include the expansion of dates for archaeological material, clarified descriptions of certain categories of archaeological material, and the addition to the archaeological material section of a category for wood and subcategories for sima, boundary markers, seals and weights, and coins. The amendments also include the addition of an ethnological material section. The restrictions on the importation of archaeological and ethnological material will be in effect through September 19, 2028. Importation of such material of Cambodia, as described in the Designated List below, will be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions* by selecting the material for "Cambodia."

Designated List of Archeological and Ethnological Material of Cambodia

To fulfill the terms of the 2023 Agreement, the Designated List contained in T.D. 99–88 and last revised by CBP Dec. 08–40, is amended to reflect the addition to the archaeological material section of a category for wood, subcategories for sima, boundary markers, seals and weights, and coins, as well as the expansion of dates for archaeological material and clarified descriptions of certain categories of archaeological material. The amendments also include the addition of an ethnological material section.

The Designated List includes archaeological and ethnological material. Archaeological material ranges in date from approximately 2,500 B.C. to A.D. 1750. Ethnological material ranges in date from A.D. 1400 to 1891. For the reader's convenience, CBP is reproducing

the Designated List contained in T.D. 99–88 and last revised by CBP Dec. 08–40 in its entirety with these changes.

The list is divided into the following categories of objects:

I. Archaeological Material

- A. Stone
- B. Metal
- C. Ceramics
- D. Glass
- E. Bone
- F. Wood

II. Ethnological Material

- A. Architectural Materials
- B. Manuscripts
- C. Religious Objects

I. Archaeological Material

Restricted archaeological material from Cambodia includes the categories listed below. The following list is representative only.

A. Stone

This category consists largely of materials made of sandstone, including many color shades (gray to greenish to black, pink to red and violet, and some yellowish tones) and varying granulosity. Due to oxidation and iron content, the stone surface can become hard and take on a different color from the stone core. These surface colors range from yellowish to brownish to different shades of gray. This dense surface can be polished. Some statues and reliefs are coated with a kind of clear shellac or lacquer of different colors (black, red, gold, yellow, brown). The surface of sandstone pieces can also be quite rough. Chipped surfaces can be white or gray in color. In the absence of any systematic technical analysis of ancient Khmer stonework, no exact description of other stone types can be provided. It is clear that other types of stone were also used (some volcanic rock, rhyolite, and schist, etc.), but these are nonetheless exceptional. Some quartz objects are also known. Precious and semi-precious stones were also used as applied decor or in jewelry settings.

Different types of stone degradation can be noted. Eroded surfaces result from sanding (loss of surface grains), contour scaling (detachment of surface plaques along contour lines), flaking, and exfoliation. The stone can also split along sedimentation layers. Chipping or fragmentation of sculpted stone is also common.

Stone objects included here come under several periods: Bronze Age (c. 2500–500 B.C.), Iron Age (c. 500 B.C.–A.D. 550), pre-Angkorian (6th–9th century), Angkorian (9th–15th century), and post-Angkorian (15th century–1750 A.D.). Many stone objects can be firmly assigned to one of these periods; some, notably architectural elements and statues, can be further assigned a specific style and a more precise date within the given period.

1. Sculpture

a. Architectural Elements—Stone was used for religious architecture in the pre-Angkorian and Angkorian periods. The majority of ancient Khmer temples were built almost entirely in stone. Even for those temples built primarily in brick, numerous decorative elements in stone were also employed. Only small portions of early post-Angkorian edifices were built in stone. The architectural elements that follow are therefore characteristic of pre-Angkorian and Angkorian times. Post-Angkorian forms are also included. The state of the material varies greatly, with some objects being well preserved, while others are severely eroded or fragmented. The sculpture of some pieces remains unfinished.

i. *Pediments*—Pediments are large decorative stone fixtures placed above temple doorways. They are triangular or round in shape and composed of two or more separate blocks that are fitted together and sculpted with decorative motifs. The ensemble can range from approximately 1–3 meters in width and 1–3 meters in height. Motifs include floral scrolls, medallions, human figures, and animals. A whole scene from a well-known story can also be represented.

ii. *Lintels*—Lintels are rectangular monoliths placed directly above temple entrance gates or doorways, below the pediments described above. They are decorated with motifs similar to those of pediments. They can reach up to nearly one meter in height and one- and one-half meters in width.

iii. *False Doors*—Three of the four doorways of a temple sanctuary are frequently "false doors"; that is, though they are sculpted to look like doors, they do not open. They bear graphic and floral motifs, sometimes integrating human and animal figures. These doors can reach up to more than two meters in height and more than one meter in width. They can be monolithic or composed of separate blocks fitted together.

iv. *Columnettes and Door Jambs*—Columnettes (or colonettes) are decorative columns placed on either side of a temple door entrance. Door jambs are decorative panels placed on either side of a temple entrance door. They can be sculpted in deep relief out of a temple doorway and therefore remain attached to the doorway on their back

side. The earliest columnettes are round and sculpted with bands which themselves are sculpted with decorative motifs. Later in the Angkorian period, the columnettes are octagonal in shape and bear more complex and abundant sculpted decor on the concentric bands. This decor includes graphic designs (pearls, diamond shapes, flowers, etc.) repeated at regular intervals along the length of the column. The base of the column is square and is also sculpted with diverse motifs and figures. The columnettes can reach around 25 cm. in diameter and more than two meters in height. Door jambs can reach more than two meters in height.

v. *Pilasters*—Pilasters are decorative rectangular supports projecting partially from the wall on either side of a temple doorway. They are treated architecturally as columns with a base, shaft, and capital. Motifs include floral scrolls and graphic designs of pearls, diamond shapes, etc., as well as human or animal figures. They range in width from approximately 20–30 cm. and can reach a height of more than two meters.

vi. *Antefixes*—Antefixes are decorative elements placed around the exterior of each level of temple tower. They are small free-standing sculptures and can take multiple forms, including but not limited to graphic designs, animal figures, human figures in niches, and miniature models of temples.

vii. *Balustrade Finials*—Long balustrades in the form of mythical serpents are found in many Angkorian temples. Often, these line either side of the entrance causeways to temples. The ends of the balustrade take the form of the serpent's multiple cobra-like heads.

viii. *Wall Reliefs*—Much of the surface area of most temples is sculpted with decorative reliefs. This decor includes graphic designs and floral motifs as well as human or animal figures. The figures can range in size from just a few centimeters to more than one meter in height. They can be integrated into the decor or set off in niches. Narrative scenes can also be represented.

ix. *Other Decorative Items*—Other decorative items include wall spikes, roof tile finials, sculpted steps, and other architectural decorations.

x. *Simas*—Simas are often decorated and carved stone pillars placed around the vihara of Buddhist monasteries at each of the eight compass directions marking the place where monks performed rituals. Sima forms are typically a decorative pillar with a conical top carved in various shapes. Some sima forms are spherical. The tops of simas are often gently peaked and may have Buddhist iconography. Decorative carved motifs typically include animals, Buddha's life stories, worshipers, and/or vegetal motifs.

b. Free-Standing Sculptures—The pre-Angkorian and Angkorian periods are characterized by extensive production of statuary in stone. Some stone statuary was also produced during the post-Angkorian period. This statuary is relatively diverse, including human figures ranging from less than one half meter to nearly three meters in height, as well as animal figures. Some figures, representations of Hindu gods, have multiple arms and heads. Figures can be represented alone or in groups of two or three. When male and female figures are presented together as an ensemble, the female figures are often disproportionately smaller than their male counterparts. Some are part-human, part-animal. Figures can be standing, sitting, or riding animal mounts. Many figures are represented wearing crowns or special headdresses and holding attributes such as a baton or a conch shell. Clothing and sometimes jewelry are sculpted into the body. Though statues are generally monolithic, later post-Angkorian statues of Buddha can have separate arms sculpted in wood and attached to the stone body. Many statues were once lacquered in black, dark brown, red, or gold colors and retain lacquer traces. Some yellow lacquer is also found.

i. *Human and Hybrid (Part-Human, Part-Animal) Figures*—Examples include statues of the eight-armed god and the four-armed god, representations of Buddha in various attitudes or stances, and female and male figures or deities, including parts (heads, hands, crowns, or decorative elements) of statuary and groups of figures. Examples include tantric Buddhist figures or representations of Hindu gods.

ii. *Animal Figures*—Examples include bulls, elephants, lions, and small mammals such as squirrels.

iii. *Votive Objects and Non-figural Sculpture*—Various abstract sculptures were also the object of religious representation from pre-Angkorian to post-Angkorian times. Examples include ritual phallic symbols (linga, lingam) and sculpted footprints of Buddha.

iv. *Pedestals*—Pedestals for statues can be square, rectangular, round, or octagonal. They vary greatly in size and can be decorated with graphic and floral decor, as well as animal or human figures. They are usually made of numerous components fitted together, including a base and a top section into which the statue is set.

v. *Foundation Deposit Stones*—Sacred deposits were placed under statues, as well as under temple foundations and in temple roof vaults, from pre-Angkorian to post-Angkorian times. Marks on these stones indicate sacred configurations, which could contain deposits such as gold or precious stones.

c. Stelae

i. *Sculpted Stelae*—Free-standing stelae, sculpted with shallow or deep reliefs, served as objects of worship and sometimes as boundary stones or boundary markers from pre-Angkorian to post-Angkorian times. Examples include stelae with relief images of gods and goddesses, Buddhas, figures in niches, and other symbols.

ii. *Inscriptions*—Texts recording temple foundations or other information were inscribed on stone stelae from pre-Angkorian to post-Angkorian times. Such texts can also be found on temple doorjambs, pillars, and walls. The stelae are found in various shapes and sizes and can also bear decorative reliefs, for example a bull seated on a lotus flower.

d. Sculpture in Brick—Brick was used mainly in pre-Angkorian and some relatively early Angkorian religious architecture. Yet, typically, while the bodies of buildings were in brick, some of the decorative elements listed above—pediments, lintels, etc., were in stone. The brick, of light orange color, was usually sculpted with a preliminary relief, which was then covered over with white stucco, itself sculpted along brick contours. Some brick reliefs seem to have been fully sculpted and not meant to be covered in stucco. Brick temple reliefs include graphic design, as well as floral or animal decor. Human and animal figures can also be represented.

e. Boundary Markers—Boundary markers were typically carved from a solid block of stone and reach approximately one meter in height. Boundary markers typically date from the 10th through 13th centuries A.D. Boundary markers were decorated in either Buddhist or Hindu iconography. Hindu decorative themes often portray depictions of Vishnu, while Buddhist decorative themes often portray the Buddha or Lokeshvara, sometimes with an additional deity featuring a domed or pointed top as a stupa, symbolizing Nirvana.

2. Jewelry

In the Bronze and Iron Ages, beads were made from semi-precious stones such as agate, carnelian, and occasionally garnet. Agate beads are banded stone, black to light brown to white in their bands. These are usually carved into tubular shapes. Carnelian beads are reddish orange and glassy. These are usually ball-shaped. Bronze and Iron Age stone bracelets have triangular or rectangular cross-sections.

3. Chipped and Ground Tools

During the Bronze and Iron Ages, chipped and ground tools such as adzes, whetstones, and arrowheads were made of metamorphic rock.

B. Metal

This category consists mainly of bronze objects. No singular alloy is characteristic of Cambodian bronzes, which contain varying degrees of copper, zinc, lead, iron, and tin. Surface colors can range from dark to light brown to goldish; a green patina is found on many objects. Some bronzes are also gilt. Some artwork in silver and gold also survives but is much less common.

Most objects were cast using "lost wax" casting with a "clay core" technique. This technique begins with a clay core, which is covered with a layer of wax before being covered with an outer layer of clay. The wax is then melted out with hot metal, which then hardened in the mold. Each casting is unique because the mold must be destroyed to obtain the metal object, Decor can be chiseled into the finished metal surface. As early as the Bronze and Iron Ages, these objects demonstrate a very high degree of technical skill. The "repoussé" technique, by which metal is beaten into shape in a concave mold, was also used.

Most of the objects presented here can be assigned to one of the periods defined for stone objects described previously: Bronze Age (c. 2500–500 B.C.), Iron Age (c. 500 B.C.–A.D. 550), pre-Angkorian (6th–9th century), Angkorian (9th–15th century), and post-Angkorian (15th century–A.D. 1750). Some pieces, in particular statuary and ritual or domestic accessories with motifs akin to architectural decor in stone, can also be assigned to specific styles and corresponding time periods within the larger historical periods.

1. Statues and Statuettes

Khmer metal statuary is comparable to Khmer stone statuary in both thematic and stylistic treatment (see general description of free-standing sculpture above). Statues can be represented alone or in groups ranging from human figures on animal mounts to triads, to more complex ensembles including architectural structures and decor. Though some colossal statues are known in both pre-Angkorian and Angkorian times, metal statues are, generally, relatively smaller in scale than their stone counterparts. Colossal statues can reach more than two meters in height; fragments demonstrate that one reclining figure measured some six meters in length. Such colossal pieces are nonetheless rare.

Statuettes as small as 15 cm. are common; larger statues more typically reach around one meter in height. Small-scale statues are generally composed of a single cast; separate pieces can be placed together, for example on a single pedestal, to form an ensemble. Larger works can be composed of multiple pieces fitted together with joints which can be concealed by chiseled decor. Some small statuettes are solid. Others are composed of two plaques, one for the front

of the piece and the other for the back; the plaques are filled with a resin-or tar-based substance and soldered together. Larger pieces are hollow. Bronze statuaries were most prevalent in the Bayon period (late 12th to early 13th century).

Post-Angkorian bronze statues and statuettes, like their stone counterparts, take on certain characteristics of Siamese sculpture but can nonetheless usually be identified as Khmer due to certain types of decor and bodily form which maintain or develop from a specific Angkorian tradition.

a. Human and Hybrid (Part-Human, Part-Animal) Figures—Examples include, but are not limited to, standing male figures, Buddhas, four-armed male figures, female figures, gods, and goddesses, all in various attitudes and dress, including fragments of sculpture such as hands, arms, and heads.

b. Animal Figures—Animal representations in metal, typically bronze or silver, resemble those in stone in both thematic and stylistic treatment. Statues and statuettes include primarily bulls, lions, and elephants with one or three trunks. Other animals, such as horses, are also represented but are less common. Known colossal animal images date from 600 B.C. to the late 12th to early 13th century. Other animal figures, such as the mythical multiheaded serpent and mythical birds and monkeys, are also frequently found as decor of ritual or domestic objects.

c. Pedestals—Pedestals in bronze often appear to be simplified and reduced versions of their stone counterparts. One innovation of sculpting the base in openwork is to be noted.

2. Other Ritual and Domestic Objects

a. Special Objects Used in Ritual and Royal Pageantry—Special ritual objects include bells, bronze lotus flowers, conch shells, palanquin hooks, and musical instruments such as tambourines, etc.

b. Containers—Ritual and domestic containers include such items as perfume holders, oil lamps or bowls, lime pots, and boxes with decorative or sculptural features.

c. Decorative Elements from Ritual or Domestic Objects—In addition to the decorative accessory items noted below, there exist insignia finials for banner poles which often take the form of small human or animal figures.

d. Jewelry—Jewelry, including but not limited to rings, bracelets, arm bands, necklaces, earrings, decorative head pieces, and belts, could have been worn not only by people but also by statues. Bronze and Iron Age bracelets may be decorated with scrolls, spirals, and the heads of buffalo/cows. Different types of rings can be noted: ring-

stamps, rings with ornamental settings, rings with settings in the form of a bull or other animal, and rings with settings for stones.

e. Instruments—Diverse percussion instruments, including varying sizes of bells, drums, gongs, and cymbals, were made in bronze. These may carry geometric designs and/or images of humans and animals.

f. Animal Fittings—In addition to bells to be suspended around the necks of animals, common to both the Angkorian and the post-Angkorian periods, various kinds of decorative animal harness accessories are known in post-Angkorian times.

g. Seals and Weights—In lead and tin. Seals may be in the form of amulets, pendants, ring seals, or other designs. Weights may be molded into snail shaped weights or may be in round or square token forms.

3. Architectural Elements

Metal architectural elements include ceiling or wall plaques sculpted with flowers or other motifs, floral plaques, and panels.

4. Weapons and Tools

Metal weapons and tools include arrow heads, daggers, spear tips, swords, helmets, and sickles.

5. Coins

Rare coinage from the Funan area of Southern Cambodia is included. Coinage dates from the 1st through 6th centuries A.D. In gold, silver, gilded silver, or tin. Designs vary, but coins often bear the image of a rising sun, a deer, a rooster, a Garuda, a team of oxen, and other designs. Inscriptions may be present and in Kharosthi script or Sanskrit.

C. Ceramics

Bronze and Iron Age ceramics are primarily earthenwares with varying colors and surface treatments. Later ceramics include both glazed and unglazed stonewares. Stonewares, and particularly glazed wares, are characteristic of the Angkorian period (9th to 15th century). Khmer ceramic production primarily concerned functional vessels (vases, pots, etc.) but also included sculptures of figurines and architectural or other decorative elements. Angkorian period vessels were generally turned on a wheel and fired in kilns. Vessels range in size from around five to at least 70 cm. in height. Glaze colors are fairly limited and include creamy white, pale green (color of Chinese tea), straw-yellow, reddish-brown, brown, olive, and black. Light colors are generally glossy, while darker colors can be glossy or matte.

Some two-colored wares, primarily combining pale green and brown, are also known. Decoration is relatively subtle, limited to incisions of graphic designs (criss-crosses, striations, waves, etc.), some sculpted decor such as lotus petal shapes, and molding (ridges, grooves, etc.); some applied work is also seen. Most decoration is found on shoulders and necks, as on lids; footed vessels are typically beveled at the base. Many wasters (imperfect pieces) are found and are also subject to illicit trade.

1. Sculpture

Ceramic sculpture known to have been produced in Cambodia proper largely concerns architectural elements. Though some figurines are known and are of notable refinement, statuary and reliefs in ceramics seem to be more characteristic of provincial production.

a. Architectural Elements—Some pre-Angkorian, Angkorian, and post-Angkorian period buildings, primarily but not exclusively royal or upper-class habitation, were roofed with ceramic tiles. The tiles include undecorated flat tiles and convex and concave pieces fitted together; a sculpted eave tile was placed as a decoration at the end of each row of tiles. These pieces were produced in molds and can be earthenware or stoneware (the latter unglazed or glazed). The unglazed pieces are orange in color; the glazed pieces are creamy white to pale green. Spikes placed at the crest of roof vaults can also be made in ceramics. These spikes were fit into a cylinder, also made of ceramics, which was itself fitted into the roof vault. Architectural ceramics sometimes have human heads and anthropomorphic or zoomorphic features.

b. Figurines and Ritual Objects— Figurines, statuettes, or plaques can include human, hybrid (part-human, part-animal), and animal figures. These are typically small in size (around 10 cm.). Ritual objects found in Cambodia proper are limited primarily to pieces in the shape of a conch shell, used for pouring sacral water or as blowing horns.

2. Vessels

a. Lidded Containers—Examples include round lidded boxes with incised or sculpted decoration, bulbous vases with lids, and jars with conical multi-tiered lids. Lids themselves include conical shapes and convex lids with knobs.

b. Lenticular Pots—Pots of depressed globular form are commonly referred to as lenticular pots. The mouth of the vessel is closed with a stopper.

c. Animal-shaped Pots—The depressed globular form can take animal shapes, with applied animal head, tail, or other body parts that

can serve as handles. The animal-shaped pot is also found in other forms. Animal-shaped pots often contain remains of white lime, a substance used in betel nut chewing. Shapes include bulls, elephants, birds, horses, and other four-legged creatures.

d. Human-shaped Pots— Anthropomorphic vessels often have some applied and incised decoration representing human appendages, features, or clothing. The vessels are usually gourd-shaped bottles.

e. Bottles—This category includes a variety of vessels with raised mouths.

f. Vases—A variety of vases are grouped together under this general heading. Some are flat based and bulbous or conical. Others have pedestal feet. Some are characterized by their elongated necks. The "baluster vases," for which Khmer ceramics are particularly known, have pedestal feet, conical bodies, relatively long necks, and flared mouths.

g. Spouted pots—These are kendi vessels, usually in the "baluster vase" form, that have short pouring spouts attached to the shoulder. Some spouted pots also have ring handles on the opposite shoulder.

h. Large jars—Large barrel-shaped jars or vats have flat bases, wide mouths, short necks, and flattened everted rims. They are always iron glazed.

i. Bowls—Bowls with broad, flat bases and flaring walls that are either straight or slightly concave, ending in plain everted or incurving rims, usually have green or yellowish glaze, although some brown-glazed bowls are known. Some are decorated with incised lines just below the rim. Most have deep flanges above the base; some are plain. Small hemispherical cups on button bases bear brown glaze. Another form is the bowl on a pedestal foot.

D. Glass

Bronze and Iron Age glass beads are usually very small (1–2 mm. across) and come in a range of colors from blue, green, red, and white. Other artifacts made of glass include spiral earrings and triangular bangle bracelets. The bracelets are light to dark green or blue-green and translucent.

E. Bone

Bone (and sometimes ivory or horn) beads, bangles, pendants, and combs are found at Bronze and Iron Age sites.

F. Wood

Archaeological wooden objects include architectural materials, free standing statues, and decorative wood used for religious and domestic

purposes. The earliest wooden Buddhist images were produced during the pre-Angkorian period in the region of southern provinces, especially located in the Mekong delta, like the Angkor Borei site. Wooden archaeological materials date from 2500 B.C.–A.D. 1750. However, most architectural materials, wooden statues and decorative objects were found from the 9th century until A.D. 1750.

1. Architectural Elements

Includes wooden beams and ceiling panels. Ceiling panels are often decorated with floral motifs.

2. Human and Hybrid (Part-Human, Part-Animal) Figures

Examples include free-standing sculptures including Buddhist sculptures, human and hybrid (half-human, half-animal) figures. Free standing sculpture was often on a rectangular, round, or square pedestal base. Bases may or may not have decoration.

3. Animal Figures

Examples include birds, bulls, elephants, lions, and mythical animals.

4. Domestic Objects

Includes wooden tools and implements used for farming and fishing, and weapons.

II. Ethnological Material

Restricted ethnological material from Cambodia includes the categories listed below. The following list is representative only.

A. Architectural Materials

1. Wooden Architectural Materials

Includes carved wooden architectural elements from monasteries and pagodas, dating from A.D. 1400 through 1891. Architectural pieces (some of which may be lacquered) include apexes; ceilings; columns; decorative balusters; doors; finials; panel paintings; pediments and pediment facia boards; pilasters; pillars; roofs, roof supports, and eaves; wall plaques; wall bars; and windows. Some carved architectural material may be decorated with animal, animal/human hybrid, or other mythical figures.

2. Stone Architectural Materials

Simas are often decorated and carved stone pillars placed around the vihara of Buddhist monasteries at each of the eight compass directions marking the place where monks performed rituals. Sima forms are typically a decorative pillar with a conical top carved in various shapes. Some sima forms are spherical. The tops of simas are often gently peaked and may have Buddhist iconography. Decorative

carved motifs typically include animals, Buddha's life stories, worshipers, and/or vegetal motifs. Simas that date from A.D. 1400 through 1891 are included.

B. Manuscripts

Includes handwritten manuscripts on paper or palm leaf dating from A.D. 1400 through 1891. May be bound or in single sheets or leaves.

1. Palm Leaf Manuscripts

Palm leaf manuscripts can be in single leaves or bound into volumes. The scripts are typically Khmer Mul script or Pali-Khmer. The text on palm leaf manuscripts tends to be incised and blackened. Palm leaf manuscripts typically discuss Buddhist scripture, sermons, legal writings, classical literary texts, secular topics, and poetry. Includes materials used to bind palm leaf manuscripts.

2. Paper Manuscripts

Paper manuscripts can be single sheets or in a folded book form. Paper was usually crafted from mulberry bark. Paper can be in a natural cream color with text written in black ink, or it can be blackened, and text written either with white chalk, a yellow gamboge ink or gold ink. Two main styles of Khmer script found on paper manuscripts include aksar chrieng (slanted script) and aksar mul (round script). Paper manuscripts typically discuss Buddhist scripture, sermons, prophesies, and medicine.

C. Religious Objects

1. Wooden Statues and Statuettes

Includes statues of adorned and unadorned Buddhas dating from A.D. 1400 through 1891. May be seated or standing. Bases may be carved, often with a lotus design. Wooden statues may be decorated with red lacquer, black lacquer, gold leaf, paint, and/or incrustations of glass. Standing statues typically range from 80 cm. to three meters in height. Smaller statuettes typically range from 50 to 70 cm. in height.

2. Metal Statues and Statuettes

Includes statues of adorned and unadorned Buddhas dating from A.D. 1400 through 1891. May be seated or standing. Bases may be carved, often with a lotus design. Heights vary, typically between 14 to 40 cm. Often crafted in bronze or silver.

3. Religious Objects

Includes both symbolic and anthropomorphic objects, bells, chariot fixtures, percussion instruments including varying sizes of gongs and cymbals, ritual candle holders (popil), and betel containers made of bronze dating from A.D. 1400 through 1891.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, the table in paragraph (a) is amended by revising the entry for Cambodia to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
	* * * * * * *	
Cambodia	Archaeological material of Cambodia ranging from approximately 2,500 B.C. to A.D. 1750, and ethnological material of Cambodia ranging from approximately A.D. 1400 to 1891.	CBP Dec. 23–11
	* * * * * * *	

* * * * *

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

Approved:

THOMAS C. WEST, JR.,
Deputy Assistant Secretary of the Treasury for Tax Policy.

[Published in the Federal Register, August 30, 2023 (88 FR 59933)]

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ETHYLENE GLYCOL BIS M-TOLY

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of ethylene glycol bis m-toly.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of ethylene glycol bis m-toly under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 19, on May 17, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 3, 2023.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0041.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 19, on May 17, 2023, proposing to revoke New York Ruling Letter N087996 pertaining to the tariff classification of ethylene glycol bis m-toly. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter (NY) N087996, dated January 11, 2010, CBP classified ethylene glycol bis m-toly in heading 2909, HTSUS, specifically in subheading 2909.49.10, HTSUS, which provides for "Ethers, ether-alcohols, ether-phenols, ether-alcohol- phenols, alcohol peroxides, ether peroxides, acetal and hemiacetal peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic ethers and their halogenated, sulfonated, nitrated or nitrosated derivatives: Other; Other: Other: Products described in additional U.S. note 3 to section VI." CBP has reviewed NY N087996 and has determined the ruling letter to be in error. It is now CBP's position that ethylene glycol bis m-toly is properly classified, in heading 2909, HTSUS, specifically in subheading 2909.30.40, HTSUS, which provides for "Ethers, ether-alcohols, ether-phenols, ether-alcohol- phenols, alcohol peroxides, ether peroxides, acetal and hemiacetal peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic ethers and their halogenated, sulfonated, nitrated or nitrosated derivatives: Other: Products described in additional U.S. note 3 to section VI."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N087996 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H311551, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §

1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H311551
September 15, 2023
OT:RR:CTF:CPMMA H311551 KSG
CATEGORY: Classification
TARIFF NO.: 2909.30.40

CHRISTOPHER COLFORD
MITSUI & CO. (USA), INC.
2009 PARK AVENUE
NEW YORK, NY 10166

RE: Revocation of NY N087996; tariff classification of Ethylene glycol bis (m-toly ether) CAS No. 54914–85–1

DEAR MR. COLFORD:

This letter is in reference to New York Ruling Letter (NY) N087996, dated January 11, 2010, regarding the tariff classification of Ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 under the Harmonized Tariff Schedule of the United States (HTSUS).

In NY N087996, Ethylene glycol bis (m-toly ether)CAS No. 54914–85–1 was classified in subheading 2909.49.1000, HTSUS.

We have reviewed NY N087996 and determined that the reasoning is in error. Accordingly, for the reasons set forth below, CBP is revoking NY N087996.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY N087996 was published on May 17, 2023, in Volume 57, Number 19 of the Customs Bulletin. No comments were received in response to the notice.

FACTS:

In NY N087996, Ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 was classified as an aromatic ether- alcohol.

ISSUE:

Whether Ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 described above is properly classified in subheading 2909.30.40, HTSUS, or in subheading 2909.49.1000, HTSUS.

LAW AND ANALYSIS:

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

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply unless the context otherwise requires.

The HTSUS subheadings under consideration are the following:

2909	Ethers, ether-alcohols, ether-phenols, ether-alcohol- phenols, alcohol peroxides, ether peroxides, acetal and hemiacetal peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives:
2909.30	Aromatic ethers and their halogenated, sulfonated, nitrated or nitrosated derivatives:
2909.30.40	Other:
	Products described in additional U.S. note 3 to section VI.
2909.49	Other:
2909.49.10	Other:
	Products described in additional U.S. note 3 to section V

Ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 was classified in subheading 2909.49 which provides for ether-alcohols. Upon review and consultation with the Newark CBP Laboratory, it has been determined that there in not an intact alcohol function group present in the chemical structure. It is an aromatic ether, not an aromatic ether-alcohol. Accordingly, it is properly classified in subheading 2909.30.40, HTSUS.

HOLDING:

By application of GRI's 1 and 6, Ethylene glycol bis (m-toly ether), CAS No. 54914–85–1 is classified in subheading 2909.30.40, HTSUS. The column one, general rate of duty is 5.5 percent *ad valorum*.

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

EFFECT ON OTHER RULINGS:

NY N087996 is revoked in accordance with the above analysis.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: NIS John Bobel and NIS Evan Thomas, NCSD

U.S. Court of International Trade

Slip Op. 23–132

SHANGHAI TAINAI BEARING CO., LTD. AND C&U AMERICAS, LLC, Plaintiffs, and PRECISION COMPONENTS, INC., XINCHANG NEWSUN XINTIANLONG PRECISION BEARING MANUFACTURING CO., LTD, and HEBEI XINTAI BEARING FORGING CO., LTD, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:22-cv-00038

[Granting in part and denying in part Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: September 14, 2023

David Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiffs and Consolidated Plaintiffs.

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

OPINION

Vaden, Judge:

Plaintiffs Shanghai Tainai Bearing Co., Ltd. and C&U Americas, LLC filed suit objecting to Commerce's resolution of the thirty-third administrative review of the antidumping order on tapered roller bearings from China. Joined by several Consolidated Plaintiffs, Shanghai Tainai brings multiple claims of error against Commerce's final determination. They find moderate success. Commerce failed to consider the necessary factors established by the Federal Circuit before applying a partial adverse inference to Shanghai Tainai to punish it for the non-compliance of its suppliers in the underlying investigation. Commerce also failed to justify its decision to deduct certain surcharges Shanghai Tainai included as extra profit on top of the Section 301 duties when calculating the U.S. price. Plaintiffs' winning streak stops there, however, as the Court rejects their remaining claims, including the claim that the Section 301 duties themselves should have been deducted from the U.S. price. Consequently,

the Motions for Judgment on the Agency Record shall be **GRANTED IN PART AND DENIED IN PART**.

BACKGROUND

Shanghai Tainai is a Chinese manufacturer of tapered roller bearings (TRBs), a type of precision bearing that facilitates the rotational movement of an axle.[1] Tapered roller bearings are made out of four basic components: rollers, cages, cups, and cones. Rollers are small steel cylinders that are held together in a circular housing called a cage. The caged rollers are inserted between two steel rings, allowing them to move. The inner ring is called the cone, and the outer ring is called the cup. The antidumping order on tapered roller bearings from China (the Order) has been in place since June 15, 1987, and covers

> . . . tapered roller bearings and parts thereof, finished and unfinished, from China; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use.

Decision Memorandum for the Final Results of the 2019–2020 Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China (Decision Memo) at 2–3 (Jan. 4, 2022), J.A. 1,004–05, ECF No. 43. Shanghai Tainai's Motion for Judgment on the Agency Record challenges the final results of the thirty-third administrative review of the Order, which covers imports of tapered roller bearings from China during the period of June 1, 2019 through May 31, 2020 (the Period of Review). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 47,731 (Dep't of Com. Aug. 6, 2020).

I. The Disputed Administrative Review

On August 6, 2020, Commerce initiated the present administrative review of the Order. *See id.* Commerce selected Shanghai Tainai as the sole mandatory respondent because it was the largest exporter of tapered roller bearings from China during the Period of Review. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished,*

[1] Shanghai Tainai has brought its Motion together with another entity, C&U Americas LLC. In earlier proceedings before this Court, Shanghai Tainai failed to explain the relationship between itself and C&U Americas. *See Shanghai Tainai Bearing Co., Ltd. v. United States*, 582 F. Supp. 3d 1299, 1308 (CIT 2022) (referring to the "recurring mystery" of the relationship between Shanghai Tainai and C&U Americas and noting that Plaintiffs' counsel declined the Court's request to shed light on it.). The Court therefore refers generally to Plaintiffs as Shanghai Tainai.

from the People's Republic of China, 86 Fed. Reg. 36,099 (Dep't of Com. July 8, 2021) and accompanying Preliminary Decision Memorandum at 3, J.A. at 13,073, ECF No. 43. Commerce received questionnaire responses from Shanghai Tainai and subsequently published its Preliminary Results on July 8, 2021. *See* 86 Fed. Reg. 36,099 (Dep't of Com. July 8, 2021).

In its Preliminary Results, Commerce took issue with a number of Shanghai Tainai's questionnaire responses. Commerce noted that Shanghai Tainai had not provided "bills of materials" from its suppliers that could substantiate Shanghai Tainai's reported "factors of production." Preliminary Decision Memorandum at 15, J.A. at 13,085, ECF No. 43. 19 U.S.C. § 1677b(c)(1)(B) requires that Commerce determine the normal value of subject merchandise from nonmarket economies such as China "on the basis of the value of the factors of production utilized in producing the merchandise" and that such value "be based on the best available information regarding the values of such factors in a market economy country . . . considered to be appropriate by [Commerce]." Commerce therefore requires that Chinese respondents such as Shanghai Tainai provide factors of production data that describe the inputs used to manufacture the merchandise as well as the price of each input in a surrogate market-economy country.[2] *See* Response to Section D of the Department's Initial Questionnaire by Shanghai Tainai Bearing Co., Ltd (Section D Questionnaire Response) at D-1, J.A. at 81,156, ECF No. 44. In the current review, Shanghai Tainai reported the following inputs as factors of production: chrome steel, cold-rolled steel, turned cups and cones, rollers, cages, and anti-rust oil. *Id.* at D-15, J.A. at 81,170. Commerce chose Romania as the surrogate country to value these inputs.[3] However, when Commerce requested that Shanghai Tainai substantiate its reported factors of production by submitting bills of materials from its input suppliers, Shanghai Tainai responded that its affiliated suppliers "do not maintain production slips" and that it "'had no way of knowing the direct input bills of materials for the unaffiliated suppliers.'" Preliminary Decision Memorandum at 15, J.A. at 13,085 (quoting Response to the Department's A, C and D Supplemental Questionnaire by Shanghai Tainai Bearing Co., Ltd. at 27, J.A. at 82,201, ECF No. 44). Commerce further noted that Shanghai Tainai did not report all the necessary factors of production data

[2] Shanghai Tainai also included the labor and energy costs of its affiliate suppliers in its factors of production database. Section D Questionnaire Response at D-15, J.A. at 81,170, ECF No. 44.

[3] Shanghai Tainai does not challenge the selection of Romania. Oral Arg. Tr. 41:11–12, ECF No. 52 (Mr. Craven: "We do not object to the use of Romania.").

for its products. For example, it omitted a factor of production value for "rollers" despite a product description indicating that rollers should be included as a cost. *Id.* at 15–16, J.A. at 13,085–86.

For its Preliminary Results, Commerce used Shanghai Tainai's reported factors of production as "facts available," averaged this data to assign a value to missing fields, calculated an estimated dumping margin of 36.75 percent, and issued additional supplemental questionnaires to both Shanghai Tainai and its unaffiliated suppliers that sought to substantiate the factors of production data. *Id.*; 86 Fed. Reg. at 36,100. The unaffiliated suppliers did not respond to Commerce's supplemental questionnaires sent directly to them. *See* Decision Memo at 7, J.A. at 1,009, ECF No. 43. Shanghai Tainai maintained that, despite its requests, its suppliers remained unable to provide the factors of production data. *See* Response to the Department's Second Supplemental Questionnaire by Shanghai Tainai Bearing Co., Ltd. (Second Supplemental Questionnaire Response) at 6, J.A. at 84,320, ECF No. 44. Shanghai Tainai attached letters it had sent to suppliers requesting bills of materials for inputs it had purchased. *Id.* at Ex. SSD-2, J.A. at 84,406–16. Shanghai Tainai also attached a single response email from a supplier, who declined to provide the information. *Id.* at J.A. 84,415. Shanghai Tainai claimed that, because it was not affiliated with these suppliers, "Tainai has no power to compel their assistance." *Id.* at J.A. 84,320.

Along with its response to the Second Supplemental Questionnaire, Shanghai Tainai submitted a case brief that challenged numerous other aspects of Commerce's Preliminary Results. *See* Administrative Case Brief of Shanghai Tainai Bearing Co., Ltd., Sept. 10, 2021 (Shanghai Tainai Case Brief), J.A. at 84,449, ECF No. 44. Shanghai Tainai first objected to Commerce's use of financial statements from Timken Romania SA, a bearings manufacturer, as the basis for calculating the surrogate values of Shanghai Tainai's factors of production. *Id.* at 2, J.A. at 84,450. It claimed that Timken Romania's complex manufacturing operations and use of related-party transactions made it an inappropriate comparator and that Commerce should have instead used the financial data of alternative surrogate value candidates URB Rulmenti Suceava or Compa S.A. Sibiu. *Id.* at 4–5, J.A. at 84,452–53. Shanghai Tainai next objected to what it termed "double counting" in the valuation of rollers, a factor of production in its tapered roller bearings. *Id.* at 7, J.A. at 84,455. It argued that, although it purchased finished rollers, Commerce refused to value them using the purchase price. Instead, Commerce used a surrogate value that "included the cost for the materials as well as the cost of the processing to convert the materials into rollers

and the profit for the producer of the rollers." *Id.* Shanghai Tainai also claimed that Commerce's dumping margin defied "commercial and economic reality," citing to *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, 113 F. Supp. 3d 1332 (CIT 2015) for the proposition that such margins must be discarded. *Id.* at 11, J.A. at 84,459. Plaintiff asserted that its significant operating profit would be impossible if it were dumping at the margin Commerce calculated in the Preliminary Results. *Id.*

Shanghai Tainai further alleged that Commerce improperly deducted Section 301 duties from the U.S. price of its tapered roller bearings, resulting in a higher dumping margin. *Id.* at 8, J.A. at 84,456. It argued that, although 19 U.S.C. § 1677a(c)(2)(A) requires the deduction of "United States import duties," the statute should be interpreted to refer to ordinary customs duties and not those duties imposed under Section 301, which are temporary "special" duties and therefore properly included in the U.S. price. *Id.* at 9, J.A. at 84,457. Shanghai Tainai also claimed that Commerce improperly capped the U.S. price by deducting customer payments denominated as "additional revenue for 301" from the price, even where Shanghai Tainai charged amounts that exceeded the amount of Section 301 duties. *Id.* at 10, J.A. at 84,458. This tended to increase Shanghai Tainai's dumping margin by reducing the U.S. price. Finally, Shanghai Tainai faulted Commerce for declining to grant a "by-product offset" for scrap metal that it sold, which further increased its dumping margin. *Id*. at 10–11, J.A. at 84,458–59.

On January 10, 2022, Commerce published its Final Results and accompanying Decision Memo. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results and Partial Recission of Review; 2019–2020* (Final Results), 87 Fed. Reg. 1,120 (Dep't Com. Jan. 10, 2022); Decision Memo, J.A. at 1,003, ECF No. 43. It decided to apply partial facts available with an adverse inference to fill the gaps in Shanghai Tainai's missing factors of production data. *See* Decision Memo at 7, J.A. at 1,009, ECF No. 43. When an interested party fails to act to the best of its ability to comply with a request for information from Commerce, Commerce may use an inference adverse to that party in selecting the information that will fill the gap in the record. *See* 19 U.S.C. § 1677e(b). Here, Commerce did not find that Shanghai Tainai had failed to cooperate to the best of its ability. Instead, it based its decision to apply an adverse inference on the lack of cooperation from Shanghai Tainai's suppliers. *See* Decision Memo at 8, J.A. at 1,010, ECF No. 43 ("[W]e find that Tainai has cooperated with Commerce's

requests for information, but its missing [factors of production] information from unaffiliated suppliers necessitates the use of partial AFA[.]"[4]). To do this, Commerce relied on *Mueller Comercial De Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227 (Fed. Cir. 2014). *See id*. at 12–13, J.A. at 1,014–15. In *Mueller*, the Federal Circuit affirmed Commerce's practice of using facts available with an adverse inference to calculate a respondent's dumping margin in situations where the respondent cooperated but the respondent's supplier did not. *See Mueller*, 753 F.3d at 1233. The Court described this practice as resting on policy considerations; namely, that doing so may cause the respondent to induce a supplier's compliance by refusing to do business with the supplier unless it cooperates with Commerce's requests for information. This may deter the supplier's noncooperation. *See id.*

Commerce found that Shanghai Tainai "could potentially induce compliance on the part of its unaffiliated suppliers." Decision Memo at 13, J.A. at 1,015, ECF No. 43. It wrote:

> Based on Tainai's large volume of entries during the POR[5] and the quantity of TRBs that it purchased from suppliers, it is reasonable to conclude that Tainai is an important customer to its Chinese TRB suppliers, which means that Tainai is in a position to exercise its leverage over its TRB suppliers to induce them to cooperate. Thus, we find that it is reasonable to conclude that Tainai has some business mechanism to induce its suppliers to cooperate. Furthermore, Tainai may choose not to do business with these suppliers in the future due to their lack of cooperation and instead select suppliers . . . that [are] willing to commit to participation in an [antidumping] review. By applying AFA with respect to the missing data, Commerce is relying on the statutory means that it has available to induce the cooperation of these parties so that Commerce has the information necessary to calculate accurate dumping margins.

Id. at 13–14, J.A. at 1,015–16. Commerce therefore applied partial facts available with an adverse inference for the missing factors of production data. It summarized the methodology it used to do so:

> Here, the missing data are the inputs for [turned cups and cones, rollers, or cages] that are then assembled by Tainai into finished TRBs. Accordingly, as partial AFA, we are applying the highest [factors of production] usage rate reported by Tainai's

[4] Adverse facts available, *i.e.*, the acronym-happy trade bar's way of saying Commerce drew an adverse inference when choosing among the facts available for selection.

[5] Period of review

> affiliated suppliers for turned cups and cones, tapered rollers, and cages within each product type sourced solely from the unaffiliated suppliers for each associated CONNUM.[6]

Id. at 13, J.A. at 1,015. Commerce emphasized that (1) it "calibrated the remedy so that only purchases from uncooperative producers impact Tainai's weighted-average dumping margin," and (2) its methodology "uses Tainai's submitted [factors of production] data in determining the normal value of each CONNUM[.]" *Id.* It concluded that this manner of applying adverse facts available was "consistent with the overriding purpose of the Act of fairness and accuracy" as well as "the purpose of applying AFA, which is to deter noncooperation without being punitive." *Id.* This methodology yielded a dumping margin of 538.79 percent. Final Results, 87 Fed. Reg. at 1,121. By way of comparison, the China-wide entity rate that Commerce assigned to companies that did not request a separate rate was 92.84 percent. *Id.*

Commerce's Final Results also rejected the other arguments Shanghai Tainai made in its case brief. Commerce first found that it was appropriate to use Timken Romania's financial statements to value Shanghai Tainai's factors of production because neither alternative entity met regulatory criteria: Rulmenti operated at a loss, and Compa S.A. Sibiu did not produce comparable merchandise. Decision Memo at 18, J.A. at 1,020, ECF No. 43. In contrast, Timken Romania's financial statements were usable because (1) Timken Romania produced tapered roller bearings and (2) its financial statements were accompanied by an auditor's report that identified no irregularities. *Id.* at 19, J.A. at 1,021.

Commerce next denied that it double counted the value of Shanghai Tainai's purchases of finished rollers by using a surrogate value rather than the purchase price. *Id.* at 20, J.A. at 1,022. Commerce explained that Shanghai Tainai purchased these rollers from nonmarket economy suppliers, and 19 U.S.C. § 1677b(c)(1) combined with 19 C.F.R. § 351.408 require Commerce to apply surrogate values to all such factors of production. *Id.* at 21, J.A. at 1,023. Commerce also rejected Shanghai Tainai's argument that its dumping margin

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[6] "CONNUM" is an acronym for "control number" and denotes a distinct tapered roller bearing product. To ensure that Commerce is comparing like products in the home and U.S. markets, it asks respondents to sort merchandise according to key differentiating categories — in this review, by product description, outer diameter, inner diameter, and weight. For example, cup-50–25–0.30 would be a distinct product, or CONNUM, with a "cup" design, an outer diameter of 50, an inner diameter of 25, and a weight of 0.30 kilograms. *See* Request For Information at Section C, J.A. at 1,448–49, ECF No. 43.

defied commercial and economic reality. *Id.* at 28, J.A. at 1,030. Commerce explained that "[t]he fact that the [factor of production] consumption rates we are using as partial AFA are the highest such rates does not *per se* make them unrealistic or unreasonable. The [factor of production] consumption rates are Tainai's own rates and, therefore, commercial, and nothing on the record indicates they are aberrational." *Id.* Commerce denied the precedential authority of *Baoding Mantong* and pointed out that, in *Nan Ya Plastics Corp. Ltd. v. United States*, 810 F.3d 1333 (Fed. Cir. 2016), the Federal Circuit held that Commerce's determination is accurate "'if it is correct as a mathematical and factual matter,'" and reflects commercial reality if "'it is consistent with the method provided in the statute.'" *Id.* at 29, J.A. at 1,031 (quoting *Nan Ya Plastics*, 810 F.3d at 1344). Therefore, Commerce "'need not examine the economic or commercial reality of the parties, specifically, or of the industry more generally, in some broader sense.'" *Id.*

Commerce next disagreed that Section 301 duties were improperly deducted from U.S. price and cited to prior decisions that treated these duties as "U.S. import duties," which are required by statute to be deducted. *Id.* at 22, J.A. at 1,024. Commerce also continued to find that amounts Shanghai Tainai charged customers to offset the Section 301 duties must be capped at the actual amount of the Section 301 duties and that additional amounts could not be included in the U.S. price of the merchandise. *Id.* at 22–23, J.A. at 1,024–25. Commerce concluded by finding that it correctly denied Shanghai Tainai's claim for a by-product offset because Plaintiff had failed to provide production records that could substantiate the amount of scrap generated from the production of subject merchandise during the period of review. *Id.* at 26, J.A. at 1,028.

After receiving the Final Results, which contained a far larger dumping margin than Commerce had found in the Preliminary Results, Shanghai Tainai submitted a ministerial error allegation. *See* Ministerial Error Allegations of Shanghai Tainai Bearing Co., Ltd. (Ministerial Error Allegations), J.A. at 84,881, ECF No. 44. Shanghai Tainai's allegation focused on Commerce's methodology for choosing partial facts available and alleged that it did not properly implement its decision to "rel[y] on Tainai's highest reported usage rate for each of the [factors of production] on a product-specific rate for each control number[.]" *Id.* at 3, J.A. at 84,883. Rather than select the factor of production on a product-specific basis, Commerce allegedly selected the factor of production on a more general component-level basis, leading to distortions. For example, Shanghai Tainai alleged that Commerce took factors of production usage rates from much heavier,

more expensive bearings and applied them to lighter, cheaper bearings that shared nothing in common besides being "the same general type of component" but which "are simply not the same product." *Id.* at 4–5, J.A. at 84,884–85. Shanghai Tainai further alleged that the absence of factors of production data for the production of finished inputs — such as turned cups and cones, rollers, and cages — was "ultimately irrelevant" because Shanghai Tainai purchased these inputs in a finished state and knew their usage rates. *Id.* at 6–7, J.A. at 84,886–87.

On February 10, 2022, Commerce published its response to Shanghai Tainai's ministerial error allegations. *See 2019–2020 Antidumping Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Allegation of Ministerial Errors in the Final Results* (Ministerial Error Response), J.A. at 13,467, ECF No. 43. Commerce rejected both of Shanghai Tainai's allegations, describing them as falling outside of 19 CFR § 351.224(f)'s definition of a ministerial error as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error." *Id.* at 3–5, J.A. at 13,469–71. Commerce wrote, "While we were less than exact in our phrasing, the language in our memoranda and programing indicates our intention to apply the AFA on a product description basis as that product was reported in the CONNUM." *Id.* It described its manner of selecting facts otherwise available with an adverse inference and applying surrogate values to finished inputs as reflecting intentional methodological choices rather than an unintentional error. *Id*.

II. The Present Dispute

On February 24, 2022, Shanghai Tainai filed its Complaint alleging that Commerce's Final Results were unsupported by substantial evidence and arbitrary and capricious. *See* Complaint, ECF No. 7. In its Motion for Judgment on the Agency Record, (Pls.' Br.), Shanghai Tainai claimed the same defects that it had alleged during the administrative process: (1) Commerce improperly applied facts available with an adverse inference to a cooperative entity; (2) the facts that Commerce selected were unreasonable and distortive; (3) the dumping margin that Commerce calculated defied commercial and economic reality; (4) Commerce erred in selecting the financial statements of Timken Romania as the source for the surrogate values of Shanghai Tainai's factors of production; (5) Commerce improperly valued finished inputs purchased by Shanghai Tainai using surrogate values; (6) Commerce improperly deducted Section 301 duties from

the U.S. price of the subject merchandise; (7) Commerce improperly capped amounts that Shanghai Tainai charged its customers and denominated as "additional revenue for 301"; and (8) Commerce should have granted Shanghai Tainai a by-product offset. Pls.' Br. at 13, 23, 24, 31, 35, 42, 44, 46, 52, ECF No. 32.

Shanghai Tainai's Motion was accompanied by a separate Motion from Chinese entities that were not selected for individual review but received the same rate as Shanghai Tainai. *See* Consolidated Plaintiffs' Motion for Judgment on the Agency Record, ECF No. 34; *see also* 19 U.S.C. § 1673d(c)(5)(A) (providing that the all-others rate shall be an average of the dumping margin assigned to entities selected for individual review). These Consolidated Plaintiffs (Precision Components, Inc., Xinchang Newsun Xintianlong Precision Bearing Manufacturing Co., Ltd. and Hebei Xintai Bearing Forging Co., Ltd.) moved for judgment on the agency record with an accompanying brief whose sole claim was that any new rate resulting from a remand of Commerce's Final Results should also be applied to the Consolidated Plaintiffs. *See* Consolidated Plaintiffs' Motion for Judgment on the Agency Record at 10, ECF No. 34.

The Government then filed its Response to Plaintiffs' Motion for Judgment on the Agency Record (Def.'s Br.), ECF No. 37, rejecting Shanghai Tainai's arguments. *See* Def.'s Br., ECF No. 37. The Government described its decision to apply facts available with an adverse inference as reasonable. *Id*. at 9. 19 U.S.C. § 1677e(b)(1) provides for the application of facts available with an adverse inference whenever an "interested party" has failed to cooperate to the best of its ability with a request for information. The Government pointed to Commerce's determination that Shanghai Tainai's unaffiliated suppliers were interested parties in their own right because they were "producers of subject merchandise." *Id*. at 10 (citing the scope of the Order as including "TRBs and parts thereof, finished and unfinished."). Because Commerce had issued questionnaires seeking factors of production data from both Shanghai Tainai and its unaffiliated suppliers, the suppliers' failure to respond meant that "the statute permitted Commerce to 'use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available,' or, fill the gap in the data with information that may result in a higher dumping margin in order to induce future cooperation with Commerce's requests." *Id.* at 11 (quoting 19 U.S.C. § 1677e(b)(1)(A)). The Government also argued that Shanghai Tainai's efforts to collect this data from its suppliers were lacking, noting that Shanghai Tainai only sought the information after the Preliminary Results and could only demonstrate a single round of correspondence

with its suppliers. *Id.* at 15. The Government noted that Shanghai Tainai had previously participated in a 2012–13 new shipper review under the Order; therefore, it and its suppliers knew, or should have known, that "[t]his is *fundamental* data that any producer or importer should be prepared to provide." *Id.* at 13 (emphasis in original).

The Government also rejected Shanghai Tainai's other claims. It described Commerce's choice of facts available to fill the gaps in the record as reasonable because Commerce used "reported costs for similar inputs from Tainai's affiliated producers," did so only for "components that were 100% provided by unaffiliated parties," and determined that choosing facts with an adverse inference was "necessary to induce future cooperation from Tainai's unaffiliated suppliers." *Id.* at 18. The Government denied that Commerce's determination needed to reflect "commercial reality" as an independent standard, citing Federal Circuit precedent. *Id.* at 23. The Government next argued that the claims originating in Shanghai Tainai's ministerial error allegations — namely, that Commerce used factors of production data from highly dissimilar products and that missing factors of production data for finished inputs it purchased were irrelevant — were not ministerial errors and were adequately addressed by Commerce's Ministerial Error Response. *Id.* at 25–27. The Government then claimed that Commerce reasonably determined that Timken Romania's financial statements were the best available information for calculating surrogate value, pointing to Commerce's statutory discretion to make such a determination and to various defects in alternative financial statements that rendered them unusable. *Id.* at 30–31. Regarding the deductibility of Section 301 duties, the Government cited Commerce's consistent practice of deducting them from U.S. price as "U.S. import duties" and argued that Commerce reasonably capped amounts that Shanghai Tainai charged customers and denominated as "additional revenue for 301" by limiting such amounts to the actual amount of the Section 301 duties. *Id.* at 34, 36. Finally, the Government described Commerce's denial of Shanghai Tainai's request for a by-product offset as a reasonable response to Shanghai Tainai's failure to provide evidence of the amount of scrap it produced during the period of review. *Id.* at 38–39.

On March 23, 2023, the Court held oral argument. *See* Oral Arg. Tr., ECF No. 52. There, the Court ordered supplemental briefing on Shanghai Tainai's two claims related to Section 301 duties. First, the Court asked the parties to consider the deductibility of Section 301 duties from U.S. price in light of the Federal Circuit's decision in *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25 (Fed. Cir. 2023), which upheld this Court's decision that

Section 232 duties are deductible as "U.S. import duties." Second, the Court ordered supplemental briefing on the question of Commerce's capping of amounts charged to customers invoiced as "additional revenue for 301" after Plaintiff clarified the nature of these charges at oral argument. *See* Oral Arg. Tr. 40:13–18, ECF No. 52; *see also* Defendant's Response to the Court's March 23, 2023 Order (Def.'s Supp. Br.), ECF No. 53; Plaintiffs' Response to the Court's March 23, 2023 Order (Pls.' Supp. Br.), ECF No. 54. With the record now complete, the Court decides the parties' claims.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiffs' challenge to the Final Results under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final determinations in antidumping reviews. The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). If they are unsupported by substantial evidence or not in accordance with the law, 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). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

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

Commerce may apply facts otherwise available with an adverse inference against a cooperating respondent on the theory that doing so will incentivize the respondent's non-cooperative suppliers to provide information sought during an antidumping review. However, when it does so, Commerce must satisfy specific requirements that the Federal Circuit has identified — namely, Commerce must make a case-specific determination that the respondent can influence its suppliers' decision to cooperate, and Commerce must take into account the predominant interest in accuracy and explain any deterrence-based rationale that is used against the cooperating party. The Court finds that Commerce failed to meet this standard and remands Commerce's Final Results for additional explanation consistent with those requirements. In doing so, the Court does not accept Shanghai Tainai's claim that Commerce calculated a dumping margin that had no basis in commercial reality. The Court also rejects Plaintiffs' argument that Commerce improperly selected the financial statements of Timken Romania when calculating surrogate values. That entity's information was the best available to Commerce.

The Court agrees with Shanghai Tainai that Commerce did not sufficiently explain its decision to cap price increases that Shanghai Tainai masked by invoicing its customers for Section 301 duty payments. The Court takes issue with Commerce's attribution of these amounts to the sale of services, rather than merchandise, and additionally rejects its unacceptably narrow interpretation of the regulation defining price adjustments. However, Commerce was correct to deduct the actual Section 301 duty payments from U.S. price, as doing otherwise would ignore the clear textual command in the presidential order enacting the duties that they must be in addition to existing duties. Finally, Commerce's rejection of Shanghai Tainai's request for a by-product offset was proper because Plaintiff conceded that it failed to record the quantity of by-product it produced during the period of review.

II. Application of Partial Facts Available with an Adverse Inference

When foreign merchandise is sold in the United States at less than its fair value — thereby injuring a domestic industry — the law allows Commerce to impose antidumping duties on the merchandise. Antidumping duties equal the amount by which the foreign market value, known as the "normal value," of the merchandise exceeds the

U.S. price of the merchandise. 19 U.S.C. § 1677b(a). When Commerce is missing data necessary to calculate the normal value of merchandise subject to an antidumping investigation, the antidumping statute provides a two-part process to fill the gap. *See* 19 U.S.C. § 1677e(a). The statute enables Commerce to use "facts otherwise available" in place of the missing information if:

(1) Necessary information is not available on the record, or

(2) An interested party or any other person —

(A) Withholds information that has been requested by [Commerce],

(B) Fails to provide such information by the deadlines for submission of the information or in the form and manner requested, . . .

(C) Significantly impedes a proceeding under this subtitle, or

(D) Provides such information but the information cannot be verified[.]

Separately, 19 U.S.C. § 1677e(b) permits those facts otherwise available to be chosen with an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." Although § 1677e(a) and § 1677e(b) are often collapsed into "adverse facts available" or "AFA," the two statutory processes require distinct analyses rather than the single analysis implied by the term "AFA." Commerce first must determine that it is missing necessary information; and, if it wishes to fill the resulting gap with facts that reflect an adverse inference against an interested party, Commerce must secondarily determine that the party has failed to cooperate by not acting to the best of its ability. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011).

Here, Commerce chose an unorthodox path to justify its application of facts otherwise available with an adverse inference to Shanghai Tainai. After first determining in its Preliminary Results that Shanghai Tainai had failed to provide bills of materials for its factors of production, Commerce notified Shanghai Tainai of the deficiency and used Shanghai Tainai's reported factors of production information as facts otherwise available — without an adverse inference — to fill the gap in the record. *See* Decision Memo at 10, J.A. at 1,012, ECF No. 43. Commerce then sent a supplemental questionnaire to both Shanghai Tainai and its unaffiliated suppliers, seeking the missing information. Shanghai Tainai reported to Commerce its fruitless attempts to elicit the information from its suppliers; meanwhile, the suppliers

ignored Commerce's questionnaire. *See id.* at 6–7, J.A. at 1,008–09; *see also* Second Supplemental Questionnaire Response at Ex. SSD-2, J.A. at 84,406–16, ECF No. 44. Commerce therefore concluded in its Final Results that, although "Tainai has been cooperative throughout this review . . . its suppliers have not." Decision Memo at 7, J.A. at 1,009, ECF No. 43. Commerce's ultimate decision to apply facts otherwise available with an adverse inference against Shanghai Tainai's missing factors of production data was therefore *not* grounded in Plaintiff's failure to "act to the best of its ability to comply with a request for information," as § 1677e(b) would seem to require. Rather, it was based on the *suppliers*' failure to cooperate. Commerce found that "Tainai's unaffiliated TRB component suppliers are interested parties within the meaning of [19 U.S.C. § 1677(9)] because they are producers of subject merchandise (*i.e.*, all TRBs and parts thereof, finished and unfinished, from China are subject merchandise) and they failed to cooperate by not providing their [factors of production] data, either through Tainai or directly to Commerce." *Id.* at 12, J.A. at 1,014. Commerce therefore determined that, "consistent with [§ 1677e(b)], which states that Commerce may apply AFA when an interested party has failed to cooperate by not acting to the best of its ability in responding to Commerce's requests for information, we find the use of partial AFA with respect to the uncooperative producers to be appropriate." *Id.*

The legal standard that Commerce must meet in order to apply facts available with an adverse inference against a respondent on the basis of its suppliers' non-compliance is explained in *Mueller Comercial De Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227 (Fed. Cir. 2014). In the administrative proceeding underlying that case, respondent Mueller's supplier, Ternium, failed to report production cost data on a product-specific basis because it claimed such data was not "readily available." *Id.* at 1230. The Federal Circuit found that "[i]n this case, Mueller is a cooperating party, while Ternium is not." *Id.* at 1232. Commerce nonetheless calculated Mueller's dumping margin using an adverse inference because it "found that Mueller could and should have induced Ternium's cooperation by refusing to do business with Ternium, and Ternium would not be sufficiently deterred if Mueller were unaffected by Ternium's non-cooperation[.]" *Id.* at 1233. The Federal Circuit concluded that "Commerce may rely on such policies as part of a margin determination for a cooperating party like Mueller, *as long as the application of those policies is reasonable on the particular facts and the predominant interest in accuracy is properly taken into account as well*." *Id.* (emphasis added).

The Federal Circuit explained that this doctrine requires more than a mere deterrence rationale. It cited *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) for the proposition that, for non-cooperating parties, § 1677e(b) must be applied to arrive at "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *Mueller*, 753 F.3d at 1234. This was "[a]ll the more so for a cooperating party, for which the equities would suggest greater emphasis on accuracy in the overall mix." *Id.* Indeed, "Commerce cannot confine itself to a deterrence rationale and also must carry out a case-specific analysis of the applicability of deterrence and similar policies." *Id.* In cases of supplier non-cooperation, Commerce must carefully consider whether the cooperating respondent has a mechanism to force the non-cooperating supplier's cooperation. "[I]f the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party." *Id.* at 1235. Therefore, "Commerce must take into account that Mueller itself was a cooperating party and that Commerce's inducement/evasion approach to Mueller's rate calculation could discourage Mueller's own cooperation." *Id.* at 1236.

In sum, if Commerce has either (1) failed to consider evidence that reasonably detracts from the conclusion that Shanghai Tainai had sufficient control over its suppliers to force their cooperation by declining to do business with them; or (2) failed to properly take into account the predominant interest in accuracy — for instance, by failing to carry out a case-specific analysis of its deterrence rationale or failing to take into account whether a cooperating party will be discouraged from future cooperation — then Commerce lacks substantial evidence to apply facts available with an adverse inference against a cooperating party on the basis of supplier non-cooperation. Here, Commerce failed to meet either standard.

"The concept of 'control,' as discussed in *Mueller*, does not require actual control. Instead, it requires Commerce to consider record evidence concerning the practical ability of a respondent to induce the supplier's cooperation." *Venus Wire Industries Pvt. Ltd. v. United States*, 471 F. Supp. 3d 1289, 1309 (CIT 2020). Commerce did not conduct such an analysis here. Its discussion of Shanghai Tainai's ability to induce its suppliers' cooperation consisted of the following paragraph:

> While Tainai argues that it could not persuade its suppliers to cooperate with Commerce's requests for information, the record evidence supports our finding that Tainai could potentially induce compliance on the part of its unaffiliated suppliers. Com-

> merce chose Tainai as a mandatory respondent in this review because it accounted for the largest volume of entries of subject merchandise during the POR. *Based on Tainai's large volume of entries during the POR and the quantity of TRBs that it purchased from suppliers, it is reasonable to conclude that Tainai is an important customer to its Chinese TRB suppliers, which means that Tainai is in a position to exercise its leverage over its TRB suppliers to induce them to cooperate*. Thus, we find that it is reasonable to conclude that Tainai has some business mechanism to induce its suppliers to cooperate. Furthermore, Taiani may choose not to do business with these suppliers in the future due to their lack of cooperation and instead select suppliers . . . willing to commit to participation in an AD review. By applying AFA with respect to the missing data, Commerce is relying on the statutory means that it has available to induce the cooperation of these parties so that Commerce has the information necessary to calculate accurate dumping margins.

Decision Memo at 13–14, J.A. at 1,015–16, ECF No. 43 (emphasis added). Although it is true that Shanghai Tainai purchased a large quantity of tapered roller bearing parts from its suppliers as a collective group, Commerce's analysis ignored the other side of the equation — whether such quantity was significant as to each supplier. Shanghai Tainai cited record evidence that "Tainai had multiple suppliers, all of which only supplied a small portion of Tainai's needs . . . . Simply put, Tainai was not a significant enough customer of any of these entities to assert any market power over these entities." Pls.' Br. at 21, ECF No. 32 (citing to Shanghai Tainai's Response to Section D of the Department's Initial Questionnaire at Ex. D-7, J.A. at 81,310–12, ECF No. 44, providing a diversified supplier chart and recording the percentage of total input quantity purchased from each supplier). Whether Shanghai Tainai's claim was true as a factual matter was not established because Commerce failed to consider the question. *See* Oral Arg. Tr. 15:13–16, ECF No. 52 (The Court: "[Commerce] seems to speak in terms of generalities of what may be true in a large number of cases and not to the specific supplier scenario that [Shanghai Tainai] put data in the record to support."). Such one-sided analysis is barred by the requirements that Commerce's determinations be supported by substantial evidence and that the evidence be "case specific." *See Universal Camera Corp.*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the

record fairly detracts from its weight."); *Mueller*, 753 F.3d at 1234 ("Commerce cannot confine itself to a deterrence rationale and also must carry out a case-specific analysis of the applicability of deterrence and similar policies.").

The Government's arguments to the contrary miss the mark. Its brief depends heavily on the idea that Shanghai Tainai failed to use its best efforts to cooperate with Commerce's requests for data because it waited until after the publication of the Preliminary Results to seek what it should have known was necessary data and then only asked its suppliers once for the information. *See* Def.'s Br. at 15, ECF No. 37; *see also id*. at 12 ("Substantial evidence supports Commerce's finding that Tainai and its unaffiliated suppliers failed to cooperate by not acting to the best of their ability in providing a complete and accurate response to requests for production information"); *id.* at 16 ("Commerce's determination that Tainai failed to act to the best of its ability is supported by substantial evidence[.]"). Commerce, however, made no such determination. It concluded precisely the opposite, writing "we find that Tainai has cooperated with Commerce's requests for information[.]" Decision Memo at 8, J.A. at 1,010, ECF No. 43. The Government's arguments otherwise are not merely *post hoc* rationalizations; they are directly contradicted by Commerce's Final Results. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action[.]"). And when the Government did address Shanghai Tainai's arguments concerning the diversity of its supplier network, it did so by merely restating Commerce's finding that Shanghai Tainai accounted for the largest volume of entries of subject merchandise during the period of review and purchased a large quantity of tapered roller bearings from its suppliers. *See* Def.'s Br. at 19, ECF No. 37. That ignored Plaintiff's argument and data suggesting that it was not a large enough customer of any one supplier to induce compliance with Commerce's information requests. *See* Pls.' Br. at 21, ECF No. 32.

Commerce's determination to apply facts available with an adverse inference was also deficient for a second, independent reason: It failed to properly take into account the predominant interest in accuracy. *See Mueller*, 753 F.3d at 1233 ("Commerce may rely on such policies as part of a margin determination for a cooperating party like Mueller, as long as the application of those policies is reasonable on the particular facts *and the predominant interest in accuracy is properly taken into account as well*.") (emphasis added). It is true that, under the antidumping statute, Commerce has discretion to choose among

facts available in order to draw an adverse inference. *See* 19 U.S.C. § 1677e(b)(2) (providing that an adverse inference may rely on any information placed on the record). However, "Commerce's discretion in these matters . . . is not unbounded" — especially for a cooperating party. *De Cecco*, 216 F.3d at 1032. The Federal Circuit has recognized that Commerce must appropriately balance the competing goals of accuracy and deterrence when it selects facts otherwise available with an adverse inference. Although adverse facts are chosen in order to deter non-cooperation, "We find no support in our caselaw or the statute's plain text for the proposition that deterrence, rather than fairness or accuracy, is the overriding purpose of the antidumping statute when calculating a rate for a cooperating party." *Changzhou Wujin Fine Chemical Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1378 (Fed. Cir. 2012); *see also Mueller,* 753 F.3d at 1234 (Adverse inferences must be applied to arrive at "'a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance,'" but for a cooperating party "the equities would suggest greater emphasis on accuracy in the overall mix.") (quoting *De Cecco*, 216 F.3d at 1032). And, as the Government acknowledges, Commerce must support its selection of facts otherwise available with a reasonable explanation. *See* Oral Arg. Tr. 10:12–23, ECF No. 52 (The Court: "[T]he Government would agree that however broad the discretion Commerce may have to pick among the facts available when drawing an adverse [inference], if there is a limit of some sort, that limit would at least be . . . Commerce needs to have an adequate explanation for its methodology about why it picked a particular fact . . . . Would that be fair?" Ms. Westercamp: "That's correct, Your Honor.").

Despite assigning Shanghai Tainai an eye-popping dumping margin of 538.79 percent, Commerce asserts that it carefully calibrated its choice of facts available to prioritize accuracy rather than deterrence. *See, e.g.*, Decision Memo at 13, J.A. at 1,015, ECF No. 43 ("[T]he manner in which we have applied partial AFA in this review is consistent with the Court's decision in *Mueller* (*i.e.*, consistent with the overriding purpose of the Act of fairness and accuracy) and the purpose of applying AFA, which is to deter non-cooperation without being punitive."). The Government catalogued what it presented as reasonable concessions that Commerce made when calculating Shanghai Tainai's dumping margin, arguing that "Commerce did not apply 'total' AFA, but rather took Tainai's efforts into account in reaching its determination, limiting its application of adverse facts available to only the missing information where Tainai's unaffiliated suppliers provided 100 percent of the factors of production for chrome

steel, rollers, and turned cups and cones." Def.'s Br. at 13, ECF No. 37. Commerce "use[d] Tainai's own data" and substituted "the highest factor of production usage rate reported by Tainai's affiliated suppliers" for these inputs, which "has the effect of 'calibrating the remedy so that only purchases from uncooperative producers impact Tainai's weighted-average dumping margin.'" *Id.* at 17–18 (quoting Decision Memo at 13, J.A. at 1,105, ECF No. 43).

It is hard to see how Commerce's methodology could have effectively "[taken] Tainai's efforts into account" or "calibrat[ed] the remedy." *Id.* The dumping margin that Commerce calculated — 538.79 percent — wildly exceeded both the margin calculated in the Preliminary Results (36.75 percent) and the China-wide rate assigned to entities that did not participate in the investigation at all (92.84 percent). Despite Commerce's finding that Shanghai Tainai was a cooperative entity, the margin it calculated could hardly have been more punitive had Shanghai Tainai refused to participate. Commerce did not discuss how assigning such a high rate to a cooperating party could potentially disincentivize cooperation despite *Mueller*'s requirement that "Commerce must take into account that [the respondent is] a cooperating party and that Commerce's inducement/evasion approach to [the respondent's] rate calculation could discourage [the respondent's] own cooperation." *Mueller*, 753 F.3d at 1236. The dumping rate at issue in *Mueller* — 48.33 percent — is likewise dwarfed by the margin at issue here. Commerce's recitation of the ways in which it could have calculated an even higher margin does not satisfy its duty to explain the margin it did calculate.

Shanghai Tainai alleged in detail how Commerce's methodological choices resulted in such a high dumping margin. Commerce selected facts otherwise available by "applying the highest [factors of production] usage rate reported by Tainai's affiliated suppliers for turned cups and cones, tapered rollers, and cages within each product type sourced solely from the unaffiliated suppliers for each associated CONNUM." Decision Memo at 13, J.A. at 1,015, ECF No. 43. But rather than select the usage rates "within each product type," Commerce selected them within a more general "component" category. Pls.' Br. at 26, ECF No. 32. Shanghai Tainai produces tapered roller bearings in three different component categories — assembly, cup, or cone — and each category can vary widely in weight and diameter. *See* Revised U.S. Sales Database, J.A. at 83,545, ECF No. 44. In order to sort Shanghai Tainai's bearings into distinct products, or CONNUMs, Commerce asked Shanghai Tainai to provide the product description (that is, the component type), the outer diameter, the

inner diameter, and the product weight of each bearing. *See* Request for Information at Section C, J.A. at 1,448–49, ECF No. 43. By not selecting usage rates within the same "product type," surrogate values were calculated for bearings using data that came from different bearings that were up to five times heavier and nearly twice as large in diameter. *See* Pls.' Br. at 28, ECF No. 32. For example, a bearing with a total weight of less than one kilogram was calculated to use many times its total weight in turned cups and rollers — inputs that would not weigh more than the bearing into which they are incorporated. *Cf.* Revised U.S. Sales Database, J.A. at 83,545, ECF No. 44 (reporting tapered roller bearing CONNUMs as sold in the U.S.); Margin Calculation, Calculated Inputs, J.A. at 84,730–40, ECF No. 44 (calculating uniform input usage rates for tapered roller bearings of differing weights). This had the effect of greatly increasing the surrogate value of Shanghai Tainai's bearings. Rather than take into account the other dimensions that Commerce used to sort bearings into distinct products or CONNUMs — inner diameter, outer diameter, and weight — Commerce looked only to the component category, "arbitrarily selecting a value without any consideration as to the enumerated factors identified by the Department as important in dividing, categorizing and analyzing the bearings." Pls.' Br. at 27, ECF. No. 32.

Commerce never explained how this methodological choice reflected "the overriding purpose of the Act of fairness and accuracy." Decision Memo at 13, J.A. at 1,015, ECF No. 43. Instead, it pointed to other, unrelated methodological choices; declared that *these* reflected Commerce's concern with accuracy; and failed to engage with the implications of its key choice to apply factors of production usage rates at the component level without taking diameter or weight into account. *See id.* When Shanghai Tainai challenged Commerce's choice in its ministerial error allegation,[7] Commerce responded that:

> While we were less than exact in our phrasing, the language in our memoranda and programing indicates our intention to apply the AFA on a product description[8] basis as that product was reported in the CONNUM. Thus, while Tainai and PCI may have preferred that we use a different methodology to apply

[7] Because Commerce used facts otherwise available with an adverse inference for the first time in its Final Results, Shanghai Tainai did not have an earlier opportunity to challenge Commerce's methodology.

[8] "Product description" is one of four fields that Commerce used to create CONNUMs, each of which is a distinct tapered roller bearing product. The other fields were inner diameter, outer diameter, and weight. Shanghai Tainai used the "product description" field to capture the component type: assembly, cup, or cone. *See* Pls.' Br. at 27, ECF No. 32; *see also* Request For Information at Section C, J.A. at 1,448–49, ECF No. 43.

> partial AFA to certain of Tainai's [factors of production], we intentionally made the methodological choice to apply the highest [factor of production] usage rate for turned cups and cones, rollers, and cages to each CONNUM based on the product type using the descriptions Tainai provided . . . . Accordingly we find this allegation does not qualify as a ministerial error pursuant to 19 CFR 351.224(f).

Ministerial Error Response at 3, J.A. at 13,469, ECF No. 43. The Government's brief merely cited this rationale and concluded that "Commerce fully considered the physical characteristics of the reported CONNUMs." Def.'s Br. at 27, ECF No. 37. But simply resting on Commerce's discretion to do what it did fails to satisfy the requirement to "carry out a case-specific analysis of the applicability of deterrence and similar policies" when dealing with a cooperating respondent. *Mueller*, 753 F.3d at 1234. In such situations, Commerce must carefully explain how its methodological choices — certainly including those that result in a 538.79 percent dumping margin — prioritize accuracy over deterrence. *See id.* at 1234. Because Commerce did not do so, it failed to ensure that "the predominant interest in accuracy is properly taken into account," as the Federal Circuit requires. *Id.* at 1233.

In making this finding, the Court does not accept Shanghai Tainai's separate argument that Commerce's dumping margin "is inherently excessive and must be discarded" because the margin "def[ies] commercial and economic reality." Pls.' Br. at 31, 34, ECF No. 32. Although *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, 113 F. Supp. 3d at 1338, found that the "assignment of so prohibitive a dumping margin as 453.79% as a remedial measure is difficult to comprehend from a commercial or economic standpoint," the Federal Circuit later clarified that there is no independent "commercial and economic reality" test. *See Nan Ya Plastics*, 810 F.3d at 1344 (holding that "[w]hen Congress directs the agency to measure pricing behavior and otherwise execute its duties in a particular manner, Commerce need not examine the economic or commercial reality of the parties specifically, or of the industry more generally, in some broader sense," and that Commerce's determination "reflects 'commercial reality' if it is consistent with the method provided in the statute, thus in accordance with the law.").

Nor does the Court decide Shanghai Tainai's claim that, because it purchased finished inputs, surrogate values for the materials used in these inputs were not needed so that there were no gaps in the record

to fill. *See* Pls.' Br. at 23–24, ECF No. 32 ("Simply put, since it was a roller, or a turned cup or cone or a cage, and since the surrogate value data valued the roller, turned cup or cone or cage, the amount of raw material consumed, the labor and energy expended and the like which went into the roller was irrelevant. Such values were already included in the finished components."). The Court does not wish to tie the agency's hands given the breadth of the remand necessary to cure Commerce's errors. Should Commerce decide to base its calculations on the finished inputs rather than the materials used to make those inputs, it remains free to do so.

The Federal Circuit permits Commerce to draw an adverse inference against a cooperating party for the actions of its non-cooperative suppliers based on case-specific facts and analyses. Commerce's decision to invoke generalities to draw such an inference against Shanghai Tainai fails to meet this burden. Commerce also fails to discuss the incentives created by its decision to assess such a high dumping margin on a party the agency found to be cooperative. On remand, Commerce must first consider the record evidence regarding the control that Shanghai Tainai could have exerted over its diversified suppliers and recognize that a deterrence rationale applied against a cooperating party that lacks the ability to control its suppliers may be unfair to that party. Commerce must then explain how its methodological choices — specifically those that tended to increase Shanghai Tainai's dumping margin — comported with its duty to prioritize accuracy over deterrence when dealing with a cooperating respondent. In doing so, Commerce must be attuned to the risk that calculating a dumping margin for a cooperating respondent that is significantly higher than the all-others rate given to non-participating entities "could discourage [the respondent's] own cooperation." *Mueller*, 753 F.3d at 1236. If Commerce finds that it lacks substantial evidence to conclude that Shanghai Tainai was in a position to induce cooperation from its suppliers or that its methodology of selecting facts otherwise available with an adverse inference did not sufficiently prioritize accuracy over deterrence, Commerce should take new action to bring its Final Results into conformity with the Federal Circuit's mandates.

III. Selection of Surrogate Values

When Commerce investigates an antidumping respondent that is based in a non-market economy country such as China, Commerce must value the subject merchandise using information taken from a market economy country. 19 U.S.C. § 1677b(c). Commerce does this by valuing the factors of production used to create the subject mer-

chandise — such as raw materials, labor, and utilities — based on their value in a market economy country that is (1) at a comparable level of development to the non-market economy country and (2) a significant producer of comparable merchandise. *Id.* § 1677b(c)(4). Commerce must select the "best available information" to value the factors of production. *Id.* § 1677b(c)(1). However, Commerce has "broad discretion" to select the market economy information that it uses to calculate surrogate values for a non-market economy respondent. *Zhejiang DunAn Hetian Metal*, 652 F.3d at 1341.

Here, Commerce determined that Brazil, Malaysia, Mexico, Romania, Russia, and Turkey were economically comparable to China and were significant producers of comparable merchandise during the period of review. *See* Preliminary Decision Memo at 6–7, J.A. at 13,076–77, ECF No. 43. Because the parties only placed complete surrogate value information for Romania on the record and because no party argued in favor of selecting a different country, Commerce did not consider surrogate value data from any country other than Romania. *Id.* at 7, J.A. at 13,077; *see also* Oral Arg. Tr. 41:11–12, ECF No. 52 (Mr. Craven: "We do not object to the use of Romania."). The Romanian surrogate value information on the record consisted of the financial statements of three Romanian entities: Compa S.A. Sibiu (Compa), URB Rulmenti Suceava (Rulmenti), and Timken Romania. Commerce determined that Timken Romania's financial statements were the best available information for calculating surrogate values because the company is "a producer of comparable merchandise, [the financial statements] are contemporaneous with the POR, demonstrate profitability, are publicly available, are free of known countervailed subsidies, and generally satisfy Commerce's criteria for selecting surrogate companies." Decision Memo at 19–20, J.A. at 1,021–22, ECF No. 43. Commerce determined that Compa's financial statements were not suitable for use in deriving surrogate values "because [Compa] is not a producer of comparable merchandise." Instead, it "manufactures valves, windscreen wiper components, and components for turbochargers and injections systems, none of which are comparable to TRBs." *Id.* at 18, J.A. at 1,020. Commerce also determined that Rulmenti's financial statements were not usable because "[i]t is Commerce's practice to only consider companies that are profitable for calculation of surrogate financial rations" and "[d]uring the POR, Rulmenti operated at a loss." *Id.*

Shanghai Tainai challenges Commerce's decision to rely on Timken Romania's financial statements and exclude those of Compa and Rulmenti. *See* Pls.' Br. at 35, ECF No. 32. Shanghai Tainai cites Commerce's "preference for multiple financial statements," alleges

that Compa produces comparable merchandise to Shanghai Tainai because Compa "engages in the precision grinding and finishing of metal components and assembles them into finished goods," and claims that Rulmenti's lack of profit is "a defect which can be readily remedied by setting the profit to zero." *Id.* at 37–38. Conversely, Shanghai Tainai argues that Timken Romania's financial statement "is badly distorted by a significant number of affiliated party transactions and its active participation as a member of the Timken Group." Plaintiff "submits that these distortions are so significant as to require the non-use of this financial statement." *Id.* at 38. In particular, Shanghai Tainai takes issue with the fact that the Timken Group is "a large group of inter-related bearing producers including U.S. producers with an incentive to exclude, or otherwise limit, international competitors such as Tainai from the U.S. market" and conducts operations that "are significantly more complex than the operations undertaken by Tainai." *Id.* at 39–40. Shanghai Tainai notes that the Timken Group "was an active participant in the review on behalf of the domestic industry." *Id.* at 38. In the alternative, Shanghai Tainai argues that Commerce should have at least averaged the three financial statements together to "help avoid the distortion that results from the use of a single financial statement." *Id.* at 42.

The Government rebuts Shanghai Tainai's claims by first referencing Commerce's determination that the record contained only one usable financial statement — that of Timken Romania — so that Commerce's preference for using multiple financial statements was not applicable here. Def.'s Br. at 33, ECF No. 37. The Government next argues that the distortions alleged by Shanghai Tainai did not render Timken's financial statement unusable. Although Timken Romania belongs to the Timken Group, which participated in the underlying administrative review of the order on the side of the domestic industry, the Government cited to Commerce's explanation that "it has previously used surrogate financial statements of entities that are affiliated with the petitioners and such a status does not disqualify a given financial statement from consideration." *Id.* (citing Decision Memo at 19, J.A. at 13,405, ECF No. 43). Further, the Timken Group's status as a large group of inter-related bearing producers that conducts complex operations should not be disqualifying given that Commerce found that Shanghai Tainai was itself part of "a multinational group of inter-related bearing producers." *Id.* at 34 (citing Decision Memo at 19, J.A. at 13,405, ECF No. 43). The Government thus concludes that record evidence supported Commerce's

determination that Timken Romania's financial statements constituted the best available information for calculating surrogate values. *Id.*

The Government is correct. Because Shanghai Tainai did not object to the selection of Romania as the surrogate country, Commerce had a limited universe of financial statements to choose from in calculating surrogate values. Each financial statement was flawed. In the ensuing "ugly dog contest," Commerce was forced to rank these flaws and come to a reasonable determination regarding which financial statement was "the least bad one." Oral Arg. Tr. 42:15, 43:8, ECF No. 52. At oral argument, the Court registered its concern that Timken Romania's parent "is a competitor of [Shanghai Tainai]" and was "the instigator" of the challenged administrative review. *Id.* at 42:23–24. However, Timken Romania's financial statements were "accompanied by an auditor's report that identifies no irregularities in Timken Romania's reporting." Decision Memo at 19, J.A. at 1,021, ECF No. 43. The Court therefore declines to find that it was unreasonable for Commerce to reject the financial statements of companies that did not manufacture bearings or turn a profit — flaws that are worse than those of Timken Romania. Shanghai Tainai tellingly noted that ranking these flaws amounts to "a weighing question." Oral Arg. Tr. 44:15, ECF No. 52. Yet, this Court may not reweigh the evidence and substitute its judgment for Commerce's. *See Matsushita Elec.*, 750 F.2d at 936. Rather, the Court may only review the record to ascertain "whether a reasonable mind could conclude that Commerce chose the best available information." *Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1300–01 (Fed. Cir. 2016). The parties bear the burden of building the record from which Commerce makes its decision. *See Qingdao Sea-Line Trading Co., Ltd. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) ("The burden of creating an adequate record lies with the interested parties and not with Commerce.") (citing *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Given the limited options the parties placed on the record, the Court declines to second-guess Commerce's determination.

IV. Section 301 Duties

A. Deduction of Section 301 Duties from U.S. Price

In calculating Shanghai Tainai's dumping margin, Commerce deducted Section 301 duty payments from the U.S. price of the subject merchandise. Decision Memo at 22, J.A. at 1,024, ECF No. 43. This increased Shanghai Tainai's dumping margin by reducing the U.S. price. Under 19 U.S.C. § 1677a(c)(2)(A), "[U.S. price] shall be reduced by the amount, if any, included in such price, attributable to any . . .

United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." This helps ensure an "apples [to] apples" comparison between merchandise sold in the home market and the U.S. market by deducting costs associated with transporting merchandise to the United States. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983).

However, not all duties are deductible as "United States import duties." For instance, antidumping duties are considered "special duties" distinct from "United States import duties" and are not deducted from U.S. price because doing so would create a circularity problem in which the imposition of antidumping duties would itself result in increased antidumping duties. *See Power Steel Co., Ltd. v. United States*, No. 20–03771, 2021 WL 6098309 at *3 (CIT Dec. 23, 2021). Shanghai Tainai argues that this same treatment should be extended to Section 301 duties, which are imposed when the United States Trade Representative determines that the actions of a foreign government are unreasonable or discriminatory and burden or restrict U.S. commerce. *See* 19 U.S.C. § 2411(b)(1). Although Shanghai Tainai did not cite any authority for its argument, it believes these duties are akin to antidumping duties because they are imposed "in response to a specific conditions" [*sic*] and are removed when that condition is resolved. Pls.' Br. at 45–46, ECF No. 32. By contrast, deductible "U.S. import duties" should be interpreted to include only "ordinary customs duties" that "are not contingent on external events, but rather are ordinary duties at bound rates and cannot be 'avoided' by taking actions to comply with demands for action." *Id.* at 46. The Government rejects Shanghai Tainai's argument. It first cites *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1362 (Fed. Cir. 2007) for the proposition that "[n]ormal customs duties . . . have no termination provision and are permanent unless modified by Congress." Def.'s Br. at 35, ECF No. 37. The Government then notes that Commerce has determined that Section 301 duties "are normal customs duties as they have been imposed without a termination date" and that Commerce's consistent practice is to deduct them as U.S. import duties. *Id.*

On March 15, 2023, the Federal Circuit decided *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25 (Fed. Cir. 2023). There, the Federal Circuit held that certain duties imposed under Section 232, a separate statute that provides for duties to remedy national security threats, were deductible from U.S. price as "United States import duties." *See* 19 U.S.C. § 1677a(c)(2)(A). The Federal Circuit reasoned that Presidential Proclamation 9705, which

enacted the Section 232 duties at issue, "makes clear that the duty newly being imposed was to add to, and not partly or wholly offset, the antidumping duties that would be due without the new duty." *Borusan*, 63 F.4th at 34. The Federal Circuit cited language in Proclamation 9705 declaring that the duties are to be imposed "in addition to any other duties" and that "[a]ll anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed." Proclamation 9705 Adjusting Imports of Steel into the United States, clause 2, 83 Fed. Reg. 11,625, 11,627, 11,629 (Mar. 15, 2018). The Federal Circuit concluded from this language that:

> [W]hen applied to an article covered by antidumping duties, the Proclamation 9705 and antidumping duties must together result in a full imposition of both duties . . . . *i.e.*, by subtraction of the Proclamation 9705 duty from the U.S. price if the Proclamation 9705 duty is built into it. Otherwise, the Proclamation 9705 duty would be offset substantially or completely by a reduction in the antidumping duty itself (through an increase in the U.S. price and therefore a decrease in the dumping margin), defeating the evident 'in addition to' prescription of Proclamation 9705.

Borusan, 63 F.4th at 35. Declining to deduct the Section 232 duties imposed by Proclamation 9705 would have the effect of increasing the U.S. price of Borusan's merchandise and thereby reduce its dumping margin and antidumping liability, vitiating Proclamation 9705's requirement that its duties add to, rather than subtract from, any antidumping duties owed on subject merchandise. The Federal Circuit therefore upheld Commerce's decision to deduct these Section 232 duties from U.S. price by treating them as "United States import duties."

The parties did not reference *Borusan* in their briefing. This Court ordered supplemental briefing on the applicability of *Borusan* and the Court of International Trade decision it upheld, *see Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 494 F. Supp. 3d 1365 (CIT 2021), to the deductibility of Section 301 duties. *See* Def.'s Supp. Br., ECF No. 53; Pls.' Supp. Br., ECF No. 54. The Government described Commerce's determination that Section 301 duties are deductible "United States import duties" as consistent with the Federal Circuit's reasoning in *Borusan*. Specifically, the Government invoked the language of the legal instrument that proposed the Section 301 duties. *See* Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology

Transfer, Intellectual Property, and Innovation (Notice of Determination Pursuant to Section 301), 83 Fed. Reg. 14,906 (U.S. Trade Rep. Apr. 6, 2018). Like Proclamation 9705, the Notice of Determination provided that "the proposed action is *an additional duty* of 25 percent on a list of products of Chinese origin identified in the Annex to this Notice." Notice of Determination Pursuant to Section 301, 83 Fed. Reg. at 14,907 (emphasis added). To illustrate, the Notice explained that, "if a good of Chinese origin is currently subject to a zero ad valorem rate of duty, the product would be subject to a 25 percent ad valorem rate of duty; if a good of Chinese origin were currently subject to a 10 percent ad valorem rate of duty, the product would be subject to a 35 percent ad valorem rate of duty, and so on." *Id.* The Government argues that this language "clearly implies that Section 301 duties are intended to be imposed *in addition* to other duties." Def.'s Supp. Br. at 8, ECF No. 53.

The Notice of Determination Pursuant to Section 301 did not, by itself, enact the Section 301 duties. The instrument that did, the Notice of Action Pursuant to Section 301, 83 Fed. Reg. 40,823 (U.S. Trade Rep. Aug. 16, 2018), also refers to the Section 301 duty as an "additional duty." *Id.* at 40,824. Indeed, the Notice of Action contains even stronger language than the Notice of Determination, providing that "[p]roducts of China that are provided for in new HTSUS heading 9903.88.02, as established by Annex A of this notice . . . will be subject to an additional ad valorem duty of 25 percent. The rates of duty applicable to products of China that are provided for in new HTSUS heading 9903.88.2 *apply in addition to all other applicable duties, fees, exactions, and charges*." *Id.* at 40,824 (emphasis added). This language tracks that of Proclamation 9705, which "directed that the [Section 232 duty] was to be imposed 'in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles.'" *Borusan*, 63 F.4th at 29 (quoting Proclamation 9705, 83 Fed. Reg. at 11,627). Under *Borusan*, Commerce's decision to treat Section 301 duties as deductible "United States import duties" is correct.

Shanghai Tainai fails to engage with the order's language and instead argues that Section 301 duties are different in kind from Section 232 duties because the latter "are put in place to protect the National Security and have no end point" whereas the former "are subject to termination after 4 years absent an affirmative determination to extend such duties." Pls.' Supp. Br. at 7, ECF No. 54. Shanghai Tainai argues for applying a set of factors from *Wheatland Tube Co. v. United States*, 495 F.3d 1355 (Fed. Cir. 2007), which found that yet another class of duties, Section 201 "safeguard" duties, were non-

deductible special duties akin to antidumping duties. The *Wheatland Tube* factors are (1) whether the duties are remedial duties that provide relief from the adverse effects of imports; (2) whether the duties are imposed as a result of a finding of injury or threat to a U.S. industry; and (3) whether the duties provide only temporary relief. *Id.* at 1362. Shanghai Tainai asserts that Section 301 duties pass the *Wheatland Tube* test for non-deductibility because the duties "were imposed in order to provide relief from unfair competition in the form of the theft of intellectual property," "were the result of an express finding of threat to the U.S. as a result of the conduct in question," and "provide only temporary relief." Pls.' Supp. Br. at 8, ECF No. 54.

However, *Borusan* instructs that it is the text of the legal order levying duties that is paramount; and it is unnecessary for a reviewing court to apply the *Wheatland Tube* factors where that text has spoken clearly. *See Borusan*, 63 F.4th at 36 ("We do not decide whether [the holding] could soundly rest on distinctions between § 232 and the § 201 regime more generally, and the distinction between 'normal' and 'special' duties . . . . That approach presents challenges that we may avoid. The Commerce decision sufficiently rests on the proclamation-specific basis set forth above."). If the legal instrument enacting statutory duties provides that such duties are intended to be additional to existing duties, then it is reasonable for Commerce to treat them as "United States import duties" and deduct them from the U.S. price when calculating dumping margins. This principle, as elucidated in *Borusan*, extends beyond Section 232 duties and applies to other statutory duties. *See id.* at 33 ("If a statute merely authorizes a governmental officer or body to impose a duty, as § 232 authorizes the President to do, it is the particular exercise of the authority that determines — based on the character of that exercise — whether the prescribed duty comes within [United States import duties]."). Here, "the particular exercise of the authority" to enact the Section 301 duties at issue intended for these duties to be additional to antidumping duties. The Court therefore affirms Commerce's determination.

B. Capping of Amounts Denominated as "Additional Revenue for 301"

In its brief, Shanghai Tainai claims that Commerce wrongly limited "payments denominated as 'additional revenue for 301' to the amount of Section 301 duties paid on the goods." Pls.' Br. at 46, ECF No. 32. The nature of this claim was initially unclear to both the Court and the Government. *See* Oral Arg. Tr. 31:6–16, ECF No. 52. At oral argument, Shanghai Tainai clarified what it believed happened:

> MR. CRAVEN: [T]he price reported in the sales database consisted of two elements. There was the selling price on the invoice to the customer, and there was a second line on the invoice that was denominated as 301 duties for certain customers. We have requested that the price include both the price paid for the good and the price charged to the client for the increase in price for the 301 duties. For certain clients Tainai simply raised the price on the invoice. For other clients, to justify the price increase, they denominated them as 301 duties.
>
> The Commerce Department determined that they would only allow us to raise the price on the 301 duties to the extent that we had paid 301 duties and that any difference between those two was not allowed to be added to the U.S. price. So if, for example, the 301 duties were 95 cents and on the line item called 301 duties Tainai reported a dollar, the Commerce Department reduced the dollar to 95 cents.

Id. at 33:14–34:5. Here, Shanghai Tainai was direct — it saw an opportunity to mask a price increase by invoicing the increase as part of the Section 301 duty payment. It did so by billing customers for more than the actual amount of the Section 301 duties. *Id.* That tended to increase the U.S. price of the subject merchandise; but Commerce reduced these overcharges by capping them at the actual amount of the Section 301 duties, reducing the U.S. price and thereby increasing Shanghai Tainai's dumping margin.[9]

Commerce justified its decision by invoking its general practice "not to attribute revenue from related expenses to the price of subject merchandise because that uncapped amount represents profit on the sale of services, not profit on the sale of the merchandise." Decision Memo at 24, J.A. at 1,026, ECF No. 43. Commerce analogized these revenues to revenue that respondents receive from providing U.S. freight, citing to a past determination in which Commerce found "that it would be inappropriate to increase the gross unit price for subject merchandise because of profits earned on the provision or sale of freight; such profits should be attributable to the sale of the freight service, not to the subject merchandise." *Id.* at 24–25, J.A. at 1,026–27. Commerce also claimed that it was limited by 19 C.F.R. § 351.501(c), which directs Commerce to calculate U.S. price "net of

[9] At oral argument, the Court asked Shanghai Tainai's counsel to clarify how its challenge to Commerce's capping of Section 301 duty charges was distinct from its challenge to Commerce's deduction of Section 301 duties. Shanghai Tainai's counsel responded that its capping claim "has nothing to do" with deduction but rather "is a question simply of what the client paid to Tainai for the goods . . . [the amounts] were collected long after the duty was paid and it was collected for the goods." Oral Arg. Tr. 36:4–15, ECF No. 52.

price adjustments . . . that are reasonably attributable to the subject merchandise[.]" Price adjustments are defined as "a change in the price charged for subject merchandise . . . such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale, that is reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38). Commerce "note[d] that U.S. import duty revenues are not included in the list provided at 19 CFR 351.102(b)(38)." Decision Memo at 25, J.A. at 1,027, ECF No. 43. Commerce therefore concluded that it would "continue to cap additional tariff revenue by the amount of Section 301 duties applicable to each sale." *Id.*

The Court struggles to see the reason in Commerce's determination that the additional amounts Shanghai Tainai charged its customers in excess of Section 301 duties were "profit[s] on the sale of services, not profit[s] on the sale of the merchandise." *Id.* at 24, J.A. at 1,026. Costs to the customer associated with Section 301 duties were invoiced as part of the cost of the merchandise, and Commerce did not explain what "service" Shanghai Tainai provided its customers by passing along the padded cost of the Section 301 duties to them. At any rate, it is unclear why these amounts were attributable to the sale of services when "uncapped," but could become part of U.S. price up to the amount of the Section 301 duties, as Shanghai Tainai pointed out. *See* Pls.' Supp. Br. at 9, ECF No. 54 ("The United States does not dispute that this additional revenue should be part of the price paid or payable, but rather only disputes that portion of the revenue which exceeds the amount of the 301 duty reported as paid on the entry.").

The Court further finds Commerce's textual analysis unreasonable. 19 C.F.R. § 351.401(c) directs Commerce to calculate U.S. price "net of price adjustments," and "price adjustment" is defined as "a change in the price charged for subject merchandise . . . such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale, that is reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38). Commerce claims that the amounts at issue do not meet this definition of a "price adjustment" because "U.S. import duty revenues are not included in the list provided at 19 CFR 351.102(b)(38)." Decision Memo at 25, J.A. at 1,027, ECF No. 43; *see also* Oral Arg. Tr. 38:22–23, ECF No. 52 (counsel for the Government arguing that the charges are not price adjustments "because, again, these aren't rebates. These aren't deductions. This is a 301 duty."). However, that list is bookended by the terms "such as" and "or other adjustment." *See* 19 C.F.R. § 351.102(b)(38). These terms clarify that the regulation's list of price

adjustments is not exhaustive, and a change in price need not be enumerated in order to qualify as a "price adjustment" within the meaning of § 351.401(c). *See Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013) ("[T]he list . . . is preceded by 'such as,' and is therefore non-exhaustive."); *Alta Wind I Owner Lessor C v. United States*, 897 F.3d 1365, 1373 (Fed. Cir. 2018) (list of contracts that ended with "or other similar agreements" was "non-exhaustive"). Commerce's interpretation of the regulation is at odds with its plain text. On remand, Commerce must explain why the amounts at issue constitute profits on the sale of services rather than profits on the sale of merchandise and must consider whether there is any basis to exclude such amounts from the "price adjustments" described by § 351.401(c) and § 351.102(b)(38).

V. By-Product Offset

Commerce's established practice is to "grant an offset to normal value, for sales of by-products generated during the production of subject merchandise, if the respondent can demonstrate that the by-product is either resold or has commercial value and re-enters the respondent's production process." *Arch Chemicals, Inc. v. United States*, 33 CIT 954, 956 (2009). The burden is on the respondent to provide Commerce with sufficient information to support its claim of a by-product offset. *Id.* A respondent does not meet this burden if it fails to "document the quantity of scrap produced during the period of review" and merely "equate[s] total scrap sold during the period of review with total scrap produced during the period of review." *American Tubular Products, LLC v. United States*, 847 F.3d 1354, 1361 (Fed. Cir. 2017). Here, Shanghai Tainai concedes that "the quantity of scrap produced is not directly recorded" but attempts to argue that "the quantity of scrap produced is the same as the quantity of scrap sold." Pls.' Br. at 52, ECF No. 32. Because that argument is insufficient, Commerce's decision to deny Shanghai Tainai a by-product offset must be upheld.

CONCLUSION

Shanghai Tainai brings a litany of challenges to Commerce's thirty-third administrative review of the antidumping order on tapered roller bearings from China. These challenges are of varying quality; accordingly, some have found the mark and others have fallen short. Shanghai Tainai is correct that Commerce failed to adequately explain both its use of facts otherwise available with an adverse inference against a cooperating respondent and its capping of price increases that were invoiced as Section 301 duty payments. However, this Court finds that Shanghai Tainai's other complaints — that

Commerce's dumping margin defied commercial reality, relied on defective surrogate entity financial statements, wrongly deducted Section 301 duties from U.S. price, and failed to include a by-product offset — are without merit.

The Court therefore **GRANTS IN PART** and **DENIES IN PART** Shanghai Tainai's Motion for Judgment on the Agency Record and **REMANDS** Commerce's Final Results for additional explanation consistent with this opinion. Commerce shall file its Remand Redetermination with the Court within 120 days of today's date. Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Remand Redetermination. Plaintiffs shall have thirty days from the filing of the Remand Redetermination to submit comments to the Court; and Defendant shall have thirty days from the date of Plaintiffs' filing of comments to submit a reply. Any revisions Commerce makes to the dumping margin assigned to Shanghai Tainai will be extended to the Consolidated Plaintiffs.

SO ORDERED.

Dated: September 14, 2023
New York, New York

Stephen Alexander Vaden

STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 23–133

HABAŞ SINAI VE TIBBI GAZLAR ISTIHSAL ENDÜSTRISI A.Ş., Plaintiff, v. UNITED STATES, Defendant, and CLEVELAND-CLIFFS INC.; STEEL DYNAMICS, INC.; AND SSAB ENTERPRISES LLC, DEFENDANT-INTERVENORS.

Court No. 21–00527
Before: M. Miller Baker, Judge

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

Dated: September 14, 2023

Matthew M. Nolan and *Jessica R. DiPietro*, ArentFox Schiff LLP of Washington, DC, on the briefs for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Tara K. Hogan*, Assistant Director; and *Kelly A. Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Paul K. Keith*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Stephen P. Vaughn and *Daniel L. Schneiderman*, King & Spalding, LLP, of Washington, DC, on the brief for Defendant-Intervenor Cleveland-Cliffs, Inc.

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

OPINION

***Baker*, Judge:**

In this case, a Turkish manufacturer and distributor challenges the Department of Commerce's calculation of its home-market sales in an administrative review of an antidumping order applicable to steel imports from that country. For the reasons below, the court sustains Commerce's determination.

I

To combat unfair trade practices, the Tariff Act of 1930, as amended, permits Commerce to impose antidumping duties on an importer of "foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1). This requires the Department to conduct "a fair comparison . . . between the export price or constructed export price and normal value" of the subject merchandise. *Id*. § 1677b(a). The statute defines "normal value" as "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in

the exporting country . . . ." *Id.* § 1677b(a)(1)(B)(i); *see also Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1334 n.6 (CIT 2020) (discussing normal value). This case concerns the calculation of normal value.

II

In 2016, the Department issued an antidumping order covering hot-rolled steel flat products from Turkey. *See Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom*, 81 Fed. Reg. 67,962 (Dep't Commerce Oct. 3, 2016). In 2019, several domestic producers requested an administrative review of that order covering the period from October 1, 2018, through September 30, 2019. Appx001085–001088; *see Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 84 Fed. Reg. 52,068, 52,070 (Dep't Commerce Oct. 1, 2019). Commerce opened a review and selected Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi, a Turkish manufacturer and exporter of rebar, as the sole mandatory respondent. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 67,712, 67,716 (Dep't Commerce Dec. 11, 2019); *see also* Appx001096–001101.

Habaş duly answered the Department's various questionnaires. The company's Section A response provided audited financial statements in Turkish lira, *see* Appx001374–001461, and its Section B and C responses supplied home-market sales data in both U.S. dollars and lira, *see* Appx001631–001632. Habaş also submitted evidence that customers' orders were made and confirmed in dollars; the company contends that the same evidence shows that the customers paid in dollars as well. Appx001350–001360.

In its preliminary results, Commerce found that "Habaş reconciled its home-market sale values in Turkish lira . . . to its audited financial records," so the Department accordingly used "a home market unit price denominated in [lira]." Appx001024. Based on that price, the Department calculated a weighted-average dumping margin of 21.48 percent. Appx001049.

Habaş then argued that the preliminary results improperly measured its home-market sales in lira instead of dollars. Appx002213–002237. The company contended that Turkish law required it to use lira as the accounting currency, and that the Department has a "consistent line of precedents . . . in which Commerce has used U.S. dollar values for home-market sales, when the transactional elements (contracts, confirmations, and payments) were made

in dollars between the respondent and its customer, even though the accounting registrations of the sales were in local currency." Appx002219. The domestic producers responded that "[t]he total USD value of Habaş' home market sales has not been reconciled to the financial statements, and thus Commerce may not rely on those USD values in the antidumping calculations." Appx002247–002248 (emphasis and footnote references omitted).

The Department reiterated in its final results that it had to rely on lira "[b]ecause Habaş demonstrated that its [home-market] sales were reported accurately and completely in only the [lira]-denominated sales values, but not the claimed USD sales values." Appx001069. In response to Habaş's contention that the Department should base normal value on dollars because "Commerce's normal practice is to use the 'transaction currency,' " the agency explained that its protocol is to "use the sales value that can be reconciled to the company's audited financial statements." Appx001069 (quoting Habaş case brief at 2). Using those values based on lira, the agency calculated a final weighted-average dumping margin for the company of 24.32 percent. Appx001079.

III

Habaş brought this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(i) challenging Commerce's final determination. ECF 10, ¶ 3. The court has subject-matter jurisdiction over such actions under 28 U.S.C. § 1581(c).

Three domestic steel producers intervened as defendants supporting the government. *See* ECF 18 (Cleveland-Cliffs Inc.), ECF 24 (Steel Dynamics, Inc., and SSAB Enterprises LLC). Habaş moved for judgment on the agency record. ECF 44. The government, ECF 49, and the intervenors, ECF 43, opposed and Habaş replied, ECF 45 (confidential); ECF 46 (public). The court decides the motion on the papers.

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

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole,

> including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

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

In addition, Commerce's exercise of discretion in § 1516a(a)(2) cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Solar World Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in § 1516a cases brought under section 516A of the Tariff Act of 1930, APA "section 706 review applies since no law provides otherwise") (citing 28 U.S.C. § 2640(b)). "[I]t is well-established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." *See SKF USA Inc. v. United States*, 293 F.3d 1369, 1382 (Fed. Cir. 2001) (cleaned up).

IV

Habaş challenges Commerce's decision to rely on the lira values of its home-market sales rather than the reported dollar values. ECF 44, at 2–3. The company asserts two theories. First, it argues that the Department's determination is arbitrary and unreasonable given its history of preferring the transaction currency. *Id*. at 9–23. Second, the company claims that the valuation of its home-market sales in lira creates a mischaracterization of the sale price that distorts the margin. *Id*. at 23–30.

A

Habaş argues that Commerce unlawfully departed from its "long-standing practice . . . to use the currency of a respondent's sale prices based on the currency which controls the ultimate amount a purchaser pays for the sale." ECF 44, at 13.[1] The company contends that in previous antidumping reviews, the Department stated that its preference is to use the transaction currency to avoid unnecessary

[1] Although its factual determinations receive deference *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996), Commerce, like all agencies, must treat like situations consistently. *See SunEdison, Inc. v. United States*, 179 F. Supp. 3d 1309, 1316 (CIT 2016) ("[A]n agency determination that is arbitrary is *ipso facto* unreasonable, and a determination is arbitrary when it . . . treats similar situations in dissimilar ways."); *see also Brit. Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997) ("An agency is obligated to follow precedent, and if it chooses to change, it must explain why.") (quoting *M.M.&P. Mar. Advancement, Training, Educ. & Safety Program v. Dep't of Com*., 729 F.2d 748, 755 (Fed. Cir. 1984)).

currency conversions. *Id*. at 13–14 (citing *Stainless Steel Plate in Coils from the Republic of Korea*, 66 Fed. Reg. 45,279, 45,280 (Dep't Commerce Aug. 28, 2001); *Certain Hot-Rolled Steel Flat Products from the Republic of Turkey*, 84 Fed. Reg. 30,694 (Dep't Commerce June 27, 2019), and accompanying I&D Memo at 10 (2016–17 HRS I&D Memo)). For example, when calculating the home-market sales of Colakoglu, another Turkish distributor of steel products, Commerce stated that it would measure the sales in dollars where "(1) the price for these transactions [was] fixed in USD at the time of invoicing (*i.e*., at the date of sale); and (2) this USD price control[led] the ultimate amount that the purchaser pa[id] for the sale." 2016–17 HRS I&D Memo at 10.

Habaş argues that its home-market sales satisfy these criteria because they were "negotiated, confirmed, and paid in U.S. Dollars." ECF 44, at 15. The company points to e-mail communications with a customer and an invoice for a sample sale in which the ultimate price was negotiated in dollars. Appx001351–001353. Additionally, a bank statement shows that the company received a payment in dollars from the same customer.[2] Appx001360. Habaş insists that this information alone demonstrates that its home-market sales were transacted in dollars and therefore obligated Commerce to use the USD price in its calculations.

The Department, however, would have acted inconsistently with its precedent only if Habaş's home-market sales were negotiated in dollars *and* the dollar price ultimately controlled the amount paid. *See* 2016–17 HRS I&D Memo at 10. Although the company provided evidence that the prices were negotiated, ordered, and set in dollars on the invoice date, Commerce concluded that Habaş did not show that those prices ultimately controlled the final payment. Appx001070–001071.

When determining which currency's value controlled the transaction, Commerce's practice is to look to "the sales value that can be reconciled to the company's audited financial statements." Appx001069; *see also Stainless Steel Flanges from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 83 Fed. Reg. 13,244 (Dep't Commerce Mar. 28, 2018) and accompanying Preliminary I&D Memo at 9. Therefore, as in previous investigations, the Department required Habaş to "provide a reconciliation of the sales reported in [its] home market sales data-

[2] Commerce explained that this bank statement is of no use because "the payment amount apparently has no connection with the USD price and quantity shown on the invoice (*i.e*., the payment amount does not equal USD price times quantity, or to [sic] USD price times quantity plus tax)." Appx001070. The Department therefore concluded that the price shown on the document had no connection to the ultimate payment. *Id*.

bases to the total sales listed in [its] financial statements." Appx001139. The company correspondingly provided audited financial statements in lira, Appx001070, which the agency reconciled with Habaş's reported sales values, Appx001068. Commerce accordingly determined that the lira values controlled the transaction.

The company argues that if the Department could reconcile the lira invoice prices with audited financial records, the dollar prices necessarily reconcile because the lira amount is "directly related to and derived from the USD amount on the invoice." ECF 46, at 12. Commerce, however, explained that Habaş "does not know the payment date of each invoice." Appx001070. Accordingly, the Department could not determine what foreign exchange rate was in effect on the date of the actual payment. *Id*.[3] Because Commerce could not assign a value in dollars to each payment received, it could not reconcile each payment with the dollar value on the corresponding invoice.

These facts distinguish this review from Colakoglu's submission in the 2016–17 administrative review. There, the Department determined that prices were negotiated and invoiced in dollars and "the buyer paid the [lira] equivalent amount of the USD price *at the time of payment*." 2016–17 HRS I&D Memo at 9 (emphasis added). Unlike Habaş, therefore, Colakoglu could definitively assign foreign exchange rates to specific payments because it knew each payment date, and Commerce could confirm that Colakoglu was "paid the [lira] amount based on the USD price set on the date of sale and the exchange rate in effect at the time of payment," so the "USD amount controlled the ultimate [lira] amount paid by the [home-market] customers." *Id*.

As the Department explained here, "the currency in which the sales are 'incurred' is not the sole determining factor." Appx001069. Substantial evidence supports Commerce's valuation of Habaş's home-market sales in lira, and the company did not show that the Department acted arbitrarily.

B

Habaş further asserts that "relying on the [lira-]denominated value, converted to U.S. Dollars, introduces an extraordinary distortion to the margin calculations." ECF 44, at 28. This claim derives from Commerce's established practice that disfavors converting prices "into the [home-market] currency at the date of the [home-market] sale and then back to USD at the date of the U.S. sale."

[3] As Habaş points out, the lira experienced "an aberrational and unique devaluation" during the period of review, causing the foreign exchange rates to fluctuate by as much as 17.6 percent month-to-month throughout 2018. ECF 44, at 28–29. A large range of exchange rates therefore could have applied on each payment date.

2016–17 HRS I&D Memo at 9; *see also* 19 U.S.C. § 1677b-1(a) (obligating the Department to "convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise" instead of the rate in effect on the date of the home-market sale). Converting a U.S. dollar price into lira at the date of the home-market sale and then back into dollars using a different exchange rate at the date of the U.S. sale would therefore distort the home-market price.

The Department, however, did not "convert[] the USD-denominated price from U.S. Dollars to Turkish Lira." ECF 44, at 29. It instead directly "relied on Habaş's reported [lira] values, which reconciled to Habaş's audited financial statements." ECF 49, at 26. Therefore, no unnecessary currency conversion occurred.

* * *

For the foregoing reasons, the court denies Habaş's motion for judgment on the agency record and grants judgment on the agency record to the government and Defendant-Intervenors. *See* USCIT R. 56.2(b). A separate judgment will issue. *See* USCIT R. 58(a).

Dated: September 14, 2023
New York, New York

/s/ M. Miller Baker
JUDGE

Slip Op. 23–134

THE MOSAIC COMPANY, Plaintiff, v. UNITED STATES, Defendant, and OCP S.A., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 21–00116

[Remanding an agency decision concluding a countervailing duty investigation of phosphate fertilizers from Morocco]

Dated: September 14, 2023

David J. Ross, Wilmer, Cutler, Pickering, Hale and Dorr, LLP, of Washington, D.C., for plaintiff and defendant-intervenor The Mosaic Company. With him on the briefs were *Stephanie E. Hartmann* and *Natan P.L. Tubman*.

William R. Isasi, Covington & Burling LLP, of Washington, D.C., for plaintiff and defendant-intervenor OCP S.A. With him on the briefs were *Alexander D. Chinoy*, *Micaela R. H. McMurrough*, *Cynthia C. Galvez*, and *Jordan B. Bakst*.

Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Stanceu, Judge:

In this consolidated action, plaintiffs contest the final affirmative determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in a countervailing duty ("CVD") investigation of phosphate fertilizers from the Kingdom of Morocco ("Morocco") and the resulting countervailing duty order. Before the court are the motions of plaintiffs The Mosaic Company ("Mosaic") and OCP S.A. ("OCP") for judgment on the agency record, submitted under USCIT Rule 56.2. The court remands the final affirmative countervailing duty determination to Commerce with instructions pertaining to certain of the claims brought in this litigation.

I. BACKGROUND

A. The Parties to this Consolidated Action

There are two plaintiffs in this consolidated action.[1] Mosaic, a domestic mining company that also produces and sells phosphate

[1] Consolidated with the lead case, *The Mosaic Company v. United States*, Court No. 21–00116, is *OCP S.A. v. United States*, Court No. 21–00218. The Mosaic Company's Consent Mot. to Consolidate and to Extend Time to File Joint Status Report in Court No. 21–00116 (July 7, 2021), ECF No. 25; Order (July 8, 2021), ECF No. 26.

fertilizers, was the petitioner in the CVD investigation and is a defendant-intervenor. Compl. ¶ 3 (May 12, 2021), ECF No. 12. OCP, a Moroccan mining company and the country's only known phosphate fertilizer producer, is a plaintiff as well as a defendant-intervenor and was a mandatory respondent in the investigation. *Id*. ¶ 7. Defendant is the United States.

B. The Countervailing Duty Investigation and the Department's Determinations

1. Mosaic's Petition and Initiation of the CVD Investigation

In June 2020, Mosaic filed a petition (the "Petition") seeking countervailing duties on imports of phosphate fertilizer (the "subject merchandise") from the Kingdom of Morocco and the Russian Federation. *Countervailing Duty Petitions Regarding Phosphate Fertilizers From Morocco and Russia* (June 26, 2020), P.R. Docs. 1–8 ("*Petition*").[2] In the Petition, Mosaic requested that Commerce initiate an investigation into phosphate fertilizers from Morocco and Russia pursuant to its authority under section 702(c)(4) of the Tariff Act of 1930 (the "Tariff Act"), *as amended*, 19 U.S.C. § 1671a(c)(4).[3] *Petition* at I-5–I-6.

Commerce initiated the CVD investigation on July 16, 2020 ("Initiation Notice"). *Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Initiation of Countervailing Duty Investigations*, 85 Fed. Reg. 44,505 (Int'l Trade Admin. July 23, 2020) ("*Initiation Notice*"). The Initiation Notice incorporated by reference an "Initiation Checklist." *Countervailing Duty Investigation Initiation Checklist* (Int'l Trade Admin. July 16, 2020), P.R. Docs. 54–58 ("*Initiation Checklist*"). Commerce selected OCP as the sole mandatory respondent in the investigation with respect to subject merchandise imports from Morocco, for a period of investigation ("POI") of January 1, 2019 through December 31, 2019. *Initiation Notice*, 85 Fed. Reg. at 44,505, 44,508.

2. The Preliminary Determination

Following initiation of the investigation, Commerce issued questionnaires to, among others, the Government of Morocco ("GOM") and OCP. Commerce published its "Preliminary Determination" in late 2020, *Phosphate Fertilizers From the Kingdom of Morocco: Preliminary Affirmative Countervailing Duty Determination*, 85 Fed. Reg.

[2] Citations to documents from the Joint Appendix (April 27, 2022), ECF Nos. 93 (conf.), 94 (public) are referenced herein as "P.R. Doc. __" for public versions. All information disclosed in this Opinion and Order is public information.

[3] Citations to the United States Code herein are to the 2018 edition. Citations to the Code of Federal Regulations are to the 2020 edition.

76,522 (Int'l Trade Admin. Nov. 30, 2020) ("*Prelim. Determination*"), and an "Amended Preliminary Determination" shortly thereafter, *Phosphate Fertilizers From the Kingdom of Morocco: Amended Preliminary Determination of Countervailing Duty Investigation*, 85 Fed. Reg. 85,585 (Int'l Trade Admin. Dec. 29, 2020) ("*Amended Prelim. Determination*"). The Preliminary Determination incorporated by reference a "Preliminary Decision Memorandum." *Decision Memorandum for the Preliminary Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco* (Int'l Trade Admin. Nov. 23, 2020), P.R. Doc. 386 ("*Prelim. Decision Mem.*").

In the Preliminary Determination, Commerce determined for OCP a total countervailable subsidy rate of 23.46% *ad valorem*. *Prelim. Determination*, 85 Fed. Reg. at 76,523. Commerce determined preliminary *ad valorem* subsidy rates for several programs that it believed benefited OCP: (1) OCP's bond program, 0.29%; (2) government loan guarantees, 6.64%; (3) provision of phosphate mining rights for less than adequate remuneration, 12.66%; and (4) tax incentives for export operations, 3.87%. *Id.*; *Prelim. Decision Mem.* at 7–12. Commerce subsequently amended the preliminary subsidy rate to 16.88% upon addressing a ministerial error that had inflated the calculation of OCP's benefit under the loan guarantee program. *Amended Prelim. Determination*, 85 Fed. Reg. at 85,585.

3. The Post-Preliminary Determination

Mosaic submitted a "New Subsidy Allegation" following initiation of the investigation but prior to the publication of the Preliminary Determination. *Phosphate Fertilizers from Morocco: New Subsidy Allegations* (Oct. 14, 2020), P.R. Doc. 227 ("*New Subsidy Allegation*"). In response, Commerce initiated investigations into several additional programs not investigated in the Preliminary Determination. *Countervailing Duty Investigation of Phosphate Fertilizers from Morocco: New Subsidy Allegations* (Int'l Trade Admin. Nov. 3, 2020), P.R. Doc. 332 ("*New Subsidy Allegation Mem.*"). This culminated in the issuance of the Department's "Post-Preliminary Determination." *Post-Preliminary Determination of Countervailing Duty Investigation: Phosphate Fertilizers from the Kingdom of Morocco* (Int'l Trade Admin. Jan. 6, 2021), P.R. Doc. 441 ("*Post-Prelim. Determination*"). Mosaic in its New Subsidy Allegation asserted that OCP benefited from five additional programs not previously investigated by Commerce. *New Subsidy Allegation* at 2. Commerce determined that three of these programs were countervailable: (1) reductions in tax fines and penalties, 0.05%; (2) revenue exclusions from minimum tax

contributions, 0.08%; and (3) custom duty exemptions for capital goods, machinery, and equipment, 0.11%; these additions increased, from 16.88% to 17.12%, the subsidy rate preliminary calculated for OCP. *Post-Prelim. Determination* at 4–8.

4. The Final Determination

In response to the publication of the Amended Preliminary Determination and Post-Preliminary Determination, Mosaic and OCP submitted case briefs to Commerce. *Phosphate Fertilizers from Morocco: Petitioner's Case Brief* (Jan. 13, 2021), P.R. Doc. 448 ("*Mosaic's Case Br.*"); *Phosphate Fertilizers from the Kingdom of Morocco: OCP's Case Brief & Request for a Closed Hearing* (Jan. 13, 2021), P.R. Doc. 450 ("*OCP's Case Br.*"). Addressing the comments raised in those briefs, Commerce published its affirmative "Final Determination" in February 2021, *Phosphate Fertilizers From the Kingdom of Morocco: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 9,482 (Int'l Trade Admin. Feb. 16, 2021) ("*Final Determination*"), which incorporated by reference a "Final Issues and Decision Memorandum," *Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco* (Int'l Trade Admin. Feb. 8, 2021), P.R. Doc. 473 ("*Final I&D Mem.*"). Commerce notified the International Trade Commission ("Commission" or the "ITC") of its affirmative Final Determination, and the ITC issued an affirmative injury determination. *Phosphate Fertilizers From Morocco and Russia*, 86 Fed. Reg. 17,642 (Int'l Trade Comm'n Apr. 5, 2021). Commerce published a countervailing duty order (the "Order") shortly thereafter. *Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Countervailing Duty Orders*, 86 Fed. Reg. 18,037 (Int'l Trade Admin. Apr. 7, 2021) ("*Order*").

In the Final Determination, Commerce determined a total countervailable subsidy rate for OCP of 19.97%, calculated as the sum of the subsidy rates for six countervailable programs that Commerce identified. *Final Determination*, 86 Fed. Reg. at 9,483; *Order*, 86 Fed. Reg. at 18,038; *Final I&D Mem.* at 5–6. These six programs and rates were: (1) government loan guarantees, 0.06%; (2) provision of phosphate mining rights for less than adequate remuneration, 18.42%; (3) tax incentives for export operations, 1.27%; (4) reductions in OCP's tax fines and penalties, 0.05%; (5) revenue exclusions for minimum tax contributions, 0.07%; and (6) customs duty exemptions for capital goods, machinery, and equipment, 0.10%. *Final I&D Mem.* at 5–6.

C. Proceedings Before the Court

Mosaic and OCP commenced their actions in 2021. Amended Summons (Apr. 12, 2021), ECF No. 10; Compl.; Summons (May 6, 2021), Ct. No. 21–00218, ECF No. 1; Compl. (June 4, 2021), Ct. No. 21–00218, ECF No. 8. Before the court are Mosaic's and OCP's motions for judgment on the agency record under USCIT Rule 56.2. Pl. The Mosaic Co.'s Rule 56.2 Mot. for J. on the Agency R. (Oct. 15, 2021), ECF No. 51; Rule 56.2 Mot. for J. on the Agency R. of OCP S.A. (Oct. 15, 2021), ECF Nos. 53 (conf.), 54 (public).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude a countervailing duty investigation.

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)).

B. Countervailing Duties under the Tariff Act

When certain conditions are met, the Tariff Act provides for a "countervailing duty" to be assessed on imported merchandise to remedy the effect of a subsidy provided by the government of the exporting country. Section 701(a) of the Tariff Act, 19 U.S.C. § 1671(a), provides for the imposition of a countervailing duty if: (1) Commerce determines that an "authority," defined as either the government of a country or a public entity within the territory of the country, *id*. § 1677(5)(B), "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States"; and (2) the Commission determines that an industry in the United States is materially injured or threatened with material injury by reason of the subsidized imports.

A "countervailable subsidy" exists, generally, where an authority provides a financial contribution to a person and a benefit is thereby conferred, and the subsidy meets the requirement of "specificity," as determined according to various rules set forth in the statute. *Id.* §§ 1677(5), (5A). When a subsidy involves the provision of goods or services rather than the provision of monies directly, a benefit is conferred if those goods or services are provided by the authority for less than adequate remuneration ("LTAR"). *Id.* § 1677(5)(E)(iv).

C. Summary of Claims in this Consolidated Action

OCP claims, first, that the CVD investigation was initiated unlawfully because the Petition lacked sufficient support from the domestic industry. It claims, further, that even if the initiation was lawful, the Department's determination that the Moroccan government's provision of phosphate mining rights conferred a benefit to OCP was unsupported by substantial evidence because of flaws in the methodology Commerce used to assess the adequacy of remuneration. OCP claims, third, that the Department's investigating three programs (reduction in tax fines and penalties, revenue exclusions for minimum tax contributions, and customs duty exemptions for capital goods, machinery, and equipment) was unlawful because Commerce lacked authority to investigate these three programs. Fourth, OCP claims that, even if the investigation into the reduction in tax fines and penalties was lawful, Commerce erred in finding the program to be *de facto* specific. Finally, OCP claims that Commerce unlawfully investigated the provision of phosphogypsum byproduct disposal services (a government program Commerce ultimately determined OCP did not use during the POI), arguing that the Petition inadequately alleged elements of a countervailable subsidy.

Mosaic claims that the Department's benefit calculation for the Moroccan government's provision of mining rights was affected by errors that understated the benefit. Mosaic claims, second, that Commerce incorrectly found that two programs under the government's value-added tax ("VAT") regime conferred no benefit to OCP.

D. The Initiation of the CVD Investigation

OCP's first claim is that Commerce unlawfully initiated an investigation of phosphate fertilizers from Morocco, having erroneously determined that the Petition demonstrated adequate industry support. Mem. in Supp. of Consol. Pl. and Def.-Int. OCP S.A.'s Rule 56.2 Mot. for J. on the Agency R. 14 (Oct. 15, 2021), ECF Nos. 53 (conf.), 54 (public) ("OCP's Br."). OCP argues that because certain fertilizer products, namely nitrogen, phosphorus, and potassium ("NPK") fertilizers, are subject merchandise, Commerce was required to include

all domestic producers of NPK fertilizers in the domestic industry when assessing whether the domestic industry supported the Petition. *Id*. According to OCP, the domestic producers of the like product must include "bulk blenders," domestic producers who do not manufacture an individual granulated or compounded fertilizer with a phosphate component but instead blend fertilizers produced by others into specific formulations. OCP takes the position that the Department's unwarranted exclusion of bulk blenders from the domestic industry resulted in an unlawful decision that the Petition had the requisite support of the domestic industry.

OCP's claim arose due to the structure of the scope language used by Commerce in the investigation and, ultimately, the Order. In initiating the investigation, Commerce determined that "there is a single domestic like product, coextensive with the scope" of the investigation. *Initiation Checklist* at Attachment II, at 12; *see also Initiation Notice*, 85 Fed. Reg. at 44,506. For the investigation and the Order, Commerce employed identical scope language, covering "phosphate fertilizers in all physical forms." *Initiation Checklist* at Attachment I; *Order*, 86 Fed. Reg. at 18,038. The third paragraph of the scope language provides that the scope includes certain fertilizers that contain phosphate but also contain other plant nutrient components, as follows:

> The covered merchandise also includes other fertilizer formulations incorporating phosphorous and non-phosphorous plant nutrient components, whether chemically-bonded, granulated (*e.g.*, when multiple components are incorporated into granules through, *e.g.*, a slurry process), or compounded (*e.g.*, when multiple components are compacted together under high pressure), including . . . nitrogen, phosphorous, potassium (NPK) fertilizers.

Id. A plain-meaning reading of this scope language limits these additional products to those that are not merely mixtures or "blends" of different fertilizers. Instead, the finished product must be "chemically-bonded, granulated . . . or compounded" in order to be included within the scope. *Id*.

The fourth paragraph of the scope language, which gave rise to OCP's claim, addresses mixtures and blends in which the finished product, in the condition in which it is imported, is not itself "chemically-blended, granulated, or compounded" and is not, in and of itself, merchandise that is subject to the Order. The fourth paragraph provides that:

> Phosphate fertilizers that are otherwise subject to this investigation are included when commingled (*i.e.*, mixed or blended) with phosphate fertilizers from sources not subject to this investigation. Phosphate fertilizers that are otherwise subject to this investigation are included when commingled with substances other than phosphate fertilizers subject to this investigation (*e.g.*, granules containing only non-phosphate fertilizers such as potash [a potassium product] or urea [a nitrogen product]). *Only the subject component of such commingled products is covered by the scope of this investigation*.

Id. (emphasis added). Thus, the fourth paragraph of the scope language sweeps into the scope of the Order certain upstream products, i.e., "[p]hosphate fertilizers that are otherwise subject to this investigation" that are not the imported merchandise but instead are upstream products that were used in producing the imported merchandise. The "subject merchandise" content is limited to the aforementioned "chemically-blended, granulated, or compounded" fertilizers. *Id*. The other components of the imported merchandise present within "such commingled products" are expressly excluded from the scope by the fourth paragraph. *Id*.

Arguments can be made that the Department's inclusion of the upstream products within the scope of the Order was contrary to law. According to section 701(a) of the Tariff Act, Commerce is to impose countervailing duties upon "a class or kind of merchandise *imported*, or *sold* (or *likely to be sold*) for *importation*, into the United States" if a countervailable subsidy is provided with respect to that merchandise and the ITC finds injury or threat to a domestic industry "by reason of imports of *that merchandise* or by reason of sales (or the likelihood of sales) of *that merchandise* for *importation*." 19 U.S.C. § 1671(a) (emphasis added). Because Commerce, by operation of the fourth paragraph of the scope language, is imposing countervailing duties only upon an ingredient in the imported merchandise, not the merchandise itself that was imported or sold for importation, it can be argued that Commerce lacked statutory authority to include that paragraph within the scope language of the Order. The court does not opine in *dicta* whether such arguments would have merit but notes that OCP has not raised any such arguments in this litigation. As the court explains below, the arguments OCP puts forth are unconvincing because Commerce reasonably determined the composition of the domestic like product (and, therefore, of the corresponding domestic industry) based on the scope language, which, as unchallenged in this litigation, is presumed to have been lawful.

In challenging the Department's initiation of the investigation, OCP argues that Commerce unlawfully refused to consider opposition to the Petition by wholesalers; that, by disregarding bulk blended NPK, the Department relied on a flawed calculation of the total production of the domestic like product; and that Commerce acted contrary to statute when it declined to poll the industry. OCP's Br. 14–38. These arguments are addressed below.

1. Pre-Initiation Opposition to the Petition of Domestic Wholesalers

Contesting the Department's determination of industry support, OCP alleges that Commerce "was required to consider" the views of "certain domestic parties," namely wholesalers, who "notified Commerce of their opposition to the Petition." *Id*. at 15 (citing American Plant Food's Letter *Re: Phosphate Fertilizer from Morocco and Russia: Opposition to Countervailing Duty Petition* at 2 (July 14, 2020), P.R. Doc. 47 ("*APF Letter*")).[4] OCP argues that "[a]cting contrary to law, Commerce refused to do so." *Id*. (citing 19 U.S.C. § 1671a(c)(4)(A)(ii) for the proposition that "[t]he law requires Commerce to consider the views of 'domestic producers and workers' who express either support for, or opposition to, the petition when evaluating industry support" and 19 U.S.C. § 1671a(c)(5) for the proposition that "domestic producers or workers" include wholesalers). This argument is unconvincing.

The statute provides that, for a petition to have industry support, "the domestic producers or workers who support the petition" must "account for at least 25 percent of the total production *of the domestic like product*" and must "account for more than 50 percent of the production *of the domestic like product* produced by that portion of the industry expressing support for or opposition to the petition." 19 U.S.C. §§ 1671a(c)(4)(A)(i)–(ii) (emphasis added). Mosaic, in the Petition, asserted that it identified all known producers of the domestic like product: itself, Nutrien/Potash Corp., Simplot, Intafos/Agrium, and Meherrin. *Petition* at I-6; *Initiation Checklist* at Attachment II, at 8 ("The petitioner identified all known producers of the domestic like product."). Among these producers, only Mosaic either supported or opposed the Petition. *Petition* at I-5 ("Petitioner is unaware of any domestic producer that opposes the Petitions."); *Initiation Checklist* at Attachment II, at 9.

Having identified a single domestic like product that is coextensive with the scope of the investigation, having determined that the "pe-

[4] Commerce also cited a letter submitted by a second wholesaler, which also commented in opposition to the Petition but requested confidential treatment of its entire letter. The overly broad claim of confidentiality is unwarranted.

titioner provided sufficient information to establish *all known producers of the domestic like product*," and having found that Mosaic was the only producer of the domestic like product to comment either in support of or opposition to the Petition, Commerce concluded that "there is adequate industry support within the meaning of section 702(c)(4)(A) of the Act," 19 U.S.C. § 1671a(c)(4)(A), to initiate the investigation. *Initiation Checklist* at Attachment II, at 14–15 (emphasis added). Neither OCP nor the domestic wholesalers who opposed the Petition successfully demonstrated otherwise.

Although identifying themselves as "interested parties" eligible to comment on the issue of industry support, per 19 U.S.C. § 1671a(c)(4)(E),[5] neither wholesaler demonstrated or even alleged that they engaged in any actual "production of the domestic like product," let alone the extent to which their production activities might alter or refute the industry support calculation put forth by Mosaic in the Petition (and upon which Commerce relied when determining that sufficient industry support existed). *Initiation Checklist* at Attachment II, at 11 (stating that neither wholesaler "provided Commerce with any data."). Instead, the wholesalers provided boilerplate language articulating their opposition to the Petition only in generalized terms. *See APF Letter* at 2. One wholesaler, American Plant Food, undercut its own position when it conceded that "[i]f Mosaic is successful in their petition, it would leave the American growers with *one producer of phosphate*," implicitly conceding that Mosaic is responsible for producing at least a significant portion of the domestic like product. *Id.* (emphasis added).

The burden of record creation lies in general with the parties, not the agency. *See SeAH Steel VINA Corporation v. United States*, 950 F.3d 833, 845 (Fed. Cir. 2020) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted)). Here, the parties involved (petitioner Mosaic and the wholesaler opponents) were better positioned than was Commerce to provide data pertaining to total production of the domestic like product. That only the petitioner did so, and that the evidence submitted by the petitioner was sufficient to support the Department's decision to initiate the investigation, do not constitute a "refusal" by Commerce to consider wholesaler opposition to the Petition.

[5] The statute provides that "any person who would qualify as an interested party under section 1677(9) of this title if an investigation were initiated, may submit comments or information on the issue of industry support." 19 U.S.C. § 1677(9)(C), in turn, defines "interested party" to include "a manufacturer, producer, or wholesaler" of a domestic like product.

2. Exclusion of the Products of Bulk Blenders from the Total Production of the Domestic Like Product

OCP argues, further, that Commerce unlawfully initiated the investigation because the Department wrongfully excluded bulk blenders from the domestic industry and wrongfully excluded "bulk blended NPK" from the calculation of total production of the domestic like product, such that Commerce "materially underestimated production in the United States" when assessing industry support. OCP's Br. 19. This argument is also unconvincing.

As previously discussed, paragraphs three and four of the scope language, when read together, provide that NPK fertilizers are in-scope merchandise, and therefore considered to be part of the domestic like product, only if they are "chemically-bonded, granulated, or compounded." *Initiation Checklist* at Attachment I; *Order*, 86 Fed. Reg. at 18,038. Paragraph four of the scope having clarified that "only the subject component of such commingled products is covered by the scope," Commerce interpreted the scope of the investigation to conclude that the commingled products of bulk blenders are not, in and of themselves, included within the domestic like product. It could be argued that their products, had they been imported, should have been considered subject merchandise because the subject merchandise component therein would have subjected the importer to countervailing duty liability. But the inherent problem arises from the uncontested scope language itself (which may have been unlawful but was unchallenged), not with the Department's conclusion that bulk blenders do not produce the domestic like product, which Commerce defined to be coextensive with the scope of the investigation.

Because OCP has not challenged the scope language, the court must conclude that Commerce did not act contrary to record evidence in finding that "it is not appropriate to collect data from companies that perform such blending techniques and doing so could result in double-counting." *Initiation Checklist* at Attachment II, at 14; *Final I&D Mem*. at 9.

3. The Department's Decision Not to Poll the Domestic Industry

Finally, OCP argues that "[w]here the petition fails to establish industry support for an investigation, as was the case here," Commerce was obliged to "'poll the industry or rely on other information' to evaluate industry support." OCP's Br. 31–32 (citing 19 U.S.C. § 1671a(c)(4)(D) and *Initiation Checklist* at 3, and at Attachment II, at 10, 14–15).

This argument also fails. The relevant statutory provision requires Commerce to "poll the industry or rely on other information in order to determine if there is support for the petition" only "[i]f the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product." 19 U.S.C. § 1671a(c)(4)(D). The legislative history indicates that "if the petition *on its face* does not establish that it is supported by domestic producers or workers accounting for more than 50 percent of total domestic production, Commerce will poll the industry or otherwise determine whether the support requirements have been met." S. Rep. No. 103–412, at 36 (1994) (emphasis added). As defendant argues:

> [I]t is not enough for an interested party to merely express an opposition to the petition and demand polling. . . . Rather, the party must proffer sufficient evidence to Commerce to demonstrate that the industry support data presented in the petition contained an error of sufficient magnitude to change the outcome of the industry support calculation.

Def.'s Opp'n to Pls.' Mots. for J. Upon the Admin. R. 36 (Feb. 22, 2022), ECF Nos. 72 (conf.), 79 (public) ("Def.'s Resp.") (citing *PT Pindo Deli Pulp v. United States*, 36 CIT 394, 414, 825 F. Supp. 2d 1310, 1328). In support of its "polling" argument, OCP relies on its contentions that Commerce unlawfully ignored opposition to the Petition by domestic wholesalers and improperly excluded bulk blended NPK from the total production of the domestic like product. Both contentions are unpersuasive for the reasons the court has put forth.

In summary, OCP has not demonstrated a right to relief on its claim that the initiation of the CVD investigation was unlawful.

E. The Benefit Calculation for the Provision of Mining Rights for LTAR

OCP and Mosaic, for different reasons, claim that Commerce improperly determined the benefit conferred by the government of Morocco's provision of mining rights to OCP. Commerce determined that this program was countervailable at a rate of 18.42%. *Final I&D Mem.* at 5. OCP argues that, to the extent a benefit was conferred at all, the benefit found by Commerce was too large; Mosaic argues, conversely, that the benefit calculated by Commerce was too small. Both claims object to aspects of the methodology Commerce used to assess the adequacy of remuneration for the mining rights.

The Moroccan government, which owns all mineral reserves, granted OCP a monopoly to mine phosphate, including during the

POI. *Prelim. Decision Mem.* at 11; *Final I&D Mem.* at 31. Commerce preliminarily determined that this exclusive provision of mining rights constituted a countervailable subsidy because it provided a financial contribution benefiting OCP via the provision of a good for less than adequate remuneration and was *de jure* specific. *Prelim. Decision Mem.* at 11–12 (citing 19 U.S.C. §§ 1677(5), (5A)). To make its LTAR determination, Commerce relied on its regulation, 19 C.F.R. § 351.511(a)(2).

The regulation directs Commerce to measure "adequate remuneration" pursuant to a three-tiered methodology. Finding that "there are no suitable market-determined benchmark prices for phosphate ore mining rights in Morocco," Commerce determined that it could not use a tier-one approach. *Prelim. Decision Mem*. at 12 (citing 19 C.F.R. § 351.511(a)(2)(i)). Finding also that "[t]he government is the sole provider of mining rights for phosphate ore in Morocco and, thus, there are no private, market-determined prices available for the good in question," Commerce determined that a tier-two approach also was unavailable. *Id*. (citing 19 C.F.R. § 351.511(a)(2)(ii)). Commerce determined it would conduct a tier-three analysis and examine "whether the government price is consistent with market principles." *Id*. (citing 19 C.F.R. § 351.511(a)(2)(iii)).

Neither the statute nor the regulation provides guidance on how Commerce is to conduct a tier-three LTAR analysis or how Commerce is to calculate the government price when the "good or service" provided by the governmental authority consists of an intangible legal right (in this case, mining rights). Commerce stated that, in such situations, it may "find it appropriate to conduct a benefit analysis not on mining rights *per se*, but on the value of the underlying good conveyed via the mining rights." *Final I&D Mem.* at 23. In exercising those mining rights, Mosaic mined phosphate ore, from which it produced phosphate rock using a "beneficiation" process. *See Prelim. Decision Mem*. at 11–12. Although preferring to use unbeneficiated phosphate ore as the underlying good for the purposes of its benefit analysis, Commerce was unable to identify a global market for this good. *Id.* at 12 n.81. Commerce, instead, used "phosphate rock beneficiated in 2019 to calculate the total benefit." *Final I&D Mem.* at 29 & n.197 (citation omitted).

For its tier-three analysis, Commerce essentially constructed an estimated price for OCP's beneficiated phosphate rock using a cost of production ("COP") buildup, assessing OCP's production costs from

OCP's questionnaire responses.[6] Commerce then compared this price with a world benchmark price, which Commerce calculated as the average of various prices for beneficiated phosphate rock selected "from among the benchmark data submitted by the petitioner and OCP." *Prelim. Decision Mem.* at 12; *see also Final I&D Mem.* at 18. Finally, to calculate the benefit conferred, Commerce "multiplied the difference between the calculated per-unit cost buildup, including the production cost of the phosphate rock and the extraction taxes paid, and the benchmark per-unit price of phosphate rock, by the total amount of phosphate rock mined and beneficiated by OCP during the POI." *Prelim. Decision Mem.* at 12; *see also Final I&D Mem.* at 29.

OCP does not challenge the general methodology Commerce used under tier three but argues that the COP buildup incorrectly failed to include OCP's selling, general, and administrative (collectively, "SG&A") expenses and that the Department's calculation of a profit component was flawed. With respect to the world benchmark, both OCP and Mosaic argue that Commerce erred in including certain prices or in failing to make certain adjustments. The court addresses these arguments below.

1. The Cost of Production Buildup: The Department's Exclusion of SG&A

OCP first argues that Commerce impermissibly excluded SG&A from the cost of production buildup. OCP's Br. 39. The court agrees.

In response to the Department's questionnaires, OCP reported categories of SG&A expenses. It informed Commerce that, other than the direct costs it incurred "in the extraction, beneficiation, and transport of phosphate rock," it also "allocates a portion of two corporate-level expenses to each of its mining operations/entities: (1) headquarters ('HQ') and support expenses, and (2) cost of debt." *OCP S.A. Suppl. Questionnaire Resp. Part Three* at 7–8 (Nov. 6, 2020), P.R. Doc. 354 ("*OCP's Suppl. Questionnaire Resp. Part III*"). OCP recorded these expenses only at a corporate, company-wide level of accounting.

In its reporting to Commerce, OCP allocated corporate-level HQ and support costs to each of its various "operations/entities," including its mining operations, "on the basis of total operating costs." *Id.* at 8 and Appendix MIN2–7. OCP's HQ and support costs covered such expenses as the "purchases of services (*e.g.*, IT [information technology] services, catering, accounting services, facility management,"

[6] Commerce claimed confidential treatment for its constructed price. This calculation necessarily will change upon remand. Before deciding to claim confidential treatment for the revised constructed price it calculates on remand, Commerce must consult with OCP to determine whether public disclosure actually has the potential to cause competitive harm to OCP.

"external costs (*e.g.*, telecom, consulting and advertising, bank fees, insurance)," "personnel costs (the salaries, overtime, bonuses . . .)," and "amortization of equipment related to headquarters and equipment that is used across functions such as IT." *Resp. to Questionnaire in Lieu of On-Site Verification* at 39–40 (Dec. 30, 2020), P.R. Doc. 436 ("*OCP's Verification Resp.*"). OCP also reported that its debt costs reflected "interest paid on various debts—bonds, loans, convertible debt, or lines of credit—that are broadly applicable or fund general corporate purposes," *id*. at 19, including "interest expenses on loans it has used to fund capital improvements associated with its mining operations," *OCP's Case Br.* at 28.

Commerce excluded the entire amount of OCP's reported SG&A expenses from the COP buildup. Commerce explained that "[a]lthough OCP itemized the expenses that constitute its HQ/support costs and cost of debt into generic categories, we do not have sufficient information on how each of these line items contributed to OCP's mining operations and how these costs are relevant to the pricing of phosphate rock." *Final I&D Mem*. at 24 (citation omitted). Commerce having stated that it sought to "take into consideration the *relevant production costs* associated with producing the phosphate rock from the minerals in the ground as well as *the pricing of phosphate rock*," *id*. (emphasis in original), it appears that the Department's decision not to include SG&A costs stemmed entirely from OCP's cost accounting methods.

OCP stated in a questionnaire response that "[h]eadquarters and support activities do not stand alone in a business. They exist to support the production operations of the larger entity. Therefore, some of those costs are properly associated with the mining activities." *OCP's Verification Resp.* at 6. Before the court, OCP argues, similarly, that "[i]t defies logic to conclude that OCP, a single company that operates several mining sites that are used to produce phosphate rock, incurs no HQ-level SG&A expenses in that production," OCP's Br. 42, and that only "a fictitious company" could operate with "zero HQ-level SG&A expenses," Reply Br. of Consol. Pl. and Def.-Int. OCP S.A. 23 (Apr. 13, 2022), ECF Nos. 91 (conf.), 92 (public) ("OCP's Reply").

Commerce based its decision to exclude SG&A expenses from the COP buildup on a finding that *not all* of the SG&A expenses reported by OCP were necessarily directly relevant to phosphate rock production and pricing. *Final I&D Mem*. at 24. Commerce found that "to the extent that some items in OCP's HQ/support expenses in the cost build up could arguably be related to mining operations, the record

does not contain sufficient evidence that would allow us to segregate and remove those costs which are considered unrelated to mining operations." *Id*.

OCP provided documentation demonstrating that its SG&A expenses included costs attributable to its phosphate mining operations. *See, e.g.*, *OCP's Verification Resp.* at 6–7, 29; *OCP's Case Br*. at 25–26; OCP's Br. 46 n.15 (noting that HQ-level SG&A expenses included "salaries for certain personnel," including those "who perform roles directly related to mining operations."). Similarly, with respect to debt costs, OCP reported that its "financing and debt costs" included "interest expenses on loans it has used to fund capital improvements associated with its mining operations." *OCP's Case Br.* at 28 & n.83. The Department's excluding *all* SGA expenses from the COP buildup is an implied finding that OCP incurred *zero* SG&A expenses in the process of producing phosphate rock. In light of record evidence that OCP engaged in mining activities and incurred SG&A costs in doing so, the Department's exclusion of all SG&A expenses from the COP buildup was *per se* unreasonable.

The government and Mosaic attempt to defend the Department's exclusion of OCP's SG&A expenses on the basis of the state of record evidence. The government argues, for instance, that "it was OCP's responsibility to segregate mining-related from mining-unrelated costs." Def.'s Resp. 58. But as OCP explained, doing so was not possible because OCP recorded HQ and support expenses, as well as debt costs, only at a corporate level. To adjust for this, OCP allocated its SG&A expenses to each of its various operations, including mining operations, in proportion to the respective shares of total direct expenses, which it reported to Commerce. *OCP's Suppl. Questionnaire Resp. Part III* at 8. Relying on the familiar principle that the burden of creating an adequate record lies with the interested parties, the government and Mosaic argue that OCP failed to provide adequate evidence on SG&A expenses. Def.'s Resp. 63 ("OCP had the burden to either segregate the relevant expenses from expenses unrelated to phosphate rock production or, alternatively, provide Commerce with an allocation methodology that is reasonable and non-distortive. OCP did neither."); The Mosaic Co.'s Mem. in Opp'n to OCP's Rule 56.2 Mot. for J. Upon the Agency R. 52 (Feb. 22, 2022), ECF Nos. 73 (conf.), 74 (public) ("Mosaic's Resp.") ("OCP had multiple opportunities to attempt to provide sufficient information demonstrating that the costs at issue are relevant to Commerce's phosphate rock cost buildup, but it squandered these opportunities.").

Defendant's argument implying that OCP could have segregated the relevant expenses is nonsensical. OCP could not place on the

record "segregated" SG&A cost data that did not exist. To perform the task of identifying SG&A expenses for its production of beneficiated phosphate rock, OCP necessarily resorted to an allocation method. And while defendant argues that OCP's method of allocation was unreasonable and distortive, it fails to substantiate that argument based on record evidence and suggests no alternative allocation method.

As Mosaic concedes, Commerce, having chosen to use a COP buildup to calculate the government price, was obligated to ensure that its methodology was reasonable and supported by substantial evidence. Mosaic's Resp. 39. The court agrees with OCP that Commerce, in excluding all SG&A expenses, failed to do so. OCP's corporate-wide SG&A costs and allocation method were, and are, present on the record for the Department's consideration. On remand, Commerce either must accept OCP's SG&A cost allocation method or must show that it is unreasonable in light of a satisfactory alternative methodology it would use instead.

2. The Cost of Production Buildup: Calculation of Profit

OCP argues that Commerce erred when determining the profit rate for inclusion in the COP buildup. OCP's Br. 51. In the Preliminary Determination, Commerce calculated the COP buildup without accounting for profit. *Final I&D Mem*. at 25–27. Following OCP's comments on the Preliminary Determination, *OCP's Case Br.* at 34, Commerce "agree[d] with OCP that it should add a profit component" to the COP buildup, to ensure an "apples-to-apples" comparison with "benchmark prices which are inclusive of profit." *Final I&D Mem*. at 26–27; *see also OCP's Ministerial Error Comments* (Feb. 16, 2021), P.R. Doc. 479 and *Allegations of Ministerial Errors in the Final Determination* (Int'l Trade Admin. Mar. 15, 2021), P.R. Doc. 485 ("*Final Ministerial Error Mem*.").

In adding a profit component, Commerce calculated "a general profit rate based on OCP's general corporate data," OCP's Br. 54 (citing *Final I&D Mem*. at 27), and multiplied it by OCP's total cost of phosphate rock production during the POI, *OCP S.A. Calculations for the Final Determination* at 2 (Int'l Trade Admin. Feb. 8, 2021), P.R. Doc. 475 ("*Final Calculation Mem*.") (citing *OCP's Section III Questionnaire Response* at Ex. Gen-4(a)(iii) (Sept. 17, 2020), P.R. Docs. 130–142 ("*OCP's Section III Questionnaire Resp.*")). Commerce added this profit amount to the COP buildup for phosphate rock to obtain an updated, higher price inclusive of profit.

OCP argues that the Department's profit calculations were unsupported by substantial record evidence and, therefore, that the Depart-

ment's determination that the Moroccan government provided mining rights to OCP at LTAR must be remanded. OCP's Br. 51–52. OCP maintains that the profit rate chosen by Commerce should have been a rate pertaining solely to phosphate rock production rather than a general corporate profit rate; in the alternative, OCP argues that the Department's profit rate suffered from calculation errors. The court addresses these arguments below.

a. The Selection of OCP's Overall Corporate Profit Rate Over a Surrogate Profit Rate

OCP argues, first, that Commerce was obligated to "select a profit rate that is specific to the production of the good that is the subject of the COP buildup (*i.e.* in this case phosphate rock)." OCP's Br. 52–53. OCP provides no statute, regulation, or binding precedent in support of this contention but resorts to the general principle that Commerce has an overarching obligation to determine rates "as accurately as possible." *Id*. at 55 (citing *Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. v. United States*, 45 CIT __, __, 498 F. Supp. 3d 1345, 1353 (2021) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) ("[T]he basic purpose of the statute" is to ensure that Commerce determines "margins as accurately as possible."))). OCP contends, further, that "Commerce's practice" requires the use of a "surrogate profit rate" when "the investigated producer is integrated such that it not only produces the good on which the COP buildup is based, but also other (*e.g.*, downstream) products." *Id*. at 52–53 (citing several prior Commerce determinations). For a surrogate profit rate, OCP proposed a rate based on profit data of a company operating in Jordan, not Morocco, the Jordan Phosphate Mines Company PLC ("JPMC"), whose financial statements "allowed Commerce to calculate a profit rate specific to phosphate rock production, *i.e.*, a profit rate specific to JPMC's phosphate unit." *Id*. at 55 (citing *Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco: New Factual Information* at Ex. 22, at 119–120 (Nov. 4, 2020), P.R. Docs. 333–346 ("*OCP NFI*")).

The statute requires Commerce to assess adequacy of remuneration according to "prevailing market conditions" for "the good or service being provided" and "in the country which is subject to the investigation." 19 U.S.C. § 1677(5)(E). In the situation presented, the statute did not require Commerce to use a surrogate profit rate from a company not operating in Morocco. Moreover, if it is assumed, *arguendo*, that the Department has a consistent past practice of using surrogate profit rates in analogous circumstances, as OCP alleges it does, Commerce was free to deviate from that practice so long as it

provided a reasoned explanation for its departure. *See, e.g.*, *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003) (citing *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)).

In its Final Determination, Commerce explained that it will rely on a surrogate profit rate when such a rate is "the only profit rate on the record." *Final I&D Mem*. at 27 (citing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Issues and Decision Memorandum for the Final Determination* at 24 (Int'l Trade Admin. July 29, 2016) ("*Cold-Rolled Steel from Russia Final I&D Mem*.")). As "OCP provided the necessary information to calculate a profit rate derived from its 2019 unconsolidated financial statements," the Department determined that "there is no need to resort to surrogate information." *Id*.

OCP argues that "Commerce's selected, non-specific profit rate" (i.e. OCP's overall corporate profit rate) "is inaccurate because it includes business activities unrelated to the production of phosphate rock." OCP's Br. 56. While OCP advocates use of the JPMC surrogate profit rate based on a factor of specificity to phosphate rock production, that rate is inferior as to other factors, being derived from business conditions of a different company in a different country. Neither profit data set was perfect, but on this record OCP has not shown that it was unreasonable for Commerce to rely upon the data set specific to OCP's own business operations.

b. The Profit Rate Calculation Methodology

OCP argues, second, that even if the court sustains the Department's decision to use OCP's overall corporate profit rate rather than a surrogate profit rate, the court still should remand the Final Determination to Commerce with respect to the profit rate calculation methodology. OCP's Br. 56. The court agrees.

To calculate OCP's overall corporate profit rate, Commerce divided OCP's 2019 "profit before tax" by the company's "operating expenses" to determine a profit rate of 5.47%. *Final Calculation Mem.* at 2; *OCP's Section III Questionnaire Resp.* at Ex. Gen-4(a)(iii) ("*OCP's 2019 Profit and Loss Statement*").

OCP contends that Commerce introduced an error into the denominator when it "improperly *included* HQ and support costs in the denominator of the profit ratio in contradiction of its position that these very same expenses should be *excluded* in the cost buildup to which the profit rate would be applied." OCP's Br. 57. OCP observes that "Commerce could have avoided this manifest analytical inconsistency by simply including HQ, support, and debt expenses in its

mining rights COP buildup." *Id*. at 58 n.23. Because the court is remanding the Final Determination with instructions to include SG&A expenses in the COP buildup, Commerce necessarily must address the claimed "inconsistency" between the Department's apparent inclusion of SG&A expenses in the operating expense figure used in the denominator of the profit rate calculation, and exclusion of the same from the COP buildup.

OCP also argues that the Department's calculation methodology understated the profit rate, objecting that the numerator that Commerce used, i.e. profit before tax, "is not on the same basis as the denominator, which was limited to *operating* expenses." *Id*. at 60. The court concludes that Commerce must reconsider its use of this methodology, which it has failed to demonstrate was reasonable on the record evidence.

In support of its profit rate calculation methodology, Commerce explained: "In *Cold-Rolled Steel from Russia*, Commerce calculated a profit ratio for a provision of mining rights for LTAR program by dividing a company's profit before tax by its COGS [cost of goods sold]." *Final I&D Mem*. at 27 (citing *Cold-Rolled Steel from Russia Final I&D Mem*. at Comment 4). Relying on this past practice, Commerce found it appropriate, "similar to the circumstance in *Cold-Rolled Steel from Russia*," to "calculate a profit ratio for OCP by taking OCP's 'income before taxes' (profit before tax) and dividing it by its 'operating expense' (COGS) from its 2019 unconsolidated profit and loss statement." *Id*.

In this proceeding, Commerce also explained that actual data on OCP's cost of goods sold was not available on the record. *Final Ministerial Error Mem*. at 4. Commerce used OCP's operating expense for the profit rate denominator instead, even though it acknowledged that the two metrics are not equivalent. *OCP's Ministerial Error Comments* at 4 ("[T]he Department based the denominator in its profit ratio calculation on the 'total operating expenses' listed in OCP's profit and loss ('P&L') statement contained in OCP's 2019 unconsolidated financial statements, which the Department appears to have incorrectly assumed was equivalent to COGS."). OCP argues that "COGS as a term and an accounting concept does not include HQ and support expenses." *Id*. That "the 'total operating expenses' line item demonstrably includes HQ and support expenses" therefore indicates that OCP's "operating expense" is "*not* OCP's COGS." *Id*. at 5 (citations omitted).

Commerce also acknowledged that "we did make a mistake in our IDM [Final Issues and Decision Memorandum] by inadvertently

equating 'operating expenses,' which are a line item in OCP's 2019 P&L statement, to 'COGS,' which is not a line item in that statement." *Final Ministerial Error Mem*. at 4. Commerce then stated, opaquely, that "[t]his inadvertent error in the narrative does not affect our calculations because we have used the correct line item from the P&L statement in the calculations based on our stated intent." *Id*.

The record contained data disclosing OCP's operating income, which Commerce, without clear explanation, declined to use as the profit rate numerator. It is reasonable to presume that "operating income" represents net profits derived from a company's standard operations, and in this case there was record evidence that OCP's operating income included revenues from "sales of merchandise" and "sales of goods and services produced," less expenses from "purchase of consumed materials and supplies," "payroll costs," and other items. *See OCP's 2019 Profit and Loss Statement*. In contrast, OCP's Profit and Loss Statement contained record evidence that income before taxes, the profit metric Commerce used for its profit rate numerator in the Final Determination, reflected the sum of OCP's operating income, financial income, and non-current income, the latter two of which would appear to have minimal relevance to phosphate rock production or sale (as they include such items as "revenues from equity securities," "exchange loss," "profit on disposal of fixed assets," and "net book value of transferred fixed assets"). *See id*. OCP points out that because it realized *negative* financial and non-current income in 2019, its profit before tax was lower than its operating income for that year. *See id*.; OCP's Br. 60.

Commerce reported that it would rely on a past practice to calculate the profit rate by dividing profit before tax by COGS. Even if it is assumed, *arguendo*, that this past practice would have been reasonable in this proceeding, such methodology was not feasible as OCP's COGS was not on the record. Having chosen OCP's operating expense for the profit rate denominator instead, Commerce could no longer rely on its irrelevant past practice, and thus, Commerce was obligated to explain the reasonableness of the profit rate calculation methodology it ultimately used. Commerce did not do so, its explanations having been limited to a description of its inapplicable prior practice. *Final I&D Mem*. at 27. Moreover, Commerce has not addressed OCP's concern that the Department's profit rate calculation methodology "failed to achieve an apples-to-apples comparison internally because the numerator is not on the same basis as the denominator." OCP's Br. 60; *OCP's Ministerial Error Comments* at 7 ("[T]he profit ratio must be calculated with a numerator and denominator that are calculated on an apples-to-apples basis.").

In defending the Department's profit rate calculation, defendant engages in the same flawed reasoning as Commerce. The government argues, for instance, that "[c]onsistent with past practice in *Cold-Rolled Steel from Russia*, Commerce calculated a profit ratio by dividing OCP's profit (before tax) by its operating expenses." Def.'s Resp. 68. As discussed previously, doing so was *not* consistent with past practice, as Commerce calculated a profit rate in *Cold-Rolled Steel from Russia* by dividing profit before tax by COGS but in this investigation calculated OCP's profit rate by dividing profit before tax by operating expense.

Defendant also argues that OCP "failed to exhaust its administrative remedies," *id*., because OCP did not raise its arguments "before the Commerce [*sic*] in its case brief," *id*. at 67 (citing *OCP's Case Br*. at 34–41). This argument has no basis in, and is contradicted by, the record facts. As noted above, the Preliminary Determination, on which the case brief was based, included a COP buildup without accounting for profit, a serious deficiency OCP identified in its case brief. *Final I&D Mem*. at 25–27. As OCP points out, "Commerce calculated a profit rate for the first time in the *Final Determination*, *after OCP filed its case brief*." OCP's Reply 41. OCP could not have been expected to object in its case brief to a profit calculation method that Commerce had not yet proposed.

On remand, Commerce must reconsider its method of determining a profit rate and explain why any method it chooses is reasonable when considered in light of the record evidence.

3. The World Price Benchmark for Phosphate Rock

In measuring what it considered to be a benefit conferred by the Moroccan government to OCP through the provision of mining rights at LTAR, Commerce estimated a world price benchmark for phosphate rock against which the government price could be compared. OCP and Mosaic, for different reasons, object to the Department's calculation of a world price benchmark.

To determine the benchmark, Commerce:

> [O]btained a world market price by selecting, from among the benchmark data submitted by the petitioner and OCP, data which are reported on an [*sic*] free-on-board basis, and which include information related to the "bone phosphate of lime" (BPL) level or P_2O_5 content of the rock, such that we could exclude data which relate to phosphate rock which does not compare to that which was mined/beneficiated by OCP during the POI.

Prelim. Decision Mem. at 12. From benchmark data provided by Mosaic and OCP, Commerce identified thirteen world prices for phosphate rock that were sold on a free-on-board basis and were comparable to the phosphate rock produced by OCP, based on similarities in BPL level or P_2O_5 (phosphorous pentoxide) content.[7]

The thirteen prices Commerce used were sourced from third-party market research organizations (CRU Group, Argus Media, Fertecon, and Profercy) and reflected average 2019 phosphate rock export prices from a range of countries and regions (specifically, Egypt, Jordan, Peru, Algeria, Syria, China, and North Africa).[8] *OCP Preliminary Calculation Memorandum* at 9 (Int'l Trade Admin. Nov. 25, 2020), P.R. Doc. 391 (citing *Petition* at Exs. II-23 (Argus Media report), II-24 (CRU report) and *OCP NFI* at Exs. 18 (Fertecon report), 21 (Profercy report)). Commerce preliminary used the simple average of those thirteen prices ($66.96/metric ton) for its world benchmark price. *Prelim. Decision Mem*. at 12. Commerce continued to rely on this benchmark price in the Final Determination. *Final I&D Mem*. at 18. This price was considerably higher than the price Commerce calculated from its COP buildup.

a. The Department's Inclusion of North African Phosphate Rock Prices in the World Price Benchmark

OCP argues that Commerce erred in including in its world price benchmark the North African price of $77.50/metric ton, which represented prices from Morocco and Tunisia and was more than $10/metric ton higher than the benchmark average. Per OCP's argument, "the record demonstrated that the North Africa prices included OCP

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[7] It is not disputed that the BPL percentage of phosphate rock is equal to 2.1852 times the P_2O_5 percentage. The Mosaic Co.'s Mem. in Supp. Of Rule 56.2 Mot. for J. Upon the Agency R. 18, ECF Nos. 55 (conf.), 56 (public). Thus, the two metrics readily may be interchanged through a simple calculation.

[8] The thirteen prices were as follows, listed by country or region, price, and source of information: Egypt ($47/metric ton, CRU Group); Jordan ($88/metric ton, CRU Group); Peru ($75/metric ton, CRU Group); Algeria ($55/metric ton, CRU Group); Jordan ($91.75/metric ton, Argus Media); Algeria ($56.25/metric ton, Argus Media); North Africa ($77.50/metric ton, Argus Media); Peru ($62/metric ton, Fertecon); Egypt ($58.16/metric ton, Profercy); Algeria ($66.89/metric ton, Profercy); Peru ($66.97/metric ton, Profercy); Syria ($56.98/metric ton, Profercy); and China ($68.94/metric ton, Profercy). *OCP Preliminary Calculation Memorandum* at 9 (Int'l Trade Admin. Nov. 25, 2020), P.R. Doc. 391, C.R. Doc. 257.

The price for the North Africa region was based on sales from Morocco and Tunisia. *Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco* at 19 (Int'l Trade Admin. Feb. 8, 2021), P.R. Doc. 473.

Because Commerce relied on four different sources to obtain the benchmark prices, the benchmark included multiple price points for certain countries (Egypt, Jordan, Peru, and Algeria).

prices." OCP's Br. 61 (citing *Petition* at Ex. II-26, at 10). OCP objects that "one group of prices that Commerce included in its benchmark price calculation was substantially influenced by the very activity that Commerce is evaluating against this benchmark." *Id*. at 62. Arguing that the Department's benefit determination "relied on a circular price comparison," i.e., a comparison of OCP's COP buildup-based government price against an export price comprised, in part, of OCP's own prices, OCP alleges that Commerce failed to "accurately measure the adequacy of remuneration for mining rights." *Id*. at 61. OCP has not demonstrated that it was improper for Commerce to use the North African price in performing an LTAR analysis according to tier three of its regulations.

In a tier-three LTAR analysis, Commerce is directed to "measure the adequacy of remuneration by assessing whether the government price is *consistent with market principles*." 19 C.F.R. § 351.511(a)(2)(iii) (emphasis added). In including the North Africa price in its benchmark calculation, Commerce explained that the "North Africa phosphate rock price is 'defined by sales to Europe, India and Brazil from OCP/GCT'" (where GCT is Groupe Chimique Tunisien, a Tunisian producer of phosphate rock). *Final I&D Mem*. at 19 (citing *Petition* at Ex. II-26, at 10). Therefore, the North African price "include[s] non-Moroccan prices" and, critically, constitutes "an export price . . . meaning that it is a market price that would reflect commercial realities in the world market." *Id*. (citation omitted). OCP does not contest these facts. OCP's Br. 64 ("Commerce's response simply misses the point."). Instead, OCP relies on inapposite case law and prior Commerce proceedings.[9]

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[9] OCP cites *U.S. Steel Corp. v. United States*, 33 CIT 1935 (2009), *aff'd*, 425 F. App'x 900 (Fed. Cir. 2011) ("*U.S. Steel*") and *Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination* (Int'l Trade Admin. Nov. 8, 2017) ("*Softwood Lumber from Canada*"). Mem. in Supp. Of Consol. Pl. and Def.-Int. OCP S.A.'s Rule 56.2 Mot. for J. on the Agency R. 62–63 (Oct. 15, 2021), ECF Nos. 53 (conf.), 54 (public).

U.S. Steel involved a tier-two benchmark in which actual world market prices were available in India, the country subject to the countervailing duty review. 33 CIT at 1945. This Court held in *U.S. Steel* that Commerce properly excluded from the tier-two benchmark NMDC prices (i.e prices charged by the National Mineral Development Corporation, a governmental authority), because those prices came from "the very government provider of the good at issue" and were "not reflective of a market-determined price for the good resulting from actual transactions in India." 33 CIT at 1944–45. That "the comparison of NMDC to NMDC prices would be a meaningless measure of the adequacy of remuneration" was a secondary concern to the fact that the NMDC prices were not viable for a tier-two benchmark in the first place. *See U.S. Steel*, 33 CIT at 1945.

In *Softwood Lumber from Canada*, Commerce evaluated whether BC Hydro, a government authority, provided a benefit by purchasing electricity at more than adequate remuneration. For that investigation, Commerce utilized a "benefit-to-the-recipient" methodology, articulated in 19 C.F.R. § 351.503(b), to determine whether the government paid a higher price in purchasing electricity from respondents, than it received in selling

While arguing that the North African price introduced "a circular price comparison" into the Department's LTAR analysis, OCP has not shown that use of this price was unreasonable as part of the Department's tier-three analysis. Moreover, OCP does not challenge, *per se*, the use of that indirect tier-three LTAR analysis for mining rights, which involved a cost buildup for OCP's production of beneficiated phosphate rock and comparison of the same with the world market price (although challenging aspects of that analysis, i.e., SG&A, estimated profit rate and market prices for the phosphate rock).

b. The Department's Inclusion of Egyptian Phosphate Rock Prices in the World Price Benchmark

Mosaic argues that Commerce unlawfully included two prices reflecting lower-quality Egyptian phosphate rock in the calculation of the world price benchmark. Specifically, Mosaic contests the inclusion of the $47/metric ton (from the CRU report) and $58.16/metric ton (from the Profercy report) Egyptian price points, both of which were lower than the benchmark average price of $66.96/metric ton. The Mosaic Co.'s Mem. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. 14–19 (Oct. 15, 2021), ECF Nos. 55 (conf.), 56 (public) ("Mosaic's Br.") (citing *OCP Preliminary Calculation Memorandum* at 9). Mosaic contends that the Egyptian phosphate rock is "not properly comparable to the phosphate rock OCP obtained pursuant to the mining rights provided by the GOM" and therefore that "Commerce's inclusion of Egyptian phosphate rock prices in the benchmark was unsupported by substantial evidence." Mosaic's Br. 14. The court disagrees.

In determining which prices to include in the world price benchmark, Commerce looked to the bone phosphate of lime, also known as phosphorus pentoxide, content of the rock. *Prelim. Decision Mem*. at 12; *Final I&D Mem*. at 18–19. Determining that "BPL and P^2O^5 levels determine OCP's phosphate rock prices," *Final I&D Mem*. at 19 (citing *Phosphate Fertilizers from the Kingdom of Morocco: OCP's Rebuttal Brief* at 12–13 (Jan. 19, 2021), P.R. Doc. 453), and further finding that Egyptian phosphate rock "has a similar BPL or P^2O^5 content as OCP's phosphate rock," Commerce decided it would "con-

electricity. For this reason, Commerce rejected a proposed benchmark based on the prices that BC Hydro paid to companies other than respondents for the purchase of electricity. Commerce explained that such a benchmark would not comport with its benefit-to-the-recipient methodology, as such prices simply would compare the prices at which the government purchased electricity from some companies against the prices at which the government purchased electricity from others. That "the comparison would be circular insofar as it would result in a comparison of an alleged subsidy with itself" was a secondary concern.

In contrast, Commerce relied here on a tier-three approach, not a tier-two benchmark, to measure whether a good was provided at LTAR and used a benchmark that consisted of market-determined export prices.

tinue to use Egyptian phosphate rock prices in the benchmark" for the Final Determination as it did for the Preliminary Determination. *Id.* at 20. Although Mosaic disputes the precise BPL content range for Moroccan and Egyptian rock, Mosaic's Br. 18–19, Mosaic does not deny that Commerce, in calculating the benchmark, "include[d] *all* phosphate rock prices on the record—including Egyptian prices—that fall within or overlap with the BPL and P^2O^5 content range of OCP's rock." Def.'s Resp. 40 (citing *Data from OCP Final Calculations* (Feb. 8, 2021), P.R. Doc. 476). Nor does Mosaic deny that "phosphate content/BPL content" is "the industry's own standard . . . metric of comparability" for phosphate rock. Resp. Br. of Consol. Pl. and Def.-Int. OCP S.A. 17 (Feb. 22, 2022), ECF Nos. 75 (conf.), 76 (public) ("OCP's Resp.").

Mosaic argues, instead, that "phosphate rock characteristics other than BPL content affect rock quality" and that Egyptian phosphate rock is compromised by "qualitative differences" such as "elevated levels of carbonate and iron" that render the Egyptian rock "low quality." Mosaic's Br. 17–19. Mosaic alleges that "Commerce did not engage meaningfully" with evidence of these qualitative differences, such that the Department "improperly disregarded critical evidence that undermines its reasoning and conclusions." Mosaic's Br. 14, 19; The Mosaic Co.'s Reply in Supp. of its Rule 56.2 Mot. for J. Upon the Agency R. 3–4 (Apr. 14, 2022), ECF Nos. 89 (conf.), 90 (public) ("Mosaic's Reply"). This argument is unconvincing.

Mosaic's argument relies on record evidence that Commerce could have regarded as having little if any probativity on the issue presented. Specifically, Mosaic cites a single report for the proposition that "Egyptian rock is low-quality and mostly used in low-value applications." Mosaic's Br. 17 (quoting *Phosphate Fertilizers from Morocco: Submission of Factual Information to Rebut, Clarify, or Correct* at Ex. 1 (Nov. 16, 2020), P.R. Doc. 371 ("*CRU Article*")). That "report" is, in fact, an article published by a commodities research firm that speculates, with respect to the operations of one Egyptian mining company (Misr Phosphate) as it "finalis[es] plans for [an] integrated phosphoric acid plant" at one of its mine sites (Abu Tartour), that "the low quality of Egyptian phosphate rock, in addition to its carbonate and iron content, *may* mean that only manufacturing low grade acid is economic." *CRU Article* at 6 (emphasis added). As OCP points out, the article does not substantiate the extent to which the carbonate or iron content in Egyptian phosphate rock renders it low quality for purposes other than manufacturing phosphoric acid, nor does the article, or other record evidence, provide "any actual

analysis of the carbonate and iron levels or the end use of the Egyptian rock as compared to OCP's rock produced during the POI." OCP's Resp. 9.

The court must deny relief on Mosaic's claim that Commerce improperly included the Egyptian prices in its benchmark calculation. Mosaic has not demonstrated that Commerce improperly disregarded "critical evidence," Mosaic's Br. 19, about alleged qualitative differences between Egyptian and Moroccan phosphate rock.

c. The Department's Decision Not to Adjust the World Price Benchmark for International Delivery Charges

Mosaic argues that Commerce erred in the calculation of its benchmark by declining to apply upward adjustments to the benchmark price to account for international freight charges, import duties, and value added taxes (collectively, "international delivery charges") to arrive at a delivered price. Mosaic's Br. 19–26. Mosaic points to 19 C.F.R. § 351.511(a)(2)(iv), which specifies that, for tier-one and tier-two benchmarks calculated pursuant to 19 C.F.R. §§ 351.511(a)(2)(i) and (ii), Commerce is directed to use "delivered prices." *Id*. at 20–21 (citations omitted). According to Mosaic's argument, "to the extent that a tier 3 benchmark is based on world market prices," as it is here, "it would be illogical for Commerce to exclude delivery charges and deviate from the rule in 19 C.F.R. § 351.511(a)(2)(iv)." Mosaic's Br. 21. Mosaic also relies on its analysis of prior Commerce proceedings. Mosaic's Br. 23–25; Mosaic's Reply 13–20.

The court disagrees with Mosaic. On its face, what Mosaic calls the "rule in 19 C.F.R. § 351.511(a)(2)(iv)" is expressly limited to tier-one and tier-two analyses and was inapplicable in this situation, Commerce having resorted to a tier-three analysis due to unavailability of information from which to apply tier-one or tier-two methodology. *Prelim. Decision Mem*. at 12; *Final I&D Mem.* at 32; *see Mosaic Co. v. United States*, 46 CIT __, __, 589 F. Supp. 3d 1298, 1315 (2022) ("It is unreasonable to rely only on a regulation pertaining to tier-one and tier-two benchmarks to adjust a tier-three benchmark price."). It must be presumed that Commerce, when promulgating the regulation, intentionally made the "delivered price" limitation inapplicable to tier three. The price data Commerce used for its benchmark were derived from actual free-on-board, not delivered, prices. *Prelim. Decision Mem.* at 12; *Final I&D Mem*. at 14. Adding estimated delivery charges to the data on actual prices would not have made the data more accurate.

F. VAT Programs

Mosaic claims that Commerce acted unlawfully in determining that two tax programs alleged in the Petition, VAT Refunds and VAT Exemptions for Capital Goods, Machinery, and Equipment, were not countervailable. Both claims turn on the nature and functioning of the country's tax regime.

Morocco operates a value-added tax system, under which taxpayers ordinarily incur "input VAT" when they purchase inputs from suppliers and collect "output VAT" from purchasers upon sale of the goods they produce. *OCP's Section III Questionnaire Resp.* at 104. Citing prior practice with regard to "VAT regimes which operate normally," Commerce determined that the two VAT programs are not countervailable. *Final I&D Mem.* at 78–79, 81.

In the administration of its VAT regime, the Moroccan government uses a credit invoice system, under which "the amount of input VAT that the company paid is deducted from the amount of output VAT that it collected, which results in either VAT due to the state or, if the company pays a greater amount of input VAT than the amount of output VAT it collects, it accumulates credits that can be used the following month or collected as a refund." *Id.* at 79.

The Moroccan tax code exempts exported goods from input VAT payments because the ultimate purchasers are beyond the ordinary reach of the taxing authorities. In export situations, Moroccan law provides that companies accruing VAT credits in excess of the input VAT they owe are "entitled to seek reimbursement of such credits." *OCP's Section III Questionnaire Resp.* at 110. Additionally, under reforms made to the Moroccan tax code in 2017, certain companies are eligible for exemptions to the payment of input VAT on locally-purchased capital goods, equipment, and machinery in connection with investment agreements with the Moroccan government. *Id*. at 112.

In the Petition, Mosaic alleged that the two VAT programs, i.e., the payment of refunds for OCP's accumulated VAT credits and the grant of exemptions for VAT payments on capital goods, constituted countervailable subsidies. Commerce investigated both programs and determined that neither conferred a benefit to OCP. Mosaic now challenges those determinations.

1. VAT Refunds

Mosaic claims that Commerce erred in not countervailing the Moroccan government's refund to OCP of 20.5 billion Moroccan dirhams in VAT tax credits. Mosaic's Br. 26. Mosaic argues that because Morocco's VAT law provides for producers to recover the difference be-

tween VAT collected from sales and VAT paid on input "only in limited circumstances and pursuant to a specific statutory mechanism," the Moroccan government conferred a benefit by refunding credits that "were effectively worthless." *Id*. at 27, 29. The record evidence is that OCP accrued the credits in question pursuant to specific provisions of the Moroccan tax code, including Article 92, which exempts exported goods and local fertilizer sales from VAT. *Phosphate Fertilizers from the Kingdom of Morocco: Supplemental Questionnaire Response of the Government of the Kingdom of Morocco* at SVI-3 (Nov. 3, 2020), P.R. Docs. 286–331 (citing Article 92 of the Moroccan tax code). Credits were also accrued pursuant to Article 94 of the Moroccan tax code, subjecting certain domestic purchases to a VAT rate of zero percent. *Id.* (citing Article 94 of the Moroccan tax code).

The Moroccan tax code authorizes refunds of accumulated VAT credits. *Phosphate Fertilizers from the Kingdom of Morocco: Questionnaire Response of the Government of the Kingdom of Morocco* at VII-6 (Sept. 17, 2020), P.R. Docs. 145–209 ("*GOM's Initial Questionnaire Resp*.") (citing Article 103 of the Moroccan tax code). There is record evidence that due to its own fiscal constraints, the government of Morocco was unable to refund from its own treasury the outstanding credits of OCP and other companies. *Id.* at VII-7. Because of this, the Moroccan government negotiated financial agreements with the companies eligible for VAT refunds and several Moroccan banks. *Preliminary Decision Mem.* at 15 (citing *GOM's Initial Questionnaire Resp.*at Ex. VII-10). The government, the banks, and OCP reached agreements under which the government borrowed a principal amount used to refund the VAT credits. *Id*. Separate non-recourse agreements known as "factoring agreements" between OCP and the banks required OCP to pay the interest on the loans directly to the banks. *Phosphate Fertilizers from the Kingdom of Morocco: OCP S.A. Supplemental Questionnaire Response, Part I* at 29 (Nov. 3, 2020), P.R. Doc. 254 and *OCP's Section III Questionnaire Resp.* at Ex. VAT-6. By doing so, OCP received the cash value of its outstanding VAT credits but also assumed liability for the interest payments to the banks.

Mosaic points to several aspects of the VAT refund program as evidence "that the GOM acted in an *ultra vires* manner" in making the refunds. Mosaic's Br. 29. First, Mosaic rejects the notion that Moroccan law provides for refunds of VAT credits of the sort that OCP received through the factoring agreements. *Id*. at 27. In support of that argument, Mosaic points to the text of a Moroccan regulation covering VAT refunds, which states that after the taxpayer files an application "at the end of each quarter of the calendar year in respect of transactions carried out during the previous quarter or quarters .

. . [t]he refunds of fees . . . shall be settled within a maximum period of three (3) months from the filing date of the application." Mosaic's Reply 25 (quoting *GOM's Initial Questionnaire Resp.* at Ex. VII-1). Mosaic argues that because the refunds that OCP obtained via the factoring agreements were for multiple years and not paid within the three-month period following OCP's refund request, they were outside of the law's authorization. *Id.* The three-month period is the apparent basis upon which Mosaic argues that the VAT credits were "effectively worthless."

Mosaic argues, further, that the bespoke nature of the factoring agreements also reflected *ultra vires* conduct by the government of Morocco. Mosaic suggests that the program did not arise from the legitimate functioning of Moroccan law but rather was pushed forward by a government eager to assist OCP without a valid statutory basis or even the necessary funds on hand. Mosaic's Br. 29 (citing *Phosphate Fertilizers from the Kingdom of Morocco: OCP Supplemental Questionnaire Response Part 5* at Appendix GEN2–13(d) (Nov. 10, 2020), P.R. Doc. 358).

Mosaic's arguments do not align with the record evidence, which shows that VAT credits are intended to balance a system that shifts the VAT tax burden onto the ultimate consumer, maintaining VAT neutrality for producers such as OCP. Mosaic's Br. 26–27 (citing *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Silicon Metal From Brazil* at 18 (Int'l Trade Admin. Mar. 8, 2018)). Commerce reasonably determined from the evidence that the timeline provided in the regulations for the payment of refunds in no way diminishes the "normal" operation of the VAT system. *See Final I&D Mem.* at 79–80. In its focus on the timeline for the refunds, Mosaic does not convince the court that Commerce erred in failing to find an "*ultra vires*" scheme that improperly overlooked some defect in OCP's refund application. *GOM's Initial Questionnaire Resp.* at VII-6. Mosaic's argument that OCP was not legally entitled to the VAT refund relies on unsupported speculation rather than probative record evidence.

2. VAT Exemptions

Mosaic also argues that Commerce incorrectly determined that the Moroccan government's grant of VAT exemptions to OCP's purchases of capital goods, machinery, and equipment did not confer a benefit. Mosaic's Br. 33–34. Per this exemption, OCP did not pay input VAT (and, correspondingly, did not receive output VAT or credits) on the

purchases of capital goods pursuant to investment agreements with the government that related to certain infrastructure projects in Morocco. *Final I&D Mem.* at 81; *OCP's Section III Questionnaire Resp.* at 112.

In finding the VAT exemption program not countervailable, Commerce reasoned that in a normally operating VAT system such as Morocco's, input VAT exemptions do not reduce a producer's tax burden but rather decrease the amount of credits that the company eventually will obtain. *Final I&D Mem.* at 81. Commerce concluded from the evidence that any input VAT that would have been paid in the absence of the exemptions would have been offset by the credits accumulated and, therefore, that the program did not reduce actual tax liability. As Commerce explained, "the VAT exemptions obtained by OCP on its input purchases reduce the credits it accumulated, and there are no additional credits granted; therefore, it does not receive a benefit under 19 CFR 351.510(a)." *Final I&D Mem.* at 81–82.

Mosaic argues that Commerce, consistent with agency practice in similar cases, was required to find the VAT exemptions to be a countervailable subsidy because they were obtained by OCP "contingent on the satisfaction of commitments made in investment agreements." Mosaic's Br. 34 (citing *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2016* (Int'l Trade Admin. July 26, 2019), 84 Fed. Reg. 36,051 and *Issues and Decision Memorandum for the Final Results, and Partial Rescission, of the Countervailing Duty Administrative Review of Steel Concrete Reinforcing Bar From the Republic of Turkey; 2016* (Int'l Trade Admin. July 26, 2019)). This argument is unconvincing.

Mosaic does not refute, or even directly confront, the Department's finding that "VAT exemptions received by OCP and its cross-owned affiliates on its input purchases reduce the credits they accumulated, and there are no additional credits granted; therefore, they do not receive a benefit." *Final I&D Mem.* at 82. Even were the court to presume, *arguendo*, that Commerce had a practice of countervailing VAT exemptions similar to those at issue here (a contention with which Commerce itself does not agree), the court still would reject Mosaic's argument. Regardless of any past practice, Commerce provided a sufficient explanation to justify its determination not to countervail the capital goods, machinery, and equipment program in this proceeding. *Id.*; *see, e.g.*, *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003) (citing *Atchison*, 412 U.S. at 808) ("Commerce is permitted to deviate from this past practice, at

least where it explains the reason for its departure," where the "past practice" being challenged was "not a burden imposed by statute or regulation" but was merely "a general practice of Commerce.").

G. The Department's "Other Forms of Assistance" Question

The initial questionnaire asked if the Moroccan government provided "any other forms of assistance to your company during [the] POI." *Investigation of Phosphate Fertilizers from Morocco: Countervailing Duty Questionnaire* at Section III, at 46 (Int'l Trade Admin. July 28, 2020), P.R. Doc. 61. OCP answered this question under protest, providing information relating to several government programs. *OCP's Section III Questionnaire Resp.* at 146–158. From OCP's responses, Mosaic included five programs in its New Subsidy Allegation, which Commerce investigated: (1) reductions in tax fines and penalties; (2) revenue exclusions from minimum tax contributions; (3) customs duty exemptions for capital goods, machinery, and equipment; (4) value-added-tax exemptions for capital goods, machinery, and equipment; and (5) rail transport services for LTAR. *New Subsidy Allegation* at 2; *New Subsidy Allegation Mem.* at 2–6. Commerce ultimately found three of these programs to be countervailable: (1) reductions in tax fines and penalties; (2) revenue exclusions from minimum tax contributions; and (3) customs duty exemptions for capital goods, machinery, and equipment. *Final I&D Mem.* at 6.

OCP, referring to the inquiry in the questionnaire as "an extra-statutory fishing expedition," would have the court "void *ab initio* Commerce's improperly initiated investigation of five programs based on unlawfully obtained information, and vacate Commerce's determination to countervail three of them." OCP's Br. 64. OCP claims that Commerce exceeded its statutory authority when it asked OCP about "any other forms of assistance" and, consequently, when it investigated the five programs and found three of them to be countervailable. *Id.* at 11, 65. The court finds no merit in this claim.

In section 775, the Tariff Act provides investigative authority Commerce is to exercise "[i]f, in the course of a proceeding under this subtitle, the administering authority [i.e., Commerce] discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition." 19 U.S.C. § 1677d. In that event, Commerce is directed to "include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding." *Id*. § 1677d(1). OCP focuses the court's attention on the words "appears to be a countervailable subsidy," which are used twice in the

statutory provision. According to OCP, the phrase "appears to be a countervailable subsidy" is "an evidentiary standard set by Congress that serves as a threshold predicate to the exercise of Commerce's investigatory powers" that was not satisfied in the circumstance by which Commerce expanded its CVD investigation. OCP's Br. 65 (citing 19 U.S.C. § 1677d).

There are two fatal flaws in OCP's interpretation of the statute. First, as to plain meaning, the provision expresses no limitations on the means or methods by which Commerce "discovers a practice which appears to be a countervailable subsidy." 19 U.S.C. § 1677d. To the contrary, the statute expressly requires only that the discovery occur "in the course of a proceeding under this subtitle." *Id*. *See Changzhou Trina Solar Energy Co. v. United States,* 40 CIT at __, 195 F. 3d 1334, 1341 (2016). Commerce, therefore, did not act *ultra vires* in inquiring as to "any other forms of assistance" in the questionnaire it sent to OCP. Second, with respect to congressional intent, OCP is not correct that the phrase "appears to be a countervailable subsidy" is "an evidentiary standard" that precluded Commerce from proceeding in the circumstances presented here. OCP's interpretation would impose an unwarranted limitation on the investigative authority Congress intended Commerce to have. That intent is evident in section 775 of the Tariff Act, which is written as an expansion, not a limitation, on that authority. It is also evident in the larger context of the Tariff Act. Section 702, for example, broadly authorizes Commerce to self-initiate a countervailing duty investigation based on "information available to it," even in the absence of a petition. 19 U.S.C. § 1671a(a).

In support of its claim, OCP cites *Allegheny Ludlum Corp. v. United States*, 25 CIT 816 (2001). OCP's Brief 66. *Allegheny Ludlum* is inapposite: the petitioner in that case claimed that Commerce erred in *failing* to initiate an investigation, arguing that 19 U.S.C. § 1677d generates an independent obligation for Commerce to investigate any subsidy that "appears" countervailable. *Allegheny Ludlum*, 25 CIT at 817. Concluding that § 1677d imposes no such limitation on the Department's broad enforcement discretion, this Court in *Allegheny Ludlum* reasoned that Commerce must be afforded "sufficient latitude to weigh and analyze both negative evidence and positive evidence." *Id.*, 25 CIT at 824.

H. The Specificity Determination for Reduction in Tax Penalties

OCP claims that Commerce erred in finding a government program allowing relief from tax fines and penalties to be *de facto* specific, arguing that "the agency distorted the specificity analysis by making

this program artificially seem more 'limited' than it was." OCP's Br. 11. OCP asks the court to "reject Commerce's specificity finding as unsupported by substantial evidence, and otherwise not in accordance with law." *Id.* at 71. The court agrees with OCP.

After learning of the government tax program through its "other forms of assistance" question, discussed above, Commerce investigated the reduction of certain of OCP's tax fines and penalties, ultimately determined the program under which they were administered was *de facto* specific pursuant to 19 U.S.C. § 1677(5A)(D)(iii)(I) and therefore countervailable, and applied a 0.05% ad valorem rate to the program. *Final I&D Mem.* at 6, 75; *Post-Prelim. Determination* at 4.

The Moroccan government has the authority to assess fines and penalties against taxpayers that fail to comply with Moroccan tax requirements. *Phosphate Fertilizers from the Kingdom of Morocco: Supplemental Questionnaire Response of the Government of the Kingdom of Morocco – Part 2* at Ex. S-IX-2 (Nov. 11, 2020), P.R. Docs. 359–64 ("*GOM's Suppl. Questionnaire Resp. Part 2*"). Article 236 of the Moroccan tax code provides that the Moroccan government "can grant, at the request of the taxpayer, taking account of the circumstances, a discount or a moderation of surcharges, fines and penalties provided by the legislation in force." *OCP's Section III Questionnaire Resp.* at 146 (quoting Article 236 of the Moroccan Tax Code). The waiver or reduction of penalty requires that the taxpayer settle the outstanding tax liability in full. *GOM's Suppl. Questionnaire Resp. Part 2* at S-IX-2. Undisputed record facts demonstrate that all Moroccan taxpayers, whether corporate, individual, or otherwise, were eligible to apply for penalty relief under the program. *Id.* at S-IX-17. The corporate taxpayers taking advantage of the program during the POI consisted of 8,761 companies from at least eighteen different industries. *Id.* at S-IX-13–S-IX-14.

Section 771(5A)(D)(iii) of the Tariff Act, 19 U.S.C. § 1677(5A)(D)(iii), addresses "*de facto*" specificity by providing that "[w]here there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific" if any of four factors exist. Commerce based its determination on the first of those four factors, which applies where "[t]he actual recipients of the subsidy, *whether considered on an enterprise or industry basis*, are limited in number." 19 U.S.C. § 1677(5A)(D)(iii)(I) (emphasis added). Commerce based its "*de facto* specificity" conclusion on the record fact that 8,761 companies out of 262,165 corporate taxpayers in Morocco applied for and received penalty reductions under the program during the POI. *Final I&D Mem.* at 75 (citations omitted). There is much wrong with the Department's conclusion.

First, to arrive at its conclusion, Commerce compared the number of corporate taxpaying *recipients* of penalty relief, 8,761, to the total number of corporate *taxpayers*, 262,165, not the total number of corporate taxpayers who incurred penalties. The resulting percentage (3.34%) is essentially meaningless from the standpoint of determining the "specificity" of the program because the numerator and denominator were not logically comparable. The only corporate taxpayers who could have applied for relief under the program during the POI, i.e., the "potential" recipients, were those that had incurred a tax penalty and had satisfied the requirement to pay all taxes they owed. Apparently, Commerce would have been convinced not to countervail the program only if a majority or near-majority of the corporate taxpayers in Morocco incurred penalties. Because Commerce made no attempt to compare the actual recipients to the universe or composition of the group of potential recipients, or to ascertain whether any identifiable group of taxpayers benefited disproportionately, its "specificity" methodology was not analytically sound. The "actual recipients," for purposes of 19 U.S.C. § 1677(5A)(D)(iii)(I), that happened to be corporations—8,761—can scarcely be described as "limited in number."

The Department's comparison methodology disregarded the uncontested fact that the program was available to all taxpayers, not only corporate ones. That 3.34% of corporate taxpayers benefited from penalty relief, under a program that was not limited to corporate taxpayers, does not support a conclusion that the program was not broadly available and broadly used throughout the Moroccan economy. The term "taxpayers" encompasses individuals as well as all types of juridical persons in addition to corporations; it is reasonable to conclude that it also might include such entities as partnerships and unincorporated associations. In deciding that the program was *de facto* specific, Commerce based its determination on 8,761 corporate taxpayers rather than ascertain the actual number of users of the program.

Second, the Department's comparison of corporate taxpaying recipients with corporate taxpayers does not give full effect to the words "whether considered on an enterprise or industry basis," which modify the term "limited in number." It is axiomatic that a statutory interpretation must give effect to every word of the provision being construed. *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Williams v. Taylor,* 529 U.S. 362, 404 (2000)). The recipients of tax penalty relief under the program under consideration cannot accurately be described as limited in number "on an enterprise . . . basis" because there is no record evidence that either the eligibility for the

program, or the actual participation in it, had anything to do with whether the recipients were "enterprises," i.e., businesses, or any specific type of enterprise.[10] Nor was the program confined to "industries" or any members thereof. For these reasons, the Department's finding that the actual recipients were limited in number on an enterprise or industry basis, *Final I&D Mem.* at 75, is not supported by substantial record evidence.

Royal Thai Government v. United States, 436 F. 3d 1330 (Fed. Cir. 2006), is illustrative of the principle requiring the court to disallow the Department's affirmative specificity determination where, as here, the number of recipients is not limited when considered on an enterprise basis. *Royal Thai Government* upheld a finding of a lack of specificity where the Thai government selected 351 companies to take part in a debt restructuring program. The Court of Appeals for the Federal Circuit affirmed this Court's holding that "[g]iven the numerous and diverse industries represented on the 351 list, the Court finds that Commerce did not err in its finding that the 351 list was not limited in number based on industry or enterprise." *Royal Thai Government v. United States,* 28 CIT 1218, 1221, 341 F. Supp. 1315, 1319 (2004), *aff'd*, 436 F. 3d 1330 (Fed. Cir. 2006).

Third, the Department's interpretation produces an absurd result. The record evidence does not establish that the tax fines and penalties reduction program is anything other than a common, ordinary tax administration program, available to all taxpayers, under which the taxing authority may mitigate a penalty. The Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 929 (1994) ("*SAA*"), cautions against the overreaching and indiscriminate type of specificity finding Commerce employed in this case.[11] The SAA cited approvingly the decision of this Court in *Carlisle Tire & Rubber Co. v. United States*, 5 CIT 229, 564 F. Supp. 834 (1983) and its reasoning, explaining that "all governments, including the United States, intervene in their economies to one extent or another, and to regard all such interventions as countervailable subsidies would produce absurd results." *SAA* at 929. In its misapplication of 19 U.S.C. § 1677(5A)(D)(iii)(I), Commerce produced just such an absurd result

[10] *Government of Quebec v. United States*, 46 CIT __, 567 F. Supp. 3d 1273 (2022) is distinguishable from this case in upholding an affirmative specificity finding for a program that limited availability to enterprises.

[11] The Statement of Administrative Action "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements Act] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

here. The SAA quotes the following language from the *Carlisle Tire & Rubber* opinion:

> Thus, included in Carlisle's category of countervailable benefits would be such things as public highways and bridges, as well as a tax credit for expenditures on capital investment even if available to all industries and sectors. . . . To suggest, as Carlisle implicitly does here, that almost every import entering the stream of American commerce be countervailed simply defies reason.

SAA at 929 (quoting *Carlisle Tire & Rubber*, 5 CIT at 233–34, 564 F. Supp. at 838). The penalty relief program at issue is available not only to "all industries and sectors" but to all types of taxpayers.

In defending the specificity finding, Commerce and defendant relied on the SAA for the proposition that to escape a specificity finding, a program must be "broadly available and widely used throughout an economy." Def.'s Resp. 86; *Final I&D Mem.* at 75 (quoting *SAA* at 929). In relying on this language to support the Department's misguided specificity finding, they not only presume, without evidentiary support, that the program was not "widely used," but also selectively quote the SAA. The actual language is as follows:

> The specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy. Conversely, the specificity test was not intended to function as a loophole through which narrowly focussed subsidies provided to or used by discrete segments of the economy could escape the purview of the CVD law.

SAA at 930. The Moroccan penalty relief program is described by the first sentence, not the second. It had "widespread availability" to all taxpayers, had a large number of users (as indicated by the fact that corporate taxpayers alone accounted for 8,761 of those users), and there is no record evidence to show that it was "provided to or used by discrete segments of the economy."

That the program allowed the benefit to be granted as a matter of discretion does not support an affirmative specificity finding. The SAA also includes the following pertinent discussion:

> In the Administration's view, if the actual users of the subsidy are too large in number to reasonably be considered as a specific group, and if there is no evidence of dominant or disproportion-

> ate use, the fact that a foreign authority administering a subsidy program may have exercised discretion in selecting the recipients of the subsidy is insufficient to justify a finding of *de facto* specificity.

SAA at 931. Here, the "actual users of the subsidy," which were comprised of all types of taxpayers (not only corporate ones), is too large and diverse "to reasonably be considered as a specific group," and "there is no evidence of dominant or disproportionate use" by any enterprise, group of enterprises, or industry.

In summary, the Department's determination that the tax fine and penalty reduction program was *de facto* specific was unsupported by the record evidence and, in the interpretation of 19 U.S.C. § 1677(5A)(D)(iii)(I), contrary to law. Commerce must reconsider its specificity determination accordingly.

I. The Department's Initiation of an Investigation of the Phosphogypsum Byproduct Disposal Program

OCP claims that Commerce erred in initiating an investigation into, and collecting information on, an alleged phosphogypsum disposal program because of "the Petition's failure to adequately allege each of the elements of a countervailable subsidy." OCP's Br. 77. Although Commerce ultimately deemed the program not to have been used, OCP asks that the investigation into the program be "invalidated" and that information about the program be struck from the record. *Final I&D Mem.* at 7, 85; OCP's Br. 79 n.34.

In the Petition, Mosaic alleged that the Moroccan government was providing phosphogypsum disposal services to OCP for LTAR, or, alternatively, was foregoing revenue in the form of fees waived for the dumping of phosphogypsum waste into Moroccan coastal waters. *Petition* at II-14–II-18. Rejecting the LTAR theory, Commerce initiated an investigation into the program based on a theory of revenue foregone. *Initiation Checklist* at 15–16. After collecting information related to the program on the record, Commerce determined in its preliminary and final determinations that the phosphogypsum disposal program was "not in use" during the POI. *Prelim. Decision Mem.* at 17; *Final I&D Mem.* at 7, 86.

OCP claims that Commerce erred in initiating an investigation into the phosphogypsum disposal program under the revenue foregone theory, arguing that Mosaic failed to adequately allege any of the elements of a countervailable subsidy. OCP's Br 78. OCP also claims that Commerce impermissibly allowed Mosaic to place on the record "nearly 100 pages of material related to this rejected allegation" of byproduct disposal services for LTAR. *Id*. at 82.

No relief can be granted on OCP's claim. Commerce's determination on the phosphogypsum disposal program was a ruling in OCP's favor. *Final I&D Mem.* at 86. Therefore, OCP suffered no legally cognizable harm that would entitle it to Article III standing before this court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 2130, 2134 (1992). In challenging an action where no party can claim injury in fact, OCP asks the court to issue an advisory opinion. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) (stating that "the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts.").

OCP submits that unless the "investigation into the program [is] invalidated, Commerce may unlawfully request information on by-product disposal in any future administrative review of the CVD order." OCP's Br. 79 n.34. This is a speculation of a future harm, not a showing that OCP had standing to bring its claim in this litigation. Moreover, there is no relief the court could grant that would address the speculative future harm that OCP contemplates.

III. CONCLUSION

For the reasons discussed in the foregoing, the court remands the Final Determination to Commerce for reconsideration of the Department's decision to exclude OCP's SG&A costs, including HQ, support, and debt costs, from the cost of production buildup calculation, for reconsideration of its method of calculating OCP's profit rate for purposes of that cost of production buildup calculation, and for reconsideration of its specificity determination with regard to the program for reductions in tax fines and penalties.

Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Pl. The Mosaic Co.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 51 be, and hereby is, denied; it is further

ORDERED that Rule 56.2 Mot. for J. on the Agency R. of OCP S.A., ECF Nos. 53 (conf.), 54 (public) be, and hereby is, granted in part and denied in part; it is further

ORDERED that Commerce, consistent with this Opinion, shall issue a new determination upon remand (the "Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that Commerce shall submit the Remand Redetermination to the court within 90 days of the issuance of this Opinion and Order; it is further

ORDERED that Mosaic and OCP shall have 30 days from the submission of the Remand Redetermination to submit to the court comments thereon; and it is further

ORDERED that defendant shall have 15 days from the date of the last comment submission to submit to the court its response to the comments submitted by Mosaic and OCP.

Dated: September 14, 2023
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE

Slip Op. 23–135

HITACHI ENERGY USA INC., Plaintiff, v. UNITED STATES, Defendant, and HYUNDAI HEAVY INDUSTRIES CO., LTD. and HYUNDAI CORPORATION USA, Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Court No. 16–00054

[Sustaining the U.S. Department of Commerce's fourth remand results.]

Dated: September 19, 2023

R. Alan Luberda, *David C. Smith*, *Joshua R. Morey*, *Melissa M. Brewer*, and *Scott M. Wise*, Kelley Drye & Warren, LLP, of Washington, DC, for Plaintiff.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. Of counsel was *David W. Richardson*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David E. Bond, *Ron Kendler*, *Walter J. Spak*, and *William J. Moran*, White & Case LLP, of Washington, DC, for Defendant-Intervenors.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") fourth redetermination upon remand. *See* Final Results of Redetermination Pursuant to Ct. Remand (July 25, 2023) ("Fourth Remand Results"), ECF No. 210–1.[1] The Fourth Remand Results pertain to Commerce's second administrative review of the antidumping duty order concerning large power transformers from the Republic of Korea for the period of review August 1, 2013, through July 31, 2014. *See Large Power Transformers From the Republic of Korea*, 81 Fed. Reg. 14,087 (Dep't Commerce Mar. 16, 2016) (final results of antidumping duty admin. review; 2013–2014) ("*Final Results*"), ECF No. 27–2, and accompanying Issues and Decision Mem., A-580–867 (Mar. 8, 2016), ECF No. 27–2.

The court has issued several opinions resolving substantive issues raised in this case; familiarity with those opinions is presumed. *See ABB, Inc. v. United States* ("*ABB I*"), 41 CIT __, 273 F. Supp. 3d 1200 (2017); *ABB Inc. v. United States* ("*ABB II*"), 42 CIT __, 355 F. Supp. 3d 1206 (2018), *recons. denied*, 43 CIT __, 375 F. Supp. 3d 1348 (2019); *ABB Inc. v. United States* ("*ABB III*"), 44 CIT __, 437 F. Supp. 3d 1289 (2020); *ABB Inc. v. United States* ("*ABB IV*"), 44 CIT __, 443 F. Supp. 3d 1354 (2020). Most relevant for purposes of this opinion, the court

[1] The administrative record associated with Commerce's Remand Results is contained in both Public and Confidential Remand Records, ECF Nos. 211–1, 211–2.

in *ABB II and ABB III sustained* Commerce's application of partial adverse facts available (or "partial AFA") in connection with service-related revenues that Hyundai Heavy Industries Co. and Hyundai Corp. USA (together, "Hyundai"), a respondent in the underlying proceeding, failed to report. *See ABB II*, 355 F. Supp. 3d at 122123; *ABB III*, 437 F. Supp. 3d at 1300. In sustaining the use of partial AFA, the court also sustained Commerce's decision not to issue Hyundai a supplemental questionnaire pursuant to 19 U.S.C. § 1677m(d). *See ABB II*, 355 F. Supp. 3d at 1222. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") vacated and remanded that decision, holding that Hyundai should have been afforded the opportunity to supplement the record pursuant to 19 U.S.C. § 1677m(d) and that Commerce's resort to partial AFA was unsupported by substantial evidence. *See Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1382–86 (Fed. Cir. 2022).[2] The Federal Circuit's decision led to Commerce's issuance of the Fourth Remand Results. *See* Fourth Remand Results at 1; Order (Dec. 16, 2022), ECF No. 200 (ordering remand to Commerce for reconsideration consistent with *Hitachi Energy USA Inc.*).

On July 25, 2023, Commerce issued its Fourth Remand Results. Therein, in accordance with *Hitachi Energy USA Inc.*, Commerce reconsidered its *Final Results,* allowing Hyundai to supplement its questionnaire response by providing additional information regarding service-related revenues and expenses. *Id*. at 1–2. Commerce accepted this information and recalculated the final antidumping duty margin for Hyundai. *Id*. at 2.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

The deadline for any comments in opposition to the Fourth Remand Results was August 30, 2023. *See* Am. Scheduling Order (July 6, 2023), ECF No. 209. The deadline has lapsed with no comments in opposition having been filed. Commerce's Fourth Remand Results are uncontested and comply with the opinion of the Federal Circuit and the court's remand order for Commerce to provide Hyundai an oppor-

[2] On February 24, 2022, the court granted Plaintiff's motion to amend the caption to reflect the Plaintiff's name change to "Hitachi Energy USA Inc." *See* Order (Feb. 24, 2022), ECF No. 194.

tunity to supplement the record with information concerning service-related revenue and subsequently redetermine any dumping margin.

CONCLUSION

There being no substantive challenge to the Fourth Remand Results, and that decision being otherwise lawful and supported by substantial evidence, the court sustains Commerce's Fourth Remand Results. Judgment will be entered accordingly.

Dated: September 19, 2023
New York, New York

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

Slip Op. 23–136

OCP S.A., Plaintiff, EUROCHEM NORTH AMERICA CORPORATION, Consolidated Plaintiff, and PHOSAGRO PJSC, INTERNATIONAL RAW MATERIALS LTD., and KOCH FERTILIZERS LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE MOSAIC COMPANY and J.R. SIMPLOT COMPANY, Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 21–00219

[The Determination of the United States International Trade Commission is remanded in conformity with this opinion.]

Dated: September 19, 2023

Shara L. Aranoff, Covington & Burling LLP, of Washington, DC, for Plaintiff OCP S.A. With her on the brief are *James M. Smith*, *Victor D. Ban*, *Sooan (Vivian) Choi*, *Caroline Garth*, and *Kwan Woo (Kwan) Kim*.

Peter Koenig, Squire Patton Boggs LLP, of Washington, DC, for Consolidated Plaintiff EuroChem North America Corporation. With him on the brief is *Jeremy W. Dutra*.

Paul C. Rosenthal, Kelley Drye & Warren LLP, of Washington, DC, for Plaintiff-Intervenor. With him on the brief is *Melissa M. Brewer*.

Courtney S. McNamara, Attorney-Advisor, Office of the General Counsel, International Trade Commission, of Washington, DC, for the Defendant United States. With her on the brief are *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation of the International Trade Commission.

Stephanie E. Hartmann, Wilmer Cutler Pickering Hale and Dorr LLP, of Washington, DC, for Defendant-Intervenor Mosaic Company. With her on the brief are *Jeffrey I. Kessler*, *Patrick J. McLain*, *Alexandra Maurer,* and *David J. Ross*.

Stephen P. Vaughn and *Jamieson L. Greer*, King & Spalding LLP, of Washington, DC, for Defendant-Intervenor the J. R. Simplot Company. With them on the brief is *Clinton R. Long*.

John R. Magnus, TradeWins LLC, of Washington, DC, for *amici curiae* American Soybean Association, National Cotton Council of America, National Sorghum Producers, and Agricultural Retailers Association.

OPINION

Vaden, Judge:

Before the Court is a Motion for Judgment on the Agency Record, pursuant to United States Court of International Trade (USCIT) Rule 56.2, submitted by Plaintiff OCP S.A. (OCP) on its own behalf and on behalf of Consolidated Plaintiff EuroChem North America Corporation (EuroChem). *See* Pl.'s Mot. for J. on the Agency R., ECF No. 56 (Pl.'s Br.). Plaintiff's Motion, supported by Plaintiff-Intervenors Phos Agro PJSC (PhosAgro), International Raw Materials Ltd. (International Raw Materials), and Koch Fertilizer, LLC (Koch), contests the affirmative material injury determinations of the United States International Trade Commission (the Commission) in its final determinations in the countervailing duty investigations in *Phosphate Fer-*

tilizers from Morocco and Russia published in the *Federal Register* on April 5, 2021. 86 Fed. Reg. 17,642 (ITC Apr. 5, 2021). *See* Pl.-Int. PhosAgro's Mot. for J. on the Agency R., ECF No. 66; Pl.-Int. International Raw Materials' Mot. for J. on the Agency R., ECF No. 77; Pl.-Int. Koch's Mot. for J. on the Agency R., ECF No. 75. The Commission opposes Plaintiff's Motion, requesting the Court sustain its determinations. Def. ITC's Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 102 (Def.'s Br.). Defendant-Intervenors the Mosaic Company (Mosaic) and J.R. Simplot Company (Simplot) join the Commission in opposing Plaintiff's Motion.[1] *See* Def.-Int. Mosaic's Resp. Br. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 101; Def.-Int. Simplot Resp. Br. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 98. The Plaintiffs bring multiple challenges against the Commission's determination. Because one factually unsupported finding undergirds the Commission's determination across all statutory factors, the Court addresses that error only. Any consideration of other issues will come after the Commission's redetermination on remand should they remain relevant. The Court therefore **GRANTS** Plaintiffs' Motions for Judgment on the Agency Record and **REMANDS** this matter to the Commission for further proceedings consistent with this opinion.

BACKGROUND

I. Factual Record

Phosphate fertilizer is one of the key ingredients that allows modern agriculture to efficiently feed the world. It facilitates photosynthesis — the process by which plants use sunlight, water, and carbon dioxide to create oxygen and energy. *Phosphate Fertilizers from Morocco and Russia*, Inv. Nos. 701-TA-650–651, USITC Pub. 5172 (Mar. 2021) (ITC Final Determination) at 7, 14, J.A. at 20,571, 20,578, ECF No. 116. Farmers' need for phosphate fertilizer fluctuates because variations in weather impact the number of acres that farmers can cultivate. *Id*. Fewer plants need less fertilizer. ITC Final Determination at I-10, II-14, J.A. at 20,644, 20,664, ECF No. 116; *Staff Report – Final and Preliminary* (Staff Report) at I-10, I-15, J.A. at 98,390, 98,411, ECF No. 107.

Demand for phosphate fertilizer is also influenced by economic speculation on the prices of major crops. When agricultural commodi-

[1] Because the relevant arguments are all taken from Plaintiff OCP's Motion, the Court will generally refer to the Motions using the singular Plaintiff's Motion. The arguments, however, cover all named Plaintiffs. Plaintiff OCP has standing to challenge the results of Inv. No. 701-TA-650, and Consolidated Plaintiff EuroChem has standing to challenge the results of Inv. No. 701-TA-651.

ties are expected to be less valuable, fewer of them are grown, requiring less fertilizer. Further complicating any measurement of demand is the brief period that farmers have to apply fertilizer before spring planting and after harvest. ITC Final Determination at 16, J.A. at 20,580, ECF No. 116; Views at 20–21, J.A. at 99,590–91, ECF No. 107; *Hearing Transcript* (Hearing) at 204–05, J.A. at 17,668–69, ECF No. 116; *Pre-Hearing Brief of EuroChem North America Corporation, Public Version* (Feb. 4, 2021) (EuroChem Pre-Hearing Pub. Br.) at attach. B:2–3, J.A. at 11,821–22, ECF No. 111; *Pre-Hearing Brief of EuroChem North America Corporation, Confidential* (Feb. 3, 2021) (EuroChem Pre-Hearing Confidential Br.) at attach. B:2–3, J.A. at 91,792–93 (discussing a two-week "peak period"), ECF No. 107. The predictability of fertilizer application windows — assuring that the "peak period" is struck — varies with the region, crops, and weather, among other factors. Missing these brief windows prevents effective application of fertilizer, curtailing demand. *Pre-Hearing Brief of OCP S.A., Public Version* (Feb. 4, 2021) (OCP Pre-Hearing Pub. Br.) at 7, J.A. at 13,933, ECF No. 113; *Pre-Hearing Brief of OCP S.A., Confidential* (Feb. 3, 2021) (OCP Pre-Hearing Confidential Br.) at 15, J.A. at 88,573, ECF No. 107. Distributors and retailers attempt to build inventory in the months preceding the spring and fall application seasons, as buyers project their needs for the upcoming seasons, often submitting orders three to six months in advance. ITC Final Determination at I-10, J.A. at 20,664, ECF No. 116; Staff Report, J.A. at 98,411, ECF No. 107; *Response to U.S. Importers' Questionnaire of The Mosaic Company* (Mosaic Questionnaire Response) at 47, J.A. at 87,369, ECF No. 107; *Response to U.S. Importers' Questionnaire of Koch Fertilizer, LLC*, (Koch Questionnaire Response) at 46, J.A. at 87,621, ECF No. 107; EuroChem Pre-Hearing Pub. Br. at attach. B:1, J.A. at 11,820, ECF No. 111; EuroChem Pre-Hearing Confidential Br. at attach. B:1 J.A. at 91,791, ECF No. 107 (fertilizer purchases made "usually six months in advance to ensure adequate supply"); *Post-Hearing Brief of International Raw Materials Ltd., Public Version* (Feb. 18, 2021) (Int'l Raw Materials Post-Hearing Pub. Br.) at Ex. 5:2, J.A. at 16,158, ECF No. 115; *Post-Hearing Brief of International Raw Materials, Ltd., Confidential* (Feb. 17, 2021) (Int'l Raw Materials Post-Hearing Confidential Br.) at Ex. 5:2, J.A. at 96,305, ECF No. 107; Hearing at 228, J.A. at 17,692, ECF No. 116.

The domestic supply chain for fertilizer reflects these realities. ITC Final Determination at 16, II-1, J.A. at 20,580, 20,651, ECF No. 116; Staff Report at II-1, J.A. at 98,397, ECF No. 107; Views at 20–21, J.A. at 99,590–91, ECF No. 107. Three corporations are responsible for the overwhelming majority of U.S. phosphate fertilizer production: Mo-

saic, Nutrien, and Simplot. Staff Report at III-1, J.A. at 98,429, ECF No. 107; Views at 23, J.A. at 99,593, ECF No. 107. A steady supply is necessary because farmers are unsure of exactly when they will need phosphate fertilizer and what volume they will require. ITC Final Determination at II-18, J.A. at 20,668, ECF No. 116; Staff Report at II-20, J.A. at 98,416, ECF No. 107; Hearing at 202, J.A. at 17,666, ECF No. 116. A web of distributors convey the product from manufacturers to co-ops and other agricultural retailers who sell to individual farmers for application on their fields. Mosaic Questionnaire Response at 10, J.A. at 87,442, ECF No. 107; Koch Pre-Hearing Pub. Br. at Ex.6, J.A. at 9,910, ECF No. 110; Koch Pre-Hearing Confidential Br. at Ex.6, J.A. at 91,771, ECF No. 107. Sellers cannot delay their stocking decisions to correspond to farmer demand because delay in ordering would prevent the product from arriving by the time it is needed. ITC Final Determination at 16, II-16, J.A. at 20,580, 20,666, ECF No. 116; Views at 20–21, J.A. at 99,590–91, ECF No. 107; Staff Report at II-17, J.A. at 98,413, ECF No. 107; *Pre-Hearing Brief of Koch Fertilizer, LLC, Public Version* (Feb. 4, 2021) (Koch Pre-Hearing Pub. Br.) at Ex.6, J.A. at 9,910, ECF No. 110; *Pre-Hearing Brief of Koch Fertilizer, LLC, Confidential* (Feb. 3, 2021) (Koch Pre-Hearing Confidential Br.) at Ex.6, J.A. at 91,771, ECF No. 107. Redundancy of supply remains the cheapest and most effective means to hedge against potential delays. Hearing at 184, 202, J.A. at 17,648, 17,666, ECF No. 116; *Koch Witness Testimony* at Ex. 1:1, J.A. at 3,684, ECF No. 109.

During the Commission's investigation into whether the domestic fertilizer industry was materially injured by reason of subject imports between January 2017 and September 2020, two major developments impacted the phosphate fertilizer market. None of the parties dispute these developments. They do, however, dispute their implications.

First, during the initial two years of the period of investigation, domestic producers closed facilities resulting in decreased fertilizer production. In December 2017, Mosaic shuttered its two-million-ton production facility in Plant City, Florida. Views at 23, J.A. at 99,593, ECF No. 107. Following this shutdown, Mosaic's CEO stated that its decision "opened a hole for some imports to increase . . . . So we gave up 1 million tonnes of market here in the U.S. intentionally." OCP Prehearing Br., Ex. 11 at 30–31, J.A. 12,655–56, ECF No. 112. Nutrien increased production capacity between 2017 and 2018 but closed its Redwater, Canada facility in May 2019. Views at 24, J.A. at 99,594, ECF No. 107. Over the course of 2019, Mosaic temporarily idled facilities in Louisiana and Barstow, Florida, leading to additional production curtailments. *Id.* at 23, J.A. at 99,593.

Second, starting in fall 2018, abnormally high rainfall resulted in "massive flooding and prolonged river closures along the Mississippi River system that stranded fertilizer barges and resulted in delayed, destroyed or abandoned plantings, especially in the Midwest and Great Plains regions." Views at 40, J.A. at 99,610, ECF No. 107. This extreme weather affected three consecutive fertilizer application seasons and caused a large decrease in demand for fertilizer, negatively impacting prices and leading to a rise in inventories that lasted through 2019. ITC Final Determination at 17, 33, J.A. at 20,581, 20,597, ECF No. 116; Views at 21, 43, J.A. at 99,591, 99,613, ECF No. 107. Like their domestic counterparts, foreign suppliers reduced their production and shipments to the United States. ITC Final Determination at IV-3, J.A. at 20,697, ECF No. 116; Staff Report at IV-3, J.A. at 98,445, ECF No. 107 (reduction in import volumes). Once normal weather returned in the spring of 2020, these trends reversed. Post-Hearing Brief of OCP S.A., Public Version (Feb. 18, 2021) (OCP Post-Hearing Pub. Br.) at 69, J.A. at 16,548, ECF No. 116; Post-Hearing Brief of OCP S.A., Confidential (Feb. 22, 2021) (OCP Post-Hearing Confidential Br.) at 69, J.A. at 97,757, ECF No. 107.

II. The Present Dispute

Mosaic submitted petitions to the Department of Commerce (Commerce) and the Commission on June 26, 2020, asserting that subsidized imports from Morocco and Russia materially injured the U.S. fertilizer industry. *Views of the Commission* (Views), J.A. at 99,573, ECF No. 107. After receiving the petition, the Commission set the scope of its investigation. It first decided its period of investigation would encompass January 2017 to September 2020.[2] *Id.* Second, the Commission defined the domestic like product as phosphate fertilizer and excluded other types of fertilizer from the investigation. *Id.* at 4–16, J.A. at 99,574–86. Third, the Commission described the domestic industry under investigation as including all producers of phosphate fertilizers in the United States as well as cumulated subject imports from Morocco and Russia.[3] *Id*. The Commission then sought and received domestic industry data — provided through questionnaires sent to and received from Nutrien, Simplot, and Mosaic — that were collectively responsible for the vast majority of U.S. phosphate fertilizer production during the period of investigation. Staff Report at III-1, J.A. at 98,429, ECF No. 107; Views at 23, J.A. at 99,593, ECF

[2] The Commission's report ultimately contained full sets of collected data for 2017, 2018, and 2019; the same document incorporated data comparing the first nine months of 2019 with the same calendar months of 2020. Views at 3, J.A. at 99,573

[3] Throughout this opinion, discussion of "subject imports" refers to cumulated subject imports.

No. 107. On February 9, 2021, the Commission conducted a hearing with interested parties (the Hearing), received pre-Hearing and post-Hearing briefs from these parties, and collected its findings in a Staff Report published on February 26, 2021. On April 5, 2021, the Commission determined by majority vote that the domestic phosphate fertilizer industry had been materially injured by reason of subject imports and laid out its reasoning in the Views of the Commission. One Commissioner dissented.

To determine whether subject imports caused material injury to domestic industry in the United States, the Commission considers three statutory factors — the volume of subject imports, the effect of such imports on prices, and the economic impact of subject imports on the domestic industry. *See* 19 U.S.C. § 1677(7)(C)(i)–(iii). Regarding volume, the Commission determined that imports of subject merchandise underwent a significant increase in both absolute terms and relative to consumption in the United States. Views at 33–35, J.A. at 99,603–05, ECF No. 107. In an analysis totaling 311 words, exclusive of footnotes, the Commission found that imports "increased from 2.0 million short tons in 2017 to 3.0 million short tons in 2018, before decreasing to 2.7 million short tons in 2019, for an overall increase of 37.4 percent between 2017 and 2019" but that subject imports "were lower in interim 2020 at 1.2 million short tons than in interim 2019 at 2.0 million short tons." *Id.* at 33–34, J.A. 99,603–04. The Commission further found that subject imports gained market share relative to the domestic like product by making up a larger share of declining U.S. consumption during the period of investigation. *Id.* at 34–35, J.A. 99,604–05.

The Commission's analysis of price effects was more extensive. In accordance with 19 U.S.C. § 1677(7)(C)(ii), the Commission considered both whether the price of subject imports significantly undersold domestic prices and whether the effect of imports otherwise depressed prices or prevented price increases. The Commission's pricing data demonstrated that, in the vast majority of instances (136 of 170 instances, or 80%), subject imports actually sold at a higher price than the domestic like product. Views at 37, J.A. at 99,607, ECF No. 107. Nonetheless, the Commission found that "prices of the domestic like product and subject imports tracked each other closely" and that "subject imports and the domestic like product were similarly priced[.]" *Id.* In the absence of significant underselling, the Commission instead found that subject imports depressed prices because their "significant volumes created oversupply conditions in a declining market and low prices[.]" *Id.* at 44, J.A. at 99,614. The Commission explained its interpretation of the record:

> The record shows that significant volumes of subject imports entered the U.S. market between 2017 and 2018 and remained at elevated levels in 2019 despite a significant demand decline due to what an OCP witness characterized as "Black Swan" level rainfall beginning in the fall of 2018 and lasting through 2019 . . . . Apparent U.S. consumption of phosphate fertilizers declined from 2018 to 2019 . . . . Yet notwithstanding these market conditions, subject imports continued to enter the market, and U.S. shipments of subject imports increased by 300,000 short tons (6.2 percent) between 2018 and 2019. As a result, U.S. shipments of subject imports exceeded demand, and shipments of subject imports increased their share of the market at the expense of the domestic industry and nonsubject imports. U.S. importers' inventories of subject imports in 2018 and 2019 remained at elevated levels compared to 2017.

Views at 40–43, J.A. at 99,610–13, ECF No. 107. Because foreign producers continued to export despite declining demand, the Commission concluded that subject imports, rather than the weather, were responsible for price depression. *See id.* at 45, J.A. at 99,615 (concluding that "the record as a whole shows that subject imports contributed significantly to oversupply conditions in a declining market" and that "[a]lthough U.S. prices began to increase in the beginning of 2020 as weather conditions improved, they remained at levels lower than those that existed in 2017 and 2018 until after the filing of the petitions at the end of June 2020[.]").

The cause of oversupply conditions in the U.S. market during 2018 and 2019 was hotly disputed by the parties to the Commission's investigation. During the Hearing, Commissioner Rhonda Schmidtlein engaged in an extended colloquy with fertilizer distributors regarding whether the oversupply was best attributed to unpredictable weather conditions or increasing volumes of subject imports:

> COMMISSIONER SCHMIDTLEIN: Given the unusually wet weather conditions that everyone agrees had an impact on demand and the already high inventory levels for both domestic producers and subject imports, why did imports continue to increase from 2018 to 2019 even though the bad weather had already started at the end of 2018?

Hearing at 222–23, J.A. 15,718–19, ECF No. 115. Distributor representatives answered that imports continued to enter the U.S. because of demand projections that were frustrated by the bad weather:

> NIEDERER:[4] [I]t's a little bit like watching a boat stop or a train wreck. . . it takes a lot of time to stop the imports, the import process, if you will, from the time you procure a vessel, get to port, and bring it here, the contracts that go into making that . . . we anticipated having a good spring of '19. We felt there was pent-up demand from the fall of 2018, and so you anticipate alleviating your inventories. And so you still make preparations for what would be a normal consumption for a year because a plant still needs a certain amount put down on the ground. And the unfortunate thing was we had unprecedented levels of moisture during the spring.

Id. at 223–24, J.A. at 15,719–20; *see also* Koch Fertilizer Post-Hearing Br. at 12–13, J.A. at 96,123–24, ECF No. 107 (noting that "imports that arrived in Q1 2019 were ordered in Q4 2018 in anticipation of strong spring 2019 demand" but that "imports declined once the extent of the spring 2019 flooding was understood"). The record indicated that subject imports into the United States were higher in the first quarter of 2019 compared to the equivalent period in 2018 but declined overall in 2019 compared to 2018. *See* Staff Report at IV-13–14, J.A. at 98,455–56, ECF No. 107 (recording 1,083,021 short tons of subject imports in January–March 2018 compared to 1,415,262 short tons in the same period of 2019); Views at 33, J.A. at 99,603, ECF No. 107 (recording 3.0 million short tons of subject imports overall in 2018 and 2.7 million short tons in 2019). Distributors further argued that imports continued to fill demand projections in early 2019 because of the lack of available supply from domestic producers following announced facility closures:

> Distributors were planning for a normal spring season in 2019, and they were planning for this after Mosaic had closed Plant City and taken roughly one-and-a-half million tons out of supply. At the same time, Nutrien in January of 2018 had indicated they were closing their Redwater, Alberta plant . . . . So the question coming back, why did these imports continue to increase, you know, I think the short answer is there's this gaping hole in supply left by the closure of both the Plant City and the Redwater, Alberta plant. Combined, those were roughly 2 million tons of product. And so, when distributors were planning for the spring, a normal spring season, there was a big hole to fill, and most importantly, the market was calling for those tons.

[4] Jake Niederer, Director of Sales and Marketing, Archer Daniels Midland Company

Hearing at 229, J.A. at 15,725, ECF No. 115.[5]

That did not explain, however, why future demand could not be satisfied from excess domestic inventory that had begun accumulating in 2018 rather than subject imports. Commissioner Schmidtlein asked "how [can we] square [new imports], though, with the fact that you had excess capacity in the U.S. industry and that the U.S. industry was sitting on increasing inventories of a substantial amount." *Id.* at 230, J.A. at 15,726. The distributors responded with a key point — the flooding had affected demand in some regions but not others, and it was not feasible to move fertilizer within the United States once it had already arrived at its location. Instead, the economics of the supply chain mandated new imports rather than domestic reshipment:

> NIEDERER: What I tried to qualify earlier is that as you had this product in inventory up in certain locations throughout the U.S., not everywhere was wanting in on that. So you had some terminals coming back open needing supply, and so that's why myself and others in the distribution business would begin to import again. *While you may have high inventory in one market, you need inventory in another market. It's cost-prohibitive to move it from that location to another.* That was the big reason for us to import again, and also it seem[ed] that we had gone through those weather events and demand was starting to recover.

Id. at 230–231, J.A. at 15,726–27 (emphasis added). The infeasibility of domestic reshipment, requiring new imports to fill projected demand, was repeated throughout the Hearing:

> LAMBERT:[6] In western Canada, in the northern plains, and in the delta at that point, the product is misplaced. So you had product, it got trapped. *It couldn't get to the right location and in order to fill in the new needs for new demand, the only way to accurately do it and economically do it is to bring in fresh product* . . . if you order a pair of shoes from Amazon and they ship it to China, is it cheaper for them to send those shoes back from China or is cheaper to send a new pair of shoes from a location in Las Vegas to wherever it may be in Missouri?

Id. at 264, J.A. at 15,760 (emphasis added).

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[5] The Hearing transcript did not identify the speaker by name.

[6] Donal Lambert, President, EuroChem North America

> LAMBERT: [C]ustomers in the United States that don't have the ability to purchase from Mosaic have to make plans to bring product to facilitate for their customers. And those vessels were coming. And once they're on their way, they're coming here. Product is moving up-river. So it's sitting in barges, moving up-river, waiting for the normal river open period when it can reach the end destination. And when flooding occurs, it obviously logistically makes a different ball game. And then, once you get product north, once it was allowed, the rivers subsided and product was moved north, *it's prohibitive to move a barge from Minneapolis-St. Paul back down to Mississippi. Just the economics don't allow it. And so, in order to facilitate the needs for the farmers in the delta, you would bring in more product.* It's much more economical to do that versus bring back product southbound on the river.

Id. at 227, J.A. at 15,723 (emphasis added).

The parties emphasized this point in their post-Hearing briefs, which cited prohibitive freight rates required to move product within the United States after it had arrived at its destination. *See, e.g.*, EuroChem Post-Hearing Br. at 10 (contrasting Mississippi barge rates of $18 per short ton with rail rates of $60–80 per short ton and $35 per short ton to reship back down the Mississippi and noting that, "[g]iven Mosaic's refusal to supply, the only economical option was to bring more product to meet the demand of customers . . . . Absent the imports, there would have been a shortage in the South Plains and Delta markets, and many customers would not have had access to phosphate fertilizers."); OCP Post-Hearing Confidential Br. at 29–30, J.A. at 16,508–09, ECF No. 116 ("Shipping back downriver is prohibitively expensive, and in other cases, river closures made reallocating supply impossible. The upshot was that it was more economical for 'misplaced' or 'trapped' inventories to be kept in place in certain areas to await improved demand, and to 'bring in fresh product' to meet new demand elsewhere.").

The Commission took little notice of the parties' argument that it was cost-prohibitive to reship fertilizer within the United States. The Commission instead found that domestic reshipment was a possible solution to weather related demand disruptions. In a footnote, it summarized the issue:

> Respondents blame the oversupply conditions on demand projections that failed to materialize . . . . Regardless of the reasonableness of any demand projections, the record supports that importers' import levels and inventories exceeded demand and

> contributed to an oversupply of the U.S. market. *U.S. importers continued to import subject phosphate fertilizers because it was more "economical" to do so rather than pay U.S. inland freight to move existing inventories.*

Views at 43, J.A. at 99,613, ECF No. 107 (emphasis added). Having attributed the oversupply conditions to subject imports continuing to enter the United States in 2019 despite declining demand, the Commission concluded its price analysis with the finding that "the record as a whole shows that subject imports contributed significantly to oversupply conditions in a declining market and had significant price-depressing effects on prices in the U.S. market in 2019." *Id.* at 45, J.A. at 99,615.

Finally, the Commission evaluated "all relevant economic factors which have a bearing on the state of the industry," including, but not limited to, output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development, and factors affecting domestic prices. 19 U.S.C. § 1677(7)(C)(iii); Views at 48, J.A. at 99,618, ECF No. 107. The statute requires the Commission to consider these factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). The Commission generally found that these indicators declined between 2017 and 2019. *See* Views at 49–52, J.A. at 99,619–22, ECF No. 107 (finding that the domestic industry's "output indicators declined from 2017 to 2019 but were higher in interim 2020 than in interim 2019"; U.S. shipments declined between 2017 and 2019 but were higher in interim 2020; employment indicators "also declined between 2017 and 2019"; and financial indicators "increased between 2017 and 2018, but deteriorated in 2019").

In its impact analysis, the Commission returned to its oversupply theory, stating that:

> Subject imports continued to enter the U.S. market at elevated levels in 2019 even as demand declined in the second half of 2018 through 2019 .. . . Due to the downward pricing pressure exerted by the oversupply of subject imports on U.S. prices, the domestic industry was forced to reduce prices, which in turn, caused its revenues to be lower than they would have been otherwise. The domestic industry's sales revenues declined between 2018 and 2019 along with its profitability . . . . As a consequence, we find that subject imports had a significant impact on the domestic industry.

Id. at 52–53, J.A. at 99,622–23. The Commission noted that it considered "arguments that the domestic industry's poor performance was not caused by subject imports, but rather was the result of other factors," namely, "declining U.S. demand in 2019 due to unusually poor weather conditions." *Id.* at 53, J.A. at 99,623. However, the Commission discounted that explanation because imports had increased despite declining demand, explaining that "as record-setting precipitation impacted three planting seasons in a row beginning in the fall of 2018, the volume of subject imports persisted beyond levels demanded, resulting in a substantial buildup of U.S. importer inventories of subject imports and an oversupply condition in the U.S. market." *Id.* at 55–56, J.A. at 99,625–26. In a footnote to that statement, the Commission once again asserted that domestic product could have been reshipped to address regional demand instead of requiring new imports:

> Respondents argue that product was necessary to serve demand in U.S. regions unaffected by the poor weather conditions. *However, this argument fails to explain why U.S. importers could not supply U.S. customers from its building inventories or from product that sat on barges on the Mississippi River system.* Indeed, as U.S. importers acknowledged, it was possible for the U.S. importers to do so, but that it was costly to move product by rail or back down the Mississippi River. Consequently, they chose to import more product.

Id. at 56 n.217, J.A. at 99,626 (emphasis added). The Commission concluded that subject imports "had a significant impact on the domestic industry." *Id.* at 59, J.A. at 99,629.

In rendering its Final Determination, the Commission found by a vote of four to one that the phosphate fertilizer industry in the United States was materially injured by reason of imports from Morocco and Russia. *Phosphate Fertilizers from Morocco and Russia*, 86 Fed. Reg. at 17,642. Following these proceedings, Commerce prepared and posted notice of countervailing duty orders on April 7, 2021. *Phosphate Fertilizers from the Kingdom of Morocco and the Russian Federation: Countervailing Duty Orders*, 86 Fed. Reg. 18,037 (Dep't of Com. Apr. 7, 2021). Plaintiff OCP appealed the ITC's determination on May 6, 2021, commencing the present suit. Compl. ¶ 15, ECF No. 10.

OCP's brief challenges each statutory element of the Commission's investigation, arguing that its findings of significant volume, price effects, impact, and injury causation were unsupported by substantial evidence. OCP drew the Court's attention to the Commission's over-

supply analysis, writing that the Commission's volume determination "rest[s] on unsupported subsidiary findings regarding subject import inventories," in particular that "subject imports that resupplied regions unaffected by adverse weather constituted excess supply." Pl.'s Br. at 16–17, ECF No. 56. OCP faulted the Commission for asserting that respondents "'failed to explain why U.S. importers could not supply U.S. customers' in such regions by relocating fertilizer 'from its building inventories' in areas suffering reduced demand," and for "speculat[ing] that 'it was *possible* for the U.S. importers . . . to move product by rail or back down the Mississippi River' instead of buying imports." *Id.* at 17 (quoting Views at 41, 56, J.A. at 20,605, 99,626) (emphasis in original). OCP argued that "the record made clear that it is cost-prohibitive to move product back down the Mississippi system. Respondents put this evidence before the Commission and did not 'fail to explain' it. Moreover, this evidence was uncontroverted." *Id.* OCP concluded that the Commission's assumption that "inventories anywhere in the U.S. should be available to supply other regions, such that imports were not needed, is unsupported by substantial evidence." *Id.* at 17–18.

OCP further argued that the Commission's wrongful assumption about the feasibility of reshipping domestic inventories broke the causal link between subject imports and adverse volume and price effects, despite 19 U.S.C. § 1677(7)'s requirement that material injury must be "by reason of" subject imports. *See id.* at 43. OCP faulted the Commission for "rel[ying] heavily on its finding that subject imports failed to adjust instantaneously — *e.g.*, through cancellation of orders or diversion of inventories to other regions — in response to demand disruptions across three seasons of historically wet weather." *Id.* at 44. OCP explained that inventories rose in 2019 "not because of an unwarranted import surge, but because demand projections proved spectacularly wrong" during the extended flooding. *Id.* at 45. In support, OCP cited record evidence that "inventories cannot be relocated to geographic areas with higher demand"; "subject import entries fell sharply in late 2019 and early 2020 in response to the weather-related demand shock"; and "inventories of both domestic and imported fertilizers declined." *Id.*

The Commission's brief rejected these arguments and reiterated its position that the domestic market did not require additional imports in 2019. Def.'s Br. at 25, ECF No. 102. The Commission cited record evidence that inventories of subject imports were higher in 2018 and 2019 compared to 2017; but "[d]espite these elevated inventories, importers reported continuing to import additional fertilizers because

it was more 'economical' than moving existing inventories[.]" *Id.* at 18. The Commission wrote that it "did not, as OCP claims, merely 'speculate that it was *possible* for the U.S. importers . . . to move product by rail or back down the Mississippi.' Rather, the Commission relied on the testimony of respondents' own witnesses, one of whom stated that it was simply 'much more economical' to import additional subject merchandise 'versus bringing back product southbound on the river.'" *Id.* at 26. The Commission cited record evidence that, it claimed, "establishes that fertilizer is routinely transported by rail" and that fertilizer was in fact shipped this way in response to flooding. *Id.* (citing J.A. 17,732, 98,466, 17,709–11, 17,719, and 17,721). The Commission's record evidence of this latter point — that domestic reshipment of inventories occurred in response to flooding — consisted of a statement at the Hearing made by David Coppess of Heartland, a farmers' cooperative:

> We have a terminal over in Nebraska City, Nebraska, that serve[s] northwest Missouri, southwest Iowa and Nebraska. We were devastated. 26 feet of water. It shut that facility down and it flooded lots of acres. But we still had 75 to 80 percent of our market share [that] wasn't flooded. And the farmers . . . were very aggressive yet about trying to purchase fertilizer for the acres that were dry enough to plant . . . . And we had spot outages. The river terminals were closed. They couldn't get resupply. And we were crying for product from where we could get it. Primarily we had rail. But mostly truck if we could find it anywhere. So there was spot shortage during that time period with demand well within the central part of the corn belt that wasn't wet.

Hearing at 268, J.A. at 17,732, ECF No. 116.

On June 28, 2022, the Court held oral argument. There, the parties devoted considerable attention to whether record evidence demonstrated the feasibility of reshipping domestic inventories in lieu of subject imports. In particular, the Court drew a distinction between the Commission's finding that such reshipment was "possible" and whether there was evidence it had actually occurred:

> THE COURT: Can you tell me where in the record there is evidence showing that it was a frequent occurrence in the fertilizer market for people to ship fertilizer that had already been delivered to its intended original destination and instead ship it somewhere else in the country?

> MCNAMARA: I don't know that this was something saying that there was a frequent occurrence, but the Commission reasonably relied on the information showing that there was — it's possible and there was —
>
> THE COURT: Well now, let's stop there, you said "possible." No one's saying it's not possible . . . the statute says that you shall evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry. That seems to me to suggest not what's possible but what's actually done.

Oral Arg. Tr. at 56:22–58:5, ECF No. 129. In response, Commission counsel again pointed to David Coppess's statement for record evidence "not just that it's possible, there's evidence that it was done." *Id.* at 58:8–9.

However, counsel for Defendant-Intervenor Mosaic later conceded that David Coppess's statement was not referring to the reshipment of fertilizer that had already reached its destination and sat in inventory but rather described measures to move fertilizer that had become stuck on river barges due to flooding:

> HARTMANN: Your Honor asked questions about is it — does the record show that fertilizer [that] has been delivered to a customer would ever be redirected, and I just want to clarify. The exchange that happened at the hearing . . . it wasn't about fertilizer that had actually been delivered to a customer, it was about fertilizer that was sitting on barges either at New Orleans or somewhere upward or — and couldn't move to customers' locations because parts of the river were shut down, and there was testimony from EuroChem witness as well as from a Heartland witness that in that scenario, they were trying to move around the river system by rail, by truck, because so much of the flooding caused the rivers to slow down.
>
> THE COURT: So what you're telling me is that the example to which the Commission was referring was an example to which whatever the final destination was, the fertilizer was inaccessible because of flooding, and in that instance they redirected it to somewhere that presumably was accessible?
>
> HARTMANN: Or that they could have.

Id. at 149:10–150:22. The Court continued to press for record evidence that reshipment of domestic inventories after delivery had ever occurred but instead only received references to "intermodal delivery"

in which fertilizer sellers used multiple modes of transportation to initially deliver fertilizer to customers:

> HARTMANN: I believe the Commission was referring earlier to testimony by [Coppess] about how they couldn't get supply via rail — or via river because the flooding, so therefore, they had tried to get supply wherever they could, by rail or by truck. The EuroChem witness testified that product was moving upriver but got stuck, and because it would have been uneconomical to move via barge back down the river —
>
> THE COURT: They didn't do it.
>
> HARTMANN: — that's why they brought in new imports.
>
> THE COURT: Okay. So but would [it] be accurate to say that there is no evidence of there being a widespread practice of their redirecting it.
>
> HARTMANN: Your Honor, I think — and it would be accurate to say there's a widespread practice of intermodal delivery, meaning Mosaic, for example, can deliver via barge to rail or barge to truck, that is very common practice in this industry and something that could have been done to avoid the river flooding. I think it's accurate to say there's no record evidence that the importers chose to do that when faced with the widespread flooding in the Mississippi River, instead they brought in new imports to supply the delta region.

Id. at 152:3–153:14. It is on this record that the Court now considers whether the Commission's finding that the domestic phosphate fertilizer industry suffered material injury by reason of subject imports is supported by substantial evidence.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The Court must assess the factual and legal findings underpinning the Commission's determinations and "hold unlawful any determination, finding or conclusion . . . unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 USC § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). It must be "more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

However, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

This Court's review of the Commission's determination is limited to the administrative record that was before the agency. 19 U.S.C. § 1516a(b)(2)(A). To determine if substantial evidence exists, the Court considers "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The Court assesses whether the Commission succeeded in putting forward a reasoned explanation by "mak[ing] the necessary findings and hav[ing] an adequate evidentiary basis for its findings." *In re NuVasive, Inc.*, 842 F.3d 1376, 1382 (Fed. Cir. 2016) (internal citations omitted). To meet this threshold, the Commission must not only "examine the relevant data and articulate a satisfactory explanation for its action," it must also provide "a rational connection between the facts found and the choice made." *Id*.

DISCUSSION

I. Legal Background

The Commission is responsible for determining whether imports that have been sold for less than their fair value in the United States have materially injured a domestic industry. 19 U.S.C. § 1673d(b). "Material injury" is defined as a "harm which is not inconsequential, immaterial, or unimportant." § 1677(7)(A). When determining whether imports have caused material injury to a domestic industry, the Commission is required to consider three factors: (1) the volume of the imports, (2) the effect of imports on prices of the domestic like product, and (3) the impact of imports on domestic producers of the like product. 19 U.S.C. § 1677(7)(B). In considering these factors, the Commission must establish a "causal — not merely temporal — connection between the [less than fair value] goods and the material injury." *Gerald Metals, Inc. v. United States*, 123 F.3d 716, 720 (Fed. Cir. 1997).

The Commission does not analyze the statutory factors in a vacuum. Under 19 U.S.C. § 1677(7)(C)(iii), the Commission "shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry." Although the statute does not define the term "conditions of competition," the Commission's practice

is to perform this analysis by making findings about U.S. market characteristics, U.S. purchasers, the supply chain, geographic distribution, demand trends, substitutability, purchasing patterns, elasticity, and other aspects of the market for the subject merchandise. *See, e.g.*, Staff Report, J.A. at 98,397–428 (considering these factors). "The Commission's findings regarding competition and market conditions must be supported by substantial evidence in the record." *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union, AFL-CIO, CLC v. United States*, 348 F. Supp. 3d 1328, 1333 (CIT 2018). By ensuring that the Commission considers the characteristics and trends that shape the domestic industry, "the statute prevents the ITC from attributing to subject imports an injury whose cause lies elsewhere." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1222 (2006).

The Commission "does not comply with its statutory mandate by simply describing various conditions of competition in isolation," but rather the Commission must apply its findings regarding the conditions of competition to its analysis of the three statutory factors: subject import volume, price effects, and impact on the domestic industry. *Altx, Inc. v. United States*, 26 CIT 709, 719 (2002); *see also Nucor Corp. v. United States*, 28 CIT 188, 207 (2004), *aff'd*, 414 F.3d 1331 (Fed. Cir. 2005) ("The material injury statute directs the ITC to evaluate all relevant economic factors (i.e. volume, price effects, and impact) 'within the context of the business cycle and conditions of competition that are distinctive to the affected industry.'"); *Nippon Steel Corp. v. United States*, 25 CIT 1415, 1420 (2001) (finding that "for the Commission's findings under section 1677(7)(C)(1) to be supported by substantial evidence, the Commission must analyze the volume and market share data in the context of conditions of competition"); *Hynix Semiconductor*, 30 CIT at 1220 (upholding the Commission's determination where it "examined both the business cycle and the unique conditions of the domestic industry in determining the impact of subject imports").

The Commission must analyze the conditions of competition on the basis of actual industry practices. When the Commission makes a finding on volume, price, or impact that is premised on speculation about industry conditions, that finding has not been "evaluate[d] . . . within the context of the business cycle and the conditions of competition that are distinctive to the affected industry." 19 U.S.C. §1677(7)(C)(iii); *see also Catfish Farmers of America v. United States*, 37 CIT 717, 733 (2013) ("[S]peculation does not amount to reasonable inference, as it provides no factually-grounded basis for sustaining an

agency's determination."). The opinion in *Altx* confirmed this principle. In that case, the Commission considered whether the volume of imports of circular seamless stainless steel hollow products was significant, in accordance with § 1677(7)(C)(i). The Commission found that it was but separately conceded that there was a large portion of the market "not supplied by the domestic industry (either because of incapability or lack of viability)." *Altx*, 26 CIT at 717. Although the Commission had not established that the imported products were in fact available from domestic sources, the Commission nonetheless argued that import volumes could still be significant if "the domestic industry is *capable* of producing a particular product type, even if for practical considerations it does not produce it in any significant quantity." *Id.* at 718 (emphasis in original).

The Court rejected this reasoning. It first found that the Commission had failed to "indicate any evidence from which the court may discern whether the increases in volume of subject imports it deemed significant . . . can be attributed to product types or size ranges not produced by the domestic industry." *Id.* The Court found that a "theoretical possibility of future production" or "the potential for future viability" of a given industry practice have no "meaning that would bear on the significance of actual subject import volume, or increases thereof, for the purpose of determining present material injury[.]" *Id.* The Court reminded the Commission of its duty to evaluate volume, price effects, and impact on the domestic industry within the context of the conditions of competition distinctive to the affected industry and noted that "[t]he Commission does not comply with its statutory mandate by simply describing various conditions of competition in isolation." *Id.* at 719. It ordered the Commission to "analyze the significance of subject import volume in terms of product types available and practically unavailable from U.S. sources during the [period of investigation] . . . in a manner that reflects the actual limitations." *Id.*

Altx's lesson is plain: Industry conditions must dwell in the realm of reality and not merely in the realm of the possible. Industry conditions that are hypothetical, theoretical, or speculative are not part of the conditions of competition distinctive to the affected industry; and Commission findings that have been premised on such conjectures are legally deficient. *See* 19 U.S.C. § 1677(7)(C)(iii). *Altx*'s holding is supported by the language of the statute. The term "distinctive" calls for an inquiry into qualities or characteristics that are extant in the industry rather than possibilities that may never come to be. *See Distinctive*, *Webster's New International Dictionary* (2d ed. 1956) ("that which marks or distinguishes one thing regarded in its relation

to other things . . . that which constitutes or expresses the character or quality of the thing itself, without necessary reference to other things"); *Distinctive*, *Oxford English Dictionary* (2d ed. 1989) ("Serving to differentiate or distinguish; peculiar to one person or thing as distinct from others, characteristic; having well-marked properties; easily recognized"). Accordingly, an industry condition must be shown, by substantial evidence, to exist in fact before it can support determinations of significant volume, price effects, and impact on the domestic industry.

II. The Commission's Finding on Domestic Reshipment

In the present case, the Commission made a key finding regarding a condition of competition in the fertilizer industry — a finding that would ground the Commission's determinations that imports of subject fertilizer were significant in volume, price effect, and impact. The Commission found that it was "possible" to supply fertilizer to high demand regions of the country by reshipping fertilizer that had already been delivered to flooded, low demand regions so that additional foreign imports were not necessary:

> Respondents argue that [imports were] necessary to serve demand in U.S. regions unaffected by the poor weather conditions. However, this argument fails to explain why U.S. importers could not supply U.S. customers from its building inventories or from product that sat on barges on the Mississippi River system. Indeed, as U.S. importers acknowledged, it was possible for the U.S. importers to do so, but that it was costly to move product by rail or back down the Mississippi River. Consequently, they chose to import more product.

Views at 56 n.217, J.A. at 99,626, ECF No. 107. This finding was an important one. All three statutory elements of the Commission's positive material injury determination — significant volume, price effects, and impact on the domestic industry — rested on the notion that subject imports oversupplied the U.S. market in excess of demand. For example, the Commission concluded that the record "demonstrates that subject imports — through their significant volumes that created oversupply conditions in a declining market and low prices — exerted downward pricing pressure on the domestic like product and significantly depressed U.S. prices in 2019." *Id.* at 44, 53 (finding similarly that "the oversupply of subject imports" caused a "significant impact on the domestic industry"). The Commission's oversupply thesis posited that subject imports continued to arrive in 2019 even after poor weather had disrupted plantings. It wrote,

"Subject imports continued to enter the U.S. market at elevated levels in 2019 even as demand declined in the second half of 2018 through 2019, causing an oversupply in the U.S. market and significantly depressing U.S. prices." Views at 52–53, J.A. at 99,622–23.

However, Plaintiffs offered a simple explanation for why imports continued to enter the U.S. in 2019. Plaintiffs first noted that imports that arrived in 2019 had been ordered earlier based on normal demand projections. *See* Hearing at 223–24, J.A. at 15,719–20, ECF No. 115; *see also* Koch Fertilizer Post-Hearing Br. at 12–13, J.A. at 96,123–24, ECF No. 107 ("[I]mports that arrived in Q1 2019 were ordered in Q4 2018 in anticipation of strong spring 2019 demand[.]") However, flooding disrupted demand in certain regions, and it is cost-prohibitive to reship fertilizer from those locations to high demand regions that had not been flooded. Instead, new imports had to satisfy the demand from regions with good weather:

> [D]ownriver transportation inefficiencies and river closures . . . imposed localized supply constraints that limited distributors' ability to serve customers using existing inventories. Supply that had already been shipped upriver and warehoused was not always available to meet demand in . . . areas less affected by adverse weather. Shipping back downriver is prohibitively expensive, and in other cases, river closures made reallocating supply impossible. The upshot was that it was more economical for 'misplaced' or 'trapped' inventories to be kept in place in certain areas to await improved demand, and to 'bring in fresh product' to meet new demand elsewhere[.]

OCP Post-Hearing Confidential Br. at 29–30, J.A. at 16,508–09, ECF No. 115. Plaintiffs supported this explanation with record evidence. *See, e.g.*, EuroChem Post-Hearing Br. at 10 (contrasting Mississippi barge rates of $18 per short ton with rail rates of $60–80 per short ton and $35 per short ton to reship back down the Mississippi); *see also supra* Background II (recounting Hearing testimony regarding the infeasibility of reshipping fertilizer that had already arrived at its destination). Plaintiffs' point was that additional imports that arrived in 2019 were not part of an "oversupply." Rather, they filled demand that could not be filled by domestic inventories because those inventories could not feasibly be reshipped from low demand regions to supply high demand regions.

Nonetheless, the Commission concluded that domestic reshipment *was* feasible. In footnotes to its Views, the Commission offered its rebuttal to Plaintiffs' argument that imports were necessary to serve demand in U.S. regions unaffected by poor weather:

> Respondents blame the oversupply conditions on demand projections that failed to materialize. Regardless of the reasonableness of any demand projections, the record supports that importers' import levels and inventories exceeded demand and contributed to an oversupply of the U.S. market. U.S. importers continued to import subject phosphate fertilizers because it was more "economical" to do so rather than pay U.S. inland freight to move their existing inventories.

Views at 43, n.161, J.A. at 99,613, ECF No. 107 (quoting the testimony of Donal Lambert of EuroChem North America, Hearing at 227, J.A. at 15,723, ECF No. 115.); *see also* Views at 56, n.217, J.A. at 99,626, ECF No. 107 ("[T]his argument fails to explain why U.S. importers could not supply U.S. customers from its building inventories . . . . Indeed, as U.S. importers acknowledged, it was possible for the U.S. importers to do so, but that it was costly to move product by rail or back down the Mississippi River. Consequently, they chose to import more product.").

The Commission's rebuttal cited only a single piece of record evidence for the proposition that it was "possible" to reship domestic inventories from their original destination to higher demand regions. It quoted EuroChem President Donal Lambert's Hearing testimony for the proposition that "it was more 'economical' to [import] rather than pay U.S. inland freight[.]" Views at 43, J.A. at 99,613, ECF No. 107. Yet, quoted in full, Lambert's testimony makes a point opposite to the one the Commission intended:

> Product is moving up-river. So it's sitting in barges, moving up river, waiting for the normal river open period when it can reach the end destination. And when flooding occurs, it obviously logistically makes a different ball game. And then, once you get product north, once it was allowed, the rivers subsided and product was moved north, *it's prohibitive to move a barge from Minneapolis-St. Paul back down to Mississippi. Just the economics don't allow it.* And so, in order to facilitate the needs for the farmers in the delta, you would bring in more product. It's much more economical to do that versus bring back product southbound on the river.

Hearing at 227, J.A. at 15,723, ECF No. 115 (emphasis added). Faced with testimony that reshipping product back downriver was prohibitively expensive, the Commission used it as evidence that the practice was possible but merely "costly" and claimed that Plaintiffs "acknowledged" this. Views at 56, n.217, J.A. at 99,626, ECF No. 107. But as

Lambert's full testimony demonstrates, Plaintiffs acknowledged nothing of the kind. Rather, Plaintiffs placed evidence on the record that emphasized the *economic impossibility* of doing what the Commission claimed. *See*, *e.g.*, OCP Post-Hearing Confidential Br. at 29–30, J.A. at 16,508–09, ECF No. 116; EuroChem Post-Hearing Br. at 10; Hearing at 230–31, J.A. at 15,726–27, ECF No. 115 ("So you had some terminals coming back open needing supply, and so that's why myself and others in the distribution business would begin to import again. While you may have high inventory in one market, you need inventory in another market. It's cost-prohibitive to move it from that location to another."). Plaintiffs' evidence — including its pricing data demonstrating economic infeasibility — was uncontroverted.

The Government attempted to salvage the Commission's evidence-free assumption by claiming that the Commission relied on record evidence to determine that "mov[ing] existing inventories" was possible. Counsel noted that a witness "specifically testified about having shipped fertilizer by rail, as well as by truck, in response to flooding," and that "[o]ther record evidence establishes that fertilizer is routinely transported by rail." Def.'s Br. at 26, ECF No. 102. But that evidence did not support the Commission's argument or address Plaintiffs' point. It is the same evidence Mosaic's counsel referenced at oral argument in response to the Court's request for evidence of domestic reshipment from inventories:

> THE COURT: Okay. So but would [it] be accurate to say that there is no evidence of there being a widespread practice of their redirecting it.
>
> HARTMANN: Your Honor, I think — and it would be accurate to say there's a widespread practice of intermodal delivery, meaning Mosaic, for example, can deliver via barge to rail or barge to truck, that is very common practice in this industry and something that could have been done to avoid the river flooding. I think it's accurate to say there's no record evidence that the importers chose to do that when faced with the widespread flooding in the Mississippi River, instead they brought in new imports to supply the delta region.

Oral Arg. Tr. 152:19–153:14, ECF No. 129. Indeed, Mosaic's counsel conceded that evidence of shipping fertilizer by rail and truck in response to flooding had nothing to do with product that had already been delivered to its destination and sat in inventory. It instead referred to actions taken to remove fertilizer from river barges that flooding had immobilized:

> HARTMANN: Your Honor asked questions about is it — does the record show that fertilizer [that] has been delivered to a customer would ever be redirected, and I just want to clarify. The exchange that happened at the hearing . . . it wasn't about fertilizer that had actually been delivered to a customer, it was about fertilizer that was sitting on barges either at New Orleans or somewhere upward or — and couldn't move to customers' locations because parts of the river were shut down, and there was testimony from EuroChem witness as well as from a Heartland witness that in that scenario, they were trying to move around the river system by rail, by truck, because so much of the flooding caused the rivers to slow down.
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> THE COURT: So what you're telling me is that the example to which the Commission was referring was an example to which whatever the final destination was, the fertilizer was inaccessible because of flooding, and in that instance they redirected it to somewhere that presumably was accessible?
>
> HARTMANN: Or that they could have.

Id. at 149:10–150:22. This evidence simply does not show what the Commission claims. Intermodal delivery — in which multiple methods of transportation are used to deliver fertilizer to its destination — is distinct from reshipment of fertilizer that has already reached its intended destination. Such evidence does not show that "mov[ing] existing inventories" occurred, much less that it was a normal condition of competition. 19 U.S.C. § 1677(7)(C)(iii). The same is true for methods used to remove fertilizer from barges stuck in flooded rivers. *See USX Corp. v. United States*, 11 CIT 82, 84 (1987) ("ITC may not rely upon isolated tidbits of data which suggest a result contrary to the clear weight of the evidence."). Far from having "fail[ed] to explain" why domestic reshipment was infeasible, Plaintiffs offered uncontroverted record evidence for the proposition. *Cf.* Views at 56, J.A. at 99,626, ECF No. 107.

Even if evidence existed that domestic reshipment was possible, the Commission may not ground its determinations in "theoretical possibilit[ies]." *Altx*, 26 CIT at 718 (finding that it is not what an industry is "capable of" or what it could potentially do in the future, but what is actually done that matters). Practices that are economically infeasible are not part of "the conditions of competition distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). In order to meet that statutory requirement, it was incumbent on the domestic industry to place evidence on the record showing that domestic reshipment of

fertilizer from inventories had occurred as a normal business practice. It failed to do so. It is easy to see why: A practice that is uneconomical will not be adopted by an industry as part of its conditions of competition. *Cf.* Hearing at 269–70, J.A. at 15,765–66, ECF No. 115 (Lambert: "If we didn't have that demand from our customers asking us to bring those tons, we wouldn't have brought them.").

The Commission's theory that the U.S. market was oversupplied by imports that exceeded demand rests like an inverted pyramid on an unsupported finding regarding what might be possible if economics did not matter. The Commission assumed that fertilizer delivered to one area of the country could be shipped via intermodal delivery to another area of the country to allow its immediate use. When asked for record evidence demonstrating that this had happened during the period of investigation, no party cited any. Even the most forgiving articulations of the substantial evidence standard do not allow for the Commission to make findings based on evidence not present in the record. *See, e.g.*, *Columbian Enameling & Stamping Co.*, 306 U.S. at 300 (requiring that substantial evidence be "more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established"); *Consol. Edison Co. of New York*, 305 U.S. at 229 (describing substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). On remand, the Commission should conduct a new analysis of the conditions of competition with respect to domestic reshipment and make new findings that are supported by substantial evidence. To do so, the Commission may, at its discretion, reopen the record, accept new evidence, and take any other lawful procedural measures necessary to make factually supported findings.

III. Volume, Price, and Impact

The Commission's determinations do not fail merely because they include a mistaken assumption about domestic industry practices. *See American Spring Wire Corp. v. United States*, 8 CIT 20, 23 (1984) ("No factor, standing alone, triggers a *per se* rule of material injury."). Nor does it matter whether the mistaken assumption was or was not part of the Commission's formal conditions of competition analysis. Rather, on discovering defects in the Commission's analysis of prevailing conditions in the domestic industry, wherever in the Views they appear, a reviewing court's task is to analyze the degree to which the Commission has incorporated such defects into its determinations on volume, price effects, and impact. *See Nucor Corp.*, 28 CIT at 207 ("The material injury statute directs the ITC to evaluate all relevant economic factors (i.e. volume, price effects, and impact) 'within the

context of the business cycle and conditions of competition that are distinctive to the affected industry.'").

Here, the Commission's finding that subject imports were oversupplied was central to its determination that the volume, price effects, and impact of subject imports was significant. *See, e.g.*, Views at 44, J.A. at 99,614, ECF No. 107 ("The record therefore demonstrates that subject imports — through their significant volumes that created oversupply conditions . . . exerted downward pricing pressure[.]"); *id.* at 52–53, J.A. at 99,622–23 ("Subject imports continued to enter the U.S. market at elevated levels in 2019 even as demand declined in the second half of 2018 through 2019, causing an oversupply in the U.S. market and significantly depressing U.S. prices."). However, the existence of uncontroverted record evidence that additional imports were needed in 2019 to supply regions unaffected by bad weather undermines the Commission's oversupply analysis. During the Commission's investigation, Plaintiffs argued that these imports were not in excess of demand but rather were "pulled in" to the U.S. market by the unavailability of domestic fertilizer. *See, e.g.*, OCP Post-Hearing Confidential Br. at 5, J.A. at 16,469, ECF No. 116 ("While the historically wet weather in fall 2018, spring 2019, and fall 2019 challenged the market's ability to match supply to demand in real time, subject import volumes . . . did not exceed the supply deficit they were pulled into the market to fill."). Plaintiffs claimed that the increase in subject imports between 2017 and 2019 (753,938 short tons) did not exceed the 1 million short ton supply gap that Mosaic created when it closed its Plant City facility. *See* OCP Prehearing Br., Ex. 11 at 30–31, J.A. at 12,655–56. ECF No. 112 (quoting Mosaic CEO James O'Rourke's statement that its decision to close the facility "opened a hole for some imports to increase . . . . So we gave up 1 million tonnes of market here in the U.S. intentionally.").

The Court has determined that the Commission lacked substantial evidence to assert that domestic inventories were available in 2019 to supply high-demand regions in the U.S. market. *See supra* Section II. Because of this failure, the Commission failed to controvert Plaintiffs' record evidence that subject imports were not oversupplied but instead responded to authentic demand signals. The centrality of the alleged oversupply to the Commission's determinations on volume, price effects, and impact compels the Court to conclude that these determinations are themselves unsupported by substantial evidence. *See Universal Camera Corp.*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Below, the Court explains how the Commission's failure impacted each determination. On remand, the Commis-

sion must not only revisit its analysis of the conditions of competition with respect to domestic reshipment but also should apply any new findings to its analysis of volume, price effects, and impact and make any redetermination required by the evidence.[7] *See Altx*, 26 CIT at 719 ("The Commission does not comply with its statutory mandate by simply describing various conditions of competition in isolation."); *see also JMC Steel Group v. United States*, 24 F. Supp. 3d 1290, 1308 (CIT 2014) (ordering the Commission on remand to explain finding in the context of the business cycle and providing that "the Commission may make additional determinations . . . as are necessary to account for such explanations").

A. Volume

Under the Tariff Act of 1930, the Commission must consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). The touchstone of the inquiry is "significance." "Congress, this court, and ITC itself have repeatedly recognized that it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)." *USX Corp. v. United States*, 11 CIT 82, 85 (1987) (emphasis in original). To determine if a volume of imports is significant, the Commission "must analyze the volume and market share data in the context of the conditions of competition." *Nippon Steel*, 25 CIT at 1420; *see also Angus Chemical Co. v. United States*, 20 CIT 1255, 1266 (1996) ("The Commission evaluates import volume 'in light of the conditions of trade, competition, and development regarding the industry concerned.'") (quoting *General Motors Corp. v. United States*, 17 CIT 697, 711 (1993), *aff'd*, 140 F.3d 1478 (Fed. Cir. 1998)).

The Commission's brief, 311-word volume analysis (out of 59 pages of its Views) reported only the size of the increase in subject imports and market share during the period of investigation and did not reference any conditions of competition that bore on its conclusion that such increases were "significant." *See* Views at 33–35, J.A. at 99,603–05, ECF No. 107. This volume analysis was not required, in the first instance, to explicitly cite the Commission's findings on the

[7] The parties have raised additional issues with the Commission's volume, price, and impact findings, including potentially inflated lost sales totals and the domestic industry's alleged prioritization of exports over the U.S. market. *See, e.g.*, Pl.'s Br. at 28, 41, ECF No. 56. Because the Commission's reconsideration of domestic reshipment may alter these findings, the Court will reserve any review of them until after remand. *Cf. Celanese Chemicals, Ltd. v. United States*, 31 CIT 279, 311 (2007) ("Because each of these findings may be subject to change on remand, judicial review of the Commission's volume and price effects findings would be inappropriate at this time.").

conditions of competition. *See Hynix Semiconductor*, 30 CIT at 1219 ("[T]he ITC need not lay out its analysis in some prescribed way, as there is no 'magic word analysis.'"). But because the Court now orders the Commission to make new findings concerning the availability of domestic inventories to fill U.S. demand, the Commission's volume analysis must be consistent with any such findings on remand. *See Nucor Corp.*, 28 CIT at 207 ("The material injury statute directs the ITC to evaluate . . . volume . . . 'within the context of the business cycle and conditions of competition that are distinctive to the affected industry.'") (quoting 19 U.S.C. § 1667(7)(C)).

The facts of *Altx* parallel the situation here and highlight the importance of ensuring that a determination of significant volume is not at odds with findings on the conditions of competition in the domestic industry. In that case, "[t]he Commission concluded that the volume of subject imports was significant without discussing subject import volume in relation to its findings with respect to the conditions of competition." *Altx*, 26 CIT at 717. Specifically, the Commission found that there existed certain segments of the market for stainless steel products that the domestic industry did not supply; but it did not determine whether "the increase in subject imports [was] primarily or entirely in the range of product types not produced by the domestic industry." *Id.* at 717–18. The Court remanded the Commission's finding of significant volume and required it to "analyze the significance of subject import volume in terms of product types available and practically unavailable from U.S. sources during the [period of investigation][.]" *Id.* at 719. *Altx* therefore stands for the principle that imported volumes may not be significant if the imported quantities fill demand that the domestic industry is unable to meet "either because of incapability or lack of viability." *Id.* at 717. Accordingly, if the Commission finds on remand that fertilizer was "practically unavailable from U.S. sources" to supply high-demand regions in 2019 because doing so would not have been economically viable, the Commission must ensure that any determination of significant volume takes account of these conditions.

B. Price

The portion of the Tariff Act that governs the Commission's evaluation of price effects requires consideration of whether:

> I. there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

> II. the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). Here, the Commission did not find significant price underselling by subject merchandise. The Commission's pricing data demonstrated that, in the vast majority of instances (136 of 170, or 80%), subject imports actually sold at a *higher* price than the domestic like product. Views at 37, J.A. at 99,607, ECF No. 107. The Commission instead found that these imports caused price depression by entering the U.S. at significant volumes "despite a significant demand decline due to what an OCP witness characterized as 'Black Swan' level rainfall beginning in the fall of 2018 and lasting through 2019." *Id.* at 40, J.A. at 99,610. The Commission concluded that the record demonstrated that "subject imports — through their significant volumes that created oversupply conditions in a declining market and low prices — exerted downward pricing pressure on the domestic like product and significantly depressed U.S. prices in 2019." *Id.* at 44, J.A. at 99,614. In order to attribute this downward pricing pressure to the imports themselves, the Commission's price analysis invoked the availability of domestic reshipment:

> Respondents blame the oversupply conditions on demand projections that failed to materialize . . . Regardless of the reasonableness of any demand projections, the record supports that importers' import levels and inventories exceeded demand and contributed to an oversupply of the U.S. market. U.S. importers continued to import subject phosphate fertilizers because it was more "economical" to do so rather than pay U.S. inland freight to move existing inventories.

Id. at 43, n.161, J.A. at 99,613 (quoting Hearing, J.A. at 15,723).

The Commission's finding of price depression was based on its conclusion that subject imports "exceeded demand." *Id.*; *see also id.* at 41, J.A. at 99,611. But that conclusion was vulnerable to the Plaintiffs' rebuttal that bad weather, not imports, was responsible for declining demand. Section 1677(7) requires that any material injury be "by reason of" subject imports, and unprecedented weather events that frustrated demand projections were a potential intervening cause. The Commission bypassed this argument by finding that subject imports prevented domestic inventories from supplying remaining demand via "inland freight." *Id.* at 43, J.A. at 99,613. Substantial evidence did not support this belief. Like the Commission's impact analysis, its price analysis took testimony that the "inland freight"

option was prohibitively expensive and used it to conclude that the practice was "possible" — a conclusion that was contradicted by the very evidence on which it was based. The full portion of Hearing testimony that the Commission cited read:

> LAMBERT: [C]ustomers in the United States that don't have the ability to purchase from Mosaic have to make plans to bring product to facilitate for their customers. And those vessels were coming. And once they're on their way, they're coming here. Product is moving up-river. So it's sitting in barges, moving up-river, waiting for the normal river open period when it can reach the end destination. And when flooding occurs, it obviously logistically makes a different ball game. And then, once you get product north, once it was allowed, the rivers subsided and product was moved north, *it's prohibitive to move a barge from Minneapolis-St. Paul back down to Mississippi. Just the economics don't allow it. And so, in order to facilitate the needs for the farmers in the delta, you would bring in more product. It's much more economical to do that versus bring back product southbound on the river.*

Hearing at 227, J.A. at 15,723, ECF No. 115 (emphasis added). This cited evidence cannot rationally support the proposition that domestic supplies could meet demand by moving the fertilizer from its existing locations. Quoted in full, it says the very opposite. *Cf. Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (Commission must base its assessments on "currently available evidence and on logical assumptions and extrapolations flowing from that evidence.").

The Commission's pricing analysis depended in part on a purported fact about the fertilizer market for which no evidence existed. *Cf. Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (substantial evidence standard requires the agency to "articulate [a] rational connection between the facts found and the choice made"). Accordingly, on remand, the Commission must revisit its pricing analysis and make any redeterminations required by the evidence. *See Nucor Corp.*, 28 CIT at 207 ("The material injury statute directs the ITC to evaluate . . . price effects . . . 'within the context of the business cycle and conditions of competition that are distinctive to the affected industry.'") (quoting 19 U.S.C. § 1667(7)(C)).

C. Impact

The Tariff Act's Section 771(7)(C)(iii) requires that, in evaluating the impact of subject imports on the domestic industry, the Commis-

sion "shall evaluate all relevant economic factors which have a bearing on the state of the industry." These factors include, but are not limited to:

> I. actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> II. factors affecting domestic prices,
>
> III. actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> IV. actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> V. in a proceeding under part II of this subtitle [concerning the imposition of antidumping duties], the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii). As stated above, these factors must be considered in the context of the business cycle and the conditions of competition distinctive to the affected industry. *Id.* The Commission found that "[d]ue to the downward pricing pressure exerted by the oversupply of subject imports on U.S. prices, the domestic industry was forced to reduce prices, which in turn, caused its revenues to be lower than they would have been otherwise" and that sales revenues and profitability declined between 2018 and 2019. Views at 53, J.A. at 99,623, ECF No. 107. "As a consequence, we find that subject imports had a significant impact on the domestic industry." *Id.*

"By mandating consideration of 'all relevant economic factors,' the statute prevents the ITC from attributing to subject imports an injury whose cause lies elsewhere." *Hynix Semiconductor*, 30 CIT at 1222. Because Plaintiffs had argued that demand disruption caused by poor weather was responsible for any alleged injury, the Commission's impact analysis stated:

> We have considered the role of other factors so as not to attribute injury from other factors to the subject imports. In doing so, we have considered respondents' arguments that the domestic industry's poor performance was not caused by subject imports, but rather was the result of other factors. Specifically, we considered the role of declining U.S. demand in 2019 due to unusually poor weather conditions. Subject imports increased their

> U.S. shipment volume even as demand declined significantly in 2019 . . . . The downward force of demand declines in 2019 on the domestic industry's condition therefore does not rebut that the industry's performance would have been stronger in the absence of the significant volume of subject imports[.]

Views at 53–54, J.A. at 99,623–24, ECF No. 107. The increase in shipments of subject imports in 2019 was key to the Commission's finding that subject imports, and not the weather, were responsible for the domestic industry's poor performance during the period of investigation. Although the record did indicate that subject imports increased during the first quarter of 2019, it nonetheless reflects an overall *decline* in 2019 relative to 2018. Staff Report at IV-13–14, J.A. at 98,455–56, ECF No. 107 (recording 1,415,262 short tons of subject imports in January–March 2019 compared to 1,083,021 short tons in the same period of 2018); Views at 33, J.A. at 99,603, ECF No. 107 (noting that the volume of subject imports reached "3.0 million short tons in 2018, before decreasing to 2.7 million short tons in 2019[.]"). The Commission's own Views, therefore, undermined its key conclusion that subject imports continued to "pour" into the U.S. in 2019 despite declining demand. *See* Views at 52, J.A. at 99,622, ECF No. 107. According to the Views, they did no such thing.

Further, the Court has found that respondents offered an explanation for why additional imports were needed in early 2019: Imports initially arrived in response to projections of normal demand; but when the flooding persisted, imports remained the only cost-effective way to supply regions that were unaffected by poor weather. The Commission's rebuttal that such imports were not needed because these regions could have been supplied by reshipping product from weather-affected regions was unsupported by substantial evidence. This defect contaminated the Commission's impact analysis, which depended on the conclusion that "[s]ubject imports increased their U.S. shipment volume even as demand declined significantly in 2019[.]" *Id.* at 53, J.A. at 99,623. Although the Commission intended to depict imports as entering an oversupplied market to drive down prices and harm the domestic industry, the record shows that domestic product could not effectively fill all U.S. demand during the severe flooding of late 2018 and 2019. This leaves open the possibility that subject imports were responding to bona fide demand signals in 2019 rather than oversupplying a saturated market. *See* Hearing at 269–70, J.A. at 15,765–66, ECF No. 115 (Lambert: "If we didn't have that demand from our customers asking us to bring those tons, we wouldn't have brought them.").

Not only did the Commission's impact analysis fail to consider the conditions of competition distinctive to the fertilizer industry, it also did not "analyze compelling arguments that purport to demonstrate the comparatively marginal role of subject imports in causing [the] injury." *Hynix Semiconductor*, 30 CIT at 1223. The Commission skipped over uncontroverted evidence that tended to support Plaintiffs' theory that weather related demand declines were an intervening cause of injury. The Commission must therefore revisit its impact analysis on remand. It must extend any relevant findings it makes concerning the possibility of domestic reshipment to the question of impact and make any redeterminations required by the evidence.

It should be noted that classifying the Commission's mistaken finding regarding the possibility of domestic reshipment as part of its "conditions of competition" analysis is unnecessary to the Court's holding. *See* 19 U.S.C. § 1677(7)(C)(iii). Although the descriptor is semantically accurate, the finding that domestic reshipment was feasible is ultimately a factual finding like any other. This finding, however, lacked support in the record. The Commission proceeded to incorporate this mistaken factual finding directly into its price and impact analyses and indirectly into its determination of significant volume — contaminating them. *See supra* Section III. The Court finds that the Commission's misapprehension of the evidence "was of sufficient importance that the Commission might have determined that there was no material injury or threat of material injury at all" had it not been incorporated into its Final Determination — requiring remand. *Borlem S.A.-Empreedimentos Industrias v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) (upholding the CIT's remand of the Commission's positive material injury determination where "the decision under review rests on an erroneous fact"); *see also Catfish Farmers of America*, 37 CIT at 733 (acknowledging that, although "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . . speculation does not amount to reasonable inference, as it provides no factually-grounded basis for sustaining an agency's determination") (internal quotations omitted). This Court's holding does not depend on any formalism regarding the Commission's conditions of competition analysis but instead finds that its failure to ground a key finding in record evidence undermined the Final Determination by more than the substantial evidence standard will permit.

CONCLUSION

The Commission enjoys significant discretion to determine that a domestic industry has suffered material injury by reason of subject

imports. *See Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 1008 (1998), *aff'd*, 216 F.3d 1357 (Fed. Cir. 2000) (The Commission has the "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis."). That discretion does not include the ability to assume facts for which there is insufficient evidence. Any Commission findings that depend on such evidence-free assumptions are not supported by substantial evidence and must be returned to the Commission for reconsideration. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (Substantial evidence requires "the agency [to] examine the relevant data and articulate a satisfactory explanation for its action[.]"). Because the Commission grounded its findings on an unsupported assumption that fertilizer could be reshipped from one destination to another to meet existing demand, its current decision may not stand. It is therefore **ORDERED** that Plaintiffs' Motions for Judgment on the Agency Record are **GRANTED**, and the Commission shall take new action in accordance with this opinion.

The Commission may take new evidence, reconsider existing evidence, or take any other action allowed by its procedures on remand to come to a conclusion supported by substantial evidence. The Commission is directed to file its remand redetermination within 120 days of the date of this decision. Plaintiff shall have 30 days thereafter to file any comments on the remand redetermination. Plaintiff-Intervenors and the Consolidated Plaintiff shall have 14 days after the filing of Plaintiff's comments to file their own comments. The Commission shall file its comments within 30 days of the filing of Plaintiff-Intervenors' and the Consolidated Plaintiff's comments. Defendant-Intervenors shall file their comments within 14 days of the filing of the Commission's comments. Plaintiff shall have the option of filing a reply to these comments, due 30 days from the filing of Defendant-Intervenors' comments.

SO ORDERED.

Dated: September 19, 2023
New York, New York

/*s*/ *Stephen Alexander Vaden*
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 23–137

SMA SURFACES, INC. (F/K/A POLARSTONE US), Plaintiff, v. UNITED STATES, Defendant, and CAMBRIA COMPANY, LLC, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00399

[Commerce's *Final Remand Redetermination* is sustained.]

Dated: September 20, 2023

Michael S. Holton, *Erik D. Smithweiss*, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C. and Los Angeles, CA, for Plaintiff SMA Surfaces, Inc. (f/k/a Polarstone US).

Joshua E. Kurland, Trial Attorney, U.S. Department of Justice, Washington, D.C., for Defendant the United States. With him on the briefs 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 *Jared Cynamon*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance.

Luke A. Meisner and *Roger B. Schagrin*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Cambria Company LLC.

OPINION

Katzmann, Judge:

Before the court are the remand results of the U.S. Department of Commerce ("Commerce") following a scope inquiry request filed by Plaintiff SMA Surfaces, Inc. ("SMA Surfaces"), an importer of crushed glass surface products from the People's Republic of China. *See Redetermination Pursuant to Court Remand Order* (Dep't Com. Apr. 11, 2023), Apr. 12, 2023, ECF No. 44 ("*Final Remand Redetermination*"). SMA Surfaces argues that the *Final Remand Redetermination* is unsupported by substantial evidence, is contrary to law, and does not comply with the court's remand order. *See SMA Surfaces, Inc. v. United States* ("*SMA Surfaces I*"), 47 CIT __, __, 617 F. Supp. 3d 1263, 1283 (2023). Defendant the United States and Defendant-Intervenor Cambria Company LLC ("Cambria") oppose SMA Surfaces's challenge on remand.

The court concludes that SMA Surfaces has waived its challenge before the U.S. Court of International Trade ("CIT") for failure to file briefing that is particularized to the *Final Remand Redetermination*. Because Commerce's results are otherwise supported by substantial evidence, in accordance with law, and compliant with the court's remand order, the *Final Remand Redetermination* is sustained.

BACKGROUND

The facts, legal framework, and exhibits of this case have been set out in the previous opinion and are recounted here to extent they are relevant. *SMA Surfaces I*, 617 F. Supp. 3d at 1267–71. SMA Surfaces requested a scope inquiry clarifying that three of its glass surface products—"Grey Concrete Leather," "Andes," and "Twilight"—were not subject to the antidumping and countervailing duty orders on certain quartz surface products from China, which Commerce had instituted pursuant to the statutes designed for fair trade and prevention of injury to domestic industry. *See Certain Quartz Surface Products from the People's Republic of China: Antidumping and Countervailing Duty Orders*, 84 Fed. Reg. 33053 (Dep't Com. July 11, 2019) ("*QSP Orders*"). The exemption for crushed glass surface products from the *QSP Orders* ("crushed glass exclusion") requires the satisfaction of four criteria, defined as follows:

> Specifically excluded from the scope of the orders are crushed glass surface products. Crushed glass surface products must meet each of the following criteria to qualify for this exclusion: (1) The crushed glass content is greater than any other single material, by actual weight; (2) there are pieces of crushed glass visible across the surface of the product; (3) at least some of the individual pieces of crushed glass that are visible across the surface are larger than one centimeter wide as measured at their widest cross-section (glass pieces); and (4) the distance between any single glass piece and the closest separate glass piece does not exceed three inches.

QSP Orders, 84 Fed. Reg. 33055–56. After reviewing SMA Surfaces's request, Commerce determined that the three glass surface products did not qualify for the crushed glass exclusion. *See* Mem. from J. Pollack to J. Maeder, re: Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Quartz Surface Products from the People's Republic of China: SMA Surfaces at 5–6 (Dep't Com. July 15, 2021), P.R. 15 ("Final Scope Ruling").

SMA Surfaces petitioned the court for review, contending that the Final Scope Ruling was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). In *SMA Surfaces I*, the court concluded that Commerce's inclusion of the Grey Concrete Leather and Andes products in the *QSP Orders* was justified by substantial evidence and in accordance with law, but that Commerce's inclusion of the Twilight product was not justified by substantial evidence. 617 F. Supp. 3d at 1283. Specifically, "[w]ithout any further explanation of what about Exhibit

16 failed to justify Twilight's compliance with the fourth criterion, Commerce's decision is simply not 'obvious in light of the determination as a whole.'" *Id.* at 1281 (quoting *U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed. Cir. 1990)). The court remanded the Final Scope Ruling to Commerce for reconsideration of the Twilight product. *Id.*

Following the court's order, in March 2023, Commerce released its draft remand results to interested parties. *See Draft Results of Redetermination Pursuant to Court Remand* (Dep't Com. Mar. 14, 2023), R.P.R. 1 ("*Draft Remand Redetermination*"). SMA Surfaces and Cambria timely submitted comments on the *Draft Remand Redetermination*. *See* Letter from SMA Surfaces to G. Raimondo, Sec'y Com., re: Comments on Draft Results of Redetermination (Mar. 22, 2023), R.P.R. 2; Letter from Cambria to G. Raimondo, Sec'y Com., re: Comments on Draft Remand Redetermination (Mar. 22, 2023), R.P.R. 3.

On April 12, 2023, Commerce timely filed the remand results with the court, addressing the parties' comments. *See Final Remand Redetermination*. Commerce again reviewed the evidence of the Twilight product for compliance with the crushed glass exclusion. It concluded that "because SMA Surfaces only submitted pictures of a portion of a Twilight slab, SMA Surfaces failed to demonstrate that its Twilight product meets the criteria of the crushed glass scope exclusion, which require that there be one centimeter glass pieces within three inches of another one centimeter glass piece *across the surface of the product*." *Final Remand Redetermination* at 5–6 (emphasis in original). Commerce further explained:

> Specifically, to demonstrate that a product meets the plain language of the crushed glass scope exclusion, an interested party would have to provide photographic evidence of all of the product's surface, and possibly multiple examples to prove that this is normally a product that meets the requirements of the exclusion. For example, if Commerce were provided with detailed pictures or video of three entire slabs, with all four edges and all six "sides" (front, back and each edge/side) present, such photographic or video evidence might satisfy the requirements to prove such an exclusion, but it would definitely be a case-specific analysis.
>
> In this case, SMA Surfaces only provided pictures of a subsection of a larger Twilight product (only one edge is present in the pictures provided); thus, it failed to demonstrate that the Twilight product met the "across the surface of the product" criterion of the crushed glass scope exclusion. Therefore, we continue

> to find that SMA Surfaces' Twilight product is within the scope of the *Orders*.

Id. at 6 (footnote omitted).

On May 12, 2023, SMA Surfaces filed with the court comments on the *Final Remand Redetermination*, in which it attached and incorporated by reference the document that it had filed challenging Commerce's *Draft Remand Redetermination*. *See* Pl.'s Cmts. on Final Remand Redetermination, May 12, 2023, ECF No. 47 ("Pl.'s Cmts."). The Government and Cambria filed responses to SMA Surfaces's comments. *See* Def.'s Resp. to Pl.'s Cmts. on Remand, June 12, 2023, ECF No. 50 ("Def.'s Resp."); Def.-Inter.'s Reply in Supp. of Final Remand Redetermination, June 12, 2023, ECF No. 51 ("Def.-Inter.'s Resp.").

DISCUSSION

Jurisdiction remains proper under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(vi). The court will sustain Commerce's redetermination on remand if it is supported by substantial evidence on the record and is otherwise in accordance with law, *see* 19 U.S.C. § 1516a(b)(1)(B)(i), which includes compliance with the court's remand order, *see BGH Edelstahl Siegen GmbH v. United States*, 47 CIT __, __, 639 F. Supp. 3d 1237, 1240 (2023); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1402 (2018), *aff'd*, 779 F. App'x 744 (Fed. Cir. 2019).

As a threshold matter, the court first concludes that SMA Surfaces has waived its objections to the *Final Remand Redetermination* filed by Commerce with the court. The court next sustains the *Final Remand Redetermination* for adequately addressing SMA Surfaces's objections before Commerce and for otherwise being supported by substantial evidence, in accordance with law, and compliant with the court's remand order.

I. SMA Surfaces Has Waived Its Objections to the Final Remand Redetermination

The Government and Cambria first contend that SMA Surfaces waived its challenge to the *Final Remand Redetermination*. *See* Def.'s Resp. at 5–6; Def.-Inter.'s Resp. at 2–4. In its two-page filing, SMA Surfaces stated that it "believes its comments on the Draft Remand Results sufficiently address [its] position with respect to Commerce's Final Remand Results," Pl.'s Cmts. at 1, and attached its administrative brief challenging the *Draft Remand Redetermination*, *see id.* attach. 1 ("Pl.'s Admin. Br."). SMA Surfaces did not brief any argu-

ments specific to Commerce's analysis and explanation as articulated in the *Final Remand Redetermination*.

"[I]t is black letter law that—to properly preserve an issue for appeal—a party generally must first exhaust its remedies by making its argument before the agency, then brief that argument before the trial court. Arguments that are not properly preserved are waived." *AL Tech Specialty Steel Corp. v. United States*, 29 CIT 276, 285 (2005) (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002)). Even if an argument has been raised to the agency, the failure to raise that argument before the court on remand generally constitutes waiver.[1] *See, e.g.*, *POSCO v. United States*, 42 CIT __, __, 335 F. Supp. 3d 1283, 1287 (2018); *NTN Bearing Corp. of Am. v. United States*, 26 CIT 949, 950 n.1 (2002), *aff'd*, 368 F.3d 1369 (Fed. Cir. 2004); *Pac. Giant, Inc. v. United States*, 26 CIT 1331, 1332 n.1 (2002). The argument must be developed for judicial review; perfunctory statements or summary incorporation of prior arguments cannot preserve an issue. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001))); *Home Prods. Int'l, Inc. v. United States*, 36 CIT 665, 672–74, 837 F. Supp. 2d 1294, 1300–02 (2012) (deeming an argument on remand waived "because it was too cursory to warrant the court's consideration"); *see also Z.A. Sea Foods Priv. Ltd. v. United States*, 46 CIT __, __, 606 F. Supp. 3d 1335, 1343–44 (2022) (collecting authority), *appeal docketed* No. 23–1469 (Fed. Cir. Feb. 7, 2023).

SMA Surfaces's failure to present developed argumentation that is responsive to the *Final Remand Redetermination* results in waiver. Objections to an agency's draft remand results do not, without further elaboration, constitute validly presented objections to the final remand results. *See NTN Bearing Corp. of Am. v. United States*, 26 CIT at 950 n.1; *Pac. Giant*, 26 CIT at 1332 n.1. Moreover, Commerce's *Final Remand Redetermination* is expressly responsive to each of the

[1] Not raising the argument before the agency, by contrast, would constitute a failure to exhaust administrative remedies rather than a waiver of argument. *See Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) ("The doctrine of exhaustion of administrative remedies . . . provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969))); *see also* 28 U.S.C. § 2637(d) ("[T]he [CIT] shall, where appropriate, require the exhaustion of administrative remedies."). Because SMA Surfaces timely raised its objections to Commerce's *Draft Remand Redetermination*, *see* Pl.'s Admin. Br., and because there was no subsequent opportunity in the administrative process to challenge the final version, SMA Surfaces has exhausted its administrative remedies here.

arguments in SMA Surfaces's administrative brief. *See Final Remand Redetermination* at 9–13. Yet SMA Surfaces offers no specific response apart from the perfunctory statement that Commerce has again erred for the same reasons, leaving it to the court and the parties to piece its arguments together. *See SmithKline*, 439 F.3d at 1320 ("[I]ssues adverted to in a perfunctory manner . . . are deemed waived." (quoting *Tolbert*, 242 F.3d at 75)); *Home Prods. Int'l*, 36 CIT at 673, 837 F. Supp. 2d at 1301 (a party may not "mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones" (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990))). With no argument tailored to the *Final Remand Redetermination* to consider, the court deems SMA Surfaces's objections to the final agency results waived.

II. The Final Remand Redetermination Adequately Addressed SMA Surfaces's Preliminary Objections and Is Accordingly Sustained

Although the court's analysis could end with the waiver issue, the court also concludes that, upon review of the *Final Remand Redetermination*, the final agency results addressed the preliminary objections that SMA Surfaces attempts to reassert here. SMA Surfaces first argued before the agency that "absolutely nothing on the record suggest[ed] that the photographs of Twilight provided by SMA [Surfaces] are not representative of the entire surface of the whole product." Pl.'s Admin. Br. at 2. But in asking Commerce and the court to draw an inference in its favor, that argument gets the standard backwards. SMA Surfaces could have submitted more and better-labeled photographic evidence to show compliance with the crushed glass exclusion. "Ultimately, the burden of creating an adequate record lies with [SMA Surfaces] and not with Commerce." *SMA Surfaces I*, 617 F. Supp. 3d at 1279 (cleaned up) (quoting *Aristocraft of Am., LLC v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1372, 1380 (2018), *as amended* (Apr. 17, 2019)).

Relatedly, SMA Surfaces contended that Commerce set too high an evidentiary bar in requiring images of "all of the product's surface . . . with all four edges and all six sides." Pl.'s Admin. Br. at 2 (quoting *Final Remand Redetermination* at 6). But the agency's requirement is well founded in the plain language of "across the surface of the product." The text of the crushed glass exclusion invites a "comprehensive examination of the product's surface," rather than a narrow examination of "a small portion of the product." *Final Remand Redetermination* at 11; *SMA Surfaces I*, 617 F. Supp. 3d at 1273 ("If the scope language is unambiguous, it governs." (cleaned up) (quoting

Meridian Prods., LLC v. United States, 851 F.3d 1375, 1381 (Fed. Cir. 2017))).

SMA Surfaces next argued that Commerce's evidentiary bar for meeting the "across the surface of the product" requirement was not made clear in a prior scope ruling. *See* Pl.'s Admin. Br. at 3; *see also* Mem. from M. Skinner to J. Maeder, re: Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Quartz Surface Products from the People's Republic of China: Request by Deyuan Panmin International Limited and Xiamen Deyuan Panmin Trading Co., Ltd. at 5 (Dep't Com. Feb. 20, 2020) ("*Panmin*"). Like the final scope ruling considered in *SMA Surfaces I*, Commerce summarily stated in the *Panmin* ruling—which was not challenged before the CIT—that the glass pieces did not meet criterion four's distance requirements "across the surface of the product." *Panmin* at 5. Because the agency acted consistently in administering the crushed glass exclusion in both *Panmin* and this case, *see SMA Surfaces I*, 617 F. Supp. 3d at 1283, the lack of further explanation in *Panmin* does not somehow limit Commerce's ability to explain the same "across the surface of the product" requirement in more detail here.

SMA Surfaces's final contention was that if Commerce required additional photographs, it erred in not issuing a supplemental questionnaire or reopening the record of the *Final Remand Redetermination*. *See* Pl.'s Admin. Br. at 4. But the court's prior opinion already rebutted that point. "Without any other statute or regulation obligating Commerce to ask for additional evidence before a final determination, the burden of developing an adequate record falls on SMA Surfaces, not Commerce." *SMA Surfaces I*, 617 F. Supp. 3d at 1280.

Having determined that the *Final Remand Redetermination* adequately addressed SMA Surfaces's preliminary objections, the court concludes that Commerce's results are supported by substantial evidence, in accordance with law, and compliant with the court's remand order.[2]

CONCLUSION

For the foregoing reasons, Commerce's *Final Remand Redetermination* is sustained. Judgment will enter accordingly.

SO ORDERED.

[2] Cambria also argues that the crushed glass pieces in the Twilight product are not "visible," which would fail the crushed glass exclusion criteria, and proposes that the court direct Commerce to review on that basis if the *Final Remand Redetermination* were remanded again. *See* Def.-Inter.'s Resp. at 6–8. Because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), and the court here is sustaining the *Final Remand Redetermination*, the court expresses no view on Cambria's argument.

Dated: September 20, 2023
New York, New York

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

Slip Op. 23–138

UNITED STATES OF AMERICA, Plaintiff, v. LINCOLN GENERAL INSURANCE COMPANY (IN LIQUIDATION), Defendant,

Before: Jane A. Restani, Judge
Court No. 11–00296

JUDGMENT

Upon reading plaintiff's consent motion to dismiss; and upon consideration of other papers and proceedings had herein; it is hereby

ORDERED that plaintiff's motion be, and hereby is, granted; and it is further

ORDERED, ADJUDGED, and DECREED that the above-captioned action is **DISMISSED**.

Dated: September 20, 2023
New York, New York

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

Slip Op. 23–139

SECOND NATURE DESIGNS LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 17–00271

[Plaintiff's Motion for Summary Judgment is granted in part and denied in part. Defendant's Cross-Motion for Summary Judgment is granted in part and denied in part.]

Dated: September 21, 2023

John M. Peterson, and *Patrick B. Klein*, Neville Peterson LLP, of New York, N.Y., argued for Plaintiff Second Nature Designs Ltd.

Brandon A. Kennedy, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-In-Charge. Of counsel on the brief was *Alexandra Khrebtukova*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, N.Y.

OPINION

Katzmann, Judge:

Before the court are cross-motions for summary judgment. Plaintiff Second Nature Designs Ltd. ("Second Nature") contests the denial of protests challenging the United States Customs and Border Protection's ("Customs") classification decision of imports containing various decorative items of plant parts ("subject merchandise"). Customs classified the subject merchandise under subheading 0604.90.60 of the Harmonized Tariff Schedule of the United States ("HTSUS"),[1] carrying a duty rate of 7 percent *ad valorem*. Second Nature argues that the proper classification is subheading 0604.90.30, HTSUS, a duty-free provision. Defendant the United States ("the Government") contends that in addition to Customs's original classification for certain categories of the subject merchandise, other headings of HTSUS provide the correct classification for other categories.

For the reasons established herein, the court agrees with Second Nature's preferred classifications for certain categories of the subject merchandise involving dried items and curled items. For certain other categories, the court agrees with the Government's preferred classification regarding certain styles of merchandise constituting artificial flowers or fruit. The court further finds that factual issues persist as to the remainder of the categories, precluding the grant of summary judgment. Accordingly, the court grants in part and denies

[1] References to "chapter," "heading," or "subheading" herein refer to the relevant parts of the HTSUS.

in part both Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment.

BACKGROUND

The court first sets out the overarching legal, factual, and procedural background necessary to contextualize the various classification claims brought forth by Second Nature and the Government. The court will further develop such backgrounds as relevant and necessary in the forthcoming discussion.

I. Legal Background

The HTSUS governs the classification of merchandise imported into the United States. *See Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). The HTSUS sets out the tariff rates and statistical categories using a series of nested chapters, headings, and subheadings. In general, the HTSUS's primary headings describe broad categories of merchandise, while its subheadings provide a particularized division of the goods within each category. The HTSUS "shall be considered to be statutory provisions of law for all purposes." 19 U.S.C. § 3004(c)(1). Proper classification is governed by the General Rules of Interpretation ("GRIs") of the HTSUS as well as the Additional U.S. Rules of Interpretation. *See Roche Vitamins, Inc. v. United States*, 772 F.3d 728, 730 (Fed. Cir. 2014) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

Judicial review of classification decisions involves two steps. First, the court determines the proper meaning of the terms used in the HTSUS provision, which is a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014) (citing *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005)). Second, the court determines whether the subject merchandise falls within the description of those terms, which is a question of fact. *See id.* (citing *Orlando Food*, 140 F.3d at 1439). The key factual issue is the nature of the merchandise. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) ("[S]ummary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.").

The court applies the GRIs in numerical order beginning with GRI 1; the court will reach subsequent GRIs only if analysis under the preceding GRI does not yield proper classification of the subject merchandise. *See Link Snacks*, 742 F.3d at 965; *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). "The HTSUS is designed so that most classification questions can be answered by GRI 1 ...." *Telebrands Corp. v. United States*, 36 CIT 1231, 1235, 865

F. Supp. 2d 1277, 1280 (2012), *aff'd*, 522 F. App'x 915 (Fed. Cir. 2013). Therefore, "a court first construes the language of the heading, and any section or chapter notes in question." *Orlando Food*, 140 F.3d at 1440. Once imported merchandise is determined to be classifiable under a particular heading, a court must then look to the subheadings to find the correct classification of the merchandise in question. *Id.* Only after "exhausting the terms of the subheadings and related [chapter] notes would one turn to GRI 3 to choose between two or more potentially applicable subheadings." *Telebrands*, 36 CIT at 1236, 865 F. Supp. 2d at 1281.

GRI 2 provides that the classification of "goods consisting of more than one material or substance" shall be determined according to the principles of GRI 3. GRI 2, HTSUS. Under GRI 3(a), goods are classified into "[t]he heading which provides the most specific description"; but if multiple headings "each refer to part only of the materials or substances contained in [a mixed good]," the headings are regarded as equally specific and the court moves to GRI 3(b) by classifying the good according to the material that gives the good its "essential character." GRI 3, HTSUS. If no essential character can be found, then the good is classified pursuant to GRI 3(c) "under the heading which occurs last in numerical order among those which equally merit consideration." *Id.* After using the GRIs to determine the correct heading, the court determines the correct HTSUS subheading using GRI 6, which directs that GRIs 1 through 5 be reapplied at the subheading level. GRI 6, HTSUS. "Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." *Orlando Food*, 140 F.3d at 1440.

HTSUS terms are "construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss*, 195 F.3d at 1379 (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The court defines HTSUS tariff terms by relying on its own understanding of the terms and "consult[ing] lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Id.* at 1379. For additional direction on construing HTSUS provisions, the court may also consult the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes" or "ENs"). *See StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011). Although the "Explanatory Notes are not legally binding," they "may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision." *Roche Vitamins*, 772 F.3d at 731.

II. Procedural Background

From August 26, 2015, to November 13, 2015, Second Nature filed nine entries regarding the subject merchandise with the port of Detroit, Michigan. Joint Rule 56.3 Stmt. of Material Facts as to Which There Are No Genuine Issues to Be Tried ¶ 2, Jan. 28, 2022, ECF No. 91–1 ("Joint SOF"). From July 9, 2015, to December 26, 2016, Second Nature filed 140 entries of the subject merchandise with the port of Buffalo, New York. *Id.* Customs classified the merchandise under subheading 0604.90.60, HTSUS, which covers: "Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: Other." Joint SOF ¶ 4.

Second Nature timely filed eleven protests between February 23, 2016, and June 29, 2017, with the Port Directors of Customs at the Port of Buffalo, New York, and the Port of Detroit, Michigan. Compl. ¶ 11, Dec. 21, 2017, ECF No. 7; Am. Answer ¶ 11, Aug. 24, 2022, ECF No. 114. These protests contested the classification, rate, and amount of duty assessed in liquidation, pursuant to 19 U.S.C. §1514(a)(2).[2] Compl. ¶ 11; Am. Answer ¶ 11. Specifically, Second Nature argued that the entries should have instead been classified under subheading 0604.90.30, HTSUS, which covers: "Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: dried or bleached." Compl. ¶ 11; Am. Answer ¶ 11.

On May 8, 2017, Customs issued Headquarters Ruling Letter H279097, again confirming the 0604.90.60 classification for the further worked dried or bleached botanicals. Joint Mot. at 5; Compl. ¶ 12; Am. Answer ¶ 12. As support, Customs cited rulings where it had considered numerous other botanical products and found that dried natural goods which were decorated beyond bleaching or drying were

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[2] Goods imported into the customs territory of the United States must first be "entered," or in other words declared, to Customs. Customs is then responsible for determining the final classification and valuation of the goods through a process called "liquidation of the entry." 19 U.S.C. § 1500 sets out the procedures for the liquidation process, which includes final appraisal, a final classification decision, and liquidation, i.e., final ascertainment of duties. After liquidation of the entry occurs, an importer may seek administrative review of a classification decision by protesting the decision to Customs, which results in an internal review of the decision by a higher level of authority within Customs. If the importer is dissatisfied with the decision resulting from its protest, it may then, as here, seek judicial review. *See Amcor Flexibles Kreuzlingen AG v. United States*, 46 CIT __, __, 560 F. Supp. 3d 1326, 1329–30 (2022).

classified under 0604.90.60. *Id.* Between May 19, 2017, and October 30, 2017, Customs denied certain protests underlying this action. Compl. ¶ 13; Am. Answer ¶ 13.

Following the denial of its protests, Plaintiff timely filed suit on November 17, 2017, contesting Customs's classification and alleging that the goods are instead properly classified under subheading 0604.90.30, HTSUS. *See* Summons, Nov. 17, 2017, ECF No. 1; Compl. at 4. The Government filed its Answer on April 12, 2018, defending Customs's classification under subheading 0604.90.60, HTSUS. *See* Answer, Apr. 12, 2018, ECF No. 12.

The parties entered the discovery phase of the case. Joint SOF at 3. Discovery was slated to conclude on November 2, 2018. Scheduling Order, May 25, 2018, ECF No. 17. However, following numerous motions for extension by the parties, discovery was ultimately extended until February 14, 2022—largely to accommodate the parties' joint efforts to establish the scope of the litigation and prepare an agreed-upon statement of facts. *See* Order, Oct. 27, 2021, ECF No. 80; Joint Status Report at 1–3, Dec. 1, 2021, ECF No. 84 (discussing efforts to produce a joint statement of facts pursuant to Rule 56.3 of the U.S. Court of International Trade ("CIT")).

On January 28, 2022, shortly before the close of discovery, the parties jointly moved for an order implementing certain case management procedures, staying discovery, and dividing the proceedings into two phases. *See* Joint Mot. for Entry of Order Providing Case Management Proc. & Dividing Remainder of Litigation into Two Phases, Jan. 28, 2022, ECF No. 91 ("Joint Mot." or "Joint Motion"). In the Joint SOF that was attached to the Joint Motion, the parties divided the merchandise into eight categories, from Category One to Category Eight. *See* Joint SOF ¶¶ 6–41. The parties further stipulated that the parties sought only the court's determination as to the "appropriate methodology" for applying the GRIs in Category Seven, and that the parties would further resolve the proper classification through "briefing or by trial" as necessary. Joint Mot. at 2. The Parties further indicated that the Joint SOF would serve as the parties' joint statement of facts for the purposes of USCIT Rule 56.3. *See* Joint SOF at 1. The court granted the Joint Motion and partitioned the litigation into two phases, and the parties proceeded with the following motions for summary judgment as part of the first phase. *See* Scheduling Order, Feb. 2, 2022, ECF No. 93 ("Feb. 2022 Scheduling Order").

On the same day the Joint Motion was filed, the Government filed a motion for leave to amend its Answer and assert a counterclaim that the subject merchandise is, in part, correctly classified under HTSUS

6702.90.65. *See* Mot. to File an Am. Ans. & Suppl. Pleading Asserting a Counterclaim at 8–9, Jan. 28, 2022, ECF No. 92 ("Def.'s Am."). Plaintiff responded in opposition on February 18, 2022, *see* Pl.'s Resp. in Opp. to Def.'s Mot. to Am. at 2, Feb. 18, 2022, ECF No. 95 ("Pl.'s Am. Resp."), and the Government replied on March 22, 2022, *see* Def.'s Reply in Supp. of its Mot. to File an Am. Ans. & Suppl. Pleading Asserting a Counterclaim, Mar. 22, 2022, ECF No. 99 ("Def.'s Am. Reply"). On July 25, 2022, the court granted the Government's motion for leave to amend and designated the proposed counterclaim as a defense. *See Second Nature Designs Ltd. v. United States*, 46 CIT __, __, 586 F. Supp. 3d 1334, 1342 (2022).

After the court's order granting the motion, the Government filed its Amended Answer on August 24, 2022. *See* Am. Answer. In the Amended Answer, in addition to the alternative classification under HTSUS 6702.90.65 that the Government originally sought to add in its amendment, the Government included three more alternative classifications for certain items, variously under HTSUS subheadings 4602.12.45, 4602.19.45, and 4602.19.80. *See id.* ¶¶ 14, 17, 20, 23. The additional alternative classifications under heading 4602 were not mentioned in the Government's motion for leave to file an amended answer, nor in the Government's subsequent briefs for its motion to amend. *See* Def.'s Mot. Am. Answer & Supp. Pleading, Jan. 28, 2022, ECF No. 92–1; Def.'s Am. Reply.

Before the filing of the Amended Answer by the Government, on June 13, 2022, Second Nature filed a Motion for Summary Judgment to classify all eight categories of the subject merchandise under subheading 0604.90.30, HTSUS. *See* Pl.'s Mot. for Summ. J. at 1, June 13, 2022, ECF No. 104 ("Pl.'s Mot."); Pl.'s Mot. for Summ. J. Mem. of Points & Auth. at 1, June 13, 2022, ECF No. 104–2 ("Pl.'s Br."). The Government filed its Cross-Motion for Partial Summary Judgment on September 30, 2022. *See* Def.'s Resp. & Cross-Mot. for Partial Summ. J. Mem. of Law, Sept. 30, 2022, ECF No. 115 ("Def.'s Br."). Thereafter, Second Nature moved out of time to file a reply brief, and the court granted the motion. *See* Mot. Out of Time Leave to File Reply Br., Dec. 14, 2022; ECF No. 118; Order, Dec. 15, 2022, ECF No. 119; Pl.'s Reply Br. in Supp. of its Mot. for Summ. J., Dec. 15, 2022, ECF No. 120 ("Pl.'s Reply"). On January 10, 2023, the parties jointly submitted fifteen physical exhibits as representative samples. *See* Joint Cert. of Filing & Serv. of Physical Exs., Jan. 10, 2023, ECF No. 121–1 ("Joint Cert. Exs."). The Government filed its reply brief. *See* Def.'s Reply Br. in Supp. of its Cross-Mot. for Partial Summ. J., Mar. 15, 2023, ECF No. 129 ("Def.'s Reply").

On June 8, 2023, the court issued questions to the parties in advance of oral argument. *See* Letter, June 8, 2023, ECF No. 133. Second Nature and the Government filed written responses. *See* Pl.'s Resp. to Ct.'s Qs. For Oral Arg., June 16, 2023, ECF No. 135 ("Pl.'s OAQ Resp."); Def.'s Answers to Ct.'s Qs. for Oral Arg., June 16, 2023, ECF No. 134 ("Def.'s OAQ Resp."). Oral argument took place on Tuesday, June 20, 2023. *See* Oral Arg., June 20, 2023, ECF No. 136. The court invited the parties to file submissions after oral argument, and Second Nature and the Government made such submissions. *See* Pl.'s Post-Arg. Subm., June 27, 2023, ECF No. 137 ("Pl.'s Post-Arg. Br."); Def.'s Post-Arg. Subm., June 27, 2023, ECF No. 138. The court later issued supplemental questions to the parties, *see* Letter, June 30, 2023, ECF No. 139, and Second Nature and the Government timely responded. *See* Pl.'s Resp. to Ct.'s June 30, 2023 Letter, July 12, 2023, ECF No. 140 ("Pl.'s Supp. Q. Resp."); Def.'s Answers to Ct.'s Supp. Qs., July 12, 2023, ECF No. 141 ("Def.'s Supp. Q. Resp.").

III. Factual Background

The parties have divided the subject merchandise into eight categories. Unless otherwise noted, the following facts are undisputed in the parties' joint statement and subsequent briefing:

In Category One, the subject product styles consist of foliage, branches, or other parts of plants, without flower buds, or grasses, mosses, or lichens, that have glitter or another coating applied to their exterior, and/or have been dyed. Joint SOF ¶ 6. The parties presented five styles as representative of the merchandise within Category One: (1) Exhibit No. 1, "Item No. 00055, Pinecones—Large Champagne Glitter—Consumer Pack"; (2) Exhibit No. 2, "Item No. 03379, Lotus Pods White Wash—Bulk Pack"; (3) Exhibit No. 3, "Item No. 15731, Palm Reed Mahogany—Value Pack"; (4) Exhibit No. 4, "Item 65536, Banana Stem White Wash, Value Pack"; and (5) Exhibit No. 5, "Item No. 64649, Pinecones Large Snow Item." *Id.* ¶¶ 7–11; Joint Cert. Exs. at 1.

Category Two comprises two product styles. Joint SOF ¶ 12. The parties submit that the styles of merchandise in Category Two are appropriately classified under HTSUS 0604.90.30. Def.'s Br. at 6, 24; Pl.'s Reply at 11.

In Category Three, the subject product styles consist of thin flat strips of a plant of the *Calamus* genus that are dried, dyed, and/or glittered, and shaped directly into decorative curls. Joint SOF ¶ 15. Exhibit No. 6, "Item No. 01694, Cane Spring Red Glitter—Bulk Pack" is the sole representative style for this category. *Id.* ¶ 16; Joint Cert. Exs. at 1.

In Category Four, the subject product styles consist of thin flat strips of colored willow (genus *Salix*) plaited into the shape of a triangle and impaled on a stick. Joint SOF ¶ 17. "Item No. 03322, Christmas Trees Gold Glitter—Consumer Pack" represents the characteristics of the merchandise within this category. *Id.* ¶ 18; Joint Cert. Exs. at 1. Despite designating the item as Exhibit No. 7, the parties did not submit a physical exhibit for Category Four because the manufacturer has discontinued the representative product. Joint Cert. Exs. at 1.

In Category Five, the subject product styles consist of thin flat strips of vegetable materials, other than willow or wood, shaped directly into balls or other shapes, and some of which are also impaled on sticks. Joint SOF ¶ 19. Exhibit No. 8, "Item No. 00210, Kambu Balls 8cm—Stemmed Red Glitter—Consumer Pack" represents the characteristics of the merchandise within this category. *Id.* ¶ 20; Joint Cert. Exs. at 1.

In Category Six, the subject product styles consist of articles that are handmade, using metal wire, tape, or glue to affix various dried plant materials into shapes resembling flowers or fruit. Joint SOF ¶ 21. Three styles represent the merchandise covered by Category Six: (1) Exhibit No. 9, "Item No. 16236, Deco Flowers Yellow—Value Pack"; (2) Exhibit No. 10, "Item No. 3229, Pumpkins—Stemmed Orange—Consumer Pack"; and (3) Exhibit No. 11, "Item No. 00696, Sola Berries Red Glitter—Consumer Pack." *Id.* ¶ 22; Joint Cert. Exs. at 1.

In Category Seven, the subject product styles all contain more than one type of item. Joint SOF ¶ 21. The parties have agreed that the following six styles may serve as representative styles for the merchandise covered by Category Seven: (1) Exhibit No. 12, "Item No. 00182, Deck The Halls Champagne Glitter—Bouquet"; (2) Exhibit No. 13, "Item No. 57170, Trick or Treat—Bouquet"; (3) Exhibit No. 14, "Item No. 40180, Pumpkin/Root Ball Mix Orange—Jumbo Bag"; (4) Exhibit No. 15, "Item No. 03347, Panchu Bouquet"; and (5) Exhibit No. 16 "Item No. 50970, Fall Harvest Bunch Bouquet." *Id.*; Joint Cert. Exs. at 2. The parties indicated that "Item No. 51670, Root Ball Bouquet Item" was inadvertently included as a representative style, and further that "they intended to omit it from the Joint SOF." Joint Cert. Exs. at 2; Joint SOF ¶ 21.

Category Eight contains 123 subject product styles, and the parties agree on the tariff classification of the imported merchandise under HTSUS subheadings 1401.10.00, 4602.19.60, 0604.90.10, 0604.90.30, and 3926.40.00. Joint SOF ¶ 34.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(a). The court may grant summary judgment when the movant shows that "there is no genuine issue as to any material fact," and is thus "entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also* USCIT R. 56(a). "[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In other words, the inquiry is "*whether the evidence presents a sufficient disagreement* to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52 (emphasis added). The movant bears the burden of demonstrating that there exists no genuine issue of material fact that would warrant a trial. *See, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

"With respect to cross-motions for summary judgment, each motion is evaluated on its own merits and reasonable inferences are resolved against the party whose motion is being considered." *Marriott Int'l Resorts, L.P. v. United States*, 586 F.3d 962, 968–69 (Fed. Cir. 2009) (citing *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1391 (Fed. Cir. 1987)). "The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other . . . ." *Mingus*, 812 F.2d at 1391. "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.*"To the extent there is a genuine issue of material fact, both motions must be denied." *Marriott Int'l*, 586 F.3d at 969.

DISCUSSION

Before the court, Second Nature asserts that (1) pursuant to GRI 1, the subject merchandise in Categories One, Three, Four, Five, Six, and Seven are properly classified as "dried or bleached" botanicals under the *eo nomine* provision[3] of HTSUS 0604.90.30; and (2) Note 2, Chapter 6 of the HTSUS governs classification for Category Seven. The Government counters that (1) HTSUS 0604.90.30 is not an *eo nomine* provision, and that the basket provision of HTSUS 0604.90.60 is the correct classification for Category One; (2) Category Three is appropriately classified under HTSUS 4602.12.45 as other

[3] *See infra* pp. 13–14.

articles of rattan; (3) Category Four is appropriately classified under HTSUS 4602.19.45 as other articles of willow or wood; (4) Category Five is appropriately classified under HTSUS 4602.19.80 as other articles; (5) Category Six is appropriately classified under HTSUS 6702.90.65 as artificial flowers or fruit; and (6) Category Seven consists of composite items that require GRI 3 to be read together with Note 2, Chapter 6 of the HTSUS. The court will address each argument in turn, focusing on specific categories at a time.

I. HTSUS 0604.90.30 Is an Eo Nomine Provision as Between Subheadings Within Heading 0604

A. Issue-Specific Legal Background

1. Eo Nomine Provisions

In examining the subheadings, the court must first "assess whether the subject Headings constitute *eo nomine* or use provisions because different rules and analysis will apply depending upon the heading type." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1164 (Fed. Cir. 2017). An *eo nomine* provision "describes an article by a specific name," whereas a use provision describes articles according to their principal or actual use. *Id.* An HTSUS provision is to be treated as *eo nomine* "when the interpretation [is] centered on the terms describing an article by a specific name." *Schlumberger*, 845 F.3d at 1164 (citing *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1278 (Fed. Cir. 2016)). In other words, when the "operative question" is whether the merchandise in question qualifies as an item that is "expressly named and covered by [the] HTSUS heading," such HTSUS provisions can be treated as containing an *eo nomine* designation. *Sigma-Tau*, 838 F.3d at 1278. Subheadings, as well as headings, can constitute *eo nomine* provisions. *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011).

"An *eo nomine* designation, with no terms of limitation, will ordinarily include all forms of the named article." *Irwin Indus. Tool Co. v. United States*, 920 F.3d 1356, 1360 (Fed. Cir. 2019) (quoting, ultimately, *Hayes-Sammons Chem. Co. v. United States*, 55 C.C.P.A. 69, 75 (1968)). "*Stated otherwise, all forms, grades and qualities of the named article are embraced by such a designation*." *Hayes-Sammons*, 55 C.C.P.A. at 75 (citation omitted and emphasis in original).[4]

[4] The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") adopted the case law of the Court of Customs and Patent Appeals ("CCPA") as binding precedent in its first ever en banc opinion, *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc). *See Deckers Corp. v. United States*, 752 F.3d 949, 964 (Fed. Cir. 2014). "[T]he Court

Thus, once a provision is found to be *eo nomine*, "an article which has been improved or amplified but whose essential characteristic is preserved or only incidentally altered is not excluded from an unlimited *eo nomine* statutory designation." *Casio, Inc. v. United States*, 73 F.3d 1095, 1098 (Fed. Cir. 1996). The criterion is whether the item "possess[es] features *substantially in excess* of those within the common meaning of the term." *Id.* (emphasis in original) (citation omitted). Factors such as design, use, or function may serve as "analytical tools or factors" in making this determination. *CamelBak*, 649 F.3d at 1367.

2. Whether Reading Subheading Terms Together with the Terms of Superior Headings Can Constitute an Eo Nomine Designation under the HTSUS

The key issue raised by Second Nature's argument is whether a subheading constituting only of adjectival terms, such as subheading 0604.90.30 ("[d]ried or bleached"), can be interpreted as an *eo nomine* provision when read together with the words of the superior heading, for the purpose of comparison with another eight-digit level subheading. Second Nature argues that "while subheadings 0604.90.30 and 0604.90.60, HTSUS are not, in isolation, considered '*eo nomine*' provisions, when read in conjunction with the superior headings and subheadings, they do in fact describe a type of merchandise *eo nomine* [.]" Pl.'s OAQ Resp at 1. Thus, according to Second Nature, "[g]oods of subheading 0604.90 are differentiated according to whether they were subjected to certain forms of processing (drying or bleaching)." *Id.*

To the contrary, the Government contends that subheading 0604.90.30 is not an *eo nomine* designation because the terms "dried or bleached" are "not a specific or well-known name for any commodity, but rather are a description of a particular way of processing or preparing the articles in question." Def.'s Br. at 17. In essence, the Government's argument is that because the subheading does not name anything, i.e., contain a noun describing a commercial name for a product or merchandise, the provision is not an *eo nomine* designation. *Id.*; Def.'s Reply at 6–7; *see also* Def.'s OAQ Resp. at 3.

of Customs and Patent Appeals always sat [en] banc" and, therefore, the most recent decision of the CCPA controls as precedent over prior inconsistent decisions. *Id.* (quoting *Celestaire, Inc. v. United States*, 120 F.3d 1232, 1235 (Fed. Cir. 1997)). For classification issues, "the construction of a Customs classification provision by a panel of [the Federal Circuit] is binding upon both the Court of International Trade and subsequent panels of [the Federal Circuit] in later protest cases involving the same subheading or heading" "unless and until overruled by an intervening Supreme Court or en banc decision." *Id.* at 964, 966 (citing *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1316 (Fed. Cir. 2013) (en banc)).

Although the parties have not directly supported their respective arguments with cases on point, a close reading of two cases cited in the briefs only for general propositions offers comparative context. *See* Pl's Br. at 10 (citing *United States v. Bruckmann*, 65 C.C.P.A. 90, 582 F.2d 622 (1978)); Def.'s Br. at 9 (citing *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014)). The first case, *Bruckmann*, was decided by the former CCPA and the second case, *Link Snacks*, was decided by the Federal Circuit. First, the holding in *Bruckmann* is that there is a general interpretive rule that a reference to "parts" in a superior heading will not travel down to a subheading if that subheading is an *eo nomine* provision. *See* 65 C.C.P.A. at 95, 582 F.2d at 626 ("[T]he subheading argued by Bruckmann to be proper . . . is [n]ot adjectival in form . . . . That item is an [e]o nomine provision and, by the general rule, does not include parts.").

In *Link Snacks*, the Federal Circuit held that the subheading in HTSUS 1602.50.09,[5] containing only the adjectival phrase "[c]ured or pickled," is an *eo nomine* designation. 742 F.3d at 966 ("The subject beef jerky is described, *eo nomine*, by HTSUS 1602.50.09 as cured beef products.").[6] The Federal Circuit further held that the *eo nomine* designation within subheading 1602.50.09 "does not draw distinctions based on whether or not the meat is dehydrated; the only inquiry is whether or not the meat has been cured." *Link Snacks*, 742 F.3d at 966. Therefore, "[a]lthough there is a respectable argument that the further step of dehydration affects the beef jerky product

[5] The relevant provisions of the HTSUS were as follows:

1602	Other prepared or preserved meat, meat offal or blood:						
. . . . .							
1602.50	Of bovine animals						
1602.50.05		Offal					
		Other:					
			Not containing cereals or vegetables				
1602.50.09				Cured or pickled			
				Other:			
					In airtight containers:		
1602.50.10						Corned beef	
1602.50.20						Other:	

HTSUS (2006); *see also Link Snacks*, 742 F.3d at 966.

[6] The *Link Snacks* court therefore affirmed the CIT's holding that "the '[c]ured' subheading, 1602.50.09, is an *eo nomine* provision that 'include[s] all forms of the named article,' even improved forms." *Link Snacks, Inc. v. United States*, 37 CIT 373, 378, 901 F. Supp. 2d 1369, 1375 (2013) (alterations in original) (citation and internal quotation marks omitted), *aff'd*, 742 F.3d 962.

beyond the curing process, it does not overcome the simple and straightforward classification of the subject merchandise as cured beef products." *Id.* Thus, even a subheading such as 1602.50.09 containing only the adjectival terms "[c]ured or pickled" can constitute an *eo nomine* provision. *Id.*

B. Subheading 0604.90.30 Is an Eo Nomine Provision for the Purposes of This Case

The court now turns to the HTSUS provision in question. Under the applicable HTSUS at the time of importation, heading 0604 and subheadings 0604.90.30 and 0604.90.60 were as follows:

0604	Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, *fresh, dried, dyed, bleached, impregnated or otherwise prepared:*		
0604.20.00	Fresh		
. . . . .			
0604.90	Other:		
0604.90.10		Mosses and lichens	
		Other:	
0604.90.30			Dried or bleached
0604.90.60			Other

HTSUS (2015) (emphasis added). As of 2023, no significant changes have been implemented to the relevant provisions. *See* HTSUS (2023).

While the court takes a "heading-specific approach," *Victoria's Secret Direct, LLC v. United States*, 769 F.3d 1102, 1110 (Fed. Cir. 2014), the opinions of the Federal Circuit and predecessor courts may provide several "analytical tools or factors" in interpreting other headings and subheadings under the HTSUS, *see CamelBak*, 649 F.3d at 1367 (examining, inter alia, case law pertaining to audio synthesizers in classification case of backpacks and other items). Examining the analytical tools employed by the two opinions in *Bruckmann* and *Link Snacks*, the court determines that HTSUS subheading 0604.90.30 is an *eo nomine* provision. Unlike the *Bruckmann* opinion, which interpreted the former Tariff Schedules of the United States, 65 C.C.P.A. at 94–95, 582 F.2d at 626, the case at bar, like *Link Snacks*, involves interpretation of a subheading within the HTSUS. Also unlike *Bruckmann*, which involved the application of a specific rule of interpretation regarding a "parts" designation, this case involves general descriptors and raises the issue of whether such descriptors, names, or nouns may travel down, as was the case in *Link Snacks*. Thus the

court follows the Federal Circuit's approach in *Link Snacks*.[7]

As in the case of *Link Snacks*, a subheading consisting of only "descriptive terms" is to be read as an *eo nomine* provision when the operative question focuses on the terms describing an article. *See* 742 F.3d at 966. Just as a tariff subheading containing only the words "[c]ured or pickled" constitutes an *eo nomine* provision because the only relevant inquiry under that subheading is whether the product is "cured," the court determines that subheading 0604.90.30, composed of the words "dried or bleached," constitutes an *eo nomine* provision for the purposes of this case.

II. Category One Is Properly Classified Under Subheading 0604.90.30

The court now turns to the classification of the products in Category One. The Government argues that because the items are dyed or glittered or further decorated with artificial snow, they are not merely "dried or bleached" products as defined under subheading 0604.90.30. Def.'s Br. at 20–21. Accordingly, the Government contends that the basket provision of subheading 0604.90.60 is the only appropriate classification for the products at issue, as the provision best describing the merchandise in whole. *Id.* at 21. Further, the Government avers that even if subheading 0604.90.30 is an *eo nomine* designation, the items are transformed with features substantially in excess of those within the common meaning of the terms "dried" and "bleached." Def.'s OAQ Resp. at 3. Second Nature responds that the *eo nomine* designation is applicable to improved products, and the additional processing such as coloring or glittering does not convert them into something else. Pl.'s Reply at 6.

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[7] Second Nature further argues that "classification provisions are either *eo nomine* or by use." Pl.'s Supp. Q. Resp. at 1. In contrast, the Government only submits that it is not an *eo nomine* provision. *See, e.g.*, Def.'s Supp. Q. Resp. at 1–2. The Government does not address whether the provision is a use provision, or if there is indeed such a dichotomy under the HTSUS. *See id.*; Def.'s Br; Def.'s Reply; Def.'s OAQ Resp.

Recent Federal Circuit opinions instruct the court to first "assess whether the subject Headings constitute *eo nomine* or use provisions." *Schlumberger*, 845 F.3d at 1164; *see also Apple Inc. v. United States*, 964 F.3d 1087, 1093 (Fed. Cir. 2020) ("There are two types of HTSUS headings, *eo nomine* [and] use provisions." (alteration in original)). In determining whether a provision is *eo nomine*, the court must focus on the "operative question" of whether the merchandise "qualifies as . . . items that are expressly named and covered by [the relevant] HTSUS heading." *Sigma-Tau*, 838 F.3d at 1278; *see also Schlumberger*, 845 F.3d at 1164. In other words, "when the interpretation center[s] on the terms describing an article," that provision is considered to be *eo nomine*. *Schlumberger*, 845 F.3d at 1164 (citing *Sigma-Tau*, 838 F.3d at 1278).

The language within subheading 0604.90.30, "dried or bleached," describes a condition of the merchandise. It does not describe a use to which the product is dedicated. As such, the key inquiry posed by the language of subheading 0604.90.30 is whether the item qualifies as such "dried or bleached" items. Therefore, under the *eo nomine*–use dichotomy, the provision constitutes an *eo nomine* provision for the purposes of this case.

It is undisputed that all of the representative samples within Category One are "dried" products, Joint SOF ¶¶ 7–9, consisting of foliage, branches or other parts of plants, without flower buds, or grasses, mosses or lichens, that have glitter or another coating applied to their exterior, and/or have been dyed, *id.* ¶ 6. However, it is also undisputed that the representative samples within Category One are not bleached: the word "bleached" does not appear in any of the samples' descriptions. *See id.* ¶¶ 6–9. Indeed, of the merchandise currently in dispute, only two styles within Category Seven contain such bleached components, *id.* ¶¶ 29, 32, with the remainder of bleached items found in Category Eight, *id.* ¶¶ 35, 40.

Following the approach of *Link Snacks*, the court determines that the subject merchandise is described, *eo nomine*, by subheading 0604.90.30 as "dried" foliage, branches, or other parts of plants, without flower buds, or grasses, mosses or lichens. The only inquiry of this *eo nomine* designation is whether or not the item has been dried. The styles of Category One have all been dried. Thus, any argument that the further processes of dyeing and glittering affect the product beyond the drying process fails to "overcome the simple and straightforward classification of the subject merchandise" as dried products. *Link Snacks*, 742 F.3d at 966.

The Government's arguments to the contrary are unpersuasive. First, the Government notes that dictionary definitions indicate that the common meaning of "bleach" is to remove color, Def.'s Mot. at 18, and thus the addition of dyes and glitter imparting a certain color to the merchandise may render the items substantially in excess of the common meaning of bleached goods. However, as noted *supra* p. 19, the merchandise in Categories One through Six contain only items that were, and remain, dried. Subheading 0604.90.30 was not defined as "dried *and* bleached." The subsequent improvements to those items do not transform their dried characteristic, and thus do not remove the merchandise from the simple classification provided in subheading 0604.90.30.

Second, the Government raises a syntactic point on the use of the word "dyed" in the superior heading to argue that the "dried or bleached" subheading only covers items that have been merely dried, and not items that have been dried and further "dyed and/or bleached." Def.'s Reply at 12; Def.'s OAQ Resp. at 5–6. The Government's position is based on a definition of "fresh" as not dry, based on an exemplar sentence of fresh from the Collins Dictionary Online, and a definition from the Britannica Dictionary Online. Def.'s Reply at 4–6; Def.'s OAQ Resp. at 6. Based on this definition, the Government argues that subheading 0604.90, labeled "other" as opposed to

"fresh," can only mean dried merchandise because fresh is "not dry" for the purposes of the term. But this argument is not persuasive because the structure of the table and the offered definitions do not necessitate such a reading. Subheading 0604.90 could easily be read as "dried, dyed, bleached, impregnated, or otherwise prepared" by simple elimination,[8] and the dictionaries cited by the Government do not explicitly define "fresh" as not dry. Likewise, the Government's argument as to description in whole and the need to resort to the basket provision is without merit.

Accordingly, the court determines that the merchandise identified in Category One is properly classified under subheading 0604.90.30.

III. Category Three Is Properly Classified Under Subheading 0604.90.30

The product styles in Category Three consist of thin flat strips of a plant of the *Calamus* genus that are dried, dyed, and/or glittered, and "shaped directly into decorative curls." Joint SOF ¶ 15. The parties present "Item No. 01694, Cane Spring Red Glitter—Bulk Pack" as a representative style for the merchandise covered by Category Three. *Id.* ¶¶ 15–16.

The Government argues that in addition to heading 0604, these items are prima facie classifiable under heading 4602 as "other articles, made directly to shape from plaiting materials or made up from articles of heading 4601 . . . : Of vegetable materials: Of rattan: Other: Other," Def.'s Br. at 25 (internal quotation marks omitted), following the "relative specificity" rule of GRI 3(a). *Id.* at 26–27. The Government further argues that items curled into shape are covered by the "other articles, made directly to shape from plaiting materials" language within heading 4602. *Id.* Thus, by the application of the relative specificity rule provided in GRI 3(a), the proper heading should be 4602 according to the Government. *Id.* at 25.

Second Nature submits that (1) the language of heading 4602 is limited by interpretive canons and that (2) the *calamus* strips are not plaiting materials constituting articles of Heading 4601, nor do the strips constitute "made up" articles. Pl.'s Reply at 12–13. Thus, according to Second Nature, only heading 0604 is prima facie

[8] Under such a reading, it is possible to envision a type of merchandise such as "preserved grasses," undergoing a form of chemical treatment to retain moisture, and thus rendering such products, not fresh, not mosses or lichens, not dried or bleached, but "impregnated or otherwise prepared." That reading would not render subheading 0604.90.60 "meaningless" as the Government suggests. Def.'s Reply at 4–6. It may be true that drying is the most common form of preparation for botanical products, but based on the arguments and briefing, the court is not persuaded that the structure of the tariff provisions necessitates the conclusion that the word "Other" in Subheading 0604.90 can only be read as "dried."

applicable, and subheading 0604.90.30 remains the proper classification for the merchandise within this category. *Id.*

Headings 4601 and 4602 read in relevant part:

4601	Plaits and similar products of plaiting materials, whether or not assembled into strips; plaiting materials, plaits and similar products of plaiting materials, bound together in parallel strands or woven, in sheet form, whether or not being finished articles (for example, mats, matting, screens):
. . . . .	
4602	Basketwork, wickerwork and other articles, made directly to shape from plaiting materials or made up from articles of heading 4601; articles of loofah:
	Of vegetable materials:
4602.12	Of rattan:
. . . . .	
	Other:
4602.12.35	Wickerwork
4602.12.45	Other:

HTSUS, ch. 46 (2015). As of 2023, no significant changes have been implemented to the relevant provisions. *See* HTSUS (2023). Note 1, Chapter 46 further defines "plaiting materials: as follows:

> In this chapter the expression "plaiting materials" means materials in a state or form suitable for plaiting, interlacing or similar processes; it includes straw, osier or willow, bamboos, rattans, rushes, reeds, strips of wood, strips of other vegetable material (for example, strips of bark, narrow leaves and raffia or other strips obtained from broad leaves), unspun natural textile fibers, monofilament and strip and the like of plastics and strips of paper, but not strips of leather or composition leather or of felt or nonwovens, human hair, horsehair, textile rovings or yarns, or monofilament and strip and the like of chapter 54.

Id., ch. 46 n.1.

A. The Relevant Language in HTSUS 4602 Is Ambiguous

The key question is whether the language of heading 4602 can cover items "shaped directly into decorative curls," or if it is limited to require that "other articles, made directly to shape from plaiting materials," be woven or interlaced. Second Nature argues that the canon *noscitur a sociis* limits the range of permissible construction, and based on the dictionary definition of "basketwork" and "wickerwork," the other articles under heading 4602 should also be inter-

preted as requiring weaving or interlacing. Pl.'s Reply at 13–14. The Government argues that the language does not contain any such limitation or requirement pertaining to weaving or interlacing, and thus such requirements are unnecessary. Def.'s OAQ Resp. at 7.

While canons of construction are certainly valuable tools of statutory interpretation, they are "no more than [a] rule[] of thumb." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 146 (2013) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)). The text is the "one, cardinal canon" a court must turn to "before all others." *Germain*, 503 U.S. at 253; *accord* Robert A. Katzmann, *Judging Statutes* 29 (2014) ("When statutes are unambiguous . . . , the inquiry for a court generally ends with an examination of the words of the statute.").

Thus, the court first turns to the text of the statute to determine whether there is any ambiguity in the text of heading 4602 referring to "[b]asketwork, wickerwork, and other articles, made directly to shape from plaiting materials or made up from articles of heading 4601." The Government argues that because the other articles are limited to those articles "made directly to shape from plaiting materials," and because the curled pieces of the *calamus* plant are such articles "made directly to shape," there is no ambiguity and the items are clearly defined as such. Def.'s OAQ Resp. at 7.

The parties have not offered any clear definition of the term "other articles" or the phrases "made directly to shape." The terms are undefined in the statute, and the chapter notes do not provide further guidance. The broad nature of the terms creates ambiguity as to whether it may encompass items shaped into any form, such as curled sticks, or whether it requires some form of weaving or interlacing. Thus, the term is ambiguous as to the scope of merchandise covered within the phrase "other articles, made directly to shape from plaiting materials."

B. Applying the Tools of Statutory Interpretation, the Meaning of "Other Articles, Made Directly to Shape" Requires Weaving or Interlacing

Resolving this ambiguity requires the court to first consider context imparted by other related HTSUS provisions. *See Gerson Co. v. United States*, 898 F.3d 1232, 1236–37 (Fed. Cir. 2018) ("[An HTSUS heading] does not exist in a vacuum, and we must read it in conjunction with other relevant provisions to discern its meaning."). The court "must read the words in their context and with a view to their place in the overall statutory scheme." *BMW of N. Am. LLC v. United*

States, 926 F.3d 1291, 1299 (Fed. Cir. 2019) (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)). "Generally, the HTSUS is not designed so that the headings overlap; therefore, a GRI 1 analysis should be a searching one." *Metchem, Inc. v. United States*, 30 CIT 902, 905, 441 F. Supp. 2d. 1269, 1272 (2006), *aff'd*, 513 F.3d 1342 (Fed. Cir. 2008).

First, considering the context of the headings, the Government's suggested reading of heading 4602 is overbroad. The Government argues that because the merchandise is "shaped directly into decorative curls," it aligns with the language of heading 4602, and thus according to the Government two headings are prima facie applicable. However, such a reading that curled items are "other articles, made directly to shape" for the purposes of heading 4602 necessarily implies that any shaped item whatsoever would be classified under heading 4602 as long as that item is made of plaiting materials. Def.'s Br. at 28 (citing HTSUS, ch. 46 n.1). Plaiting materials include not only "strips of other vegetable material" but also "unspun natural textile fibers, monofilament and strip and the like of plastics and strips of paper." HTSUS, ch. 46 n.1. Such a broad interpretation would lead to an anomalous result with respect to the scope of not just headings 0604 and 4602, but also several other headings within the HTSUS involving textiles, plastics, and paper.

Further, the Explanatory Notes to Chapter 46 provide guidance on the interpretation of the terms within Heading 4602. "After consulting the headings and section or chapter notes, [the court] may also consult the World Customs Organization's Explanatory Notes, which accompany each chapter of the HTSUS." *Gerson*, 898 F.3d at 1237 (quoting *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1375 (Fed. Cir. 2016)). "Although not binding, *where a tariff term is ambiguous* the Explanatory Notes may provide persuasive and clearly relevant guidance to the meaning of the term." *Id.* (emphasis added) (quoting *StoreWALL, LLC*, 644 F.3d at 1363).[9]

The general EN to Chapter 46 provides that:

> In addition to articles of loofah, this Chapter covers semi-manufactured products (heading 46.01) and certain articles (headings 46.01 and 46.02) *made by interlacing, weaving or by similar methods* of assembling unspun materials . . . .

[9] Second Nature argues with regard to Category Seven that it is improper to import a limitation from the ENs, citing *Midwest of Cannon Falls Inc. v. United States*, 122 F.3d 1423, 1428 (Fed. Cir. 1997). However, as noted in *Gerson*, the tariff provisions in *Midwest* were unambiguous. *Gerson*, 898 F.3d at 1238. As such, the holding in *Midwest* that the EN's limitations cannot be used to narrow a clear, unambiguous expression of legislative intent is inapposite here, when the tariff provision in question "*is* ambiguous standing alone." *See id.* (emphasis in original).

As described in the EN, the chapter is intended to include certain semi-manufactured products and certain articles made by interlacing, weaving, or similar method of assembling unspun materials. Considering this language in the EN, the court finds that Government's suggested reading of "other articles, made directly to shape from plaiting materials" is overinclusive. Heading 4602 is formulated in a way that captures items of basketwork, wickerwork, and other articles involving methods such as interlacing, weaving, or other similar methods. To hold that curled items would be prima facie classifiable under this heading would lead to an anomalous application of the HTSUS.

IV. Genuine Issues of Material Fact Preclude Summary Judgment as to Categories Four and Five

In a tariff classification dispute, summary judgment is appropriate only when "there is no genuine dispute as to the nature of the merchandise and the classification determination turns on the proper meaning and scope of the relevant tariff provisions." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013). A genuine issue of material fact regarding "the salient physical characteristics" of the merchandise, *id.*, or regarding "exactly what the merchandise is," *id.* (quoting *Bausch & Lomb*, 148 F.3d at 1365), precludes a grant of summary judgment. At summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see also Ford Motor Co. v. United States*, 157 F.3d 849, 854 (Fed. Cir. 1998). In ascertaining whether a genuine issue of material fact exists, a court draws all inferences against the moving party in reviewing the submitted evidence. *See Matsushita Elecs. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Moreover, on cross-motions for summary judgment in tariff classification cases, "each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts." Plexus Corp. v. United States, 44 CIT __, __, 489 F. Supp. 3d 1379, 1388 (2020) (quoting, ultimately, Massey v. Del Labs., Inc., 118 F.3d 1568, 1573 (Fed. Cir. 1997)).*

Unlike their arguments regarding the merchandise in Category Three, the parties do not dispute that the styles in Category Four and Category Five are "plaited." *See* Joint SOF ¶¶ 17–20; Pl.'s Reply at 14,

17; Def.'s Reply at 18, 20–21.[10] Thus Second Nature's arguments as to *noscitur a sociis* and the requirement of weaving and interlacing are inapposite here.[11]

For Category Four, Second Nature maintains that the proper classification for Category Four items is subheading 4602.19.35 as items of wickerwork, as opposed to the Government's preferred classification of subheading 4602.19.45. Likewise, for Category Five, Second Nature submits that subheading 4602.19.60 is the proper classification for Category Five items, as opposed to the Government's preferred classification of subheading 4602.19.80. In both cases, the key issue is whether the items qualify as wickerwork.

The Government argues that the common meaning of wickerwork requires that the items be made of "vegetable twigs and rods, in contrast to strips, filaments, etc.," with twigs and rods consistently held in Customs's practice as having "a *generally* cylindrical shape" and "rounded cross-sections." Def.'s Br. at 30 n.12, 34 n.14, 38 n.16 (emphasis added). According to the Government, because the parties do not dispute that the items in Categories Four and Five are made of "thin flat strips," Joint SOF ¶¶ 17–20, the items are made of strips and filaments and cannot be classified as wickerwork. In contrast, Second Nature argues that the products at issue consist of "twigs, osiers or the like plaited together," Pl.'s Reply at 16 (citation omitted), and that the common meaning of "wickerwork" does not require the items to be cylindrical, *id.*

Assuming arguendo that Government's definition of the common meaning applies, that would only require the twigs and rods to be "*generally*" cylindrical or with rounded cross-sections. It does not require that the components be completely round. Further, in reviewing the submitted evidence, the court finds that there is a genuine issue of material fact as to the salient physical characteristic of the merchandise: whether the items within Category Four and Category Five are composed of twigs and the like, or whether they are made of strips, filaments, and the like.

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[10] Second Nature originally submitted that the items in Category Five are "not plaited—that is they are not braided." Pl.'s Br. at 18 (internal quotation marks omitted); Pl.'s OAQ Resp. at 8. However, Second Nature later clarified its position as follows: "Plaintiff's argument is not that the material is *not plaited*, but rather, the shapes of these products not qualify for classification in Heading 4602, HTSUS . . . ." Pl.'s Post-Arg. Br. at 2 (emphasis in original).

[11] By Second Nature's own preferred definition, plaiting is defined as "the *interlacing* of strands: BRAIDING." *See* Pl.'s Br. at 17 (first emphasis added). Second Nature argues, without supporting authority, that the term "other articles made directly to shape" requires the article to have a certain intricate weaving and interlacing, or a form of "braiding" found in ordinary basketwork or wickerwork. Pl.'s Post-Arg. Br. at 2. The court finds this argument unpersuasive based on the text of the HTSUS, and further declines to require such a level of intricacy that has not been clearly presented or defined.

The Government avers that the description and photographs in the Joint SOF "clearly show that the article *is* made directly to shape from plaiting materials" because the articles are made of thin flat strips. Def.'s Reply at 17. However, Exhibit No. 8, *supra* p. 10, appears at odds with this statement. *See Simod Am. Corp.*, 872 F.2d at 1578 ("[T]he merchandise itself is often a potent witness in classification cases."). A factfinder considering the exhibit may reasonably conclude either that the items are made from twigs of a generally cylindrical shape, or that the cross-sections are rounded.

The Government also argues that Second Nature's position on the so-called "lata star" item, which the parties have agreed to classify under subheading 4602.19.60 as wickerwork in Category Eight, is inconsistent with its position that the styles of Categories Four and Five are not properly classified under heading 4602. *See, e.g.*, Def.'s Reply at 17; Def.'s OAQ Resp. at 9–10. The lata star is an item made of a dogbane plant of the Apocynum genus, which is a vegetable material other than willow or wood, with a round cross-section, plaited into the shape of a star and impaled on a wooden stick. Joint SOF ¶¶ 27, 36. Per the Government, the lata star's "physical composition and description closely resemble those of the styles of Categories Three, Four, and Five." Def.'s Reply at 17. But examining the physical sample of the "lata star" component alongside the "kambu ball," which is a representative sample of Category Five composed of the same vegetable material as the "lata star," the court concludes that the two items are not sufficiently similar to foreclose Second Nature's arguments here. A factfinder may reasonably discern a difference in the roundedness of the items' cross-sections and may reasonably conclude that the kambu ball is composed of either "twigs" of wickerwork or "strips."[12]

Thus, evaluating each party's motion on its own merits, and drawing all reasonable inferences against the party whose motion is under consideration, the court finds genuine issues of material fact remain as to each motion. Again, "the judge's function" at the summary judgment stage "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine

[12] As noted by the predecessor court in *International Fashions v. United States*, when an article's relevant characteristics are not apparent from a layperson's visual examination of an exhibit, it is the movant's responsibility to "adduce testimonial evidence from persons familiar" with the merchandise. 78 Cust. Ct. 153, 155 (1977). In essence, the parties here seek a factual determination of whether the pieces of willow or dogbane plant may constitute materials of wickerwork or other materials, based on statements and conflicting evidence alone, without presenting the court with such expert testimony or other relevant evidence. The court may not make such factual determinations at the summary judgment stage based on the record before it.

issue for trial." *Anderson*, 477 U.S. at 249; *see also Ford Motor Co.*, 157 F.3d at 854. To grant Second Nature's motion, the court would need to weigh the evidence, including the Joint SOF's description of the item as consisting of "thin flat strips" and find as a matter of fact that the products at issue consist of "twigs, osiers or the like plaited together." Likewise, to grant Government's motion, the court would need to weigh the evidence, including the physical exhibits such as the lata star, and find as a matter of fact that the products at issue indeed are composed of "thin flat strips." The court's function at this stage is not to determine the truth of these factual contentions one way or another, especially when the dispute involves the genuine issue of material fact regarding "exactly what the merchandise is." *Deckers Outdoor*, 714 F.3d at 1371. Thus, summary judgment for either party on this issue is improper at this stage of the litigation.[13]

V. Category Six Is Properly Classified Under Subheading 6702.90.65

Regarding the items in Category Six, the Government proposes an alternative classification under subheading 6702.90.65 as artificial flowers or fruit. Second Nature argues that the common meaning of "artificial flower" can only refer to flowers composed of man-made materials, and not natural materials such as parts of plants that have been dried and bleached. Pl.'s Br. at 19; Pl.'s OAQ Resp. at 9–10. Further, Second Nature argues that the two representative samples of artificial fruit do not resemble the actual fruit because of the difference in size and because they are placed on a stick. The court finds Second Nature's arguments unpersuasive and concludes that the Government's classification is correct.

A. Artificial Flowers Need Not Be Composed Solely of Non-Natural Materials

With the first contention, the court again begins with the text of the headings and relevant chapter notes. Pointing to dictionary definitions and several decisions of the predecessor court, Second Nature argues that the plain meaning of "artificial flowers" encompasses only articles made from "artificial" materials. Pl.'s OAQ Resp. at 9–10; Pl.'s Reply at 19–21.

[13] Especially in a case such as this, where the parties have filed cross-motions for summary judgment, supported only by a joint statement of facts and certain physical exhibits, the grant of summary judgment requires caution. *See* 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2720 (4th ed. 2023) ("[A] party may argue that no issue exists in the hope that his legal theory will be accepted . . . ."). In any event, "[t]o the extent there is a genuine issue of material fact, both motions must be denied." *Marriott Int'l*, 586 F.3d at 969.

As a preliminary matter, the definitions offered by Second Nature do not support its synecdochic proposition that the materials comprising an artificial flower must themselves be artificial to warrant "artificial" classification for the whole.[14] Further, as noted by the Government during oral argument, subheading 6702.90.10 lists "feathers," by no means exclusively a man-made item, as a possible material for artificial flowers.[15]

The cases of the predecessor court also support this conclusion. As Second Nature itself notes, the predecessor court held under the former tariff provision that artificial flowers can be made using dried plant parts. Pl.'s Reply at 21 (citing *Terra Firma Sales Corp. v. United States*, 84 Cust. Ct. 54, 55 (1980)). In *Terra Firma*, the merchandise at issue consisted of parts of dried plants which had been glued together to form a flower and then attached to a wrapped wire stem. 84 Cust. Ct at 55. The importer argued that artificial flowers must be composed of artificial substances, and the predecessor court held as follows:

> [I]n the opinion of the court, the artificiality of artificial flowers resides in the manner of their creation and not in the synthetic nature of their components. An artificial flower is a flower whose body was not created by nature, *and it matters not whether it is made from bits and pieces of natural plants. . . . There is no ambiguity in the term artificial flowers* and no reason to refer to legislative history. In any event, plaintiff's references reveal only that the fabrication of artificial flowers from parts of natural plants was not one of the princip[al] concerns of the legislators. There is no indication that such products were not to be considered artificial.

Id. (emphasis added).

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[14] Neither one of Second Nature's dictionary definitions of "artificial" support its argument. Pl.'s OAQ Resp. at 9. First, the Merriam-Webster Online Dictionary defines "artificial" as "humanly contrived, often on a natural model." *Artificial*, Merriam-Webster, https://www.merriamwebster.com/dictionary/artificial (last updated Sept. 11, 2023). Under that definition, an "artificial flower" would be a humanly-contrived flower, often on a natural model. Likewise, the Britannica Dictionary defines "artificial" as "not natural or real; made, produced or done to seem like something natural." *Artificial*, Britannica Dictionary, https://www.britannica.com/dictionary/ artificial (last visited Sept. 11, 2023). Using the second definition, the term "artificial flower" is a flower that is not natural or real, or a flower that is made, produced, or done to seem like something natural. But neither definition is so narrow as to suggest that all of the component parts of an artificial flower must also be humanly contrived or man-made.

[15] Also instructive is the wording of Note 3(b), Chapter 67, HTSUS, which excludes "artificial flowers, foliage or fruit of . . . wood or other materials, obtained in one piece . . ." The fact that such artificial flowers of wood, a naturally occurring ingredient, were explicitly excluded suggests that the common meaning of artificial flowers would generally encompass such materials.

Further, in *Cochran Co. v. United States*, an early leading case, one of the articles at issue was "a cluster of black straw wound into the form of berries or grapes and set on a black-straw leaf attached to a stem of black straw and metal." 10 Ct. Cust. 62, 64 (1920); *see also Marshall Field & Co v. United States,* 45 C.C.P.A. 72, 76 (1958) (describing background to *Cochran*). The *Cochran* court held that such items were classifiable as artificial fruit, notwithstanding the fact that they are made of straw, a natural material. 10 Ct. Cust. at 64. It reasoned that:

> It may be that neither exhibit truly represents any natural flower, fruit, leaf, or stem. Nevertheless, both come within the tariff designation of "artificial and ornamental fruits, grains, leaves, flowers, and stems," inasmuch as they are articles which simulate the natural fruit, flower, leaf, or stem in its physical characteristics and appearance sufficiently *to cause them in common understanding to be regarded as leaves, stems, flowers, or fruits produced not by nature, but by the hand of man*, and which at the same time are appropriate and suitable to be used for those purposes of ornamentation to which the natural products may be temporarily devoted.

Id. (emphasis added). The court finds these opinions to be instructive for the case at bar. Ultimately, the common meaning of "artificial flowers" cannot be read as requiring that the articles consist solely of man-made materials.

B. The Merchandise Falls Within the Common Meaning of Artificial Flowers or Fruit

The court turns to Second Nature's second contention, which is that certain articles at issue would not be considered a flower or fruit based solely on their physical characteristics and appearance. Pl.'s Reply at 21. Second Nature does not raise this argument regarding the "Item No. 16236, Deco Flowers Yellow—Value Pack" sample, and agrees that it may resemble a flower in appearance. Pl.'s OAQ Resp. at 9. Second Nature makes distinctions only as to Exhibit No. 10, "Item No. 3229, Pumpkins—Stemmed Orange—Consumer Pack"; and Exhibit No. 11, "Item No. 00696, Sola Berries Red Glitter—Consumer Pack." Pl.'s Reply at 21; Joint SOF ¶ 22; Joint Cert. Exs. at 1. Second Nature's arguments are unpersuasive.

Second Nature contends that "when dried plant parts are fashioned into a [two-inch] wide miniature structure resembling a pumpkin, and placed on a stick," the resulting article is not an "artificial fruit" because "it would not be regarded as a fruit." Pl.'s Reply at 21.

Likewise, Second Nature argues that when dried plant parts are shaped into the form of berries and placed on a stick, the resulting article would not be considered to be artificial berries because "berries are not mounted on a stick." *Id.*

Whether Second Nature takes issue with the disparity in size between the samples and real fruit or the fact that both samples are mounted on a stick, *see* Pl.'s OAQ Resp. at 10–11, neither distinction is compelling. In both appearance and size, the relevant representative samples, Exhibit No. 10, "Item No. 3229, Pumpkins—Stemmed Orange—Consumer Pack" and Exhibit No. 11, "Item No. 00696, Sola Berries Red Glitter—Consumer Pack," may reasonably be regarded as artificial fruit in common understanding.[16] Further, even if the articles are mounted on a stick, they would still fall under HTSUS heading 6702, which encompasses "articles made of artificial flowers, foliage or fruit."

Accordingly, the court determines that the merchandise within Category Six, as represented by the samples, are classified prima facie under heading 6702, HTSUS. The court further determines that subheading 6702.90.65 is the proper subheading for classification of the merchandise.

VI. Genuine Issues of Material Fact Preclude Summary Judgment as to Category Seven

A. The GRIs Are Applied in Numerical Order

The Government argues that even if the subject merchandise within this category are properly described in Heading 0604, the bouquets and mixtures also contain items described under other headings, and thus the court must apply GRI 3(b) for the composite goods. In the Government's words, "Note 2 to Chapter 6 *must be read together with GRI 3*," Def.'s Reply at 26 (emphasis in original). The

[16] In *United States v. Dieckerhoff, Raffloer & Co.*, the Court of Customs Appeals held that wax pieces about the size of a small hickory nut, resembling in shape and color of various fruits and vegetables, are significantly different in terms of size and thus not considered artificial flowers. 4 Ct. Cust. 384, 385 (1913). That case is inapposite here, where Second Nature has not established such a significant difference in size. The fact that the samples are only two inches wide does not necessarily create a significant disparity with natural products of pumpkin, especially when considering that pumpkins used for decoration are often miniature varieties of a similar size. The berries in the sample are also not significantly different in size from natural berries.

Further, as noted in *Cochran*, there is no requirement that the merchandise must accurately represent an actual plant. 10 Ct. Cust. at 64 ("It may be that neither exhibit truly represents any natural flower, fruit, leaf, or stem. Nevertheless, both come within the tariff designation . . . ."). The relevant inquiry is whether a man-made article "looks enough like a flower (real or imaginary) to be regarded as an artificial flower [or fruit] 'in common understanding.'" *Marshall Field*, 45 C.C.P.A. at 80 (emphasis omitted) (quoting *Cochran*, 10 Ct. Cust. at 64).

problem with this argument is that it relies on GRI 3(b) analysis of composite goods when analysis under GRI 1 is not exhausted.

A basic tenet of HTSUS classification is that the GRIs operate in a hierarchy. *See Otter Prods.*, 834 F.3d at 1375 ("We apply the GRIs in numerical order . . . ."). As noted above, because the HTSUS is not designed so that the headings overlap, the GRI 1 analysis should be searching. *Metchem*, 30 CIT at 905, 441 F. Supp. 2d at 1272. The court does not reach GRI 3 unless it is satisfied that more than one heading may cover the article. *Orlando Food*, 140 F.3d at 1440.

GRI 1 provides that "classification shall be determined according to the terms of the headings and *any relative section or chapter notes*." GRI 1, HTSUS (2015) (emphasis added). "We apply GRI 1 as a substantive rule of interpretation, such that when an imported article is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are inoperative." *Rubies Costume Co. v. United States*, 922 F.3d 1337, 1342 (Fed. Cir. 2019) (citation omitted). "The Chapter Notes are an integral part of the HTSUS, and have the same legal force as the text of the headings." *Roche Vitamins*, 772 F.3d at 731; *see also Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (treating Note 4 to Chapter 52 as having the same weight as statutory language). Therefore, "a court first construes the language of the heading, and any section or chapter notes in question." *Orlando Food*, 140 F.3d at 1440. Once imported merchandise is determined to be classifiable under a particular heading, a court must then look to the subheadings to find the correct classification of the merchandise in question. *Id.* Only after "exhausting the terms of the subheadings and related [chapter] notes would one turn to GRI 3." *Telebrands*, 36 CIT at 1236, 865 F. Supp. 2d at 1281.[17]

Thus, the Government's argument that "Note 2 to Chapter 6 *must be read together with GRI 3*," Def.'s Reply at 26 (emphasis in original), is unpersuasive. That argument runs counter to the well-recognized rule that the GRIs apply in numerical order; the interpretation of

[17] As the *Telebrands* court described in detail:

> What is clear from the legislative history . . . and case law is that *GRI 1 is paramount*. [GRI 1] provides in relevant part, "classification shall be determined according to the terms of the headings and any relative Section or *Chapter Notes*." . . . The Explanatory Notes to GRI 1 state that "*the terms* of the headings and *any relative Section or Chapter Notes are paramount*, i.e., they are the first consideration in determining classification" and the GRIs are to be considered in numerical order. *The headings and relevant notes are to be exhausted before inquiries, such as those of GRI 3, are considered*, e.g., specificity or essential character. The HTSUS is designed so that most classification questions can be answered by GRI 1, so that there would be no need to delve into the less precise inquiries presented by GRI 3.

36 CIT at 1235, 865 F. Supp. 2d at 1280 (emphasis added) (citations and footnotes omitted).

chapter notes is paramount when evaluating classification under GRI 1. Only after exhausting GRI 1 can the court turn to subsequent GRIs. *Id.*; *see also Lemans Corp. v. United States*, 660 F.3d 1311, 1316 (Fed. Cir. 2011) ("GRI 1 requires classification according to the terms of the headings and any relative section or chapter notes. If GRI 1 resolves the issue, the court is not to look to other GRIs." (internal citation and quotation marks omitted)).

B. Genuine Issues of Material Fact Remain as to the Nature of the Merchandise

The Government's other argument is that Note 2 to Chapter 6 cannot resolve the classification issue because of the nature of the merchandise. Thus the Government implies that application of GRI 1 does not solve the issue, necessitating application of the subsequent GRIs. In the Government's words, "Note 2 does not obviate the need for an essential character analysis under GRI 3(b) for composite styles, *when such bouquets consist in part of components that, if imported separately, would be classified under different tariff provisions*." Def.'s Br. at 50 (emphasis added). The Government contends that because the goods all contain components that the parties agree would be classified under different tariff provisions, *id.* at 44, and further because those components are not mere accessories, the merchandise falls outside the scope of the chapter note, *id.* at 51; Def.'s Reply at 27–28.

Second Nature counters that Note 2, Chapter 6 resolves the classification issue. According to Second Nature, "[o]nce it is determined that a bouquet contains a part of a plant specified in heading 0604, HTSUS, and that said plant part is dried or bleached, the bouquet is classified under subheading 0604.90.30, HTSUS, [and] resort to GRI 3 is precluded." Pl.'s Reply at 23. Second Nature further argues that if a bouquet contained items falling within two or more subheadings within headings 0603 or 0604, HTSUS, a GRI 3 analysis may be necessary, but that this is not the situation at bar since Second Nature's bouquets "contain only dried or bleached plant parts of subheading 0604.90.30." *Id.* at 23 n.16. Thus, according to Second Nature, "mixtures in the form of bouquets, floral baskets, wreaths and similar articles, containing any of the goods of heading 0603 or 0604, HTSUS, are classifiable in those headings." *Id.* at 22.

Note 2, Chapter 6 of the HTSUS provides in relevant part:

> Any reference in heading 0603 or 0604 to goods of any kind shall be construed as including a reference to *bouquets, floral baskets, wreaths and similar articles* made wholly or *partly of goods of*

> *that kind*, account not being taken of *accessories of other materials*. However, these headings do not apply to collages or similar decorative plaques of heading 9701.

HTSUS, ch. 6 n.2 (emphasis added).

Clearly, the parties dispute a material fact, which is the physical characteristics of the bouquets. *See, e.g.*, Pl.'s Supp. Q. Resp. at 2; Def.'s Supp. Q. Resp. at 2. Despite the parties' representations otherwise, the record shows pronounced disagreement on the question of whether (1) the items are bouquets and similar articles containing only dried or bleached plant parts of subheading 0604.90.30, or (2) the items are prima facie classifiable under a different heading and thus fall outside the scope of the text allowing "accessories" to be disregarded. As noted by the Government, the parties indicated that at least two of the styles contain items that, if individually imported, would be properly classified in subheading 4602.19.60, HTSUS. Def.'s Br. at 46, 48; Joint SOF ¶¶ 28, 31. That classification contrasts with Second Nature's statement that the bouquets "contain only dried or bleached plant parts of subheading 0604.90.30." Pl.'s Reply at 23 n.16; *see also* Pl.'s Supp. Q. Resp. at 2 (stating that Second Nature does not agree with the Government's characterization).

Further, in response to the Government's arguments that Note 2 may not be read in an overbroad manner, Second Nature argues that the note limits its scope "to bouquets, floral baskets, wreaths and similar articles," and disregards "accessories." Pl.'s OAQ Resp. at 3. But the focus of Second Nature's arguments has been on the bouquet products. *See, e.g.*, Pl.'s OAQ Resp. at 12 ("Note 2 to Chapter 6 specifically governs the classification of bouquets of Heading 0604 . . . ."); Pl.'s Post-Arg. Br. at 3. Second Nature does not address how "Item No. 40180, Pumpkin / Root Ball Mix Orange—Jumbo Bag," an item that the parties agree is "representative" of the merchandise within this category, Joint SOF ¶¶ 26, 30, can be properly characterized as "bouquets, floral baskets, wreaths and similar articles" that contain "only dried or bleached plant parts of subheading 0604.90.30."[18] Further, Second Nature does not address how this item

[18] By the parties' submission of uncontroverted fact, that style consists of ball-shaped items, two-thirds of which consist of "root balls" properly classified under subheading 4602.19.60 if individually imported. *Id.* ¶¶ 30, 31. The other components are the artificial pumpkins discussed *supra* p. 11, with the added fact that they are not stemmed. *Id.* ¶ 30. A factfinder inspecting the physical sample as represented in Exhibit No. 14, *supra* p. 11, may reasonably conclude that these items are simply placed together in a vinyl bag. *See Trans-Atlantic Co. v. United States*, 60 C.C.P.A. 100, 102–03, 471 F.2d 1397, 1398 (1973) ("[T]he sample of the imported merchandise . . . is itself a potent witness . . . ."); *see also* Joint SOF ¶ 30; Joint Cert. Ex. at 2; Exhibit No. 14. Second Nature does not adequately address why this style,

factually supports its legal argument "that when two or more products *covered by the same tariff provision are imported together*, they do not constitute a 'mixture.'" Pl.'s Post-Arg. Br. at 4 (emphasis added); *see also* Pl.'s Supp. Q. Resp. at 2. Thus Second Nature, as movant, has not established the absence of a genuine issue of material fact, and summary judgment is improper at this stage. *See Anderson*, 477 U.S. at 247; USCIT R. 56(a).

Likewise, the Government's contention that all the merchandise within this category contains at least one item that is indisputably classified in a heading other than heading 0604 also leads to a genuine issue of material fact.[19] Indeed, the Government suggests that it does not know the actual components of the goods in this category and argues that further discovery is necessary to determine their components. Def.'s OAQ Resp. at 8. The court concludes, therefore, that the Government, as cross-movant, has also not demonstrated an absence of a genuine dispute of material fact. *See Anderson*, 477 U.S. at 247 (1986); USCIT R. 56(a).

The parties here dispute a genuine issue of material fact regarding the salient physical characteristics of the individual components constituting Category Seven items. *See Deckers Outdoor*, 714 F.3d at 1371They dispute whether the merchandise comprises only items properly classified under heading 0604, or whether certain items may fall under a different heading. This dispute, in turn, implicates additional genuine issues of material fact about whether those items can be characterized as accessories to the primary article, and what the primary article is.[20] The "salient physical characteristics" of the subject merchandise have thus not been established by undisputed facts,

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representative of the merchandise within Category Seven, fits its description of "all or most of the items in a bouquet [that], if individually imported, would be classified under the same HTS item, 0604.90.30." Pl.'s Post-Arg. Br. at 4.

[19] Not only is the Government's factual claim missing from the formal Joint SOF, but it is also in contention with the samples that the parties provided. Specifically, a factfinder may reasonably conclude that "Item No. 03347, Panchu Bouquet," does not contain at least one item classified outside of Heading 0604, and the Government has failed to identify such an item on the record before the court at summary judgment. Joint SOF ¶ 32; Def.'s Supp. Q. Resp. at 2. Instead, the Government now claims that this item should be categorized in Category Eight. Def.'s Supp. Q. Resp. at 2–3.

[20] In essence, Second Nature asks the court to categorically determine that all merchandise within Category Seven may be properly classified under subheading 0604.90.30, Pl.'s Br. at 19–21, by focusing on specific samples without explaining why the "Pumpkin/Root Ball Mix Orange—Jumbo Bag," a sample representing the style of several items within Category Seven, is adequately covered by the text of Note 2, Chapter 6. Likewise, the Government asks the court to categorically determine that all merchandise within Category Seven must be resolved under GRI 3, without establishing the factual basis for that claim, i.e., that at least one component of each item in Category Seven is classifiable under a heading other than heading 0604.

Deckers Outdoor, 714 F.3d at 1371, and this action may not be resolved on summary judgment.

Again, "[t]he fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other . . . ." *Mingus,* 812 F.2d at 1391. "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.* "To the extent there is a genuine issue of material fact, both motions must be denied." *Marriott Int'l*, 586 F.3d at 969. Accordingly, both motions are denied with respect to the classification of the items described in Category Seven at this stage of the litigation.

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED that Second Nature's Motion for Summary Judgment is **GRANTED** as to the merchandise identified in Categories One and Three, which are classified under HTSUS subheading 0604.90.30; and it is further

ORDERED that the Government's Cross-Motion for Summary Judgment is **GRANTED** as to the merchandise identified in Category Six, which is classified under HTSUS subheading 6702.90.65; and it is further

ORDERED that the parties' classification of the merchandise identified in Category Two under HTSUS subheading 0604.90.30, *see* Def.'s Br. at 6, 24; Pl.'s Reply at 11, and in Category Eight under HTSUS subheadings 1401.10.00, 4602.19.60, 0604.90.10, 0604.90.30, and 3926.40.00, *see* Joint SOF ¶¶ 34–41, is hereby adopted by the court; and it is further

ORDERED that, insofar as the motions do not pertain to the merchandise identified in Categories One, Two, Three, Six, and Eight, Second Nature's Motion for Summary Judgment and the Government's Cross-Motion for Summary Judgment are **DENIED**; and it is further

ORDERED that, within fourteen days of this order, the parties will file a joint status report and a proposed scheduling order governing the second phase of the litigation. *See* Feb. 2022 Scheduling Order at 2. The proposed scheduling order should provide for any discovery, including written discovery and depositions, that may be necessary for classifying the merchandise identified in Categories Four, Five, and Seven.

SO ORDERED.

Dated: September 21, 2023
New York, New York

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

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