U.S. Customs and Border Protection

Slip Op. 13–151

CHANG CHUN PETROCHEMICAL CO. LTD., Plaintiff, v. UNITED STATES, Defendant, and SEKISUI SPECIALTY CHEMICALS AMERICA, LLC, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 11–00095

[Commerce's *Remand Results* are sustained]

Dated: December 18, 2013

Kelly A. Slater, Edmund W. Sim, and Jay Y. Nee, Appleton Luff Pte Ltd., of Washington, DC, for Plaintiff.

Alexander V. Sverdlov and Loren M. Preheim, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer,* Attorney-International, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce.

Daniel J. Plaine, Thomas M. Johnson, Jr., Andrea F. Farr, and James F. Doody, Gibson Dunn & Crutcher, LLP, of Washington, DC, for Defendant-Intervenor.

OPINION & ORDER

Carman, Judge:

Defendant-Intervenor Sekisui Specialty Chemicals America, LLC ("Defendant-Intervenor" or "Sekisui") partially challenges the Results of Redetermination Pursuant to Court Remand ("*Remand Results*"), dated July 12, 2013 (ECF No. 47–1), by Defendant U.S. Department of Commerce ("Defendant" or "Commerce") in the investigation of an antidumping duty order on polyvinyl alcohol ("PVA") from Taiwan. *See Polyvinyl Alcohol from Taiwan,* 76 Fed. Reg. 5,562 (Dep't of Commerce Feb. 1, 2011) (final determination of sales at less than fair value) ("*Final Determination*"), P.R.[1] 157, and accompanying Issues and Decision Memorandum, A-583–841 (Jan. 26, 2011), P.R. 153. Plaintiff Chang Chun Petrochemical Company Limited ("Plaintiff" or "CCPC") supports the *Remand Results*. Upon

[1] "P.R." stands for "Public Record."

review of the *Remand Results* and parties' comments, the Court holds that Commerce fully complied with the Court's remand order and thus sustains the *Remand Results*.

PROCEDURAL HISTORY

The procedural history of this case was detailed in Slip Opinion 13–49 ("Slip Op. 13–49") (ECF No. 42). Familiarity with the procedural history is presumed and only the essential events will be reproduced, as relevant, in this opinion. At the heart of this case was whether Commerce applied the proper regulation and whether Commerce properly applied that regulation.

In 1997, Commerce promulgated a targeted dumping regulation which supplemented the targeted dumping statute. *See* 19 C.F.R. § 351.414(f) (2004)[2] (hereinafter referred to as the "targeted dumping regulation").[3]

In September of 2004, Celanese Chemicals America, LLC—now known as Sekisui Specialty Chemicals America, LLC, Defendant-Intervenor in this case and a domestic producer of PVA—filed a petition against PVA from Taiwan that is the underlying administrative proceeding at issue. Celanese alleged all three types of targeted dumping—for customer, region and time period—against CCPC, Plaintiff in this case and the only known producer of PVA in Taiwan during the period of investigation from July 2003 to June 2004. On October 4, 2004, Commerce initiated a less than fair value investigation on PVA from Taiwan. *Polyvinyl Alcohol from Taiwan*, 69 Fed. Reg. 59,204 (Dep't of Commerce Oct. 4, 2004) (initiation of antidumping duty investigation), P.R. 28.

Due to extensive litigation regarding the injury determination made by the International Trade Commission, the antidumping duty

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[2] All references to Title 19 of the Code of Federal Regulations refer to the 2004 edition, unless otherwise stated. The provision at issue in the instant case, 19 C.F.R. § 351.414(f), did not change between its promulgation in 1997 and the initiation of this investigation in 2004.

[3] The targeted dumping regulation, codified at 19 C.F.R. § 351.414(f) in 1997 and revoked in 2008, stated, in pertinent part:

> (f) *Targeted dumping*—(1) *In general*. Notwithstanding paragraph (c)(1) of this section, the Secretary may apply the average-to-transaction method, as described in paragraph (e) of this section, in an antidumping investigation if:
>
> . . . .
>
> (ii) The Secretary determines that such differences cannot be taken into account using the average-to-average method or the transaction-to transaction method and explains the basis for that determination.
>
> (2) *Limitation of average-to-transaction method to targeted dumping*. Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

investigation was interrupted for six years. *See* Slip Op. 13–49 at 5–6. In September of 2010, Commerce issued its preliminary determination of dumping, *Polyvinyl Alcohol from Taiwan*, 75 Fed. Reg. 55,552 (Dep't of Commerce Sept. 13, 2010) (preliminary determination of sales at less than fair value and postponement of final determination), P.R. 127, and five months later its final determination with a weighted-average dumping margin of 3.08 percent, *Final Determination*, 76 Fed. Reg. at 5,563. Commerce determined that CCPC engaged in targeted dumping which warranted the application of the average-to-transaction method to all sales. The antidumping order was published in March. *Polyvinyl Alcohol from Taiwan*, 76 Fed. Reg. 13,982 (Dep't of Commerce Mar. 15, 2011) (antidumping duty order), P.R. 162.

In December of 2008, during the time that the injury determination was being litigated and the antidumping investigation was on hold, Commerce issued an interim final rule[4] which removed the targeted dumping regulation—19 C.F.R. § 351.414(f)— that had been in effect at the time the PVA investigation was initiated in 2004.

Plaintiff brought this action challenging Commerce's decision to apply the targeted dumping methodology to CCPC's sales. *See* Pl.'s Mot. for J. on the Agency Record 56.2 (ECF No. 23). Defendant-Intervenor fully supported Commerce's *Final Determination*. Resp. Br. of Sekisui Specialty Chemicals America, LLC in Opp'n to Pl.'s Mot. for J. on the Agency Record (ECF No. 30). In the first slip opinion, the Court found that Commerce (1) properly applied the targeted dumping regulation in the underlying investigation and (2) has the discretion to shift policy because an agency's policy is not binding on itself. Slip Op. 13–49 at 17–19, 25–27. However, the Court remanded the case to Commerce (1) "to provide an explanation, pursuant to 19 C.F.R. § 351.414(f)(1)(ii), as to why the transaction-to-transaction method cannot account for the differences in Plaintiff's U.S. sales prices" and (2) "to provide a reasoned analysis or explanation, pursuant to 19 C.F.R. § 351.414(f)(2), as to why the specific circumstances of this case are such that the normal limitation on application of the average-to-transaction method is inappropriate to employ." *Id*. at 28.

[4] *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't of Commerce Dec. 10, 2008) (interim final rule) (hereinafter referred to as "Withdrawal Notice"). The legality of the *Withdrawal Notice* was subsequently challenged, and a new withdrawal is under review at Commerce. *See Gold East Paper (Jiangsu) Co., Ltd. v. United States*, 37 C.I.T. __, 918 F. Supp. 2d. 1317 (2013). However, the current legal challenge does not affect the outcome of this case because the targeted dumping regulation was unequivocally in effect during the period of review of the underlying proceeding.

On May 23, 2013, Commerce released the draft results of its remand redetermination to interested parties and provided parties the opportunity to comment. *Remand Results* at 2. Both Plaintiff and Defendant-Intervenor provided comments. *Id*. On July 12, 2013, Commerce filed its *Remand Results*, where it redetermined a weighted-average dumping margin of zero percent for CCPC. *Id*. Defendant-Intervenor challenges Commerce's *Remand Results*.

STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).[5] The Court sustains determinations, findings or conclusions of an agency unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (internal quotation omitted). Courts "look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

DISCUSSION

I. Remand Results

On remand, Commerce redetermined CCPC's weighted-average dumping margin at zero percent. *Remand Results* at 2. Commerce "provided an explanation, pursuant to 19 C.F.R. § 351.414(f)(1)(ii), as to why the transaction-to-transaction method cannot account for the differences in the U.S. sales prices" of CCPC and "reconsidered its position regarding the application of the average-to-transaction method to CCPC's sales because there is no meaningful difference between applying the average-to-average method and the average-to-transaction method when the average-to-transaction method is applied to only those sales found to be targeted pursuant to 19 C.F.R. § 351.414(f)(2)." *Id.* at 1–2 (footnote omitted).

Upon analysis, Commerce found that "use of the transaction-to-transaction method is inappropriate in this investigation." *Id*. at 2. Commerce noted that "Congress intended that [Commerce] would employ the transaction-to-transaction method in limited situations," specifically in the "unusual situations" where "there are a substantial number of sales," the product is "custom made," or the prices are

[5] All references to the United States Code refer to the 2006 edition, unless otherwise stated.

volatile. *Id*. at 4. Commerce concluded that none of those circumstances were "present with respect to CCPC sales" and thus the use of transaction-to-transaction method was not warranted. *Id*. at 4–5.

Commerce further found that "it is neither impracticable to segregate CCPC's targeted sales nor that the targeting by CCPC was extensive," thus not justifying departure from the "normal" limitation of applying the average-to-transaction method to only CCPC's targeted sales. *Id*. at 6. Upon remand, Commerce employed the limitation found in the targeted dumping regulation at 19 C.F.R. § 351.414(f)(2). Accordingly, "in accordance with the regulatory language applicable to this investigation, [Commerce has] limited the application of the average-to-transaction method to only CCPC's targeted sales and recalculated CCPC's weighted-average dumping margin." *Id*.

CCPC agrees with Commerce, stating that the entirety of the *Remand Results* presents "a reasoned basis for examining whether . . . a departure [from the normal limitation on application of the average-to-transaction method] is appropriate in the case of CCPC" and properly analyzes "CCPC's reported sales data." Comments of Pl. Chang Chun Petrochemical Co. Ltd. on Results of Redetermination Pursuant to Court Remand ("Pl.'s Comments") at 3–4 (ECF No. 50).

Defendant-Intervenor Sekisui partially challenges the *Remand Results*. Sekisui agrees with Commerce's explanation regarding the first remand basis, as to "why the transaction-to-transaction comparison methodology cannot account for the differences in U.S. sales prices," but challenges Commerce's analysis regarding the second remand basis, as to why the "specific circumstances of this case are such that the normal limitation on application of the average-to-transaction method is inappropriate." Comments of Sekisui Specialty Chemicals America, LLC Regarding Final Results of Redetermination Pursuant to Court Remand ("Def.-Int.'s Comments") at 3 (ECF No. 55). Sekisui asserts that Commerce erred in its targeted sales analysis, neither properly defining nor quantifying the targeted sales, and urges the Court to issue an order instructing Commerce "to revise its dumping margin calculation accordingly." *Id*. at 4–5.

II. Remand Instructions

As previously stated, the Court remanded two issues to Commerce: (1) "to provide an explanation . . . as to why the transaction-to-transaction method cannot account for the differences in Plaintiff's U.S. sales prices" and (2) "to provide a reasoned analysis or explanation . . . as to why the specific circumstances of this case are such that

the normal limitation on application of the average-to-transaction method is inappropriate to employ." Slip Op. 13–49 at 28.

A. Transaction-to-Transaction Comparison Method

The targeted dumping regulation required Commerce to provide an explanation of why the transaction-to-transaction method should not be applied. 19 C.F.R. § 351.414(f)(1)(ii). The Court found that Commerce's *Final Determination* was not in accordance with law because it lacked "an explanation regarding the insufficiency of using the transaction-to-transaction method in this investigation." Slip Op. 13–49 at 20–21. Accordingly, the Court remanded this issue to Commerce to provide an explanation of why the transaction-to-transaction method could not be used in this case. *Id*. at 28.

B. The Limiting Clause

The targeted dumping regulation contained a clause that "normally" limited the application of the average-to-transaction method to only targeted sales. 19 C.F.R. § 351.414(f)(2). The Court found that Commerce's *Final Determination* was not in accordance with law because it lacked a "reasoned analysis or explanation regarding why this investigation does not constitute a normal situation" thereby requiring a departure from the norm. Slip Op. 1349 at 24. Accordingly, the Court remanded this issue to Commerce to provide a reasoned analysis or explanation of why the normal limitation on the application of the average-to-transaction should not be employed in this case. *Id*. at 28.

III. Analysis

A. Transaction-to-Transaction Comparison Method

Consistent with Congressional intent, Commerce noted that the transaction-to-transaction method "will be employed only in unusual situations." *Remand Results* at 3 (internal quotation omitted). Commerce cited the SAA for what constitutes an "unusual situation," where "there are very few sales and the merchandise sold in each market is identical or very similar or is custom made." *Id*. at 4 (quoting Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 842 (1994) *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178 ("SAA")). Commerce reasoned that neither of these unique circumstances is present in the instant case. Def.'s Resp. to Comments upon the Remand Determination ("Def.'s Resp.") at 3. "Nor were there unique facts about Chang Chun's sales, such as price volatility" to give Commerce reason to consider applying

the less favored comparison method. *Id*. Thus, Commerce determined that the "use of the transaction-to-transaction method is inappropriate." *Remand Results* at 5. No party challenges this redetermination. *See generally* Pl.'s Comments, Def.-Int.'s Comments at 3.

The Court holds that Commerce provided a sufficient explanation for its determination not to employ the transaction-to-transaction method that is consistent with the record evidence and in accordance with law. Therefore, Court sustains Commerce's determination not to employ the transaction-to-transaction method in this case.

B. The Limiting Clause

Consistent with its targeted dumping policy in effect at the time of the investigation, Commerce noted that the average-to-transaction method would only be applied "to all sales when it was impracticable to segregate the targeted sales or when the targeting was extensive." *Remand Results* at 6. On remand, Commerce found "that it is neither impracticable to segregate CCPC's targeted sales nor that the targeting by CCPC was extensive." *Id*.; *see also* Confidential Calculation Memo at 3 (ECF No. 48–2). Neither the regulation nor the policy defines the words extensive or widespread. While Sekisui offers its opinion on how Commerce should employ these terms, interpretation of a regulation and pertinent policy is left to the expertise of Commerce. The Court finds that Commerce's decision that Plaintiff's targeted dumping was neither extensive nor widespread is not arbitrary or capricious, well within its discretion, and entitled to deference.

Commerce looked at samples of sales to the alleged targeted types. *Remand Results* at 7–8. The use of samples is statutorily authorized pursuant to 19 U.S.C. § 1677f-1. While no party challenges the use of samples, Defendant-Intervenor Sekisui asserts that all sales should have been considered targeted based on the samples. Def.-Int.'s Comments at 9, 13–14. Sekisui challenges Commerce's determination to apply the average-to-transaction method to only CCPC's targeted sales and argues that the average-to-transaction method should be applied to all of CCPC's U.S. sales. *Id*. Sekisui alleges that Commerce "abruptly and without notice changed its initial position." *Id*. at 3–4. Sekisui purports that Commerce came up with the wrong conclusion because Commerce did not properly define or quantify the targeted sales. *Id*. at 5. Further, Sekisui asserts that Commerce should have used a two part test to calculate targeted dumping in this case. Def.-Int.'s Comments at 7–10. In April 2008, Commerce introduced a new methodology for targeted dumping applying the

above-referenced two part test.[6] Sekisui requests as relief that the Court direct Commerce to use a methodology established in 2008 in this 2004 case. This the Court will not do.

Commerce considered and analyzed Sekisui's claims in a draft remand sent to interested parties on May 23, 2013. *Remand Results* at 2. Contrary to Sekisui's contention that Commerce "abruptly and without notice changed its initial position, now concluding that it should only apply the average-to-transaction methodology in its margin calculation to 'targeted' sales," Def. Int.'s Comments at 3–4, Commerce did precisely what the Court instructed: Commerce analyzed and provided a reasoned explanation whether to limit the application of the average-to-transaction method, *Remand Results* at 5–11. The Court agrees with Defendant that Sekisui's contentions lack merit. *See* Def.'s Resp. at 2.

Commerce further reasoned that it could "discern no other distinguishing facts or features of CCPC's U.S. sales (targeted or otherwise) such that the normal limitation of applying the average-to-transaction method to only CCPC's targeted sales is inappropriate." *Remand Results* at 6 (internal quotation omitted). Commerce thus determined to limit "the application of the average-to-transaction method to only CCPC's targeted sales and recalculated CCPC's weighted-average dumping margin." *Id.*

After deciding to limit the application of the average-to-transaction method to only Plaintiff's targeted sales, Commerce realized that "there [is] no meaningful difference between applying the average-to-average method and the average-to-transaction method." *Remand Results* at 1. Using the average-to-average method resulted in a zero percent margin while using the average-to-transaction method resulted in a *de minimis* margin. *Remand Results* at 10. The targeted dumping regulation unequivocally showed a preference for using the average-to-average comparison method and allowed use of the other methods only if differences in export prices could not be taken into account using the average-to-average method. 19 C.F.R. § 351.414(f). Commerce explained that it "compared the margin calculated by applying the average-to-transaction comparison only to targeted sales with the margin calculated using the average-to-average method" and "found that the differences were not significant." Def.'s Resp. at 10. Thus, Commerce decided to use the average-to-average

[6] *See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26,371 (Dep't of Commerce May 9, 2008); *Mid Continent Nail Corp. v. United States*, 34 C.I.T. __, 712 F. Supp. 1370 (2010).

method in the *Remand Results*. *Id*. at 5. The Court finds Commerce's decision to use the average-to-average method to calculate Plaintiff's dumping margin is not arbitrary or capricious and within the agency's discretion.

The Court holds that Commerce provided reasoned explanations for its determinations to limit the application of the average-to-transaction method and to ultimately use the average-to-average method. Those explanations are supported by the record and in accordance with law. Therefore, the Court sustains Commerce's redetermination in this case.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendant's *Remand Results* are sustained; and it is further

ORDERED that Defendant-Intervenor's motion for oral argument (ECF No. 62) is denied. Judgment to enter accordingly.

Dated: December 18, 2013
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE

Slip Op. 13–152

XIAMEN INTERNATIONAL TRADE AND INDUSTRIAL CO., LTD., ZHEJIANG ICEMAN GROUP CO., LTD., and FUJIAN GOLDEN BANYAN FOODSTUFFS INDUSTRIAL CO., LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 11–00411

[Final results of an administrative review of the antidumping duty order on certain preserved mushrooms from the People's Republic of China remanded.]

Dated: December 20, 2013

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington DC, for plaintiffs.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiffs Xiamen International Trade & Industrial Co., Ltd. ("XITIC"), Zhejiang Iceman Group Co., Ltd. ("Iceman Group"), and Fujian Golden Banyan Foodstuffs Industrial Co., Ltd. ("Golden Banyan") (collectively, "Plaintiffs") challenge the U.S. Department of Commerce's ("Department" or "Commerce") findings in the 2009–2010 administrative review of the antidumping duty order on certain preserved mushrooms from the People's Republic of China ("PRC"). *See Certain Preserved Mushrooms from the People's Republic of China*, 76 Fed. Reg. 56,732, 56,733 (Dep't Commerce Sept. 14, 2011) (final admin. review) ("*Final Results*"); *Certain Preserved Mushrooms from the People's Republic of China*, 76 Fed. Reg. 70,112 (Dep't Commerce Nov. 10, 2011) (am. final admin. review) ("*Amended Final Results*").[1] Specifically, XITIC challenges Commerce's selection of surrogate values for XITIC's inputs of lime, fresh mushrooms, and mushroom spawn. XITIC also argues that Commerce should have applied its new surrogate labor methodology when calculating XITIC's surrogate labor rate and financial ratios. Iceman Group asserts that Commerce unlawfully assigned Iceman Group a separate rate because the company was not being reviewed. Iceman Group and Golden Banyan also allege that Commerce's separate rate calculations incorrectly included Guangxi Jisheng Foods, Inc.'s ("Jisheng") 266.13% partial adverse facts available ("AFA") margin. As set forth below, the court sustains in part and remands in part.

BACKGROUND

On March 30, 2010, Commerce initiated an administrative review of the antidumping duty order on certain preserved mushrooms from the PRC. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 Fed. Reg. 15,679, 15,681 (Dep't Commerce Mar. 30, 2010) ("*Initiation Notice*"). Commerce initiated its review at the request of petitioner Monterey Mushrooms ("Petitioner"), which asked that the Department review twenty-six PRC exporters and producers of subject mer-

[1] The court initially consolidated this case under consolidated case number 11–00378. Order, Court No. 11-00378, ECF No. 15. The court later deconsolidated the action and stayed member case number 11–00411 pending a final decision in *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013). Order, Court No. 11–00378, ECF No. 45. After that decision issued, XITIC voluntarily dismissed its zeroing claim. Order, Court No. 11–00411, ECF No. 24. Unless otherwise specified, all ECF citations contained herein are to documents filed in Court No. 11–00378.

chandise. *See Certain Preserved Mushrooms from the People's Republic of China*, 76 Fed. Reg. 12,704, 12,704 (Dep't Commerce Mar. 8, 2011) (prelim. admin. review) ("*Preliminary Results*"). The review period ran from February 1, 2009 to January 31, 2010. *Id.*

Commerce determined that it could only individually examine the three largest producers or exporters of subject merchandise. Accordingly, Commerce selected XITIC, Blue Field (Sichuan) Food Industrial Co, Ltd. ("Blue Field"), and Jisheng as mandatory respondents. Resp't Selection Mem. at 5, PD I 35 (May 17, 2010), ECF No. 16 (Dec. 12, 2011) ("PD I 35"). Commerce also accorded separate rate status to certain companies, including Plaintiffs Golden Banyan and Iceman Group. *Final Results*, 76 Fed. Reg. at 56,733.

Using India as the primary surrogate market economy country, Commerce calculated dumping margins of 13.12% for XITIC and 84.55% for Golden Banyan and Iceman Group. *Id.* The Department later amended its *Final Results* to correct a ministerial error, which adjusted Golden Banyan's and Iceman Group's rates to 76.12%. *Amended Final Results*, 76 Fed. Reg. at 70,113.

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and must uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Court reviews the substantiality of the evidence "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

The Court employs a two-part analysis to determine whether Commerce's statutory construction is otherwise in accordance with law. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The Court first asks whether Congress has directly spoken to the question at issue in the case. *Id.* If it has, the Court gives effect to Congress's unambiguously expressed intent. *Id.* If Congress has not directly addressed the pertinent issue, the Court assesses whether Commerce's interpretation "is based on a permissible construction of the statute." *Id.* at 843. To survive scrutiny, Commerce need not provide "the *only* reasonable interpretation or

even the *most* reasonable interpretation" of a statutory provision. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

DISCUSSION

I. Commerce's surrogate values for lime and mushroom spawn were not based in substantial evidence, and voluntary remand is appropriate so Commerce can recalculate XITIC's surrogate labor rate and financial ratios

XITIC[2] challenges Commerce's selection of surrogate values for its inputs of lime, mushroom spawn, and fresh mushrooms, as well as the methodology Commerce used to derive XITIC's surrogate labor rate and financial ratios. For the following reasons, the court sustains Commerce's selection of a surrogate value for fresh mushrooms, but remands so Commerce can reconsider its values for lime and mushroom spawn. The court also grants the United States' request for a voluntary remand to recalculate XITIC's surrogate labor rate and financial ratios.

A. Legal framework for the selection of surrogate values

A dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). In non-market economy ("NME") proceedings, Commerce constructs normal value by valuing the inputs used to produce the merchandise (the factors of production)[3] plus "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses."[4] *Id*. § 1677b(c)(1)(B). The goal of this practice is to construct a hypothetical market value for a product, which then serves as the normal value for purposes of com-

[2] XITIC sold subject merchandise to the U.S. market during the period of review, but an affiliated producer apparently produced the merchandise. *See, e.g.*, XITIC Section A Questionnaire Resp. at A-13, PD I 44 (June 16, 2010), ECF No. 16 (Dec. 12, 2011) ("PD I 44"). For purposes of this opinion, the court uses XITIC to refer to both entities.

[3] Factors of production include "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3). A respondent identifies the factors used to produce subject merchandise along with consumption rates. Commerce then calculates the cost of each input by multiplying the consumption rate by the surrogate value. *See* Prelim. Results Analysis Mem. at 2, PD I 107 (Feb. 28, 2011), ECF No. 16 (Dec. 12, 2011).

[4] General expenses and profit include expenses that are not traceable to a specific product. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1715, 462 F. Supp. 2d 1262, 1300 (2006). To capture these expenses and profits, Commerce must factor in overhead, profit, and selling, general, and administrative expenses. *Id.* Commerce achieves this by using surrogate financial ratios. *Id.*

puting any dumping margin. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

Commerce selects values for each factor of production—known as "surrogate values"— "based on the best available information regarding the values of such factors in a market economy country or countries." 19 U.S.C. § 1677b(c)(1); *see also id.* §1677b(c)(4) (elaborating that, to the extent possible, Commerce must use an economically comparable market economy that is a significant producer of subject merchandise). Because no statute or regulation defines the "best available information," Commerce has established certain non-dispositive policy preferences. Namely, the Department prefers surrogates values that are contemporaneous with the period of review, publicly available, product-specific, representative of broad market average prices, and free of taxes and import duties. I&D Mem. at 7, PD II 10 (Sept. 6, 2011), ECF No. 16 (Dec. 12, 2011) ("*I&D Mem.*"). Commerce has not identified a hierarchy among these factors, and the weight accorded to a factor varies depending on the facts of each case. *Id.*

Commerce has broad discretion to decide which data constitute the best available information regarding the value of a particular factor. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). The role of a reviewing court is "not to evaluate whether the information Commerce used was the best available, but" to determine "whether a reasonable mind could conclude that Commerce chose the best available information." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011). To meet that standard, Commerce must justify its surrogate value with a reasoned explanation supported by substantial evidence. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1677, 462 F. Supp. 2d 1262, 1269 (2006). Though a reasoned explanation need not be a perfect explanation, Commerce must still fairly evaluate and compare the data sets on the record using its established analytical criteria. *Id.*

B. Commerce's decision to value XITIC's "lime" input using GTA import data for slaked lime was not supported by substantial evidence

With that framework in mind, the court turns to XITIC's first challenge to Commerce's surrogate values. Commerce valued one of XITIC's factors, "lime," using Global Trade Atlas ("GTA") import data for Indian Harmonized Tariff Schedule ("HTS") subheading 2522.20 ("slaked lime"). XITIC submits that this value was unsupported by substantial evidence because record evidence suggested that XITIC

used calcium carbonate (identified as Indian HTS subheading 2836.50.00) in producing mushrooms. Pls.' Mot. for J. on Agency R., ECF No. 23 ("Pls.' Br."), at 11.

i. *Factual background*

In its initial Section D questionnaire response, XITIC used the word lime to describe one of its inputs. XITIC clarified in a concise spreadsheet accompanying that submission that lime was associated with PRC HTS subheading 2836.50.00 ("[c]alcium carbonate"). XITIC Section D Questionnaire Resp. at Ex. D-5, PD I 56 (July 13, 2010), ECF No. 16 (Dec. 12, 2011) ("PD I 56"). XITIC first used the words "calcium carbonate" when submitting proposed surrogates for use in the preliminary determination. XITIC Proposed Surrogate Value Submission at 2, PD I 92 (Nov. 22, 2010), ECF No. 16 (Dec. 12, 2011) ("PD I 92"). In that submission, XITIC listed one of its raw material inputs as "Lime (Calcium Carbonate)" and again supplied Indian HTS subheading 2836.50.00 as the correct tariff number from which to draw a surrogate value. *Id.*

Commerce disregarded XITIC's proposed tariff number in its *Preliminary Results*, which would have yielded a value of 6.36 Indian Rupees per kilogram ("Rs./kg."). Prelim. Surrogate Value Mem. at 5, PD I 110 (Feb. 28, 2011), ECF No. 16 (Dec. 12, 2011) ("PD I 110"). Instead, Commerce valued lime at 8.96 Rs./kg. using GTA import data for slaked lime (Indian HTS 2522.20). *Id.* at 6. Commerce rejected XITIC's value because there was no record information "that XITIC actually used calcium carbonate in the production of subject merchandise." *Id.*

In response, XITIC submitted a Wikipedia entry defining agricultural lime as "pulverized rock containing primarily calcium carbonate." XITIC Surrogate Value Submission at Attach. 1, PD I 117 (Mar. 28, 2011), ECF No. 16 (Dec. 12, 2011). XITIC later relied on that definition when arguing that lime meant calcium carbonate, not slaked lime. XITIC Case Br. at 2–3, PD I 119 (Apr. 7, 2011), ECF No. 16 (Dec. 12, 2011) ("PD I 119"). XITIC additionally cited record evidence that another respondent, Blue Field, used calcium carbonate as an input. *Id.* at 2.

Commerce rejected XITIC's request to revalue lime in its *Final Results*. *I&D Mem.* 27. First, Commerce dismissed XITIC's Wikipedia entry as unreliable because it contained no citations to outside sources supporting the article's definitions. *Id.* Commerce then noted that the term "'lime' is generic, has multiple usages, and can be used

to describe any treatment to soils with a calcium compound." *Id.* In light of the ambiguity, Commerce decided that lime likely meant slaked lime because calcium carbonate "lack[ed] the term lime" and "slaked lime . . . include[d] the term lime." *Id.* Commerce finally concluded that "[i]f XITIC used calcium carbonate it should have specifically so stated in its questionnaire responses, as Blue Field did, and not leave it to a term that has multiple meanings." *Id.*

ii. *Commerce's value for lime was not supported by substantial evidence*

Commerce's determination was not supported by substantial record evidence. Commerce rejected the Wikipedia entry as unreliable and implicitly dismissed the notion that the term lime could refer to calcium carbonate. Nonetheless, several lines later, Commerce found that the term "can be used to describe any treatment to soils with a calcium compound." *Id.* By making that general assertion, Commerce suggested that lime *could* mean either calcium carbonate or calcium hydroxide (slaked lime), as both are calcium compounds. *See* XITIC Third Suppl. Questionnaire Resp. at App'x S3–1 at 35, PD I 101 (Jan. 28, 2011), ECF No. 16 (Dec. 12, 2011) ("PD I 101") (identifying slaked lime's chemical name).

Assuming that lime could reasonably refer to calcium carbonate and slaked lime, Commerce did not effectively explain why a surrogate value for slaked lime was the best available information regarding that input. Initially, Commerce never found that slaked lime could be used in producing subject merchandise. *See Calgon Carbon Corp. v. United States*, Slip-Op 11–21, 2011 WL 637605, at *8 (CIT Feb. 17, 2011) ("Commerce must show a rational relationship between the surrogate value and the input to which it is applied."). Moreover, Commerce apparently based its selection solely on the fact that slaked lime actually contained the word lime, while calcium carbonate did not. That logic is flawed because, as XITIC notes, calcium carbonate is a chemical name and slaked lime is the common name for a different chemical compound (calcium hydroxide). *See* Pls.' Reply in Supp. of Mot. for J. on Agency R., ECF No. 36 ("Pls.' Reply"), at 2; PD I 101 at App'x S3–1 at 35 (listing chemical name for slaked lime). Commerce's misleading and mismatched comparison of the two products did not rise to the level of substantial evidence supporting its chosen surrogate value for lime.

Commerce's analysis was also flawed because it inaccurately presumed that nothing on the record tied XITIC's lime input to calcium carbonate. In fact, in its initial questionnaire response, XITIC de-

scribed lime by reference to the HTS subheading for calcium carbonate. XITIC persisted in this classification when it submitted its proposed surrogate values before the *Preliminary Results* and even put calcium carbonate in parentheses next to lime. XITIC again explained to Commerce in its case brief that it did not use slaked lime in its production process.[5] This evidence collectively signaled that XITIC used calcium carbonate and, albeit imperfectly, communicated this to Commerce on multiple occasions.[6]

Commerce apparently believed that XITIC should have communicated this information more directly, like Blue Field, by listing calcium carbonate as an input on its questionnaire responses. However, Commerce may not ignore what XITIC did place on the record because it wishes XITIC were more precise. Based on the record before the court, a reasonable mind could not conclude that Commerce chose the best available information to value XITIC's factor of production. Commerce is, therefore, instructed on remand to reconsider its finding that a surrogate value for slaked lime is the best available information for valuing XITIC's lime input.

C. Commerce's decision to use GTA import data to value XITIC's mushroom spawn was not supported by substantial evidence

XITIC also disputes Commerce's valuation of mushroom spawn, another input that XITIC used in producing subject merchandise. Commerce valued mushroom spawn using GTA import data for Indian HTS subheading 0602.90.10. XITIC argues that Commerce's determination was unsupported by substantial evidence in essentially two ways. XITIC avers that, by focusing exclusively on why XITIC's proffered surrogates were flawed, Commerce failed to explain why the GTA data were preferable. Pls.' Br. 19–20. XITIC additionally submits that Commerce did not support with substantial evidence its determination that XITIC's proffered surrogates were flawed. *Id.* at 20. Specifically, XITIC asserts that Commerce based its dismissal of XITIC's surrogates on impermissible speculation. *Id.* at 20–21.

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[5] In its USCIT Rule 56.2 brief, XITIC also argues that it could not use slaked lime in its production process because of a possible chemical reaction. Pls.' Br. 9–10. XITIC did not raise that argument before the agency, and the court will not consider it for the first time at this late stage. *See* 28 U.S.C. § 2637(d) (providing that this Court "shall, where appropriate, require the exhaustion of administrative remedies").

[6] The court finds that there was evidence tying XITIC's lime input to calcium carbonate, but expresses no opinion on whether record evidence also suggested that XITIC used slaked lime as an input. If that is the case, Commerce did not make any finding to that end on the record.

i. *Factual background*

In proceedings before Commerce, XITIC proposed two surrogate values to value mushroom spawn—one derived from a 2004–2005 annual report of Agro Dutch Industries Limited ("Agro Dutch"), and the other from a 2007–2008 annual report of Himalya International Limited ("Himalya"). PD I 92 at 3. Commerce instead valued mushroom spawn at 217.38 Rs./kg. using GTA import data for Indian HTS subheading 0602.90.10 (mushroom spawn). PD I 110 at 6. Commerce preliminarily dismissed XITIC's proffered data, which would have resulted in surrogate values of approximately 115.38 Rs./kg. or 36.97 Rs./kg., because that data "did not include broad market averages." *Id.*

In its case brief, XITIC asserted that the GTA data were not specific to XITIC's input. PD I 119 at 6. In particular, XITIC argued that it only used white button mushroom spawn and that the GTA basket data encompassed all four types of mushroom spawn sold in India. *Id.* XITIC thus advocated for the use of its own surrogates based on Agro Dutch and Himalya data.

Petitioner criticized XITIC's proposed data, citing the following language from a 2009–2010 report of a different Indian mushroom producer, Flex Foods Limited ("Flex Foods"):

> The yield of mushroom to a great extent depends upon quality of spawn. Good quality of spawn should be contamination free with high yield potential. The non-availability of quality spawn is a common problem of large mushroom growers.

Pet'r's Rebuttal Br. at 10, PD I 123 (Apr. 14, 2011), ECF No. 16 (Dec. 12, 2011) (emphasis omitted). Petitioner reasoned that Agro Dutch and Himalya, both large mushroom growers, must have also experienced difficulty obtaining high-quality spawn. For that reason, Petitioner questioned the "quality and applicability of" the companies' data. *Id.*

Commerce continued to use the GTA data to value mushroom spawn in its *Final Results*, but never directly stated why the non-specific GTA data were the best available information regarding the value of mushroom spawn. Instead, Commerce explained why both of XITIC's surrogates were flawed. Commerce believed the Agro Dutch and Himalya reports were imperfect because they were "not representative of broad market averages, free of taxes and import duties, or contemporaneous with the" review period. *I&D Mem.* 28. Commerce also concurred with Petitioner "regarding the common problem of the availability of quality spawn for large mushroom growers." *Id.* Commerce elaborated:

> Due to the size and nature of Flex Foods, Agro Dutch, and Himalaya [sic], they would be affected by the shortage of quality spawn and would most likely have to use lower quality spawn. Such usage of lower quality spawn would not be reflective of the high quality spawn indicated by XITIC.

Id.

ii. *Commerce's value for mushroom spawn was not supported by substantial evidence*

The court agrees with XITIC that Commerce erred by not explaining why the GTA data was the best available information for valuing mushroom spawn. To support a surrogate value with substantial evidence, Commerce "must do more than simply identify flaws in the data sets it rejects." *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1417, 460 F. Supp. 2d 1365, 1369 (2006); *see also Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 495, 318 F. Supp. 2d 1339, 1352 (2004) (noting that Commerce errs by "discard[ing] the alternatives as flawed" without "evaluat[ing] the reliability of its own choice"). "Commerce must also apply the same criteria to the data upon which it relies, and explain how the preferred data meet these criteria, or why a given criterion should not apply to the preferred data." *Guangdong Chems.*, 30 CIT at 1417, 460 F. Supp. at 1369. Moreover, though Commerce need not rely on perfect data, it must explain why its data are superior to competing values. *See Dorbest*, 30 CIT at 1675, 462 F. Supp. 2d at 1268 (explaining that the "'best' choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data"). Here, Commerce neither critically evaluated the nonspecific GTA data nor compared that data against XITIC's proffered data. Therefore, remand is appropriate so Commerce can fully explain whether the data it selected comports with its statutory duty to use the best available information.[7]

The court also agrees that Commerce poorly reasoned its rejection of XITIC's proposed surrogate values. Commerce dismissed the Agro Dutch and Himalya reports because the data contained therein were

[7] Commerce explained elsewhere that it uses GTA data because it satisfies the Department's preference for publicly-available information representative of broad market averages. PD I 110 at 3. Presumably, Commerce used the GTA data to value mushroom spawn for those reasons. However, Commerce never so stated, and more importantly, Commerce never explained why the GTA data fit its selection criteria better than XITIC's data. This failure is especially notable because XITIC raised specificity concerns in its case brief. Though the Government summarily addresses the specificity issue in its responsive briefing, *see* Def.'s Br. 30, the court cannot accept these post-hoc rationalizations, *see Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

not (1) contemporaneous with the period of review, (2) representative of broad market averages, (3) free of taxes and import duties, or (4) reflective of the high-quality spawn that XITIC uses to produce subject merchandise. While XITIC does not challenge the first three of Commerce's findings, XITIC correctly argues that Commerce failed to support its conclusion that the Agro Dutch and Himalya data did not reflect XITIC's high-quality spawn. *See* Pls.' Br. 20–21.

In concluding that the Agro Dutch and Himalya data did not properly value XITIC's input, Commerce reasoned that those companies would experience difficulty obtaining high-quality spawn in the market. As a result, they would purchase lower-quality spawn, and lower-quality spawn was not reflective of XITIC's high-quality spawn. *I&D Mem.* 28. Commerce's analysis is flawed because it relies exclusively on unfounded assumptions.

First, Commerce assumed that Agro Dutch (in 2004–2005) and Himalya (in 2007–2008) had difficulty obtaining high-quality spawn because they were large mushroom producers. But the report undergirding this assumption refers only to one company's experience during the 2009–2010 year. Commerce also assumed without any knowledge that large mushroom growers purchased low-quality spawn just because they had difficulty obtaining high-quality spawn. Lastly, Commerce assumed that XITIC used high-quality spawn in manufacturing subject merchandise and that the Agro Dutch and Himalya data for lower-quality spawn did not reflect XITIC's input. Yet, if that is the case, Commerce did not cite (nor can the court locate) any record support for its assertion that XITIC used high-quality spawn.

In sum, based on this record, the court cannot find that Commerce supported its surrogate value for mushroom spawn with substantial evidence. On remand, Commerce must reconsider whether its proffered data is the *best* available information for valuing mushroom spawn. In doing so, Commerce must address what fairly detracts from the reliability of its selected surrogate value. Therefore, Commerce must consider XITIC's argument that the GTA data were not specific to subject mushrooms, especially because the GTA value is more than double XITIC's competing surrogate values. Finally, Commerce must revisit the reliability of the Agro Dutch and Himalya data and clearly explain why it believes that data do not accurately approximate XITIC's "high quality" mushroom spawn.

D. Commerce's decision to value fresh mushrooms using the average of a price range found in a Flex Foods report was supported by substantial evidence

XITIC's final challenge to the valuation of XITIC's raw material inputs pertains to Commerce's selection of a surrogate value for fresh mushrooms. *See* Pls.' Br. 11–17. Commerce valued fresh mushrooms using a 2009–2010 annual report for Flex Foods, an Indian purchaser of fresh mushrooms. That report provides a range of prices for fresh mushrooms, from which Commerce selected the average as a surrogate value. XITIC argues that Commerce should have used sales data from various Agro Dutch reports to value fresh mushrooms, or at least valued fresh mushrooms using the low end of the Flex Foods price range. *Id.*

i. *Factual background*

XITIC proposed that Commerce value fresh mushrooms at 12.12941 Rs./kg., a figure derived from a 2009–2010 annual report for Agro Dutch. PD I 92 at 3, Attach. 4 at 29. Although Agro Dutch primarily sold canned mushrooms during the 2009–2010 period, it also reported volume and value figures for a smaller quantity of fresh mushroom sales.

Commerce preliminarily rejected XITIC's proffered value as well as a comparatively higher value submitted by Petitioner. PD I 110 at 7. According to Commerce, Agro Dutch's 2009–2010 data were unreliable because the company reported a loss that fiscal year. *Id.* Commerce instead relied on statistics from Agro Dutch's 2006–2007 annual report to extrapolate a surrogate value of 14.69 Rs./kg., which Commerce then inflated to 17.02 Rs./kg. to make it contemporaneous with the period of review. *Id.*

After the *Preliminary Results*, Petitioner maintained that the Agro Dutch report did not reflect market conditions in India because it was based on sales of a relatively small quantity of fresh mushrooms occurring at "fire-sale" prices below the cost of production. *See* Pet'r's Case Br. at 3–5, PD I 120 (Apr. 7, 2011), ECF No. 16 (Dec. 12, 2011) ("PD I 120"). To corroborate its assertions regarding Agro Dutch's data, Petitioner cited the 2009–2010 annual report from Flex Foods. *Id.* Summarizing Flex Foods' experience in the market, that report provided:

> When there is a glut in the market, the price of mushroom falls down to Rs. 2030/Kg but as the demand increases or there is shortage [sic] of mushrooms in the market the price rises up to Rs. 60–70/Kg. Thus there is always an uncertainty in market

> prices of mushroom which reduces the amount of net profit and this discourages the mushroom growers. This problem gets aggravated during peak production months . . . .

Commerce Surrogate Values Source Docs. at Ex. 4 at 5, PD I 106 (Feb. 28, 2011), ECF No. 16 (Dec. 12, 2011).

XITIC argued in rebuttal that Commerce should continue to use the 2006–2007 Agro Dutch data because they were both verified by certified public accountants and based on a large number of actual sales occurring over an extended period of time. XITIC Rebuttal Br. at 2, PD I 122 (Apr. 12, 2011), ECF No. 16 (Dec. 12, 2011). XITIC did not criticize the accuracy of Petitioner's corroborative Flex Foods data, but averred that the Agro Dutch data were consistent with the values in the Flex Food report. *Id.* at 4–5.

Commerce rejected both proposed surrogates and, therefore, changed its surrogate value for fresh mushrooms between the *Preliminary Results* and *Final Results*. Commerce agreed that the "Agro Dutch data are now two years old, and may not be as representative of a variety of market conditions as are other data on the record." *I&D Mem.* 8. Further, Commerce questioned the reliability of the Agro Dutch data because it was unclear how many transactions were reflected in the sales volume and value figures. *Id.* Commerce found that the Flex Foods data, by contrast, were both contemporaneous and "representative of a variety of market conditions affecting the price of fresh mushrooms in India." *Id.* at 9. The data were also specific to button mushrooms, and therefore specific to subject merchandise. *Id.*

When selecting among the range of prices provided in the Flex Foods report, Commerce used the average of the low- and high-bounds. *Id.* Commerce reasoned that an average was appropriate because the information on the record did not signal "which (if either) of these two conditions may have prevailed in India during the POR, or for how long." *Id.*

ii. *Commerce's value for fresh mushrooms was supported by substantial evidence*

Before this court, XITIC contests Commerce's final surrogate value on multiple grounds. Initially, XITIC revives its argument that the best available information for valuing fresh mushrooms is the 2009–2010 Agro Dutch report. Pls.' Br. 13. XITIC argues, alternatively, that Commerce should have continued to use inflated

2006–2007 Agro Dutch data to value fresh mushrooms. *Id.* at 14.[8] According to XITIC, the data from the Agro Dutch reports are "vastly superior" because they are based on documented sales transactions, as opposed to "a generalized description of the range of market prices" that Flex Foods experienced. *Id.* XITIC also submits that the Agro Dutch data are equally representative of market averages because, like the Flex Foods data, they reflect only one company's experience in the market. *Id.* at 15.

Commerce supported with substantial evidence its conclusion that the Flex Food data were the best source of information for valuing fresh mushrooms. Commerce reasonably decided to use the Flex Foods report because it was (1) contemporaneous, (2) publicly available, (3) specific to button mushrooms, and (4) representative of a variety of market conditions affecting fresh mushroom prices. *I&D Mem.* 9. Commerce also explained why both Agro Dutch data sets were not better valuation sources.

Commerce explained that it dismissed the 2009–2010 Agro Dutch data, notwithstanding its contemporaneity, because Agro Dutch reported a loss during the 2009–2010 financial year. *See* PD I 110 at 7. Presumably, Commerce interpreted this to mean that the data were unreliable for use as a surrogate value, or at a minimum that they were not the best available information for valuing fresh mushrooms. *See Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (sustaining decision "of less than ideal clarity" because the agency's path was reasonably discernible). This decision comports with Federal Circuit precedent. *See QVD Food*, 658 F.3d at 1325–26 (upholding Commerce's rejection of company financial data reported during a period of "serious financial trouble"); *see also Shanghai Foreign Trade Enters.*, 28 CIT at 489, 318 F. Supp. 2d at 1347 (upholding Commerce's decision to disregard contemporaneous financial data compiled in year where company sustained a loss).

Commerce also explained that it rejected the 2006–2007 Agro Dutch report because, unlike the Flex Foods report, it was neither contemporaneous with the period of review nor as representative of broad market averages. Specifically, Commerce noted that while the Agro Dutch report "provides the only data on the record that give

[8] XITIC also suggests that Commerce acted unreasonably by finding that the 2006–2007 Agro Dutch data were the best available during the *Preliminary Results* and later attacking the same data on contemporaneity grounds in the *Final Results*. Pls.' Br. 12–13. "However, preliminary determinations are 'preliminary' precisely because they are subject to change." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995). Commerce did not even discuss the excerpt from the Flex Foods report in the *Preliminary Results* because no one advocated for the data's use as a surrogate value for fresh mushrooms. In the face of anevolving administrative record containing multiple data sets, Commerce reasonably shifted course between its preliminary and final determination.

fresh mushroom sales volume and value figures," the report did not indicate how many unique transactions were reflected in those figures or the timing of the transactions. *I&D Mem.* 8. The data could have been unreliable if, for example, they were based on a small number of large sales or if all the sales occurred within a condensed timeframe. Due to this uncertainty, Commerce preferred the Flex Foods report because it provided a broad range reflecting market fluctuations throughout the review period.

XITIC alleges that there was "no basis in the administrative record for Commerce to have concluded that the Flex Foods description of the range of prices during the period of review somehow reflected a broader market than the Agro Dutch data." Pls.' Br. 15. However, XITIC misinterprets Commerce's actual conclusion. Commerce did not find that the Flex Foods data *necessarily* reflected a broader market, but rather that the Agro Dutch data "*may* not be as representative of a variety of market conditions." *I&D Mem.* 8 (emphasis added). Commerce's concerns regarding the representativeness of the Agro Dutch data were well-founded. Fresh mushroom sales comprised only a small percentage of Agro Dutch's overall sales, and Commerce did not know whether the relatively sparse mushroom sales reflected a range of market conditions. Since the Flex Foods data provided the certainty that the Agro Dutch data lacked, Commerce reasonably preferred the Flex Foods data to value fresh mushrooms.

The court next addresses whether Commerce supported its decision to use the average of the Flex Foods range when valuing fresh mushrooms. XITIC asserts that the low end of the Flex Foods range more accurately approximates what XITIC would have paid for fresh mushrooms in a comparable market economy. Citing record evidence, XITIC avers that it only purchased fresh mushrooms during peak production periods and that the surrogate value should, similarly, reflect purchases made during this time. *See* Pls.' Br. 16 (citing PD I 44, App'x A-17 (containing XITIC brochure listing mushroom's season as December to April); PD I 101, App'x S3–1 at 28– 29 (discussing mushroom growing seasons in North China)). XITIC further argues that if the surrogate value reflected prices during peak production periods, it would be close to 20 Rs./kg. because there would likely be an excess supply, or glut, in the market. *See id.* at 16–17.

XITIC's speculative arguments do not undermine Commerce's reasoned decision to use the average of the Flex Foods prices. Initially, XITIC assumes that there is ample record evidence supporting its argument that it only purchases fresh mushrooms during months of peak production. But the corroborative evidence XITIC cites never

actually states that proposition. Indeed, though XITIC suggests mushroom harvest season stretches from January to mid-April, XITIC indicated in a questionnaire response that it purchased fresh mushrooms between October and December. *See* PD I 56 at 10. Moreover, XITIC concludes without any evidentiary support that peak mushroom season necessarily corresponds with a glut in the market for the length of that season. This unsupported claim paints an overly simplistic picture of the fresh mushroom market by both assuming that mushroom producers oversupplied the market during the period of review and ignoring that market prices are not set exclusively by supply.

E. Voluntary remand is appropriate so Commerce can recalculate XITIC's surrogate labor rate and financial ratios

Lastly, XITIC challenges the methodology Commerce used to calculate its surrogate labor rate and surrogate financial ratios. XITIC's argument turns on changes that Commerce made to its labor methodology during the administrative review at issue in this case. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011). When Commerce announced its new procedures, it indicated that it would employ the revised methodology to pending proceedings if "feasible" in light of statutory deadlines. *Id.* at 36,093. Commerce did not apply the revised methodology to XITIC, but it did in other review proceedings initiated in the same month. Pls.' Br. 24. XITIC asserts that Commerce's disparate treatment rendered the surrogate labor rate calculations unsupported by substantial evidence.

The Government agrees that it should have calculated XITIC's surrogate labor rate and surrogate financial ratios using the revised methodology. Def.'s Resp. to Pls.' Mot. for J. on Agency R., ECF No. 30 ("Def.'s Br."), at 33. Therefore, the Government requests a voluntary remand granting the agency sixty days to make necessary adjustments. *Id.* Because the Government has raised a "substantial and legitimate" concern, the court remands for recalculation. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (noting that "if the agency's concern is substantial and legitimate, a remand is usually appropriate"); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT __, __, 882 F. Supp. 2d 1377, 1381 (2013) (providing that Commerce's concerns are substantial and legitimate when, *inter alia*, Commerce offers a compelling justification for its request).

II. Commerce lawfully included Iceman Group as a separate rate company but did not support its calculation of Iceman Group and Golden Banyan's separate rates with substantial evidence

Two separate rate respondents, Iceman Group and Golden Banyan, challenge the separate rates that Commerce calculated in this administrative review. Iceman Group avers that Commerce never initiated a review for Iceman Group and that it was, thus, not lawfully covered by the review. Iceman Group contends, alternatively, that Commerce improperly included one mandatory respondent's large margin in the calculation of Iceman Group's separate rate. Golden Banyan joins in this alternative claim. As discussed below, the court sustains with regard to the inclusion of Iceman Group, but remands on the issue of the separate rate calculation.

A. Legal framework for initiation of reviews and assignment of separate rates

The United States has a "retrospective" assessment system whereby final liability for antidumping duties is determined after importation. 19 C.F.R. § 351.212(a). As such, importers deposit estimated duties at importation, and actual duty assessment often occurs in an administrative review proceeding covering an already lapsed discrete period of time. *Id.*

Commerce does not automatically conduct administrative reviews for all subject merchandise that entered during the period of review. To secure review, interested parties must identify specific exporters or producers for which a review is requested. *Id.* § 351.213(b). Commerce publicly lists those companies in a Federal Register notice. If entries are not covered by a review, Commerce instructs Customs to assess duties at the cash deposit rate at entry. *Id.* § 351.212(c)(1). If entries are covered by a review, Commerce "review[s] . . . and determine[s] . . . the amount of any antidumping duty" and assesses final duties. 19 U.S.C. § 1675(a)(1)(B).

Commerce may determine that it is not practicable to calculate individual dumping margins for every company subject to a review. *Id.* § 1677f-1(c)(2). In that scenario, Commerce limits its analysis to a sample of mandatory respondents (often with the largest export volumes of subject merchandise). *See id.*; *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1372–73 (Fed. Cir. 2013). In market economy proceedings, Commerce calculates an "all others" rate for companies that were not individually investigated. 19 U.S.C. § 1673d(c)(5). That rate is usually a weighted average of the mandatory respondents' rates, excluding any zero or *de minimis* rates and

any rates based entirely on facts available or AFA. *Id.* § 1673d(c)(5)(A).

In NME proceedings, Commerce employs a different procedure. The Department begins with a rebuttable presumption that all NME exporters and producers are subject to government control. *See, e.g.*, *Yangzhou Bestpak*, 716 F.3d at 1373. Thus, the Department assigns a single PRC-wide rate to all companies unless a company establishes the absence of *de jure* and *de facto* government control. *Id.* The PRC-wide rate is usually based on total AFA. *Id.*

Companies usually establish the absence of government control through separate rate applications or certifications. *Id.* at 1374. Non-mandatory respondents that successfully rebut the presumption of control are known as separate rate respondents. *Id.* Though not compelled by statute, Commerce calculates separate rates for non-mandatory separate rate respondents in the same way that it calculates all others rates in market economy investigations. *Id.*

B. Commerce's decision to assign a separate rate to Iceman Group was in accordance with law

Iceman Group alleges that the Department did not comply with relevant law and past practice when it conducted a review for a company not specifically identified in Commerce's initiation notice. Pls.' Br. 25, 29–33. Iceman Group argues that Commerce was instead required to instruct U.S. Customs and Border Protection ("CBP") to liquidate Iceman Group's entries at the cash deposit rate in effect at entry (zero percent). *Id.* at 31. According to Iceman Group, its accidental participation in the review did not absolve Commerce of its duty to follow its own regulations. *Id.* at 32. Some background is helpful to understand Iceman Group's claim.

i. *Factual background*

In this case, Petitioner requested an administrative review for a company identified as "Zhejiang Iceman Food Co., Ltd." ("Iceman Food"). Pet'r's Req. for Review at 9, PD I 1 (Mar. 1, 2010), ECF No. 16 (Dec. 12, 2011). Petitioner's request did not encompass Iceman Group, and Commerce did not initiate a review for that company. *See Initiation Notice*, 75 Fed. Reg. at 15,681. Shortly after initiating its review, Commerce instructed CBP to liquidate entries from specified separate rate companies that were not subject to the review. *See* Pls.' Br. at Attach. 1. Iceman Group had previously obtained a separate rate and was not nominally subject to the review, but Commerce nonetheless omitted Iceman Group from its liquidation instructions. *Id.*

Kutak Rock LLP appeared in the review proceeding on behalf of Iceman Food a few weeks later. Kutak Rock Notice of Appearance at 1, PD I 7 (Apr. 5, 2010), ECF No. 16 (Dec. 12, 2011). Counsel later began referring to its client as Iceman Group in a separate rate certification. *See* Iceman Group Separate Rate Certification at 1, PD I 33 (Apr. 29, 2010), ECF No. 16 (Dec. 12, 2011) ("PD I 33"). In that certification, counsel listed the email address for Iceman Group as "jacky@icemanfood.com." *Id.* at 2.

In the *Preliminary Results*, Commerce determined that Iceman Group (not Iceman Food) was entitled to separate rate status and assigned the company a separate rate of 53.69%. *See* 76 Fed. Reg. at 12,710. Iceman Group did not comment on those results, and Commerce continued to list Iceman Group in its *Final Results*. Shortly thereafter, Iceman Group realized that it was not named in the initiation notice and submitted a ministerial error allegation. *See* Iceman Group Ministerial Error Allegation, PD II 30 (Oct. 25, 2011), ECF No. 16 (Dec. 12, 2011).

In that submission, Iceman Group alleged that the review covered only Iceman Food and asked to be omitted from the amended final results. *Id.* at 3. Iceman Group cited Commerce's behavior in a subsequent administrative review in support. In that review, Petitioner again listed Iceman Food in its request. *Id.* at 4. But this time, Commerce recognized the error and instructed Customs to liquidate Iceman Group's entries at the cash deposit rate at entry. *Id.*

In rejecting Iceman Group's request, Commerce found, first, that Iceman Group's submission did not raise a genuine ministerial error. *See Amended Final Results*, 76 Fed. Reg. at 70,113 (citing 19 U.S.C. § 1675(h); 19 C.F.R. § 351.224(f)). Moreover, Commerce identified four reasons for equating Iceman Group with Iceman Food:

> (1) Counsel filed an entry of appearance on behalf of Iceman Food on April 5, 2010; (2) Iceman Group, which never filed a separate notice of appearance, filed a certification for a separate rate on April 29, 2010; (3) the separate rate certification filed by Iceman Group lists the company Web site as *www.icemanfood.com* and the company email address as "*jacky@icemanfood.com*;" [sic] and (4) Iceman Group did not comment on the *Preliminary Results*, which specifically list Iceman Group as preliminarily receiving a separate rate.

Id.

ii. *Commerce lawfully included Iceman Group in the review*

Iceman Group contends that Commerce's failure to follow the automatic assessment procedures set forth in 19 C.F.R. § 351.212(c) is dispositive. In other words, because Commerce did not receive a request for a review for Iceman Group, Commerce's subsequent inclusion of Iceman Group as a separate rate company was *ultra vires*. Pls.' Br. 31 (relying on regulatory language indicating that Commerce "will" instruct Customs to liquidate the unreviewed entries at their cash deposit rate). Based on the unique circumstances of this case, the court declines to adopt Iceman Group's belated and overly narrow arguments.

Because Commerce did not initiate a review for Iceman Group, Commerce should have included Iceman Group in its non-review liquidation instructions pursuant to § 351.212(c). However, rather than alert Commerce to the flawed instructions, Iceman Group's counsel appeared in the proceeding on behalf of Iceman Food and filed a separate rate certification for Iceman Group. When Commerce assigned Iceman Group a separate rate, Iceman Group filed no response. This behavior, among other evidence, reasonably led Commerce to find that Iceman Group and Iceman Food described the same company.[9]

After having long acquiesced in Commerce's misconception, Iceman Group claimed after the *Final Results* that assigning Iceman Group a separate rate was a ministerial error. Iceman Group was in an awkward position to make this claim, though, because Commerce merely complied with Iceman Group's own request for a separate rate. Indeed, Iceman Group did not explain how Commerce's alleged ministerial error fit the legal definition of that term, and Commerce found that it did not. *See Amended Final Results*, 76 Fed. Reg. at 70,113.

Even assuming that Iceman Group raised an actual ministerial error, Commerce does not abuse its discretion when it declines to correct a ministerial error that was reflected in a review's preliminary results and that no one challenged. *See QVD Food*, 658 F.3d at 1328. In these *Preliminary Results*, Commerce published a separate rate for Iceman Group. At that point, Iceman Group was conclusively on notice of Commerce's belief that Iceman Group was the same entity as Iceman Food. Since it did not challenge the appropriateness of the rate at that juncture, Commerce did not commit reversible error by not correcting the mistake later. *See id.* The court is not persuaded that relevant law compels a different result. 19 U.S.C. § 1675(a)

[9] Though not on the record in the review, Iceman Group admits in briefing before the court that Iceman Food is the company's former name. *See* Pls.' Br. 26 n. 2.

requires only that Commerce publish notice of reviews in the Federal Register, but neither mandates the substance of the notice nor prescribes a particular method for assessing final duties on unreviewed entries. Commerce established its own method for assessing duties on non-reviewed entries in 19 C.F.R. § 351.212(c). Notably, though, that regulation was chiefly designed to "reduce the administrative burden on [Commerce] of automatically reviewing every outstanding order," not to benefit respondents. *See* H.R. Rep. No. 98–725, at 22–23 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5149.

Critical to the outcome here, this is not a case where Commerce omitted a company from an initiation notice and that company did not participate because it believed it was excluded from the review. It would be unlawful to bind an unsuspecting company in that scenario, as the company would not have notice or "recourse to protect itself against an unfavorable antidumping duty." *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1379 (Fed. Cir. 2002).[10] The facts here are different. Iceman Group clearly knew that it was the intended subject of the review. That knowledge led Iceman Group to seek and receive a separate rate in its own name. Consequently, Iceman Group cannot seriously claim that its inclusion in the review "c[a]me as a surprise," nor can it somehow allege that it was unable to protect its interests. *See id.* ; *accord UCF Am. Inc. v. United States*, 18 CIT 1074, 1081, 870 F. Supp. 1120, 1126 (1994) (upholding Commerce's inclusion of non-named companies when companies "were afforded an opportunity to defend their interests" and therefore "suffered no prejudice"). *Cf. Sigma Corp. v. United States*, 17 CIT 1288, 1298, 841 F. Supp. 1255, 1264 (1993) (ordering assessment at cash deposit rate at entry because company did not know it was being reviewed and did not participate).[11]

[10] In *Transcom*, 294 F.3d at 1378, the Federal Circuit interpreted the statutory and regulatory provisions to require "that 'any reasonably informed party should be able to determine, from the published notice of initiation read in light of announced Commerce Department policy, whether particular entries in which it has an interest may be affected by the administrative review.'" (citation omitted). The court elaborated that the underlying purpose of the notice provisions is to "provide[] notice that the exporters' interests might be affected" so that an exporter can protect its interests by proving its entitlement to a separate rate. *Id.* at 1379. In this case, the notice of initiation itself may have been deficient. Nonetheless, that deficiency did not prejudice Iceman Group, as it believed it was covered by the review and ultimately received a separate rate.

[11] The court is equally unpersuaded that Commerce's practice requires a different result. Initially, what Commerce did in a subsequent review of this order is not binding in the present review. *See U.S. Steel Corp. v. United States*, 33 CIT 984, 1003, 637 F. Supp. 2d 1199, 1218 (2009). Moreover, the proceedings that Iceman Group cites to establish Commerce's prior practice are inapposite. *See* Pls.' Br. 32. Those proceedings simply do not mirror the facts of the case at bar.

C. Commerce's separate rate calculation methodology was not supported by substantial evidence

As an alternative claim, Iceman Group (joined by Golden Banyan) alleges that Commerce unlawfully included mandatory respondent Jisheng's 266.13% margin in its separate rate calculations.[12] Iceman Group and Golden Banyan also argue that Commerce's separate rates were not supported by substantial evidence even if it were proper to include Jisheng's margin. Specifically, Iceman Group and Golden Banyan claim that Commerce did not explain how the separate rate reasonably reflected those companies' commercial activities, and that Commerce's failure rendered the *Amended Final Results* unsupported by substantial evidence.

i. *Factual background*

To calculate Golden Banyan's and Iceman Group's separate rates, Commerce followed its normal practice of weight averaging the margins of the three mandatory respondents in this case. Because none of the mandatory respondents received zero, *de minimis*, or "entirely" facts available margins, the Department included all three rates in its calculations. *See Final Results*, 76 Fed. Reg. at 56,733 (following framework in 19 U.S.C. § 1673d(c)(5)(A)). The final separate rate was 76.12%, the weighted average of Blue Field's 2.17% margin, XITIC's 13.12% margin, and Jisheng's 266.13% margin. *See id.* (containing final margins for XITIC and Jisheng); *Amended Final Results*, 76 Fed. Reg. at 70,113 (containing final margin for Blue Field).

Jisheng's 266.13% margin was based on partial, but not total, AFA. *Preliminary Results*, 76 Fed. Reg. at 12,709–10. Nonetheless, the PRC-wide rate for the review period was a comparatively smaller 198.63%. *Id.* at 12,710. The PRC-wide rate is typically based on total AFA, and it appears that was true here. *See Yangzhou Bestpak*, 716 F.3d at 1373; *Certain Preserved Mushrooms from the People's Republic of China*, 71 Fed. Reg. 64,930, 64,933 (Dep't Commerce Nov. 6, 2006) (prelim. admin. review) (noting PRC-wide rate based on total AFA).

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[12] Iceman Group and Golden Banyan did not raise this issue before the agency because Jisheng's margin did not exceed the PRC-wide rate until the *Final Results*. Because the basis for their claim did not arise until after the *Final Results*, Iceman Group and Golden Banyan are not precluded from raising the issue here. *See, e.g.*, *U.S. Magnesium LLC v. United States*, 31 CIT 988, 990 (2007).

ii. *Commerce did not support its methodology with substantial evidence*

The question before the court is whether Commerce could reasonably interpret 19 U.S.C. § 1673d(c)(5) to permit Commerce's methodology in this case. Because § 1673d(c)(5) establishes procedures for calculating an all others rate in market economy investigations, it does not speak directly to calculating a separate rate in NME reviews. *See Chevron*, 467 U.S. at 842. Nonetheless, Commerce has consistently applied that statute's framework when determining separate rates, apparently equating the all others rate with separate rates in the NME context. The Federal Circuit has implicitly accepted Commerce's practice. *See, e.g.*, *Yangzhou Bestpak*, 716 F.3d at 1377–38 (analyzing Commerce's separate rate calculations under § 1673d(c)(5)).

Since there is no statute or regulation directly on point, "Commerce has a measure of discretion in determining what methodology to employ." *Albemarle Corp. v. United States*, 37 CIT __, __, 931 F. Supp. 2d 1280, 1291 (2013). Here, Commerce applied the "[g]eneral rule" for calculating the all others rate. *See* 19 U.S.C. § 1673d(c)(5)(A). That general rule sets the all others rate at "an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under" the facts available statute. *Id.*

Section 1673d(c)(5)(A) only requires the exclusion of margins determined "entirely" under facts available or AFA and is silent with regard to partial AFA rates. As a result, Commerce could have reasonably interpreted the statutory language to allow the inclusion of partial AFA margins in some circumstances. *See Chevron*, 467 U.S. at 843 (requiring deference to an agency's reasonable construction of ambiguous statute).

Nonetheless, "it is possible for the application of a particular methodology to be unreasonable in a given case." *Yangzhou Bestpak*, 716 F.3d at 1378 (quoting *Thai Pineapple Canning Indus. Corp. v. United* States, 273 F.3d 1077, 1085 (Fed. Cir. 2001)). Moreover, Commerce may not rely on a literal interpretation of the statute "at the expense of the reason of the law and producing absurd consequences." *Sorrells v. United States*, 287 U.S. 435, 446 (1932). The court is concerned that Commerce's mechanical application of § 1673d(c)(5) in this case undercut the actual purpose behind that statutory subsection and antidumping law generally—that is, to calculate dumping margins as accurately as possible. *See, e.g.*, *Yangzhou Bestpak*, 716 F.3d at 1379.

The two fully cooperative mandatory respondents in this case—Blue Field and XITIC— received rates of 2.17% and 13.12%. By contrast, Commerce assigned Jisheng a partial AFA rate of 266.13%. That rate is over 250% greater than the rates assigned to Blue Field and XITIC, and it is also substantially higher than the 198.63% PRC-wide total AFA rate. Commerce would not have included the 198.63% figure in its separate rate calculations, as the statute expressly excludes total AFA margins. It is unclear how the inclusion of a figure 67.5% higher than that and over 250% higher than rates assigned to other mandatory respondents is less distortional.

The Federal Circuit recently found that "rate determinations for nonmandatory, cooperating separate rate respondents must . . . bear some relationship to their actual dumping margins." *Id.* at 1380. Because Commerce did not even address the seemingly anomalous result flowing from its separate methodology in this case, the court cannot find that Commerce "articulate[d] a satisfactory explanation for its action." *See id.* at 1378. Therefore, Commerce did not support its calculations with substantial record evidence and remand is appropriate for additional investigation or explanation. *See id.* at 1380.

Although the Government argues that Commerce did not need to explain how Iceman Group's and Golden Banyan's margins reflected their commercial activities, the court disagrees. The Government asserts that the requirement that separate rates reasonably reflect dumping margins "attaches only when the record yields only zero or *de minimis* rates, or rates based entirely on facts otherwise available." Def.'s Br. 49. In support of its argument, the Government cites the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act. *See* H.R. Rep. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.

In discussing § 1673d(c)(5), the SAA notes that the "general rule" is that Commerce will employ the procedure that it used in this case. *See id.* at 4201. If all mandatory respondent margins are zero, *de minimis*, or based on total AFA, the statute contemplates an alternative method of weight averaging those margins. *Id.* But if that alternative method "results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers," Commerce should use another reasonable method. *Id.*

According to the Government, if Commerce applies the general rule (i.e., weight averages all margins that are not zero, *de minimis*, or based on total facts available), it need not consider whether the resulting rate reasonably reflects potential dumping margins for separate rate respondents. Def.'s Br. 49. While this is correct as a

general rule, it is nonetheless illogical not to expect that the preferred methodology should also reasonably reflect potential dumping margins. Consequently, where the data used clearly indicates an unexplained anomaly, Commerce must articulate a reasonable basis for its use of the anomalous result. Because the circumstances here strongly suggest that application of the preferred methodology does not reflect dumping margins (and indeed thwarts the statute's intended purpose), Commerce must explain why its actions are based on a reasonable reading of the record.

CONCLUSION AND ORDER

For the foregoing reasons, the court concludes that Commerce must reconsider (1) the surrogate values it applied to XITIC's inputs of lime and mushroom spawn; and (2) the methodology it used to calculate separate rates in this review. The court also grants Commerce's request for a voluntary remand to recalculate XITIC's surrogate labor rate and financial ratios.

Upon consideration of all papers in proceedings in this case and upon due deliberation, it is hereby

ORDERED that the *Final Results* and *Amended Final Results* be, and hereby are, REMANDED to Commerce for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, GRANTED as provided in this Opinion and Order; it is further

ORDERED that Commerce shall reconsider its decision to use GTA data for Indian HTS subheading 2522.20 as a surrogate value for lime, and in doing so, must determine whether such surrogate represents the "best available information" on the record in accordance with 19 U.S.C. § 1677b(c)(1), as compared with alternative surrogates in the record; it is further

ORDERED that Commerce shall reconsider its decision to use GTA data for Indian HTS subheading 0602.90.10 as a surrogate value for mushroom spawn, and in doing so, must determine whether such surrogate represents the "best available information" on the record in accordance with 19 U.S.C. § 1677b(c)(1), as compared with alternative surrogates in the record; it is further

ORDERED that Commerce shall employ its revised labor methodology to recalculate XITIC's surrogate labor rate and financial ratios and, if appropriate, adjust the financial ratios; it is further

ORDERED that Commerce shall explain whether the separate rates assigned to Iceman Group and Golden Banyan reasonably reflect the companies' potential dumping margins and, if warranted, redetermine those rates; and it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its Remand Redetermination, which shall comply with all directives in this Opinion and Order; that Plaintiffs shall have thirty (30) days from the filing of the Remand Redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiffs' comments to file comments.

Dated: December 20, 2013
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 13–153

SONY ELECTRONICS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 09–00043

[In this classification case, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.]

Dated: December 23, 2013

Jack D. Mlawski, Galvin & Mlawski, of New York, N.Y., for plaintiff.

Amy M. Rubin, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; *Karen V. Goff*, Commercial Litigation Branch, Civil Division, United States Department of Justice. Of counsel on the brief was *Chi S. Choy*, Office of the Assistant Chief Counsel for Import Administration, United States Customs & Border Protection.

OPINION

At issue is the proper classification of Sony Electronics, Inc.'s ("Sony" or "plaintiff") Sony NSC-GC1 Net-Sharing Cam ("the merchandise" or "NSC-GC1"). Before the court are the cross-motions for summary judgment of plaintiff and of the United States ("defendant") on behalf of United States Customs and Border Protection ("Customs"). Pl.'s Mot. for Summ. J. (ECF Dkt. No. 27); Def.'s Cross-Mot. for Summ. J. (ECF Dkt. No. 34). The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006).

For the reasons set forth below, plaintiff's motion for summary judgment is granted, defendant's cross-motion for summary judgment is denied, and the court finds that the NSC-GC1 is properly classified as a "digital still image video camera" under Harmonized

Tariff Schedule of the United States ("HTSUS") subheading 8525.80.40 because that provision encompasses digital cameras capable of recording both still and moving images. HTSUS 8525.80.40 (2007).

BACKGROUND

The facts described below have been taken from the parties' stipulated facts, their statements of material facts not in dispute, the court's independent examination of the merchandise, and the record. The NSC-GC1 is an electronic device that is capable of digitally capturing and recording still images and moving images. The merchandise is imprinted with the words "NET-SHARING CAM." The merchandise weighs approximately five ounces, has an LCD[1] monitor display, a built-in microphone, and uses a rechargeable lithium ion battery.

The merchandise is capable of capturing still images at five different resolutions. It also captures moving images at two resolutions and several different frames per second rates. The NSC-GC1 has only 2MB of user accessible internal memory and is designed to incorporate a removable flash memory stick, which is sold separately, for the storage of more than small numbers of still images or short durations of moving images. The camera records images digitally, saving still images in .jpg[2] format and moving images in .mp4[3] format.

In May of 2007, Sony requested a ruling as to the proper classification of the merchandise, arguing that it should be classified as a

[1] LCD ("liquid crystal display") is "a screen (such as a television screen or the screen on a watch) that works by passing a small amount of electricity through a special liquid." *LCD*, MERRIAM WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/lcd (last visited Nov. 26, 2013); *see also* MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1218 (6th ed. 2003) (providing a more detailed explanation of how liquid crystal display technology functions).

[2] A .jpg or JPEG file is "[a]n ISO/ITU standard for compressing still images. Pronounced 'jay-peg,' the JPEG format is very popular due to its variable compression range. JPEGs are saved on a sliding resolution scale based on the quality desired. For example, an image can be saved in high quality for photo printing, in medium quality for the Web and in low quality for attaching to e-mails, the latter providing the smallest file size for fastest transmission over slow connections." *Definition of: JPEG*,PC MAGAZINE ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/45676/jpeg (last visited Nov. 18, 2013); MCGRAWHILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1140 (6th ed. 2003) ("Graphics file format for compressed still images, particularly photographic images found on the World Wide Web; developed by the Joint Photographic Experts Group.").

[3] A .mp4 or MPEG-4 file is one of "[a] family of ISO/ITU standards for compressing digital video" that "is an extremely comprehensive system for multimedia representation and distribution . . . offer[ing] a variety of compression options" and which can "identify and deal with separate audio and video objects in the frame, which allows individual elements to be compressed more efficiently." *Definition of: MPEG*, PC MAGAZINE ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/47295/mpeg (last visited Nov. 18, 2013).

"digital still image video camera" under HTSUS 8525.80.40, which carries a duty rate of "free." [4] On August 31, 2007, Customs issued Headquarters Ruling ("HQ") H012688. There, it took the position that the NSC-GC1 should be classified as "Television cameras, digital cameras and video camera recorders: Other" under HTSUS 8525.80.50, which carries a duty rate of 2.1% *ad valorem*.[5] In its ruling, Customs described the merchandise as a "digital camera" and opined that "the term 'cam'" which is imprinted on the merchandise "is associated with video as opposed to still images." HQ H012688 (Aug. 31, 2007).

Sony imported the merchandise on November 26, 2007. On entry, Customs classified the merchandise under HTSUS 8525.80.50. Sony timely protested and, after paying all required duties, commenced this action.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986).

The court reviews Customs' classification decisions de novo, applying the HTSUS General Rules of Interpretation ("GRIs") and the HTSUS Additional U.S. Rules of Interpretation ("ARIs").[6] *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). A Customs classification determination is entitled to deference "proportional to its 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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[4] HTSUS 8525.80.40 (2007) covers: "Transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders: Television cameras, digital cameras and video camera recorders: *Digital still image video cameras.*" HTSUS 8525.80.40 (2007) (emphasis added).

[5] HTSUS 8525.80.50 (2007) covers: "Transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders: *Television cameras, digital cameras and video camera recorders: Other*." HTSUS 8525.80.40 (2007) (emphasis added).

[6] Although referred to separately here, the GRIs and ARIs are part of the HTSUS statute which "consists of '(A) the General Notes; (B) the General Rules of Interpretation; (C) the Additional U.S. Rules of Interpretation; (D) sections I to XXII, inclusive (encompassing chapters 1 to 99, and including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (E) the Chemical Appendix." *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (citation omitted).

DISCUSSION

I. LEGAL FRAMEWORK

Classification determinations involve a two-step process by which the court first "ascertain[s] the meaning of the specific terms in the tariff provision" and then "determine[s] whether the goods come within the description of those terms." *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013) (citation omitted). The first step is a question of law; the second is a question of fact. *Id.* If there is no factual dispute regarding what the merchandise is, "the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions." *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009) (citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999), and *Bausch & Lomb, Inc.*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998)).

As with any statute, "[w]hen interpreting HTSUS provisions, [courts] must strive to give effect to every word in the statutory text." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013) (citing *Marx v. Gen. Revenue Corp.,* 133 S.Ct. 1166, 1178 (2013), and *Corley v. United States,* 556 U.S. 303, 314 (2009)). An interpretation of a tariff provision will be disfavored if it "render[s] other language in [the relevant subheading] superfluous." *Id.* In other words, courts should construe the provisions of the tariff code in a way that avoids rendering terms redundant, meaningless, or inoperative.

GRI 1 directs that tariff classification initially "be determined according to the terms of the headings and any relative section or chapter notes." Unless there is evidence of a "contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *Carl Zeiss*, 195 F.3d at 1379).

After the proper HTSUS heading is determined, the court must determine the appropriate subheading. "At the subheading level, [GRI] 6 controls and gives priority to the terms of those subheadings and any related subheading notes as well as the relevant section, chapter, and subchapter notes" and applies GRIs 1–5 as appropriate. *Del Monte Corp. v. United States*, 730 F.3d 1352, 1352 (Fed. Cir. 2013) (citations and internal quotation marks omitted); GRI 6 ("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.").

Ultimately, the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citation omitted). The court "is required to decide the correctness not only of the importer's proposed classification but of the Government's classification as well." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 874 (Fed. Cir. 1984).

II. SUMMARY JUDGMENT IS APPROPRIATE

The parties do not dispute the nature or function of the NSC-GC1. They agree that it is a camera capable of digitally capturing still images and moving images. As has been noted, summary judgment is appropriate where, as here, there is no "factual dispute regarding the nature, structure, and use of imported merchandise." *Kahrs*, 713 F.3d at 644 (citation omitted). Because there is no factual dispute as to the nature of the merchandise, the inquiry here "collapses entirely into a question of law about the meaning and scope of the relevant tariff provisions." *Del Monte Corp.*, 730 F.3d at 1352 (citations and internal quotation marks omitted).

The parties agree, and the court finds, that the merchandise should be classified under Heading 8525 and six-digit subheading HTSUS 8525.80. Heading 8525 is an *eo nomine* provision, which "includes all forms of the named article." *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000) (citing *Carl Zeiss*, 195 F.3d at 1379). HTSUS subheading 8525.80 covers "Television cameras, digital cameras and video camera recorders." The Explanatory Note to subheading 8525.80 states that "[t]his group covers cameras that capture images and convert them into an electronic signal." The Explanatory Notes to the Harmonized Commodity Description and Coding System, 4th ed., 85.25 (2007) ("Explanatory Notes"). Because classification to the six-digit subheading is clear, the court's task is to determine the correct eight-digit subheading level, applying GRI 6.

III. THE CONSTRUCTION OF HTSUS SUBHEADING 8525.80.40

The parties' dispute centers around the scope of HTSUS 8525.80.40. In particular, they argue for different interpretations of the phrase "digital still image video cameras" in HTSUS subheading 8525.80.40. Customs' position is that the phrase "digital still image video cameras" references a single function article capable only of capturing still pictures and recording them by electronic means. Customs further contends that the phrase "digital still image video cameras" is a term of art for "cameras that use video technology to principally

capture and reproduce still images." Def.'s Mem. in Opp'n to Pl.'s Mot. for Summary J. and in Supp. of Def.'s Cross-Mot. for Summary J. 10 (ECF Dkt. No. 34) ("Def.'s Br."). For Customs, the word "video" in the context of the full phrase "refers to a technology used for the capture and reproduction of images by electronic means, rather than film." Def.'s Br. 18. Customs' position is that cameras capable of taking both still and moving images are not fully covered by any one subheading, and that a principal function analysis under Note 3 to HTSUS Section XVI is required. Section Note 3 to Section XVI, HTSUS (2007) ("[M]achines [with multiple functions are to] . . . be classified as if consisting only of that component or as being that machine which performs the principal function."). Thus, under this interpretation, a camera that principally records still images by electronic means is a "still image video camera" but one that primarily captures moving images is not. Under Customs' interpretation, plaintiff's merchandise is not classifiable under HTSUS 8525.80.40 because it principally functions as a camcorder.

Defendant continues that its interpretation of HTSUS 8525.80.40 in this manner has been a consistent practice, and is therefore entitled to deference under *Mead*. Def.'s Br. 9 (citing *Mead Corp.*, 533 U.S. at 235, *Skidmore*, 323 U.S. at 140, *Dell Prods. LP v. United States*, 642 F.3d 1055, 1060 (Fed. Cir. 2011), and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (internal quotations omitted)).

As to its preferred classification, Customs maintains that HTSUS 8525.80.50 is intended to include video camera recorders or "camcorders," meaning cameras whose principle function is to capture moving images. Thus, Customs argues, because the principal function of the merchandise is to capture moving images, and still image recording capability is only secondary, the NSC-GC1 is properly classified as "other" under HTSUS 8525.80.50 and not as a "digital still image video camera" under HTSUS 8525.80.40.

Customs also takes the position that a Note 3 analysis should be applied, and result in classification of the NSC-GC1 under HTSUS 8525.80.50, even if the court were to find the phrase "video" to mean moving images. It contends that not employing a principal function analysis would obliterate any real distinction between HTSUS 8525.80.40 and HTSUS 8525.80.50, rendering the latter an empty category. Def.'s Br. 30. Put another way, because most modern digital cameras have the ability to capture both still images and moving images, Customs asserts that, under plaintiff's interpretation, all of

those cameras would fall under HTSUS 8525.80.40 if no principal function analysis is necessary, thus rendering HTSUS 8525.80.50 a nullity.

Customs further argues that the term video is not made superfluous by the addition of the word digital under its interpretation. The term video, it contends, serves to distinguish the cameras of HTSUS 8525.80.40 from the film-based cameras of Chapter 90. Thus, Customs insists that inclusion of the word "video" in the subheading is necessary for the provision to stand alone because it functions to exclude film-based cameras from the subheading. Customs does not believe that exclusion of film-based cameras from Chapter 85 at the chapter level is sufficient to make this distinction.

Sony argues that the phrase "digital still image video cameras" in HTSUS 8525.80.40 is intended to cover digital cameras that are capable of taking both still images and moving images. Plaintiff's Mem. of Law in Supp. of Pl.'s Mot. for Summary J. 10 (ECF Dkt. No. 27–2) ("Pl.'s Br."). For plaintiff, under the proper construction of HTSUS 8525.80.40, the term "video" means "moving images." Pl.'s Mem. of Law in Opp'n to Def.'s Cross-Mot. and in Supp. of Pl.'s Mot. for Sum. J. 1 (ECF Dkt. No. 37) ("Pl.'s Reply"). Specifically, Sony insists that Customs' interpretation of the term "video" would make that word redundant because the word "digital" already provides that the camera captures pictures electronically. Since each word of subheading 8525.80.40 must be given meaning, plaintiff claims that "video" must mean something other than electronic picture capture and that this meaning can only be "moving images." Moreover, SONY maintains that an interpretation of the word "video" as electronic image capture in 8525.80.40 would be inconsistent with the common use of the word "video" and of the word's use in other subheadings of heading 8525, as well as with the structure of the statute, the chapter and section notes, and many of Customs' prior rulings. Finally, Sony argues that because the word "digital" signifies electronic picture capture, no further words are necessary to separate these cameras from ones that use film. Accordingly, Sony asserts that the proper construction of the subheading covers cameras that digitally record both still and moving images. Because 8525.80.40 fully describes the NSC-GC1, Sony continues, it is not a composite machine for which a principal function analysis under Note 3 to Section XVI is appropriate.

Both parties also argue that the Explanatory Notes support their interpretation, cite to various dictionaries, and refer to statements made by Customs' expert David J. Bancroft to support their construction of the term "video."

A. Customs' Determination is Not Entitled to Deference

As an initial matter, defendant's position is that it has consistently interpreted HTSUS 8525.80.40 to require a principal function analysis, and that this consistent use provides the basis for deference being shown to its interpretation in HQ H012688. *Mead Corp.*, 533 U.S. at 235. The court finds this argument unconvincing. Indeed the ruling's lack of persuasive power is evidenced by Customs' inconsistency in its classification of articles under the competing headings and their predecessor headings.[7] Consistency in Customs' interpretation of a provision "enhances the persuasive power of that interpretation." *Dell Prods.*, 642 F.3d at 1060. But that principle cuts both ways. A lack of consistency indicates that Customs has not thoroughly considered a particular classification and undermines the persuasive power of its conclusions.

The term "still image video camera" was first introduced to the tariff schedule in 1996 and the term "digital" was added the following year. A review of Customs' ruling letters regarding these provisions clearly demonstrates that Customs regularly classified digital cameras capable of capturing both still and moving images under 8525.80.40 and its predecessor subheadings in the years prior to the importation of plantiff's merchandise.

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[7] The phrase "still image video cameras" was introduced into the HTSUS in 1996 under HTSUS 8525.40.00 (1996) ("Still image video cameras and other video camera recorders."). Goods entered under 8525.40.00 in 1996 were subject to a 3.4% rate of duty. The following year, the tariff schedule was revised and the word "digital" was added to the phrase in the new subheading, 8525.40.40. The 1997 revision created a new six digit subheading 8525.40 ("Still image video cameras and other video camera recorders"), and two new subheadings. Specifically, HTSUS 8525.40.40 ("Digital still image video cameras"), dutiable at a rate of 2.2%, and 8525.40.80 ("Other"), dutiable at a rate of 2.9%, were created. The latter subheading covered the language formerly included in 8525.40.00: "Other: Camcorders" and "Other: Other."

The rate of duty on each heading was reduced in 1998 to 1.5% for 8525.40.40 and 2.5% for 8525.40.80. In 1999, the rates were again reduced to .7% for 8525.40.40 and 2.1% for 8525.40.80. In 2000, the rate for 8525.40.40 was changed to "free." The duty rates associated with each tariff heading's language remained the same in all subsequent revisions through the import of the goods at issue.

The 1997 modifications and the three-year reduction of the rates were a result of the presidential proclamation to Implement the World Trade Organization Ministerial Declaration on Trade in Information Technology Products and Agreement on Distilled Spirits, Procl. 7011 of June 30, 1997, 62 Fed. Reg. 35909, 35926–927, 35941 (Presidential Documents, July 2, 1997).

In the 2002 HTSUS, six digit subheading 8525.40 was revised to read: "Still image video cameras and other video camera recorders; digital cameras." Finally, in the 2007 HTSUS, the subheadings were revised again. Six digit subheading 8525.80 ("Television cameras, digital cameras and video camera recorders") was created. Within that new subheading the language of prior eight-digit subheading 8525.40.40 found its way into new eight digit subheading 8525.80.40 and that of former eight-digit subheading 8525.40.80 moved into eight digit subheading 8525.80.50.

In 2002, Customs classified five digital cameras capable of taking both moving and still images under 8525.40.40 after applying GRI 3(c) (where essential character cannot be determined, an item is classified under the subheading last in numerical order). NY I85601 (Sept. 10, 2002) (classifying two cameras); NY H87527 (Feb. 6, 2002) (classifying two cameras); NY H87528 (Feb. 1, 2002). Tellingly, this analysis did not consider classification under 8525.40.80, the predecessor of 8525.80.50, which would have been last in numerical order had it been considered.[8]

In its first headquarters rulings[9] on subheading 8525.40.40, Customs revoked and modified three NY office rulings that had classified dual function digital cameras under 8525.80.50's predecessor heading, 8525.40.80. HQ 966531 (Sept. 4, 2003) (revoking NY I84563); HQ 966530 (Sept. 4, 2003) (modifying NY I86730); HQ 966072 (Sept. 4, 2003) (revoking NY I84955). There, Customs reasoned that because of the Information Technology Agreement of 1997, subheading 8525.40.40 encompassed "those articles commonly and commercially referred to as digital cameras." Because these devices, capable of both capturing still images and functioning as webcams (taking moving images), were commonly known as digital cameras, 8525.40.80 was expressly "not considered."

In 2005, in a conclusion directly at odds with Customs' current position, it issued a ruling letter classifying an item known as the "VuGo Digital Video Camera," a device capable of both still and moving image capture. NY L88863 (Nov. 18, 2005). There, Customs performed a principal function analysis and determined that the item's principal function was that "of *video recording*," i.e. the capture of moving images, and classified it under 8525.40.40 *for that very reason*. *Id.* (emphasis added). Among other things, this ruling undermines the notion that "still image video camera" is a term of art indicating the capture of still images.

Next in 2006, Customs classified digital cameras capable of taking both still and moving images (thousands of images and hours of video) under 8525.40.40. NY R05115 (Nov. 6, 2006); NY M85537 (Aug. 25 2006) (revoked by HQ H046643); NY R04505 (Aug. 15, 2006) (revoked by HQ H046643); NY R04507 (Aug. 15, 2006) (revoked by HQ H046643); NY R04381 (July 21, 2006) (revoked by HQ H046643

[8] These ruling letters considered whether the essential character of the cameras was as a television type camera under the subheadings of 8525.30 or a digital still image video camera of 8525.40.40. Under GRI 3(c), when an article's essential character cannot be determined between two or more potential headings, it is classified under the one that is numerically last.

[9] Headquarters rulings "are statements of the official position of the Customs Service which are likely to be of widespread interest and application." 19 C.F.R. § 177.8(b) (2007).

(May 10, 2010)). In these instances, the ruling letter did not include a principal function analysis. Rather, the letters contained no analysis beyond describing the merchandise and identifying a chosen classification. Notably, NY R05115 anticipated the 2007 reformatting of the subheadings and advised the importer that it was "anticipated" that the item, a three function digital camera, video camera, and binoculars, would be classified under HTSUS 8525.80.40 after the revisions took effect. NY R05115.

In March of 2007, Customs classified dual or multifunction digital cameras, i.e., those that are capable of still image capture and moving image capture, under 8525.80.40, noting a principal function analysis had been performed and that Customs determined that function to be "as a still image digital camera." NY N007185 (Mar. 6, 2007).

Later in 2007, however, Customs issued the ruling letter that applies to the merchandise at issue in this case. In that ruling, it stated that "[t]he scope of the heading [(8525.80.40)] did not change with the amendment of the HTSUS" in 2007, which reorganized the subheadings of HTSUS 8525.80. HQ H012688. Nevertheless, after performing a principal function analysis, Customs determined that, because the principal function was "of a video camera," that the article was classifiable under 8525.80.50. HQ H012688. This was the first time since the revocation of the 2003 NY rulings that Customs issued a ruling classifying a multifunction digital camera in the "other" heading. It is worth observing that Customs' reasoning in the opinion made use of the term "video" as describing a moving image when it found that "the term 'cam'," that is imprinted on the merchandise, "is associated with video as opposed to still images." HQ H012688. On the same day, Customs issued a different HQ ruling determining that a multifunction article which had a principal function of a "still image camera" was classifiable under 8525.80.40. HQ H002853 (Aug. 31, 2007).

In 2010, three years after the importation of the merchandise and during the pendency of this action, Customs issued HQ H046643 which revoked NY M85537, NY R04505, NY R04507, and NY R04381, and adopted the position taken in this case. Thus, it was not until late in the game that Customs took the position that the phrase "digital still image video camera" is a "term of art, its meaning is not the same as the plain meaning of its component words." HQ H046643.

As has been seen, over the life of HTSUS 8525.80.40 and its earlier incarnations, the Department has not consistently applied a principal function analysis. If anything, prior to importation at issue in this litigation, Customs could most consistently have been said to interpret 8525.80.40 as covering any article that would be identified as a "digital camera" regardless of whether the camera could capture both

still and moving images. Consequently, Customs' classification determination in this case was not the result of its consistent interpretation of the tariff, is unpersuasive, and is not entitled to deference by the court.

B. The Word "Video" in HTSUS 8525.80.40 Means "Moving Images"

Despite defendant's insistence that "video" in the term "still image video camera" refers only to electronic image capture, the court finds that "moving images" is the meaning of "video" in HTSUS 8525.80.40. As noted, "[w]hen a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common meaning." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citation omitted). "The Trade Court may examine many resources to ascertain the common meaning or commercial understanding of a particular tariff term." *Deckers*, 714 F. 3d at 1371 (citations omitted). Here, the court has considered (1) dictionary definitions of the term; (2) the opinion of Customs' expert; (3) the HTSUS explanatory notes; (4) the history of the phrase "still video camera"; and (5) the overall construction of the HTSUS, in reaching its conclusion.

1. Dictionary Definitions

"To discern the common meaning of a tariff term, [the court] may consult dictionaries." *Kahrs*, 713 F.3d at 644 (citation omitted). A review of several dictionaries indicates the dominant meaning of the term "video" at the time the language at issue was enacted was "moving images," even though the term can also refer to video capture technology.

Plaintiff points the court to definitions from four dictionaries in support of construing the term "video" as "moving images." Pl.'s Br. 13–15 (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2012) (defining "video" as "[a] sequence of images processed electronically into an *analog or digital* format and displayed on a screen with sufficient rapidity as to create the illusion of motion and continuity" (emphasis added)); *Video*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/video (2012) ("1. Television; *also* : the visual portion of television, 2. videotape: as *a* : a recording of a motion picture or television program for playing through a television set *b* : a videotaped performance of a song often featuring an interpretation of the lyrics through visual images, 3: a recording similar to a videotape but stored in digital form (as on an optical disk or a computer's hard drive)."); THE FREE ON-LINE DICTIONARY OF COMPUT-

ING (2010) ("Moving images stored as a sequence of static images (called 'frames') representing snapshots of the scene, taken at regularly spaced time intervals, e.g. 50 frames per second.").

Defendant agrees that a common and commercial meaning of "video" is "moving images." Def.'s Br. 20–21. Nonetheless, Customs argues that "video" also commonly denotes "a technology used for the capture and reproduction of images by electronic means" also citing the Merriam-Webster Online Dictionary. Def.'s Reply to Pl.'s Opp'n to Def.'s Cross-Mot. for Summary J. 6 ("Def.'s Reply") (citing *Video*, THE MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/video (last viewed July 14, 2012) (defining "video" as "being, relating to, or used in the transmission or reception of the television image" or "being, relating to, or involving images on a television screen or computer display."); NEW MERRIAMWEBSTER DICTIONARY 809 (1989)). However, because even these definitions rely on the term "television," which denotes an image that is capable of movement, Customs' sources do not support its position.

Dictionaries published contemporaneously with the statutory language's enactment are highly probative, particularly in the case of a technological term whose meaning may change quickly. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental cannon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning." (emphasis added and citation omitted)). To that purpose, the court also referred to the 1996 edition of the American Heritage Dictionary of the English Language which defined "video" when used as an adjective as "1. Of or relating to television, especially televised images. 2. Of or relating to videotaped productions or videotape equipment and technology" and when used as a noun as "1. The visual portion of a televised broadcast. 2. Television: a star of stage, screen, and video. 3. A videocassette or videotape, especially one containing a recording of a movie, music performance, or television program." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1991 (3d Ed. 1996). Notably, each of these definitions, through their reference to television, videotape, and movies, contemplates "moving images." None specifically address a particular method of image capture, except in reference to "videotape," which is indisputably a technology for the recording and display of moving images.

Although the dictionaries placed on the record by the parties indicate that there are two potential meanings of the word "video," the

court looks to the ordinary meaning. "That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2003 (2012) (citing *Mallard v. United States Dist. Court for the Southern District of Iowa*, 490 U.S. 296, 301 (1989)). Based on these dictionary entries, it is clear that by 1997 the term "video" was ordinarily understood to mean "moving images."

2. The Government's Expert Witness

Both parties also rely on expert reports from Customs' expert David J. Bancroft. The record contains three statements by Mr. Bancroft: Stipulated Exhibit 1 ("Bancroft Report"); Stipulated Exhibit 2 ("Amended Bancroft Report"); and Def.'s Exhibit 2 ("Bancroft Declaration"). To the limited extent that these reports are appropriate evidence in support of a motion for summary judgment, their primary value is in demonstrating the evolution of the word "video" over time.

Both parties rely on the Bancroft Report and Amended Bancroft report extensively.[10] However, neither of these reports are sworn as was required by United States Court of International Trade Rule 56(e)[11] in effect at the time of the parties' cross motions. At that time, USCIT Rule 56(e) was identical to the former Federal Rule of Civil Procedure 56(e) and "unsworn statement[s] submitted in support of a summary judgment motion d[id] not meet the requirements" of that rule. *Citizen Watch Co. of Am., Inc. v. United States*, 34 CIT __, __, 724 F. Supp. 2d 1316, 1325 n.9 (2010) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.17 (1970)).[12] Accordingly, despite the parties' extensive reliance on and quotation of those reports, the court will not consider them.

Although the Bancroft Declaration is sworn, it is not particularly helpful to the court in establishing the meaning of the phrase "digital still image video cameras" in HTSUS 8525.80.40. First, Mr. Bancroft opines "that the term 'still image video camera' would not refer to a camera that is capable of taking both still and moving images," a

[10] Although Customs relies on the unsworn Amended Bancroft Report, it argues that plaintiff's reliance on the Bancroft Report was impermissible because that report was also unsworn. Thus, there is no agreement between the parties as to the use of the Bancroft Report or the Amended Bancroft Report. Def.'s Br. 21 n.6.

[11] USCIT Rule 56 has since been amended to parallel current Federal Rule of Civil Procedure 56 which liberalized the type of evidence that may be used to support a motion for summary judgment.

[12] Unlike in *Citizen Watch*, where an unsworn statement was rehabilitated by a later sworn statement, the Bancroft Declaration here makes no reference to either the Bancroft Report or the Amended Bancroft Report. *Cf. Citizen Watch*, 34 CIT at __, 724 F. Supp. 2d at 1325 n.9 ("[T]he deficiency of an unsworn expert report may be cured for consideration on summary judgment by a later affidavit or deposition reaffirming the report.")

position evidently at odds with Customs' principal use argument. Bancroft Decl. ¶ 12. Next, he acknowledges that the term video "is also commonly used to refer to the continuously varying electronic signal that is used to represent and convey moving images in consumer products such as camcorders," again seemingly parting company with Customs position that the term video means image capture by electronic means. Bancroft Decl. ¶ 12.

Then, after stating that dual function articles are not "still image video cameras," Mr. Bancroft appears to contradict this position by asserting that "[d]igital still cameras," a term he says is equivalent to "digital still image video camera," "and camcorders optimize one function over the other, either still image or moving image. . . . Most digital still cameras and camcorders, however, do have the components . . . to provide both still image and moving image functions." Bancroft Decl. ¶ 15. Put another way, Mr. Bancroft says in one place that a multifunction camera would not meet the definition of a "still image video camera" but in another that it would, so long as moving image capture was not the primary function of the device. Thus, the declaration is of little use for determining the meaning of the full term "digital still image video cameras."

Mr. Bancroft's declaration does, however, indirectly support the proposition that in 1997, when the word "digital" was added to 8525.40.40, the addition was intended to distinguish the digital cameras of 8525.40.40 from the analog cameras of 8525.40.80. In other words, Mr. Bancroft's declaration supports the notion that Congress could not have intended the words "still image video camera" to be a term of art when the word digital was added in 1997. In particular, Mr. Bancroft bases his view of the term "still image video camera" on the use of that phrase to describe a "type of product [that] used a modified 'video camera recorder' in order to capture, store, and display still images in a form that a consumer television set would treat is if it were a broadcast video signal." Bancroft Decl. ¶ 10. Pointing to two examples from 1981 and 1988, Mr. Bancroft continues to explain that these types of cameras were available "[i]n the late 1980's and into the beginning of the 1990's, before the advent of computer based technology that could process, store, and display still images at a consumer-friendly price level." Bancroft Decl. ¶ 10. He continues that "[a]round 1987, digital technology started to replace analog for recording still images" and that "[g]iven the digital aspect of the new cameras, the term 'video' [was] no longer needed to distinguish them from still cameras using photographic film." Bancroft Decl. ¶ 12(c), (d). Thus, contrary to Customs' position, the words "still image video camera" would no longer have been used as a term of art to denote

cameras that capture still images by electronic means by the time that the term "digital" was added in 1997. It follows, then, that the purpose of the addition of the word "digital" was to distinguish the electronic cameras using digital technology to capture still and moving images from electronic cameras using analog[13] technology.

All in all, the principal value of the Bancroft Declaration is to establish that by 1997 Congress would not have added the term "digital" if it understood the phrase "still image video camera" to be a term of art meaning a camera that uses electronic means to capture still images. Because Congress did add the word "digital," however, it is clear that it intended the phrase "still image video cameras" to be interpreted according to the meaning of its individual words. Moreover, the declaration supports the court's understanding that the common meaning of the word "video" evolved more toward "moving images" during the 1990s.

3. The Explanatory Notes

The Explanatory Notes, "while not legally binding, are 'persuasive' and are 'generally indicative' of the proper interpretation of [a] tariff provision." *Lemans Corp. v. United States*, 660 F.3d 1311, 1316 (Fed. Cir. 2011) (quoting *Drygel, Inc. v. United States*, 541 F.3d 1129, 1134 (Fed. Cir. 2008)). Both parties rely on the Explanatory Notes, and the court finds them useful here.

The Explanatory Note for Heading 8525, reads, in part:

> This group covers cameras that capture images and convert them into an electronic signal that is:
> (1) transmitted as a *video* image to a location outside the camera for viewing or remote recording (i.e., television cameras).
> (2) Recorded in the camera as a still image or a *motion picture* (i.e., digital cameras and *video camera recorders*).

Explanatory Note 85.25 (emphasis added).

Plaintiff asserts that the phrase "that capture images and convert them into an electronic signal" distinguishes these electronic cameras from cameras that capture still or moving images by other means; i.e., by the use of chemical-based film. Pl.'s Reply 7 (citing Explanatory Note 85.25(B)). Plaintiff further maintains that the term "video camera recorders" in Section (B)(2), correlates to the term "motion picture." Pl.'s Br. 7 (citing Explanatory Note 85.25(B)(2)). Thus, for

[13] "Analog implies a continuous signal in contrast with digital, which breaks everything into numbers. Analog video cameras scan their viewing area a line at a time and convert the infinitely varying intensities of red, green and blue (RGB) light into analogous electrical signals." *Definition of: analog*, PC MAGAZINE ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/37741/analog (last visited Nov. 26, 2013)

plaintiff, the Note demonstrates that the word "video" is unnecessary to distinguish the cameras of Chapter 85 (taking electronic pictures) from those of Chapter 90 (taking film pictures) and, further, that the word is properly construed as "moving images."

For its part, defendant argues that the Explanatory Note suggests that "digital cameras are those that capture images and convert them into an electronic signal which is recorded as a still image; and video camera recorders are those that capture images electronically and record them as a motion picture." Def.'s Br. 20. Defendant posits that the Explanatory Notes do not refer to a "motion picture" as a "video." Def.'s Br. 20 n.5. This position, however, seems to be at odds with the position that a "video camera recorder" is a device that captures moving images. Defendant does not explain this inconsistency. Nevertheless, Customs insists that the Explanatory Notes establish that the term "video" should be construed to denote an electronic method of image capture as a means of distinguishing electronic cameras from film cameras.

The court agrees that the Explanatory Note distinguishes electronic cameras of Chapter 85 from the cameras that capture images by other means (i.e., film) of Chapter 90. However, Explanatory Note 85.25 also states that "[t]he cameras of this heading capture an image [using] a light-sensitive device . . . [which] sends an electrical representation of the images to be further processed into an analog or digital record of the images" and that "[i]n digital cameras and video camera recorders, images are recorded onto an internal storage device or onto media." In other words, the Explanatory Note interprets the phrases "television cameras," "digital cameras," and "video camera recorders" all to denote a method of electronic image capture, regardless of whether or not the term "video" is used in the description of the item. Moreover, the use of the word "video" in the term "video camera recorders" but not in "digital cameras" further demonstrates that the Explanatory Note uses the term "video" to denote moving images.

The Note, however, does more than this. Indeed, Explanatory Note 85.25 consistently uses the word "video" to mean a moving image. Explanatory Note 85.25(B) uses the term twice, each time indicating a moving image. Thus, the use of the word "video" in 85.25(B)(1) clearly means a moving image because of the explanatory parenthetical that indicates that items of this type are television cameras. The word television means the viewing of moving images. Similarly, 85.25(B)(2)'s parallel structure between the text and its examples also indicates that "video" means moving images. While the term "still image" is paired with the parenthetical example of a "digital

camera," the term "motion picture" is paired with the term "video camera recorder." Thus, the Explanatory Note demonstrates that the term "video" is intended to denote a moving image or motion picture, not image capture by electronic means, in HTSUS 8525.80.40.

4. History of the Term "Still Video Camera"

Next, the court does not agree with defendant that the use of the term "still video camera" years prior to the enactment of HTSUS 8525.80.40 is probative of the subheading's meaning. Defendant asserts that the "digital cameras" commonly used today were described as "still video cameras" when they first appeared in the late 1980s and early 1990s. Def.'s Br. 22. Defendant claims that the term "still image video camera" in the HTSUS is derived from this term and relies on technical encyclopedias for this proposition. Def.'s Br. 22–23 (citing MCGRAW HILL ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 177, 179 (7th ed. 1992) ("Still video cameras use electronic sensors instead of film, and store the image on magnetic media or optical disks. . . . Electronic cameras that record still images are called still video cameras."). Defendant also points to "The Sony Blog" which referred to another Sony product, the MAVICA, as "the first still video camera," even though the product did not record moving images. Def.'s Br. 23 (citing *The Sony Blog*, SONY ELECTRONICS, *Flashback Friday: Sony MAVICA Digital Camera* (1981), http://blog.sony.com/flashback-fridaysony-mavica-digita-camera-1981 (last visited July 23, 2012) (attached as Ex. 8 to Def.'s Br.)).

Customs also refers to documents from the Harmonized System Committee of the World Customs Organization. Def.'s Br. 24. Specifically, it cites to comments submitted by the Austrian Administration, Brazilian Administration, and Japanese Administration in 1989, purporting to show that these foreign administrations had a uniform understanding that the term "video" referred to video technology, and to the grouping of "television cameras," "video camera recorders," and "still video cameras" under new subheading 8525.40 during the Seventh Session in 1991. Declaration of Lisa Cariello ¶¶ 8–12 ("Cariello Decl."); *see* Exs. A–E to Cariello Decl. Defendant contends that "in the late 1990's and early 2000's, with the advent of digital cameras, the HSC documents reflect an understanding that digital still cameras were properly classified as still image video cameras." Def.'s Br. 26 (citing Cariello Decl. ¶ 13).

As with the Bancroft Declaration, the court does not find these instances of the use of the term "still video cameras" probative as to the meaning of HTSUS 8525.80.40. As noted above, the Bancroft Declaration itself indicates that the technologies and the commonly

used terms referring to those technologies underwent a shift with the introduction of digital technology in the early 1990s. As such, the use of the term "still video camera" in early 1990s technical manuals, a 1981 advertisement, and in certain non-United States originating World Customs Organization documents, does not demonstrate the meaning of the term "video" as used by Congress when it changed in the HTSUS 1996 and 1997. To the contrary, this historical overview, together with contemporaneous dictionary definitions, serves to reinforce the point that the meaning of the term "video" shifted more and more toward "moving images" as digital technology became prevalent in the late 1980s and early 1990s.

Indeed, that the word "digital" was added in 1997, shows that Congress intended its addition to distinguish the cameras of 8525.40.40 ("digital still image video cameras"), which record using digital technology, from those of 8525.40.80 ("Other: Camcorders"), which use analog technology, because it was aware that the word "video" commonly indicated "moving images" at that time. Had Congress understood the term "still image video cameras" to denote the electronic capture of still images as Customs suggests, the addition of the word "digital" would have served no purpose.

5. Construction of the HTSUS

As noted, courts should construe the provisions of the tariff code in a way that avoids rendering terms redundant, meaningless, or inoperative. *Deckers*, 714 F. 3d at 1371. Here, the overall structure of the HSTUS, including the relationship between its headings and subheadings, is highly probative.

Defendant's argument that its interpretation of "video" as electronic image capture would not render the word "video" superfluous is unpersuasive. *See* Def.'s Reply 3. Under defendant's argument, the term "video" is essential to distinguish the electronic cameras of Chapter 85 from film cameras of Chapter 90. Def.'s Br. 29. However, the interplay of HTSUS Note 1(m) to Section XVI and HTSUS Chapter Note 1(h) to Chapter 90 already makes this distinction. Specifically, Section Note 1(m) to Section XVI excludes all "[a]rticles of Chapter 90" from classification within the headings of Section XVI, which includes heading 8525. Section Note 1(m) to Section XVI, HTSUS (2007). The articles of Chapter 90 cover film-based still and moving image cameras. Unlike the Explanatory Notes, the HTSUS Section and Chapter Notes are part of the statute and carry the force of law. As is common in the HTSUS, Note 1(h) to Chapter 90 is Note (1)m's mirror, excluding "television cameras, digital cameras and video camera recorders (heading 8525)" from Chapter 90. Chapter

Note 1(h) to Chapter 90, HTSUS (2007). These mirroring provisions, then, perform the function Customs claims for the word "video." That is, they separate electronic cameras from cameras that take pictures using film. Defendant's interpretation of HTSUS 8525.80.40 would, thus, make these notes without effect, contrary to GRI 1, or make either the word "video" or "digital" redundant. *See* GRI 1 ("[C]lassification shall be determined according to the terms of the headings *and any relative section or chapter Notes*." (emphasis added)).

Defendant's position that the meaning of the individual words in HTSUS 8525.80.40 should be ignored in favor of a reading of the entire phrase "digital still image video cameras" is equally unconvincing. As explained above, the court finds little evidence that the phrase "still image video camera" was a term of art in use at the time it appeared in the tariff schedule. Indeed, there is simply nothing to indicate that in 1997, when the word "digital" was added, the entire phrase was a term of art in in any context.

Moreover, there is no dispute that the word "video" in HTSUS 8525.80.50's phrase "video camera recorders" denotes moving images. Indeed, as plaintiff correctly points out, to adopt defendant's meaning here would require the court to apply different meanings to the word "video" in the different subheadings of HTSUS 8525.80. That is, video would denote moving images in HTSUS 8525.80.50 ("video camera recorders") and electronic image capture in 8525.80.40. Pl.'s Reply 8–9 (citing *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995)). Thus, defendant's interpretation would also run afoul of the "established cannon of construction" that "similar language contained within the same section of a statute [is to] be accorded a consistent meaning." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (citation omitted).

Finally, defendant's position that interpreting "video" to mean "moving images" would make HTSUS 8525.80.50 an empty category is meritless. The inclusion of the word "digital" in the phrase "digital still image video cameras" serves to distinguish moving image video recorders using digital technology, which fall into HTSUS 8525.80.40, from video camera recorders using analog technology. Those latter, albeit somewhat archaic, devices are still properly covered by subheading 8525.80.50. What is more, 8525.80.50 is the basket "other" category of subheading 8525.80 and will continue to capture those unusual items that do not fit into 8525.80's other subheadings. *See, e.g.*, NY N155196 (Apr. 6, 2011) (classifying a pen with a built in audio and video recorder under 8525.80.50).

Accordingly, the structure of the HTSUS further establishes that HTSUS 8525.80.40 encompasses those digital cameras capable of capturing both still images and moving images.

C. NSC-GC1 is a "Digital Still Image Video Camera" Under HTSUS 8525.80.40

Because the NSC-GC1 is fully described by HTSUS 8525.80.40 and Note 3 to Section XVI does not apply, the merchandise is properly classified under that subheading. That is, because both of the NSC-GC1's functions are covered by HTSUS 8525.80.40, there is no reason to apply a test intended to help choose between two headings.

1. HTSUS 8525.80.40 Fully Describes the Merchandise

As noted, there is no factual dispute as to just what the NSC-GC1 is. It is a digital camera capable of taking both still images and moving images. As explained above, HTSUS 8525.80.40 encompasses such products. Accordingly, HTSUS 8525.80.40 describes the NSCGC1 fully for classification purposes.

2. Note 3 to Section XVI is Inapplicable

Because HTSUS 8525.80.40 fully describes plaintiff's merchandise, a principal function analysis under Note 3 to Section XVI is not appropriate here. GRI 1[14] requires the application of relevant HTSUS chapter and section notes. Note 3 to Section XVI states,

> [u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Section Note 3 to Section XVI, HTSUS (2007). Here, a single tariff provision, 8525.80.40, fully describes the merchandise, so it is not necessary to engage in an analysis beyond GRI 1. Although the merchandise is a machine capable of two functions, i.e., capturing moving and still images, both of those functions are described by subheading 8525.80.40. Note 3 is only applicable where an item possesses multiple functions that are accounted for in different tariff provisions. Where a heading describes all of the functions of a mul-

[14] Pursuant to GRI 1, "[t]he titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [GRIs 2 through 6]." GRI 1.

tifunction article, an analysis of the principal function under Note 3 is not necessary. As noted, subheading 8525.80.40 covers all of the primary functions of the merchandise. Consequently, a principal function analysis is not appropriate.

CONCLUSION

For the reasons stated above, the court concludes that the correct tariff classification for the Sony NSC-GC1 Net-Sharing Cam is subheading 8525.80.40, HTSUS, subject to a duty rate of "free." Judgment will enter accordingly.

Dated: December 23, 2013
New York, New York

/s Richard K. Eaton
RICHARD K. EATON