# U.S. Court of International Trade

Slip Op. 18–26

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN DIAMOND PRODUCTS, INC., CLIFF INTERNATIONAL LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., HEBEI HUSQVARNA-JIKAI DIAMOND TOOLS CO., LTD., WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., BOSUN TOOLS CO., LTD., and BOSUN TOOLS INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 15–00164
**PUBLIC VERSION**

[Re-remanding 2012–13 administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: March 22, 2018

*Daniel B. Pickard*, *Maureen E. Thorson*, and *Stephanie M. Bell*, Wiley, Rein & Fielding, LLP, of Washington, DC, for plaintiff.

*John J. Todor*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Paul Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Gregory S. Menegaz*, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKeiffer & Horgan, PLLC, of Washington, DC, for defendant-intervenors Bosun Tools, Co., Ltd. and Bosun Tools Inc.

## OPINION AND ORDER

### Musgrave, Senior Judge:

*Diamond Sawblades and Parts Thereof From the People's Republic of China* ("PRC"), 80 Fed. Reg. 32344 (June 8, 2015) (final antidumping duty administrative review of 2012–13 period) ("*Final Results*"), as explained by its accompanying issues and decision memorandum, Public Record Document ("PDoc") 354 (June 2, 2015) ("*IDM*"), was previously remanded to the International Trade Administration, U.S. Department of Commerce ("Commerce" or "Department") for further consideration of its methodology for surrogate valuation of steel cores

(diamond sawblade parts and subject merchandise in their own right) and its selection of financial statement(s) for use in determining surrogate financial ratios. *See Diamond Sawblades Manufacturers' Coalition v. United States*, 41 CIT ___, 219 F. Supp. 3d 1368 (2017). The results of remand are now before the court, ECF No. 83 (Sep. 22, 2017) ("*Redetermination*"), and the plaintiff argues further remand is needed with respect to both issues. The court agrees, as follows.

*Discussion*

I. Valuation of Steel Cores

As mentioned previously, in the original proceeding Commerce expressed a preference for valuing factors of production ("FOPs") using official import data[1] but abandoned that approach in subsequent proceedings with respect to valuing the steel cores after concluding that the tariff schedules of Commerce's choice of primary surrogate country, Thailand, provided imprecise coverage of those products. The agency then resorted to valuing both self-produced and purchased cores based on the FOPs reported by respondents for their production, *i.e.*, a "build-up" methodology.[2] *See IDM* at 38. During the underlying administrative review, the plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC") requested Commerce to consider returning to the use of import data, in accordance with Commerce's earlier-expressed preference therefor, and consider in particular the use of data for Thai Harmonized Tariff Schedule (HTS) item 8202.31.10, which covers steel "toothed blanks" (*i.e.*, cores for circular sawblades), DSMC arguing that the provision was specific to cores for circular sawblades with a working edge of steel. *See* PDoc 232.[3]

Commerce declined, DSMC appealed, and the valuation of cores was remanded for reconsideration due to three broad reasons: First, Commerce had rejected using the Thai HTS data partly because they had resulted in "unreasonably high" surrogate values, but Commerce

[1] *See, e.g.*, *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results of admin. rev.; 2009–2010) and accompanying issues and decision memorandum ("I&D Memo") at cmt. 11 ("we prefer country-wide information such as government import statistics to information from a single source and we prefer industry-wide values to values of a single producer because industry-wide values better represent prices of all producers in the surrogate country.").

[2] *See id.*; *Diamond Sawblades and Parts Thereof Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 36166 (June 17, 2013) and accompanying I&D Memo at cmt. 8; *Diamond Sawblades and Parts Thereof Final Results of Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 35723 (June 24, 2014) and accompanying I&D Memo at cmt. 12.

[3] DSMC also placed information on the record indicating that the production process used and costs incurred to make steel cores for DSB cores and cores with metal working parts were largely identical. *See* CDoc 174, PDoc 226, at Att. 1.

did not identify an adequate benchmark for making such an assessment. Slip Op. 17–36 at 7–8. Second, Commerce had rejected DSMC's use of the actual core purchase prices of respondent Weihai Xiangguang Mechanical Industrial Co., Ltd., defendant-intervenor herein ("Weihai"), to demonstrate the reasonableness of the Thai data but had then relied on these same purchase prices to support its use of the build-up methodology. *Id.* at 8–9. Third, the finding that the merchandise covered by HTS item 8202.31.10 is meaningfully different from the cores used in the production of subject merchandise was unsupported. *Id.* at 9–11. Accordingly, the determination as a whole was concluded unsupported by substantial evidence, and the issue was remanded for reconsideration. *Id.* at 12–13.

During remand, in its draft results Commerce continued to use the build-up methodology to value purchased cores, reasoning that it provided more accurate valuation of those than would the Thai import data, as the later were "a broad category covering many chemical and physical compositions." *See IDM* at 9. Commenting on the draft, DSMC argued that the build-up methodology continued to produce absurd results. DSMC Draft Cmts, R[4]-PDoc 24, at 13–18. From DSMC's perspective, the build-up methodology resulted in surrogate values for purchased cores that significantly diverged from the values for self-produced cores with similar characteristics, *id.* at 14–15, and it contended that [[

]], *id.* at 15–18. Thus, given that the agency's apparent intent in using the build-up methodology was to recreate the full market value of self-produced cores, DSMC contended that [[

]]. *Id.* DSMC further pointed out that its original appeal of the agency's core valuation methodology encompassed the valuation methodology as applied to Bosun as well as Weihai. *Id.* at 13 n.49.

In the final remand results, Commerce made no further change to the core valuation methodology employed in the draft results. *Redetermination* at 16–20. Commerce explained that the changes it had made only affected the valuation of Weihai's cores, as respondent Bosun Tools Co., Ltd.[5] had used a different reporting methodology for purchased cores. To reach that result, the *Redetermination* maintains that the decision not to rely upon the AUV for merchandise under Thai HTS 8202.31.10 is due to finding the build-up methodology more

[4] "R" denotes reference to remand administrative record documents.

[5] Herein, together with Bosun Tools Inc.,"Bosun".

product-specific than using the AUV for merchandise under that HTS item.[6] With respect to the determination to reject DSMC's comparison between the Thai AUV and Weihai's purchase prices from NME suppliers, the *Redetermination* reiterates that the Thai AUV were not compared to those purchase prices in order to evaluate the reasonableness of the Thai AUV substantively but rather to identify the distortion in DSMC's comparison methodology.[7] Commerce claims that, as corrected for inconsistent quantity units, the build-up methodology properly accounts for core weight.[8]

DSMC here argues Commerce still fails to explain or support its cores build-up methodology because the *Redtermination* still does not account for the full amount of steel used to produce cores and results in inaccuracy. DSMC Comments at 16–21. "The agency has valued purchased cores using the weight of the steel in the core as a starting point, while it has valued self-produced cores using the weight of the steel employed in producing those cores as a starting point" and "[t]he record indicates that the amount of steel used to produce a core is greater than the amount of steel that ultimately is incorporated into the core; *i.e.*, the production of cores from steel sheet/plate results in scrap loss." *Id*. at 19, referencing, *inter alia,* DSMC's Draft Remand Comments at 15–18 & Ex. 2. In other words, "the agency has valued purchased cores as though scrap was not generated at all in the production of such goods, although nothing on the record suggests that this is possible." *Id*. at 20, referencing *id*. at 16 & Ex. 2. *See Redetermination* at 18–19.

[6] *See Redetermination* at 5–12 (concluding to use the build-up methodology based on product specificity). Therefore, or thereby, Commerce abandoned the conclusion that the Thai AUV is "unreasonably high" in preferring build-up methodology over import data. The *Redetermination* also explains that "build up" methodology is based largely on import data in any event. Elaborating thereon, the defendant states: that products covered by Thai HTS 8202.31.10 are different from diamond sawblades; that steel for diamond sawblades has certain chemical and physical compositions to meet a minimum level of hardness to satisfy specific safety requirements; that Thai HTS 8202.31.10 covers steel sawblade blanks of all chemistries and sizes; and that there is no information on the record regarding the chemical or physical composition of the products covered by Thai HTS 8202.31.10 in contrast to record detail of the chemical and physical compositions of the cores Weihai purchased and the steel Weihai consumed in its own production of cores. Def's Resp. at 16, referencing *Redetermination* at 8–10.

[7] *See Redetermination* at 11–12. In the *Final Results*, Commerce found that DSMC's comparison did not properly take the weight of Weihai's purchased cores into account. *IDM* at 39. To demonstrate, Commerce tested the comparison methodology by making the same comparison after taking core weight into account and concluded that DSMC's proposed AUV overvalued cores. *See Redetermination* at 11; *IDM* at 39. In other words, the defendant quotes, Commerce made the comparison only to "highlight flaws in the methodology DSMC used to compare its proposed Thai AUV with Weihai's purchase prices from NME suppliers." *Redetermination* at 11.

[8] *Id*. at 12.

The defendant contends that Commerce's methodology did take scrap into account in the volume of steel used to produce the cores and that DSMC's argument "does not take into account our offset of scrap from self-produced cores in the normal value calculation" as the reason why DSMC's comparison showed significant difference in valuation for Weihai's purchased cores. *Id*. at 18. Noting DSMC's statement that it would not oppose applying a scrap offset to the cores Weihai purchased if Commerce also compensates for the larger quantity of steel consumed,[9] the defendant also contends that DSMC did not argue for a scrap offset in the build-up methodology for purchased cores in its comments to Commerce, as DSMC had only argued that Commerce should [[

]]. *See* DSMC Draft Remand Comments at 17.

Whether that is mere semantics, the defendant fundamentally relies on Commerce's explanation for using the quantity of steel that it did in its build-up methodology: "the purchased core would be the core itself, exclusive of scrap that may have resulted from producing the core". *Redetermination* at 18. The defendant argues that applying a scrap offset for the purchased cores would be inconsistent with Commerce's practice regarding scrap offsets, which is not to grant a scrap offset without production or inventory records of scraps produced. Def's Resp. at 20, referencing *American Tubular Products, LLC v. United States*, 847 F.3d 1354, 1361 (Fed. Cir. 2017) (affirming Commerce's denial of scrap offset due to respondent company's "failure to document scrap production"). In this case, the defendant continues, Commerce has no records indicating the volume of scrap produced by Weihai's unaffiliated NME suppliers. Def's Resp. at 20. And without the information necessary to apply a scrap offset, and without detailed information on the production process of Weihai's NME suppliers, the defendant persists, Commerce valued the cores based on the volume of steel actually contained in the cores, which the defendant argues was reasonable.

Generally speaking, Commerce's grant of a scrap offset to a respondent's NV is on a conceptually different footing than consideration of the scrap that would be produced in production by a supplier. DSMC's fundamental argument is this:

> [T]he difference between the agency's calculated value for the self-produced cores in the example and the value for purchased cores is greater than [[ ]]. DSMC's Comments at Exhibit 1. The values for the self-produced cores are [[ ]] than the

[9] *See* DSMC Comments at 20.

> values calculated for the purchased cores. *Id*. [at] 7[.] There is a significant quantum of the difference in value, accordingly, that is not attributable to differences in steel grade. Indeed, even if one applies the same surrogate value to both types of steel, the value of the self-produced cores ranges from [[ ]], still [[ ]] higher than the purchased core valuation of [[ ]]. This may go some way to explaining why the agency did not attempt to illustrate the flaws in DSMC's example by presenting a comparison between purchased and self-produced cores that use the identical grade of steel. Doing so does not resolve the differences in valuation; rather, it confirms that such differences exist.
>
> The Department next confirms that the difference in the valuation of similar, if not identical, self-produced and purchased cores is at least partly a function of the distinct treatment of scrap between cores that are purchased and those that are self-produced. [*Redetermination* ] at 18–19. This too confirms that the problem pointed out by DSMC — significantly divergent values for products with highly similar, if not identical, cores — exists. It also, as indicated in DSMC's comments on the draft results, suggests the reason why the problem exists. DSMC's Comments at 15–18. But contrary to the agency's apparent assumption, [*id.*] at 18–19, explaining why a problem exists does not make the problem go away.

DSMC Comment at 18–19 (bracketing added).

The court can agree in part. The implication that application of a scrap offset for the self-produced cores aligns their weights with those of purchased cores is not an unreasonable explanation for why Commerce declined to adjust its build-up methodology in the manner suggested by DSMC, but in the final analysis the defendant's response does not persuade that a problem does not still exist with respect to the build-up methodology as applied to purchased cores in light of the apparent disparity in value(s) when compared to the value(s) the methodology sums for the self-produced cores, as outlined above by DSMC. *Ceteris paribus*, no rational producer would continue to self-produce cores if purchased cores can be had at values [[ ]] lower than that of self-produced cores. There may be another explanation, but assuming that is not an inaccurate characterization of the problem (*i.e.*, the extent or degree of discrepancy), the court is not in a position to opine a reconciliation, which is a matter that at least requires further reconsideration and elucidation via

second remand. *Cf., e.g.*, 19 U.S.C. §1677e(a)(1), *with, e.g., Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT ___, ___, 815 F. Supp. 2d 1311, 1317 (2012) (use of facts otherwise available authorized when necessary information is not available in the record).

II. Selection of Surrogate Financial Statement(s)

Commerce was also requested to address issues potentially undermining the suitability of the financial statements for Trigger Co. Philippines, Inc. ("Trigger") as an appropriate surrogate, including Trigger's status as a captive producer, its use of prison labor and certain tax liabilities, as well as clarify Commerce's conclusion that the Philippines, which was not on the list of economically-comparable countries prepared by Commerce's Office of Policy for the review ("OP List"), was nonetheless concluded to be at a comparable level of economic development to the PRC in the final results. *See* Slip Op. 17–36 at 27, 29–33 (identifying financial statements issues). On remand, in order to address those, Commerce solicited additional financial statement information for countries on the OP List. DSMC submitted KM's 2012 financial statements, and both DSMC and Bosun submitted 2013 financial statements for Thai Gulf, a producer of comparable merchandise from the primary surrogate country.[10] Commerce claims its selection of Thai Gulf's financial statements mooted the concerns with respect to Trigger's financial statements. *See Redetermination* at 12–13.[11] And as it had done for the original final results, Commerce on remand declined to use KM's financial statements claiming they lacked detail, specifically their failure to provide beginning and ending inventories. *See id.* at 22.

DSMC here challenges Commerce's decision to rely upon the Thai Gulf financial statements alone rather than an average or combination of the 2013 Thai Gulf financial statements and the 2013 KM financial statements. *See* DSMC's Draft Remand Comments, R-PDoc 27, R-CDoc 9, at 7–10. DSMC argues that Thai Gulf and KM are both producers of comparable merchandise and that Thai Gulf's financial statements are no more detailed regarding inventory movements

[10] Bosun also submitted financial statements for two other companies. DSMC argued those financial statements were problematic, and Commerce agreed. *See Redetermination* at 13–14.

[11] The defendant contends that Thai Gulf's statements do not suffer from the same shortcomings as Trigger's, *i.e.*, there is no indication on the record that Thai Gulf is a captive producer, employs prison labor, or would otherwise not serve as a suitable surrogate, and the reliability of the 2013 Thai Gulf financial statements is unchallenged here. *See* Def's Resp. at 11, referencing *Redetermination* at 12–13 (discussing the selection of the Thai Gulf statements).

than KM's financial statements. *See id.* at 11. DSMC therefore argues that Commerce cannot justify using Thai Gulf's financial statements alone and not use KM's as well by invoking the level of detail of each statement. *See* DSMC Comments at 14 ("[a]ccordingly, the agency's rationale for finding Thai Gulf's statement, but not KM's statement, sufficiently detailed is unclear").

Specifically, DSMC maintains that the agency's decision to reject KM's 2013 financial statements is not adequately explained or supported because the 2013 Thai Gulf financial statements are actually no more detailed regarding inventory movements than KM's statements and that in fact it is actually KM's that is the more detailed of the two schedules with respect to inventory movements since it includes a line item for "supply" in addition to values for finished goods and raw materials at the end of the 2012 and 2013 financial years. *Cf.* DSMC Original SV Submission at Ex. 1A, p. 9, *with* DSMC Submission of New Financial Statements at Ex. 5, p. 5. Given that Thai Gulf's financial statements contain no greater level of detail than KM's with respect to inventory movements but was deemed suitably detailed, DSMC argues, it is not clear what type of "beginning and ending inventories" information the agency perceived as fatally missing from KM's statement.

Elaborating, DSMC argues that while a lack of "beginning and ending inventories" is the only specific flaw Commerce identified in KM's financial statements, the agency implied that other relevant, but unidentified, data were missing as well. *See Redetermination* at 22. In the *Redetermination*, Commerce cites to its *Final Results* in explaining its decision on remand to reject KM's 2013 statement for lack of detail; however, the *Final Results*, like the remand results, indicate only that "KM's financial statements lack detailed line items such as inventories open and closed." *IDM* at 47. This, DSMC contends, does not identify or adequately explain what other relevant information the agency perceived as missing from KM's financial statements.

DSMC's comments provide a side-by-side comparison of KM's and Thai Gulf's 2013 statements, and the comparison indicates that the statements are highly similar, without any obvious deficiency in KM's 2013 financial statements as compared with Thai Gulf's. DSMC details that both statements begin with approximately one page of auditor's notes before providing high-level balance sheet information on current and non-current assets, liabilities, and shareholders'/owners' equity;[12] both contain profit and loss statements that, in turn,

[12] *Cf.* DSMC Original SV Submission at Ex. 1A, pp. 1–2, *with* DSMC New Submission at Ex. 5, pp. 1–2.

contain an equal number of line items for identical categories of income/expenses;[13] both contain equally detailed statements of changes in shareholders' equity;[14] both provide schedules for costs of manufacturing, selling expenses, administrative expenses, and other expenses;[15] and the notes to both companies' statements first provide general information and then describe the basis for the preparation of the statements and accounting policies before providing schedules for (1) cash/cash equivalents, (2) inventories, (3) property, plant & equipment, (4) other non-current assets, (5) trade accounts payable, and (6) other current liabilities.[16] KM's statement also includes schedules for long term loans and significant expenses, while Thai Gulf's statement also includes a schedule for other revenue.[17]

In other words, DSMC argues, neither schedule appears to be missing anything significant, and neither company's financial statements uniformly appear of greater detail with respect to the number of line items in particular schedules; thus, DSMC argues, it is unclear from the record why the agency found KM's financial statements to be insufficiently detailed in comparison with Thai Gulf's as there is no explanation of what other information the agency perceived as missing. Accordingly, DSCM contends, the agency's rationale for finding Thai Gulf's financial statements but not KM's sufficiently detailed is unclear, particularly since KM's statement appears to contain more detail regarding inventories than Thai Gulf's, and although the agency alluded to other issues, it did not explain what those issues were, and review of the schedules themselves appears to show that they are highly similar in terms of detail overall. *See generally* DSMC Comments at 9–15.

The defendant responds by contending that DSMC failed to exhaust its administrative remedies before Commerce in not arguing that the level of detail in KM's financial statements required their inclusion, *see* 28 U.S.C. §2637(d), and it also argues Commerce's determination that the 2013 Thai Gulf financial statements had a greater level of detail than the KM financial statements was substantially supported by record evidence in any event. Therefore, the defendant maintains,

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[13] *Cf.* DSMC Original SV Submission at Ex. 1A, p. 3, *with* DSMC New Submission at Ex. 5, p. 3.

[14] *Cf.* DSMC Original SV Submission at Ex. 1A, p. 4, *with* DSMC New Submission at Ex. 5, p. 3.

[15] *Cf.* DSMC Original SV Submission at Ex. 1A, pp. 5–7, *with* DSMC New Submission at Ex. 5, pp. 7–8.

[16] *Cf.* DSMC Original SV Submission at Ex. lA, pp. 8–11, *with* DSMC Submission of New Financial Statements at Ex. 5, pp. 3–6.

[17] *Cf.* DSMC Original SV Submission at Ex. lA, pp. 8–11, *with* DSMC Submission of New Financial Statements at Ex. 5, pp. 6–7.

Commerce's determination to rely on the Thai Gulf financial statements alone but not the 2013 KM financial statements is supported by substantial evidence and in accordance with law. The defendant further argues DSMC's own submissions to Commerce recognize a greater level of detail for Thai Gulf's statements than KM's statements in that the Thai Gulf statements provide finished goods beginning and ending balance line items which can be used to populate the "Change in Finished Goods" column. Def's Resp. at 13, referencing DSMC Submission of New Financial Statements (July 25, 2017) ("DSMC New Submission"), R-PDocs 4–5, at Ex. 5. By contrast, the worksheet DSMC provided to accompany KM's 2013 financial statements provides a single line item for "Direct Materials" but no line item information to populate the "Change in Finished Goods" column. *Id*. at 13–14, referencing Letter from Wiley Rein LLP to Sec'y Commerce, re: Diamond Sawblades and Parts Thereof from the People's Republic of China: Submission of Surrogate Value Information (Nov. 4, 2014), PDoc 263, CDoc 201, at Ex. 1A ("DSMC Original SV Submission"). The defendant explains that Commerce uses the data for these line items in calculating the materials included in the cost of goods sold, which in turn is used in the calculation of financial ratios for overhead, profit, and selling, general, and administrative expenses. *See, e.g.*, Surrogate Values Spreadsheet, R-PDoc 17, at Financial Ratios (R) Thai Gulf (providing the data and calculations to determine financial ratios based on the Thai Gulf financial statements). Thus, the defendant insists, DSMC's own submissions indicate that KM's 2013 statements lacked details for inventories open and closed.

As noted above, the standard of review applicable to Commerce's decisions in administrative reviews, including decisions on remand, requires that the agency provide a 'rational connection between the facts found and the choice made" and "articulate a satisfactory explanation for its action.'" *E.g. Baroque Timber Indus. (Zhongshan) Co. v. United States*, 36 CIT ___, ___, 971 F. Supp. 2d 1333, 1339–40 (2014) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) and *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)). This means more than merely offering a conclusory statement of its findings. *Shanghai Foreign Trade Enterprises, Co. v. United States*, 28 CIT 480, 488 (2004); *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 611 (2002).

On the one hand, the defendant's further explanation, above, of how Commerce used the Thai Gulf statement, while helpful, is essentially

*post hoc* as to Commerce's general statement that the KM statement "lacked some details such as beginning and ending inventories". And comparison of KM's 2013 statement with Thai Gulf's 2013 statement does not apparently, *see supra*, reveal greater detail with respect to inventory movements in one or the other, nor does it reveal any other appreciable deficiencies in KM's statement. Rather, as DSMC argues, the two statements appear highly similar in overall detail. Furthermore, if the defendant's explanation above is complete and accurate, it still remains unclear to the court whether the KM statement is unusable, for example whether the statement provides sufficient information to discern what the "change in finished goods" is, or, for that matter, the extent to which that is relevant or necessary, given that the KM statement provides amounts for "raw materials for manufacturing," "supply" and "cost of manufacturing," among other line items. If all else is equal, comparison of the 2013 KM financial statements *vis-à-vis* the Thai Gulf financial statements would seem commonsensical.

On the other hand, the defendant appears correct that DSMC did not argue this "level" of detail of KM's financial statement before Commerce, and therefore the latter cannot be faulted for not undertaking a side-by-side comparison of the financial statements in this instance. *See, e.g., Jiaxing Brother Fastener Co. v. United States*, 34 CIT 1455, 1465, 751 F. Supp. 2d 1345, 1355 (2010) (the court shall, "where appropriate, require the exhaustion of administrative remedies" in trade cases) (quoting 28 U.S.C. § 2637(d)). *see also Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (while not absolute, the statute "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies"). Nonetheless, in view of DSMC's presentment, the administrative determination needs to be remanded for further explanation in accordance with the foregoing, because if the DSMC is correct, and its presentment here is accurate, then the determination as it stands would seem to be at odds with administrative practice. *See, e.g., Dupont Teijin Films v. United States*, 38 CIT ___, ___, 997 F. Supp. 2d 1338, 1346 (2014) ("[w]hen the record contains multiple contemporaneous financial statements from different producers, Commerce's practice is to average the financial statements to eliminate any potential distortions that may arise from any one producer's statement" (referencing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368, 1374 (Fed. Cir. 2010)); *Jiaxing Bro. Fastener Co. v. United States*, 38 CIT ___, ___, 11 F. Supp. 3d 1326, 1331 (2014) ("Commerce has a stated

preference . . . to use multiple financial statements to calculate surrogate financial ratios"), *aff'd*, 822 F.3d 1289 (Fed. Cir. 2016).

The point here is not a reweighing of the evidence, only that DSMC's comments call into question whether it can be concluded that substantial evidence of record supports Commerce's rejection of the 2013 KM financial statement and its reliance upon the 2013 Thai Gulf statement alone. The defendant's response does not address the entirety of the DSMC's arguments, and based on the record it is therefore unclear that a rational connection between it and the agency's choice has been made, nor has the agency adequately explained that choice or cited record evidence that would support it. Thus, it cannot be concluded at this time that substantial evidence supports the finding that KM's 2013 financial statements lack the necessary details for the purpose of determining the margin(s) of dumping.

III. Separate Rate Respondents

DSMC also argues that any further changes to the margins for the mandatory respondents would impact the weighted-average calculation of the dumping margin assigned to non-selected companies that demonstrated their eligibility for a separate rate. *See* DSMC Comments at 21–22. In accordance with the foregoing, this issue must be remanded as well.

*Conclusion*

For the above reasons, *Diamond Sawblades and Parts Thereof from the Republic of China*, 80 Fed. Reg. 32344 (June 8, 2015), is hereby remanded again to the International Trade Administration, U.S. Department of Commerce for further proceedings consistent with this opinion.

The parties shall provide comment, or indication of none, on the sufficiency of the information indicated for redaction from the confidential version of this opinion (indicated above by double bracketing) to the Clerk of the Court within seven (7) days, including any indication of information that should be but is not presently indicated as subject to redaction.

The second results of remand shall be due June 20, 2018, and by the fifth business day after the filing thereof, the court anticipates that the parties will file a joint status report with a proposed schedule for further comments, if any, on those results.

**So ordered.**

Dated: March 22, 2018
New York, New York

*/s/ R. Kenton Musgrave*
R. KENTON MUSGRAVE, SENIOR JUDGE

## Slip Op. 18–27

EREGLI DEMIR VE CELIK FABRIKALARI T.A.S, et al., Plaintiffs, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00218
**PUBLIC VERSION**

[Granting in Part and Denying in Part Plaintiff's and Consolidated Plaintiffs' Rule 56.2 Motions for Judgment on the Agency Record.]

Dated: March 22, 2018

*David L. Simon*, Law Office of David L. Simon, of Washington, DC, argued for Plaintiff Ereğli Demir ve Çelik Fabrikalari T.A.Ş. With him on the brief was *Mark B. Lehnardt*, Mark B. Lehnardt, Esq., of Washington, DC.

*Matthew M. Nolan*, Arent Fox LLP, of Washington, DC, argued for Consolidated Plaintiffs Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. With him on the brief was *Nancy A. Noonan*.

*Renée A. Burbank*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brandon J. Custard*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*David C. Smith, Jr.* and *Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, argued for Defendant-Intervenor ArcelorMittal USA LLC. With them on the brief were *Paul C. Rosenthal* and *R. Alan Luberda*. *Roger B. Schagrin* and *Christopher T. Cloutier*, Schagrin Associates, of Washington, DC, for Defendant-Intervenors Steel Dynamics, Inc. and SSAB Enterprises LLC.

*Stephen A. Jones* and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for Defendant-Intervenor AK Steel Corporation.

*Jeffrey D. Gerrish* and *Luke A. Meisner*, Skadden Arps Slate Meagher & Flom, LLP, of Washington, DC, for Defendant-Intervenor United States Steel Corporation.

*Alan H. Price* and *Christopher B. Weld*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Corporation.

### *OPINION AND ORDER*

**Barnett, Judge:**

Plaintiff Ereğli Demir ve Çelik Fabrikalari T.A.Ş. ("Erdemir") and Consolidated Plaintiffs Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. (together, "Çolakoğlu") (collectively, "Plaintiffs"), move, pursuant to United States Court of International Trade ("USCIT" or "CIT") Rule 56.2, for judgment on the agency record, challenging the United States Department of Commerce's ("Commerce" or the "agency") final results in the sales at less than fair value investigation

of certain hot-rolled steel flat products from the Republic of Turkey.[1] *See Certain Hot-Rolled Steel Flat Products from the Republic of Turkey*, 81 Fed. Reg. 53,428 (Dep't Commerce Aug. 12, 2016) (final determination of sales at less than fair value; 2014–2015) ("*Final Determination*"), ECF No. 41–1, and accompanying Issues and Decision Mem., A-489–826 (Aug. 4, 2016) ("I&D Mem."), ECF No. 41–3, as amended by *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom*, 81 Fed. Reg. 67,962 (Dep't Commerce Oct. 3, 2016) (am. final affirmative antidumping determinations for Australia, the Republic of Korea, and the Republic of Turkey and antidumping duty orders), ECF No. 41–2.

Erdemir challenges Commerce's determinations regarding its home market and U.S. dates of sale. *See* Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 52, and Mem. in Supp. of Mot. of Pl. Ereğli Demir ve Çelik Fabrikalari T.A.Ş., for J. Upon the Agency R. Pursuant to Rule 56.2 ("Erdemir Mem."), ECF No. 52–1. Çolakoğlu challenges Commerce's determinations regarding duty drawback, indirect selling expenses, corrections to international ocean freight expenses, cost-averaging methodology, and treatment of excess heat as a coproduct. *See* Confidential Pls.' Mot. for J. on the Agency R., ECF No. 53, and Confidential Pls. Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 ("Çolakoğlu Mem."), ECF No. 53–1. Defendant United States (the "Government") and Defendant-Intervenors urge the court to sustain Commerce's determinations. *See* Confidential Def.'s Mem. in Opp'n to Rule 56.2 Mots. for J. on the Agency R. ("Gov. Resp."), ECF No. 59; Confidential Def.-Ints.' Resp. in Opp'n to Pls.' Mots. for J. on the Agency R. ("Def.-Ints. Resp."), ECF No. 61. For the following reasons, the court grants Erdemir's motion as to its home market date of sale. The court further grants Çolakoğlu's motion as to duty drawback and corrections to international ocean freight expenses. Plaintiffs' motions are denied in all other respects. The issues upon which the court has granted Plaintiffs' respective motions are remanded to the agency for reconsideration or further explanation.

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[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 41–4, and a Confidential Administrative Record ("CR"), ECF No. 41–5. Parties submitted joint appendices containing all record documents cited in their briefs. *See* Public Joint App. ("PJA"), ECF No. 70; Confidential Joint App. ("CJA"), ECF No. 69; Confidential Suppl. App. of Pl. Erdemir, ECF No. 80; Public Suppl. App. of Pl. Erdemir, ECF No. 81; Çolakoğlu's Confidential Suppl. App. ("Çolakoğlu Suppl. CJA"), ECF No. 82; Çolakoğlu's Non-Confidential Suppl. App. ("Çolakoğlu Suppl. PJA"), ECF No. 83; Çolakoğlu's Confidential Second Suppl. App. ("Çolakoğlu 2nd Suppl. CJA"), ECF No. 85; Çolakoğlu's Non-Confidential Second Suppl. App. ("Çolakoğlu 2nd Suppl. PJA"), ECF No. 86. The court references the confidential versions of the relevant record documents and briefs, if applicable, throughout this opinion.

## BACKGROUND

Commerce initiated this anti-dumping duty investigation of hot-rolled steel flat products (“hot-rolled steel”) on August 31, 2015 in response to petitions filed by domestic producers of hot-rolled steel. *See Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom*, 80 Fed. Reg. 54,261 (Dep’t Commerce Sept. 9, 2015) (initiation of less-than-fair-value investigations; 2014–2015). Commerce selected Çolakoğlu and Erdemir as mandatory respondents in the investigation. *See* Respondent Selection Mem. at 5–6, CJA Tab 1.[2] The period of investigation (“POI”) ran from July 1, 2014 to June 30, 2015. *Final Determination*, 81 Fed. Reg. at 53,428.

On March 22, 2016, Commerce issued its *Preliminary Determination. See Certain Hot-Rolled Steel Flat Products From the Republic of Turkey*, 81 Fed. Reg. 15,231 (Dep’t Commerce March 22, 2016) (aff. prelim. determination of sales at less than fair value; 2014–2015), and accompanying Preliminary Decision Mem., A-489–826 (“Prelim. Mem.”), CJA Tab 19, PJA Tab 19, PR 252, ECF No. 69–1.

Commerce conducted sales verifications of Çolakoğlu and Erdemir in Istanbul, Turkey from March 28 through April 8, 2016, and of Çolakoğlu in Houston, Texas, from May 5 through May 7, 2016. I&D Mem. at 2. Commerce conducted cost verifications of Erdemir in Eregli, Turkey, from April 18 to April 22, 2016, and of Çolakoğlu in Istanbul, Turkey, from April 25 to April 29, 2016. *Id.* at 2.

On August 4, 2016, Commerce issued its *Final Determination. See Final Determination*, 81 Fed. Reg. at 53,428. In the *Final Determination*, Commerce calculated a weighted-average dumping margin of 3.66 percent for Erdemir and 7.15 percent for Çolakoğlu. 81 Fed. Reg. at 53,429.

On October 14, 2016, Erdemir timely instituted this action. *See* Summons, ECF No. 1. On October 28, 2016, Çolakoğlu also filed suit challenging *the Final Determination. See* Summons, ECF No. 1 (Court No. 16–232). On January 18, 2017, the court consolidated the two actions. *See* Order (Jan. 18, 2017), ECF No. 45.[3]

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[2] The Respondent Selection Memorandum identifies Çolakoğlu and “Iskenderun Demir Ve Celik” (“Iskenderun”) as the mandatory respondents. Respondent Selection Mem. at 5. Iskenderun is Erdemir’s subsidiary. *See, e.g.*, Gov. Resp. at 4.

[3] Additional factual and procedural background is contained in the relevant section when helpful to the analysis.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[4] and 28 U.S.C. § 1581(c) (2012).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938)). It "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports Commerce's determination, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, that a plaintiff can point to evidence that detracts from the agency's conclusion or the possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)).

## DISCUSSION

### I. Erdemir's Rule 56.2 Motion

#### A. Legal Framework for Date of Sale Determinations

To determine whether the subject merchandise is being sold at less than fair value, Commerce compares the export price or, as is the case

[4] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition.

here, the constructed export price[5] of the subject merchandise to its normal value.[6] *See generally* 19 U.S.C. 1673 *et seq*. Normal value is "the price [of the foreign like product] at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." *Id.* § 1677b(a)(1)(A).

The antidumping statute does not state a particular methodology for determining the "time of sale" for purposes of that comparison. However, the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act defines "date of sale" for the purposes of currency conversion as the "date when the material terms of sale are established." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 810 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4153.[7] Consistent with the SAA, Commerce's regulations prescribe that "[i]n identifying the date of sale of the subject merchandise . . ., the [agency] normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business." 19 C.F.R. § 351.401(i) (2015). The regulation further prescribes, however, that "the [agency] may use a date other than the date of invoice if [it] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." *Id.*; *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,349 (Dep't Commerce May 19, 1997) ("*Preamble*") ("If [Commerce] is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, [Commerce] will use that alternative date as the date of sale").[8] In other words,

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[5] Constructed export price is defined as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter," with applicable adjustments pursuant to § 1677a(c) and (d). 19 U.S.C. § 1677a(b)

[6] When, as here, the subject merchandise is sold or offered for sale "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price," normal value is determined on the basis of home market sales. 19 U.S.C. § 1677b(a)(1)(B).

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

[8] In the *Preamble*, Commerce further explains that

> as a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established. In [Commerce's] experience, price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced. The existence of an enforceable sales agreement between the buyer and the seller does not alter the fact that, as a practical matter, customers frequently change their minds and sellers are responsive to those changes. [Commerce] also has found that in many industries, even though a buyer and

Commerce's date of sale regulation establishes a "rebuttable presumption" in favor of the invoice date unless the proponent of a different date produces satisfactory evidence that the material terms of sale were established on that alternate date. *Colakoglu Metalurji A.S. v. United States*, 29 CIT 1238, 1240, 394 F. Supp. 2d 1379, 1380–81 (2005); *see also Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 41 CIT ___, ___, 256 F. Supp. 3d 1260, 1263 (2017) ("Commerce's date of sale regulation . . . squarely plac[es] the burden on interested parties challenging the presumptive invoice date[] to remove any doubt about when material terms are firmly and finally set . . . .") (citation omitted).

Material terms of sale may include price, quantity, and delivery and payment terms. *See, e.g.*, *Sahaviriya Steel Industries Public Co. Ltd. v. United States*, 34 CIT 709, 727, 714 F. Supp. 2d 1263, 1280 (2010), *aff'd*, 649 F.3d 1371 (Fed. Cir. 2011) (citations omitted).[9] Commerce also has viewed the specification of an aggregate quantity tolerance level as a material term because of its potential to effect quantity. *See Nakornthai Strip Mill Public Co. Ltd. v. United States*, 32 CIT 553, 561, 558 F. Supp. 2d 1319, 1327 (2008); *Sahaviriya Steel*, 34 CIT at 727, 714 F. Supp. 2d at 1280. "[E]vidence that material terms of sale changed after the contract date is relevant to determining the date on which the parties had a real meeting of the minds." *Nucor Corp. v. United States*, 33 CIT 207, 264, 612 F. Supp. 2d 1264, 1312 (2009) (internal quotation marks omitted). "In choosing a date of sale, Commerce weighs the evidence presented and determines the significance of any changes to the terms of sale involved." *Sahaviriya Steel*, 34 CIT at 728, 714 F. Supp. 2d at 1263; *see also Nakornthai III,* 33 CIT at 336, 614 F. Supp. 2d at 1333 (because Commerce typically disregards insignificant changes to material terms, the record supporting a finding that material terms were not set until invoicing must also "support the finding that [] change[s] to the material terms represented in the contract [were] significant").

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> seller may initially agree on the terms of a sale, those terms remain negotiable and are not finally established until the sale is invoiced.

62 Fed. Reg. at 27,348–49.

[9] The Government contends this court *and the U.S. Court of Appeals for the Federal Circuit* ("Federal Circuit") have affirmed Commerce's consideration of payment terms as material terms in the date of sale analysis. Gov. Resp. at 39 (citing, *inter alia*, *Sahaviriya Steel*, 34 CIT 709, 714 F. Supp. 2d 1263, which the Federal Circuit affirmed, 649 F.3d 1371). In *Sahaviriya Steel*, the CIT favorably referenced *Nakornthai III*, noting that price, quantity, delivery terms and payment terms were among the terms of sale regarded as "material" by Commerce. 34 CIT at 727, 714 F. Supp. 2d at 1280; *see also Nakornthai Strip Mill Public Co. Ltd. v. United States* ("*Nakornthai III*"), 33 CIT 326, 614 F. Supp. 2d 1323 (2009). On appeal to the Federal Circuit, however, the only issues challenged were whether Commerce properly conducted a changed circumstances review and exercised its authority pursuant to a partial revocation. *See Sahaviriya Steel*, 649 F.3d at 1372–73.

### B. Commerce's Reliance on the Invoice Date as the Date of Sale for Erdemir's Home Market Sales

#### 1. Factual Background

For home market sales, Erdemir uses an online portal called "ErdemirOnline" to interact with its customers. *See* Sect. A Questionnaire Resp. of Ereğli Demir ve Çelik Fabrikalari T.A.Ş. and Iskenderun Demir ve Çelik A.Ş ("Erdemir § A QR") at 19, CJA Tab 3, CR 25–58, PJA Tab 3, PR 107–113, ECF No. 69. Erdemir described the sales process as: (1) the customer places an order via email or fax stating certain requirements (including quantity, dimension, thickness, and quality); (2) Erdemir contacts the customer to review the order; (3) if the order is deemed suitable, Erdemir transmits to the customer a pro forma invoice via ErdemirOnline, email, or fax, stating the "order details, delivery details, price information and quotation with sale price and further information related to time of giving of order guarantee (option time)"; (4) the customer accepts the order via ErdemirOnline (the "click" date) within a given timeframe (referred to as "option time"). Erdemir § A QR, Ex. A-08 ("Domestic Terms & Conditions") ¶¶ 5.1–5.4; *see also* Erdemir § A QR, Ex. A-10 at 4 (screen shot of customer's acceptance through ErdemirOnline); Erdemir § A QR, Ex. A-10 at 5 (sample pro forma invoice for a home market sale).

When the order is ready to ship, the customer is notified through ErdemirOnline. Domestic Terms & Conditions ¶ 9.1. The actual quantity sold is subject to a leeway or tolerance based on the ordered quantity. *Id.*¶ 9.4. The tolerances for homes market sales are: (1) +/-50 percent for orders less than 100 metric tons ("MT"); (2) +/-20 percent for orders 100–150MT; and (3) +/-10 percent for orders above 150MT. *Id.*[10] The unit price is stated (in USD/ton) on the pro forma invoice, deviations from which are not permitted. *Id.*¶ 9.2. The final payable amount constitutes the unit price from the pro forma invoice, multiplied by the actual tonnage, plus value added tax. *Id.*¶ 9.3. When making payment, the customer may elect to pay in cash or via credited (term) payment. *Id.*¶ 9.4(a)-(b). If the customer selects a credited payment, it must make a pre-determined down payment before the payment deadline. *Id.*¶ 9.4(b).

#### 2. Parties' Contentions

Erdemir contends that Commerce erred in rejecting the "click date" as the date of sale. Erdemir Mem. at 17–20. Commerce reasoned that

[10] Each coil weighs around 25 tons. *See* Erdemir § A QR, Ex. A-10 at 1 (sample home market sales invoice).

the payment term (cash or credited payment) is not fixed until the merchandise is ready to be picked up and the customer elects a cash or credited payment. *See id.* at 17–18. Erdemir contends that this election is included in the Domestic Terms & Conditions and, therefore, does not constitute a change. *Id*. at 18–20; *see also* Confidential Reply Br. in Supp. of Mot. of Pl. Ereğli Demir ve Çelik Fabrikalari T.A.Ş., for J. Upon the Agency R. Pursuant to Rule 56.2 ("Erdemir Reply") at 1–4, ECF No, 65. Erdemir further contends that, to the extent the election of cash or credited payment is considered a "change" to a contract term, "the change is immaterial because Erdemir receives the same net value [from] the sale in either event." Erdemir Mem. at 19; Erdemir Reply at 2.[11]

The Government contends that Erdemir failed to produce sufficient evidence that the material terms of sale were established upon the "click date." Gov. Resp. at 36. The Government further contends that the flexibility afforded by Erdemir's Domestic Terms & Conditions do not overcome Commerce's regulatory presumption for the invoice date as the date of sale. Gov. Resp. at 36; *see also id.* at 37 ("Despite Erdemir's arguments, the fact remains that payment terms are a material term . . . .").

Defendant-Intervenors contend that Erdemir's argument regarding the immateriality of the customer's selection of cash or credited payment term "misunderstands [Commerce's] date of sale analysis." Def.-Ints. Resp. at 23. Pointing to Commerce's date of sale regulation, Defendant-Intervenors argue that "it is the date the material terms of sale relied on by [Commerce] are firmly and finally established that determines the date of sale, regardless of whether Erdemir views the specific terms as having any 'consequences.'" *Id.* at 24.

### 3. Analysis

In the underlying proceeding, Commerce pointed to Erdemir's fixing of the "total credit extension amount and per unit amount . . . in the home market sales invoices" to support its determination that "differences in the material terms of sale between order and sales invoice [dates]" merited selection of the invoice date as the home market date of sale. I&D Mem. at 26 & nn.132–33 (internal quotations and footnote citations omitted). Commerce also pointed to its "normal practice" of considering delivery and payment terms as ma-

[11] Erdemir explains that, for example, receiving "100 dollars today is equivalent to, say, 102.5 dollars at 90 days assuming the term-payment interest rate is 10 percent (100*10%*90/360=2.5)." Erdemir Mem. at 19 (citing Hr'g Tr. (June 23, 2016) ("Hr'g Tr.") at 79–80, CJA Tab 36, PJA Tab 36, PR 319, ECF No. 69–2). Thus, according to Erdemir, "whether the customer elects to pay $100 today or $102.50 in 90 days is immaterial." *Id.*

terial terms of sale. I&D Mem. at 26. Commerce's conclusory analysis fails to demonstrate a reasoned decision supported by substantial evidence.

The payment terms provided in Erdemir's Domestic Terms & Conditions expressly permit Erdemir's customers to pay by cash or credited payment when the goods are ready to ship. *See* Domestic Terms & Conditions ¶ 9.4. The payment term does not change in that the *option* to pay by cash or credited payment is withdrawn or otherwise modified; instead, Erdemir's customers exercise that option at the appropriate time. *See id.*; Erdemir Mem. at 18 (Commerce failed to consider evidence that the payment option "is embedded in the contract itself"); Erdemir Reply at 1 ("Commerce fails to identify any payment *term* that ever changed . . . ."). Commerce does not explain why the selection of the payment option at the so-called "ready date," when the cash or credit terms have been pre-established and are alleged to be economically equivalent,[12] represents a change to a material term. *See* I&D Mem. at 26. *Cf. Nakornthai III*, 33 CIT at 334–36, 614 F. Supp. 2d at 1332–33 (rejecting Commerce's assertion that the elimination of a line item tolerance level materially alters the contract merely because tolerance is considered material because it fails to address the significance of the change).[13]

The Government's attempt to distinguish *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 33 CIT 695, 735–36, 625 F. Supp. 2d 1339, 1372–73 (2009) is unpersuasive. Gov. Resp. at 38; *see also* Erdemir Mem. at 19–20 (analogizing *Habas*). In *Habas*, following a remand, Commerce reversed its prior determination and relied on the contract date as the date of sale despite a post-contract

[12] Erdemir discusses economic equivalence in the context of a hypothetical 100 USD sale, which it supports by way of reference to a general discussion at Commerce's hearing in the underlying administrative proceeding. *See* Erdemir Mem. at 19 (citing Hr'g Tr. at 79–80); *supra* note 11. Commerce did not reject Erdemir's proposed date of sale on the basis of non-equivalence. *See* I&D Mem. at 26. Because it is unclear whether the record contains actual evidence establishing the economic equivalence of the cash and credit payment terms, the degree to which this principle supports Erdemir's proposed date of sale is also unclear.

[13] The *Nakornthai III* court nonetheless sustained Commerce's date of sale determination on the basis of its factual findings regarding the significance of changes to payment and delivery terms, which were supported by substantial evidence. 33 CIT at 338, 614 F. Supp. 2d at 1334. Specifically, a change to a payment term permitted Nakornthai to receive a large portion of its payment earlier than the date set in the contract, while changes to the letter of credit's expiration date and last shipment dates gave Nakornthai additional time to ship the subject merchandise "while still being entitled to full payment." *Id.* (citations omitted). The court noted, however, that it was not affirming "Commerce's finding [] merely because these material contractual terms were amended," but on the basis of Commerce's "requisite factual findings of significance with regard to the change in payment and delivery terms." *Id.* In contrast, here, the optional payment term is not changed or renegotiated, and Commerce has not made any factual findings regarding significance. *See* Domestic Terms & Conditions ¶ 9.4; I&D Mem. at 26; Erdemir Mem. at 18 (the Domestic Terms & Conditions do not "leav[e] room for renegotiating or changing the payment terms").

billing adjustment because the adjustment was a late delivery fee to which parties had contractually agreed. 33 CIT at 735–36, 625 F. Supp. 2d at 1373. The Government asserts that *Habas* is distinguishable because the record in that case reflected a billing adjustment to one sale, whereas here, credit terms for several sales were finalized at the time of invoicing. Gov. Resp. at 38 (citation omitted). *Habas*, however, did not rely on the number of sales to which the billing adjustment applied; rather, the court sustained Commerce's determination because the contractual nature of the late delivery fee meant that material terms of sale had not changed. 33 CIT at 735–76, 625 F. Supp. 2d at 1373. Additionally, to the extent the Government seeks to rely on the number of sales for which credit terms were selected at the "ready date," the Issues and Decision Memorandum lacks any such analysis or reliance. *See* I&D Mem. at 26; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (the court may not accept "*post hoc* rationalizations for agency action," and may only sustain the agency's decision "on the same basis articulated in the order by the agency itself").

Defendant-Intervenors' reliance on the *Preamble* to Commerce's date of sale regulation is also unavailing. Defendant-Intervenors quote a passage stating that certain terms may remain negotiable even after the initial agreement between buyer and seller. Def.-Ints. Resp. at 23–24 (quoting *Preamble*, 62 Fed. Reg. at 27,348–49). Here, however, there is no evidence that terms remained negotiable, or that Erdemir's customers changed their minds and were accommodated by Erdemir. *Cf. SeAH Steel Corp., Ltd. v. United States*, 25 CIT 133, 136 &n.7 (2001) (sustaining Commerce's reliance on the invoice date when the record demonstrated that SeAH permitted a customer to request a *different* payment term between the contract date and invoice date). Accordingly, the court will remand Commerce's date of sale determination for Erdemir's home market sales for reconsideration or further explanation.

### C. Commerce's Reliance on the Invoice Date as the Date of Sale for Erdemir's U.S. Sales

#### 1. Factual Background

For sales to the United States, customers initiate the sales process through a written or oral inquiry, to which Erdemir responds with a written offer. Erdemir § A QR at 19. Erdemir subsequently issues a more detailed sales agreement, pro forma invoice, and technical data sheet specifying price, grade, size, shipping conditions, and quantity, which is then signed by both parties. *Id.* The general terms and conditions for U.S. sales accompanying the sales agreement state

that it "shall come into force when signed by both parties . . . ." Erdemir § A QR, Ex. A-09 (sample U.S. sales agreement) ("U.S. Terms & Conditions") ¶ 6.1. The pro forma invoice more specifically states that, "[u]pon receipt of the Pro-forma Invoice signed by the Buyer, it is at the ultimate discretion of the Seller to give final confirmation to the Pro-forma Invoice by the signing the same." Erdemir § A QR, Ex. A-9 (pro forma invoice) ("Pro Forma") Misc. ¶ 1. Thereafter, Erdemir's customer issues a letter of credit. Erdemir § A QR at 19. If the letter of credit is untimely, Erdemir has the option to accept or reject the letter of credit; extending the letter of credit opening term is at Erdemir's sole discretion. U.S. Terms & Conditions, Annex 3 ¶ 2.2. U.S. sales are subject to quantity tolerances in the following amounts: (1) +/-10 percent for line items over 200MT; (2) +/-10 percent for each lot; and (3) +/-10 percent for each sale (grand total). Erdemir § A QR, Ex. A-9 (technical specifications) ("Tech. Specs.") ¶ 3.2. For sizes/items equal to or less than 200MT, the tolerance may exceed +/-10 percent. *Id.*

**2. Parties' Contentions**

Erdemir contends that Commerce erred in rejecting the date upon which it signed the pro forma invoice as the date of sale on the basis of volume differences, multiple signature dates, and delays in opening letters of credit because (1) any differences between the quantities ordered and shipped were immaterial;[14] (2) in accordance with the U.S. Terms & Conditions and the pro forma invoice, "the only relevant [signature] date is the last date—that of Erdemir's signature"; and (3) the U.S. Terms & Conditions permit Erdemir to determine the consequences of an untimely letter of credit, which includes extending the opening term. Erdemir Mem. at 21–26; Erdemir Reply at 5–12.[15]

The Government contends that "Erdemir's relatively small number of U.S. sales" in conjunction with inconsistencies between the quantities ordered and shipped favored selecting the invoice date. Gov. Resp. at 41. The Government further contends that Commerce reasonably determined that the presence of "multiple document dates on the pro forma invoice" meant "that either the material terms changed

[14] Erdemir also points to the overall 0.06 percent quantity leeway for all U.S. sales as demonstrating the "insignifican[ce]" of any quantity variance. *See, e.g.*, Erdemir Mem. at 23. Because the pertinent inquiry focuses on when the contracting parties had a meeting of the minds as to their respective contracts, volume differences calculated on the basis of all U.S. sales are irrelevant, and the court has—correctly—rejected a similar argument in the past on the basis that it "would render meaningless the quantity tolerance levels negotiated by the contracting parties." *See Sahaviriya Steel*, 34 CIT at 729, 714 F. Supp. 2d at 1281.

[15] At oral argument, Erdemir abandoned its argument that the contract provisions permitting partial shipments resolved any quantity differences. *See* Erdemir Mem. at 22; Oral Arg. at 43:40–45:42.

at the last minute, or were not yet finalized when the document was signed." Gov. Resp. at 41–42 ("Commerce made a reasonable assumption that the printed date on the pro forma invoice was crossed out because the material terms changed at the last minute, or were not yet finalized when the document was signed.") . The Government also contends that the failure to timely open the letter of credit "supported the finding that the payment terms set forth in the pro forma invoices not only have the potential to change, but do change." Gov. Resp. at 39–40; *see also* Def.-Ints. Resp. at 18–19, 21–23 (advancing similar arguments).[16]

### 3. Analysis

Commerce articulated three reasons for rejecting the pro forma signature date as the date of sale. As discussed below, the court sustains Commerce's determination on the basis of each of these reasons.

#### a. Volume Differences

Commerce asserted that for "small shipments, U.S. customers are bound to accept the quantity shipped regardless of the quantity they ordered," and the record showed differences between the quantities ordered and shipped. I&D Mem. at 26. Commerce further explained that "some of Erdemir's larger U.S. sales failed to meet the tolerance threshold set forth in the terms of sale." *Id.* at 26 & n.136 (citation omitted). Commerce noted that, in *Circular Welded Pipe from Taiwan*, differences in the material terms of just 2 out of 62 sales merited basing the date of sale on the invoice date. *Id.* at 26–27 (citing *Circular Welded Carbon Steel Pipes and Tubes from Taiwan*, 76 Fed. Reg. 63,902 (Dep't Commerce Oct. 14, 2011) (final results of antidumping duty admin. review) ("*Circular Welded Pipe from Taiwan*"), and accompanying Issues and Decision Mem., A-583–008 (Oct. 6, 2011) at Cmt. 1). Commerce explained that, by that standard, there were sufficient changes here such that Erdemir failed to establish a date of sale other than invoice date. *Id.* at 27.

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[16] Defendant-Intervenors also contend that Erdemir used inconsistent language to describe the triggering event giving rise to the date of sale. *See* Def.-Ints. Resp. at 19–20. Commerce did not rely on any inconsistent language to support its determination. *See* I&D Mem. at 27. Additionally, Erdemir defined the date of sale for U.S. sales as the "contract date," and "reported its pro[ ]forma invoice date as the date of contract" in the "CONDATEU" field. Sect. C Questionnaire Resp. of Ereğli Demir ve Çelik Fabrikalari T.A.Ş. and Iskenderun Demir ve Çelik A.Ş at 17, CJA Tab 4, CR 78–79, PJA Tab 4, PR 141, ECF No. 69; *see also* Erdemir § A QR at 19. The "CONDATEU" field in each of Erdemir's sales verification exhibits correspond to Erdemir's final signature date on the pro forma invoice. *See* Sales Verification Exs. ("SVE") 11–14, CJA Tab 28, CR 336, 343–55, PJA Tab 28, PR 273, ECF No. 69–1. Accordingly, Defendant-Intervenors' argument lacks merit.

Commerce's reliance on quantity differences for small shipments is unsupported by record evidence. First, Commerce's reference to "small shipments" is unclear. The absence of a tolerance applies only to line items below 200MT. *See* Tech. Specs. ¶ 3.2. None of Erdemir's sales were this small. *See* Suppl. § B-C Questionnaire Resp. of Ereğli Demir ve Çelik Fabrikalari T.A.Ş. and Iskenderun Demir ve Çelik A.Ş ("Erdemir 2nd Suppl. § BC QR"), Ex. SBC-21, CJA Tab 11, CR 193–246, PJA Tab 11, PR 214, ECF No. 69 (Erdemir Invoice/Contract Sales Comparison). Moreover, the tolerances applicable to lot and grand totals mean that Erdemir's customers are not "bound to accept the quantity shipped regardless of the quantity they ordered," *see* I&D Mem. at 26, because these aggregate tolerances would still be applicable.

Commerce's reliance on volume differences and Erdemir's purported failure to meet the tolerance thresholds for "larger U.S. sales" supports Commerce's date of sale decision. While each lot and sale conformed to leeway allowances, two line items in one lot of one sale exceeded the 10 percent tolerance limit for line items above 200MT. *See* Erdemir 2nd Suppl. § BC QR, Ex. SBC-21. *Circular Welded Pipe from Taiwan* is, thus, analogous to this case because the record evidences Erdemir's ability to ship items not in conformity with the quantity ordered or the tolerance limits established in the signed pro forma invoice. *See* I&D Mem. at 26. This evidence supports Commerce's finding that Erdemir failed to establish that the material terms of sale were set on a date other than invoice date.

### b. Letter of Credit Opening Dates

Erdemir's U.S. Terms & Conditions require letters of credit to be opened within a particular timeframe. U.S. Terms & Conditions, Annex 3 ¶ 2.1. According to Commerce, the failure of several customers to timely open the letters of credit means that payment terms are not final when the pro forma invoice is signed. I&D Mem. at 27 & n.142 (citing *Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,362 (Dep't Commerce Oct. 13, 2015) (final determination of sales at less than fair value), and accompanying Issues and Decision Mem., A-489–822 (Oct. 5, 2015) ("*Welded Line Pipe from Turkey*, I&D Mem.") at Cmt. 9).[17]

[17] In Erdemir's Final Analysis Memorandum, Commerce explained that [[ ]] out of [[ ]] pro forma invoices failed to reflect letters of credit that were opened within the requisite [[ ]] days, covering [[ ]] out of [[ ]] sales to the United States. Final Analysis Mem. for Ereğli Demir ve Çelik Fabrikalari T.A.Ş. and its Affiliates ("Erdemir Final Analysis Mem.") at 3, CJA Tab 39, CR 478, PJA Tab 39, PR 323, ECF No. 69–2 (citing, *inter alia*, Erdemir 2nd Suppl. § BC QR, Ex. SBC-21)

In *Welded Line Pipe from Turkey*, Commerce declined to rely on the contract date as the date of sale when the customer's failure to timely establish a letter of credit required amending the contract to "change the letter of credit expiry date and latest date of shipment." *Welded Line Pipe from Turkey*, I&D Mem. at 24. Here, while Erdemir's U.S. Terms & Conditions allow Erdemir to accept or reject untimely letters of credit, *see* U.S. Terms & Conditions, Annex 3 ¶ 2.2, the frequency with which customers were untimely in opening the letters of credit and with which Erdemir waived the deadline supports Commerce's decision that Erdemir did not adequately demonstrate that material terms were set on a date other than invoice date, *see* Erdemir Final Analysis Mem. at 3.

**c. Pro Forma Signature Dates**

Commerce also identified a pro forma invoice with different signature dates, which prevented it "from determining which date should be considered the signature date for those sales." I&D Mem. at 27;[18] *see also* Erdemir Final Analysis Mem. at 3 & n.3.[19] Substantial evidence supports Commerce's determination. Specifically, Erdemir signed the pro forma invoice associated with SVE 11 on two different signature dates: November 12, 2014 and November 17, 2014. *See* SVE 11. The pro forma invoice states that Erdemir's signature "give[s] final confirmation" for the sale. Pro Forma, Misc. ¶ 1. It is, therefore, unclear whether the pro forma invoice associated with SVE 11 became "final" on November 12 or November 17. While Erdemir asserts that its "final signature binds the parties," this is not the only reasonable interpretation of the evidence. *See Matsushita*, 750 F.2d at 933 (the possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported

[18] Commerce's reliance on different *document* dates, however, lacks merit. Commerce opined that a handwritten date replacing a printed date on one of the pro forma invoices "indicates that either the material terms changed at the last minute, or were not yet finalized when the document was signed." I&D Mem. at 27 & n.139 (citing SVE 11). The pro forma invoice associated with SVE 11 shows an original printed date of 11/6/2014, which was crossed out and replaced with a handwritten date of 11/7/2014. *See* SVE 11. However, Commerce does not explain why the amended document date suggests that the material terms changed or were not final when the pro forma was signed on the later date. *See id.*; Pro Forma, Misc. ¶ 1 (stating that the sale is confirmed when the pro forma invoice is signed by Erdemir).

[19] Commerce identified pro forma invoice number [[ ]] as the invoice at issue, Erdemir Final Analysis Mem. at 3 & n.3, which corresponds to the pro forma invoice associated with SVE 11, *see* SVE 11. Commerce's reference to the "[two] pro forma invoices in this exhibit" is, however, mistaken. Erdemir Final Analysis Mem. at 3 & n.3. SVE 11 contains one pro forma invoice numbered [[ ]], with content spanning two pages. *See* SVE 11.

by substantial evidence).[20] The lack of clarity regarding when the pro forma invoice associated with SVE 11 became final provides substantial evidence supporting Commerce's rejection of Erdemir's signature date as the date of sale.[21] Commerce's three reasons for its determination to reject Erdemir's proposed date of sale for U.S. sales are each supported by substantial evidence.

## II. Çolakoğlu's Rule 56.2 Motion

### A. Commerce's Denial of Çolakoğlu's Duty Drawback Adjustment

#### 1. Legal Framework

Pursuant to 19 U.S.C. § 1677a(c)(1)(B), Commerce will increase constructed export price ("CEP") by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." This statutory duty drawback adjustment is intended to prevent the dumping margin from being distorted by import taxes that are imposed on raw materials used to produce exported subject merchandise. *See Wheatland Tube Co. v. United States*, 30 CIT 42, 60, 414 F. Supp. 2d 1271, 1286 (2006), *rev'd on other grounds*, 495 F.3d 1355 (Fed. Cir. 2007); *Allied Tube & Conduit Corp. v. United States*, 29 CIT 502, 506, 374 F. Supp. 2d 1257, 1261 (2005) (citations omitted).

Commerce has developed a two-prong test to determine whether a respondent is entitled to a duty drawback adjustment. First, the import duty and rebate or exemption must be "directly linked to, and dependent upon, one another"; and, second, the respondent "must demonstrate that there were sufficient imports of the imported material to account for the duty drawback or exemption granted for the

[20] At oral argument, Erdemir asserted that the first of Erdemir's signatures represents the date on which Erdemir made the offer, which was then sent to the customer, who then signed and returned the pro forma invoice for Erdemir's final, and confirmatory, signature. Oral Arg. at 51:00–52:09. Even if true, this explanation is not supported by the record evidence that was before Commerce. Had the customer dated its signature sometime between November 12 and 17, the date of Erdemir's "final confirmation" may have been self-evident. Because the customer does not appear to have dated the document, Commerce had no way of knowing that Erdemir signed the pro forma before sending it to the customer and upon its return. *See* SVE 11.

[21] Erdemir signed the other pro forma invoices on a single date. *See* SVE 12–14. However, it would be impractical to expect Commerce to arrive at different date of sale determinations for different sales, particularly when each review may encompass multiple sales. *See Toscelik*, 256 F. Supp. 3d at 1263.

export of the manufactured product." I&D Mem. at 5; *see also Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335, 1340–41 (Fed. Cir. 2011) (affirming the lawfulness of Commerce's two-prong test).

"[T]he first prong enables Commerce to verify that the home country allows rebates or exemptions *only* for those imported inputs used to produce exported merchandise," *Wheatland Tube*, 30 CIT at 60, 414 F. Supp. 2d at 1286. The second prong "requires the foreign producer to demonstrate that it has imported a sufficient amount of raw materials to account for the drawback received upon export of the finished product." *Id.* (citation omitted). The respondent bears the burden of proving its eligibility for the duty drawback adjustment. *See, e.g.*, *Allied Tube*, 29 CIT at 506–07, 374 F. Supp. 2d at 1261.

### 2. Procedural Background

Çolakoğlu first responded to Commerce's questions regarding duty drawback in its initial questionnaire response filed on December 9, 2015. *See* Questionnaire Resp. of Çolakoğlu Metalurgi, A. Ş, and its Affiliates to Sect. C of the U.S. Dep't of Commerce Antidumping Duty Questionnaire ("Çolakoğlu § C QR") at C-32 -C-34, CJA Tab 6, CR 125–26, PJA Tab 6, PR 158–60, ECF No. 69. On January 21, 2016, Commerce issued a third supplemental questionnaire, and for the first time, asked for additional information about Çolakoğlu's duty drawback calculation. *See* Third Suppl. Questionnaire ("Çolakoğlu Third Suppl. § BC Questionnaire") at 6, CJA Tab 8, CR 162, PJA Tab 8, PR 190, ECF No. 69.[22] Çolakoğlu responded to Commerce's supplemental questionnaire attaching, *inter alia*, three exhibits supporting its duty drawback request. *See* Part II of Questionnaire Resp. of Çolakoğlu Metalurgi, A.S, and its Affiliates to Third Suppl. Sects. B and C of the U.S. Dep't of Commerce Antidumping Duty Questionnaire ("Çolakoğlu Third Suppl. § BC QR Part II"), Ex. SBC-13a (copies of IPRs), CJA Tab 15, CR 275–79, PJA Tab 15, PR 223–25, ECF No. 69; *id.*, Ex. SBC-13c (revised duty drawback calculation); *id.*, Ex. SBC-13d (a copy of an extract obtained from the Turkish Ministry of Economy online system covering U.S. sales).

[22] Commerce specifically asked Çolakoğlu to provide (1) copies of the relevant Turkish IPRs ("Inward Processing Regime"); (2) an excerpt from the Turkish Customs code describing a particular HS ("Harmonized System") code supporting "the amount of the import duty rate"; (3) a detailed explanation of Çolakoğlu's calculation with supporting documentation; (4) an explanation of Çolakoğlu's linkage of its total exports included in the calculation to each "specific IPR number"; (5) documentation "link[ing] the duty drawback and the exempted duties directly to specific U.S. sales"; and (6) further explanation regarding the total export quantity "reported in Çolakoğlu's Section C U.S. sales database." Çolakoğlu Third Suppl. § BC Questionnaire at 6. Commerce also asked Çolakoğlu to clarify whether it procures slab from Turkish or foreign sources (or both). *Id.*

Commerce preliminarily determined not to grant Çolakoğlu a duty drawback adjustment on the basis that certain documents were illegible or insufficiently translated, and "failed to establish a link between the imported inputs and the duties exempted upon export because there was no evidence that the inputs subject to the IPR were used in exported subject merchandise." Prelim. Mem. at 13 & n.58 (explaining that "Çolakoğlu's documents could not be tied to an official Turkish government source"). Commerce, therefore, concluded that Çolakoğlu had failed to satisfy the first of its two-prong test. *Id.* at 13.

Çolakoğlu "offer[ed] to provide better quality copies of certain documents" on the first day of verification, Çolakoğlu Protest Regarding Dep't Refusal to Verify Duty Drawback (April 4, 2016) ("Çolakoğlu April 4 Protest") at 1–2, CJA Tab 25, PJA Tab 25, PR 267, ECF No. 69–1, but Commerce declined the documents and refused to verify Çolakoğlu's request for the duty drawback adjustment, I&D Mem. at 7. Çolakoğlu protested Commerce's refusal. *See, e.g.*, Çolakoğlu April 4 Protest.

### 3. Parties' Contentions

Çolakoğlu contends (1) that substantial evidence demonstrates that it has met both requirements of Commerce's two-prong test; (2) Commerce should have informed it that certain submissions related to its duty drawback request were deficient and provided an opportunity to remedy or explain the deficiency; and (3) Commerce should nonetheless have verified the adjustment. Çolakoğlu Mem. at 12–23; Confidential Reply Br. of Consolidated-Pls. Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. ("Çolakoğlu Reply") at 2–12, ECF No. 64.

The Government contends that Commerce correctly declined the adjustment because Çolakoğlu failed to show "that its inputs . . . were used to manufacture exported subject merchandise," and the incomplete translations and illegibility of certain record documents meant that "Commerce could not ascertain if the slabs imported by Commerce were indeed the types of slab necessary to produce hot-rolled steel." Gov. Resp. at 12–13. The Government further contends that Commerce gave Çolakoğlu several opportunities to submit documents demonstrating its entitlement to the adjustment, Çolakoğlu "knew or should have known that it submitted [deficient documents]," and Commerce's statutory responsibility to inform respondents of deficient submissions must be read in light of the respondent's burden to "provide Commerce with an accurate submission within the

prescribed statutory deadline.” *Id.* at 16–18. The Government also contends that Commerce correctly declined to verify the adjustment because the information Çolakoğlu provided was “not capable of verification.” *Id*. at 19.

Defendant-Intervenors contend that Commerce correctly determined that Çolakoğlu was not entitled to the duty drawback adjustment, and Commerce “was not required to direct Çolakoğlu to submit documentation establishing the authenticity of the information it submitted on the record.” Def.-Ints. Resp. at 29. Defendant-Intervenors further contend that the submitted documents, even if accepted, did not establish the necessary link, and Commerce correctly declined to verify the adjustment. *Id.* at 30, 31–34.

#### 4. Analysis

Çolakoğlu contends that substantial evidence supports granting the duty drawback adjustment. *See* Çolakoğlu Mem. at 12–18. The relevant inquiry for the court’s review however, is whether Commerce’s decision to deny the adjustment is supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Commerce’s decision rests on its determination that Çolakoğlu failed to meet the first prong of the agency’s two-prong test. *See* I&D Mem. at 5 (“Çolakoğlu . . . fail[ed] to establish a link between the imported inputs and the duties exempted upon export . . . .”). However, Commerce has failed to articulate a clear standard by which it determines whether that link has been met, and Commerce’s reasons for finding that Çolakoğlu failed to meet the test are unsupported by substantial evidence.

As to the first prong, Commerce explained that it seeks only “a reasonable link between the duties imposed and those rebated or exempted”; it does “not require that the imported material be traced directly from importation through exportation.” *Id.* at 4. Commerce goes on, however, to present different measures for substantiating its “reasonable link,” somewhat interchangeably, without addressing the distinct evidentiary burdens of each. Specifically, Commerce stated that Çolakoğlu failed to demonstrate (1) that “the inputs [slab] subject to the IPR *were used* to manufacture the exported subject merchandise,” (2) “that the particular export *was made* with the slab imported under the same IPR,” (3) whether the “slabs . . . were indeed *the types of slabs* necessary for the production of hot-rolled steel,” or (4) that “the imported slab *can be used and was used* to make the final product.” *Id.* at 5–6 (emphasis added). Commerce further stated that “[i]n prior Turkish cases, [it] has required that there be evidence on the record that the imported inputs can be used in the production of

the final product.” *Id.* at 5 & n.16 (citing *Certain Oil Country Tubular Goods From the Republic of Turkey*, 79 Fed. Reg. 41,971 (Dep’t Commerce July 18, 2014) (final determination of sales at less than fair value and aff. final determination of critical circumstances, in part), and accompanying Issues and Decision Mem., A-489–816 (July 10, 2014) (“*OCTG from Turkey*, I&D Mem.”) at Cmt. 1); *Steel Concrete Reinforcing Bar From Turkey*, 79 Fed. Reg. 54,965 (Dep’t Commerce Sept. 15, 2014) (final neg. determination of sales at less than fair value and final determination of critical circumstances), and accompanying Issues and Decision Mem., A-489–818 (Sept. 8, 2014) at Cmt. 1); *cf.* Gov. Resp. at 1314 (asserting that Çolakoğlu failed to show that the imported slabs and exported hot-rolled steel shared “certain metallurgical characteristics, such as carbon content”).

There is a difference between demonstrating that specific imports of slab *were used* to produce specific exports of hot-rolled steel, and demonstrating that the slab imported under the Turkish IPR *is suitable for producing* hot-rolled steel. Commerce’s citation to prior Turkish cases fails to clarify the applicable standard. In *OCTG from Turkey*, for example, the agency granted the adjustment when “[e]ach respondent demonstrated that when it opened the DIIBs,[23] it documented 1) projected quantities of imports, which qualify based on an 8-digit level HTS [“Harmonized Tariff Schedule”] number (which include API-5CT coil used for OCTG) . . . .” *OCTG from Turkey*, I&D Mem. at Cmt. 1; I&D Mem. at 5 n.16. Commerce further justified the adjustment on the basis that “each respondent ha[d] demonstrated that the Turkish Government *approved* and maintained DIIBs through the IPR which documented exports of OCTG to the United States.” *OCTG from Turkey*, I&D Mem. at Cmt. 1 (emphasis added). So too here, Çolakoğlu provided information for each IPR documenting what appear to be HTS codes (referred to as “GTIP” codes) for the imported slab and corresponding exports. *See, e.g.*, Çolakoğlu Third Suppl. § BC QR Part II, Ex. SBC-13a (IPR 2923, p.6). Çolakoğlu also demonstrated the Turkish Government’s approval of each IPR on the basis that the duty free imports were used to produce the exported material. *See, e.g.*, *id.* (IPR 2923, p.1). Commerce’s explanation and conclusory citations to prior rulings fail to apprise the court of the precise standard it seeks to apply in this case, and whether that standard is consistent with—or departs from—its prior rulings. *See RHP Bearings Ltd. v. United States,* 288 F.3d 1334, 1347 (Fed. Cir. 2002) (“[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.”) (citation omitted).

[23] “DIIBs” is another term for Turkey’s Inward Processing Regime. Prelim. Mem. at 13.

At oral argument, the Government explained that obtaining the adjustment requires more than demonstrating eligibility for the duty drawback pursuant to Turkish law, but less than a direct tracing of an input from import to export. The Government further stated that Çolakoğlu's documentation failed to apprise Commerce of certain metallurgical characteristics or otherwise indicate that the imported slabs were the types of slabs used to produce hot-rolled steel.[24] Oral Arg. at 1:20:15–1:28:15.[25] The Government's oral presentation suggests that Commerce's references to the actual use of imported slab in exported hot-rolled steel were mistaken and should be understood as speaking to the suitability of the imported slab. The court may not accept "*post hoc* rationalizations for agency action," and may only sustain the agency's decision "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines,* 371 U.S. at 168–69. Commerce's rationale is unclear and insufficiently moored to past practice. For that reason alone, a remand is required for Commerce to clarify its standard for determining eligibility for the duty drawback adjustment. However, Commerce's stated reasons for failing to find the first prong satisfied also lack merit.

Commerce first points to partial translations and the illegibility of certain documents on the record. I&D Mem. at 5. Commerce explained that it was not required to issue a supplemental questionnaire because Çolakoğlu bore the burden of demonstrating eligibility for the adjustment, and it had "ample opportunity" to do so. I&D Mem. at 6–7.[26] It is true that respondents bear the burden of demonstrating eligibility for a duty drawback adjustment, *see Allied Tube*, 29 CIT at 506–07, 374 F. Supp. 2d at 1261, and submitting accurate information, *see* 19 U.S.C. § 1677m(b). If, however, Commerce

> determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] *shall* promptly inform the person submitting the response of the nature of the deficiency and *shall*, to the extent practicable,

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[24] As noted by the Government, the Federal Circuit has affirmed Commerce's denial of a duty drawback adjustment even though the Turkish Government granted certain imports duty free status. *See Maverick Tube Corp. v. Toscelik Profil ve Sac Endustrisi A.S.*, 861 F.3d 1269 (Fed. Cir. 2017). In that case, however, the respondent's imports were incapable of use in the subject merchandise. *Id.* at 1271. Instead, the Turkish Government granted duty free status on the basis of equivalency, "whereby similar products may be substituted for each other for drawback purposes." *Id.* at 1271–72.

[25] Citations to the oral argument reflect time stamps from the recording.

[26] Commerce also faults Çolakoğlu for failing to "request[] an opportunity to place new factual information . . . on the record prior to the *Preliminary Determination*." I&D Mem. at 7. It was not until the *Preliminary Determination*, however, that Commerce alerted Çolakoğlu to the deficiencies with regard to its documentation. *See* Prelim. Mem. at 13.

> provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews.

19 U.S.C. § 1677m(d) (emphasis added). Commerce did not address the requirements of § 1677m(d). *See* I&D Mem. at 6–7. Commerce's assertion that Çolakoğlu had several opportunities to submit factual information demonstrating eligibility for the adjustment appears to overlook the procedural record of this case. Çolakoğlu provided information regarding duty drawback in its initial questionnaire response, and it was not until Commerce issued a third supplemental questionnaire to Çolakoğlu that it sought any additional information regarding duty drawback. *See* Çolakoğlu § C QR at C-32 C-34; Çolakoğlu Third Suppl. § BC Questionnaire at 6. The Government's suggestion that Commerce's statutory obligation is mitigated by the respondent's burden to provide accurate information runs counter to the mandatory nature of § 1677m(d). *See* Gov. Resp. at 16.[27] Commerce erred in failing to inform Çolakoğlu that its supplemental submission was deficient or make findings with regard to the practicability of providing Çolakoğlu with an opportunity to remedy or explain the deficiencies.[28]

Commerce also points to the lack of an official Turkish government seal, stamp, or identifying marker on documents "showing the amount of imported slab and exported finished hot-rolled steel." I&D

[27] The Government cites *NSK Ltd. v. United States*, 17 CIT 590, 593, 825 F. Supp. 315, 319 (1993) and *Chinsung Indus. Co. v. United States*, 13 CIT 103, 106–07, 705 F. Supp. 598, 601 (1989) in support of the proposition that 19 U.S.C. § 1677m(d) "must be read in the context of a respondent's burden to prepare and provide Commerce with an accurate submission within the prescribed statutory deadline." Gov. Resp. at 16. Neither case, however, addresses § 1677m(d) or otherwise recognizes any limitations on the statute's mandatory language. The Government also relies on *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373 (Fed. Cir. 2016), as support for the proposition that Çolakoğlu "was, or should have been [aware]" of the deficiencies. Gov. Resp. at 17. *Papierfabrik*, however, relied on the respondent's actual awareness of certain deficiencies caused by its intentionally fraudulent responses to affirm Commerce's decision not to issue a supplemental questionnaire pursuant to § 1677m(d). 843 F.3d at 1384. As the Government recognizes, the instant case does not involve fraud, Gov. Resp. at 17, and *Papierfabrik* does not support a finding that § 1677m(d) is limited by what a respondent "should have" known. Finally, the Government points to a respondent's burden to provide complete translations pursuant to 19 C.F.R. § 351.303(e). Gov. Resp. at 17. However, Commerce did not rely on Çolakoğlu's purported failure to comply with the regulation when it declined the adjustment, and in fact, considered those portions of certain documents that were legible as part of its decision to deny the adjustment. *See* I&D Mem. at 5–6.

[28] The court's finding is based on the particular facts of this case in which only one or two pages of a multi-page exhibit were difficult to read and a substantial portion of each document was translated. Defendant does not suggest that any asserted shortcomings were intentional and this would appear to be a textbook case for why § 1677m(d) exists—to ensure that respondents have an opportunity to address minor deficiencies in the course of a proceeding.

Mem. at 5. Commerce did not cite any request or past practice requiring an official seal on a document appended to a questionnaire response, or otherwise explain why it declined to inform Çolakoğlu of the deficiency pursuant to 19 U.S.C. § 1677m(d) or otherwise confirm the documents' authenticity at verification. *See* I&D Mem. at 5.[29] This particular basis is entirely conclusory and, thus, lacking in reasoned explanation.

Commerce further points to discrepancies in the quantities and values of the imported material and the exported product in the legible and translated portions of the IPR closing documents in Exhibit SBC-13a as compared to Çolakoğlu's duty drawback calculation worksheet contained in Exhibit SBC-13c. I&D Mem. at 5–6 & nn.17–18 (citing Çolakoğlu 3rd Suppl. § BC QR Part II, Exs. SBC-13a and SBC-13c). There are slight discrepancies in the value of the imported inputs for two of the IPRs, *compare* Çolakoğlu 3rd Suppl. § BC QR Part II, Ex. SBC-13a (IPR 484, p.1 and IPR 4246, p.1), *with id.*, Ex. SBC-13c (total purchases for each IPR),[30] and discrepancies in the quantity of imports and exports for each IPR.[31] Nowhere, however, does Commerce explain the materiality of these discrepancies for the purpose of demonstrating whether the imports can (or were) used to produce the subject merchandise. *See* I&D Mem. at 5–6. At oral argument, the Government and Defendant-Intervenors both suggested that each basis for Commerce's determination should not be viewed in isolation, but as one of several factors that, together, merited Commerce's decision to deny the adjustment. *See* Oral Arg. at 1:48:05–1:49:51, 1:49:58–1:50:08. Such an approach, however, obfuscates the weakness of each basis that, individually and together, fail to support Commerce's determination.

Finally, Commerce refused to verify Çolakoğlu's duty drawback request because Çolakoğlu's original submission was "too deficient to

[29] The Government confirmed at oral argument that Commerce does not have such a policy. Oral Arg. at 1:37:10–1:37:20. The Government also asserted that Commerce had discretion to verify the document's source at verification, but that the duty drawback issue as a whole was not verified. Oral Arg. at 1:37:40–1:38:37. Commerce's decision not to verify duty drawback is discussed *infra*.

[30] Commerce relied, in part, on a discrepancy in the values of imported slab for IPR 2923. I&D Mem. at 5 n.17. That "discrepancy," however, appears to stem from Çolakoğlu's rounding of the value. *Compare* Çolakoğlu 3rd Suppl. § BC QR Part II, Ex. SBC-13a (IPR 2923, p.1 (referring to an import value of $[[ ]]), *with id.*, Ex. SBC13c at p.7 (referring to an import value of $[[ ]] for IPR 2923).

[31] The import and export quantities contained in the IPR supporting documents (page 6 of each IPR) do not correspond to the import and export quantities stated in Çolakoğlu's duty drawback calculation worksheet. *See* Çolakoğlu 3rd Suppl. § BC QR Part II, Exs. SBC-13a, SBC-13c at p.7.

rely upon and thus not capable of verification." I&D Mem. at 7.[32] As discussed above, however, Commerce's refusal to verify the adjustment is predicated on faulty reasoning and a failure to adhere to its statutory obligation concerning deficient submissions. The agency's assertion that the record information was "too deficient" for verification is unsupported by substantial evidence because Commerce failed to inform Çolakoğlu of the deficiency or make findings with regard to the practicability of providing Çolakoğlu with an opportunity to remedy or otherwise address the deficiencies. *See* 19 U.S.C. § 1677m(d).

Commerce claimed that accepting Çolakoğlu's documents at verification would have constituted "the acceptance of a new questionnaire response . . . in a time period [Çolakoğlu] established" rather than the agency's deadlines, which would have "precluded the [agency] from analyzing the information thoroughly and . . . denied other parties . . . the opportunity to comment meaningfully." I&D Mem. at 7. However, "[r]emedying any deficiency in a questionnaire response typically will require submission of new information." *China Kingdom Import & Export Co., Ltd. v. United States*, 31 CIT 1329, 1350, 507 F. Supp. 2d 1337, 1356 (2007). Further, Çolakoğlu attempted to submit the documents in response to Commerce's initial identification of its inability to read certain exhibits, and not at some arbitrary time Çolakoğlu unilaterally established. *See* Prelim. Mem. at 13 (dated March 14, 2016); Çolakoğlu April 4 Protest at 1–2; *cf. China Kingdom*, 31 CIT at 1350, 507 F. Supp. 2d at 1356–57 ("A mere finding that the remedy would require Commerce to consider new information [presented at verification] is not commensurate with a finding that allowing the interested party to effect the remedy would be impracticable under the circumstances, given the statutory time limits.").

In sum, Commerce's decision to deny Çolakoğlu's request for a duty drawback adjustment was based on its procedural missteps and inconsistent and conclusory analysis that, as a whole, renders its determination lacking substantial evidence and reasoned explanation. Accordingly, it will be remanded for reconsideration.

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[32] By statute, Commerce

> shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements . . . if—
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

### B. Commerce's Denial of a Quarterly Cost-Averaging Methodology

#### 1. Legal Framework

Commerce calculates the normal value of the subject merchandise on the basis of home market sales that are made "in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce, therefore, disregards sales at prices that are less than the cost of production, *id.*§ 1677b(b)(1), because those sales are not made within the ordinary course of trade, *id.*§ 1677(15)(A). The cost of production "equal[s] of the sum of . . . the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a *period* which would ordinarily permit the production of that foreign like product in the ordinary course of business." *Id.*§ 1677b(b)(3)(A) (emphasis added).[33]

The statute does not define the "period" to be used or the method by which Commerce must calculate the costs of production. *SeAH Steel Corp. v. United States*, 34 CIT 605, 614, 704 F. Supp. 2d 1353, 1361 (2010). Commerce's usual methodology is to rely on "an annual weight-average cost" for the period of investigation. I&D Mem. at 13. Commerce may depart from its usual methodology and rely on quarterly cost-averages when "significant cost changes are evident [and] . . . sales can be accurately linked with the concurrent quarterly costs." *Pastificio Lucio Garofalo, S.p.A. v. United States*, 783 F. Supp. 2d 1230, 1235–36 (CIT 2011), *aff'd* 469 F. App'x 901 (Fed. Cir. 2012); *see also* I&D Mem. at 13–14. The significance of any cost changes must be demonstrated before Commerce analyzes the linkage between costs and sales. I&D Mem. at 13. A significant cost change "is defined as a greater than 25 percent change in [cost of manufacturing] between the high and low quarters during the POI . . . ." *Id.* at 14.[34]

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[33] Section 1677b defines the cost of production as an amount equal to

(A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;

(B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C. § 1677b(b)(3).

[34] Commerce conducts this analysis "on a CONNUM-specific basis." Gov. Resp. at 25; *see also* I&D Mem. at 14. A "CONNUM" is a control number assigned to materially-identical products to distinguish them from non-identical, i.e., similar, products. Gov. Resp. at 25 n.2.

### 2. Parties' Contentions

Çolakoğlu contends that Commerce's 25 percent threshold for relying on quarterly cost-averages is "overly rigid" and fails to capture significant cost changes arising through currency fluctuations. Çolakoğlu Mem. at 26. According to Çolakoğlu, Commerce should have conducted its analysis in U.S. Dollars instead of Turkish Lira—thereby accounting for "devaluations of the Turkish Lira in relation to the U.S. [Dollar]"—because it purchased "[a]lmost all major inputs" in U.S. Dollars before converting the costs to Lira in its accounting system. Çolakoğlu Mem. at 27, 31–32; *see also* Çolakoğlu Reply at 18 ("[R]egardless of the currency in which Çolakoğlu keeps its books, the costs of its material input purchases are incurred in USD."). Had Commerce done so, "the 25 percent threshold test would have been met and would have triggered the use of Commerce's alternative cost methodology." Çolakoğlu Mem. at 26, 32.

The Government contends that Commerce correctly applied its usual methodology by conducting its cost change analysis in Turkish Lira because that is the currency in which Çolakoğlu maintains its books and records. Gov. Resp. at 27. The Government further contends that Çolakoğlu's argument that Commerce "should have converted [its] normal accounting records, which are stated in Turkish Lira, to U.S. [D]ollars, because it purchased inputs in dollars, . . . is just selective accounting for Çolakoğlu's desired outcome." Gov. Resp. at 26.

Defendant-Intervenors contend that Çolakoğlu has "misconstrue[d] the standard of review." Def.-Ints. Resp. at 39 ("The [c]ourt must decide whether the administrative record contains substantial evidence to support [Commerce's] decision.") (internal quotation marks, alteration, emphasis, and citation omitted).

### 3. Analysis

Çolakoğlu essentially argues that Commerce's methodology for determining when to deviate from annual cost-averages and rely on quarterly cost-averages is unreasonable because it fails to account for currency fluctuations. *See* Çolakoğlu Mem. at 31 ("The 25 [percent] threshold is not statutory, and would be improved by incorporating an exchange rate factor."). Yet, as Çolakoğlu concedes, Commerce has broad discretion to develop a suitable methodology for calculating the costs of production. *See* Çolakoğlu Mem. at 28 (quoting *SeAH Steel*, 34 CIT at 617, 704 F. Supp. 2d at 1363 ("Commerce is afforded considerable discretion in formulating its practices in this regard.")). Beyond asserting that the 25 percent threshold is "overly rigid" and

identifying an alternative (preferred) outcome had Commerce conducted its analysis in U.S. Dollars, Çolakoğlu offers no persuasive reason why Commerce's methodology is unreasonable on its face or as applied in this case. Commerce rejected Çolakoğlu's request to convert its accounting records from Turkish Lira to U.S. Dollars before conducting its analysis because "[t]he analysis of significant cost change should be performed in the same currency as contained in the cost database, which is Turkish Lira." I&D Mem. at 15. Commerce further explained that "Çolakoğlu's reported costs already take into account exchange rate differences because purchases in U.S. dollars are converted to Turkish Lira in the month of the purchase in the normal course of business." *Id.* at 15. Commerce's refusal was reasonable and consistent with the statute that provides for cost calculations on the basis of the exporter's books and records. *See* 19 U.S.C. § 1677b(f)(1)(A).

Çolakoğlu also fails to explain why conducting the analysis in U.S. Dollars would not distort Commerce's calculations. Although "[a]lmost all major inputs" are purchased in U.S. Dollars, some inputs are purchased in Turkish Lira. *See* Çolakoğlu Mem. at 27; Çolakoğlu's Request for Applying Quarterly Average Cost Data at 3, CJA Tab 17, CR 304, PJA Tab 17, PR 244, ECF No. 69–1. Additionally, the cost of production consists of "the cost of materials *and* of fabrication or other processing," among other things. 19 U.S.C. § 1677b(b)(3) (emphasis added). Although Çolakoğlu's raw material costs account for more than 60 percent of the cost of producing hot-rolled steel, Çolakoğlu's Case Br. (Rev.) at 22, CJA Tab 34, CR 473–45, PJA Tab 34, PR 312–16, ECF No. 69–2, expenses for the remaining aspects of production (e.g., energy, labor, etc.) are, presumably, incurred in Turkish Lira. These facts further support Commerce's determination to conduct its analysis in the currency in which Çolakoğlu keeps it books. Commerce's finding that Çolakoğlu's cost changes did not exceed the 25 percent threshold is supported by substantial evidence[35] and will be sustained.

[35] Commerce compared the cost of production for the highest and lowest cost quarters for 10 CONNUMs representing Çolakoğlu's five "most frequently sold home and U.S. market CONNUMs during the POI." Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Çolakoğlu Metalurgi A.Ş and its Affiliates ("Çolakoğlu Final Cost Calc. Mem.") at 2 & Attach. 1, CJA Tab 40, CR 497, PJA Tab 40, PR 327, ECF No. 69–2. That analysis shows that none of the 10 CONNUMs "exceeded the 25 [percent] significance threshold." *Id.* at 2, Attach. 1.

### C. Commerce's Treatment of Excess Heat as a Co-Product Instead of a By-Product

#### 1. Legal Framework

"The antidumping statute does not mention the treatment of by-products, and Commerce has not filled the statutory gap with a regulation." *Arch Chemicals, Inc. v. United States*, Slip Op. 11–41, 2011 WL 1449034, at *2 (CIT Apr. 15, 2011) (internal quotation marks and citation omitted). However, Commerce's "practice has been to grant an offset to normal value, for sales of by-products generated during the production of subject merchandise, if the respondent can demonstrate that the by-product is either resold or has commercial value and re-enters the respondent's production process." *Id.* (emphasis omitted).[36] Commerce considers several factors to determine whether joint products[37] are co-products or by-products:

> 1) how the company records and allocates costs in the ordinary course of business, in accordance with its home country [generally accepted accounting principles ("GAAP")]; 2) the significance of each product relative to the other joint products; 3) whether the product is an unavoidable consequence of producing another product; 4) whether management intentionally controls production of the product; and, 5) whether the product requires significant further processing after the split-off point.

I&D Mem. at 17 (citations omitted).

[36] In other words, Commerce generally subtracts the revenue derived from the sale of by-products from the costs of production, thereby lowering the normal value and, potentially, lowering the antidumping margin that is derived from the difference between normal value and CEP. *See Arch Chemicals*, 2011 WL 1449034, at *2; *Magnesium Corp. of America v. United States*, 20 CIT 1092, 1106, 938 F. Supp. 885, 899 (1996); Çolakoğlu Mem. at 32 (distinguishing the consequences of Commerce's treatment of by-products and co-products). If, however, a joint product is considered a co-product, costs are allocated to the sales revenue from the sale of the co-product, which decreases the offset to normal value. *See* Çolakoğlu Mem. at 32.

[37] In the Issues and Decision Memorandum, Commerce used the National Association of Accountants' ("NAA") definition of joint product "as two or more products so related that one cannot be produced without producing the other(s), each having relatively substantial value and being produced simultaneously by the same process up to a split-off point." I&D Mem. at 16 (citations omitted). Joint products include "major products, by-products, and co-products." *Id.* "The NAA defines a by-product as a secondary product recovered in the course of manufacturing a primary product, whose total sales value is relatively minor in comparison with the sales value of the primary product(s)." *Id.* In contrast, "[w]hen two or more major products appear in the same group, they are called co-products." *Id.* "Products of greater importance are termed major products and products of minor importance are termed by-products." *Id.*; *see also IPSCO, Inc. v. United States*, 12 CIT 384, 388, 687 F. Supp. 633, 636 (1988) (noting Commerce's reliance on "the importance of a product to the overall economic activity of its producer and the product's value in relationship to the value of the primary product" to distinguish by-products from co-products).

No one factor is dispositive, and Commerce "consider[s] each factor in light of all of the facts and circumstances surrounding each case." I&D Mem. at 17. Çolakoğlu bears the burden of substantiating its entitlement to a by-product offset. *See* 19 C.F.R. § 351.401(b)(1).

### 2. Parties' Contentions

Çolakoğlu contends that Commerce erroneously found that Çolakoğlu "tracks the production of excess heat and assigns a cost to it." Çolakoğlu Mem. at 34; Çolakoğlu Reply at 19 ("Commerce's factual premise for its conclusion is simply wrong."). Çolakoğlu further contends that its recordation of revenue from the sale of excess heat is consistent with Turkish GAAP, and Commerce's conclusion that the separate recording of revenue supports treatment of the excess heat as a co-product calls into question the relevance of Commerce's joint product distinction to Turkish GAAP. Çolakoğlu Mem. at 34–35. The Government contends that a respondent's recording of costs "is just one factor in Commerce's well-established analysis of whether [a joint product] is a co-product or a by-product," and Commerce's decision is consistent with prior proceedings involving Çolakoğlu. Gov. Resp. at 30–31 (citation omitted); *see also* Def.-Ints. Resp. at 39–40.

### 3. Analysis

Çolakoğlu operates a gas turbine ("GT1"), which generates power for its steel production as well as electricity and excess heat. I&D Mem. at 16. Çolakoğlu's affiliate, Ova Elektrik, A.S. ("OVA"), owns a steam turbine. *Id.* Çolakoğlu sells the excess heat generated by GT1 to OVA for use in its steam turbine. I&D Mem. at 16; *see also* Verification of the Cost Resp. of Çolakoğlu Metalurgi A.Ş. and its Affiliates at 22, Çolakoğlu Suppl. CJA Tab 4, CR 464, Çolakoğlu Suppl. PJA Tab 4, PR 293, ECF No. 82 (describing the process by which excess heat is sold to OVA). Çolakoğlu reported the "revenues generated from the sale of excess heat to its affiliate OVA as a by-product offset to the electricity costs used in its steel production." I&D Mem. at 16 (citations omitted). Commerce, however, disagreed, finding that Çolakoğlu's excess heat should instead be treated as a co-product, thereby disallowing a "full revenue offset to Çolakoğlu's production of electricity." *Id.* at 16.

Commerce's determination rested on the first and second of the above-listed factors. *See id.* at 17–18.[38] As to the first factor,

[38] Commerce found that the facts relevant to the third through fifth factors were not indicative of either treatment. I&D Mem. at 17–18. As to the third factor, Commerce found no evidence indicating whether excess heat production is unavoidable. *Id.* at 17. Çolakoğlu asserts that excess heat production is inevitable, but it cites no record evidence. Çolakoğlu Reply at 20. Commerce concluded that the fourth factor was neutral because there was no

Commerce found that Çolakoğlu tracks the production of excess heat, assigns a cost to it, and "records sales of excess heat as a main income." I&D Mem. at 17. However, Commerce did not identify record evidence to support its finding that Çolakoğlu assigns a cost to excess heat. *See id.* Although Çolakoğlu records the cost of electricity sold to OVA, it does not appear to assign a cost for excess heat. *See* Questionnaire Resp. of Çolakoğlu Metalurgi A.Ş and its Affiliates to Sect. D of the U.S. Dep't of [C]ommerce Antidumping Duty Questionnaire ("Çolakoğlu § D QR"), Ex. D-18, Çolakoğlu Suppl. CJA Tab 7, CR 102, 112, 114, Çolakoğlu Suppl. PJA Tab 7, PR 148–50, 152–53, ECF No. 82; Çolakoğlu Reply at 19–20. At oral argument, the Government did not dispute the absence of Çolakoğlu's recording of costs associated with excess heat,[39] and instead emphasized the treatment of the sale of excess heat as revenue rather than as an offset to electricity costs. Oral Arg. at 2:38:45–2:40:43.

The record shows that Çolakoğlu records the sale of excess heat as a separate line item. *See* Çolakoğlu's Sales Verification Ex. 3, Çolakoğlu 2nd Suppl. CJA Tab 1, CR 367–68, Çolakoğlu 2nd Suppl. PJA Tab 1, ECF No. 85 (listing income from OVA as revenue).[40] Commerce's interpretation of the evidence—that recording of the sale of excess heat as revenue rather than an offset supports treatment as a co-product—is reasonable. Çolakoğlu simply draws the opposite conclusion from the available evidence. *See* Çolakoğlu Mem. at 34 ("Çolakoğlu does not assign costs to excess heat and separately records the revenue from excess heat, all of which underscores the fact [that] excess heat should be treated as a by-product."). Çolakoğlu asserts that its treatment of excess heat "is not conditioned on

record evidence demonstrating that Çolakoğlu's management intentionally controlled the amount of excess heat produced. I&D Mem. at 18. Çolakoğlu misconstrues Commerce's finding on this issue. *See* Çolakoğlu Reply at 20. Commerce also concluded that the fifth factor was neutral because "both the electricity and the excess heat . . . required minimal to no additional processing . . . after the split-off point." I&D Mem. at 18. Çolakoğlu contends that "excess heat requires significant further processing to generate electricity." Çolakoğlu Reply at 21. Çolakoğlu acknowledges, however, that excess heat "is not a product but a fuel source for a steam turbine." *Id.* Thus, although it may take "significant further processing" to produce electricity from excess heat, the excess heat itself is not further processed before becoming a source of value. *See* I&D Mem. at 18 (describing the implications of further processing after the split-off point).

[39] To the extent the Issues and Decision Memorandum states otherwise, the Government concedes that it is incorrect. Oral Arg. at 2:38:45–2:39:09.

[40] Çolakoğlu asserts that it "books the excess heat as an offset to its electricity costs." Çolakoğlu Reply at 19 (citing Çolakoğlu § D QR at D-21). The cited document contains Çolakoğlu's narrative response, which further references Exhibit D-12 appended to the questionnaire response for Çolakoğlu's "calculation of the excess heat offset." Çolakoğlu § D QR at D-21. Exhibit D-12 is precisely that—Çolakoğlu's own calculation of the offset for the POI—and is not, in fact, a representation of the manner in which Çolakoğlu maintains its books and records. *See* Çolakoğlu § D QR, Ex. D-12.

whether excess heat is considered a by-product or a co-product," and questions the relevance of Commerce's joint product distinction to the treatment of excess heat under Turkish GAAP. *Id.* at 35. Regardless of Çolakoğlu's reasons for treating the sale of excess heat as revenue, however, the court must uphold an agency determination that is supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. (30)*, 322 F.3d at 1374 (citation omitted). Çolakoğlu's separate recording of the sale of excess heat is "such relevant evidence" that reasonably, and adequately, supports Commerce's conclusion that the first factor favors treatment as a co-product.[41]

As to the second factor, Commerce found that "the value of the excess heat is significant relative to the value of electricity." I&D Mem. at 17 (citation omitted). Çolakoğlu questions the standard by which Commerce measured significance, and asserts that Commerce "never evaluated the relative value of electricity to excess heat." Çolakoğlu Reply at 20. As Çolakoğlu recognizes, however, it does not assign a market value to electricity because it is consumed by Çolakoğlu. *Id.* Thus, Commerce examined the value of the excess heat relative to the cost of producing electricity. Oral Arg. at 2:41:25–2:43:10; *see also* Çolakoğlu § D QR, Ex. D-12. Although revenue and cost are not equivalent measures, this factor does not require a precise comparison. *See* I&D Mem. at 17 (considering "the significance of each product relative to the other joint product[]," which does not demand an examination of the relative significance each product's *value*). The value of excess heat is roughly half the amount of the cost of electricity produced by GT1.[42] A reasonable mind could conclude that the value of the excess heat revenue is sufficiently significant so as to support its treatment as a coproduct. *See Huaiyin Foreign Trade Corp. (30)*, 322 F.3d at 1374. Although Commerce's explanation could have been clearer, the path of its decision is discernible. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a

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[41] That Çolakoğlu does not assign costs to excess heat does not change the outcome. Even assuming, *arguendo*, that one would expect to find costs associated with a coproduct, the possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *See Matsushita*, 750 F.2d at 933.

[42] For the POI, Çolakoğlu earned [[ ]] TL (Turkish Lira) in revenue for the sale of excess heat, and incurred [[ ]] TL in costs to produce electricity at GT1. Çolakoğlu § D QR, Ex. D-12.

reviewing court.") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) ("We will . . . uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (internal quotation marks and citation omitted)).

In sum, Commerce's consideration of the five factors, and its reliance on the first and second factors in particular, provides substantial evidence to support Commerce's decision to treat excess heat as a co-product rather than a by-product. *See* 19 C.F.R. § 351.401(b)(1).[43] Accordingly, Commerce's decision to treat excess heat as a co-product will be sustained.

### D. Commerce's Calculation of Indirect Selling Expenses

Pursuant to 19 U.S.C. § 1677a(d)(1), Commerce shall reduce a respondent's constructed export price[44] by certain expenses incurred by an affiliated seller in the United States.[45] The statute and the relevant regulation, 19 C.F.R. § 351.401(g), are silent as to how Commerce should calculate indirect selling expenses ; thus, Commerce has discretion to fashion a reasonable methodology. *See, e.g.*, *NSK Ltd. v. United States*, 29 CIT 1, 17, 58 F. Supp. 2d 1276, 1291 (2005), *aff'd,* 162 F. App'x 982 (Fed. Cir. 2006). "Commerce typically allocates indirect selling expenses based on sales value." *Micron Tech., Inc. v. United States*, 23 CIT 55, 62, 44 F. Supp. 2d 216, 223 (1999); *see also* Gov. Resp. at 22 ("Commerce generally uses a relative sales value methodology to calculate a respondent's indirect selling expenses."). Pursuant to this methodology, "Commerce calculates an allocation ratio" by dividing a respondent's total indirect selling expenses (the numerator in this equation) by its total sales value upon

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[43] Commerce also points to "the [significant] amount of kilowatts of excess heat generated in relation to the electricity generated at Çolakoğlu's GT1." I&D Mem. at 17 (citation omitted). The record before the court, however, does not clearly indicate the measure of excess heat. Rather, the record only shows the amount of electricity produced by OVA's steam turbine *from* Çolakoğlu's excess heat, measured in kilowatts. *See* Çolakoğlu Final Cost Calc. Mem., Attach. 2. The significance of this value for purposes of the issue under consideration is unclear; however, this lack of clarity is not dispositive because the court finds Commerce's determination as to the second factor adequately supported by its finding with regard to the value of the excess heat.

[44] Sales are made on a CEP basis when the "subject merchandise is first sold . . . in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b).

[45] In full, § 1677a(d)(1) instructs Commerce to reduce CEP by the amounts incurred by an affiliate for:

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) ) any selling expenses that the seller pays on behalf of the purchaser; and

(D) ) any selling expenses not deducted under subparagraph (A), (B), or (C).

19 U.S.C. § 1677a(d)(1).

which those expenses were incurred (the denominator). Gov. Resp. at 22; *see also U.S. Steel Corp. v. United States*, 34 CIT 252, 257–58, 712 F. Supp. 2d 1330, 1337 (2010) (describing Commerce's relative sales value methodology). Commerce then applies that ratio to the subject merchandise's gross unit price to allocate the indirect sales expenses to each sale. Gov. Resp. at 22.

Here, Çolakoğlu's affiliate, Medtrade, Inc. ("Medtrade") assisted Çolakoğlu with all of its sales in the United States and North America, and, thus, all of Çolakoğlu's U.S. sales were on a CEP basis. I&D Mem. at 8–9. Accordingly, Commerce calculated Çolakoğlu's indirect selling expense ratio on the basis of Medtrade's POI sales and expenses. *Id.* at 8–9; *see also* Verification of the U.S. Sales Responses of Çolakoğlu Metalurgi A.S. (Metalurgi), Çolakoğlu Dis Ticaret A.S. (COTAS), and Medtrade Inc. (Medtrade) ("Çolakoğlu CEP Sales Verification Report") at 10–11, CJA Tab 30, CR 463, PJA Tab 30, PR 294, ECF No. 69–1.

Çolakoğlu contends that Commerce should instead have allocated Medtrade's indirect selling expenses over sales by Medtrade *and* COTAS, Çolakoğlu's Turkey-based affiliate responsible for direct sales to North America, because some of Medtrade's expenses pertained to Canadian sales. Çolakoğlu Mem. at 23–24 & n.5. According to Çolakoğlu, its proposed ratio would more accurately reflect the indirect selling expenses incurred on U.S. sales. *Id.* at 24. Defendant responds that Commerce correctly declined to include COTAS sales in the indirect selling expense denominator because "it would have created a falsely low ratio by including COTAS sales but not COTAS expenses," which were reported elsewhere.[46] Gov. Resp. at 23; *see also* Def.-Ints.' Resp. at 39–40.

Commerce calculated an indirect selling expense ratio based upon Medtrade's POI sales and expenses encompassing all of North America. *See* Çolakoğlu CEP Sales Verification Report at 10–11. The geographic consistency reflected in the numerator and denominator thus produced a ratio that, when applied to unit price, reasonably allocated the indirect selling expenses to each sale. Including COTAS's sales in the denominator while excluding its expenses from the numerator would, as the Government contends, artificially lower the ratio. Accordingly, Çolakoğlu has not demonstrated that Commerce's allocation of indirect selling expenses in this case is unreasonable or unsupported by substantial evidence and it will be sustained.[47]

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[46] COTAS expenses were reported in a separate field capturing "indirect selling expenses incurred in the country of manufacture." Çolakoğlu CEP Sales Verification Report at 10.

[47] Çolakoğlu alternatively contends that Commerce should reset indirect selling expenses for U.S. sales by COTAS to "zero" in order to "offset the distortive effect of not including Çolakoğlu's direct U.S. sales in the [indirect selling expense] ratio denominator." Çolakoğlu

### E. Commerce's Rejection of Corrections to Çolakoğlu's International Ocean Freight Expenses

Çolakoğlu challenges Commerce's refusal to accept at verification certain "minor corrections" to its reported international freight expenses that consisted of "small discounts on international freight charges." Çolakoğlu Mem. at 36. Commerce rejected the corrections on the basis that they "were not minor" because they "affected most of Çolakoğlu's U.S. sales." I&D Mem. at 10 & n.32 (citing Verification of the Sales Response of Çolakoğlu Metalurji A.S. (Metalurji), Çolakoğlu Dis Ticaret A.S. (COTAS), and Medtrade Inc. (Medtrade) ("Çolakoğlu Sales Verification Report") at 2, Çolakoğlu Suppl. CJA Tab 2, CR 462, Çolakoğlu Suppl. PJA Tab 2, PR 292, ECF No. 82). Commerce therefore calculated Çolakoğlu's ocean freight on the basis of its questionnaire response. *Id.* at 10 & n.29 (citations omitted). The Government contends that that Commerce's refusal to accept corrections to Çolakoğlu's reported international freight expenses was supported by substantial evidence. Gov. Resp. at 31; *see also* Def.-Ints. Resp. at 40. The Government is incorrect.

The Sales Verification Report relied on by Commerce to support its rejection of Çolakoğlu's corrections fails to substantiate the nature of the corrections. *See* Çolakoğlu Sales Verification Report at 2. Rather, like the Issues and Decision Memorandum, the Sales Verification Report merely reiterates Commerce's basis for rejecting the corrections. *See id.* At oral argument, the Government explained that Commerce's verifiers refused to accept the relevant document, so all the record contains is Commerce's explanation for the refusal. Oral Arg. at 2:16:00–2:16:28.

Although Commerce has "discretion to reject substantial new factual information submitted after the deadline for submission of such information," *Reiner Brach GmbH & Co.KG v. United States*, 26 CIT 549, 560, 206 F. Supp. 2d 1323, 1334 (2002), the court must have some basis upon which to review Commerce's decision that the corrections "were not minor."[48] The court cannot accept Commerce's bare conclusion because it is not supported by substantial evidence. 19

Mem. at 24 & nn.6–7. Because the court has not found any distortion in Commerce's indirect selling expense ratio, it need not address Çolakoğlu's proposed remedy.

[48] The purpose of verification is "to verify the accuracy and completeness of submitted factual information." *Jinko Solar Co., Ltd. v. United States*, 41CIT ___, ___, 229 F. Supp. 3d 1333, 1356 (2017) (quoting 19 C.F.R. § 351.307(d)). Commerce therefore accepts new information at verification "only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record." *Id.* (citation omitted);

U.S.C. § 1516a(b)(1)(B)(i).[49] Commerce's determination will be remanded for reconsideration.

## CONCLUSION & ORDER

In accordance with the foregoing, Plaintiffs' respective motions for judgment on the agency record are granted, in part, and denied, in part, and it is hereby

**ORDERED** that Commerce's *Final Determination* is remanded for reconsideration or further explanation of Commerce's treatment of Erdemir's date of sale for home market sales as discussed in Section I.B; it is further

**ORDERED** that Commerce's *Final Determination* is remanded for reconsideration of Çolakoğlu's request for a duty drawback adjustment as discussed in Section II.A; it is further

**ORDERED** that Commerce's *Final Determination* is remanded for reconsideration or further explanation of the agency's rejection of Çolakoğlu's corrections to international ocean freight expenses, as discussed in Section II.E; it is further

**ORDERED** that Commerce shall file its remand redetermination on or before June 20, 2018; it is further

**ORDERED** that subsequent proceedings shall be governed by USCIT Rule 56.2(h); it is further

**ORDERED** that any comments or responsive comments must not exceed 5,000 words; it is further

**ORDERED** that Commerce's *Final Determination* is sustained with respect to Erdemir's date of sale for U.S. sales, as discussed in Section I.C; and it is further

**ORDERED** that Commerce's *Final Determination* is sustained with respect to Commerce's denial of a quarterly cost-averaging methodology for calculating Çolakoğlu's costs of production, Commerce's treatment of excess heat as a by-product, and Commerce's calculation of Çolakoğlu's indirect selling expenses, as discussed in Sections II.B-D.

Dated: March 22, 2018
New York, New York

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

[49] According to the Government, because Çolakoğlu does not dispute the factual basis underlying Commerce's decision (i.e., that the corrections affected most of Çolakoğlu's U.S. sales), and only challenges the conclusion Commerce drew from that factual basis, the document's absence from the record is not dispositive. Oral Arg. at 2:17:22–2:18:03. The court disagrees. Even assuming, *arguendo*, that the corrections affected the majority of Çolakoğlu's U.S. sales, it does not necessarily follow that the corrections were—or were not—minor. That determination is inherently fact-specific and raises questions, for example, about the precise nature of the discount and whether its acceptance would have required a single recalculation of the freight applicable to each sale or transaction-specific recalculations. Because the court is unable to address those questions, Commerce's decision must be remanded.

Slip Op. 18–32

DEOSEN BIOCHEMICAL LTD., DEOSEN BIOCHEMCIAL (ORDOS) LTD., DEOSEN USA, INC., and A.H.A. INTERNATIONAL CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and CP KELCO US, INC., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 17–00044

[The court sustains the determinations of the U.S. Department of Commerce.]

Dated: April 2, 2018

*Chunlian Yang, Kenneth G. Weigel*, Alston & Bird LLP, of Washington, D.C., for plaintiffs.

*Kelly A. Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Brandon J. Custard*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Matthew L. Kanna*, Arent Fox LLP, of Washington, D.C., for defendant-intervenor.

## *OPINION AND ORDER*

**Goldberg, Senior Judge:**

Plaintiffs Deosen Biochemical Ltd. ("Deosen Zibo"), Deosen Biochemical (Ordos) Ltd. ("Deosen Ordos"), Deosen USA Inc. ("Deosen USA"), and A.H.A. International Co., Ltd. ("AHA") challenge the final results issued by the U.S. Department of Commerce ("Commerce" or "the Department") in its administrative review of the antidumping duty on xanthan gum from the People's Republic of China.

Plaintiffs filed two separate complaints challenging Commerce's findings as they relate to two separate periods of review: July 19, 2013 through June 30, 2014 ("AR1"), Complaint, No. 17–00044 ("AR1") ECF No. 5 (Mar. 9, 2017), and July 1, 2014 through June 30, 2015 ("AR2"), Complaint, No. 17–00045 ("AR2") ECF No. 2 (Mar. 10, 2017). The two complaints assert that Commerce cannot lawfully apply to Plaintiffs the China-wide rate of 154.07%, the imposition of which was based primarily on a business arrangement that spanned both periods of review. *See* Resp. to Suppl. Questionnaire, AR2 P.R. 45 (Oct. 9, 2015), ECF No. 43. As a result, both complaints and Commerce's ultimate decision will be analyzed collectively by the court.[1]

Specifically, Plaintiffs dispute the application of facts otherwise available ("FA") and adverse facts available ("AFA") under 19 U.S.C.

[1] The court has entered a substantially identical opinion in *Deosen Biochemical Ltd. v. United States*, Court No. 17–00045.

§§ 1677e(a) and (b), *see* Post-Prelim. Results Mem., AR1 P.R. 333 (Aug. 5, 2016), ECF No. 47, as well as the resultant rate imposed by Commerce. *See Xanthan Gum from the People's Republic of China*, 82 Fed. Reg. 11,428, 11,429–30 (Dep't Commerce Feb. 23, 2017) (final results) ("Final Results") and accompanying Issues & Decision Mem. ("I&D Mem.").[2] On review of Plaintiffs' motions for summary judgment, Mot. for J. on Agency R., AR1 & AR2 ECF Nos. 32 (Aug. 23, 31, 2017), the court sustains Commerce's application of FA and AFA as well as the resultant separate rate of 154.07%.

## *BACKGROUND*

Commerce initiated an antidumping duty investigation in July 2012, *Xanthan Gum from Austria and the People's Republic of China*, 77 Fed. Reg. 39,210 (Dep't Commerce July 2, 2012) (initiation), and published the results roughly a year later. *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't Commerce July 19, 2013) (am. final determination). After receiving requests for review of that order, Commerce initiated the first administrative review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 51,548 (Dep't Commerce Aug. 29, 2014) (initiation).

AHA was chosen as a mandatory respondent, Selection of Resp'ts Mem., AR1 P.R. 24 at 5 (Sept. 23, 2014), and was issued a questionnaire. AHA Questionnaire, AR1 P.R. 27 (Sept. 25, 2014). Based on AHA's responses, Commerce then sent questionnaires to Deosen Zibo and Deosen Ordos in order to gather more information on sales reported by AHA. Deosen Questionnaire, AR1 P.R. 133 (Feb. 26, 2015). The questionnaires requested that the entities describe, and provide documentation relating to, "agreement(s) for sales in the United States (*e.g.*, long-term purchase contract, short-term purchase contract, purchase order, order confirmation)." AHA Questionnaire, AR1 P.R. 27 at A-7; AHA Questionnaire, AR2 P.R. 30 at A-7 (Sept. 29, 2015); Deosen Questionnaire, AR2 P.R. 96 at A-7 (Nov. 13, 2015).

Plaintiffs submitted several responses to Commerce's questionnaires. *See* Deosen's Sec. A Resp., AR1 P.R. 165 at 16–18 (Mar. 24, 2014); AHA's Sec. A Resp., AR1 P.R. 57 at 15–16 (Oct. 27, 2014); AHA's Sec. A Resp., AR2 P.R. 113 at 16–18 (Nov. 23, 2015); s*ee also* Deosen's Sec. A Resp., AR2 P.R. 121 (Dec. 9, 2015). Each response indicated that sales were made pursuant to purchase orders made by customers

[2] The Final Results covered only AR1; however, in AR2 Commerce imposed the same rate for the same reasons. *See Xanthan Gum from the People's Republic of China*, 82 Fed. Reg. 11,434, 11,435 (Dep't Commerce Feb. 23, 2017) (final results) and accompanying Issues & Decision Mem.

of the Deosen entities. Commerce then sent a supplemental questionnaire, to which Plaintiffs responded on May 7, 2015. Deosen's Sec. A. Suppl. Resp., AR1 P.R. 192 (May 7, 2015). In that response, Plaintiffs further explained the relationship between Deosen Zibo and AHA, providing that "the vast majority of Deosen Zibo's US sales were made through AHA International Co., Ltd. to Deosen's US customers" and that "AHA purchased the subject merchandise from Deosen and resold it to Deosen USA . . . ." *Id.* at 6. None of these responses included information on any formal agreements made between Plaintiffs.

Thereafter, the Department delayed announcing its final determinations so that it could "further examine[] the relationship between Deosen and AHA with respect to the sales at issue," Deferral of the Final Results, AR1 P.R. 310 at 4 (Feb. 9, 2016), and sent Plaintiffs a supplemental questionnaire. Suppl. Questionnaire, AR1 P.R. 312 (Mar. 4, 2016).

On March 21, 2016, Plaintiffs disclosed, for the first time, two documents detailing an arrangement between Deosen Zibo and AHA covering the period of March 13, 2013 to February 28, 2015, under which AHA agreed to export xanthan gum on behalf of Deosen Zibo. Resp. to Suppl. Questionnaire, AR1 P.R. 317, Ex. 7 (Mar. 21, 2016) ("Export Service Agreements").[3]

On August 5, 2016, Commerce made preliminary findings on the significance of the Export Service Agreements. *See* Post-Prelim. Results Mem., AR1 P.R. 333 (Aug. 5, 2016). Commerce determined that the documents showed "that Deosen controlled the sales through AHA, that Deosen assumed all responsibilities for the sales, and that Deosen bore the risk of any losses associated with those sales." *Id.* at 6. Thus, the Department found that "Deosen's sales to AHA and AHA's sales to Deosen's U.S. customers were not a legitimate sales process, as claimed by Deosen and AHA, but instead were sales made and controlled by Deosen." *Id.* at 7. As a result, Commerce decided that not only had Plaintiffs withheld the Export Service Agreements, they had also impeded the investigation both by providing inconsistent statements contradicted by the Export Service Agreements and by structuring their business arrangement in such a way as to omit necessary information from the record. *See id.* at 7–9 (citing 19 U.S.C. § 1677e(a)(2)).

In its final decision, Commerce determined that not only was FA appropriate, *see id.*, but also that AFA was warranted because Plaintiffs had "failed to cooperate by not acting to the best of [their] ability to comply with a request for information" in violation of 19 U.S.C. §

[3] The Export Service Agreements were later disclosed in AR2 as well. *See* Resp. to Req. for Submissions, AR2 P.R. 287, Ex. 7 (July 19, 2016).

1677e(b)(1). I&D Mem. cmt. 1. Three specific reasons gave rise to the FA conclusion: Plaintiffs 1) withheld the Export Service Agreements, 2) organized their business arrangement in such a manner so as to impede the investigation, and 3) provided inconsistent information. *Id.* Withholding the Export Service Agreements and not revealing the business arrangement were particularly relevant because, in Commerce's view, those details "could have an effect on U.S. prices" and the information that was provided was "artificially constructed and [did] not provide a reliable basis upon which to calculate a dumping rate." *Id.* Additionally, Commerce determined that, at a minimum, "submit[ting] misleading information" and continuing to be "not forthcoming with key aspects" of the business relationship both were indicators that Plaintiffs had not acted to the best of their abilities, thus justifying the imposition of AFA. *Id.*

Ultimately, even though Plaintiffs were otherwise entitled to a separate rate, *see id.* cmt. 3, Commerce imposed the China-wide rate of 154.07% to Plaintiffs, "the highest dumping margin alleged in the petition," *id.*, as a result of the Department's AFA determination. *See* Final Results at 11,429–30.

## *JURISDICTION AND STANDARD OF REVIEW*

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and will sustain Commerce's determinations 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).

## *DISCUSSION*

In enacting 19 U.S.C. § 1677e, Congress set out a two-step process with which Commerce must comply if it is to invoke AFA. First, the Department must identify a justification for the application of FA and, only then, if there is a determination that a party has not acted to "the best of its ability," may Commerce apply AFA. 19 U.S.C. § 1677e(b)(1). Here, Commerce permissibly imposed an AFA rate of 154.07% and, as such, the Department's Final Results are sustained.

### *a. Adverse Facts Available*

Commerce has the ability to "use [] facts otherwise available" when a party to a proceeding: A) withholds information requested by the Department, B) fails to provide requested information by a specified deadline or in a specified form, C) "significantly impedes a proceeding," or D) provides information that cannot be verified. *See* 19 U.S.C. § 1677e(a)(2). This statute provides Commerce with the ability to fill in "informational gaps" with FA when those gaps arise out of one of

the four circumstances described in 19 U.S.C. § 1677e(a)(2). *See Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1225, 1231 (2017) (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)). Only once one of these conditions has been met and the Department has deemed FA appropriate may Commence evaluate whether or not to impose AFA. If the Department determines that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may:

> [U]se an inference that is adverse to the interests of that party in selecting from among the facts otherwise available; and [] is not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.

19 U.S.C. § 1677e(b)(1). In other words, if the party withheld requested information *and* did not "put forth its maximum effort" to comply with that request, *see Nippon Steel Corp.*, 337 F.3d at 1382, the Department can apply AFA.

The court's review probes whether the Department's finding that requested information was withheld is supported by substantial evidence, and its imposition of AFA was in accordance with law. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed Cir. 2012) (applying the substantial evidence standard to agency findings of fact and the "arbitrary and capricious (or contrary to law) standard" to agency reasoning).

Here, Commerce asked for "agreement(s) for sales in the United States," *see, e.g.*, AHA Questionnaire, AR1 P.R. 27 at A-7, and when it became apparent that the Export Service Agreements had been withheld, Commerce determined that the application of FA was appropriate under 19 U.S.C. § 1677e(a)(2). I&D Mem. cmt. 1. Then, because Commerce also determined that Plaintiffs had failed to act to the best of their ability to produce the Export Service Agreements, Commerce imposed an AFA rate of 154.07%. Final Results at 11,429.

Substantial evidence supports Commerce's conclusion that Plaintiffs withheld requested information under 19 U.S.C. § 1677e(a)(2)(A). "The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record . . . ." *Nippon Steel Corp.*, 337 F.3d at 1381.

As an initial matter, the Export Service Agreements were clearly requested. As the Export Service Agreements laid out an "agreement for sales in the United States," the documents should have been produced in response to Commerce's original questionnaire.[4] Next, the information contained within the Export Service Agreements was withheld. Although Plaintiffs generally described their arrangement, Commerce requested—but was not furnished with—documentation regarding that arrangement. Commerce found that, "[c]ontrary to Deosen's claims, the [Export Service Agreements] [did] not merely confirm the explanations of the relationship given in the questionnaire response but provide[d] the Department with specific details regarding the arrangement between AHA and Deosen which clearly show just how limited AHA's role was in the sales that Deosen reported as AHA's." I&D Mem. cmt. 1. As there were discrepancies between the previous representations and the details found within the Export Service Agreements, Commerce's finding that Plaintiffs withheld requested information under 19 U.S.C. § 1677e(a)(2)(A) is supported by substantial evidence. Once it became clear that those sales agreements had been withheld, Commerce was entitled to apply FA.

Commerce's second justification for applying FA, impeding an investigation under 19 U.S.C. § 1677e(a)(2)(C), is likewise supported by substantial evidence. Commerce's application of FA under 19 U.S.C. § 1677e(a)(2)(A) serves as a distinct ground for applying FA so as to make this separate finding, to an extent, moot. In any event, as this court has previously stated, the parties' arranging a principal-agent relationship for the purposes of obtaining a lower rate may act as an impediment to a proceeding. *See Tianjin Machinery Import & Export Corp. v. United States*, 31 CIT 1416, 1422–24, 2007 WL 2701368, at *5–6 (2007). As in *Tianjin*, Plaintiffs only fully revealed their agency scheme designed to obtain the lower cash deposit rate after the fact. Whereas Plaintiffs at one point described "Deosen's U.S. sales of subject merchandise [as] AHA's sales," the Export Service Agreements revealed "that these were actually sales made and controlled by Deosen." I&D Mem. cmt. 1. As a result, substantial evidence supports Commerce's determination that Plaintiffs impeded the

[4] Indeed, Plaintiffs appear to concede that the Export Service Agreements were requested by Commerce in the original questionnaire. *See* Mot. for J. on Agency R., AR1 & AR2 ECF Nos. 32 at 21 (Aug. 23, 31, 2017) (suggesting that the withholding of the document was the result of an "accidental omission.").

Department's investigation by concealing the true nature of Plaintiffs' relationship with one another. Plaintiffs' arguments to the contrary are unavailing.[5]

The court now turns to Commerce's imposition of AFA and whether the Department's determination that Plaintiffs had "failed to cooperate by not acting to the best of [their] ability to comply with a request for information," 19 U.S.C. § 1677e(b)(1), was in accordance with law. "Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp.*, 337 F.3d at 1382. Commerce asked for sales agreements four times across two administrative reviews; each time, Plaintiffs withheld key responsive documents. Instead, the Export Service Agreements were produced as "new factual information" in response to the Department's supplemental questionnaire. *See* Resp. to Suppl. Questionnaire, AR1 P.R. 317 at 1 (Mar. 21, 2016).

While Plaintiffs argue that their "unintentional omission due to a good faith misunderstanding of a question cannot be the basis for applying AFA," Mot. for J. on Agency R. 23, AR1 ECF No. 32 (Aug. 23, 2017), they mistakenly construe the statute as both requiring Commerce to 1) excuse such "unintentional omissions" and 2) make a showing of bad faith. It does neither. *See Nippon Steel Corp.*, 337 F.3d at 1382–83 (holding that the statute does not "condone inattentiveness, carelessness, or inadequate record keeping" and "does not contain an intent element.").

Rather, Commerce must only show that a reasonable importer would have known to preserve the requested documentation and that Plaintiffs failed to produce the requested information because they

[5] Plaintiffs maintain that Commerce impermissibly relied on "Deosen's and AHA's actions to structure sales of Deosen's subject merchandise in such a way to avoid payment of the proper antidumping duty cash deposits at the appropriate rate." *See* I&D Mem. cmt. 1. However, not only does this assertion misstate the Department's view but it also overlooks Commerce's primary reason for applying FA. Plaintiffs inaccurately characterize Commerce's FA decision as an attempt by Commerce to "punish Plaintiffs for arranging their sales to use a lower cash deposit rate[, which] was not in accordance with law." *See* Mot. for J. on Agency R. 17, AR1 ECF No. 32 (Aug. 23, 2017); *see also* Mot. for J. on Agency R. 17, AR2 ECF No. 32 (Aug. 31, 2017) ("In an effort to distract from its use of AFA to punish Plaintiffs for using the lower cash deposit rate, Commerce attempts to justify its actions by reciting the statute."). In actuality, Commerce determined that Plaintiffs' business arrangement—and the concealment thereof—impeded the investigation by leaving the record devoid of certain material information. *See* I&D Mem. cmt. 1 ("The record demonstrates that Deosen and AHA significantly impeded the proceeding by engaging in a scheme to avoid the applicable cash deposit rate, *resulting in necessary information not being available on the record* to calculate an accurate dumping margin." (emphasis added)). Contrary to Plaintiffs' assertions, Commerce did not conclude that the arrangement itself impeded the investigation.

did not put forth their maximum effort. *See id.* Certainly, as here, repeated requests for and avoiding production of certain documents can constitute failure to cooperate to the best of Plaintiffs' ability. *See id.* at 1383 (sustaining Commerce's AFA decision when it requested data that respondent repeatedly failed to—but ultimately did—produce). By withholding a requested document despite multiple requests for its production, Plaintiffs failed to act to the best of their abilities. Therefore, we sustain Commerce's imposition of AFA as it was in accordance with law.

Accordingly, Commerce's determinations that FA and AFA were available are supported by substantial evidence and in accordance with law. As such, those determinations are sustained and the court must next consider whether Commerce's chosen AFA rate was appropriate.

*b. Commerce's Selected AFA Rate*

Plaintiffs also argue that Commerce's selected AFA rate, the China-wide rate, was not in accordance with law because Commerce had already determined that Plaintiffs were entitled to a separate rate. So long as Commerce's reasoning is not arbitrary and capricious, the court will sustain the Department's chosen AFA rate. *See Changzhou Wujin Fine Chem. Factory Co.*, 701 F.3d at 1377.

"In antidumping duty proceedings involving merchandise from a nonmarket economy country, [] Commerce presumes all respondents are government-controlled and therefore subject to a single country-wide rate." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015). If a respondent is able to rebut this presumption, it may be entitled to a separate rate. *See id.*

Regardless of any separate rate analysis, the imposition of AFA may rely on information derived from the petition, final determinations in the investigation, previous reviews, or any other information placed on the record. 19 U.S.C. § 1677e(b)(2). Further, Commerce has the discretion to select the highest rate on the record, 19 U.S.C. § 1677e(d)(2), and the resultant rate need not "reflect[] an alleged commercial reality of the interested party," 19 U.S.C. § 1677e(d)(3)(B). Commerce "may employ [such] inferences . . . to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See Viet I-Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1110 (Fed Cir. 2016).

Plaintiffs contend that because they were initially found to be entitled to a separate rate by Commerce, the Department is precluded from using the China-wide rate as part of AFA. Plaintiffs' position ignores the plain language of the statute, which gives Commerce the

discretion to impose the highest rate on the record. *See* 19 U.S.C. § 1677e(d)(2); *see also Viet I-Mei Frozen Foods Co.*, 839 F.3d at 1109–10 (upholding Commerce's AFA selection of the Vietnam-wide rate despite the finding of respondent's eligibility for a separate rate). Plaintiffs claim to find support in this court's ruling in *Shenzhen Xinboda Industrial Co. v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1305, 1317 (2016). Yet, that case is inapposite as it contemplated Commerce's rejection of separate rate information. *See id.* at 1316. That is not at issue here. The question of separate rates is entirely detached from the imposition of AFA such that a party's entitlement to a separate rate does not eliminate the power of Commerce to choose from available numbers on the record, including the country-wide rate. *See* 19 U.S.C. §§ 1677e(b)(2), (d)(2).

Tellingly, Plaintiffs cite to cases decided before Congress's amendments to the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). *See Yantai Xinke Steel Structure Co. v. United States*, Slip Op. 12–95, 2012 WL 2930182, at *14 (CIT July 18, 2012); *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 771–72, 387 F. Supp. 2d 1270, 1287 (2005). It was these amendments that granted Commerce the discretion to apply the highest rate on the record and in which Congress also made clear that the Department was not required to impose an AFA rate that reflected alleged commercial realities. *See* 19 U.S.C. § 1677e(d)(2), (3); *see also generally Özdemir Boru San. ve Tic. Ltd. Sti.*, 41 CIT __, 273 F. Supp. 3d 1225 (discussing the import of the amendments). Plaintiffs conveniently disregard the broad discretion Congress granted to Commerce.

Ultimately, Commerce acted in accordance with law in imposing the China-wide rate despite its contemporaneous determination that Plaintiffs had established their entitlement to a separate rate. AFA permits Commerce to choose from among the options available on the record; that Plaintiffs had established their entitlement to a separate rate as an initial matter did not eliminate the China-wide rate as an option when the Department deemed AFA appropriate. As a result, this court sustains Commerce's chosen AFA rate.

## *CONCLUSION AND ORDER*

For the foregoing reasons, upon consideration of the parties' motions for summary judgment and all papers and proceedings herein, it is hereby:

**ORDERED** that Commerce properly applied FA under 19 U.S.C. § 1677e(a)(2)(A) and (c), AFA under 19 U.S.C. § 1677e(b)(1), and a rate of 154.07%; it is further

**ORDERED** that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record is DENIED.

Dated: April 2, 2018
New York, New York

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

## Slip Op. 18–33

Deosen Biochemical Ltd., Deosen Biochemcial (Ordos) Ltd., Deosen USA, Inc., and A.H.A. International Co., Ltd., Plaintiffs, v. United States, Defendant, and CP Kelco US, Inc., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 17–00045

[The court sustains the determinations of the U.S. Department of Commerce.]

Dated: April 2, 2018

*Chunlian Yang*, *Kenneth G. Weigel*, Alston & Bird LLP, of Washington, D.C., for plaintiffs.

*Kelly A. Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Brandon J. Custard*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Matthew L. Kanna*, Arent Fox LLP, of Washington, D.C., for defendant-intervenor.

### ***OPINION AND ORDER***

**Goldberg, Senior Judge:**

Plaintiffs Deosen Biochemical Ltd. ("Deosen Zibo"), Deosen Biochemical (Ordos) Ltd. ("Deosen Ordos"), Deosen USA Inc. ("Deosen USA"), and A.H.A. International Co., Ltd. ("AHA") challenge the final results issued by the U.S. Department of Commerce ("Commerce" or "the Department") in its administrative review of the antidumping duty on xanthan gum from the People's Republic of China.

Plaintiffs filed two separate complaints challenging Commerce's findings as they relate to two separate periods of review: July 19, 2013 through June 30, 2014 ("AR1"), Complaint, No. 17–00044 ("AR1") ECF No. 5 (Mar. 9, 2017), and July 1, 2014 through June 30, 2015 ("AR2"), Complaint, No. 17–00045 ("AR2") ECF No. 2 (Mar. 10, 2017). The two complaints assert that Commerce cannot lawfully apply to Plaintiffs the China-wide rate of 154.07%, the imposition of which was based primarily on a business arrangement that spanned both periods of review. *See* Resp. to Suppl. Questionnaire, AR2 P.R. 45 (Oct. 9, 2015), ECF No. 43. As a result, both complaints and Commerce's ultimate decision will be analyzed collectively by the court.[1]

Specifically, Plaintiffs dispute the application of facts otherwise available ("FA") and adverse facts available ("AFA") under 19 U.S.C.

[1] The court has entered a substantially identical opinion in *Deosen Biochemical Ltd. v. United States*, Court No. 17–00044.

§§ 1677e(a) and (b), *see* Post-Prelim. Results Mem., AR1 P.R. 333 (Aug. 5, 2016), ECF No. 47, as well as the resultant rate imposed by Commerce. *See Xanthan Gum from the People's Republic of China*, 82 Fed. Reg. 11,434, 11,435 (Dep't Commerce Feb. 23, 2017) (final results) ("Final Results") and accompanying Issues & Decision Mem. ("I&D Mem.").[2] On review of Plaintiffs' motions for summary judgment, Mot. for J. on Agency R., AR1 & AR2 ECF Nos. 32 (Aug. 23, 31, 2017), the court sustains Commerce's application of FA and AFA as well as the resultant separate rate of 154.07%.

## *BACKGROUND*

Commerce initiated an antidumping duty investigation in July 2012, *Xanthan Gum from Austria and the People's Republic of China*, 77 Fed. Reg. 39,210 (Dep't Commerce July 2, 2012) (initiation), and published the results roughly a year later. *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't Commerce July 19, 2013) (am. final determination). After receiving requests for review of that order, Commerce initiated the first administrative review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 51,548 (Dep't Commerce Aug. 29, 2014) (initiation).

AHA was chosen as a mandatory respondent, Selection of Resp'ts Mem., AR1 P.R. 24 at 5 (Sept. 23, 2014), and was issued a questionnaire. AHA Questionnaire, AR1 P.R. 27 (Sept. 25, 2014). Based on AHA's responses, Commerce then sent questionnaires to Deosen Zibo and Deosen Ordos in order to gather more information on sales reported by AHA. Deosen Questionnaire, AR1 P.R. 133 (Feb. 26, 2015). The questionnaires requested that the entities describe, and provide documentation relating to, "agreement(s) for sales in the United States (*e.g.*, long-term purchase contract, short-term purchase contract, purchase order, order confirmation)." AHA Questionnaire, AR1 P.R. 27 at A-7; AHA Questionnaire, AR2 P.R. 30 at A-7 (Sept. 29, 2015); Deosen Questionnaire, AR2 P.R. 96 at A-7 (Nov. 13, 2015).

Plaintiffs submitted several responses to Commerce's questionnaires. *See* Deosen's Sec. A Resp., AR1 P.R. 165 at 16–18 (Mar. 24, 2014); AHA's Sec. A Resp., AR1 P.R. 57 at 15–16 (Oct. 27, 2014); AHA's Sec. A Resp., AR2 P.R. 113 at 16–18 (Nov. 23, 2015); s*ee also* Deosen's Sec. A Resp., AR2 P.R. 121 (Dec. 9, 2015). Each response indicated that sales were made pursuant to purchase orders made by customers

[2] The Final Results covered only AR2; however, in AR1 Commerce imposed the same rate for the same reasons. *See Xanthan Gum from the People's Republic of China*, 82 Fed. Reg. 11,428, 11,430–31 (Dep't Commerce Feb. 23, 2017) (final results) and accompanying Issues & Decision Mem.

of the Deosen entities. Commerce then sent a supplemental questionnaire, to which Plaintiffs responded on May 7, 2015. Deosen's Sec. A. Suppl. Resp., AR1 P.R. 192 (May 7, 2015). In that response, Plaintiffs further explained the relationship between Deosen Zibo and AHA, providing that "the vast majority of Deosen Zibo's US sales were made through AHA International Co., Ltd. to Deosen's US customers" and that "AHA purchased the subject merchandise from Deosen and resold it to Deosen USA . . . ." *Id.* at 6. None of these responses included information on any formal agreements made between Plaintiffs.

Thereafter, the Department delayed announcing its final determinations so that it could "further examine[] the relationship between Deosen and AHA with respect to the sales at issue," Deferral of the Final Results, AR1 P.R. 310 at 4 (Feb. 9, 2016), and sent Plaintiffs a supplemental questionnaire. Suppl. Questionnaire, AR1 P.R. 312 (Mar. 4, 2016).

On March 21, 2016, Plaintiffs disclosed, for the first time, two documents detailing an arrangement between Deosen Zibo and AHA covering the period of March 13, 2013 to February 28, 2015, under which AHA agreed to export xanthan gum on behalf of Deosen Zibo. Resp. to Suppl. Questionnaire, AR1 P.R. 317, Ex. 7 (Mar. 21, 2016) ("Export Service Agreements").[3]

On August 5, 2016, Commerce made preliminary findings on the significance of the Export Service Agreements. *See* Post-Prelim. Results Mem., AR1 P.R. 333 (Aug. 5, 2016). Commerce determined that the documents showed "that Deosen controlled the sales through AHA, that Deosen assumed all responsibilities for the sales, and that Deosen bore the risk of any losses associated with those sales." *Id.* at 6. Thus, the Department found that "Deosen's sales to AHA and AHA's sales to Deosen's U.S. customers were not a legitimate sales process, as claimed by Deosen and AHA, but instead were sales made and controlled by Deosen." *Id.* at 7. As a result, Commerce decided that not only had Plaintiffs withheld the Export Service Agreements, they had also impeded the investigation both by providing inconsistent statements contradicted by the Export Service Agreements and by structuring their business arrangement in such a way as to omit necessary information from the record. *See id.* at 7–9 (citing 19 U.S.C. § 1677e(a)(2)).

In its final decision, Commerce determined that not only was FA appropriate, *see id.*, but also that AFA was warranted because Plaintiffs had "failed to cooperate by not acting to the best of [their] ability to comply with a request for information" in violation of 19 U.S.C. §

[3] The Export Service Agreements were later disclosed in AR2 as well. *See* Resp. to Req. for Submissions, AR2 P.R. 287, Ex. 7 (July 19, 2016).

1677e(b)(1). I&D Mem. cmt. 1. Three specific reasons gave rise to the FA conclusion: Plaintiffs 1) withheld the Export Service Agreements, 2) organized their business arrangement in such a manner so as to impede the investigation, and 3) provided inconsistent information. *Id.* Withholding the Export Service Agreements and not revealing the business arrangement were particularly relevant because, in Commerce's view, those details "could have an effect on U.S. prices" and the information that was provided was "artificially constructed and [did] not provide a reliable basis upon which to calculate a dumping rate." *Id.* Additionally, Commerce determined that, at a minimum, "submit[ting] misleading information" and continuing to be "not forthcoming with key aspects" of the business relationship both were indicators that Plaintiffs had not acted to the best of their abilities, thus justifying the imposition of AFA. *Id.*

Ultimately, even though Plaintiffs were otherwise entitled to a separate rate, *see id.* cmt. 3, Commerce imposed the China-wide rate of 154.07% to Plaintiffs, "the highest dumping margin alleged in the petition," *id.*, as a result of the Department's AFA determination. *See* Final Results at 11,435.

## *JURISDICTION AND STANDARD OF REVIEW*

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and will sustain Commerce's determinations 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).

## *DISCUSSION*

In enacting 19 U.S.C. § 1677e, Congress set out a two-step process with which Commerce must comply if it is to invoke AFA. First, the Department must identify a justification for the application of FA and, only then, if there is a determination that a party has not acted to "the best of its ability," may Commerce apply AFA. 19 U.S.C. § 1677e(b)(1). Here, Commerce permissibly imposed an AFA rate of 154.07% and, as such, the Department's Final Results are sustained.

### *a. Adverse Facts Available*

Commerce has the ability to "use [] facts otherwise available" when a party to a proceeding: A) withholds information requested by the Department, B) fails to provide requested information by a specified deadline or in a specified form, C) "significantly impedes a proceeding," or D) provides information that cannot be verified. *See* 19 U.S.C. § 1677e(a)(2). This statute provides Commerce with the ability to fill in "informational gaps" with FA when those gaps arise out of one of

the four circumstances described in 19 U.S.C. § 1677e(a)(2). *See Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1225, 1231 (2017) (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)). Only once one of these conditions has been met and the Department has deemed FA appropriate may Commence evaluate whether or not to impose AFA. If the Department determines that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may:

> [U]se an inference that is adverse to the interests of that party in selecting from among the facts otherwise available; and [] is not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.

19 U.S.C. § 1677e(b)(1). In other words, if the party withheld requested information *and* did not "put forth its maximum effort" to comply with that request, *see Nippon Steel Corp.*, 337 F.3d at 1382, the Department can apply AFA.

The court's review probes whether the Department's finding that requested information was withheld is supported by substantial evidence, and its imposition of AFA was in accordance with law. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed Cir. 2012) (applying the substantial evidence standard to agency findings of fact and the "arbitrary and capricious (or contrary to law) standard" to agency reasoning).

Here, Commerce asked for "agreement(s) for sales in the United States," *see, e.g.*, AHA Questionnaire, AR1 P.R. 27 at A-7, and when it became apparent that the Export Service Agreements had been withheld, Commerce determined that the application of FA was appropriate under 19 U.S.C. § 1677e(a)(2). I&D Mem. cmt. 1. Then, because Commerce also determined that Plaintiffs had failed to act to the best of their ability to produce the Export Service Agreements, Commerce imposed an AFA rate of 154.07%. Final Results at 11,435.

Substantial evidence supports Commerce's conclusion that Plaintiffs withheld requested information under 19 U.S.C. § 1677e(a)(2)(A). "The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record . . . ." *Nippon Steel Corp.*, 337 F.3d at 1381.

As an initial matter, the Export Service Agreements were clearly requested. As the Export Service Agreements laid out an "agreement

for sales in the United States," the documents should have been produced in response to Commerce's original questionnaire.[4] Next, the information contained within the Export Service Agreements was withheld. Although Plaintiffs generally described their arrangement, Commerce requested—but was not furnished with— documentation regarding that arrangement. Commerce found that, "[c]ontrary to Deosen's claims, the [Export Service Agreements] [did] not merely confirm the explanations of the relationship given in the questionnaire response but provide[d] the Department with specific details regarding the arrangement between AHA and Deosen which clearly show just how limited AHA's role was in the sales that Deosen reported as AHA's." I&D Mem. cmt. 1. As there were discrepancies between the previous representations and the details found within the Export Service Agreements, Commerce's finding that Plaintiffs withheld requested information under 19 U.S.C. § 1677e(a)(2)(A) is supported by substantial evidence. Once it became clear that those sales agreements had been withheld, Commerce was entitled to apply FA.

Commerce's second justification for applying FA, impeding an investigation under 19 U.S.C. § 1677e(a)(2)(C), is likewise supported by substantial evidence. Commerce's application of FA under 19 U.S.C. § 1677e(a)(2)(A) serves as a distinct ground for applying FA so as to make this separate finding, to an extent, moot. In any event, as this court has previously stated, the parties' arranging a principal-agent relationship for the purposes of obtaining a lower rate may act as an impediment to a proceeding. *See Tianjin Machinery Import & Export Corp. v. United States*, 31 CIT 1416, 1422–24, 2007 WL 2701368, at *5–6 (2007). As in *Tianjin*, Plaintiffs only fully revealed their agency scheme designed to obtain the lower cash deposit rate after the fact. Whereas Plaintiffs at one point described "Deosen's U.S. sales of subject merchandise [as] AHA's sales," the Export Service Agreements revealed "that these were actually sales made and controlled by Deosen." I&D Mem. cmt. 1. As a result, substantial evidence supports Commerce's determination that Plaintiffs impeded the Department's investigation by concealing the true nature of Plaintiffs' relationship with one another. Plaintiffs' arguments to the contrary are unavailing.[5]

[4] Indeed, Plaintiffs appear to concede that the Export Service Agreements were requested by Commerce in the original questionnaire. *See* Mot. for J. on Agency R., AR1 & AR2 ECF Nos. 32 at 21 (Aug. 23, 31, 2017) (suggesting that the withholding of the document was the result of an "accidental omission.").

[5] Plaintiffs maintain that Commerce impermissibly relied on "Deosen's and AHA's actions to structure sales of Deosen's subject merchandise in such a way to avoid payment of the

The court now turns to Commerce's imposition of AFA and whether the Department's determination that Plaintiffs had "failed to cooperate by not acting to the best of [their] ability to comply with a request for information," 19 U.S.C. § 1677e(b)(1), was in accordance with law. "Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp.*, 337 F.3d at 1382. Commerce asked for sales agreements four times across two administrative reviews; each time, Plaintiffs withheld key responsive documents. Instead, the Export Service Agreements were produced as "new factual information" in response to the Department's supplemental questionnaire. *See* Resp. to Suppl. Questionnaire, AR1 P.R. 317 at 1 (Mar. 21, 2016).

While Plaintiffs argue that their "unintentional omission due to a good faith misunderstanding of a question cannot be the basis for applying AFA," Mot. for J. on Agency R. 23, AR1 ECF No. 32 (Aug. 23, 2017), they mistakenly construe the statute as both requiring Commerce to 1) excuse such "unintentional omissions" and 2) make a showing of bad faith. It does neither. *See Nippon Steel Corp.*, 337 F.3d at 1382–83 (holding that the statute does not "condone inattentiveness, carelessness, or inadequate record keeping" and "does not contain an intent element.").

Rather, Commerce must only show that a reasonable importer would have known to preserve the requested documentation and that Plaintiffs failed to produce the requested information because they did not put forth their maximum effort. *See id.* Certainly, as here, repeated requests for and avoiding production of certain documents can constitute failure to cooperate to the best of Plaintiffs' ability. *See id.* at 1383 (sustaining Commerce's AFA decision when it requested data that respondent repeatedly failed to—but ultimately did—produce). By withholding a requested document despite multiple

applicable antidumping duty cash deposits at the appropriate rate." *See* I&D Mem. cmt. 1. However, not only does this assertion misstate the Department's view but it also overlooks Commerce's primary reason for applying FA. Plaintiffs inaccurately characterize Commerce's FA decision as an attempt by Commerce to "punish Plaintiffs for arranging their sales to use a lower cash deposit rate[, which] was not in accordance with law." *See* Mot. for J. on Agency R. 17, AR1 ECF No. 32 (Aug. 23, 2017); *see also* Mot. for J. on Agency R. 17, AR2 ECF No. 32 (Aug. 31, 2017) ("In an effort to distract from its use of AFA to punish Plaintiffs for using the lower cash deposit rate, Commerce attempts to justify its actions by reciting the statute."). In actuality, Commerce determined that Plaintiffs' business arrangement—and the concealment thereof—impeded the investigation by leaving the record devoid of certain material information. *See* I&D Mem. cmt. 1 ("The record demonstrates that Deosen and AHA significantly impeded the proceeding by engaging in a scheme to avoid the applicable cash deposit rate, *resulting in necessary information not being available on the record* to calculate an accurate dumping margin." (emphasis added)). Contrary to Plaintiffs' assertions, Commerce did not conclude that the arrangement itself impeded the investigation.

requests for its production, Plaintiffs failed to act to the best of their abilities. Therefore, we sustain Commerce's imposition of AFA as it was in accordance with law.

Accordingly, Commerce's determinations that FA and AFA were available are supported by substantial evidence and in accordance with law. As such, those determinations are sustained and the court must next consider whether Commerce's chosen AFA rate was appropriate.

*b. Commerce's Selected AFA Rate*

Plaintiffs also argue that Commerce's selected AFA rate, the China-wide rate, was not in accordance with law because Commerce had already determined that Plaintiffs were entitled to a separate rate. So long as Commerce's reasoning is not arbitrary and capricious, the court will sustain the Department's chosen AFA rate. *See Changzhou Wujin Fine Chem. Factory Co.*, 701 F.3d at 1377.

"In antidumping duty proceedings involving merchandise from a nonmarket economy country, [] Commerce presumes all respondents are government-controlled and therefore subject to a single country-wide rate." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015). If a respondent is able to rebut this presumption, it may be entitled to a separate rate. *See id.*

Regardless of any separate rate analysis, the imposition of AFA may rely on information derived from the petition, final determinations in the investigation, previous reviews, or any other information placed on the record. 19 U.S.C. § 1677e(b)(2). Further, Commerce has the discretion to select the highest rate on the record, 19 U.S.C. § 1677e(d)(2), and the resultant rate need not "reflect[] an alleged commercial reality of the interested party," 19 U.S.C. § 1677e(d)(3)(B). Commerce "may employ [such] inferences . . . to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See Viet I-Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1110 (Fed Cir. 2016).

Plaintiffs contend that because they were initially found to be entitled to a separate rate by Commerce, the Department is precluded from using the China-wide rate as part of AFA. Plaintiffs' position ignores the plain language of the statute, which gives Commerce the discretion to impose the highest rate on the record. *See* 19 U.S.C. § 1677e(d)(2); *see also Viet I-Mei Frozen Foods Co.*, 839 F.3d at 1109–10 (upholding Commerce's AFA selection of the Vietnam-wide rate despite the finding of respondent's eligibility for a separate rate).

Plaintiffs claim to find support in this court's ruling in *Shenzhen Xinboda Industrial Co. v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1305, 1317 (2016). Yet, that case is inapposite as it contemplated Commerce's rejection of separate rate information. *See id.* at 1316. That is not at issue here. The question of separate rates is entirely detached from the imposition of AFA such that a party's entitlement to a separate rate does not eliminate the power of Commerce to choose from available numbers on the record, including the country-wide rate. *See* 19 U.S.C. §§ 1677e(b)(2), (d)(2).

Tellingly, Plaintiffs cite to cases decided before Congress's amendments to the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). *See Yantai Xinke Steel Structure Co. v. United States*, Slip Op. 12–95, 2012 WL 2930182, at *14 (CIT July 18, 2012); *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 771–72, 387 F. Supp. 2d 1270, 1287 (2005). It was these amendments that granted Commerce the discretion to apply the highest rate on the record and in which Congress also made clear that the Department was not required to impose an AFA rate that reflected alleged commercial realities. *See* 19 U.S.C. § 1677e(d)(2), (3); *see also generally Özdemir Boru San. ve Tic. Ltd. Sti.*, 41 CIT __, 273 F. Supp. 3d 1225 (discussing the import of the amendments). Plaintiffs conveniently disregard the broad discretion Congress granted to Commerce.

Ultimately, Commerce acted in accordance with law in imposing the China-wide rate despite its contemporaneous determination that Plaintiffs had established their entitlement to a separate rate. AFA permits Commerce to choose from among the options available on the record; that Plaintiffs had established their entitlement to a separate rate as an initial matter did not eliminate the China-wide rate as an option when the Department deemed AFA appropriate. As a result, this court sustains Commerce's chosen AFA rate.

## *CONCLUSION AND ORDER*

For the foregoing reasons, upon consideration of the parties' motions for summary judgment and all papers and proceedings herein, it is hereby:

**ORDERED** that Commerce properly applied FA under 19 U.S.C. § 1677e(a)(2)(A) and (c), AFA under 19 U.S.C. § 1677e(b)(1), and a rate of 154.07%; it is further

**ORDERED** that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record is DENIED.

Dated: April 2, 2018
New York, New York

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

Slip Op. 18–34

ARCELORMITTAL USA LLC, Plaintiff, and AK STEEL CORPORATION, NUCOR CORPORATION, and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and NOVOLIPETSK STEEL PUBLIC JOINT STOCK COMPANY, Defendant-Intervenor.

Before: Judge Gary S. Katzmann,
Court No. 16–00173
**PUBLIC VERSION**

[Motion for Judgment on Agency Record 56.2 on behalf of Plaintiff ArcelorMittal USA LLC and Plaintiff-Intervenors AK Steel Corporation, Nucor Corporation, and United States Steel Corporation is denied.]

Dated: April 3, 2018

*Paul Rosenthal* and *Melissa Brewer*, Kelley Drye & Warren LLP, of Washington, DC, argued for plaintiff. With them on the brief were *Kathleen W. Cannon*, *R. Alan Luberda*, and *John M. Herrmann*.

*Alan H. Price*, *Timothy C. Brightbill*, and *Christopher B. Weld*, Wiley Rein LLP, of Washington, DC, for plaintiff-intervenor, Nucor Corporation.

*Thomas M. Beline* and *Sarah E. Schulman*, Cassidy Levy Kent LLP, of Washington, DC, for plaintiff-intervenor, United States Steel Corporation. On the brief were *Jeffrey D. Gerrish* and *Luke A. Meisner*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC.

*Daniel L. Schneiderman* and *Stephen A. Jones*, King & Spalding LLP, of Washington, DC, for plaintiff-intervenor, AK Steel Corporation.

*Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Renée A. Burbank*, Senior Trial Counsel. Of counsel on the brief was *Lydia C. Pardini*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

*Valerie Ellis*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for defendant-intervenor Novolipetsk Steel Public Joint Stock Company. With her on the brief was *William H. Barringer*.

## *OPINION*

**Katzmann, Judge:**

This case presents the confluence of agency determinations, principles of the law of contracts, and the interpretation of statute as applied to domestic and foreign generally accepted accounting principles. The following questions are posed: in an investigation into whether a foreign exporter is selling imported merchandise in the United States market at less than fair value, how should the United States Department of Commerce International Trade Administration ("Commerce") determine the date on which the imported merchandise is sold, and thus define the universe of sales that fall within Commerce's period of investigation? When a domestic party with a stake in the matter suggests a date of sale that differs from Commerce's

selected date, what is, and who carries, the attendant burden of demonstrating the correct date? Further, which of the foreign exporter's financial statements should Commerce use in determining its financial expense ratio?

Plaintiff ArcelorMittal USA LLC ("ArcelorMittal"), on behalf of itself and plaintiff-intervenors AK Steel Corporation, Nucor Corporation, and United States Steel Corporation, challenges Commerce's final determination in the less than fair value investigation involving imports of certain cold-rolled steel flat products ("cold-rolled steel") from the Russian Federation ("Russia"). *See Certain Cold-Rolled Steel Flat Products From the Russian Federation: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 Fed. Reg. 49,950 (Dep't Commerce July 29, 2016) ("*Final Determination*") and accompanying Issues and Decisions Memorandum (Dep't Commerce July 20, 2016) ("*IDM*").

Specifically, ArcelorMittal argues that: (1) Commerce should have used the date of contract between Novex Trading (Swiss) SA ("Novex") — the exporting arm of mandatory respondent Novolipetsk Steel OJSC (known collectively with its affiliates as "NLMK") — and its U.S. customers, rather than the date of invoice, as the date of sale in determining the universe of transactions subject to investigation; and (2) Commerce should have relied on NLMK's 2014 unconsolidated financial statements prepared in accordance with Russian Accounting Standards ("RAS"), rather than its 2014 consolidated financial statements prepared in accordance with U.S. generally accepted accounting principles ("GAAP"), to calculate NLMK's financial expense ratio. *See* R. 56.2 Mot. for J. on the Agency Record (June 7, 2017), ECF No. 51; Mem. in support of R. 56.2 Mot. of Pl. and Pl.-Inters. for J. on the Agency Record (June 7, 2017), ECF Nos. 52–53 ("Pl.'s Br."). Defendant the United States ("the Government") and defendant-intervenor NLMK oppose ArcelorMittal's motion. *See* Resp. to Mot. for J. on the Agency Record (Aug. 21, 2017), ECF Nos. 55, 58 ("Def.'s Br."); Resp. to Mot. for J. on the Agency Record (Aug. 21, 2017), ECF Nos. 56–57 ("Def.-Inter.'s Br.").

## BACKGROUND

### A. *Legal Background*

Pursuant to United States antidumping laws, Commerce investigates whether there exists, and imposes duties on, subject merchandise that "is being, or is likely to be, sold in the United States at less than fair value," *i.e.* dumped, and that causes material injury or threat of material injury to a domestic industry. 19 U.S.C. § 1673

(2012).[1] "The term 'subject merchandise' means the class or kind of merchandise that is within the scope of an investigation." 19 U.S.C. § 1677(25). "[A]n antidumping analysis involves a comparison of export price or constructed export price in the United States with normal value in the foreign market." 19 C.F.R. § 351.401 (2016). "Sales at less than fair value are those sales for which the 'normal value' (the price a producer charges in its home market) exceeds the 'export price' (the price of the product in the United States)." *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1326 (Fed. Cir. 2017). Normal value is defined as "the price at which the foreign like product is first sold . . . in the exporting country [i.e., the home market]." 19 U.S.C. § 1677b(a)(l)(B)(i). Export price, or constructed export price, means the price at which the subject merchandise is first sold to an unaffiliated purchaser in the United States. 19 U.S.C. § 1677a(a)–(b).

The date on which the subject merchandise is sold in the U.S. market, known in this context as the date of sale, factors into the calculation of the export price, which is then compared to normal value. *See Yieh Phui Enter. Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1319, 1322 (2011). The date of sale therefore defines the universe of sales that fall within Commerce's period of investigation ("POI"), and that are subject to Commerce's less than fair value determination.

Commerce's regulation 19 C.F.R. § 351.401(i) directs its date of sale determination:

> In identifying the date of sale of the subject merchandise or foreign like product, [Commerce] normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, [Commerce] may use a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

Commerce thus possesses discretion to select an alternate date of sale; however, an interested party proposing a date of sale other than the presumptive invoice date must demonstrate that the material terms of sale were "firmly" and "finally" established on its proposed date of sale. *Toscelik Profil v. Sac Endustrisi A.S.*, 41 CIT ___, ___, 256 F. Supp. 3d 1260, 1263 (2017) (citing *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,348–49 (Dep't Commerce May 19, 1997) ("*Preamble*")). To successfully rebut Commerce's presumptive selection of the invoice date, an interested party must also demonstrate "that a reasonable mind has one, and only

[1] Citations to the U.S. Code are to the official 2012 edition.

one, date of sale choice." *Id.* (citing *Allied Tube and Conduit Corp. v. United States*, 24 CIT 1357, 1371– 72, 127 F. Supp. 2d 207, 220 (2000) ("Plaintiff . . . must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its [date of sale] as the only reasonable outcome. If, however, the record indicates that Commerce's decision to use the invoice date as the date of sale was reasonable and was supported by substantial evidence, Plaintiff's arguments must fail.")).

B. *Factual Background*

On July 28, 2015, domestic producers of cold-rolled steel[2] filed petitions with Commerce and the U.S. International Trade Commission seeking the issuance of antidumping duty and countervailing duty orders on imported cold-rolled steel from Russia and other countries. *See Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Cold-Rolled Steel Flat Products from Brazil, the People's Republic of China, India, Japan, the Republic of Korea, the Netherlands, Russia, and the United Kingdom* (July 28, 2015), CR 1–11, PR 1–9. Commerce initiated the less than fair value investigation on imports of cold-rolled steel from Russia on August 17, 2015. *See Certain Cold-Rolled Steel Flat Products From Brazil, the People's Republic of China, India, Japan, the Republic of Korea, the Netherlands, the Russian Federation, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations*, 80 Fed. Reg. 51,198 (Dep't Commerce Aug. 24, 2015), PR 41. The POI for Russia was July 1, 2014 to June 30, 2015. *Id.*; *see* 19 C.F.R. § 351.204(b)(1) (2016).

Pursuant to 19 U.S.C. § 1677f-1(c)(2),[3] Commerce selected two respondents for individual examination: Severstal Export GmbH and PAO Severstal (collectively "Severstal") and NLMK. *See* Selection of Respondents for the Antidumping Duty Investigation on Certain

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[2] The petitioners were ArcelorMittal USA LLC, AK Steel Corporation, Nucor Corporation, and United States Steel Corporation, who are now parties in this case. *Final Determination* at 49,950 n.2.

[3] In antidumping duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Cold-Rolled Steel Flat Products from the Russian Federation, at 5 &n.15 (Sept. 14, 2015), CR 31, PR 72.

Commerce issued an antidumping duty questionnaire to NLMK in September 2015. *See* Section A Questionnaire (Sept. 17, 2015), PR 78; Section B–E Questionnaire (Sept. 18, 2015), PR 82. NLMK responded over the subsequent months. *See* NLMK's Section A Questionnaire Resp. (Oct. 16, 2015), CR 47–80, PR 108–10 ("Sec. A QR"); NLMK's Section B Questionnaire Resp. (Nov. 4, 2015), CR 91–106, PR 131–32 ("Sec. B QR"); NLMK's Section C Questionnaire Resp. (Nov. 6, 2015), CR 114–18, PR 140–41 ("Sec. C QR"); NLMK's Section A Suppl. Questionnaire Resp. (Nov. 18, 2015), CR 144–228, PR 164–65 ("Sec. A SQR"); NLMK's Section B and C Suppl. Questionnaire Resp. (Feb. 12, 2016), CR 435–56, PR 274–75 ("Sec. B–C SQR").

On March 8, 2016, Commerce published a notice of its affirmative preliminary determination of sales at less than fair value for imports of cold-rolled steel from Russia. *See Certain Cold-Rolled Steel Flat Products from the Russian Federation: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 81 Fed. Reg. 12,072 (Dep't Commerce Mar. 8, 2016), PR 404 and accompanying Preliminary Determination Memorandum (Dep't Commerce Feb. 29, 2016), PR 296 ("*PDM*"). Commerce noted that under the relevant regulation, 19 C.F.R. § 351.401(i), it will normally use a respondent's date of invoice, as recorded in the respondent's records kept in the ordinary course of business, as the date of sale, unless it determines that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. *PDM* at 23. Commerce thus preliminarily determined NLMK's date of sale using Novex's invoice date, which NLMK had reported to Commerce as the date on which the material terms of sale were established. *Id.* at 24; *see* Sec. B QR at 24–25.

Commerce additionally preliminarily based NLMK's financial expense ratio on NLMK's unconsolidated 2014 fiscal year audited financial statements, prepared in accordance with Russian Accounting Standards ("RAS"). *PDM* at 29; *see* Sec. A QR at Ex. 24. Commerce preliminarily assigned NLMK a weighted average dumping margin of 16.89 percent. 81 Fed. Reg. at 12,073.

Subsequently, Commerce conducted verification of NLMK's questionnaire responses. Verification of the Cost Response of Novolipetsk Steel OJSC in the Antidumping Duty Investigation of Cold-Rolled Flat Products from the Russian Federation (Apr. 26, 2016), CR 629, PR 345 ("Cost Verification Report"); Verification of the Sales Response of Novex Trading (Swiss) SA and Novolipetsk Steel OJSC in the

Antidumping Duty Investigation of Cold-Rolled Flat Products from the Russian Federation (June 9, 2016), CR 639, PR 360 ("Sales Verification Report"); *see* 19 C.F.R. § 351.307(c) (2016). Regarding the date of sale issue, Commerce observed that NLMK "consistently reported the invoice date as the date of sale for [the] home market and U.S. sales market." Sales Verification Report at 6.

In its questionnaire responses and at verification, NLMK provided copies of the handful of contracts between Novex and its U.S. customers that pertain to all of NLMK's reported United States transactions during the POI.[4] Sales Verification Exs. SV-23, CR 594, PR 340–41; SV-24, CR 595–600, PR 340–41; SV-25, CR 601, PR 340–41; SV-26, CR 602, PR 340–41; *see* Sec. A QR at 18, 20; Sec. B QR at 25; Sec. A SQR at Exhibit SA-4; Sec. B–C SQR at Exhibit S2BC-4. Each of these contracts contains two clauses which state that the mill specification sheet appended to each contract are integral to the contracts,[5] and another clause stating the quantity covered by that contract in metric tons plus or minus a certain percentage.[6] A provision allowing for the ultimate sale of a certain quantity above or below a contracted quantity—found here in the faces of the contracts as to each contract's total quantity, and in the attached mill specification sheets as to each specification's quantity—is referred to as a "tolerance." *See IDM* at 45–47. At verification, Commerce accordingly examined a handful of sales trace packages for the U.S. market.[7] *See* Sales Verification Report at 6–7. Commerce found that "the specifications contained in the contract do not specify the actual quantities or the date of shipment; rather, the quantities contained in the contract or specifications were described in a range," wherein both the total contract and each specification denoted quantities and ranges. *Id.* Commerce observed that "[t]he actual quantities sold and shipped for each specification are not finalized until the invoice date," and that for a particular specification[8] ("Specification at Issue") in the contract for U.S. Preselect Sale No. 2, found in Sales Verification Exhibit SV-24,[9] the quantity shipped was outside of the tolerance for that specification. *Id.* at 6–7; Sales Verification Exhibit SV-24 at 5 ("U.S. Preselect Sale No. 2").

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[4] There are [[ ]] contracts pertaining to [[ ]] transactions.

[5] [[ ]] and [["11. Packing/Marking,"]] both of which state that the mill specification sheet appended to each contract [[ ]].

[6] [[ ]] states the quantity covered by that contract in metric tons plus or minus [[ ]].

[7] [[ ]] sales trace packages.

[8] Specification number [[ ]].

[9] Internally, this sales contract is labeled [[ ]].

Regarding the financial expense ratio issue, Commerce observed that "NLMK prepares audited consolidated financial statements in accordance with the [GAAP] prevailing in the United States" and verified that NLMK's reported net financial expense ratio is based on the amounts reflected in the 2014 fiscal year audited consolidated financial statements prepared in accordance with U.S. GAAP. Cost Verification Report at 4, 26. It rejected the use of the 2014 unconsolidated RAS statements and 2015 financial statements prepared in accordance with IFRS during the cost verification as well. *Id.* at 4–5.

Petitioners and NLMK filed their respective case briefs on June 17, 2016. Petitioners' Case Brief, CR 651–53, PR 372–73; NLMK Case Brief, CR 648, PR 368. The parties filed their rebuttal case briefs on June 22, 2016. Petitioners' Rebuttal Brief, CR 659, PR 379; NLMK Rebuttal Brief, CR 654–55, PR 375.

On July 29, 2016, Commerce published its *Final Determination*. 81 Fed. Reg. 49,950. Commerce continued to use Novex's invoice date as the date of sale, because the record evidence of the investigation demonstrated that "one or more material terms of Novex's contracts changed after the dates of Novex's contracts." *IDM* at 46. Commerce disagreed with Petitioners that the quantity term for a contract would not be altered so long as the final quantity shipped remained within the aggregate weight tolerance specified in the contract. *Id.* Even if exceeding contractual tolerance provisions were to constitute a material change in quantity, noted Commerce, "it would be more appropriate to examine the weight tolerance on a specification basis, rather than a contract basis." *Id.* This was because, Commerce found, each of Novex's contracts at issue contained a combination of specifications of cold-rolled steel, and each specification was different from another within the contract. *Id.* "Specification is one of the physical characteristics of [the] merchandise under investigation . . . [and] it is associated with industry standards, designation, type, or grade of a product." *Id.* at 46 n.187. Commerce stated that "each of the contracts at issue contains specific language demonstrating that mill specification sheets"—attached to each contract and containing quantity tolerances for each specification—"form an integral part of the sales contract." *Id.* at 46. Commerce found that "the quantity shipped for one specification in one contract"—the Specification at Issue in U.S. Preselect Sale 2, recorded in the NLMK Sales Verification Report at Exhibit SV-24—"which accounted for a significant portion of the total reported U.S. sales is substantially outside the weight tolerance specified in the contract, and thus the quantity term of that contract changed after the date of the contract." *Id.* at 46–47 (citing U.S. Preselect Sale No. 2).

Regarding the financial expense ratio issue, Commerce employed NLMK's U.S. GAAP 2014 consolidated audited financial statements, rather than the unconsolidated RAS 2014 fiscal year audited financial statements that it had used in the preliminary determination to calculate the financial expense ratio. *IDM* at 55. Commerce stated that the consolidated audited financial statements "are at the highest level of consolidation available, and the preparation of such statements, which follow U.S. GAAP, is permitted by Russian law No 208-F2." *Id.* Commerce further stated that it is the agency's "longstanding practice to rely on the amounts reported in the consolidated financial statements at the highest level available to calculate the net financial expense ratio." *Id.* at 56. Commerce also explained that it had preliminarily used the unconsolidated RAS statements because it was uncertain at that time whether the 2014 consolidated U.S. GAAP statements represented the highest level of consolidation and included the operating results of NMLK. *Id.* at 53.

Commerce calculated a final weighted-average dumping margin of 1.04 percent for NLMK.[10] *Final Determination* at 49,951. Because the 1.04 percent dumping margin calculated for NLMK was less than the 2.0 percent *de minimis* threshold under the statute, Commerce terminated the less than fair value investigation with respect to NLMK. *Id.*; *see* 19 U.S.C. §§ 1673d(a)(4), 1673b(b)(3).

ArcelorMittal initiated this action challenging Commerce's *Final Determination* on August 29, 2016. Summons, ECF No. 1. ArcelorMittal filed its complaint on September 28, 2016. Compl., ECF No. 9. AK Steel moved to intervene as plaintiff-intervenor on October 7, 2016. ECF No. 11. The court granted that motion on October 12, 2016. ECF No. 15. Nucor moved to intervene as plaintiff-intervenor on October 18, 2016, and the court granted that motion the following day. ECF Nos. 16, 20. NLMK moved to intervene as defendant-intervenor on October 21, 2016. ECF No. 22. The court granted that motion on October 27, 2016. ECF No. 26. U.S. Steel moved to intervene as plaintiff-intervenor on October 28, 2016. ECF No. 27. The court granted that motion on October 31, 2016. ECF No. 31.[11]

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[10] Severstal received a 13.36 percent rate, which also became the "all-others" rate. *Final Determination* at 49,951; *see* 19 U.S.C. § 1673d(c)(5)(A).

[11] On December 21, 2016, the United States moved to stay this action pending the final outcome of the three cases challenging the U.S. International Trade Commission's ("ITC") negative final injury determination in the companion injury investigations that correspond with the administrative determination at issue here. Mot. to Stay, ECF Nos. 38–39. The United States argued that a stay was warranted because, "until and unless the ITC's negative final injury determination is reversed, the Court cannot provide meaningful relief to plaintiff ArcelorMittal USA, LLC, even if ArcelorMittal were to prevail in this action." *Id.* at 2. ArcelorMittal opposed that motion on January 9, 2017. ECF No. 40. The court granted

ArcelorMittal moved for judgment on the agency record pursuant to USCIT Rule 56.2 on June 6, 2017. Pl.'s Br. The Government and NLMK each responded in opposition on August 21, 2017. Def.'s Br.; Def.-Inter's Br. ArcelorMittal filed its reply on November 8, 2017. ECF Nos. 62–63 ("Pl.'s Reply"). Oral argument was held before the court on January 31, 2018. ECF No. 72. At the court's invitation, the parties submitted notices of supplemental authority relevant to contentions raised at oral argument between February 6 and 7, 2018. ECF Nos. 73–76.

## JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(ii). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(l)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

## DISCUSSION

### I. *Commerce's Reliance on the Invoice Date as the Date of Sale Is Supported by Substantial Evidence and in Accordance with Law.*

"A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). However, "[a]n agency finding may still be supported by substantial evidence even if

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the United States' motion on January 12, 2017. ECF No. 41. The court separately consolidated the three referenced ITC cases under the heading *ArcelorMittal USA LLC v. United States*, Consol. Case No. 16–00214. ArcelorMittal moved for reconsideration of the court's order one week later. ECF No. 42. In response, on February 7, 2017, the United States stated that its counsel "have consulted with ITC counsel representing the United States in *ArcelorMittal USA LLC v. United States*, Consol. Case No. 16–00214. Based on these interagency discussions, and to preserve the Court's and the parties' resources across both the Commerce and ITC cases, we request that the Court vacate its January 12, 2017 order and allow this case to proceed first." Resp. to Mot. for Reconsideration at 2, ECF No. 44. The court thus granted the motion for reconsideration on March 1, 2017, allowing this case to proceed while staying Consol. Court No. 16–00214. ECF No. 47.

two inconsistent conclusions can be drawn from the evidence." *Viet I-Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1106 (Fed. Cir. 2016) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

The date of sale regulation sets forth a rebuttable presumption that "[Commerce] normally will use the date of invoice." 19 C.F.R. § 351.401(i). As noted *supra*, Commerce "may use a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms." *Id.*; *see Sahaviriya Steel Indus. Pub. Co. v. United States*, 304 CIT 709, 726, 714 F. Supp. 2d 1263, 1279 (2010) ("Commerce's methodology is consistent with the principle that a party fails to rebut the presumption that date of invoice shall be used where there is a substantial variation between the quantity shipped and the tolerance level specified in a contract.") (citations omitted), *aff'd*, 649 F. 3d 1371 (Fed. Cir. 2011). The *Preamble* to the date of sale regulation emphasizes Commerce's focus on locating a meeting of the minds between the contracting parties:

> If [Commerce] is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, [Commerce] will use that alternative date as the date of sale. . . . However, [Commerce] emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly "established" in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated.

62 Fed. Reg. at 27,349. Thus an interested party proposing an alternate date of sale bears the burden of demonstrating that the material terms of sale were "firmly" and "finally" established on its proposed date. *See Toscelik*, 256 F. Supp. 3d at 1263 (citing *Preamble*, 62 Fed. Reg. 27,296, 27,348–49); *Allied Tube and Conduit Corp. v. United States*, 25 CIT 23, 25, 132 F. Supp. 2d 1087, 1090 (2001). Accordingly, to successfully rebut Commerce's presumptive selection of the invoice date, an interested party must demonstrate "that a reasonable mind has one, and only one, date of sale choice." *Toscelik*, 256 F. Supp. 3d at 1263 (citing *Allied Tube*, 127 F. Supp. 2d at 220 ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its [date of sale] as the only reasonable outcome.")).

The parties agree that quantity, price, delivery, and payment are material terms of sale relevant to the date of sale determination.[12] Pl.'s Br.; Def.'s Br.; *see USEC, Inc. v. United States*, 31 CIT 1049, 1055, 498 F. Supp. 2d 1337, 1343 (2007). ArcelorMittal argues that Commerce, in the *Final Determination*, ignored relevant evidence and improperly analyzed other evidence in concluding that there were changes in the materials terms of Novex's United States sales that occurred between the contract dates and the invoice dates. Pl.'s Br. at 17. Specifically, ArcelorMittal argues that Commerce should have analyzed differences in quantity reflected in the sales contracts on an aggregate basis, meaning according to the total quantity and accompanying tolerance for each contract, rather than on a specification basis. *Id.* at 22; *see IDM* at 46. ArcelorMittal asserts that the structure of Novex's sales contracts establish weight tolerances that are applicable to the aggregate quantity of the entire order. Pl.'s Br. at 22 (citing Sales Verification Report, at Exs. SV-23, SV-24, SV-25, and SV-26; *IDM* at 47).

The court is not persuaded by ArcelorMittal's argument that Commerce improperly analyzed quantity differentials between contract dates and corresponding invoice dates on the basis of tolerance per specification, rather than aggregate contractual tolerance. As explained *supra*, while each contract at issue features a clause[13] that defines an aggregate weight tolerance for that contract plus or minus a certain percentage at seller's option, each contract also features two clauses stating that the mill specification sheet appended to each contract are integral to the contract.[14] *See* Exs. SV-23, SV-24, SV-25, SV-26. A reasonable mind could conclude that the integrated mill specification sheets, due to their precision regarding qualities of the specifications and the quantity tolerance relevant to each specification therein, are crucial to the "firm[]" and "final[]" establishment of the material terms of sale — specifically, the material term of

[12] While the Government references only price and quantity in its brief, ArcelorMittal argues that Commerce's administrative practice identifies four criteria as constituting the material terms of sale: price, quantity, delivery, and payment. Pl.'s Br. at 16 (citing *Sahaviriya Steel*, 714 F. Supp. 2d at 1280; *Nakornthai Strip Mill Pub. Co. v. United States*, 33 CIT 326, 337–38, 614 F. Supp. 2d 1323, 1334 (2009)). The parties at oral argument agreed that these four criteria constitute material terms of sale. Regardless, for the reasons discussed *infra*, the court's analysis does not hinge on the question of whether delivery and payment also constitute material terms of sale for the purposes of the date of sale determination.

[13] As noted *supra* n.6, this clause is [[ ]].

[14] As noted *supra* n.5, these clauses are [[ ]] and [[ ]] both of which state that the mill specification sheet appended to each contract [[ ]].

quantity. *See Toscelik*, 256 F. Supp. 3d at 1263 (citing *Preamble*, 62 Fed. Reg. 27,296, 27,348–49). As Commerce found, the material term of quantity for at least one specification changed between the date of contract and the corresponding date of invoice. *IDM* at 46. The agency thus reasonably determined that the material terms of sale were not "firmly" and "finally" established until the date of invoice. *Id.* at 46–47 (citing U.S. Preselect Sale 2, Specification at Issue);[15] *see Preamble*, 62 Fed. Reg. at 27,296 ("In [19 C.F.R. § 351.401(i)], we merely have provided that, absent satisfactory evidence that the terms of sale were finally established on a different date, [Commerce] will presume that the date of sale is the date of invoice."). ArcelorMittal alternatively argues that, even on the basis of comparison between individual specifications in the contract and in the invoice — the methodology Commerce applied here — there occurred no change in material terms, because the altered quantity at issue was minimal.[16] Pl.'s Br. at 26–27. As to the remaining three material terms of sale, ArcelorMittal asserts that Commerce addressed none of the record information it submitted in its administrative case brief regarding price, delivery, or payment, and that the agency cited no record evidence demonstrating any change in those terms between the date of the contract and the invoice date for any of the U.S. sales reported by NLMK. *Id.* at 17–20. Altogether, ArcelorMittal contends that "in the face of overwhelming evidence demonstrating that all quantities remained materially the same but for one transaction of a minimal quantity, Commerce nevertheless relied on invoice date. That

[15] ArcelorMittal also argues that an aggregate, rather than specification-based, weight tolerance analysis is consistent with Commerce's administrative practice. Pl.'s Br. at 22–24 (citing *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 49,622 (final results), and accompanying IDM cmt. 9 ("[A]ny differences between the quantity ordered and the quantity shipped which fall within the tolerance specified by the entire contract do not constitute changes in the material terms of sale."); *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 65 Fed. Reg. 60,910 (Dep't Commerce Oct. 13, 2000) (final results), and accompanying IDM cmt. 1 (determining that the changes in the aggregate shipped quantities from the date of the relevant contract to the corresponding date of invoice were within the aggregate weight tolerance agreed to by both buyer and seller and thus did not constitute changes to the terms of the contract)).

The court is not persuaded by this argument. The determinations cited by ArcelorMittal address situations where the contract specifies only an aggregate quantity tolerance, rather than multiple specifications with accompanying tolerances as in the Novex contracts at issue here. *See Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 49,622; *Pipes and Tubes from Thailand*, 65 Fed. Reg. 60,910. By contrast, Commerce in the instant proceeding reasonably explained its decision to compare quantities by specification-based tolerances, rather than aggregate tolerances, as explained *supra*.

[16] ArcelorMittal argues that the single transaction upon which Commerce based its analysis accounts for a very small percentage — specifically, [[ ]] — of Novex's entire reported United States sales file. Pl.'s Br. at 26, Attachment 1.

conclusion was not based on substantial evidence." *Id.* at 27. Procedurally, ArcelorMittal argues that Commerce did not fairly evaluate the record in this regard.[17] Pl.'s Reply at 7–9.

These arguments fail to rebut the presumption that Commerce will use the invoice date as the date of sale under the applicable standard. ArcelorMittal, and not Commerce, must carry the burden of demonstrating that its proffered date of sale is not merely the superior option but also the only reasonable one. *See Toscelik*, 256 F. Supp. 3d at 1263; *Allied Tube*, 127 F. Supp. 2d at 220. ArcelorMittal presents no binding authority establishing that the change in quantity for the Specification at Issue, of U.S. Preselect Sale No. 2, is immaterial such that Commerce's reliance on the presumptive invoice date is unreasonable. Pl.'s Br. at 26. Commerce found that this change in quantity was "substantially outside the weight tolerance specified in the contract, and thus the quantity term of that contract changed after the date of contract." *IDM* at 46–47. Just as it was reasonable for Commerce to determine that a specification-based quantity analysis was appropriate for Novex's contracts in the record here, so too was it reasonable for Commerce to find that a change in quantity beyond the tolerance accompanying at least one of those specifications was material. *Id.*

Further, the fact that several material terms — here the price, delivery, and payment terms—were consistent between the date of invoice and the date of contract does not mean that the inconsistency in the quantity term is irrelevant to the court's analysis of Commerce's date of sale determination. *See* U.S. Preselect Sale No. 2, Specification at Issue. That consistency notwithstanding, Commerce's determination to apply the presumptive date of sale — the invoice date — is reasonable and supported by record evidence in its own right, for the reasons stated *supra*. Under the Court's standard of review, the possibility of drawing two inconsistent conclusions from a given record does not preclude substantial evidence support for either conclusion. *See Viet I-Mei Frozen Foods*, 839 F.3d at 1106. Even assuming arguendo that ArcelorMittal's proffered date of sale were supportable with substantial record evidence, it would not constitute the only reasonable option. *See Toscelik*, 256 F. Supp. 3d at 1263; *CC Metals & Alloys, LLC v. United States*, 40 CIT ___, ___, 145 F. Supp. 3d 1299, 1305 (2016). Commerce's conclusion that a material term

[17] In its notice of supplemental authority submitted following oral argument, ArcelorMittal contends that Commerce's conclusion — that the quantity change in the invoice for one shipment constitutes a change to the material terms of sale established in the contract — runs contrary to contract law principles, under which the quantity change should be considered a shipment of a nonconforming good rather than a change to the material terms of sale. Pl.'s Suppl. Auth. at 2, ECF No. 75 (citing UNIFORM COMMERCIAL CODE § 2–106(2)).

changed between the contract date and the invoice date such that material terms were not "firmly" and "finally" established until the latter retains substantial evidence support, even where other material terms did not change.[18]

In sum, ArcelorMittal has not rebutted the regulatory presumption favoring the invoice date as the date of sale, and Commerce's determination in regard to that issue stands.

## II. *Commerce's Use of the Consolidated U.S. GAAP Statements Is Permitted by Statute and Supported by Substantial Evidence.*

ArcelorMittal argues that Commerce's reliance on NLMK's 2014 consolidated financial statements to calculate NLMK's financial expense ratio is inconsistent with the relevant statute and is not supported by substantial evidence. Pl.'s Br. at 28–36. Specifically, ArcelorMittal contends that Commerce's use of consolidated statements prepared in accordance with U.S. GAAP is contrary to 19 U.S.C. § 1677b(f)(1)(A)'s directive that a company's "[c]osts shall normally be calculated" using statements prepared in accordance with the exporting or producing country's GAAP and Commerce did not sufficiently justify this alleged departure from the statute. *Id.* at 28–29. The court finds these arguments unavailing, and holds that Commerce's determination is consistent with the statute and supported by substantial evidence.

19 U.S.C. § 1677b(f)(1)(A) provides that:

> Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper

[18] NLMK contends that other material terms, specifically, regarding delivery, did indeed change between the contract date and the invoice date. Def.-Inter.'s Br. at 13. NLMK asserts that one of its contracts at issue, [[ ]] states that the shipment date from the port of the contract would be at [[ ]]. Def.-Inter.'s Br. at 13 (citing Petitioners' Case Brief at Attachment 1). However, NLMK contends that the bill of lading date for this contract was [[ ]], later than the dates stated in the contract. Def.-Inter.'s Br. at 13. Thus, NLMK argues that the delivery terms in the contract were not observed, and the presumptive invoice date more accurately accounts for the material terms of sale.

The court notes that Commerce did not analyze this data point, *see IDM* at 45–47, and therefore declines to consider it in regard to the soundness of the agency's date of sale determination. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." (quoting *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943))).

> allocation of costs, including that which is made available by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

Since the language of the statute — i.e., "normally be calculated" — allows for exceptions to the use of records kept in accordance with a country's GAAP,[19] particularly if those records do not reasonably reflect relevant costs, "the question becomes whether Commerce . . . reasonably invoked an exception to the rule." *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 743, 347 F. Supp. 2d 1326, 1338 (2004). When assessing whether records reasonably reflect relevant costs, the statute further provides that Commerce "shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs." 19 U.S.C. § 1677b(f)(1)(A).

Here, Commerce selected the statements in question because they were prepared at the highest level of consolidation, which reflects longstanding Commerce practice. ArcelorMittal contends that Commerce's use of the consolidated U.S. GAAP statements—rather than the unconsolidated RAS statements—violates the statute because the statute requires Commerce to use statements prepared in accordance with Russian GAAP unless Commerce makes a finding, supported by substantial evidence, that the RAS statements do not accurately

[19] Russian law — particularly, Russian Law No. 208-FZ — required companies to transition to compiling their financial statements under International Financial Reporting Standards ("IFRS"), but explicitly permitted "companies that were . . . preparing consolidated financial statements on a basis distinct from IFRS . . . to continue preparing their non-IFRS based financial statements until 2015." *IDM* at 55–56; 3d Sec. D SQR at Exhibit 3–3 (Russian Law No. 208-FZ), C.R. 510, P.R. 313. Since NMLK "historically prepared its audited consolidated financial statements in accordance with U.S. GAAP," Commerce verified that the 2014 consolidated statements were prepared in accordance with Russian Law No. 208-FZ and thus in accordance with Russian GAAP. *IDM* at 55–56 (stating that Russian GAAP permitted NMLK to "prepare its audited consolidated financial statements in accordance with U.S. GAAP" and that the 2014 audited consolidated statements were thus "acceptable under Russian GAAP"). ArcelorMittal does not challenge Commerce's conclusion that NMLK's 2014 consolidated financial statements were prepared in accordance with Russian law. However, ArcelorMittal does argue that "[a]lthough Commerce concluded that the 2014 consolidated statements were prepared in accordance with U.S. GAAP and in compliance with Russian law, this analysis is not consistent with the statutory language, which states a clear preference for reliance on respondent's books and records that are kept in accordance with the home country's GAAP. While Russian law may permit a company to rely on U.S. GAAP to prepare its financial statements, this has no bearing on whether such statements also accord with Russian GAAP." Pl.'s Br. at 33. Although defendant-intervenor NMLK disagrees with ArcelorMittal's distinction and argues for a more expansive interpretation of the statute, the Government agrees with ArcelorMittal on this issue. Oral Argument. Since this issue is not in dispute between ArcelorMittal and the Government in this case, the court declines to discuss it further.

reflect NLMK's costs. ArcelorMittal further suggests that Commerce impermissibly "bypass[ed] explicit statutory guidance governing its calculation of the costs of producing subject merchandise (and, here, the calculation of NLMK's financial expense ratio) and instead rel[ied] on its administrative practice as a basis for performing its calculations based on a financial statement that was not prepared in accordance with home country GAAP." Pl.'s Br. at 36.

However, Commerce chose to use the 2014 consolidated statements not only because of longstanding administrative policy, but because it reasonably believed that the unconsolidated statements did not reflect NLMK's expenses as accurately as the consolidated U.S. GAAP statements in light of NLMK's subsidiary relationship to the Fletcher Group. *IDM* at 56. As the Federal Circuit has noted,

> standard accounting principles acknowledge consolidated financial statements as a fair presentation of the financial position of a group. *See*, Floyd A. Beams, Advanced Accounting 74, 77, 91, 102–03 (5th ed. 1992). Following those practices, Commerce has adopted and followed a standard policy for assessing finance costs of a producer based on the consolidated financial statements of a parent because the cost of capital is fungible. Commerce's policy recognizes that consolidated financial statements indicate that a corporate parent controls a subsidiary. These consolidated statements represent the financial health of parent company operations in view of subsidiary operations. In addition, fungible financial assets invite manipulation. In other words, if Commerce used only a single division of a group as the source of financing costs, the controlling entity could shift borrowings from one division to another to defeat accurate accounting.

*Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1037 (Fed. Cir. 2003). Thus, Commerce's decision to use the highest consolidated financial statements was reasonable.

Finally, ArcelorMittal claims that Commerce's use of the consolidated financial statements is inconsistent with the agency's "expressed preference for financial statements prepared in accordance with home country GAAP," and cites a proceeding involving rebar from Turkey as evidence of this preference. Pl.'s Br. at 34; *Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Steel Concrete Reinforcing Bars from Turkey — April 1, 2004, through March 31, 2005* (Dep't Commerce Nov. 1, 2006) ("*Rebar from Turkey*"). In that proceeding, Commerce addressed 19 U.S.C. § 1677b(f)(1)(A)'s preference for the use of financial statements prepared in accordance with home country GAAP when explaining

why it chose to use statements prepared in accordance with Turkish GAAP instead of statements prepared in accordance with International Accounting Standards. *Rebar from Turkey* cmt. 6. However, in *Rebar from Turkey*, Commerce chose between two sets of unconsolidated statements; here, Commerce had consolidated and unconsolidated statements available, distinguishing this case from *Rebar in Turkey*.

For these reasons, the court is unpersuaded by ArcelorMittal's arguments, and determines that Commerce's use of the 2014 consolidated statements was supported by substantial evidence and in accordance with 19 U.S.C. § 1677b(f)(1)(A).

## CONCLUSION

For the foregoing reasons, Commerce's *Final Determination* is sustained. *So ordered.*

Dated: April 2, 3018
New York, New York

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

## Slip Op. 18–35

QINGDAO QIHANG TYRE CO., LTD., ET AL., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 16–00075

[Ordering reconsideration of certain aspects of an administrative determination in an antidumping duty proceeding on off-the-road tires from the People's Republic of China]

Dated: April 4, 2018

*Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., argued for plaintiff Qingdao Qihang Tyre Co., Ltd. With him on the brief was *Brandon M. Petelin*.

*Richard P. Ferrin*, Drinker Biddle & Reath, LLP, of Washington, D.C., argued for plaintiff Trelleborg Wheel Systems (Xingtai) Co., Ltd. With him on the brief was *Douglas J. Heffner*.

*Douglas J. Heffner*, Drinker Biddle & Reath, LLP, of Washington, D.C., argued for plaintiffs Xuzhou Xugong Tyres Co., Ltd., Xuzhou Hanbang Tyre Co., Ltd., and Armour Rubber Co. Ltd. With him on the brief was *Richard P. Ferrin*.

*Brandon M. Petelin*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for plaintiff Qingdao Free Trade Zone Full-World International Trading Co., Ltd.

*Robert K. Williams*, Clark Hill PLC, of Chicago, Ill., for plaintiff Weihai Zhongwei Rubber Co., Ltd. With him on the brief was *Lara A. Austrins*.

*John J. Todor*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

### *OPINION AND ORDER*

**Stanceu, Chief Judge:**

In this consolidated action, seven plaintiffs contest an administrative determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), issued to conclude a periodic review of an antidumping duty order on off-the-road tires from the People's Republic of China ("China" or the "PRC").[1] Ruling that certain of the Department's decisions were contrary to law, the court remands the determination to Commerce for appropriate corrective action.

[1] Consolidated under the lead case, *Qingdao Qihang Tyre Co. v. United States*, Court No. 16–00075, are *Qingdao Free Trade Zone Full-World International Trading Co. v. United States*, Court No. 16–00076; *Trelleborg Wheel Systems (Xingtai) Co. v. United States*, Court No. 16–00077; *Xuzhou Xugong Tyres Co. v. United States*, Court No. 16–00079; and *Weihai Zhongwei Rubber Co. v. United States*, Court No. 16–00084.

## *I. BACKGROUND*

### *A. The Contested Determination*

The determination contested in this litigation (the "Final Results") is *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 Fed. Reg. 23,272 (Int'l Trade Admin. Apr. 20, 2016) ("*Final Results*"). Incorporated by reference in the Final Results is a final "Issues and Decision Memorandum" containing explanatory discussion. *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2013–2014* (Int'l Trade Admin. Apr. 12, 2016) (P.R. Doc. 334), *available at* https://enforcement.trade.gov/frn/summary/prc/2016–09165–1.pdf (last visited Mar. 30, 2018) ("*Final I&D Mem.*").

### *B. Proceedings Conducted by Commerce*

Commerce issued an antidumping duty order (the "Order") on certain off-the-road ("OTR") tires from China (the "subject merchandise") in 2008. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Int'l Trade Admin. Sept. 4, 2008). Commerce initiated the review at issue in this litigation, which was the sixth administrative review of the Order, on October 30, 2014. *Initiation of Antidumping and Countervailing Duty Administrative Review*, 79 Fed. Reg. 64,565 (Int'l Trade Admin. Oct. 30, 2014). The sixth administrative review pertained to entries of subject merchandise made during the period of review ("POR") of September 1, 2013 through August 31, 2014. *Final Results*, 81 Fed. Reg. at 23,272.

Commerce published the preliminary results of the review in October 2015. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013–2014*, 80 Fed. Reg. 61,166 (Int'l Trade Admin. Oct. 9, 2015) ("*Prelim. Results*"). Commerce incorporated by reference a "Decision Memorandum for Preliminary Results." *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2013–2014* (Int'l Trade Admin. Sept. 30, 2015) (P.R. Doc. 269), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–25804–1.pdf (last visited Mar. 30, 2018) ("*Prelim. I&D Mem.*").

In the Final Results, Commerce assigned individually-determined weighted-average dumping margins to two groups of Chinese companies: Xuzhou Xugong Tyres Co., Ltd., Armour Rubber Co. Ltd., and Xuzhou Hanbang Tyre Co., Ltd. (collectively, "Xugong"), which Commerce treated as a single entity for purposes of the review; and Qingdao Qihang Tyre Co., Ltd. ("Qihang"). *Final Results*, 81 Fed. Reg. at 23,272. Having selected these exporters/producers of OTR tires as "mandatory" respondents, i.e., respondents it intended to examine individually, Commerce assigned a weighted-average dumping margin of 65.33% to Xugong and a weighted-average dumping margin of 79.86% to Qihang in the Final Results. *Id.* at 23,273. Commerce assigned a weighted average of these two margins, 70.55%, to respondents that it did not select for individual examination but that Commerce found to have qualified for a "separate rate" based on demonstrated independence from the government of China. *Id.*

*C. The Parties to this Consolidated Case*

The plaintiffs in this litigation are Qihang and Xugong, i.e., the two mandatory respondents, and the following separate rate respondents: Qingdao Free Trade Zone Full-World International Trading Co., Ltd. ("Full World"), Trelleborg Wheel Systems (Xingtai) Co., Ltd. ("Trelleborg" or "TWS Xinghai"), and Weihai Zhongwei Rubber Co., Ltd. ("Weihai Zhongwei").[2]

*D. Proceedings before the Court*

The five actions consolidated in this litigation were each commenced between April 29, 2016 and May 12, 2016. Before the court are plaintiffs' motions for judgment on the agency record brought under USCIT Rule 56.2, all of which are opposed by defendant United States. Defendant advocates that the court sustain the Final Results in all respects. *See* Def.'s Resp. to Mots. for J. on the Agency R. (June 7, 2017), ECF No. 44 ("Def.'s Br."). The court held oral argument on November 30, 2017. *See* Order (Aug. 3, 2017), ECF No. 60.

[2] Titan Tire Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC intervened as defendant-intervenors in this case and the cases consolidated under this case, *see* Order (May 31, 2016), ECF No. 18, but withdrew from these cases on September 29, 2017. *See* Order (Sept. 29, 2017), ECF No. 66.

## *II. DISCUSSION*

### *A. Jurisdiction and Standard of Review*

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),[3] pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended* 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty administrative review. In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

### *B. Summary of the Parties' Claims and the Court's Rulings*

Qihang and Xugong have three claims in common. *See* Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 (Dec. 7, 2016), ECF No. 35 ("Qihang's Br."); Mem. of P. & A. of Pls. Xuzhou Xugong Tyres Co., Ltd., Armour Rubber Co. Ltd., and Xuzhou Hanbang Tyre Co., Ltd. in Supp. of their Mot. for J. on the Agency R. (Dec. 7, 2016), ECF Nos. 32 (conf.), 33 (public) ("Xugong's Br."). Both claim that Commerce, when determining the export prices or constructed export prices of the sales of their subject merchandise, erred in making deductions for unrefunded value-added tax ("VAT") incurred in China. Qihang's Br. 5–15; Xugong's Br. 71–78. They also claim that the Department's calculation of a "surrogate" value for one of their production materials, reclaimed rubber, was not supported by substantial evidence on the record. Qihang's Br. 33–54; Xugong's Br. 23–38. In their third claim in common, both contest the method by which Commerce valued foreign inland freight in China. Qihang's Br. 15–33; Xugong's Br. 38–44. In this Opinion and Order, the court explains why it believes a remedy is necessary in response to each of these three claims of the two mandatory respondents.

Xugong claims, additionally, that Commerce erred in not choosing Peru as the market-economy country it would use as a primary surrogate country, *see* Xugong's Br. 5–23, and that Commerce unlawfully resorted to facts otherwise available and an adverse inference for certain sales Commerce determined to have been unreported in the review, *see id.* at 44–71. The court does not find merit in these two additional claims of Xugong.

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[3] All citations to the United States Code herein are to the 2012 edition, and all citations to the Code of Federal Regulations herein are to the 2016 edition, except where otherwise indicated.

Trelleborg claims that Commerce acted contrary to law in assigning it the margin of 70.55% that Commerce assigned to all separate rate respondents. Mem. of P. & A. of Pl. Trelleborg Wheel Systems (Xingtai) Co., Ltd. in Supp. of its Mot. for J. on the Agency R. (Dec. 7, 2016), ECF Nos. 30 (conf.), 31 (public) ("Trelleborg's Br."). The court rules that Commerce acted in accordance with law in assigning to Trelleborg an all-others rate.

Like Trelleborg, Full World and Weihai Zhongwei were assigned the all-others rate of 70.55% in the sixth administrative review. As plaintiffs in this case, they seek relief in the form of a redetermined all-others rate based on any revision to the rates of the examined respondents that ultimately is made as a result of judicial review. Mem. of Law in Supp. of Pl. Qingdao Free Trade Zone Full-World Int'l Trading Co., Ltd.'s Rule 56.2 Mot. for J. upon the Agency R. (Dec. 7, 2016), ECF No. 34; Mem. of Law in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R. (Dec. 7, 2016), ECF No. 36. The court rules in favor of these two plaintiffs and also rules that Trelleborg will be assigned the redetermined all-others rate.

### *C. Adjustment to Export Price and Constructed Export Price for Irrecoverable Value-Added Tax*

Under section 731 of the Tariff Act, 19 U.S.C. § 1673, an antidumping duty is imposed "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. Section 772 of the Tariff Act, 19 U.S.C. § 1677a, determines export price ("EP") and constructed export price ("CEP") by making various adjustments to "[t]he price used to establish export price and constructed export price," 19 U.S.C. § 1677a(c); Commerce refers to the unadjusted price for determining EP and CEP as the "starting price."[4] *See* 19 C.F.R. § 351.402(a).

The statutory provision at the center of the Xugong's and Qihang's value-added tax claims is section 772(c)(2)(B) of the Tariff Act, 19 U.S.C. § 1677a(c)(2)(B), which effects a downward adjustment in EP

[4] The starting price for determining export price is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). The starting price for determining constructed export price is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter." *Id.* § 1677a(b).

and CEP starting prices and thereby increases any dumping margin. The provision directs Commerce to reduce the starting price by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title."[5] 19 U.S.C. § 1677a(c)(2)(B).

For the Final Results, Commerce made several findings concerning value-added tax incurred in China by the two mandatory respondents. Among them was a finding that the respondents incurred VAT of 17% and were refunded 9%, which Commerce described as "the rebate rate for exported goods." *Final I&D Mem.* at 23 ("the record makes clear that exporters of OTR tires will pay 17 percent VAT and be refunded only nine percent . . . ."); *id.* at 24 ("according to the Chinese VAT schedule, the standard VAT levy is 17 percent and the rebate rate for subject merchandise is nine percent."). Concluding that the portion of the VAT that was not "rebated" or "refunded" due to exportation, to which Commerce referred as "irrecoverable" VAT, is an "export tax, duty, or other charge" within the meaning of 19 U.S.C. § 1677a(c)(2)(B), Commerce made downward adjustments to the EP or CEP starting prices of both mandatory respondents. *Id.* at 24. Further finding that the irrecoverable VAT was the difference between the 17% "standard VAT levy" and the 9% "rebate" rate, i.e., 8%, Commerce reduced both respondents' EP or CEP starting prices by an amount it calculated as 8% of the free-on-board ("FOB") value of the exported subject merchandise.[6] *Id.* at 23–24. This adjustment to the starting prices for EP and CEP effected a commensurate increase in the dumping margins of both mandatory respondents.

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[5] An export tax, duty, or other charge described in 19 U.S.C. § 1677(6)(C) is an export tax, duty, or other charge "levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received." 19 U.S.C. § 1677(6)(C).

[6] In the Final Issues and Decision Memorandum, Commerce defined Chinese irrecoverable VAT as follows: "Irrecoverable VAT is (1) the free-on-board value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods." *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2013–2014* at 23 (Int'l Trade Admin. Apr. 12, 2016) (P.R. Doc. 334), *available at* https://enforcement.trade.gov/frn/summary/prc/2016–09165–1.pdf (last visited Mar. 30, 2018) ("*Final I&D Mem.*"). In support of this general definition, Commerce, rather than cite record evidence pertaining to the taxes incurred by the exporters in this review, cited its own decision in a previous proceeding. *Id.* at 23 n.132 (citing "*Prestressed Wire/PRC* and accompanying Issues and Decision Memorandum, at Comment 1, n. 35."). The court notes that this general definition is inconsistent with the Department's own factual finding, which is discussed in this Opinion and Order, that the VAT in question is incurred on materials used in producing the subject merchandise.

Xugong and Qihang claim that 19 U.S.C. § 1677a(c)(2)(B) does not apply to irrecoverable VAT.[7] They argue that Chinese VAT is a domestic tax imposed on certain materials used in producing OTR tires, not an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States" within the intended meaning of the provision. *See* 19 U.S.C. § 1677a(c)(2)(B). In the alternative, they argue that the Department's having calculated irrecoverable VAT as the 8% difference between the 17% VAT rate and the 9% refund rate is unsupported by record evidence. *See* Qihang's Br. 13–15; Xugong's Br. 75–78. They maintain that because the 17% Chinese VAT is paid on material inputs, not the value of the exported merchandise, any irrecoverable VAT was not equal to 8% of the export value of the finished good.

### 1. *Commerce Did Not Make a Finding, and the Record Would Not Support a Finding, that Xugong and Qihang Actually Paid Value-Added Tax to the PRC Government upon Exportation of Subject Off-the-Road Tires*

Commerce did not state a factual finding that either Xugong or Qihang actually *paid* value-added tax to the government of China "on the exportation of" subject off-the-road tires to the United States. *See* 19 U.S.C. § 1677a(c)(2)(B). While the Final Issues and Decision Memorandum contains findings of fact and conclusions of law pertaining to value-added tax, that specific factual finding, or one equivalent to it, does not appear in the document. Commerce stated that irrecoverable VAT "*amounts to* an export tax, duty, or other charge imposed on exported merchandise," *Final I&D Mem.* at 22 (emphasis added), and "is a product-specific export tax, duty, or other charge that is *incurred* on the exportation of subject merchandise," *id.* at 26 (emphasis added). The quoted statements are not the equivalent of a finding that VAT actually was *paid* "on the exportation of" the subject OTR tires. In response to Xugong's assertion that under the applicable Chinese VAT regulations the VAT rate on exports is zero, Commerce answered that

> nowhere in the documents on the record does it say that exporters of OTR tires should not be *liable* for VAT upon export of the merchandise, and Xugong does not point to a specific exhibit

[7] Qihang did not include this argument in the case brief it submitted during the review and, therefore, did not exhaust its administrative remedies as to it. *See Qingdao Qihang Tyre Co. Ltd. Case Brief* (Dec. 21, 2015) (P.R. Doc. 321), ECF No. 61–1 ("Qihang's Case Br."). Defendant waived any objection on this ground by not including it in its Rule 56.2 response brief. *See* USCIT R. 56.2(c). Moreover, the issue, which was raised during the review by Xugong, is a pure question of law, which has been recognized as an exception to the requirement to exhaust administrative remedies. *See Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007).

> number or page number where this information can be found on the record. To the contrary, the record makes clear that exporters of OTR tires will pay 17 percent VAT and be refunded only nine percent (see below).

*Final I&D Mem.* at 23 (emphasis added). In stating its conclusion in this way, Commerce did not find that Xugong and Qihang actually *paid* VAT "on the exportation of" their subject merchandise, instead stating that the exporters were "liable" for it. *Id.* Nor does the statement specify the intended meaning of the words "will pay 17 percent VAT." *Id.*

Were the court to interpret any of the Department's quoted statements to mean that Commerce found as a fact that the mandatory respondents actually paid VAT "on the exportation of" their subject merchandise, the statements would conflict with the Department's finding that exportation of OTR tires resulted in a *refund* of value-added tax, calculated as 9% of the FOB export value of the tires. *See id.* at 22–23. It also would conflict with the Department's finding that the value-added tax at issue in this case "is VAT paid on inputs and raw materials (used in the production of exports)." *Id.* at 23.

Additionally, the record in this case would not have supported a finding that the value-added tax was paid upon the exportation of the subject merchandise. The questionnaire responses of both mandatory respondents constitute record evidence that the VAT incurred by these respondents resulted from purchases of some of the material inputs used in OTR tire production. *See Qingdao Qihang Tyre Co. Ltd. – Section C and Double Remedies Questionnaire Responses* at 44–50 (Feb. 27, 2015) (P.R. Doc 100); *Xuzhou Xugong Tyres Co., Ltd., ("Xugong") Section C Questionnaire Response for the Administrative Review of New Pneumatic Off-The-Road Tires from the People's Republic of China* at 57–59 (Feb. 27, 2015) (P.R. Doc. 101).

*2. Commerce Reasoned that VAT Incurred on Material Inputs Used in Domestic Production of a Good, But Not Refunded upon Exportation of the Good, "Amounts to" a "Tax, Duty, or Other Charge Imposed by the Exporting Government on the Subject Merchandise"*

Commerce concluded that under China's VAT regime "some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded" upon the exportation of the finished good. *Final I&D Mem.* at 22. As the court noted above, Commerce reasoned that the portion that is not refunded (to which Commerce referred as irrecoverable VAT) "amounts to" an "export

tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States" within the meaning of 19 U.S.C. § 1677a(c)(2)(B). *Id.* at 23 (". . . irrecoverable VAT, not VAT *per se*, amounts to an export tax."). Commerce stated that "[t]he statute does not define the terms 'export tax, duty, or other charge imposed' on the exportation of subject merchandise," *id.* at 23, and that "[w]e find it reasonable to interpret these terms as encompassing irrecoverable VAT because the irrecoverable VAT is a cost imposed by the government that arises as a result of the exportation of the subject merchandise." *Id.* at 23–24. The court considers, therefore, whether it was reasonable for Commerce to interpret the terms of § 1677a(c)(2)(B) to encompass VAT incurred on materials used in production of OTR tires in China that was not fully refunded upon exportation of the finished tires. The court concludes that it was not.

*3. The Department's Interpretation of 19 U.S.C. § 1677a(c)(2)(B) Is Impermissible*

Defendant argues that the Department's interpretation of 19 U.S.C. § 1677a(c)(2)(B) to apply to Chinese irrecoverable VAT is a reasonable statutory interpretation entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Def.'s Br. 45. The court disagrees.

As the Supreme Court instructed in *Chevron*, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–843 (footnote omitted). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. "Traditional tools of statutory construction," *id.*, include not only an examination of the statutory text and structure but also consideration of the legislative history. *See, e.g., Aqua Products, Inc. v. Matal*, 872 F.3d 1290, 1303, 1312–14 (Fed. Cir. 2017) (*en banc); Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 690 (2018) ("We may find Congress has expressed unambiguous intent by examining the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.") (internal quotations and citations omitted); *Kyocera Solar, Inc. v. U.S. Int'l Trade Comm'n*, 844 F.3d 1334, 1338 (Fed. Cir. 2016). In this case, the "precise question at issue," *Chevron*, 467 U.S. at 842, is whether the words "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject

merchandise to the United States" can be interpreted to describe a value-added tax incurred on materials used in the production of the merchandise in the foreign country but not refunded upon the exportation of that merchandise to the United States.

The plain meaning of the statutory language casts doubt on the Department's interpretation. The words "*export* tax, duty, or other charge imposed . . . *on the exportation* of the subject merchandise," as used in § 1677a(c)(2)(B) (emphasis added), would not appear to describe a value-added tax incurred on materials used in the domestic production of a good, even if entirely unrefunded upon a later exportation of that good. At least arguably, a value-added tax incurred on materials used in production has been "imposed" on something other than exportation and already has been incurred by the time the exportation of the finished good occurs. And although the term "tax, duty, or *other charge*" is broader than the word "tax," the provision requires that any such "charge" be "imposed . . . *on* the exportation" of the good, 19 U.S.C. § 1677a(c)(2)(B) (emphasis added). A previously-incurred tax on materials used in domestic production would not seem to satisfy this requirement.

Additionally, the statutory structure and legislative history of 19 U.S.C. § 1677a(c)(2)(B) and related provisions in the Tariff Act cause the court to conclude that "Congress had an intention on the precise question at issue" that "must be given effect." *Chevron*, 467 U.S. at 843 n.9. Congress intended that a domestic tax, such as a value-added tax, imposed by the foreign country on a good or the materials used to produce that good, would *not* result in a downward adjustment to EP and CEP starting prices under § 1677a(c)(2)(B).

Section 772(c) of the Tariff Act, 19 U.S.C. § 1677a(c), was enacted in its current form by the Uruguay Round Agreements Act ("URAA"). *See* Uruguay Round Agreements Act, Pub. L. No. 103–465, § 223, 108 Stat. 4809, 4876 (1994). The Statement of Administrative Action (the "SAA") accompanying the URAA explained that

> New section 772 retains the distinction in existing law between "purchase price" (now called "export price") and "exporter[']s sale price" (now called "constructed export price"). . . .
>
> * * *
>
> Under new section 772(c)(1), Commerce will calculate export price and constructed export price by adding to the starting prices: (1) packing costs for shipment to the United States, if not included in the price; (2) import duties that are rebated or not collected due to the exportation of the merchandise (duty drawback); and (3) countervailing duties attributable to export subsidies. Section 772(c)(2) requires that Commerce reduce export

> price to account for: (1) transportation and other expenses, including warehousing expenses, incurred in bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States; and (2) if included in the price, export taxes or other charges imposed by the exporting country. *These adjustments have not changed from current law.*

Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. 1 at 822–23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163 (emphasis added) ("*SAA*"). The reference to "current law" clarifies that the downward adjustment to EP and CEP for "export taxes or other charges" (the "export tax" adjustment) under the new statute was intended to be the same downward adjustment as the downward adjustment to purchase price and exporter's sale price (identified collectively in the statute as "United States price") as was made under the prior statute. That is, the only change to the export tax adjustment Congress intended to make in enacting the URAA was the change to the new terminology used to describe what was being adjusted.

The statutory language specifying the adjustment for export taxes, duties, and other charges, i.e., the "export tax" adjustment, was not materially changed by the URAA. Consistent with the explanation in the SAA that no change was intended in this adjustment, Congress retained in the post-URAA section 772(c)(2)(B) the provision accomplishing the adjustment that was nearly identical to that of section 772(d)(2)(B), as codified by the Trade Agreements Act of 1979 ("TAA"), the antecedent provision. Trade Agreements Act of 1979, Pub. L. No. 96–39, § 101, 93 Stat. 144, 182 (1979). Therefore, the court must decide if Congress had an intention on whether the TAA export tax adjustment would apply to materials used in the production of a good in a foreign country that was not remitted or avoided by reason of exportation of the finished good. The court concludes that Congress intended that it would not.

Just prior to enactment of the URAA in 1994, section 772, in all respects relevant to the issue presented here, was unchanged from the form in which it was enacted as part of the TAA. Significant to this discussion is that the 1979 statute included not only the export tax adjustment, which if applied would increase a dumping margin, but then also included an *upward* adjustment to purchase price and exporter's sales price, i.e., an adjustment that would *reduce* a dumping margin, that applied to recoverable value-added taxes. The two foreign-tax-related provisions that appeared in the TAA version of the statute are as follows:

The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

* * *

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation . . .

* * *

and

* * *

(2) reduced by—

* * *

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

19 U.S.C. § 1677a(d) (1982). A comparison of the language Congress used in the two provisions demonstrates an intent to address different classes of taxes in each. In § 1677a(d)(1)(C), Congress addressed a tax "imposed *in* the country of exportation directly *upon* the exported merchandise" or the components used to produce it. 19 U.S.C. § 1677a(d)(1)(C) (1982) (emphasis added). This language plainly describes a domestic tax such as a VAT. Any amount of such tax that was refunded, or not collected, by reason of exportation to the United States would reduce a dumping margin if it was reflected in prices of home-market sales of identical or similar merchandise. Consistent with its plain meaning, the provision generally was understood to refer to recoverable VAT imposed by the country of exportation. *See Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995).

In contrast, Congress provided in § 1677a(d)(2)(B) (1982) (and currently in § 1677a(c)(2)(B)) that a tax, duty, or other charge in the home-market country imposed *on the exportation* of the merchandise to the United States, if included in the price of the merchandise, would *increase* a dumping margin (unless intended to offset a countervailable subsidy). The provision does not refer to domestic taxes

imposed on the merchandise itself, and there is no mention of a tax imposed on components of that merchandise, as there was in § 1677a(d)(1)(C).

Because of the different language Congress used in the two provisions, any attempt to interpret § 1677a(d)(2)(B) to address irrecoverable VAT poses an insurmountable problem. The differences in the two provisions of the TAA demonstrate congressional awareness of a distinction between domestic taxes, such as value-added taxes, that are imposed directly *on* finished goods or the components thereof (which had the potential to result in an adjustment that reduces a dumping margin), and taxes imposed *on the exportation* of finished, exported goods (which had the potential to result in an adjustment that increases a dumping margin). While specifying in § 1677a(d)(1)(C) that a dumping margin would be reduced for a domestic tax, such as a VAT, if it was recovered (or not collected) by reason of exportation and appeared in the price of the foreign like product, Congress did not provide for a margin adjustment, downward or upward, for *irrecoverable* VAT. Congress having addressed taxes such as value-added taxes in subparagraph (1)(C) of § 1677a(d), it would be unreasonable, and illogical, to conclude that Congress also intended to address these same types of taxes in subparagraph (2)(B), in which it used language that was different and unsuitable for that purpose. Congress plainly was aware that a foreign government might impose a domestic tax on materials used in producing a good that is later exported to the United States and also aware that such a tax might be, or might not be, recovered or not collected by reason of the exportation of the good made from those materials. The plain meaning of the two provisions, when read together, demonstrates congressional intent *not* to increase a dumping margin for VAT, whether or not recoverable upon exportation of the finished good. In sum, the 1979 TAA reduced a dumping margin for *recoverable* VAT that was present in home-market prices, increased a dumping margin for taxes, duties, and other charges imposed on the exportation of the finished good to the United States, if appearing in the purchase price or exporter's sale price (unless imposed to adjust for a countervailable subsidy), and made no margin adjustment at all for *irrecoverable* VAT.

While imposing the same adjustment to United States price (now EP and CEP) for export taxes as did the TAA, the URAA converted the § 1677a(d)(1)(C) upward adjustment to United States price to a downward adjustment to normal value, where it also would reduce a dumping margin. A side-by-side comparison of the TAA and URAA provisions illustrates the change. As noted above, the TAA increased United States price (and thereby reduced dumping margins) by:

> the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation . . . .

19 U.S.C. § 1677a(d)(1)(C) (1982). As amended by the URAA, the antidumping statute reduces the price by which normal value is determined (and thereby reduces dumping margins) by

> the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product . . . .

19 U.S.C. § 1677b(a)(6)(B)(iii). This provision has remained in the antidumping law since the 1994 enactment of the URAA and is unchanged in the current statute.

The SAA discussed the change from the TAA version to the URAA version as follows:

> The deduction from normal value for indirect taxes constitutes a change from the existing statute. The change is intended to ensure that dumping margins will be tax-neutral. The requirement that the home-market consumption taxes in question be "added to or included in the price" of the foreign like product is intended to insure that such taxes actually have been charged and paid on the home market sales used to calculate normal value, rather than charged on sales of such merchandise in the home market generally. It would be inappropriate to reduce a foreign price by the amount of the tax, unless a tax liability had actually been incurred on that sale.

*SAA* at 827–28, *reprinted in* 1994 U.S.C.C.A.N. at 4166.

In *Federal-Mogul Corp.*, 63 F.3d at 1575–76, which was decided after enactment of the URAA but on a factual situation arising under the prior TAA provisions, the Court of Appeals noted that Commerce had a practice under the TAA of addressing recoverable VAT by making a downward adjustment to normal value rather than an upward adjustment to U.S. price. The Court of Appeals affirmed this practice, noting that doing so corrects a mathematical problem that understated the downward margin adjustment, from the standpoint of achieving tax neutrality, when the adjustment is made to U.S.

price. *Id.* at 1580–82. The URAA made a statutory change analogous to the Department's practice under the prior statute.

The principle that dumping margins should be "tax-neutral," which is noted in the SAA excerpt quoted above and in *Federal-Mogul, id.*, serves to explain the adjustments in the URAA and those in the TAA as well. Unless a downward margin adjustment is made, home-market taxes such as a VAT, if present in the price of the foreign like product but, due to recovery upon exportation, not present in the U.S. price (i.e., the purchase price or the exporter's sales price under the TAA, and the export price or constructed export price under the URAA), improperly inflate a dumping margin. To obtain a tax-neutral price comparison, the margin-inflating effect of a recoverable domestic tax is removed from the margin calculation, either by adding it to the U.S. price (under the previous law) or by removing it from the home-market price (under the current statute). On the other hand, an "export" tax, i.e., an export tax, duty, or other charge that is incurred upon the exportation of the merchandise, is by definition one that is not present in the home-market price of the foreign like product. Congress intended that such a tax, if present in the U.S. price, should be removed from U.S. price to achieve a tax-neutral price comparison between normal value (when based on the home-market price or other comparison-market price) and U.S. price, unless imposed to offset a countervailable subsidy. In summary, Congress provided, in both the TAA and the URAA, a statutory scheme under which home-market taxes that are recoverable upon exportation, such as recoverable VAT, the adjustment for which would reduce a dumping margin, are treated one way and export taxes, the adjustment for which would increase a dumping margin, are treated the opposite way.

It can now readily be seen that the Department's interpretation of the current § 1677a(c)(2)(B) to require a margin increase for irrecoverable VAT, which is not supported by the plain meaning of the provision, also conflicts with the legislative purpose. A foreign exporter of a product upon which VAT, a domestic tax, was imposed (either on the product itself or components therein) will receive a reduction in the dumping margin to the extent the VAT appears in the home-market price but does not appear in the U.S. price that is compared to that price, i.e., to the extent the VAT is refunded or not collected as a result of exportation ("recoverable" VAT). The downward adjustment to the margin (whether effected by an upward adjustment to U.S. price, as under former law, or a downward adjustment to normal value, as under current law) restores the balance to tax-neutrality. On the other hand, Congress intended that VAT that appears in both the home-market price and also in the U.S. price,

because it is irrecoverable upon export, would result in neither an upward nor a downward adjustment to the dumping margin. Having incurred it, the foreign producer or exporter can be expected to pass it on by including it in the U.S. price, and there is no justification for removing this domestic tax from the U.S. price. Because the irrecoverable VAT is present in the home-market price of the foreign like product and also in the U.S. price, the comparison is already tax-neutral, and no adjustment to the dumping margin is required or appropriate.[8] The producer or exporter already lost the benefit of any downward adjustment to the margin to the extent the VAT was not recovered, in that the downward adjustment to normal value (as was the previous upward adjustment to U.S. price) is limited to recoverable VAT. This stands in contrast to an export tax, which may be present in the U.S. price but, by definition, cannot be present in the home-market price. This is because, as the URAA recognized in 19 U.S.C. § 1677a(c)(2)(B) (which is continued in current law) and the TAA recognized in 19 U.S.C. § 1677a(d)(2)(B) (1982), an export tax, duty, or other charge under the "export tax" provision is limited to one that is "imposed by the exporting country on the *exportation* of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(2)(B) (emphasis added); *see* 19 U.S.C. § 1677a(d)(2)(B) (1982) ("imposed by the country of exportation *on the exportation* of the merchandise to the United States") (emphasis added). The Department's construction of 19 U.S.C. § 1677a(c)(2)(B) to increase a dumping margin for irrecoverable VAT does not achieve tax neutrality but upsets the balance the statute is intended to achieve, impermissibly inflating a dumping margin by the amount of the irrecoverable VAT.

To summarize, because irrecoverable VAT would be present in both the price of the foreign like product and the U.S. price, no adjustment to the margin is necessary to achieve tax neutrality. Making an adjustment under these circumstances by reducing the starting price for EP or CEP by the amount of the irrecoverable VAT would be "double-counting" the effect of the irrecoverable VAT, inflating the dumping margin accordingly.

Up to this point, the court's analysis considered comparisons between U.S. price and normal value that is based on price, either in the home market or another comparison market. The court now considers

[8] Commerce reasoned that Chinese irrecoverable VAT "amounts to an export tax, duty, or other charge imposed on exported merchandise *that is not imposed on domestic sales." Final I&D Mem.* at 22 (emphasis added). It was logical for Commerce to conclude that VAT that becomes irrecoverable upon exportation is not "imposed" on domestic sales: in a domestic sale of the finished good, no exportation occurs, as a matter of definition. Commerce did *not* find as a fact that Chinese domestic sales of OTR tires do not incur VAT (which, presumably, would defeat the purpose of a VAT), and the record in this case would not permit such a finding.

this issue in the context of situations in which normal value is not based on price. Normal value may be based on constructed value (under 19 U.S.C. § 1677b(e)) and, in the special case of goods produced in a non-market economy country, ordinarily is based on valuation of factors of production according to the best available information in a market economy country Commerce considers appropriate (under 19 U.S.C. § 1677b(c)). In the case of constructed value, the Tariff Act includes a provision to ensure that the cost of materials used in producing the subject imported merchandise do not include a recoverable internal tax such as a VAT. Under this provision, "the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition that is remitted or refunded upon exportation of the subject merchandise produced from such materials." 19 U.S.C. § 1677b(e). The use of the term "internal tax" distinguishes the provision from the export tax adjustment, which applies only to external taxes imposed on exportation. No provision parallel to § 1677b(e) is in § 1677b(c), which addresses normal value for non-market economy countries based on surrogate values for factors of production. This omission is logical because the prices for the materials in the home-market, non-market economy country ordinarily are not used in calculating normal value under that provision. But here also, the objective of tax neutrality is still relevant, as Commerce implicitly recognizes in preferring surrogate values that are exclusive of taxes. *See, e.g., Final I&D Mem.* at 51.

Commerce explained in the review that previously it did not adjust EP and CEP starting prices for Chinese irrecoverable VAT but that "[i]n 2012, we announced a change of methodology with respect to the calculation of the EP or CEP to include an adjustment for irrecoverable VAT in certain NME [non-market economy] countries, in accordance with section 772(c)(2)(B) of the Act." *Final I&D Mem.* at 22 (citing *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36,481, 36,482 (Int'l Trade Admin. June 19, 2012) ("*Methodological Change*")). In *Methodological Change*, Commerce explained that its administrative practice had been not to make the adjustment to EP and CEP starting prices under 19 U.S.C. § 1677a(c)(2)(B) when the good was exported from a non-market economy country "because pervasive government intervention in NMEs precluded proper valuation of taxes paid by NME respondents to NME governments." *Methodological Change*, 77 Fed. Reg. at 36,482. In the notice, Commerce concluded that for certain non-market economy countries,

specifically China and Vietnam, under its countervailing duty practice it now believed it could "determine whether the Chinese or Vietnamese governments have bestowed an identifiable and measurable benefit upon a producer, and whether the benefit is specific, including certain measures related to taxation." *Id.* On that reasoning, Commerce announced that for antidumping investigations and reviews of merchandise from China and Vietnam "the Department will determine whether, as a matter of law, regulation, or other official action, the NME government has imposed 'an export tax, duty, or other charge' upon export of the subject merchandise during the period of investigation or the period of review (*e.g.*, an export tax or VAT that is not fully refunded upon exportation)." *Id.* As applied to an internal tax such as a VAT, this reasoning was contrary to the congressional intent underlying 19 U.S.C. § 1677a(c)(2)(B).

Rather than take account of the differences between an export tax and an internal tax such as a VAT imposed domestically on materials used in production in the country of exportation, *Methodological Change* treats all irrecoverable VAT in a non-market economy country as the equivalent of an export tax for purposes of 19 U.S.C. § 1677a(c)(2)(B). This is erroneous for the reasons the court discussed previously: Congress drew a clear distinction between the export tax adjustment, which it addressed in § 1677a(c)(2)(B), and VAT imposed domestically in the country of production, on the good or the materials used to make it, which it addressed in the normal value provisions of the statute. Congress was familiar with the concept of irrecoverable VAT and addressed it by enacting provisions under which irrecoverable VAT would neither increase nor decrease a dumping margin. In carefully crafting § 1677a(c)(2)(B) to apply only to export taxes and other charges imposed upon exportation of the good, and not to internal taxes imposed by the country of exportation (whether or not recoverable upon export), Congress made no exception for the determination of EP or CEP for goods exported from non-market economy countries. To the contrary, while such countries are treated differently as to the determination of normal value, *see* 19 U.S.C. § 1677b(c), they are not treated differently as to the determination of U.S. price (EP or CEP), *see* 19 U.S.C. § 1677a. It is noteworthy that the non-market economy provisions of 19 U.S.C. § 1677b(c) predated the URAA, having been enacted as part of the Omnibus Trade and Competitiveness Act of 1988, replacing the more limited provisions relating to state-controlled economies. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1316(a), 102 Stat. 1107, 1186–87 (1988). The 1988 amendments did not make changes to § 1677a(d)(2)(B), which addressed export taxes.

From the time of the 1988 amendments to the present, there has been no indication that Congress intended for value-added taxes imposed by non-market economy countries to be treated differently under 19 U.S.C. § 1677a(d)(2)(B) (1982) (now § 1677a(c)(2)(B)) than those imposed by market economy countries. The reasoning Commerce put forth in *Methodological Change*, which applies only to certain non-market economy countries, is based on a contrary, and invalid, assumption. Broadly stated, normal value is the value at which a good *should be* sold in the U.S. market in order to be considered to be fairly traded under the antidumping duty laws. U.S. price (EP or CEP) is the adjusted price at which the good *is* sold in the U.S. market. Unlike the method of determining the former, the method of determining the latter does not change in the special situation in which the good is exported from a non-market economy country. *Compare* 19 U.S.C. § 1677a, *with* 19 U.S.C. § 1677b. Under the correct implementation of the statute, irrecoverable VAT does not result in an increase or a decrease in a dumping margin, regardless of whether the exporting country is a market economy country or a non-market economy country.

In the Final Issues and Decision Memorandum, Commerce attempts to distinguish China from other countries with respect to VAT. Commerce compared the Chinese VAT system with what it called a "typical VAT system," according to which producers "receive on export a full rebate of the VAT which they pay on purchases of inputs used in the production of exports ('input VAT'), and, in the case of domestic sales, the company can credit the VAT they pay on input purchases for those sales against the VAT they collect from customers." *Final I&D Mem.* at 22 (footnote omitted). According to Commerce, "[t]hat stands in contrast to the PRC's VAT regime, where some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded." *Id.* (footnote omitted). Under the Department's flawed reasoning, Chinese irrecoverable VAT is within the scope of 19 U.S.C. § 1677a(c)(2)(B) simply because it is irrecoverable. Were this reasoning sound, any VAT not recovered or avoided by reason of exportation of the finished good, regardless of the country of exportation, would have to be treated the same way, i.e., to increase a dumping margin. As the history and purpose of the statute demonstrate, that is not what Congress intended.

Because the Department's interpretation of 19 U.S.C. § 1677a(c)(2)(B) to allow it to deduct irrecoverable VAT from EP or CEP starting prices is not supported by plain meaning and is contrary to congressional intent, it must be set aside according to *Chevron* Step One. Defendant cites decisions in which this Court concluded that the

Department's interpretation is a reasonable one, Def.'s Br. 46–49, and the court notes that other decisions of this Court also have reached that conclusion. In these prior decisions, the issue of whether the Department's interpretation was consistent with statutory history and legislative purpose, and with legislative history as shown in the SAA, does not appear to have been argued, as that issue is not addressed in the various opinions. *See Diamond Sawblades Mfrs.' Coal. v. United States*, 42 CIT __, __, Slip Op. 18–28 at *4–12 (Mar. 22, 2018); *Aristocraft of Am., LLC v. United States*, 41 CIT __, __, 269 F. Supp. 3d 1316, 1321–26 (2017); *Jacobi Carbons AB v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1159, 1186–88 (2017); *Juancheng Kangtai Chem. Co. v. United States*, 41 CIT __, __, Slip Op. 17–3 at *25–31 (Jan. 19, 2017); *Fushun Jinly Petrochemical Carbon Co. v. United States*, 40 CIT __, __, Slip Op. 16–25 at *20–25 (Mar. 23, 2016).[9] The court now concludes that the statutory history and legislative purpose demonstrate that the Department's interpretation cannot be a reasonable one.

In conclusion, Commerce has made downward adjustments to the EP and CEP starting prices for subject merchandise exported by Xugong and Qihang based on an impermissible construction of 19 U.S.C. § 1677a(c)(2)(B). Congress did not intend for such deductions to occur. Commerce must correct this error in responding to the court's order in this proceeding. The court, therefore, has no occasion to consider the claims in the alternative of Xugong and Qihang that Commerce erroneously determined the amounts of irrecoverable VAT.

*D. Claims Challenging Surrogate Values*

In proceedings, including reviews, of antidumping duty orders on merchandise from non-market economy countries such as China, Commerce ordinarily determines the normal value of the subject merchandise according to the procedures of section 773(c)(1) of the Tariff Act, 19 U.S.C. § 1677b(c)(1). Under these procedures, Commerce determines normal value "on the basis of the value of the factors of production utilized in producing the merchandise" plus "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1). The factors of production include, but are not limited to, the "hours of labor required,"

[9] In another decision, *China Manufacturers Alliance, LLC v. United States*, 41 CIT __, __, 205 F. Supp. 3d 1325, 1344–51 (2017), this Court did not reach the statutory construction issue decided in this case because Commerce did not state a valid finding, grounded in record evidence, that the plaintiff had incurred any irrecoverable VAT, substituting instead a presumption that the plaintiff had incurred irrecoverable VAT equal to 8% of the value of the exported merchandise.

the "quantities of raw materials employed," "amounts of energy and other utilities consumed," and "representative capital cost, including depreciation." *Id.* § 1677b(c)(3). Commerce is directed generally to base the values of factors of production "on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate." *Id.* § 1677b(c)(1). Commerce is further directed to value factors of production using information from one or more market economy countries that are "at a level of economic development comparable to that of the nonmarket economy country" and "significant producers of comparable merchandise." *Id.* § 1677b(c)(4).

In contesting the Final Results, Xugong and Qihang challenge specifically the surrogate value for reclaimed rubber, a raw material that both used in tire production. *See* Xugong's Br. 23–38; Qihang's Br. 33–54. They also challenge the method Commerce used to calculate a surrogate value for one of the expenses Commerce included in the normal value calculation, which was "foreign inland freight." *See* Xugong's Br. 38–44; Qihang's Br. 15–33.

*1. Surrogate Value for Reclaimed Rubber*

"Reclaimed rubber" is a product obtained by processing rubber products into a form that can be used as a material in the manufacturing of new rubber products, such as tires. Xugong and Qihang challenge as unreasonable and aberrational the surrogate value Commerce calculated for this factor of production, which was an average unit value ("AUV") of $2.49 per kilogram, using Global Trade Atlas ("GTA") import data from Thailand on reclaimed rubber. *Final I&D Mem.* at 53–57. They argue that the AUV obtained from the Thai GTA import data was aberrational when compared to other record data and that it also was aberrational because it was higher than the surrogate values Commerce applied to natural rubber. According to Xugong and Qihang, the historical record data demonstrate that reclaimed rubber prices over the last thirty years always have been lower than the prices for natural rubber. Both argue that Commerce should have used, as the best available information, an AUV obtained from GTA data on Peruvian imports of reclaimed rubber, which was $0.53 per kilogram, and which was lower than the AUV shown in the Peruvian data for natural rubber. *See Provision of Initial Surrogate Values by Xuzhou Xugong Tyres Co. Ltd.* at Ex. 7 (Mar. 19, 2015) (P.R. Docs. 128–32) ("*Xugong Initial SV Submission*").

The record contained GTA import data on reclaimed rubber from countries Commerce considered to be economically comparable to China that allowed Commerce to determine per-kilogram AUVs,

based on quantities, as follows: Peru ($0.53, based on 1,102,938 kg.), Belarus ($0.73, based on 1,479,490 kg.), Bulgaria ($0.79, based on 367,000 kg.), Serbia ($0.82, based on 306,485 kg.), Ukraine ($0.90, based on 93,521 kg.), Ecuador ($0.99, based on 170,346 kg.), Romania ($1.07, based on 3,967,111 kg.), South Africa ($1.34, based on 312,374 kg.), Montenegro ($1.41, based on 839 kg.), Colombia ($1.84, based on 16,002 kg.), Algeria ($2.21, based on 58,157 kg.), Thailand ($2.49, based on 205,384 kg.), Jordan ($12.94, based on 249 kg.), and Paraguay ($19.57, based on 53 kg.). *See* Qihang's Br. 43. Commerce viewed the AUVs for Jordan and Paraguay as "truly aberrational" and excluded them from consideration. *Final Results of the 2013–2014 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic off-The-Road Tires from the People's Republic of China: Surrogate Value Memorandum* 6 (Apr. 12, 2016) (P.R. Doc. 336) ("*Final Surrogate Value Mem.*"). The small quantities on which the AUVs for Jordan and Paraguay were based (249 kg. and 53 kg., respectively) would appear to make these AUVs unsuitable for use as surrogate values for this reason as well.

Commerce concluded that the surrogate value based on the Thai GTA data was not aberrational, giving several reasons. Commerce recognized that the Thai AUV was approximately two-and-one-half times as large as the median value obtained from most of the other potential surrogate countries on the list prepared by its Office of Policy but stated that "we do not find this price difference to be so substantial as to call into question the validity of the Thai value or constitute evidence of aberrationality." *Final I&D Mem.* at 55–56 (footnote omitted). It also found that the quantity of imports represented by the Thai reclaimed rubber value of $2.49, which was 205,384 kg., was "a commercially viable quantity which is not distortive." *Id*. at 56–57.

Commerce also addressed the issue of whether the Thai-based value of $2.49 per kilogram was aberrational because it was higher than the Thai-based values for natural rubber, ($2.01 per kilogram for technically-specified natural rubber and $2.28 per kilogram for ribbed smoked sheets). Commerce concluded it was not, citing record data showing that "the price of natural rubber has dropped by 32–33 percent over the POR itself, and more so over the years before" and that "the value of reclaimed rubber, in comparison, has risen over the past years, 138 percent since 2009, and this rise has been at a generally steady increase." *Final I&D Mem.* at 56 (footnotes omitted). Commerce concluded that "[w]ith such a significant decrease in price

for natural rubber in the POR, that natural rubber may fall below the cost of the consistently steadily increasing reclaimed rubber does not signal that the reclaimed rubber value is aberrational or unusual." *Id.*

The Department's conclusion that the surrogate value of $2.49 per kilogram for reclaimed rubber is not aberrational lacks the support of substantial evidence on the record. The record includes data on the historical relationship between the price of natural rubber and that of reclaimed rubber, which is in the form of a table Commerce included in its final surrogate value memorandum ("Chart C: Historical Price of Natural Rubber vs. Reclaimed Rubber"). *See Final Surrogate Value Mem.* at 10. The table shows that over the 30 years between 1983 and 2013, the price for reclaimed rubber consistently has been lower than the price of natural rubber and, as a general matter, much lower. *Id.* The chart shows that despite the rise in the value of reclaimed rubber and the fall in the price of natural rubber over the last several years that are shown in the table, the price of natural rubber, as of 2013 (the last year shown in the table), still was approximately 180% higher than the price of reclaimed rubber. *Id.* Commerce relied on the movement in the prices of both commodities to conclude that the value of reclaimed rubber could be higher than the value of natural rubber, but this conclusion is refuted by the record evidence in the 30-year table. Also, record evidence that reclaimed rubber is used in production of off-the-road tires instead of natural rubber because of its cost advantage is not rebutted by other record evidence. And as Commerce itself acknowledged, the Thai AUV for reclaimed rubber was approximately two-and-one-half times the median value for this product obtained from import data from most of the other potential surrogate countries. Because the Department's finding that its surrogate value for reclaimed rubber is not aberrational is unsupported by the record evidence considered as a whole, Commerce cannot be said to have reached a valid finding that it valued reclaimed rubber according to the "best available information" as required by 19 U.S.C. § 1677b(c)(1). Commerce must reconsider that value and reach a new determination based on findings supported by substantial evidence on the record.

*2. Surrogate Value for Foreign Inland Freight*

Xugong and Qihang claim that the surrogate value Commerce applied to foreign inland freight in China, which was based on data for Thailand, was not supported by substantial record evidence. *See* Xugong's Br. 38–44; Qihang's Br. 15–33. Commerce used the Thai data to calculate a surrogate freight rate of $0.0015 per kilogram, per

kilometer. *Final Surrogate Value Mem.* at Attch. I. Xugong and Qihang challenge the method by which the surrogate value was calculated. In the alternative, they argue that Commerce should have used record data other than the data Commerce used in determining the surrogate value.

In calculating normal value according to 19 U.S.C. § 1677b(c), Commerce adds to the price of material inputs a surrogate cost for the expense incurred for inland transportation of the materials, i.e., truck freight, to the point of production. It also deducts from U.S. price (EP or CEP) a surrogate cost for the expense of transporting finished goods to the port of exportation. To calculate a surrogate value for this "foreign inland freight" in the sixth review, Commerce used a World Bank report entitled *Doing Business 2015: Thailand*, which estimated at $210 the cost of transporting products in a standard 20-foot shipping container weighing 10 metric tons from the largest city in Thailand, i.e., Bangkok, to the nearest seaport. *See Petitioners' First Surrogate Value Submission* at Ex. 9 (Mar. 19, 2015) (P.R. Docs. 138–39). The 2015 Doing Business report did not present information on the actual distance goods would have to travel to reach a seaport. *Id.* Therefore, to use the information in the 2015 report in calculating a per-kilogram, per-kilometer surrogate cost for foreign inland freight, Commerce estimated the average distance from 26 industrial districts in Bangkok to the nearest seaport, for use as the denominator in the calculation. *Final I&D Mem.* at 57–62. The distance Commerce used, both for the Preliminary Results and the Final Results, was 13.87 kilometers. *Id.* at 60. Using this average distance, Commerce calculated its surrogate freight rate of $0.0015 per kilogram, per kilometer. *Final Surrogate Value Mem.* at Attch. I. Xugong and Qihang view this distance as unreasonably low (causing the rate derived therefrom to be excessively high) and unsupported by the record data. The 13.87 kilometer estimate was derived from information in a table listing various locations in Bangkok, submitted to the record by the petitioner. *See Petitioners' Second Surrogate Value Submission* at Attch. 8 (Aug. 31, 2015) (P.R. Docs. 253–54). The source of the table was a "Bangkok Post" document describing various "districts" of Bangkok, located within "clusters." *Id.*

In addition to freight-cost information relating to Thailand, the record contained information relating to freight costs in Indonesia, submitted by Qihang, *see Qingdao Qihang Tyre Co. Ltd. – Initial Surrogate Value Submission* at Ex. SV-24 (Mar. 19, 2015) (P.R. Docs. 121–26), and information relating to freight costs in Peru, which

Xugong submitted, *see Xugong Initial SV Submission* at Ex. 8. In the Final Issues and Decision Memorandum, Commerce did not discuss the information relating to freight costs in Indonesia and Peru, confining its discussion to the record data pertaining to Thailand. *Final I&D Mem.* at 57–62. Specifically, Commerce directed most of the discussion to the choice of data from which it could estimate an average distance from industrial locations in Thailand to the nearest port. Commerce concluded that the record was sufficiently developed to support consideration of only three "usable" distances in Thailand: the 13.87 kilometer average distance, a second calculated distance of 8.3 kilometers, which was the distance from downtown Bangkok to the port of Bangkok as determined in the Department's investigation of Certain Passenger Vehicle and Light Truck Tires from China that also used the 2015 Doing Business in Thailand report, and a distance of 9.51 kilometers, which was developed "from a list of the distances to the Port of Bangkok from all Thai companies that provided information for *Doing Business in Thailand 2015* for which the World Bank provided an address." *Final I&D Mem.* at 61. Commerce concluded that "given the paucity of information on the record supporting distances higher than 13.87 km, the Department has determined to use the same distance from the *Preliminary Results* in the final results in its calculation of inland freight for these final results." *Id.* at 62.

Xugong and Qihang raise various objections to the Department's surrogate freight rate. Qihang objects that Commerce, in past proceedings, inconsistently has used various distances that the freight would travel in Thailand, most of which are much greater than 13.87 kilometers, Qihang's Br. 19–22, and should have considered the information in the Department's possession from past proceedings in determining the reasonableness of its determination, *id.* at 26. Qihang also argues that in past cases Commerce has used distances to two Thailand ports, the ports of Bangkok and Laem Chabang, rather than only the port of Bangkok. *Id.* at 22–23. Qihang further contends that, if the record did not contain sufficient data, Commerce should have taken "steps to develop the record further to satisfy its statutory obligation to support its decision through substantial record evidence." Qihang's Br. 23; *see Final I&D Mem.* at 61 ("Parties did not provide significant comments or rebuttal distance information during the period of time made available for surrogate value information."). Additionally, Qihang points out that despite its "suggesting that it was a superior source, Commerce failed to even acknowledge the data on the record with respect to the Peruvian truck price quote and

distance map submitted by Xugong." *Id*. at 27. Finally, Qihang argues that the Department unreasonably rejected Qihang's attempt to supplement the record with a more recent report, *Doing Business 2016: Thailand*, which contained freight distance information. *Id.* at 27–33.

Xugong argues that the Department's calculation of 13.87 kilometers as the distance from industrial locations in Bangkok to the nearest port was unsupported by substantial evidence because "there is no record support for petitioners' assertion that the 26 districts selected by petitioners are in fact 'industrial' districts." Xugong's Br. 40. Xugong also argues that "[w]ith respect to which country's data contains the 'best available domestic inland freight data,' Commerce in fact has conducted no record analysis whatsoever concerning the Peruvian freight data."[10] Xugong's Br. 21.

Without ruling on the parties' other arguments, the court finds that on this final point Xugong is correct. Despite Qihang's argument in its case brief that "the record evidence on inland freight costs from Peru does not pose the problems that exist with respect to the Thai data," *see Qingdao Qihang Tyre Co. Ltd. – Revised Administrative Case Brief* at 14 (Dec. 21, 2015) (P.R. Doc. 321) ("*Qihang's Case Br*."), Commerce, in the Final Issues and Decision Memorandum, did not address the issue of whether the inland freight data from Peru could constitute the best available information on the record. *See Final I&D Mem.* at 57–62. Defendant concedes that Commerce did not address Qihang's argument. *See* Def.'s Br. 41. Citing 19 C.F.R. § 351.408(c)(2), defendant argues that because "Commerce determined it had usable and reliable data" from its primary surrogate country, i.e., Thailand, "Commerce reasonably determined that it was unnecessary to weigh the relative merits of the Peruvian data." *Id.* The court does not agree with the Department's conclusion that it did not need to weigh the Peruvian inland freight data that were on the record. Commerce was obligated to consider Qihang's argument that the inland freight data

[10] This argument is not precluded by the requirement to exhaust administrative remedies, *see* 28 U.S.C. § 2637(d)—despite the fact that Xugong did not make this argument in its case brief—because Qihang's case brief presented the argument. *See Qingdao Qihang Tyre Co. Ltd. – Revised Administrative Case Brief* at 14 (Dec. 21, 2015) (P.R. Doc. 321) (arguing that "the record evidence on inland freight costs from Peru does not pose the problems that exist with respect to the Thai data."). Considering the merits of Xugong's argument does not offend "the general policies underlying the exhaustion requirement," namely "protecting administrative agency authority and promoting judicial efficiency." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379–80 (Fed. Cir. 2007) (citations and quotations omitted). The exhaustion doctrine "acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *Id.* at 1380 (citations and quotations omitted). Because Qihang made the argument in its case brief, the Department had the opportunity to consider it during the administrative proceeding.

from Peru were better than the competing data from Thailand. *See SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011) ("Commerce also has an 'obligation' to address important factors raised by comments from petitioners and respondents." (citations omitted)).

On this record, which contained alternate information that could be used in calculating a surrogate value, Commerce was obligated to determine what information constituted the "best available information." 19 U.S.C. § 1677b(c)(1). The regulation upon which defendant relies, 19 C.F.R. § 351.408(c)(2), does not compel a conclusion to the contrary. The regulation provides that "the Secretary *normally* will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (emphasis added). The regulation uses the word "normally," indicating that Commerce retains the discretion to use data from more than one market-economy country in valuing the various factors of production. The statute contemplates situations in which Commerce may need to rely upon data from more than one surrogate country in order to fulfill its statutory obligation to value a factor of production according to the "best available information." *See* 19 U.S.C. § 1677b(c)(1) ("the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country *or countries* considered to be appropriate by the administering authority." (emphasis added)). While the regulation expresses a preference for using information from only one surrogate country (except for the labor factor of production), the regulation cannot be read so broadly as to defeat the statutory directive that the factors of production be valued according to the best available information. In other words, the uniformity of data that results from having all surrogate values determined according to data from the same surrogate country may be a consideration in deciding which surrogate data to use for a particular factor of production. But in light of the statutory directive of 19 U.S.C. § 1677b(c)(1) to use the best available information from a surrogate country "or countries," it cannot be the *sole* consideration. The Department, therefore, impermissibly failed to weigh the relative merits of the Peruvian inland freight data because it determined that it had usable data from its primary surrogate country, where, as here, a party to the administrative review specifically argued that the Peruvian inland freight data were superior.

The court, therefore, directs Commerce to reconsider its surrogate value for foreign inland freight. The court does not limit its directive to the reconsideration of whether to base the surrogate value used to calculate inland freight on data from Thailand or data from Peru.

Upon remand, Commerce must reconsider that decision, but it may also reconsider other findings made that were necessary to the determination of the surrogate value for inland freight to ensure that its findings are supported by substantial record evidence. At this time, the court will not rule on the other arguments that Qihang and Xugong presented in contesting the foreign inland freight surrogate value.

*3. Xugong's Claim Challenging the Selection of Thailand as the Surrogate Country*

As discussed above, the antidumping duty statute provides generally that Commerce will base the values of factors of production "on the best available information regarding the values of such factors in a market economy country or countries" Commerce considers appropriate. 19 U.S.C. § 1677b(c)(1). Because it provides for the use of information from "a market economy country *or countries*," the statute does not confine Commerce to a single surrogate country, contemplating that Commerce may consider it necessary or appropriate to use information from more than one such country. *Id.* (emphasis added).

The Department's regulation, discussed previously, expresses a preference for valuing all factors of production, except labor, in a single country. 19 C.F.R. § 351.408(c)(2) ("Except for labor, . . . the Secretary normally will value all factors in a single surrogate country."). While the regulation makes an exception for labor, *see id.* § 351.408(c)(3), that exception has been invalidated by judicial decision. *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1377 (Fed. Cir. 2010). A policy statement the Department issued explains that Commerce ordinarily will value the labor factor of production according to data (obtained from Chapter 6A of the International Labor Organization ("ILO") Yearbook) pertaining to the "primary" surrogate country. *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093 (Int'l Trade Admin. June 21, 2011). The concept of a single "surrogate country" or a "primary surrogate country" is, therefore, one grounded only in regulation and practice, not in the statute. From the statutory standpoint, the obligation is that Commerce value factors of production according to "the best available information," 19 U.S.C. § 1677b(c)(1), regardless of the number of market economy countries Commerce considers appropriate as sources for that information (subject to the additional requirement that Commerce use, to the extent possible, information from market

economy countries that are economically comparable to China and that are significant producers of comparable merchandise).

For the Final Results, Commerce designated Thailand as "the surrogate country," i.e., the sole market economy country that would serve as the source for all information used in determining surrogate values for the normal value calculation. *See Final I&D Mem.* at 42 ("we continue to find that Thailand is the appropriate surrogate country in this review."). Xugong claims that the record evidence compelled Commerce to choose Peru instead. Xugong's Br. 6 ("[T]he record supports the conclusion that Peru is not only the better choice, but the only choice for which there is substantial record evidence."). Because the court is requiring Commerce to reconsider two surrogate values it based on data from Thailand (reclaimed rubber and foreign inland freight) the court is not sustaining a decision to use Thai data exclusively in the normal value determinations for the mandatory respondents. But for the reasons discussed below, neither does the court find merit in Xugong's claim that Commerce was required to choose Peru as the sole or primary surrogate country.

As grounds for its claim, Xugong argued before Commerce that Peruvian surrogate value data were superior to the Thai data for valuing natural rubber, for determining financial ratios, and for valuing reclaimed rubber. *See Resubmission of Xugong's Case Brief in the Administrative Review of New Pneumatic Off-The-Road Tires from the People's Republic of China* 1–23 (Dec. 21, 2015) (P.R. Doc. 320) ("Xugong's Case Br."). Before the court, Xugong offers two additional arguments. It argues that the ILO Chapter 6A data pertaining to Peru were superior to those pertaining to Thailand because the Peruvian data were specific to the rubber manufacturing industry whereas the Thai data were for manufacturing in general. Xugong's Br. 21–22. It argues also that record data pertaining to Peru were superior to those from Thailand for determining the surrogate inland freight cost. *Id.*

The court already has addressed the surrogate values for reclaimed rubber and foreign inland freight cost, in each case concluding that Commerce must reconsider these values. As to the labor data, the court does not conclude that Commerce was required to find that the Peruvian data were superior to the Thai labor data.

During the review, petitioners placed on the record Thai labor data for the "Manufacturing" industry from the National Statistical Office of the Government of Thailand. *See Petitioner's First SV Submission* at Ex. 8. The data were for the final quarter of 2013 and the first three

quarters of 2014, nearly contemporaneous with the POR. *Id.* Xugong placed on the record Peruvian labor data from Chapter 6A of the ILO Yearbook, specifically for the "Manufacture of Rubber and Plastics Products" industry. *See Xugong Initial SV Submission* at Ex. 10. The data, however, were from 2008, so Xugong used a consumer price index inflator of 115.12% (based on data from International Monetary Fund's World Economic Outlook Database) to calculate its proposed surrogate value for labor. *Id.* Commerce found that the record labor data supported its determination to select Thailand as its primary surrogate country because Thailand "provides POR-contemporaneous labor data" while the record only contained "non-contemporaneous labor data from 2008" for Peru. *Final I&D Mem.* at 45. Xugong acknowledges that the Peruvian data for which it advocates are less contemporaneous with the POR, Xugong's Br. 22 ("while it is true that the Thai labor rate data stems from the POR . . . "), and instead argues that the Peruvian data are superior as they are "more industry-specific." *Id.* Because each competing data set has a significant shortcoming, Commerce was within its discretion in choosing the Thai labor data over the Peruvian labor data.

Xugong's remaining arguments pertain to the choice of data from which to calculate financial ratios and the surrogate value for natural rubber. The court addresses these arguments below.

In determining normal value in a non-market economy proceeding, Commerce typically calculates surrogate values for factory overhead expenses, for selling, general & administrative ("SG&A") expenses, and for profit, by calculating and applying "financial ratios" derived from the financial statements of one or more producers of comparable merchandise in the primary surrogate country. *See* 19 C.F.R. § 351.408(c)(4). For these purposes, Commerce used the financial statements of three Thai companies. It used the financial statement of Hihero Tyres Co., Ltd. for the year ending December 31, 2013, and the financial statements of S.R. Tyres Co., Ltd., and Hwa Fong Rubber (Thailand) Public Company Limited ("Hwa Fong") for the year ending December 31, 2014. *Prelim I&D Mem.* at 36. As Commerce stated in the Preliminary Issues and Decision Memorandum, "[f]rom these Thai financial statements we were able to determine factory overhead as a percentage of the total raw materials, labor, and energy ('ML&E') costs; SG&A as a percentage of ML&E plus overhead (*i.e.*, cost of manufacture); and the profit rate as a percentage of the cost of manufacture plus SG&A." *Id.* (footnote omitted). Commerce found that each of these statements were from companies that produced "identical merchandise," i.e., merchandise identical to the OTR tires

that constituted the subject merchandise. *Id.* at 25. Also influencing the Department's choice was that each of the three statements broke out energy costs. *Id.*

Commerce noted that Xugong placed on the record complete financial statements for two producers in Peru, one of which, Commerce found, was not usable because it did "not adequately break out energy costs." *Id.* Commerce concluded that basing its financial ratios on three usable financial statements was preferable to basing them on one usable statement. *Id.* Commerce found, further, that the usable Peruvian statement (like the unusable one) was that of a company that produced comparable, as opposed to identical, merchandise. *Id.* Before the court, Xugong argues that the Peruvian financial statements are preferable to the Thai financial statements. Xugong's Br. 13–21. It offers several arguments in support of this contention.

Xugong argues, first, that the financial statement on the record pertaining to Hwa Fong does not support a finding that this company produced merchandise identical to the subject merchandise. *Id.* at 13–17. The financial statement, it asserts, indicated that "the principal businesses of the Company are manufacturing and distribution of tires and tubes for bicycles, motorcycles and small logistics vehicles." *Id.* at 13 (citation omitted). Further to this argument, it asserts that in a past investigation of Chinese tires for passenger cars and light trucks, Commerce declined to use Hwa Fong's financial statement due to record information that the company produced bicycle and motorcycle tires, which were not merchandise subject to that investigation. *Id.* at 13–14. Xugong argues that in rejecting its argument in the Final Results, Commerce impermissibly relied on a "2013 Tire Business Global Tire Report which states that Hwa Fong is a producer of agricultural, motorcycle, and industrial tires" and that agricultural and industrial tires "typically include off-the-road tires covered by the scope of the order." *Final I&D Mem.* at 49 (footnote omitted). Xugong points to other record evidence indicating that the Global Tire Report contained information that predated the POR and also was unreliable because it conflicted with record information pertaining to other Thai producers. *Id.* at 14–17. Xugong's arguments concerning the nature of the merchandise produced by Hwa Fong during the POR might have merit, but they are to no avail. Commerce concluded that even if Hwa Fong could be shown to be only a producer of comparable and not identical merchandise, the financial statements for the Thai companies, which broke out energy costs and pertained to two producers of identical merchandise and one producer of comparable merchandise, still would be superior to the single usable Peruvian financial statement, which was of a producer of

comparable merchandise. *Final I&D Mem.* at 49. This logical conclusion is supported by substantial evidence consisting of the financial statements on the record.

Xugong also argues that the financial statements of the two Peruvian companies that it submitted for the record, those of Goodyear del Peru S.A. ("Goodyear Peru") and Lima Caucho S.A. ("Lima Caucho"), are usable. Specifically, Xugong argues that the financial statement for the latter "very clearly indicates 'fabrication costs'" and that this category includes energy and labor, such that Commerce, having labor cost data, could derive the energy cost information. Xugong's Br. 19–20. Commerce responded to this argument for the Final Results, explaining, quite reasonably, that it prefers not to "go behind" the numbers in a financial statement or "rely on supposition." *Final I&D Mem.* at 48.

Even were Commerce to have accepted Xugong's argument that it could have used both the Goodyear Peru and Lima Caucho statements, it still would have been left with a record upon which it had three statements from Thailand as opposed to only two from Peru. Xugong has not made the case that the record statements from Peruvian companies constituted, on the whole, a superior set of data compared to those from the companies in Thailand. Xugong appears to concede this point, stating that "Commerce cannot point to substantial evidence that there is a significant difference in the overall quality of financial statement data on the record between Thailand and Peru." Xugong's Br. 17.

Xugong's argument concerning the natural rubber surrogate value is twofold. It argues, first, that the data Commerce used cannot be shown by substantial evidence to be free of tax and, in that respect, are inferior to GTA import data from Peru. Xugong's Br. 6–11. Second, it argues that the choice of surrogate value for natural rubber, which it argues was of negligible importance because this was but a minor production input, should not be a factor in favoring Thailand over Peru as the principal surrogate country. *Id.* at 11–13.

Commerce chose a surrogate value of $2.01 per kilogram for technically specified natural rubber and a surrogate value of $2.28 for natural rubber in ribbed smoked sheets, both of which values it obtained by calculating an average of daily prices during the POR, as reported by the Rubber Research Institute of Thailand ("RRIT") and compiled by the Association of Natural Rubber Producing Countries ("ANRPC"). *Final I&D Mem.* at 50–53; *see Final Surrogate Value Mem.* at Attach. I.

Both Xugong and Qihang argued during the review that Peruvian GTA import data on natural rubber were better information than the domestic Thai data (the RRIT data) Commerce used, contending that the record did not establish that the RRIT data were free of taxes. *Final I&D Mem.* at 50. Rejecting this argument in the Final Issues and Decision Memorandum, Commerce concluded that the RRIT data were the better choice. *Id.* at 53. Commerce stated its reasoning as follows:

> Because the Department finds that: 1) the RRIT data are sourced from the primary surrogate and comports with its SV [surrogate value] selection criteria of publicly available, non-export, tax-exclusive, and product-specific data; 2) no party has argued that the data are non-specific, inaccurate, aberrational, inappropriate, or that case specific factors otherwise disqualify their use; and, 3) because the Department has a preference to value all surrogate values within the same surrogate country, we continue to use the RRIT data in the *Final Results.*

*Id.* at 52 (footnote omitted). Commerce summarized its findings by stating that "[a]s outlined above, both sources are tax and duty exclusive and both are publicly available. Concerning specificity, the RRIT prices are tracked daily and based on the two specific types of natural rubber used by respondents in production, whereas Peruvian import data from GTA are only a monthly value for imports under an HTS heading for natural rubber generally, indicating that the RRIT prices are at least as specific and accurate as import prices." *Id.* at 53 (footnote omitted).

Before the court, Xugong again argues that the record evidence does not demonstrate that the RRIT data were free of taxes. Xugong's Br. 6–11. The court notes that Commerce did not reach an unqualified finding that the RRIT data were tax-exclusive. Responding to the objection of the mandatory respondents, Commerce asserted that "the RRIT domestic prices are tax-exclusive (or at a minimum, that there is no affirmative evidence that they contain taxes, *see* the discussion below), and no party contested the preliminary finding that they are publicly available, non-export, and product-specific prices for the POR." *Final I&D Mem.* at 51. The later discussion addressed the respondents' argument that a footnote pertaining to natural rubber prices in India indicated that the Thai natural rubber prices likely included domestic taxes. Commerce concluded that "it is reasonable to conclude that the RRIT prices are likely presented without taxes." *Id.* at 52. This, too, is not an unqualified finding.

Xugong explains that it "does not argue that the Thai data necessarily includes taxes, because as noted above, there is nothing explicit

on the record one way or the other." Xugong's Br. 10. Xugong notes that Commerce has an established preference for the use of import data over domestic price data due to exclusivity from tax, as stated in the Department's "Antidumping Manual." *Id.* at 10–11. The court agrees with Xugong's argument that the Thai data are not shown by substantial evidence to be free of tax, which is one of the Department's factors for choosing surrogate values. The Department's other reasons for choosing the domestic Thai data were that the Thai data "were at least as specific" to the input and were obtained from the chosen surrogate country, Thailand. As to specificity, the record GTA data for Peru, as shown in Xugong's initial surrogate value submission, were contemporaneous with the POR only for the tariff subheading Xugong listed for technically-specified natural rubber (September 2013 to August 2014) but were two years out of date for the tariff subheading it provided for natural rubber in smoked sheets (September 2011 to August 2012), for which Xugong supplied an inflator of 1.0607. *See Xugong Initial SV Submission* at Ex. 7.

Xugong challenged specifically the surrogate value for reclaimed rubber, as discussed previously in the Opinion and Order. The court does not interpret Xugong's Rule 56.2 brief as specifically challenging the natural rubber surrogate values. Instead, it raises the argument only in support of its claim that Commerce was required to choose Peru as the sole or primary surrogate country and, even in that context, minimizes the importance of the natural rubber surrogate values to the choice of surrogate country.[11] Xugong's claim does not persuade the court, if for no other reason than the financial data, which have a significant effect on the margins, do not favor Peru, as discussed above. Moreover, Commerce used Thai data to value numerous production inputs that were not challenged in this case. While the court has concluded that Commerce must reconsider its surrogate values for reclaimed rubber and for foreign inland freight, the record provides the court no valid basis to respond affirmatively to Xugong's claim that the record compelled Commerce to choose Peru as the sole or principal surrogate country by ordering reconsideration of all other surrogate values used by Commerce.

[11] The surrogate values Xugong proposed for natural rubber were less favorable to it than the values Commerce used. For natural rubber in smoked sheets, the competing values were $4.86 per kilogram (based on the Peruvian GTA data) as opposed to $2.28 per kilogram (based on the RRIT data) and for technically specified natural rubber, the competing values were $2.34 per kilogram (based on the Peruvian GTA data) as opposed to $2.01 per kilogram (based on the RRIT data). *Compare Provision of Initial Surrogate Values by Xuzhou Xugong Tyres Co. Ltd.* at Ex. 7 (Mar. 19, 2015) (P.R. Docs. 128–32), *with Final Results of the 2013–2014 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic off-The-Road Tires from the People's Republic of China: Surrogate Value Memorandum* at Attach. I (Apr. 12, 2016) (P.R. Doc. 336).

*E. The Use of Facts Otherwise Available and an Adverse Inference in the Calculation of Xugong's Margin*

Commerce issued its initial questionnaire on December 17, 2014, instructing Xugong on the reporting of its sales of subject merchandise for the sixth review. *Questionnaire* at C-1 (Dec. 17, 2014) (P.R. Doc. 34). Commerce issued a supplemental questionnaire to Xugong on May 1, 2015 requesting that Xugong report certain additional sales of subject merchandise. *Supplemental Section C and D Questionnaire* 3 (May 1, 2015) (P.R. Doc. 174) ("*First Supp. Questionnaire*"). The supplemental questionnaire requested that Xugong report "all EP and CEP sales which were invoiced during the POR, regardless of when they shipped or when they entered the United States" and to also "include any sales (if any) which shipped prior to the end of the POR but were not invoiced until after the POR." *Id.* at 4. Commerce issued an additional supplemental questionnaire to Xugong on May 7, 2015. *Second Supplemental Sections A, C, and D Questionnaire* (May 7, 2015) (P.R. Doc. 175). Xugong responded to these supplemental questionnaires on June 2, 2015. *Xuzhou Xugong Tyres Co., Ltd., ("Xugong") Supplemental A, C, and D Questionnaire Response the Administrative Review of New Pneumatic Off-The-Road Tires from the People's Republic of China* (June 2, 2015) (P.R. Docs. 191–97).

During a verification Commerce conducted at Xugong's U.S. affiliate, Commerce found that Xugong's reported sales database, as augmented in the June 2, 2015 supplemental questionnaire response, did not include certain CEP sales of subject merchandise that Commerce had requested in the May 7, 2015 supplemental questionnaire. *Final I&D Mem.* at 11. Each of the sales Commerce found to have been unreported were of subject merchandise "direct shipped" from Xugong's factory in China to the downstream U.S. customer during the POR and invoiced by the U.S. affiliate, ATI, after the close of the POR on August 31, 2014. *Id.* Commerce decided to use facts otherwise available, with an adverse inference, as a substitute for the missing sales information. For this purpose, Commerce used "the highest CONNUM-specific direct-shipped CEP sale margin as AFA ["adverse facts available"] for these missing sales." *Id.* at 12 (footnote omitted).

Xugong claims that "Commerce's determination to apply AFA in this situation is unsupported by substantial evidence." Xugong's Br. 45. The court does not find merit in this claim. While invoking the "substantial evidence" element of the standard of review, Xugong does not dispute the principal finding supporting the use of facts otherwise available, which was that the augmented sales database Xugong submitted in its June 2, 2015 questionnaire response did not include

all of its CEP sales that were direct-shipped during the POR but invoiced after the POR. Nor does Xugong make the case that Commerce erred in using an adverse inference.

*1. The Use of Facts Otherwise Available Is Warranted Because Commerce Reached a Valid Finding that Xugong Failed to Provide Requested Information*

Under 19 U.S.C. § 1677e(a)(2)(B), when a respondent fails to provide requested information, Commerce is directed generally to use the facts otherwise available in reaching the applicable determination. Under § 1677e(a)(2)(D), Commerce is directed generally to use the facts otherwise available if the information provided cannot be verified. Commerce invoked both of these provisions in resorting to facts otherwise available. *Final I&D Mem.* at 15. The directive in the May 1, 2015 supplemental questionnaire to "include any sales (if any) which shipped prior to the end of the POR but were not invoiced until after the POR," is unambiguous (albeit redundant as to the second inclusion of the word "any"). *First Supp. Questionnaire* at 4. It made no exception for sales of merchandise that entered after the POR. Because Xugong did not report those direct-shipped, CEP sales that were shipped during the POR but were invoiced after the POR (a finding Xugong does not dispute), Commerce correctly invoked subparagraph (B) of 19 U.S.C. § 1677e(a). Therefore, the court does not reach the question of whether the information Xugong did provide was verifiable for purposes of subparagraph (D).

Xugong advances various, and unavailing, arguments as to why Commerce should not have used the facts otherwise available. Xugong points out, first, that Xugong correctly followed the instructions on reporting of sales that unambiguously were set forth in the Department's initial questionnaire and were consistent with the Department's established practice. Xugong's Br. 46–52. It then argues that the supplemental questionnaire, which went beyond the "standard" reporting instructions, is inconsistent with the Department's past practice on the reporting of sales that will be used to determine a respondent's margin. According to Xugong's argument, the Department's practice, with two exceptions not here applicable, is to analyze sales data on entries occurring during the POR, rather than all sales occurring during the POR. *Id.* at 46. These arguments are not persuasive because the relevant issue is whether Xugong submitted all of the information requested in the May 1, 2015 supplemental questionnaire. Because it did not, Xugong's compliance with the reporting requirements in the initial questionnaire is irrelevant. And even if the court were to presume, *arguendo*, that Commerce had a practice

under which it did *not* request information on CEP sales that were shipped, but not invoiced or entered, within the POR, it would not change the court's conclusion. Commerce is not required to conform the scope of its information requests to the scope of those it has issued in the past.

Xugong argues, further, that "[d]espite the accuracy of Xugong's initial identification of the proper sales to report, Commerce issued a confused initial supplemental questionnaire on May 1, 2017." *Id.* at 57. Positing that Commerce requested reporting of sales in the initial questionnaire and the supplemental questionnaire on different methodologies, Xugong also contends that the questionnaires were in "conflict," *id.* at 59, and that "Commerce issued contradictory instructions." *Id.* at 70. Xugong cites *Ad Hoc Shrimp Trade Action Committee v. United States*, 33 CIT 1906, 675 F. Supp. 2d. 1287 (2011), in which Commerce declined to apply facts otherwise available with an adverse inference upon discovering it had issued conflicting reporting instructions. In this case, the directive to report *any* sales shipped during the POR, with no stated limitation as to when the merchandise was entered, was not ambiguous or otherwise unclear, and it is a mischaracterization to describe the reporting requests as conflicting. Because the May 1, 2015 supplemental questionnaire required Xugong to report sales in addition to those Xugong previously reported, it was not merely a clarification of the initial information request. *Final I&D Mem.* at 9 ("The Department requested that Xugong continue to report the same universe of sales that it had previously reported, but also to add these additional sales to its U.S. sales database.").

Xugong also maintains that in its June 2, 2015 response to the supplemental questionnaires it "made clear to Commerce that it had reported its direct-shipment CEP sales to Commerce based on having an entry date within the POR, and moreover that it did not report direct-shipment CEP sales shipped within the POR but which entered after the POR." Xugong's Br. 63. Xugong submits that it reasonably presumed that it had reported all additional sales requested by Commerce. *Id.* at 65. It argues that "[i]f Commerce had any confusion on the matter, it could simply have reviewed the database, and it would have noted that there were no sales reported with an entry date after the POR" and that "Commerce issued no further supplemental questions on this point, even though it did find the time to issue another supplemental questionnaire to Xugong on June 26, 2015." *Id.* at 66–67 (citing *Third Supplemental Sections C and D Questionnaire* 1 (June 26, 2015) (P.R. Doc. 212)). According to Xugong, "Commerce's failure to ask any further questions of Xugong regarding

this matter led to Xugong's understandable belief that whatever issue Commerce had with what constituted the proper sales universe had been resolved." *Id.* at 67. These arguments incorrectly presume that Commerce may not use facts otherwise available in response to unreported information if it does not discover the deficiency and notify the submitter as soon as it possibly could have, or before it issues a second supplemental questionnaire on the same subject matter. Although the statute requires Commerce to notify a submitter promptly, 19 U.S.C. § 1677m(d), Commerce did so upon discovering the unreported sales at verification. Under the circumstances shown by the record, it was not reasonable for Xugong to interpret the Department's silence as acquiescence.

Maintaining that Commerce, as a result of Xugong's response to the initial questionnaire, had all the information required for calculating an accurate dumping margin, Xugong argues that Commerce need not have, and should not have, requested reporting of sales for which neither the date of entry nor the date of shipment occurred during the POR. *Id.* at 67–68. "Xugong notes that it is being punished by Commerce for the fact that it did not report sales that Commerce did not initially request, and for which Commerce has provided no legal, precedential, policy, or otherwise rational basis for demanding in the first place." *Id.* at 68. Xugong does not demonstrate that Commerce acted beyond its authority in deciding that the CEP sales of merchandise shipped during the POR but not entered or invoiced during the POR should be included in the universe of sales examined to determine a margin for Xugong. Although the statute provides that Commerce, as a general matter, will determine a dumping margin for "each entry" subject to an administrative review, 19 U.S.C. § 1675(a)(2)(A)(ii), the statute does not require a perfect correspondence between examined sales and entries during a period of review, and often tying every U.S. market sale to a particular entry is not practicable. The Department's regulations recognize this point. *See* 19 C.F.R. § 351.213(e)(1) (providing that an administrative review normally will cover, as appropriate, entries, exports, or sales during the POR). The sales Xugong did not report in response to the Department's request were exported during the POR. Also, Commerce used "shipment date to define the universe of sales" after finding that "the terms of sale are fixed at the time of shipment." *Final I&D Mem.* at 13. While objecting to the Department's supplemental information request, it does not specifically contest this finding. *See* 19 C.F.R. § 351.401(i) (providing that in identifying the date of sale of subject merchandise, Commerce normally will use invoice date unless "a

different date better reflects the date on which the exporter or producer establishes the material terms of sale.").

2. *The Use of an Adverse Inference Was Warranted Based on a Finding that Xugong Did Not Act to the Best of Its Ability in Responding to the May 1, 2015 Supplemental Questionnaire*

Commerce found that "Xugong failed to act to the best of its ability in this review by not reporting the full universe of sales," *Final I&D Mem.* at 15, in responding to the request in the May 1, 2015 supplemental questionnaire, a finding supported by substantial record evidence. Xugong did not comply with the Department's clear and unambiguous instructions in reporting its sales database, yet it does not give a reason why it would have been unable to comply fully with the Department's request. If Xugong misinterpreted the request to mean that it should report only shipments of merchandise entered during the POR, its doing so could only have been the result of a lack of care in following the Department's unambiguous instructions and not a fault on the part of Commerce. Rather than argue that it used its best efforts in attempting to satisfy the Department's request for the additional sales information, it argues, unconvincingly, that Commerce somehow was at fault, for various reasons, in making the request and in structuring the various questionnaires in the way that it did. Based on the record evidence considered as a whole, Commerce was justified in invoking its authority under 19 U.S.C. § 1677e(b) to use an adverse inference in choosing from among the facts otherwise available.

*F. Trelleborg's Claims that Commerce Unlawfully Assigned it the "All-Others" Rate*

In what are essentially three separate claims, Trelleborg challenges the Department's decision in the Final Results to assign it the "all-others" rate of 70.55% that Commerce derived as a weighted average of the individual margins of the two mandatory respondents. Trelleborg claims, first, that Commerce acted unlawfully in selecting only Xugong and Qihang, and not Trelleborg, as mandatory respondents, i.e., as respondents initially chosen for individual examination and assignment of individual weighted-average dumping margins. Trelleborg's Br. 20–26. Second, Trelleborg claims that even as an unexamined respondent it should not have been assigned the 70.55% rate because that rate was unreasonable as applied to Trelleborg, which received a zero margin in a just-completed new shipper review and

asserts that it would have received a very low margin (which Trelleborg calculates as one between 1.79% and 2.03%) had it been examined individually in the sixth review. *Id.* at 10–18. Finally, Trelleborg claims that Commerce unlawfully denied its request to participate in the sixth review as a voluntary respondent. *Id.* at 26–30. As discussed below, the court concludes that Trelleborg does not qualify for a remedy on any of these claims.

*1. The Department's Decision to Examine Only Xugong and Qihang, and Not Trelleborg, as Mandatory Respondents*

Commerce initially selected two companies, Xugong and Guizhou Tyre Co., Ltd. (together with an affiliate, Guizhou Tyre Import and Export Co., Ltd.; collectively, "GTC") for individual examination as mandatory respondents, based on its finding that these two companies accounted for the largest volume of exports of subject merchandise to the United States during the POR. *Prelim. I&D Mem.* at 3 n.9. After GTC withdrew its review request, Commerce selected as a second mandatory respondent Qihang, which it found to be the next largest, i.e., third largest overall, exporter of subject merchandise to the United States during the POR. *Id.* For the Final Results, Commerce stated that "[a]lthough the Department selected Qihang as a mandatory respondent following GTC's withdrawal, we specified that there has been no change in circumstance that would warrant the Department to revisit its determination that it would not be practicable to individually examine all requested producers and exporters, and that the Department could examine no more than two producers or exporters of subject merchandise." *Final I&D Mem.* at 32 n.193. Commerce based its conclusion that it would not be practicable to examine individually more than two respondents on its workload and the associated administrative burden that would result from a third individual examination. *Respondent Selection* 1 (Dec. 16, 2014) (P.R. Doc. 32).

In explaining its decision to select only Xugong and Qihang, and not Trelleborg, as the mandatory respondents, Commerce acknowledged the "general rule" of 19 U.S.C. § 1677f-1(c)(1), which provides that "[i]n determining weighted average dumping margins under . . . section 1675(a) of this title [which applies to reviews of antidumping duty orders], the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." *Id.* at 30. Commerce relied on a statutory exception to the general rule, which Congress provided in § 1677f-1(c)(2). *Id.* The latter provision gives Commerce authority

to limit its examination of exporters or producers "[i]f it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review." 19 U.S.C. § 1677f-1(c)(2). The provision allows Commerce to limit its examination in two ways: it may limit its examination to a statistically valid sample of exporters, producers, or types of products, *see* § 1677f-1(c)(2)(A), or it may limit its examination to "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined," *see*§ 1677f-1(c)(2)(B). In explaining its decision to invoke its discretion under paragraph (B) of § 1677f-1(c)(2), Commerce stated its conclusion that the two respondents it selected, i.e., Xugong and Qihang, are representative of producers of the subject merchandise. *Id.* at 31. Commerce further explained that the all-others rate it calculated based on the individual margins of Xugong and Qihang "is drawn from a large universe of sales which are representative of off-the-road tire manufacturers' experiences" and "bears a relationship to TWS Xinghai's [Trelleborg's] economic reality." *Id.* at 32 (footnote omitted).

Trelleborg raises various objections to the Department's mandatory respondent selection. It argues, first, that failing to include Trelleborg was contrary to the statute because, "the basic purpose of the statute" being "to compute fair and accurate dumping margins," Commerce must ensure that margins assigned to non-mandatory, cooperative separate rate respondents "bear some relationship to their actual dumping margins" rather than be "untethered to actual record data for Trelleborg." Trelleborg's Br. 10–12. This argument does not convince the court. The method Congress expressly provided for in 19 U.S.C. § 1677f-1(c)(2)(B) necessarily produces an "all-others" rate that is "untethered to actual record data" on the sales of individual, unexamined respondents. Any "relationship to their actual dumping margins" that exists under § 1677f-1(c)(2)(B) is, by definition, the relationship that exists because the examined respondents are treated as representative of other respondents by virtue of being the largest exporters. Commerce assigned a margin based on the margins of the two largest exporters to the unexamined ("separate rate") respondents because it concluded that the circumstance described in § 1677f-1(c)(2) existed, notwithstanding the margin that an unexamined respondent would have been assigned had it been individually examined.

Trelleborg argues that the mandatory respondents are not representative of it because, as a foreign-owned company (in this case, one owned by a company in a market economy country, Sweden), it "has

a different pricing and cost structure than would be expected from Chinese-owned enterprises, regardless of whether they are state-owned or free from state control." Trelleborg's Br. 19 (citations omitted). As examples, it points out that it differed from Xugong in terms of its specific products, its market economy purchase inputs, its relative percentages of synthetic rubber, natural rubber, and reclaimed rubber used for all of its products, and its AUVs. *Id.* According to Trelleborg, "Commerce is required to evaluate the commercial reality facing each company to determine whether the companies' economics are comparable." *Id.* This argument presumes, incorrectly, that Congress intended to limit the application of 19 U.S.C. § 1677f-1(c)(2)(B) according to a comparative analysis of the factors Trelleborg highlights. Congress instead provided Commerce authority to examine individually producers and exporters of subject merchandise based on largest export volumes. *See* 19 U.S.C. § 1677f-1(c)(2)(B).

Trelleborg takes issue with the decision to perform individual examinations of only two respondents based on a justification of the current and anticipated workload of the Department's investigative office assigned to the proceeding. *Id.* at 25. It argues that "the administrative convenience of Commerce cannot trump statutory mandates of accuracy, reasonableness, and fidelity to commercial and economic reality" and that "[i]t is simply not true that the two largest exporters in any given industry will be representative of all others." *Id.* at 26. Commerce determined that examining individually only Xugong and Qihang was appropriate based on the statutory authority to examine the "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." 19 U.S.C. § 1677f-1(c)(2)(B). The record evidence supports the Department's finding that the two mandatory respondents were not only the two largest (other than GTC, for which the review request had been withdrawn) but also accounted for a substantial portion of the subject merchandise exports of all exporters and producers for which Commerce had remaining requests for review. *See Selection of Second Respondent for Individual Review* at Attach. I (Dec. 19, 2014) (P.R. Doc. 38). Moreover, Trelleborg has not demonstrated that, even had Commerce selected an additional mandatory respondent based on export volume of subject merchandise, it would have been the party designated under the method of selecting respondents for individual examination provided in 19 U.S.C. § 1677f-1(c)(2)(B). *See, e.g., id.* Commerce therefore had a basis, grounded in substantial record evidence and according to a

statutorily-authorized method, to conclude that the two largest exporters were representative of all exporters and producers for which review had been requested.

### 2. *The Assignment of the 70.55% "All-Others" Rate to Trelleborg*

Trelleborg argues that assigning it the 70.55% rate had the effect of denying it any meaningful benefit from a new shipper review of Trelleborg, in which Commerce assigned Trelleborg a zero margin. *Id.* at 15–17. But if that is so, that result is a permissible one under the statutory scheme. Trelleborg is correct that the zero margin produced a rate that was in effect for entries made only during a limited time, the new shipper review having been completed on June 4, 2013, less than three months prior to the beginning of the POR (September 1, 2013 through August 31, 2014). *See id.* at 17. But the statute authorized—and, upon the receipt of a valid request, indeed required—the inclusion of Trelleborg in the sixth review. Trelleborg, therefore, cannot demonstrate that the relationship between the new shipper review and the sixth periodic administrative review made Trelleborg's receiving the 70.55% all-others rate violative of the statute *per se*. Moreover, as Commerce pointed out, the zero margin Trelleborg received in the new shipper review was based on a single sale. *Final I&D Mem.* at 37.

Trelleborg maintains that the assignment of the 70.55% all-others rate was unreasonable because had Commerce calculated a margin using Trelleborg's own data, that margin would have been between 1.79% and 2.03%. *Id.* at 12–15. This assertion relies upon information related to Trelleborg's own sales, which information Commerce did not examine because Trelleborg was not an individually-examined respondent. But in light of the statutory provisions upon which Commerce was conducting the review, Trelleborg does not make the case that Commerce, on this record, was *required* to designate Trelleborg as a third mandatory respondent. Therefore, it is unavailing for Trelleborg to assert that it would have been assigned a margin between 1.79% and 2.03% had it been individually examined.

### 3. *The Department's Denial of Trelleborg's Request to Be a Voluntary Respondent*

In the Preliminary Results, Commerce announced that it was rejecting a request by Trelleborg for voluntary respondent status under section 782(a) of the Tariff Act, 19 U.S.C. § 1677m(a). *Prelim I&D Mem.* 6–10. Commerce confirmed this decision for the Final Results and reiterated its reasoning. *Final I&D Mem.* at 30–38.

Under 19 U.S.C. § 1677m(a), if Commerce has limited the number of exporters or producers individually examined according to 19 U.S.C. § 1677f-1(c)(2), it must, in a certain circumstance, "establish an . . . individual weighted average dumping margin for any exporter or producer not initially selected for individual examination" who submits to Commerce the information requested from the mandatory respondents by the date the mandatory respondents were required to submit such information. 19 U.S.C. § 1677m(a)(1). That circumstance exists when "the number of exporters or producers subject to the investigation or review is not so large that any additional individual examination of such exporters or producers would be unduly burdensome to the administering authority and inhibit the timely completion of the investigation or review." *Id.* § 1677m(a)(1)(B). Trelleborg claims that the Department's denial of its request to be a voluntary respondent was unlawful, arguing that the "number of exporters or producers subject to the investigation or review," was "not so large that any additional individual examination" of it would have been "unduly burdensome" or "inhibited the timely completion" of the review. *Id.*

There is no dispute that Trelleborg voluntarily submitted the information requested of the mandatory respondents by the required date. *Prelim. I&D Mem.* at 8; *Final I&D Mem.* at 28. Commerce rejected the voluntary respondent request, citing resource constraints. In doing so, Commerce relied upon an amendment to the statute made by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 506, 129 Stat. 362, 386–87 (2015) ("TPEA"). The TPEA added to 19 U.S.C. § 1677m(a) a new provision (now subsection § 1677m(a)(2)), entitled "Determination of unduly burdensome," under which Congress provided three specific factors, and a general "catch-all" factor, that Commerce "may consider" "[i]n determining if an individual examination under paragraph (1)(B) [i.e., § 1677m(a)(1)(B)] would be unduly burdensome."[12] 19 U.S.C. § 1677m(a)(2).

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[12] The new subsection provides that:

> In determining if an individual examination under paragraph (1)(B) would be unduly burdensome, the administering authority may consider the following:
>
> (A) The complexity of the issues or information presented in the proceeding, including questionnaires and any responses thereto.
>
> (B) Any prior experience of the administering authority in the same or similar proceeding.
>
> (C) The total number of investigations under part I [countervailing duty investigations] or part II [antidumping duty investigations] of this subtitle and reviews under section 1675 of this title being conducted by the administering authority as of the date of the determination.
>
> (D) Such other factors relating to the timely completion of each such investigation and review as the Administering Authority considers appropriate.

19 U.S.C. § 1677m(a)(2).

Under the first factor ("[t]he complexity of the issues or information presented in the proceeding, including questionnaires and any responses thereto"), Commerce concluded that "the issues, and information presented in this review are complex," adding that "analysis of both Xugong and Qihang was complicated due to Xugong's multiple subsidiaries and affiliates as well as both EP and CEP sales, and Qihang's use of tollers and wide variety of terms of sale." *Final I&D Mem.* at 33 (footnote omitted). Commerce mentioned that "we have issued four supplemental questionnaires to Xugong and five supplemental questionnaires to Qihang in this review, which included numerous questions concerning the factors of production reporting methodologies, database issues, ownership issues, and general administrative issues." *Id.*

In apparent reference to the second factor, "[a]ny prior experience of the administering authority in the same or similar proceeding," *see* 19 U.S.C. § 1677m(a)(2)(B), Commerce noted that "this was the first time that we have reviewed Qihang as a mandatory respondent and, thus, the Department had to expend additional time gaining experience with Qihang's records and practices." *Id.* Commerce also mentioned that approving the request "would necessarily have required a significant additional level of effort and resources" that would be "unduly burdensome," including the assignment of additional analysts. *Id.* at 34.

Trelleborg argues that Commerce, in denying its request for voluntary respondent status using the same rationale it used to limit the review to the two examined, i.e., mandatory, respondents, failed to recognize that denying such a request requires a higher threshold of agency burden than does limiting respondents generally. Trelleborg's Br. 26–30. According to Trelleborg, Commerce ignored the fact that Trelleborg was the only prospective voluntary respondent that submitted the necessary information and the fact that it previously examined Trelleborg in the new shipper review. *Id.* at 29–30. Trelleborg submits that because it provided Commerce "a dumping margin program that Commerce could have used if it wanted," the burden on Commerce "was as minimal as it could be with any voluntary respondent" and did not qualify as an "undue" burden. *Id.* at 30.

Trelleborg's arguments are not persuasive. In the TPEA, Congress provided Commerce with broad discretion in deciding whether or not to accept a request for voluntary respondent status. In support of its decision, Commerce applied factors Congress considered appropriate, including complexity of the review and it other resource commitments, in rejecting Trelleborg's request.

### *G. The All-Others Rate as Applied to Full World and Weihai Zhongwei*

Full World and Weihai Zhongwei were assigned the all-others rate of 70.55% in the sixth review. *Final Results*, 81 Fed. Reg. at 23,273–74. As plaintiffs in this case, they seek relief in the form of a redetermined all-others rate based on any revision to the rates of the examined respondents. At oral argument, defendant indicated that Commerce does not oppose this claim, should it be determined judicially that revision in the rates of the examined respondents is required. Because Full World and Weihai Zhongwei contested the Final Results as plaintiffs, they will qualify for any relief that ultimately is determined judicially to apply to their margins. Because it also contested the Final Results, Trelleborg will qualify for any such relief as well.

## *III. CONCLUSION AND ORDER*

For the reasons discussed in the foregoing, the court remands to Commerce the decision published as *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 Fed. Reg. 23,272 (Int'l Trade Admin. Apr. 20, 2016) ("Final Results") for reconsideration according to the conclusions the court reaches in this Opinion and Order. Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that Commerce shall submit a new determination upon remand ("Remand Redetermination") in which it recalculates export price and constructed export price for Xugong and Qihang without making deductions for Chinese value-added tax; it is further

**ORDERED** that, in the Remand Redetermination, Commerce shall reconsider, and redetermine as necessary, the surrogate values for reclaimed rubber and foreign inland freight; it is further

**ORDERED** that Commerce will recalculate the margins for Xugong and Qihang and also the margin to be assigned to Trelleborg, Full World, and Weihai Zhongwei; it is further

**ORDERED** that Commerce will submit its Remand Redermination within 90 days of the date of this Opinion and Order; it is further

**ORDERED** that comments of plaintiffs on the Remand Redetermination must be filed with the court no later than 30 days after the filing of the Remand Redetermination; and it is further

**ORDERED** that the response of defendant to the aforementioned comments must be filed no later than 15 days from the date on which the last comment is filed.

Dated: April 4, 2018
New York, New York

*/s/Timothy C. Stanceu*
Timothy C. Stanceu, Chief Judge