U.S. Court of International Trade

Slip Op. 18–153

ARKEMA, INC., THE CHEMOURS COMPANY FC, LLC, HONEYWELL INTERNATIONAL INC., Plaintiffs, v. UNITED STATES, Defendant.

PUBLIC VERSION

Before: Leo M. Gordon, Judge
Court No. 16–00179

[ITC's *Remand Results* remanded.]

Dated: November 5, 2018

James R. Cannon, Jr. and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for the Plaintiffs Arkema, Inc., The Chemours Company FC, LLC, Honeywell International Inc. and Plaintiff-Intervenors The American HFC Coalition, and its Members.

Patrick V. Gallagher, Jr., Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for Defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Ned H. Marshak, *Max F. Schutzman* and *Jordan C. Kahn*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for Defendant-Intervenors Shandong Dongyue Chemical Co. Ltd., Zhejiang Sanmei Chemical Ind. Co., Ltd., Sinochem Environmental Protection Chemicals Co., Ltd., and Zhejiang Quhua Fluor-Chemistry Co., Ltd.

Jarrod M. Goldfeder and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington, DC, for Defendant-Intervenor National Refrigerants, Inc.

OPINION and ORDER

Gordon, Judge:

This action involves the final affirmative material injury determination by the U.S. International Trade Commission ("ITC") in the antidumping duty investigation covering hydrofluorocarbon ("HFC") blends and components from the People's Republic of China ("PRC"). *See Hydrofluorocarbon Blends and Components from China*, 81 Fed. Reg. 53,157 (Int'l Trade Comm'n Aug. 11, 2016) ("*Final Determination*"); *see also Views of the Commission*, USITC Pub. 4629, Inv. No. 731-TA1279 (Final) (Aug. 2016), ECF No. 33–3 ("*Views*"); *ITC Staff Report*, Inv. No. 731-TA-1279 (July 8, 2016), as revised by Mem. INV-OO-062 (July 13, 2016), ECF Nos. 33–1 & 33–2 ("*Staff Report*").[1]

Before the court are the Views of the Commission on Remand, ECF No. 76 ("*Remand Results*") filed pursuant to *Arkema, Inc. v. United*

[1] All citations to the *Views*, *Remand Results*, the agency record, and the parties' briefs are to their confidential versions.

States, 42 CIT ___, 290 F. Supp. 3d 1363 (2018) ("*Arkema I*"), as well as the comments of Plaintiffs Arkema, Inc., The Chemours Company FC, LLC, Honeywell International Inc. and Plaintiff-Intervenors The American HFC Coalition, and its members, (collectively, "Plaintiffs"). *See* Pls.' & Pl.Intervenors' Remand Comments in Opp'n to the Comm'n's Remand Results, ECF No. 83 ("Pls.' Cmts"); *see also* Def.'s Resp. to Pls.' & Pl.-Intervenors' Remand Comments, ECF No. 86 ("Def.'s Resp."). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

In *Arkema I*, the court reviewed Plaintiffs' challenge to the ITC's application of its semi-finished products analysis to determine that HFC blends and HFC components are separate like products. *See Arkema I*, 42 CIT ___, 290 F. Supp. 3d 1363. The ITC's semi-finished products analysis examines "(1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) [the] significance and extent of the processes used to transform the upstream into the downstream articles." *Id.*, 42 CIT at ___, 290 F. Supp. 3d at 1368 (quoting *Views* at 14 n.40). The court sustained the ITC's conclusions for three of the five prongs—(2) separate markets, (3) differences in physical characteristics and functions, and (5) the significance and extent of transformation processes. *Id.*, 42 CIT at ___, 290 F. Supp. 3d at 1372–75. The court remanded the ITC's findings on the remaining two prongs: (1) dedicated for use and (4) differences in costs or value. Within those two prongs the ITC relied on certain data[3] that Plaintiffs demonstrated to be erroneously inflated. *Id.*, 42 CIT at ___, 290 F. Supp. 3d at 1369–72.

On remand, the ITC corrected the inaccuracies, but maintained its conclusions that (1) there were "significant" differences in value supporting separate like product treatment for HFC components and

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[3] Specifically, for the dedicated for use prong, Plaintiffs demonstrated that the ITC relied upon an erroneously inflated estimate for the amount of in-scope HFC components used in the production of out-of-scope blends. *Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1369–70. For the value added prong, Plaintiffs established that the ITC relied on data as to the value added to HFC components by integrated domestic producers in the production of HFC blends that erroneously inflated the value added by including "significant labor and overhead costs incurred in the manufacture of components rather than in blending operations." *Id.*, 42 CIT at ___, 290 F. Supp. 3d at 1371.

HFC blends, and (2) HFC components were not dedicated for use as HFC blends. Plaintiffs challenge each of these decisions.[4]

I. Standard of Review

The court sustains the ITC's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2018). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A West's Fed. Forms, *National Courts* § 3.6 (5th ed. 2018).

II. Discussion

A. Differences in Value

On remand the ITC again found that the cost/value prong of its semi-finished products analysis supported treating HFC components and HFC blends as separate like products. The ITC originally relied on incorrect data in determining the range of value added by the

[4] In their comments, Plaintiffs argue that the ITC must identify "hard evidence" (whatever that that may be), for the *Remand Results* to be sustained. *See* Pls.' Cmts. at 2–3, 4, 7, 10. Plaintiffs misunderstand the substantial evidence standard of review. When the court reviews substantial evidence issues, the court does not evaluate whether record evidence is "hard" or "soft," it just evaluates whether the agency finding, conclusion, or determination is reasonable given the administrative record. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

integrated producers. *See Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1371. The ITC revised its original calculated range from [[ ]] to [[ ]] percent, to [[ ]] to [[ ]] percent, which was *half* as large as initially calculated.

The ITC also determined that the value added by transforming HFC components into HFC blends for both the integrated producers and the independent blender was "significant." *Remand Results* at 17. The court believes that the term "significant" is too vague in this context. The flip side of the blending value is the HFC component value, which is [[ ]] percent, meaning HFC components are the predominant portion of HFC blends in terms of value. Given that predominance, the court is having difficulty sustaining as reasonable the ITC's mere conclusion that the comparatively smaller value added by blending is "significant." The court notes that the ITC's original overstatement of the blending value has the appearance of trying (perhaps too hard) to bolster the evidentiary basis for its decision.

The ITC also emphasizes its reliance on the "significantdifferences in sales value between HFC components and HFC blends" found in the original determination. *Id.* at 17. "In the original determination, the Commission found that the ratio of the average unit value ('AUV') of domestic producers' U.S. commercial shipments of in-scope HFC components to the AUV of in-scope HFC blends ranged from [[ ]] to [[ ]] percent during the POI." *Id.* at 17–18 (citing *Views* at 16). Plaintiffs point out, persuasively, that AUV data is generally unhelpful for analyzing the differences in value or cost between HFC components and HFC blends. *See* Pls.' Cmts. at 9.

> The AUVs reflect the average net sales value of HFC Components per short ton and the average net sales value of shipments of HFC Blends. But, HFC Components were [[ ]], whereas HFC Blends were [[ ]]. Operating [[losses]] on the sale of HFC Components ranged from [[ ]] percent. By comparison, profits on sales of HFC Blends [[ ]] percent. Therefore, comparing the AUVs, rather than cost of goods sold, is not an apples-to-apples comparison of the relative value of Components and Blends.

Id. (internal citations omitted). The ITC contends that Plaintiffs waived their arguments challenging the ITC's newly elevated and expanded reliance on the AUV data. *See* Def.'s Resp. at 7 ("Plaintiffs did not previously challenge the ITC's use of AUVs in this litigation,

nor did the Court direct the ITC to address this issue on remand."). The court disagrees. In its original determination, the ITC did not emphasize its AUV analysis:

> *Differences in Value*. During the POI, *the ratio of the average unit value of the U.S. industry's U.S. commercial shipments of subject HFC components to the average unit value of HFC blends ranged from [[ ]] percent to [[ ]] percent. Based on reported financial data*, the value added by blending operations of the integrated domestic producers ranged from [[ ]] percent to [[ ]] percent during the POI, while the value added by National's blending operations ranged from [[ ]] to [[ ]] percent during the period.

Views at 16–17 (emphasis added). The court remanded the value added analysis for the ITC to explain "how much weight the ITC placed on" the incorrect [[ ]] to [[ ]] percent data range, as well as how it weighed this prong in its ultimate separate like product determination. *See Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1371. On remand, the ITC corrected its erroneous calculations for the integrated producers' value added data, and *elevated and expanded* its reliance upon the ratio of AUVs of in-scope components to in-scope blends. *See Remand Results* at 17–18 ("We find the difference between the AUVs of the HFC components and the HFC blends *to be significant*.") (emphasis added). Plaintiffs therefore may permissibly challenge this newly expanded rationale of the *Remand Results*. On the merits, Plaintiffs' arguments (quoted above) do test the reasonableness of the ITC's reliance on the differences between the AUVs of HFC blends and HFC components as the basis for its finding that there are "significant differences in value between HFC components and blends." *Remand Results* at 18.

B. Dedication for Use

On remand, the ITC again found that HFC components were not dedicated for use in the production of HFC blends:

> **Dedicated for Use.** In the original investigation, the Commission found that "approximately [[ ]] percent of domestic production of in-scope HFC components was used in the production of out-of-scope refrigerant blends during the POI." As discussed above, the Court remanded this issue so that "the Commission may reconsider the use of the [[ ]] percent figure and the weight assigned" to this factor when making the domestic like product determination.
>
> As instructed, we have reconsidered our use of the [[ ]] percent figure as a surrogate value to estimate the degree to

which HFC components were used to produce out-of-scope refrigerants. We acknowledge the limitations of the data underlying the use of this figure as a surrogate, because it reflects some quantity of out-of-scope HFC blends that do not use in-scope HFC components. In addition, both in-scope and out-of-scope HFC blends underlying that figure are produced using variable quantities of in-scope HFC components and other out-of-scope components. Notwithstanding the limitations, which may result in this figure overstating to some extent the percentage of in-scope HFC components used to produce out-of-scope blends, we find that this figure continues to have probative value to our analysis, given the lack of more precise data in the record to enable a more rigorous calculation. Nevertheless, as discussed below, we have not relied on this figure or indeed on any specific number, wholly or even principally, in making our dedicated for use finding.

The record, as a whole, indicates that the consumption of domestically produced in- scope HFC components for the production of outof-scope HFC blends and refrigerants was not insignificant. As described in the Commission Report, questionnaire responses indicated that the out-ofscope blend production included 25 blends of HFC, hydrochlorofluorocarbon/chlorofluorocarbon ("HCFC/CFC"), and hydrofluoroolefin ("HFO") with 23 of 25 of these blends containing at least one in-scope HFC component, while other information in the record shows that there are at least 40 out-of-scope refrigerant blends containing at least one in-scope HFC component. Consequently, there are a significant number of uses for in-scope components beyond their use in the production of the five in- scope HFC blends.

In addition, we find the data supplied by the responding HFC producers, notwithstanding its limitations, to be more probative of the extent to which in-scope HFC components were used in out-of-scope blends than the witness testimony the Petitioners argue the Commission should treat as dispositive. Petitioners' estimate that only four percent of HFC components are used to produce non-scope blends is the mere assertion of a witness at the preliminary phase conference — before the bulk of material in the record was compiled — that lacks any empirical basis discernible from the record.

Finally, as we found in the original investigation, in-scope HFC components R-32 and R-125 have stand-alone end uses in

> addition to being used as components for refrigerants. Notably, R-125 has independent uses as a stand-alone refrigerant, as well as in a variety of other non-refrigerant applications, such as a blanketing gas for aluminum and magnesium casting, and in foam blowing, smelting operations, semiconductor silicon wafer processing, and certain medical applications. Similarly, R-32 can also be used as a stand-alone refrigerant in residential air conditioning systems and in semiconductor silicon wafer manufacturing.
>
> As we have explained above, we have not relied exclusively or even principally on the estimated [[ ]] percent usage figure or any other specific empirical measure in reaching these remand results. Moreover, Petitioners' argument regarding the absence of record evidence concerning the volume of in-scope HFC components that may be contained in each HFC blend misses the point. The pertinent issue here is not whether the volume of in-scope HFC components is used principally to produce in-scope HFC blends, but whether the in-scope HFC components have appreciable uses other than in the production of in-scope HFC blends. Consequently, our analysis has focused upon the instances of use and the scope or breadth of the presence of HFC components in out-of-scope refrigerants and for other applications. We find the numerous uses for HFC components beyond their use in the production of in-scope HFC blends – namely in the production of out-of-scope refrigerants, for use as stand-alone refrigerants, and for uses independent of refrigeration – to be significant. Therefore, given the record data, we do not find that HFC components are dedicated for use in the production of HFC blends.

Remand Results at 13–16.

There are a number of specific factual findings within the ITC's dedicated for use analysis that are unreasonable. Additionally, the ITC's overall rationale for this prong, in the court's view, lacks logical coherence and is therefore not a reasoned decision that the court can sustain. To begin, the court cannot understand the ITC's explanation of its use and handling of the [[ ]] percent figure. In *Arkema I*, the court remanded the ITC's use of that figure because it appeared inaccurate. 42 CIT at ___, 290 F. Supp. 3d at 1369–70. In the *Remand Results* (quoted above) the ITC acknowledged that the figure was inaccurate, apparently from "limitations of the data . . . ." *Remand Results* at 13. Despite acknowledging that these flaws overstated "the percentage of in-scope HFC components used to produce out-of-scope

blends," *Remand Results* at 13, the ITC nevertheless maintains that the data continues "to have probative value to our analysis," although apparently not enough to enable the ITC to determine a specific percentage. *Id.* at 13–14. To summarize, the ITC abandons use of the specific percentage because of flaws in the data, and then vaguely insists the data still has probative value, though it cannot be used to determine a specific measure of in-scope HFC components used to produce out-of-scope blends.

The ITC found "the data supplied by the responding HFC producers, notwithstanding its limitations, to be more probative of the extent to which in-scope HFC components were used in out-of-scope blends than the witness testimony the Petitioners argue the ITC should treat as dispositive." *Remand Results* at 14. The ITC explained its decision to prefer the flawed producer data over Plaintiffs' witness testimony by noting that the latter consisted of "the mere assertion of a witness at the preliminary phase conference — before the bulk of material in the record was compiled — that lacks any empirical basis discernible from the record." *Id.* These findings, however, are not supported by the record. The relevant testimony was not presented "at the preliminary phase conference," but instead was provided in direct response to questioning at the final hearing. *See* Pls.' Cmts. at 5–6. The Global Business and Market Manager for Chemours testified *under oath* and was questioned directly by ITC Commissioner Broadbent about the reasons for selecting three HFC Components and five HFC Blends. Hearing Tr., PD[5] 138, at 53. The witness testified that the HFC components "are used almost exclusively in HFC blends." *Id.* at 54. She explained that "in-scope blends are taking account for 96 percent of the components that are in the case. The blends that are outof-scope is literally 3 percent. And you've heard some people talk about the fire suppression market, and that's actually 1 percent of the use of those components." *Id.* at 56. At the earlier staff conference, the same witness testified that "there is essentially no direct market for the HFC components. They were created and exist today for the HFC blends market." Staff Conf. Tr., PD 25, at 28. Witnesses for Honeywell and Arkema both agreed with the witness' estimation of the portion of HCF components consumed in out-of-scope blends. Hearing Tr. at 55. The court could not identify on the record any sworn statements from other witnesses contradicting these statements. The Chemours witness also testified that "[w]e

[5] "PD" refers to a document contained in the public administrative record, and "CD" refers to a document in the confidential administrative record.

estimate that less than one percent of the sale of any of the components is used for something other than blends." Hearing Tr. at 26. The ITC agreed with her testimony on this point. *See Views* at 14–15.

The court cannot understand how a reasonable mind would disregard this sworn testimony as "mere assertion" carrying less probative value than a flawed [[ ]] percent estimate from the producers' data, which inherently "overstates" the amount of in-scope HFC components used in out-of-scope blends. The ITC (or the producers who supplied the underlying data) will not hazard a guess by how much it is overstated, the ITC just assumes without explanation that it has more probative value than Plaintiffs' estimate.

This is not the only unreasonable aspect of the ITC's decision. The ITC states that "questionnaire responses indicated that the out-of-scope blend production included 25 blends ... with 23 of 25 of these blends containing at least one in-scope HFC component, while other information in the record shows that there are at least 40 out-of-scope refrigerant blends containing at least one in-scope HFC component." *Remand Results* at 14. The ITC considered this "scope or breadth of the presence of HFC components in out-of-scope refrigerants and for other applications" as an indication that HFC components are not dedicated for use in the production of in-scope HFC blends. *Remand Results* at 15. Plaintiffs explain, however, that this "scope of breadth" is not as broad as the ITC imagines. *See* Pls.' Cmts. at 7. Plaintiffs clarify that the vast majority of out-of-scope blends allegedly containing in-scope components referenced by the ITC are not in fact manufactured or are only made in very small quantities. *Id.* The ITC's reference to "23 of 25" or "40 out-of-scope refrigerant blends containing at least one in-scope component" refers only to "blend formulas" that are registered with the American Society of Heating, Refrigeration, and Air Conditioning Engineers ("ASHRAE"), and provides no insight as to the actual volume of commercial production of out-of-scope blends containing in-scope components. *Id.* Plaintiffs also explain that a number of blends that include HFC components registered with ASHRAE were not commercially produced, *e.g.*, HFC Post-Conference Brief, CD 57, Ex. 4, and other blends were covered by patents but only produced in very small volumes. The ITC did not, therefore, have a sound handle on the actual "scope or breadth of the presence of HFC components in out-of-scope refrigerants and for other applications," *Remand Results* at 15, meaning that it must reconsider its finding that "there are a significant number of uses for in-scope components beyond their use in the production of the five in-scope HFC blends." *Id.* at 14.

The court also is having difficulty evaluating the reasonableness of the ITC's conclusions that out-of-scope uses of HFC components are "significant," "not insignificant," or "appreciable." *Remand Results* at 14, 15, 19. Recall that in *Arkema I* Plaintiffs argued that the ITC effectively required a 100 percent dedicated for use test, which the ITC denied. *Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1370. In theory then at least, the ITC left open the possibility that other uses for an upstream product would not automatically disqualify the product (like HFC components) from being "dedicated for use" in the downstream, in-scope applications. That is fine in theory, but stickier in practice. In the *Remand Results* the ITC highlights that certain HFC components have "stand-alone end uses in addition to being used as components for refrigerants." *Id.* at 15 (explaining uses for R-125 and R-32 HFC components). These stand-alone end uses are one of the primary grounds for its finding that "the numerous uses for HFC components beyond their use in the production of in-scope HFC blends" are "significant." *Id.* At the same time, however, the ITC acknowledged that a very small percentage of HFC components are used as stand-alone products. *See Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1370 (quoting *Views* at 14–15). The court is left wondering why exactly these uses are "significant"?

Similarly, although the ITC claims not to rely on the flawed [[ ]] percent figure "wholly or even principally" for its dedicated for use finding, the ITC nevertheless uses that figure to support its finding that the use of HFC components to produce out-of-scope blends is "significant." *Remand Results* at 15. Again, what exactly does the ITC mean by the term "significant" or "not insignificant"? Are these relative terms measuring out-of-scope use of HFC components against in-scope HFC blends? Or are these absolute terms that just measure the general use of HFC components in out-of-scope applications? Is the ITC concluding that the use of HFC components as standalone products are themselves "significant"? And if so, why does the ITC care about their relative use for in-scope applications and whether Plaintiffs' estimate is accurate that four, not [[9.3]], percent of HFC components go into the production of out-of-scope applications?

And what exactly does the ITC mean when it concludes that HFC components have "appreciable uses other than in the production of in-scope HFC blends"? *Remand Results* at 15. Is *any* commercial use of HFC components other than the production of in-scope blends, no matter how small relative to the principal in-scope blend use, appreciable? If so, this would seem to give credence to Plaintiffs' original contention that the ITC really is applying a de facto 100-percent threshold for its dedicated for use analysis, contrary to the ITC's

position in *Arkema I*. *See Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1370. Without a 100 percent dedicated for use test, Plaintiffs appear to have a good argument that their HFC components are dedicated for use as in-scope HFC blends. They were created for HFC blends, are overwhelmingly used for in-scope applications, and constitute the predominant value of the in-scope HFC blends.

The court cannot, however, say (and direct by affirmative injunction) that HFC components must necessarily be the same like product as HFC blends for injury analysis under the trade laws. All the court concludes here is that the ITC has failed to reasonably explain its findings in the dedicated for use and differences in value prongs. The ITC, will therefore, again have to reconsider its semi-finished products analysis of HFC components and HFC blends. It may be helpful for the agency to resist using expedient, but vague, conclusory descriptors such as "appreciable," "significant," and "not insignificant," and to explain how it weighed the respective findings under each of the factors in its overall determination.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the *Remand Results* are remanded to the ITC to reconsider the dedicated for use and value added prongs of its semi-finished products analysis, and if necessary, the ultimate conclusion; it is further

ORDERED that the ITC shall file its remand results on or before January 8, 2019; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after the ITC files its remand results with the court.

Dated: November 5, 2018
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 18–156

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

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00054
PUBLIC VERSION

[Sustaining, in part, and remanding, in part, the U.S. Department of Commerce's Remand Redetermination in the second administrative review of the antidumping duty order on large power transformers from the Republic of Korea.]

Dated: November 13, 2018

R. Alan Luberda and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, argued for Plaintiff. With them on the brief was *David C. Smith, Jr.*

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, 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 *Christopher Hyner*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

J. David Park, Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for Consolidated Plaintiff and Defendant-Intervenor Hyosung Corporation. With him on the brief were *Andrew M. Treaster*, *Henry D. Almond*, *Daniel R. Wilson*, and *Sylvia Y. Chen*.

David E. Bond, White & Case LLP, of Washington, DC, argued for Defendant-Intervenors Hyundai Heavy Industries, Co., Ltd.[1] and Hyundai Corporation USA. With him on the brief were *William J. Moran* and *Ron Kendler*.

OPINION AND ORDER

Barnett, Judge:

This matter comes before the court following the U.S. Department of Commerce's ("Commerce" or the "agency") redetermination upon remand. *See* Confidential Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 96.[2] ABB Inc. ("ABB") and Hyosung Corporation ("Hyosung") initiated this action, challenging certain aspects of Commerce's final results in the second administrative review ("AR 2") of the antidumping duty order on large power transformers ("LPT") from the Republic of Korea for the period of review August 1, 2013, through July 31, 2014. *See Large Power Transformers from the Republic of Korea*, 81 Fed. Reg. 14,087 (Dep't Commerce March 16, 2016) (final results of antidumping duty admin. review; 2013–2014) ("*Final Results*"), and accompanying Issues and Decision Mem., A–580–867 (Mar. 8, 2016) ("I&D Mem."), ECF No.

[1] Hyundai Electric & Energy Systems Co., Ltd. is the successor-in-interest to Hyundai Heavy Industries, Co., Ltd. *See* Letter from David E. Bond, Attorney, White & Case LLP, to the Court (Sept. 12, 2018), ECF No. 120.

[2] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 27–3, and a Confidential Administrative Record ("CR"), ECF No. 27–4. Parties submitted joint appendices containing record documents cited in their U.S. Court of International Trade Rule 56.2 briefs. *See* Confidential J.A. ("CJA"), ECF No. 73; Public J.A. ("PJA"), ECF No. 74. The administrative record associated with the Remand Results is contained in a Confidential Remand Administrative Record ("CRR"), ECF No. 100–2, and a Public Remand Administrative Record ("PRR"), ECF No. 100–3. Parties further submitted joint appendices containing record documents cited in their Remand briefs. *See* Confidential Remand Proceeding J.A. ("CRJA"), ECF No. 113; Public Remand Proceeding J.A. ("PRJA"), ECF No. 114. Citations are to the confidential joint appendices unless stated otherwise.

27–2; *see also* Consent Mot. to Consolidate, ECF No. 33; Order (Jun. 14, 2016), ECF No. 36. ABB challenged Commerce's treatment of U.S. commissions of Hyosung, Hyundai Heavy Industries Co., Ltd. ("HHI"), and Hyundai Corporation USA ("Hyundai USA," collectively with HHI, "Hyundai"), arguing that Commerce improperly added commission expenses to normal value when it should have deducted them from the constructed export price, and improperly granted commission offsets to normal value for commissions on U.S. sales incurred in the United States. *See* Confidential Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. at 13–31, ECF No. 41–2. ABB further argued that Commerce failed to cap Hyundai's service-related revenue included in the gross unit price of the LPTs by the amount of the related expenses. *Id.* at 31–44. Hyosung challenged Commerce's decision to cap Hyosung's reported inland freight revenue by Hyosung's reported domestic (i.e., within Korea) inland freight expense. *See* Confidential Mem. in Supp. of Consol. Pl. Hyosung's Rule 56.2 Mot. for J. Upon the Agency R. at 11–22, ECF No. 40–2.

The United States ("Defendant" or the "Government") requested a remand to address the issues that ABB raised; the court granted that request on October 10, 2017. *See ABB, Inc. v. United States* ("*AR 2 Remand Opinion*"), 41 CIT ___, ___, 273 F. Supp. 3d 1200, 1205–06 (2017).[3] The court directed Commerce to reconsider its treatment of Hyundai's and Hyosung's U.S. commissions and to "evaluate its revenue capping practice and ensure that its application of this practice is consistent with respect to [Hyundai and Hyosung]." *Id.* at 1212. With respect to the issues Hyosung raised, the court sustained Commerce's determination to cap Hyosung's reported freight revenue by its reported domestic inland freight expense. *Id.*

Commerce filed its Remand Results on February 9, 2018. *See* Remand Results. Therein, Commerce declined to grant home market commission offsets to Hyundai and Hyosung for U.S. commissions incurred in the United States. *See id.* at 28–31. Commerce reexamined the record with respect to Hyundai's reporting of the gross U.S. prices for the LPTs and determined that Hyundai had failed to report service-related revenues separate from gross unit price. *See id.* at 17 & n.56 (citing Draft Results of Redetermination Pursuant to Court Remand (Jan. 9, 2018) ("Draft Remand Results"), CJRA Tab 1, CRR 1, PJA Tab 1, PRR 1, ECF No. 113). Commerce used facts

[3] *AR 2 Remand Opinion* presents further background information on this case, familiarity with which is presumed.

available with an adverse inference for certain U.S. sales of Hyundai. Draft Remand Results at 14; Remand Results at 24 (cross-referencing the Draft Remand Results for the agency's methodological use of partial adverse facts available).

Hyundai now challenges Commerce's Remand Results on both issues. *See* Confidential Def.-Ints.' Comments in Opp'n to the Final Results of Redetermination Pursuant to Court Remand ("Hyundai's Cmts."), ECF No. 106. Hyosung challenges Commerce's Remand Results with respect to the commission offsets. *See* Hyosung's Comments on Remand Results ("Hyosung's Cmts."), ECF No. 104. ABB and the Government urge the court to sustain the Remand Results in their entirety. *See generally* Confidential Pl.'s Comments in Supp. of Remand ("ABB's Cmts."), ECF No. 108; Def.'s Resp. to Def.-Ints' Comments on the Dep't of Commerce's Final Results of Redetermination ("Gov.'s Cmts."), ECF No. 110. For the reasons discussed below, the court sustains the Remand Results with respect to Commerce's treatment of respondents' U.S. commissions and remands this matter to the agency with respect to the service-related revenue issue.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[4] and 28 U.S.C. § 1581(c). 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). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams, Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (internal citation omitted).

DISCUSSION

I. U.S. Commission Offsets

a. Commerce's Determination in the Remand Results

In the Remand Results, Commerce explained that its practice is "to distinguish two types of commissions paid on U.S. sales: (i) commissions incurred inside the United States for which Commerce deducts the commission expenses and the related profit from the price used to

[4] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

establish [constructed export price (or "CEP")[5]], and (ii) commissions incurred outside the United States, for which [Commerce] adds such commission expenses to normal value[6] and offsets differences in home market commission expenses and such U.S. commission expenses incurred outside the United States, if any." Remand Results at 9–10; *see also id.* at 28. When a commission expense is incurred in the United States, Commerce, pursuant to 19 U.S.C. § 1677a(d)(1) and (3), makes an adjustment to the price used to establish CEP and for profit allocated to that commission expense. *See id.* at 8–9. In such circumstances, Commerce treats the commission expense as a CEP expense and "deducts the expense[] and allocated profit from the price used to establish CEP without providing a home market commission offset because such commissions are only associated with economic activities in the United States." *Id.* at 11. When a commission expense is incurred outside the United States (on a sale to the United States), Commerce may make an upward or downward adjustment to "normal value based on the circumstance of sale provision in 19 U.S.C. § 1677b(a)(6)(C)(iii) and 19 C.F.R. § 351.410(e)."[7] *Id.* at 28–29. Commerce does not treat commissions outside the United States as CEP selling expenses. *Id.* at 29*; see also id.* at 10. Instead, the agency "first adds U.S. commissions incurred outside the United States to the normal value of the respective home market sales and then grants home market commission offsets, if applicable, to the normal value of such home market sales." *Id.* at 10, 29.

Commerce determined that its approach is consistent with the intent of 19 U.S.C. §§ 1677a(d) and 1677b(a)(6)(C)(iii), 19 C.F.R. § 351.402(b),[8] and the Uruguay Round Agreements Act, Statement of

[5] "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, as adjusted under [19 U.S.C. §§ 1677a(c) and (d)].

19 U.S.C. § 1677a(b).

[6] "Normal value" typically is "the price at which the foreign like product is first sold . . . 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." 19 U.S.C. § 1677b(a)(1)(B)(i).

[7] 19 C.F.R. § 351.410(e) provides:

> The [agency] normally will make a reasonable allowance for other selling expenses if the [agency] makes a reasonable allowance for commissions in one of the markets under consideration[], and no commission is paid in the other market under consideration. The [agency] will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

[8] 19 C.F.R. § 351.402(b) provides:

> In establishing constructed export price under section [19 U.S.C. § 1677a], the [agency] will make adjustments for expenses associated with commercial activities in the United

Administrative Action ("SAA"), H.R. Doc. No. 103–316, vol.1 (1994), reprinted in 1994 U.S.C.C.A.N. 4040.[9] *Id.* Commerce also noted that its practice is consistent with that articulated in the remand redetermination in the first administrative review of the antidumping duty order on LPT's from Korea, which the court sustained in *ABB, Inc. v. United States* ("*AR 1 Opinion*"), 41 CIT ___, 273 F. Supp. 3d 1186 (2017), *appeal filed*, No. 18–1300 (Fed. Cir. Dec. 14, 2017). *See id.* at 8 & n.27.

Both Hyundai and Hyosung challenge Commerce's determination as contrary to law. Hyundai's Cmts. at 15; Hyosung's Cmts. at 1. Hyosung contends that "nothing in the statute, regulations, legislative history, or other policy materials" supports a geographic distinction between commissions incurred in the United States versus those incurred in the home market on U.S. sales. Hyosung's Cmts. at 2. According to Hyosung, commissions incurred in the United States qualify for a commission offset pursuant to 19 C.F.R. § 351.410(e), which expressly allows for a commission offset when commissions are incurred in one market and not the other, without a geographical distinction as to where the commission expenses must be incurred. *Id.* at 2–3.[10] Hyundai argues that Commerce unreasonably treats similar situations differently when it "den[ies] a commission offset in one circumstance, while granting it in all others." Hyundai's Cmts. at 15 (citing *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371 (Fed. Cir. 2011)). According to Hyundai, there is no indication that Congress intended for such disparate treatment. *Id.* at 16.

b. Commerce's Determination is Sustained

At the outset, neither Hyosung nor Hyundai challenge Commerce's findings that both respondents' U.S. commissions were incurred in the United States. Therefore, the only issue for the court's consider-

> States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. The [agency] will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the [agency] may make an adjustment to normal value for such expenses under section [19 U.S.C. § 1677b(6)(C)(iii)].

[9] The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d).

[10] In a single sentence, Hyosung also makes the assertion that "Commerce's Remand Results are based on an impermissibly vague 'scope of economic activities' test, which disregards Hyosung's commercial reality and the record facts." Hyosung's Cmts. at 1 (emphasis removed). Hyosung did not further develop the argument in its brief, nor did it elaborate its position during oral argument. *See* Oral Arg. Tr. at 5:2–22, ECF No. 119. The court considers Hyosung's failure to articulate any grounds for this assertion as an implied waiver of this argument. *See Home Prods. Int'l, Inc. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1294, 1301 (2012) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.")).

ation is whether Commerce's denial of a commission offset for Hyosung and Hyundai is in accordance with law.

In requesting the remand, the Government acknowledged that Commerce had recently reconsidered its practice with regard to U.S. commissions. *See AR 2 Remand Opinion*, 273 F. Supp. 3d at 1205. Commerce articulated that methodology in the remand redetermination in the first administrative review of the antidumping duty order on LPT's from Korea. *See id.* at 1205 & n.4; *AR 1 Opinion*. Commerce requested the remand to ensure that the agency's treatment of U.S. commissions in this case was consistent with its methodology. *AR 2 Remand Opinion*, 273 F. Supp. 3d at 1205. In the Remand Results, Commerce articulated its treatment of U.S. commissions incurred in the United States on sales to the United States consistently with the methodology expressed in the *AR 1 Opinion*. *See* Remand Results at 8–11 & n.27, 29–30 & nn.114115 (citations omitted); *AR 1 Opinion*, 273 F. Supp. 3d at 1192–93 (overview of Commerce's interpretation of the law).

In *AR 1 Opinion*, the court sustained Commerce's treatment of U.S. commissions and the accompanying legal analysis. *See* 273 F. Supp. 3d at 1193–1200. The court held that Commerce's methodology was in accordance with law because the statute, regulations, and legislative history supported the geographic distinction Commerce made when it declined to grant a home market commission offset for U.S. commissions incurred in the United States. *Id.*

As the court explained,

> [w]hile many differences between U.S. price (whether based on export price or constructed export price) and normal value are taken into account when the price comparison is made, in the case of constructed export price transactions, the statutory definition of that price requires certain adjustments be made at the outset, in order to determine the constructed export price, and without regard to the comparison with normal value.

Id. at 1194 (citing 19 U.S.C. § 1677a(b)). One of those statutory adjustments is a deduction of "commissions for selling the subject merchandise in the United States." *Id.*(quoting 19 U.S.C. § 1677a(d)(1)(A)). "Although § 1677a(d)(1)(A) does not contain a geographical distinction on where commissions must be incurred," the implementing regulation explains that Commerce "will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no

matter where or when paid." *Id.* (quoting 19 C.F.R. § 351.402(b)).[11] When Commerce adopted 19 C.F.R. § 351.402, it traced its rationale to the SAA, stating "the SAA makes clear that only those expenses associated with economic activities in the United States should be deducted from CEP." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,351 (Dep't Commerce May 19, 1997) (citing SAA at 823, *reprinted in* 1994 U.S.C.C.A.N. at 4164).[12] Indeed, the relevant language in the SAA states that Commerce must deduct commissions from the CEP pursuant to §1677a(d)(1), "but only to the extent that they are incurred in the United States on sales of the subject merchandise." SAA at 823, *reprinted in* 1994 U.S.C.C.A.N. at 4164.

Moreover, the SAA explains the differences between the commissions incurred on U.S. sales in the United States and those incurred on U.S. sales outside the United States:

> In constructed export price situations Commerce will deduct direct expenses incurred in the United States from the starting price in calculating the constructed export price. However, direct expenses and assumptions of expenses incurred in the foreign country on sales to the affiliated importer will form a part of the circumstances of sale adjustment.

SAA at 828, reprinted in 1994 U.S.C.C.A.N. at 4167. Therefore, "the circumstances of sale adjustment, including the home market commissions offset," is limited to "direct expenses and assumptions of expenses *incurred in the foreign country on sales to the affiliated importer* (such as with export price sales)." *AR 1 Opinion*, 273 F. Supp. 3d at 1196.

Both Hyosung and Hyundai acknowledge that the court has sustained Commerce's treatment of the commission offset in the first administrative review, but disagree with the court's decision therein. *See* Hyosung's Cmts. at 1; Hyundai's Cmts. at 15. Neither party, however, provides a compelling argument for why the court should not follow its decision in *AR 1 Opinion*. Hyosung's reliance on 19 C.F.R. § 351.410(e) is misplaced because this regulation addresses the circumstances of sale adjustment to normal value provided for in 19

[11] Furthermore, as noted, Commerce "will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although [it] may make an adjustment to normal value for such expenses under [U.S.C. § 1677b(6)(C)(iii)]." 19 C.F.R. § 351.402(b); *see also supra* note 8.

[12] This statement was made in response to comments that the agency should adjust for all expenses incurred on CEP sales, including those incurred in the foreign market. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,351.

U.S.C. § 1677b(a)(6)(C)(iii), which requires the agency to make adjustments to normal value based on "other differences in the circumstances of sale." *See* Hyosung's Cmts. at 1–3; *AR 1 Opinion*, 273 F. Supp. 3d at 1196 (rejecting the same arguments that Hyosung raises in this review).

The case to which Hyundai cites, *Dongbu Steel*, concerns Commerce's inconsistent interpretation of the same statutory provision depending on the segment of the antidumping proceeding (investigation or review). 635 F.3d at 1371. The court concluded that Commence must provide a reasonable explanation for why the statutory language supports an inconsistent interpretation. *Id.* at 1373. The court is not confronted with the same situation here; Commerce articulated the same rationale for its treatment of U.S. commissions incurred in the United States as it did in the previous administrative review. Therefore, Hyundai's argument is unavailing.

Because the Remand Results are consistent with the practice that the agency articulated in the first administrative review, which the court upheld as reasonable and in accordance with law, Commerce's treatment of U.S. commissions in the Remand Results will be sustained.

II. Service-Related Revenue

a. Commerce's Remand Results

In the Remand Results, Commerce stated that it re-examined the record and analyzed whether there was a legal and factual basis for determining whether to cap Hyundai's service-related revenue with the associated expenses. *See* Remand Results at 2, 5. After re-examining the record, Commerce found that Hyundai had failed to provide information necessary for Commerce to apply its capping methodology. *See id.* at 17 & n.56 (citing Draft Remand Results at 11–14). The information concerned Hyundai's service-related revenues that exceeded the associated expenses. *Id.* at 17.

Commerce explained that in response to a questionnaire and during verification, the agency had received detailed sales documentation for certain U.S. sales. As part of the remand proceeding, Commerce re-examined this sales documentation and determined that for many of the transactions, record evidence indicated that the LPT price charged to the final customer included revenues for various services, and those revenues exceeded Hyundai's expenses for the provision of those services.[13] Remand Results at 23–24; Draft Remand Results at 12. Consequently, Commerce found Hyundai's gross

[13] At verification, Commerce examined five U.S. sales with U.S. sequence numbers ("SEQU") 1, 8, 11, 14, and 27. Draft Remand Results at 12–13. Of those sales, Commerce verified U.S. SEQU 1. *Id.* at 12.

unit prices for those sales were overstated.[14] Remand Results at 17 n.56; Draft Remand Results at 13.

Commerce also found that "Hyundai failed to cooperate to the best of its ability by not providing the information requested." Remand Results at 24. Therefore, Commerce determined that an adverse inference was warranted when selecting among the facts available. *Id.* As partial adverse facts available, Commerce reduced the gross unit prices for most U.S. sales "by the highest percent rate difference identified in the [U.S. sales documented at verification]."[15] Draft Remand Results at 13–14; Remand Results at 24 (cross-referencing the Draft Remand Results for the agency's methodological use of facts available).

b. Parties' Arguments

Hyundai argues that Commerce's use of partial facts available with an adverse inference was unsupported by substantial evidence and contrary to law. Hyundai's Cmts. at 2. Hyundai contends that the agency altered its standard for reporting service-related revenue from one turning on whether "the service was performed to meet the terms of sale" to "whether such service is provided." *Id.* at 4–5. Hyundai further takes issue with Commerce's reliance on "mere notations on internal correspondence, rather than documents exchanged with the unaffiliated customer" as evidence of service-related revenue. *See id.* at 7. It argues that Hyundai provided complete responses to the agency's requests for information; its responses were reasonable and informed by Commerce's conclusion in the original investigation; and Commerce verified and approved of Hyundai's reporting in the Issues and Decision Memorandum. *See id.* at 8–12. Moreover, Hyundai argues that Commerce failed to comply with the statutory requirements of 19 U.S.C. § 1677m(d) because it failed to notify Hyundai of any deficiencies in its reporting or provide it an opportunity to cure those deficiencies. *See id.* at 12–13. Additionally, Hyundai contends that Commerce failed to articulate the manner in which Hyundai failed to act to the best of its ability, and failed to explain that Hyundai had the ability to comply or acted in a manner contrary to any reasonable respondent. *See id.* at 14–15.

The Government contends that the requirement for reporting service-related revenue separately from the gross unit price has remained consistent since the beginning of this proceeding, regardless of the types of documents on which those service-related revenues

[14] The sales in question are SEQUs 8, 11, 14, and 27. *Id.* at 12–13.

[15] Commerce reduced the gross unit prices by [[ ]] percent, which is the percentage amount by which the revenue exceeded the expenses for U.S. SEQU 14. *Id.* at 14.

appear. *See* Gov.'s Cmts. at 11–12. The Government further argues that Commerce did not have an obligation to comply with § 1677m(d) because the agency was not aware of the deficiencies in Hyundai's reporting until it discovered the underlying information evincing Hyundai's misreporting for the first time at verification. *See id.* at 17–18. According to the Government, despite Commerce's request to separately report service-related revenues, Hyundai "submitted no information, much less deficient information, and stated it had no such information to report." *Id.* at 17. Moreover, the Government points out that Hyundai does not dispute that it had access to the information Commerce initially requested and that it failed to provide that information. *Id.* at 18. According to the Government, under these circumstances, Commerce's obligations pursuant to 1677m(d) were not triggered. *Id.* at 19. Lastly, the Government maintains that the agency adequately articulated how Hyundai failed to act to the best of its ability, and its decision is supported by substantial evidence. *Id.* at 19–20.

ABB likewise disputes Hyundai's assertion that Commerce changed the test for reporting service-related revenue. *See* ABB's Cmts. at 4–5. According to ABB, to accept Hyundai's claim that the agency improperly relied on internal company documents in assessing the existence of service-related revenue would result in the potential manipulation of the dumping margin. *Id.* at 10. It reasons, "if Commerce considered only the service-related revenues reflected in certain sales documents (purchase orders and invoices), rather than *any* sales documentation setting forth the intent of the parties," then "a party could easily manipulate the dumping calculation by listing service-related revenues in a document other than a purchase order or invoice." *Id.* ABB argues that Commerce was not legally prohibited from applying its capping methodology in the Remand Results after it requested the voluntary remand to reconsider the incorrect approach the agency applied in the *Final Results*. *See id.* at 6. ABB further contends that the agency's treatment of Hyundai in the Remand Results is consistent with its treatment of Hyosung under similar facts in the *AR 2 Remand Opinion*. *See id.* at 5–6 & n.4, 7–8 (citing *AR 2 Remand Opinion*, 273 F. Supp. 3d at 1205–06, 2010). Overall, ABB maintains that the court should affirm Commerce's application of partial AFA. *See id.* at 11–17.

c. Analysis

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a). Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Moreover, "[a]n adverse inference may not be drawn merely from a failure to respond." *Id.* at 1383. Rather, Commerce may apply an adverse inference "under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made." *Id.*

Here, Commerce found that Hyundai "refused to provide the necessary information for Commerce to apply its capping methodology" and "failed to act to the best of its ability by not providing the information requested." Remand Results at 24. Therefore, the court must consider (1) what information Commerce requested from Hyundai and whether Hyundai failed to provide that requested information, (2) whether Commerce informed Hyundai of any deficiencies in its reporting, and (3) whether Hyundai put forth its maximum effort to provide Commerce with full and complete answers to Commerce's requests.

i. Commerce's Information Request and Hyundai's Responses Thereto

Substantial evidence supports Commerce's finding that Hyundai did not provide information responsive to the agency's information requests. In its initial antidumping questionnaire, Commerce instructed Hyundai to report "the sale price, discounts, rebates and all other revenues and expenses in the currencies in which they were earned or incurred." Initial Antidumping Duty Questionnaire (Dec. 1, 2014) ("Initial AD Questionnaire") at C-20, CRJA Tab 4, PRJA Tab 4, PR 25, ECF No. 113. Commerce further explained that:

> the gross unit price less price adjustments should equal the net amount of revenue received from the sale. **If the invoice to your customer includes separate charges for other services directly related to the sale, such as a charge for shipping, create a separate field for reporting each additional charge.**

Id. at C-18 (emphasis added).

In its initial questionnaire response, Hyundai stated that it reported the gross unit price as the total sales price of the LPT, and reported fields "ADDPOPRU," which included the "sales amount under a separate purchase order for services that were not included in the purchase order for the transformer (e.g., supervision), but that are related to the transformer," and "ADDPOEXPU," which included "the expense associated with the additional services."[16] Resp. to Secs. B and C Questionnaires (Jan. 26, 2015) ("Sec. B&C Resp.") at C-28, CRJA Tab 5, CR 78–84, PRJA Tab 5, PR 62–64, ECF No. 113. Hyundai stated that its reporting methodology was "[c]onsistent with prior segments of this proceeding[.]" *Id.* at C-28.

In a supplemental questionnaire, Commerce requested clarification with respect to those two fields created and reported by Hyundai.[17] *See* Suppl. Questionnaire for Secs. B and C of Hyundai Heavy Industries and Hyundai Corp. USA's Resps. to the Antidumping Duty Questionnaire (May 22, 2015) ("Suppl. Sec. B&C Questionnaire") at 7, CJA Tab 14, CR 171, PJA Tab 14, PR 126, ECF No. 73–2. In response, Hyundai explained that it had separately reported only the value of, and expenses for, services for which "the customer ha[d] issued a separate, additional purchase order for services related to, but not included in the purchase order for the sale[.]"[18] Resp. to Suppl. Secs. B and C Questionnaires (June 3, 2015) ("Suppl. Sec. B&C Resp.") at 15, CRJA Tab 7, CR 173–178, PRJA Tab 7, PR 132–133, ECF No. 113. Again, Hyundai cited Commerce's determination in the original investigation to justify its reporting methodology. *Id.* at 14–15.

Despite Commerce's initial instruction that when "the invoice to [the customer] include[d] separate charges for other services directly

[16] This explanation did not account for when separate line items for services were included in the same purchase order as the LPT, nor did it address the instructions to report separate charges for services included on the invoice.

[17] Specifically, Commerce asked Hyundai to explain the difference between the two fields: "For example, describe the factual circumstances that would cause different amounts to be reported in these fields for the same sale. In addition, please clarify if you consider a sales amount entered under ADDPOPRU to be part of the purchase price of an LPT, even though the amount appeared on a separate purchase order." Suppl. Sec. B&C Questionnaire at 7.

[18] In other instances, when the purchase order and invoice included separate line items for services, such as freight, Hyundai included the separately listed revenue in the gross unit price for the LPT and did not separately report it. Suppl. Sec. B&C Resp. at 14.

related to the sale," Hyundai was to "create a separate field for reporting each additional charge," Initial AD Questionnaire at C-18, Hyundai failed to do so. Commerce pointed to record evidence to support its finding that Hyundai failed to report properly service-related revenues, including multiple invoices to U.S. customers containing separate line items for services that Hyundai did not separately report.[19] *See* Remand Results at 17 n.56; Draft Remand Results 12 & n.51 (citing Verification Exhibits, SVE 12–15), 13 & n.60 (citations omitted). Those invoices were directly responsive to the agency's questionnaire and covered more than half of the sales for which Commerce received detailed documentation. *Compare supra,* note 13, *with supra*, note 19. These invoices constitute substantial evidence that Hyundai failed to provide Commerce with requested information.

Nevertheless, there is additional information collected at verification upon which Commerce seeks to rely. In particular, Commerce seeks to rely on certain internal Hyundai communications, absent any evidence of communication with the unaffiliated customer, to find that there were additional service-related revenues and expenses that Hyundai failed to report. *See* Remand Results at 22–24. For one sale, Commerce stated that although the purchase order between the unaffiliated customer and Hyundai contained a lump-sum price, the contract between affiliates HHI and Hyundai USA contained separate service-related revenue figures.[20] *Id.* at 23 & nn.83–84 (citing Verification Exhibits, SVE 15 at 20 (JA 101396), 35 (JA 101409)). For another sale, Commerce relied on an email exchange among Hyundai employees discussing the costs for certain services, only some of which were separately identified on the purchase order and invoice to

[19] Specifically, the invoices provided for three of the five transactions received by Commerce separately identified service-related charges. For SEQU 8, the purchase order and the commercial invoice contained separate line items for ocean freight, inland freight, and technical field supervision. Draft Remand Results at 13 n.60 (citing Hyundai Heavy Industries Sales Verification Exhibits ("Verification Exhibits"), SVE 13 at 13–14 (JA 101136–37), 44–45 (JA 101167–68), CRJA Tab 9, CR 221–225, PRJA Tab 9, ECF No. 113). For SEQU 11, the invoice to the U.S. customer contained separate line items for customs and duties, supervision and delay delivery charges. Suppl. Sec. A Questionnaire Resp. (May 13, 2015), Attach. SS-17 at JA 100814–17, CRJA Tab 6, CR 113–130, PRJA Tab 6, PR 104–113, ECF No. 113. For SEQU 14, the purchase order and commercial invoice contained separate line-items for customs and duties, supervision, and delay delivery fees. *See* SVE 14 at 17 (JA 101282), 25 (JA 101290), 43–45 (JA 101308–10); *see also* Draft Remand Results at 12 & nn.55–56.

[20] With respect to this sale, SEQU 27, ABB argued at oral argument that the separately listed services in the contract between HHI and Hyundai USA were in response to the customer's request for quote. Oral Arg. Tr. at 34:13–35:12 (citing Verification Exhibits, SVE 15 at 6 ¶ 4 (JA 101380)). Commerce did not rely on this rationale or document in the Remand Results.

the U.S. customer.[21] According to the agency, the fact that some of the services mentioned in the email were omitted from the purchase order and the invoice to the unaffiliated customer did "not negate the fact that these are revenues." *Id.* at 23–24.

In its Remand Results, Commerce stated that its capping methodology is not dependent upon whether a respondent provides the services pursuant to the terms of sale or whether the service-related expenses and revenues appear as separate line-items on an invoice to the customer. *Id.* at 21. Rather, "[i]f a respondent collects, as a portion of the final price to the customer, a portion of revenue[,] which is dedicated to covering a service-related expense, and that service-related expense is less than the revenue set aside to cover the expense, then this service-related revenue is part of the material terms of sale and must be capped." *Id.* at 22; *see also id.* at 21 (stating that the capping methodology is dependent upon whether "such services were provided and whether the revenue amounts collected for the provision of such services exceed the cost of those services.").

In *AR 2 Remand Opinion*, the court acknowledged that it has examined Commerce's revenue-capping practice and found it to be reasonable. *See AR 2 Remand Opinion*, 273 F. Supp. 3d at 1208–09 (citing *Dongguan Sunrise Furniture Co., Ltd. v. United State*s, 36 CIT ___, ___, 865 F.Supp.2d 1216, 1248 (2012)). However, that acknowledgement came in the context of Hyosung's arguments as to whether Commerce had applied the incorrect cap and which potential cap "reflected how Hyosung negotiated freight with its customers." *Id.* at 1209. There was no dispute that the use of the cap was appropriate to reflect service revenues negotiated between Hyosung and its customers. That is not the case with respect to certain of Hyundai's service-related revenues that are only reflected in internal documentation. Here, the inquiry is whether Commerce may rely on internal company communications, rather than documentation or communications shared with the unaffiliated customer, to determine that there is separate service-related revenue to cap. The court concludes that it may not.

In the third administrative review of LPTs from Korea, also under review by this court, Commerce relied on purchase orders and invoices exchanged with the unaffiliated customer to conclude that the separate line items in those documents demonstrated that the ser-

[21] For SEQU 14, the September 28, 2011, email correspondence discussed costs for ocean freight, inland freight, customs and duties, and supervision, whereas the purchase order and commercial invoice contained separate line-items only for customs and duties, supervision, and delay delivery fees. *See* Verification Exhibits, SVE 14 at 12 (JA 101277), 17 (JA 101282), 25 (JA 101290), 43–45 (JA 101308–10). The record does not contain evidence that the costs for ocean freight and inland freight were discussed with the unaffiliated customer.

vices were negotiable. *Hyundai Heavy Indus., Co. Ltd. v. United States*, Slip Op. 18–101, 2018 WL 4043236, at *5 (CIT Aug. 14, 2018). As the court stated therein, "[w]hen Commerce finds that a service is separately negotiable, its practice has been to cap the service-related revenue by the associated expenses when determining the U.S. price." *Id.* at *6. This is consistent with the position articulated by the agency in the Remand Results here — that it "decline[s] to treat service-related revenue as an addition to U.S. price under [19 U.S.C. §] 1677a(c)(1) . . . or as a price adjustment under 19 [C.F.R. §] 351.102(b)(38)." Remand Results at 21.

While the agency is correct that 19 U.S.C. § 1677a(c)(1) does not provide for an addition to export price or CEP for service-related profits (when the service-related revenues exceed the service-related expenses), § 1677a(c)(2) likewise does not provide for a reduction to export price or CEP to account for any service-related profit that may inure to the producer or exporter in the course of the transaction. Thus, the agency has correctly (at times) identified the issue as whether record documentation establishes that the cost of the services (and thus any profit garnered from the provision of those services) was separately negotiable and, therefore, may be excluded from the export price or CEP and whether substantial evidence supports that exclusion. When substantial evidence does not support a finding that the cost of the services was separately negotiable from the price of the subject merchandise, the agency is without legal authority to reduce export price or CEP except by the amount of the expense in question. *See* 19 U.S.C. § 1677a(c)(2)(A).

As noted above, in the case of certain U.S. sales, Commerce relied on Hyundai's internal corporate communications and transactions with its affiliate to apply its capping methodology (and fault Hyundai for failing to report this information, which Commerce deemed "necessary" to apply its capping methodology). Remand Results at 22–24. Such internal communications, however, do not provide substantial evidence to support a finding that Hyundai's provision of the services in question was separately negotiable with the unaffiliated customer. In the absence of such evidence, the Government has not articulated any legal basis for Commerce to reduce Hyundai's gross unit price.[22]

[22] The court notes that Commerce relied on the data from one of these transactions, SEQU 14, to determine the percentage amount—[[ ]] percent—by which it would reduce the gross unit prices for the other sales in question as an adverse inference. *See* Draft Remand Results at 13 & n.59 (citing Pet'r's Case Br. (Oct. 16, 2015) at 13, n.28, CJA 29, CR 260, PJA 29, PR 185, ECF No. 73–3) (relying, in part, on Verification Exhibits, SVE 14 at 12 (JA 101277) (9/28/2011 email)); *id.* at 14. Because substantial evidence does not support Commerce's finding that ocean freight and inland freight were separately negotiable for SEQU 14, on remand, Commerce must revisit its selection of the facts available.

Thus, the court finds that substantial evidence supports Commerce's application of its capping methodology with respect to those transactions for which Commerce identified communications (e.g., purchase orders and invoices) between Hyundai and its unaffiliated customers indicating that the provision of those services may reasonably have been separately negotiable. Relatedly, substantial evidence supports Commerce's finding that Hyundai failed to provide information necessary for Commerce to apply its capping methodology with respect to those same transactions. Substantial evidence does not support Commerce's application of its capping methodology to those transactions or services for which Commerce relied only on internal communications among Hyundai employees or affiliates.[23]

Hyundai's arguments challenging Commerce's findings that are supported by substantial evidence are unavailing. In particular, Hyundai's claims that it responded to the agency's request based on its reasonable understanding of the request, and that its understanding was informed by Commerce's treatment of service-related revenues in the original investigation, are unpersuasive. *See* Hyundai's Cmts. at 4, 9–11. Commerce's conclusion in the original investigation was based on the record of that segment of the proceeding. *See* Issues and Decision Mem., A-580–867 (Jul. 2, 2012) at 29, accompanying *Large Power Transformers from the Republic of Korea*, 77 Fed. Reg. 40,857 (Dep't Commerce July 11, 2012) (final determination of sales at less than fair value) (stating, "based on our review of the record evidence at verification," to wit, "invoices and [purchase orders]," Commerce found "no evidence . . . that Hyundai has separate revenues which it has failed to report"). Each review is separate and based on the record developed by the agency in that review. *See, e.g., Jiaxing Bro. Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2014). Moreover, the reason for the failure to provide requested information is of no moment. "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 on which it makes its determination." *Nippon Steel*, 337 F.3d at 1381. As discussed below, Commerce's authority to use other sources of information, however—including its authority to use an adverse inference—is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e(a),(b).

[23] Specifically, this refers to SEQU 27 and to ocean and inland freight with respect to SEQU 14.

ii. Relevance of 19 U.S.C. § 1677m(d)

Hyundai argues that Commerce failed to comply with the requirements of 19 U.S.C. § 1677m(d) because Commerce did not timely notify Hyundai of any deficiencies in its reporting or provide Hyundai an opportunity to cure those deficiencies. Hyundai's Cmts. at 12–14. The Government argues that Commerce did not have an obligation to comply with § 1677m(d) because the agency was not aware of the deficiencies in Hyundai's reporting until the underlying information was provided at verification. *See* Gov.'s Cmts. at 17 (citing *Branco Peres Citrus, S.A. v. United States*, 25 CIT 1169 n.5, 173 F. Supp. 2d 1363, 1368 n.5 (2001)). Despite Commerce's request to separately report service-related revenues, the Government explains that Hyundai "submitted no information, much less deficient information, and stated it had no such information to report." *Id.* at 18. ABB argues that the provisions of § 1677m(d) only apply when the requirements of § 1677m(e) have been satisfied and, in this case, the information in Hyundai's questionnaire responses did not satisfy the conditions of § 1677m(e). ABB's Cmts. 14.

Pursuant to § 1677m(d), if Commerce determines that a respondent has not complied with a request for information, it must promptly inform that respondent of the nature of the deficiency and, to the extent practicable in light of statutory time-limits for completion of the administrative review, provide that respondent "an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d). Inherent in the requirement of § 1677m(d) is a finding that Commerce was or should have been aware of the deficiency in the questionnaire response. When a respondent provides seemingly complete, albeit completely inaccurate, information, § 1677m(d) does not require Commerce to issue a supplemental questionnaire seeking assurances that the initial response was complete and accurate. In other words, Commerce is not obligated to issue a supplemental questionnaire to the effect of, "Are you sure?" That is the case here.

Hyundai provided a seemingly complete response to Commerce's initial questionnaire, and responded to Commerce's supplemental questionnaire stating that it separately reported service-related revenues and expenses consistent with the original investigation. *See* Sec. B&C Resp. at C-28; Suppl. Sec. B&C Resp. at 14–15. In the absence of all of Hyundai's documentation, Commerce was not in a position to know that Hyundai's responses were incomplete and inaccurate. Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record. *See Nan Ya Plastics Corp. Ltd. v. United*

States, 810 F.3d 1333, 1337 (Fed. Cir. 2016); *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011).[24] It was not until Commerce sorted through Hyundai's sales documentation that the agency recognized that Hyundai's documentation was inconsistent with its reporting.[25] *See* Draft Remand Results at 12–13 & nn.51,60 (citing sales documentation exchanged with the customer, including invoices, containing separate line items for services that Hyundai failed to separately report). Accordingly, under these circumstances, Commerce was not statutorily mandated to provide Hyundai a subsequent opportunity to remedy the deficiency.

iii. Use of an adverse inference

As previously stated, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). Before using adverse facts available, Commerce must show:

> that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations . . . [and] that the respondent['s] . . . failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83. Commerce may apply an adverse inference "under circumstances in which it is reasonable for Commerce to expect that

[24] "It is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1073, 721 F. Supp. 2d 1285, 1299 (2010) (quoting *Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986)). A respondent must respond to the questionnaire as a whole; it may not choose what information to report based on what it thinks is relevant. *See, e.g., id.* ("Regardless of whether [the respondent] deemed the [] information relevant, it nonetheless should have produced it [in] the event that Commerce reached a different conclusion.").

[25] Hyundai also argues that Commerce was informed prior to verification that Hyundai's gross unit price, as reported, included separate service-related revenue because Hyundai explained in its supplemental questionnaire response that when its terms of sale require a provision of services related to the sale of the LPT, the gross unit price includes the value of the services required. Oral Arg. Tr. at 47:20–48:9 (quoting Suppl. Sec. B&C Resp. at 14); *see also supra*, note 18. It also stated that documentation pertaining to SEQU 11 was on the record prior to verification. Oral Arg. Tr. at 46:25–47:8. While Hyundai explained its reporting methodology, it did not alert the agency to the existence of the very information—to wit, invoices—that the agency had requested but Hyundai was choosing not to provide in the manner requested by Commerce.

more forthcoming responses should have been made." *Id.* at 1383. "An adverse inference may not be drawn merely from a failure to respond." *Id.*

A finding that simply restates the statutory standard and is unsupported by any discussion linking the applicable standard to the particular facts is inadequate. In its Remand Results, Commerce merely stated that it "finds that Hyundai failed to cooperate to the best of its ability by not providing the information requested." Remand Results at 24. Commerce's finding is unsupported by any discussion linking the applicable standard to the particular facts regarding Hyundai. Such a discussion is particularly relevant to the court's ability to review the agency's determination in a case such as this, when the agency needed the second opportunity of a remand proceeding to reconsider the existing record and alter its determination. Thus, Commerce's decision to use an adverse inference in selecting among the facts available must be remanded for further consideration and/or explanation.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are remanded to Commerce with instructions that the agency may not apply its capping methodology to those transactions or services for which Commerce relied only on internal communications among Hyundai employees or affiliates (e.g., SEQU 27 and ocean and inland freight services with respect to SEQU 14);

ORDERED that Commerce's decision to use an adverse inference in selecting among the facts available is remanded for further consideration or explanation consistent with this opinion;

ORDERED that Commerce shall file its remand results on or before February 11, 2019; and it is further

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

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

ORDERED that Commerce's Remand Results in all other respects are sustained.

Dated: November 13, 2018
New York, New York

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

Slip Op. 18–157

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

Before: Mark A. Barnett, Judge
Court No. 15–00215
PUBLIC VERSION

[Defendant's Motion for Summary Judgment is denied.]

Dated: November 13, 2018

Reta E. Bezak, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for Plaintiff. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Stephen C. Tosini*, Senior Trial Counsel, and *William G. Kanellis*, Trial Attorney.

Lucius B. Lau, White & Case LLP, of Washington, DC, argued for Defendant. With him on the brief were *Gregory J. Spak*, *Sadie L. Gardner*, and *Jessica E. Lynd*.

MEMORANDUM AND ORDER

Barnett, Judge:

In this action, the United States of America ("Plaintiff" or the "Government") seeks to recover unpaid duties and a monetary penalty pursuant to Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012),[1] plus interest, costs, and attorney fees, stemming from 36 entries of saccharin, allegedly transshipped from the People's Republic of China ("China") through the Republic of China ("Taiwan"), which Univar entered into the commerce of the United States between 2007 and 2012. *See generally* Compl., ECF. No. 2. Before the court is Defendant, Univar USA Inc.'s ("Univar" or "Defendant") motion for summary judgment. Confidential Univar's Mot. For Summ. J., ECF No. 143, and Confidential Univar USA Inc.'s Mem. of P. & A. in Supp. of its Mot. for Summ. J. ("Def.'s Mem."), ECF No. 143–2. Defendant seeks summary judgment with respect to all entries. *See* Def.'s Mem. at 1–2. Alternatively, Defendant seeks dismissal of Plaintiff's penalty claims, asserting that U.S. Customs and Border Protection ("Customs" or "CBP") failed to comply with the statutory obligations of Section 592(b)(2), thereby depriving this court of subject matter jurisdiction. Def.'s Mem. at 42–44; Confidential Univar USA Inc.'s Reply in Supp. of its Mot. for Summ. J. ("Def.'s

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012, edition, which are the same in all relevant respects to the versions in effect when the entries were made.

Reply") at 19–21, ECF No. 161. The motion is fully briefed,[2] and the court held oral argument on May 23, 2018. *See* Docket Entry, ECF No. 192; Oral Arg. Tr., ECF No. 196. For the reasons discussed below, Defendant's motion for summary judgment is denied.

BACKGROUND

I. Evidentiary Objections

Pursuant to United States Court of International Trade ("USCIT") Rule 56.3(a), a motion for summary judgment must include a separate document that contains a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." The movant must follow each statement with citation to evidence that would be admissible. USCIT Rule 56.3(c). Citations may be to "particular parts of materials in the record," such as "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." USCIT Rule 56(c)(1)(A). Pursuant to USCIT Rule 56(c)(2), "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."

In compliance with USCIT Rule 56.3, the parties have filed their proposed statements of facts and supported those statements with citations to evidence. *See generally* Confidential Univar's Rule 56.3 Statement in Supp. of its Mot. For Summ. J. ("DSOF"), ECF No. 143–3; Confidential Pl.'s Rule 56.3 Counterstatement of Fact ("PCSOF"), ECF No. 154–1; Confidential Univar USA Inc.'s Rebuttal to Pl.'s Rule 56.3 Counterstatement ("Def.'s Resp. to PCSOF"), ECF No. 161–1; Confidential Univar USA Inc.'s Suppl. Rule 56.3 Statement ("Suppl. DSOF"), ECF No. 184–1; Confidential Pl.'s Conditional Suppl. Rule 56.3 Counterstatement of Fact ("Suppl. PCSOF"), ECF No. 188–1.[3] Plaintiff has cited numerous exhibits to support its state-

[2] *See* Def.'s Mem.; Confidential Pl.'s Opp'n. to Univar's Mot. For Summ. J. ("Pl.'s Opp'n"), ECF No. 154; Def.'s Reply; Confidential Univar USA Inc.'s Suppl. Br. in Supp. of its Mot. for Summ. J. ("Def.'s Suppl. Mem."), ECF No. 184; Confidential Pl.'s Resp. to Univar's Suppl. Br. in Supp. of its Mot. for Summ. J. ("Pl.'s Resp. to Def.'s Supp. Mem."), ECF No. 188; Univar USA Inc.'s Comments Regarding Pl.'s Exhibit, Rule 801d(2) of the Federal Rules of Evidence, and Annotated Chart Two ("Def's 2nd Suppl. Mem."), ECF No. 193; Pl.'s Mot. for Leave to Respond to Univar's Suppl. Br. and Resp. ("Pl.'s Resp. to Def's 2nd Suppl. Mem."), ECF Nos. 195, 198.

[3] Subsequent to Univar's filing of the instant motion, the parties filed motions *in limine*. *See* Mem. and Order (Mar. 2, 2018) ("Order on Mots. *In Limin* e"), ECF No. 177 (resolving three motions *in limine*). After ruling on these motions, the court invited the parties to file a joint status report or proposed order for amending or supplementing their summary judgment

ments of fact. *See generally* PCSOF.[4] Univar objects to the admission of nearly all of Plaintiff's exhibits on the grounds of hearsay or relevance. The disputed evidence can be grouped in four general categories.

The first category of evidence to which Univar objects includes emails sent by Univar employees to Univar agents or third parties. For convenience, the exhibits, the relevant corresponding source where Univar makes the objection, and a brief description of the exhibit are set forth in the following table:

Table 1

Item No.	Plaintiff's Exhibit	Brief Description	Univar's Objection
1	Pl.'s Attach. 1 at Univar_011207, ECF No. 154–3 at p. 4	Email from Hung- yao Chin ("Mr. Chin")[5] to Thomas Biggs ("Mr. Biggs")[6]	Hearsay. Def.'s Resp. to PCSOF ¶ 206
2	Pl.'s Attach. 1 at Univar_014737, ECF No. 154–3 at p. 9	Email from Mr. Biggs to third party	Hearsay. Def.'s Resp. to PCSOF ¶ 246
3	Pl.'s Attach. 1 at Univar_066462, ECF No. 154–3 at p. 13	Email from Mr. Biggs to Mr. Chin	Hearsay. Def.'s Resp. to PCSOF ¶ 205

papers. *Id.* at 36. The parties agreed that Univar would file a supplemental brief, limited to 10 pages, to its summary judgment briefing. Stip. and Proposed Joint Scheduling Order Concerning Suppl. Summ. J. Briefing at 2, ECF No. 180. Thereafter, Univar filed a supplemental brief consisting of 10 pages and appended a separate statement of material facts as support. *See* Def.'s Suppl. Mem.; Suppl. DSOF. Plaintiff requests that the court reject Defendant's Supplemental Rule 56.3 statement as impermissible. Pl.'s Resp. to Def.'s Supp. Mem. at 2. The court's order inviting the parties to supplement their "summary judgment papers" was not limited to briefs only, nor did the parties' stipulation include such a limitation. Moreover, USCIT Rule 56.3(a) requires that a party file its factual positions in a "separate, short and concise statement." For these reasons, the court will not reject Defendant's supplemental Rule 56.3 statement.

[4] Plaintiff's opposition memorandum includes 23 attachments. *See* Pl.'s Opp'n., Attachs. 1–23, ECF Nos. 154–3 to 154–25; *see generally* Decl. of Stephen C. Tosini ("Tosini Decl."), ECF No. 154–2. Some of the attachments include multiple numbered deposition exhibits. The parties refer to Plaintiff's attachments as "Ex." or "Gov. Ex." *See, e.g.,* PCSOF ¶ 220 (referring to Plaintiff's attachment 12, which is Deposition exhibit 11, as "Ex. 12"). For clarity and ease of reference, the court's initial citation refers to Plaintiff's exhibits as "Attach." and, where applicable, includes in parenthesis the deposition exhibit number, i.e.: Pl.'s Attach __, (Dep. Ex. __). Any subsequent citations are to the deposition exhibit number only. Additionally, where helpful to identify the particular portion of an exhibit, the court provides the pin cite to the Bates Number, ECF page number, or both. The court refers to Plaintiff's supplemental exhibits in the manner in which they have been identified, i.e.: Pl.'s Suppl. A1, *etc. See* Confidential Pl.'s Suppl. App. in Supp. of its Opp'n to Univar's Mot. for Sum. J., ECF No. 191. During oral argument, Plaintiff proffered an additional exhibit, *see* Ex. 1, ECF No. 192, to which the court refers as "Pl.'s OA Ex. 1."

[5] Univar refers to Mr. Chin as its independent contractor. Def.'s Resp. to DSOF ¶ 135.

[6] Mr. Biggs was the director of Univar's International Sourcing Group. PCSOF ¶ 185; Def.'s Resp. to PCSOF ¶ 185.

Table 1			
Item No.	Plaintiff's Exhibit	Brief Description	Univar's Objection
4	Pl.'s Attach. 2 (Dep. Ex. 162), ECF No. 154–4 at p. 367	Email from a Univar General Manager to Mr. Biggs and others	Hearsay. Def.'s Resp. to PCSOF ¶ 227
5	Pl.'s Attach. 2 (Dep. Ex. 163), ECF No. 154–4 at p. 371	Email from a Univar General Manager to Mr. Biggs	Hearsay. Def.'s Resp. to PCSOF ¶¶ 225–226, 260
6	Pl.'s Attach. 2 (Dep. Ex. 288), ECF No. 154–4 at pp. 144–147	Emails from Mr. Biggs and Mr. Chin	Hearsay. Def.'s Resp. to PCSOF ¶¶ 191–193
7	Pl.'s Suppl. A7 (Dep. Ex. 215), ECF No. 191 at p. 9	Email from a Univar employee to third party	Hearsay. Def.'s Resp. to PCSOF ¶ 198
8	Pl.'s Attach. 2 (Dep. Ex. 311), ECF No. 154–4 at p. 268	Email from Mr. Biggs to Mr. Chin	Hearsay. Def.'s Resp. to PCSOF ¶ 210
9	Pl.'s Attach. 2 (Dep. Ex. 316), ECF No. 154–4 at p. 285	Email from Mr. Biggs to third party	Hearsay. Def.'s Resp. to PCSOF ¶¶ 200, 244
10	Pl.'s Attach. 2 (Dep. Ex. 312), ECF No. 154–4 at p. 269	Email from Mr. Chin to Mr. Biggs	Hearsay. Def.'s Resp. to PCSOF ¶ 207
11	Pl.'s Attach. 2 (Dep. Ex. 314), ECF No. 154–4 at pp. 275–282	Email from a Univar employee attaching an Application for Kosher Certification	Hearsay. Def.'s Resp. to PCSOF ¶¶ 203, 213, 237
12	Pl.'s Attach. 2 (Dep. Ex. 318), ECF No. 154–4 at p. 292	Email from Mr. Biggs to third party	Hearsay. Def.'s Resp. to PCSOF ¶ 212
13	Pl.'s Attach. 2 (Dep. Ex. 323), ECF No. 154–4 at p. 337	Email from a Univar employee to at least one other Univar employee	Hearsay. Def.'s Resp. to PCSOF ¶ 217
14	Pl.'s Attach. 2 (Dep. Ex. 327), ECF No. 154–4 at p. 345	Email thread between Univar employees	Hearsay. Def.'s Resp. to PCSOF ¶ 224
15	Pl.'s Attach. 2 (Dep. Ex. 328), ECF No. 154–4 at pp. 350–351	Univar internal email	Hearsay. Def.'s Resp. to PCSOF ¶ 242
16	Pl.'s Attach. 2 (Dep. Ex. 329), ECF No. 154–4 at p. 353	Email from a Univar General Manager to at least one other Univar employee	Hearsay. Def.'s Resp. to PCSOF ¶ 228

The second category of evidence includes emails or other written communications sent to Univar employees or agents by third parties:

Table 2			
Item No.	Plaintiff's Exhibit	Brief Description	Objection
1	Pl.'s Attach. 1 at UNIVAR_USCIT- 0531, ECF No. 154–3 at pp. 87–88	Email from William Huang to Mr. Chin	Hearsay. Def.'s Resp. to PCSOF ¶ 186
2	Pl.'s Attach. 1 at Univar 13344–47, ECF No. 154–3 at pp. 5–8	Email from Food and Drug Administration ("FDA") to a Univar employee	Hearsay. Def.'s Resp. to PCSOF ¶ 198
3	Pl.'s Attach. 2 (Dep. Ex. 310), ECF No. 154–4 at p. 266	Email from a third party to a Univar employee	Hearsay. Def.'s Resp. to PCSOF ¶ 209
4	Pl.'s Attach. 2 (Dep. Ex. 313), ECF No. 154–4 at pp. 271–274	Fax from Mr. Biggs to William Huang	Hearsay. Def.'s Resp. to PCSOF ¶ 211
5	Pl.'s Attach. 2 (Dep. Ex. 315), ECF No. 154–4 at p. 283	Production process flow chart	Hearsay. Def.'s Resp. to PCSOF ¶¶ 186, 203, 213, 237
6	Pl.'s Attach. 2 (Dep. Ex. 317), ECF No. 154–4 at p. 290	Email from a third party to a Univar employee	Hearsay. Def.'s Resp. to PCSOF ¶ 208
7	Pl.'s Attach. 2 (Dep. Ex. 322), ECF No. 154–4 at p. 336	Email to a Univar employee	Hearsay. Def.'s Resp. to PCSOF ¶ 216
8	Pl.'s Attach. 2 (Dep. Ex. 325), ECF No. 154–4 at p. 343	Email from a third party to a Univar employee	Hearsay. Def.'s Resp. to PCSOF ¶ 218
9	Pl.'s Attach. 11 (Dep. Ex. 12), ECF No. 154–13 at p. 4	Letter from U.S. Immigration and Customs Enforcement ("ICE") to Univar	Hearsay. Def.'s Resp. to PCSOF ¶ 220

The third category of evidence includes Univar's internal documents, such as trip notes, inspection reports, letters or memoranda, and a PowerPoint presentation:

Table 3			
Item No.	Plaintiff's Exhibit	Brief Description	Objection
1	Pl.'s Attach. 2 (Dep. Ex. 303), ECF No. 154–4 at pp. 245–250	Mr. Biggs's "2005 Korea-Taiwan Trip Notes"	Hearsay. Def.'s Resp. to PCSOF ¶ 235
2	Pl.'s Attach. 2 (Dep. Ex. 306), ECF No. 154–4 at pp. 258–261	Mr. Biggs's 2008 "Korea-Taiwan Visit notes"	Hearsay. Def.'s Resp. to PCSOF ¶ 236–238
3	Pl.'s Attach. 2 (Dep. Ex. 297), ECF No. 154–4 at p. 217	Inspection Report	Hearsay. Def.'s Resp. to PCSOF ¶ 190

Table 3			
Item No.	Plaintiff's Exhibit	Brief Description	Objection
4	Pl.'s Attach. 2 (Dep. Ex. 298), ECF No. 154–4 at p. 218	Inspection Report	Hearsay. Def.'s Resp. to PCSOF ¶ 190
5	Pl.'s Attach. 2 (Dep. Ex. 179), ECF No. 154–4 at p. 387–397	Univar Internal Memorandum	Hearsay. Def.'s Resp. to PCSOF ¶¶ 195–196
6	Pl.'s Attach. 18 (Dep. Ex. 277), ECF No. 154–20	Univar Internal Letter	Hearsay. Def.'s Resp. to PCSOF ¶ 239
7	Pl.'s Attach. 2 (Dep. Ex. 292), ECF No. 154–4 at p. 164	Univar Power-Point Presentation	Hearsay. Def.'s Resp. to PCSOF ¶ 221

The remaining evidence includes deposition testimony of two witnesses; an affidavit and an email, including exhibits, of Special Agent Wally Tsui ("Mr. Tsui"), who assisted in the investigation of the alleged transshipment; a 2017 version of the Taiwan's Customs Act; and statistical tables:

Table 4			
Item No.	Plaintiff's Exhibit	Brief Description	Objection
1	Pl.'s Attach. 6 & Pl.'s Suppl. A3 ("Ritell Dep.") at 56, 71–72, ECF Nos. 154–8, 191	Dep. Excerpt of Bruce Ritell	Hearsay; best evidence rule. Def.'s Resp. to PCSOF ¶ 190
2	Pl.'s Attach. 8 ("Talmid Dep.") at 53–54, ECF No. 154–10	Dep. Excerpt of Rabbi Haim Talmid	Hearsay. Def.'s Resp. to PCSOF ¶ 219
3	Aff. of Special Agent Wally Tsui in Supp. of Pl.[']s Opp'n to Univar's Mot. for Partial Summ. J. ("Tsui Aff.") ¶¶ 8–27, ECF No. 32–11	Affidavit	Hearsay. Def.'s Resp. to PCSOF ¶ 190
4	Tsui Aff., Ex. 2, ECF No. 32–13	Photographs	Hearsay. Def.'s Resp. to PCSOF ¶ 204
5	Pl.'s Attach. 14 (Dep. Ex. 129), ECF No. 154–16 at p. 1	Email enclosing a business card	Hearsay. Def.'s Resp. to PCSOF ¶¶ 186, 199, 204
6	Pl.'s Attach. 23, ECF No. 154–25	Taiwan Customs Act	Relevance. Def.'s Reply at 9

Table 4			
Item No.	Plaintiff's Exhibit	Brief Description	Objection
7	Pl.'s Resp. to Def.'s Mot. in Limine to Exclude Taiwan's Records Showing Transshipment from China Through Taiwan to the United States, Ex. 1 ("Taiwan Customs Tables"), ECF No. 145–1	Tables reflecting imports of saccharin from China into Taiwan and exports of saccharin from Taiwan to the United States	Hearsay; Inadmissible to Prove Habit. Def.'s Resp. to PCSOF ¶ 201; Def.'s Mem. at 7–8; 24–27; see also DSOF ¶ 42; PCSOF ¶ 42

Hearsay is an out of court statement offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Hearsay is inadmissible at trial unless a federal statute, Federal Rule of Evidence, or other rule prescribed by the Supreme Court provides otherwise. Fed. R. Evid. 802. The court may nonetheless "consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." *United States v. Sterling Footwear, Inc.*, 41 CIT __, __, 279 F. Supp. 3d 1113, 1124–25 (2017) (quoting *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293–94 (11th Cir. 2012)). Indeed, more generally, "for summary judgment purposes, the inquiry is whether the cited evidence may be reduced to admissible form, not whether it is admissible in the form submitted at the summary judgment stage." *Id.* at 1124 (citing USCIT Rule 56(c)(2)).

"A common type of statement that falls outside the hearsay definition, because it is not offered for its truth, is a statement that is offered to show its effect on the recipient." *Bady v. Murphy-Kjos*, 628 F.3d 1000, 1003 (8th Cir. 2011) (quoting *Barrett v. Acevedo*, 169 F.3d 1155, 1163 (8th Cir. 1999)). Additionally, a statement that "is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed" is not hearsay. Fed. R. Evid. 801(d)(2)(D). Likewise, if an opposing party creates an email incorporating content created by other individuals such that the opposing party may be said to have adopted the contents as true or believed to be true, such incorporated content is not hearsay. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D. Cal. 2006); Fed. R. Evid. 801(d)(2)(B) (a statement is not hearsay if it is "offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true"). The court may also consider hearsay statements that are specifically exempted from the hearsay rule. *See* Fed. R. Evid. 803, 804. Relevant here, any "statement[s] of the declarant's

then-existing state of mind,"[7] Fed. R. Evid. 803(3), and business records,[8] Fed. R. Evid. 803(6), are exceptions to the hearsay rule.

As to the first category of evidence (Table 1), the emails sent by Univar agents or employees are not hearsay and Univar's objection is overruled. *See* Fed. R. Evid. 801(d)(2)(D). To the extent other content was incorporated into those emails, and to the extent Univar's agents or employees manifested that they adopted or believed that the content was true, the incorporated content is admissible pursuant to Fed. R. Evid. 801(d)(2)(B). With respect to emails sent by Mr. Chin, to whom Univar refers as its independent contractor, *see* DSOF ¶ 135; Def.'s Resp. to PCSOF ¶ 191, the court finds that Mr. Chin was an agent of Univar for purposes of Fed. R. Evid. 801(d)(2)(D). First, "the precise contractual relationship between the agent and the party against whom the evidence is offered" is not determinative for purposes of Fed. R. Evid. 801(d)(2)(D). *Metro-Goldwyn-Mayer Studios*, 454 F. Supp. 2d at 973–74. Second, notwithstanding its assertion that Mr. Chin was an independent contractor, Univar itself referred to Mr. Chin as "our representative." Def.'s Mem., Attach. 29 (Univar Fed. R. Civ. P. 30(b)(6) Dep.) 114:11–12, ECF No. 143–5. Therefore, Mr. Chin's emails are not hearsay.

Regarding emails or other written communications sent to Univar employees or agents by third parties (Table 2), Plaintiff refers to those emails and communications not to prove the matters asserted therein, i.e., that the saccharin was being transshipped from China through Taiwan, but, instead, to address Univar's level of culpability. *Compare* Pl.'s Opp'n at 4–6, 15–22 (discussing evidence concerning country of origin), *with* Pl.'s Opp'n at 23–26 (discussing evidence concerning Univar's gross negligence in ascertaining the country of

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[7] Pursuant to Rule 803, "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed," unless in circumstances not applicable here, is exempted from the rule against hearsay. Fed. R. Evid. 803(3).

[8] Rule 803(6) exempts from the hearsay rule,

> A record of an act, event, condition, opinion, or diagnosis if:
> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

origin), *and* Table 2. At oral argument, Plaintiff clarified that it presented certain evidence to demonstrate Univar's awareness of its supplier's asserted lack of a Taiwanese production facility and Univar's actions in the context of reasonable care. *See* Oral Arg. Questions (May 18, 2018) ¶ 5, ECF No. 190; Oral Arg. Tr. at 22–24 (discussing Pl.'s Attach. 2 (Dep. Exs. 310, 315, 317, 322)). Defendant had no objection to the admissibility of those exhibits for that limited purpose. Oral Arg. Tr. at 29–30. Therefore, Univar's objection to emails or other communications sent by third parties to Univar's employees or agents is overruled to the extent that this evidence is offered for the limited purpose of showing its effect on the recipient and Univar's knowledge and state of mind with regard to saccharin production in Taiwan. *See Bady*, 628 F.3d at 1003; *Metro-Goldwyn-Mayer Studios*, 454 F. Supp. 2d at 974.

Similarly, Univar's internal documents, such as trip notes, inspection reports, letters or memoranda, and a PowerPoint presentation (Table 3) are admissible pursuant to Fed. R. Evid. 801(d)(2)(D). The director of Univar's International Sourcing Group, Mr. Biggs, who had the "ultimate authority within Univar [] to approve [foreign] suppliers," took notes on his trips to Taiwan in 2005 and 2008 and authenticated those trip notes during his deposition. *See* Pl.'s Attach. 2 ("Biggs Dep.") 69:14–21 (discussing Mr. Biggs's authority at Univar), 128:16–18, 133:3–12 (discussing Dep. Ex. 303), 139:16–140:9 (discussing Dep. Ex. 306), ECF No. 154–4. The letter, memoranda, and PowerPoint presentation bear Univar's company name or logo and were composed and shared by its agents or employees. *Metro-Goldwyn-Mayer Studios*, 454 F. Supp. 2d at 974. These items fall squarely within the ambit of Fed. R. Evid. 801(d)(2)(D).[9]

As to the remaining evidence set forth in Table 4, one item is an excerpt from the deposition testimony of Rabbi Haim Talmid of the Orthodox Union, a kosher certification agency. *See* Talmid Dep.; Biggs Dep. 217:19–20; Table 4 Item No. 1. From 2005 to 2013, the Orthodox Union certified the subject saccharin as kosher. *See* DSOF ¶ 115; PCSOF ¶ 115. Rabbi Talmid testified that he flew to Taiwan three times to inspect the saccharin factory of Univar's supplier so that the

[9] Deposition Exhibit 297 is a 2007 inspection report by Univar's European affiliate and Deposition Exhibit 298 is a 2012 inspection report by Univar. *See* Dep. Exs. 297, 298. Mr. Biggs testified that Univar normally utilizes inspection reports for its food grade products. Biggs Dep. 113:10–16. Specifically in the context of Deposition Exhibit 298, he testified that Univar "had a consistent process, whether it was from Europe or from the [United States] or from one of [its] China colleagues" in completing the inspection reports. *Id.* Because these inspection reports are prepared by Univar's employees based on their inspections, they are opposing party statements pursuant to Rule 801(d)(2)(D). Alternatively, based on Mr. Biggs's testimony, these reports could be reduced to admissible form as business records pursuant to Rule 803(6). *See* Biggs Dep. 111:15–112:11, 113:5–16.

Orthodox Union could continue to certify the saccharin as kosher. Talmid Dep. 53:1–68:13. On each occasion, Rabbi Talmid was told he could not inspect the plant because, respectively, the plant was shut down, there was a dangerous flood, or there was dangerous construction preventing access to the factory. *Id.* Univar objects to Rabbi Talmid's testimony concerning his conversations with third parties regarding the reasons for the inability to access the factory as inadmissible hearsay. Def.'s Resp. to PCSOF ¶ 219. Plaintiff is not offering the testimony to prove that the factory was, indeed, shut-down for a period of time, or the existence of a flood or construction near the factory. *See* PCSOF ¶ 219. Rather, the testimony is offered to prove Univar's knowledge or state of mind during this relevant time-frame with respect to the origin of its product. *See id.*; Oral Arg. Tr. at 37 ("[I]t goes to Univar's understanding of where their product was coming from."). Therefore, the objection is overruled.

Plaintiff also relies on the deposition testimony of Bruce Ritell ("Mr. Ritell") of Rit-Chem, a U.S. importer who purchased saccharin from High Trans Corporation ("HTC"), a Taiwanese producer, from 2004 to 2016. *See* Ritell Dep. 25:14–19, 30:21–31:4, 70:871:6; Table 4 Item No. 2. The Government relies on Mr. Ritell's testimony that Rit-Chem was "the sole [U.S.] purchaser of saccharin from HTC during [the] relevant time period." PCSOF ¶ 190 (citing Ritell Dep. at 72–73). In the cited testimony, Mr. Ritell references an "exclusivity agreement" between HTC and Rit-Chem, and further testified as to his knowledge of HTC's production capacity and annual output. *See* Ritell Dep. 72:2–73:18. Univar objects to the Government's reliance on Mr. Ritell's recollection of an "exclusivity agreement" and invokes the best evidence rule. *See* Def.'s Resp. to PCSOF ¶ 190 (citing, *inter alia*, Fed. R. Evid. 1002); *see also* Oral Arg. Tr. 47–48. The Government points out that in addition to the exclusivity agreement, Mr. Ritell testified as to his personal knowledge of HTC's annual production of saccharin, and the degree to which Rit-Chem and HTC's other customers were responsible for purchasing that production amount. Oral Arg. Tr. at 86.

To the extent that the Government relies on Mr. Ritell's recollection of an exclusivity agreement, Univar's objection is sustained. Rule 1002 requires production of the original of a document, such as an exclusivity agreement, to prove its contents. *See* Fed. R. Evid. 1002. Rule 1004 provides circumstances in which production of an original is excused and other evidence of the content of a writing is admissible; however, Plaintiff has not asserted that those circumstances exist here. Univar did not object to the remaining portions of Mr. Ritell's

testimony. *See* Ritell Dep. 72:1–16–73:318; Def.'s Resp. to PCSOF ¶ 190. Therefore, the court will consider the remaining testimony.

Concerning the affidavit of Agent Tsui,[10] Univar objects to paragraphs 8 through 27 and exhibit 2 on hearsay grounds. *See* Def.'s Resp. to PCSOF ¶ 190; Table 4 Item Nos. 3–4. Pursuant to USCIT Rule 56(c)(4), "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." The court notes that the affidavit is made under "penalty of perjury" and is said to be "true and correct." Tsui Aff. at 15; 28 U.S.C. § 1746 (governing unsworn declarations made under penalty of perjury). There is no indication that Agent Tsui is not "competent" to testify; thus, the issue is whether the affidavit is based on personal knowledge and states "facts that would be admissible in evidence." USCIT Rule 56(c)(4).

The court finds that paragraphs 10, 11, and 13 through 16 are not hearsay because they convey information based on Agent Tsui's personal knowledge and observation. *See* Tsui Aff. ¶¶ 10–11, 13–16 (discussing Agent Tsui's visits to Taiwan in April and June 2010, the purpose of his visits, and his personal observations). In contrast, paragraphs 8, 9, 12, and 17 through 27 recount Agent Tsui's telephone and email conversations with Teddy Weng ("Mr. Weng") from HTC concerning HTC's corporate and manufacturing office locations, its corporate officers' identities, the identity of its U.S. client, and, largely, HTC's relationship with Univar's saccharin supplier. *Id.*¶¶ 8–9, 12, 17–27.

The Government acknowledged during oral argument that to the extent any of those paragraphs convey information from HTC about HTC's relationship with Univar's saccharin supplier, they constitute hearsay. Oral Arg. Tr. at 24. The Government asserted that it does not intend to have a representative of HTC testify at trial. *Id*. Thus, those hearsay statements could not be reduced to admissible form. The Government argued, however, that this evidence is nonetheless admissible pursuant to the residual exception of Fed. R. Evid. 807. *Id.* at 25.

Pursuant to Rule 807, a hearsay statement not otherwise covered by a hearsay exception is admissible if:

[10] Agent Tsui "was a Special Agent with the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI), from 2004 through 2015." Tsui Aff. ¶ 1. His duties included "the investigation of . . . customs violations involving illegal entry of goods . . . into the United States." *Id.* He "was assigned to the Office of International Affairs, ICE Attaché in Hong Kong from 2009 through 2013, with an area of investigative responsibility that encompassed Hong Kong, Taiwan and Macau." *Id.* ¶ 2.

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

Fed. R. Evid. 807(a).[11] The drafters of the rule "intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." Fed. R. Evid. 803(24) advisory committee's note to 1974 Enactment.[12] When admitting evidence pursuant to Rule 807, the court must make detailed findings concerning the facts and circumstances that indicate that the statement has a sufficiently high degree of trustworthiness justifying its admission. *See id.*; *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993) ("District courts must make detailed findings when admitting evidence under Rule [807].").[13]

The court recognizes that the Government is offering paragraphs 8, 9, 12, and 17 through 27 of Agent Tsui's affidavit as evidence of material facts, satisfying the second prong of Rule 807. *See* Fed. R. Evid. 807(2); PCSOF ¶¶ 190, 199, 202, 204. The Government suggests that the statements in those paragraphs are "more probative on the point[s] for which [they are] offered than any other evidence that the proponent can obtain through reasonable efforts" because the Government attempted to contact HTC personnel through the issuance of a letter rogatory but received an incomplete response. *See* Fed. R. Evid. 807(3); Oral Arg. Tr. at 24; Pl.'s Mot. for Leave to File A Status Report and Status Report, Ex. B, ECF Nos. 175, 175–2 (HTC's incomplete response to letter rogatory). Of concern to the court, however, is a lack of adequate explanation for why Mr. Weng's statements to Agent Tsui have "equivalent circumstantial guarantees of trustwor-

[11] Rule 807 also has a notice requirement, which is not at issue here. Fed. R. Evid. 807(b).

[12] In 1997, the contents of Rule 803(24) and 804(b)(5) were combined and transferred to Rule 807. Fed. R. Evid. 807 advisory committee's note to 1997 amendment.

[13] Factors that may weigh on the trustworthiness inquiry can vary widely and include: whether the declarant had a motivation to speak truthfully or otherwise; the spontaneity of the statement[;] . . . whether the statement was under oath; whether the declarant was subject to cross-examination at the time the statement was made; the relationship between the declarant and the person to whom the statement was made; whether the declarant has recanted or reaffirmed the statement; whether the statement was recorded and particularly whether it was videotaped; and whether the declarant's firsthand knowledge is clearly demonstrated.
2 Kenneth S. Broun, *McCormick on Evidence* § 324 (7th Ed. 2013) (footnotes omitted).

thiness" to any of the other hearsay exceptions. *See* Fed. R. Evid. 807(a). The Government contends that the affidavit "recount[s] the contents of the reports of investigation, which were made contemporaneous[ly] and with his visits and his discussions with those individuals." Oral Arg. Tr. at 25. In other words, according to the Government, these statements offer "equivalent circumstantial guarantees of trustworthiness" to the hearsay exception set forth in Rule 803(8)(A)(iii). Rule 803(8)(A)(iii) exempts from the hearsay rule "[a] record or statement of a public office if [] it sets out . . . in a civil case . . ., factual findings from a legally authorized investigation." Fed. R. Evid. Rule 803(8)(A)(iii).

A review of Agent Tsui's reports of investigation ("ROI") demonstrates that the paragraphs in his affidavit merely introduce the information contained in the ROI. *Compare* Tsui Aff. ¶¶ 8–9, 12, 17–27, *with* Tsui Aff., Ex. 1 (ROI) at 63–64, ECF No. 32–12; *see also* Tsui Aff. ¶ 5 (stating that the ROI contains Agent Tsui's "contemporaneous recordation of events related to the Univar investigation.") The paragraphs in the affidavit and the ROI appear to be merely a transcript of Agent Tsui's interview with Mr. Weng. Without further information on the record, the court cannot make the detailed findings regarding the "special facts and circumstances which, in the court's judgment, indicate[]" that Mr. Weng's statements to Agent Tsui have "a sufficiently high degree of trustworthiness and necessity to justify [their] admission;" therefore, the court sustains Univar's objections with respect to those paragraphs. *See* Fed. R. Evid. 803(24) advisory committee's note to 1974 Enactment*; F.T.C.*, 994 F.2d at 608.

The court likewise sustains Univar's objection concerning the email authored by Agent Tsui and the attachment therein. *See* Dep. Ex. 129; Def.'s Resp. to PCSOF ¶¶ 186, 199, 204; Table 4 Item No. 5. Agent Tsui's email contains, as an attachment, a purported "business card" of William Huang ("Mr. Huang") that lists Mr. Huang as the president of Long Hwang Chemical Co. ("LH Chemical") and Lung Huang Trading Company, Ltd. ("LH Trading"). Dep. Ex. 129. The Government is offering this business card to show the truth of the matter asserted therein—that Mr. Huang was the president of both companies—and to establish the address for those companies. *See* PCSOF ¶¶ 186, 199, 204; Oral Arg. Tr. at 20, 21, 29. Plaintiff has offered no justification why this is not hearsay. Plaintiff argues that this document is nonetheless admissible to impeach Mr. Huang's testimony regarding the location of the saccharin production facility and his lack of affiliation with LH Chemical. *See* Pl.'s Resp. to Def.'s 2nd Suppl. Mem. at 4 (citing Fed. R. Evid. 613(b)). Rule 613(b)

permits introduction of "extrinsic evidence of a *witness's* prior inconsistent statement" under certain circumstances. Fed. R. Evid. 613(b) (emphasis added). In this email, Agent Tsui states that he received the business card from a "Taiwan source." Dep. Ex. 129. In his affidavit, he explains that the Taiwan source was Mr. Weng.[14] *See* Tsui Aff. ¶ 8, 27. Therefore, the Government has not shown that this exhibit contains a statement by Mr. Huang, such that it would be admissible for impeachment purposes pursuant to Rule 613(b).

With respect to Exhibit 2 to Agent Tsui's affidavit, the court, pursuant to its discretion, may admit photographs as substantive or illustrative evidence, provided that the proponent lays a proper foundation for the photographs. *See United States v. May*, 622 F.2d 1000, 1007 (9th Cir. 1980); Fed. R. Evid. 901(a). Mr. Tsui's affidavit states that Exhibit 2 includes "true and correct photographs of the site that [he] visited [in June 2010] from Google maps." Tsui Aff. ¶ 15. Thus, the photographs are illustrative of his visit, properly authenticated, and therefore admissible.

The remaining evidentiary objections of Univar are based on relevance. *See* Table 4 Item Nos. 6–7. The Government relies on certain provisions of the Taiwan Customs Act, as amended on January 18, 2017, to establish import and export declaration requirements in Taiwan as they pertain to the 2009–2012 saccharin entries. *See* PCSOF ¶ 58, 62–63; Pl.'s Attach. 23; Table 4 Item No. 6; *see also* Pl.'s Opp'n at 16 (citing Taiwan Customs Act, arts. 10, 16, 18, 44). Univar objects to the relevance of Taiwan Customs Act, as amended on January 18, 2017, to establish the status of Taiwanese law during the 2009 to 2012 time period. Def.'s Reply at 9. During oral argument, the Government provided a print-out from the Global Legal Information Network displaying a history of the revisions to this Act, but asserted it had difficulty obtaining the English translation of the language of the amendments. *See* Oral Arg. Tr. at 10–11; Pl.'s OA Ex. 1. The Government's new exhibit shows, and both Univar and the Government acknowledge, that only Article 10 of this Act has been amended since 2012. *See* Pl.'s OA Ex. 1; Def.'s 2nd Suppl. Mem. at 2; Oral Arg. Tr. at 10–11.

Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without the evidence; and . . .

[14] "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). One way of authenticating an item of evidence is through the testimony of a witness with knowledge stating that "that an item is what it is claimed to be." Fed. R. Evid. 901(b)(1). The Government has failed to authenticate Exhibit 129 because Mr. Tsui does not have personal knowledge that the business card belongs to Mr. Huang. Rather, the extent of his knowledge is that Mr. Weng produced the business card.

the fact is of consequence in determining the action." Fed. R. Evid. 401. Because the court cannot ascertain whether the current language of Article 10 is substantively the same as the language of Article 10 as it existed in the relevant period, the current version is irrelevant and, therefore, inadmissible. The court overrules Univar's objection with respect to the remaining provisions of the Taiwan Customs Act.

During the course of discovery, Plaintiff procured four versions of tables from the Department of Investigation, Customs Administration, Ministry of Finance, Republic of China ("Taiwan Customs") that purport to reflect imports of saccharin from China into Taiwan by LH Chemical and exports of saccharin from Taiwan to the United States made by LH Trading during the period 2009 to 2012. DSOF ¶ 42; PCSOF ¶ 42; Taiwan Customs Tables; Table 4 Item No. 7. While these Taiwan Customs Tables concern only imports and exports to and from Taiwan from 2009 to 2012, Plaintiff seeks to rely on this evidence as relevant to the shipments in 2007 and 2008, asserting they prove a habit of transshipment by Mr. Huang.[15] *See* Pl.'s Opp'n at 17–19. Univar objects to the admissibility of the Taiwan Customs Tables for this purpose. *See* Def.'s Mem. at 24–27; Def.'s Reply at 5–8.

Rule 406 provides that

> [e]vidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Fed. R. Evid. 406. "[B]efore a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semiautomatic' in nature." *Simplex, Inc. v. Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1293 (7th Cir. 1988); *see also* Fed. R. Evid. 406 advisory committee's note to the 1972 proposed rules ("The doing of the habitual acts may become semi-automatic in nature").

The Government has failed to establish that the Taiwan Customs Tables demonstrate conduct by Mr. Huang or his purported companies that is "'semi-automatic' in nature." The Taiwan Customs Tables

[15] Between 2007 and 2012, Univar made 36 entries of saccharin into the United States. PCSOF ¶ 181; Def.'s Resp. to PCSOF ¶ 181; *see also* DSOF ¶ 2; Gov's Resp. to DSOF ¶ 2. Univar made 20 entries in 2007 and 2008 and 16 entries between 2009 and 2012. DSOF ¶¶ 13, 48; PCSOF ¶¶ 13, 48.

indicate that between 2009 and 2011, LH Chemical imported from China 20 shipments of sodium saccharin into Taiwan from five different sellers at two different ports of entry. *See* Taiwan Customs Tables at ECF p. 5. The mesh sizes (reflecting the particle size), quantities, and weight of these imports vary. *See id.* The Taiwan Customs Tables also indicate that between 2009 and 2012, LH Trading exported 16 shipments of sodium saccharin to the United States, and Univar was the importer. Taiwan Customs Tales at ECF p. 6. The Government argues that these tables, which represent "the evidence of transshipment between 2009 and 2012" are "relevant regarding the alleged transshipment of pre-2009 entries." Pl.'s Opp'n at 17. The activities of LH Chemical and LH Trading, during the 2009–2012 period, do not reflect the type of uniform conduct that would suggest a habit or routine practice for purposes of Rule 406. Notwithstanding the fact that LH Chemical imported from China and LH Trading exported to the United States, differences in the shipments—including different suppliers and different ports—make the Taiwan Customs Tables insufficiently probative with respect to the 2007 and 2008 entries. Therefore, the court sustains Univar's objection to the use of these tables to establish a habit of Mr. Huang or routine practice of his purported companies relative to the earlier time period.

Lastly, the Government objects to the admissibility of an affidavit upon which Univar relies in support of its summary judgment motion. *See* DSOF ¶ 60; PCSOF ¶ 60; Def.'s Mem., Attach. 38 (Aff. of Sun, Chia Ling) ("Sun Aff."), ECF No. 143–5. Univar relies on the affidavit of Chia Ling Sun ("Ms. Sun"), a branch manager at ECI Taiwan Co. Ltd., which is a subsidiary of Expeditors International, a global "logistics and freight forwarding company." Sun. Aff. ¶ 1. Univar relies on Ms. Sun's affidavit to establish a definition of the "import declaration date" as reflected in the Taiwan Customs Tables and the length of time it typically takes for goods to clear customs in Taiwan. *See* Def.'s Mem. at 9–12.

Ms. Sun opines that "to the best of [her] knowledge, the import declaration date is the date on which the customs documentation (the 'declaration') is submitted to the Taiwanese customs authority with respect to a particular shipment of imported goods." Sun Aff. ¶ 3. According to Ms. Sun, "[t]hese documents are normally submitted when the shipment arrives in Taiwan," and "[o]nce goods arrive in Taiwan by ship, it typically takes four to five working days for those goods to clear customs and an additional one working day for those

cleared goods to be delivered to a local consignee." *Id.*¶ 3–4. Ms. Sun concluded that "to the best of [her] knowledge, it typically takes six working days for goods to clear customs and be delivered locally after arrival in Taiwan by ship." *Id.* ¶ 4.

Plaintiff objects to Univar proffering Ms. Sun's "undisclosed expert report in conjunction with its motion for summary judgment," but has no objection to Univar bringing Ms. Sun "to the United States for deposition and trial." PCSOF ¶ 60; Pl.'s Opp'n at 3 n.1.[16] At oral argument, Univar maintained that Ms. Sun is a lay witness, within the ambit of Rule 701, who may permissibly opine upon matters within her personal knowledge. Oral Arg. Tr. at 6–7. The Government countered that Ms. Sun is an expert, within the ambit of Rule 702, whose testimony is purely based on her experience at Expeditors International. Oral Arg. Tr. at 8–9.

Rule 701 permits a lay witness to testify on matters "rationally based on the witness's perception," helpful to a clear understanding of the determination of a fact in issue, and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. The rule was amended in 2000 to add the latter portion "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."[17] Fed. R. Evid. 701 advisory committee's note to 2000 amendments. Nevertheless, "the line between expert testimony under [Rule] 702 ... and lay opinion testimony under [Rule] 701 ... is not easy to draw." *Kahrs Int'l, Inc. v. United States*, 33 CIT 1297, 1302 (2009) (quoting United States v. Ayala–Pizarro,407 F.3d 25, 28 (1st Cir. 2005)).

Many courts, including the U.S. Court of International Trade, "have permitted specialized opinion testimony, without first qualifying the witness as an expert, because 'the particularized knowledge that the witness has [is derived] by virtue of his or her position in the business.'" *Kahrs Int'l,* 33 CIT at 1302 (alteration in original) (citations omitted) (quoting Fed. R. Evid. 701 advisory committee's note to 2000 amendments); *see also Lerner New York, Inc. v. United States*, Slip-Op. 11–149, 2011 WL 6019334 (CIT Dec. 5, 2011) (citing Fed. R. Evid. 701 advisory committee's note to 2000 amendments). Pursuant to this

[16] Plaintiff states that "Univar proffers testimony from three previously undisclosed Taiwanese expert witnesses," but objects only to Ms. Sun's affidavit. *See* Pl.'s Opp'n at 3 n.1 (citing Sun Aff.; Def.'s Mem., Attach. 40 (Decl. of Chen Che-Hung), ECF No. 1435 at pp. 842–44; Def.'s Mem., Attach. 40 (Written Test. of Secretary General, Kaohsiung Yuan City Chamber of Commerce) ("Chamber of Commerce Test."), ECF No. 143–5 at pp. 845–46); DSOF ¶¶ 131–133; PCSOF ¶¶ 131–133 (not disputing Univar's statements of facts for which Univar cites Attachment 40 as evidence).

[17] Pursuant to Rule 702, an expert is "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702.

standard, the court finds that Ms. Sun's affidavit is not admissible as opinion testimony by a lay witness.

Based on her 10-year employment with Expeditors International, Ms. Sun states that she has "developed a deep familiarity with Expeditors' day-to-day customs operations in Taiwan by assisting importers and exporters through processing documentation, calculating duties, arranging for inspections, [and] arranging for delivery." Sun Aff. ¶ 1. Ms. Sun, however, indicates that her experience is limited to the Taipei location and she does not provide any indication of having personal knowledge relevant to food additive or chemical import/export practices. While Ms. Sun provides her opinion on questions posed by Univar's counsel, she provides no linkage between those opinions and her personal knowledge for the court to consider. Thus, Ms. Sun's affidavit does not constitute lay witness testimony admissible pursuant to Rule 701. See Fed. R. Evid. 701(a) (lay witness's testimony must be "rationally based on the witness's perception"). Moreover, Ms. Sun's affidavit may not be considered as expert testimony because Univar has neither sought to qualify it as such and has not disclosed it in accordance with the court's scheduling order. *See* Order (Nov. 25, 2015), ECF No. 16. Accordingly, the court will not consider Ms. Sun's affidavit for purposes of ruling on Univar's summary judgment motion.

To the extent the parties' remaining evidentiary objections concerned issues already addressed in the court's order resolving previously filed motions *in limine*, that order remains undisturbed and the court need not re-address those objections here. *See* Order on Mots. *In Limin* e (addressing admissibility of Taiwan Customs Tables concerning the 2009 to 2012 entries and expert reports).

II. Facts Not Genuinely in Dispute

Upon review of the parties' facts (and supporting exhibits) and taking into account the above evidentiary rulings, the court finds there is no genuine dispute with the following material facts.[18]

A. Saccharin and the Antidumping Duty Order

Saccharin is a non-nutritive sweetener generally used in beverages and foods, personal care products, table top sweeteners, and animal

[18] Citations are provided to the relevant paragraph number of the undisputed facts and response; internal citations generally have been omitted. Citations to the record are provided when a fact is controverted based on objections to the cited evidence, the court has overruled the objection, and the fact is supported by the proponent's cited evidence. Citations to the record are also provided when a fact, though not admitted by both parties, is uncontroverted by record evidence. *See* USCIT Rule 56(c)(3)("The court need consider only the cited materials, but it may consider other materials in the record.").

feeds. *Saccharin from the People's Republic of China*, 68 Fed. Reg. 40,906, 40,907 (Dep't Commerce July 9, 2003) (notice of antidumping duty order) ("*AD Order*"). There are four primary chemical compositions of saccharin: (1) sodium saccharin;[19] (2) calcium saccharin; (3) acid or insoluble saccharin; and (4) research grade saccharin. *Id.* Acid saccharin may refer "to a crude form of the product that is . . . further processed to make sodium saccharin." Pl.'s Attach. 20 (Expert Report of Henry B. McFarland, Ph.D.) ("McFarland Report") at 2, ECF No. 154–22; *see also* Chyall Report ¶ 38 (stating that a chemical process to prepare sodium saccharin may use acid saccharin as the starting point).

The "mesh size" of saccharin refers to the particle size of the product. Def.'s Mem., Attach. 36 (Expert Report of Michael Coffield) ¶ 7, ECF No. 143–5. "A common method used to characterize the particle size . . . is to pass the material through a standard wire mesh screen." DSOF ¶ 83; PCSOF ¶ 83. "[M]esh screen openings . . . are classified according to the number of openings along a linear inch of the mesh"; "the larger the numerical value of the mesh size, the smaller the opening." DSOF ¶¶ 83, 85; PCSOF ¶¶ 83, 85. Thus, a high numerical value of the mesh size corresponds with small physical particles of the material. DSOF ¶ 86; PCSOF ¶ 86.

In July 2003, the U.S Department of Commerce ("Commerce") issued an antidumping duty order covering saccharin from China. PCSOF ¶ 179; Def's Resp. to PCSOF ¶ 179; *see also AD Order*. At all times relevant to this action, the China-wide antidumping duty rate for imported saccharin was 329.33 percent or 329.94 percent. PCSOF ¶ 180; Def.'s Resp. to PCSOF ¶ 180.

B. Univar and the Subject Entries

Univar[20] "is the leading chemical distributor in the United States, providing more chemical products and related services than any other company in the marketplace." PCSOF ¶ 178; Def.'s Resp. to PCSOF ¶ 178. Prior to 2003, Univar imported saccharin from China. PCSOF ¶ 184; Def.'s Resp. to PCSOF ¶ 184. After Commerce issued the antidumping duty order, Univar internally declared itself "temporarily out of the sodium saccharin business" while it considered other

[19] Chemists refer to "sodium saccharin" and "saccharin sodium" interchangeably. Def.'s Mem., Attach. 33 (Expert Report of Leonard J. Chyall, Ph.D) ("Chyall Report") ¶ 28, ECF No. 143–5.

[20] At all times relevant to the matters described in Plaintiff's complaint, Defendant was a wholly-owned subsidiary of Univar Inc. PCSOF ¶ 177; Def.'s Resp. to PCSOF ¶ 177. Defendant objects to Plaintiff referring to Defendant and Univar Inc. interchangeably as "Univar." Def.'s Resp. to PCSOF ¶ 178. The court refers only to Defendant as "Univar."

sources for its saccharin imports. DSOF ¶ 153;[21] Def.'s Mem., Attach. 51 (Univar internal email), ECF No. 143–5; PCSOF ¶ 184; Def.'s Resp. to PCSOF ¶ 184.

Mr. Biggs is the director of Univar's International Sourcing Group, PCSOF ¶ 185; Def.'s Resp. to PCSOF ¶ 185, and had the "ultimate authority within Univar [] to approve [foreign] suppliers, Biggs Dep. 69:14–21. After Commerce issued the antidumping duty order, Mr. Biggs consulted the World Wide Directory of Chemical Producers to search "for non-Chinese manufacturers [of saccharin]."[22] DSOF ¶ 139; PCSOF ¶ 139; Def.'s Mem. at 18. He sent a list from that database to Mr. Chin, who then informed Mr. Biggs that Mr. Huang was "the only viable manufacturer in Taiwan." DSOF ¶ 140; PCSOF ¶ 140.

In October 2003, Mr. Chin obtained prices from Mr. Huang "of [LH] Chemical" and reported those prices to Mr. Biggs. PCSOF ¶ 191; Dep. Ex. 288 at UNIVAR_013664–013665. Mr. Huang quoted a price of $3,850 per metric ton ("MT") for 20–40 mesh size saccharin delivered freight on board in Taiwan.[23] *See* PCSOF ¶ 192; Dep. Ex. 288 at UNIVAR_013664–013665. Univar was informed that the quoted price was higher than the price for saccharin from China but lower than the price for saccharin from Japan. *See* Dep. Ex. 288 at UNIVAR_013664; *see also* PCSOF ¶ 194; Def.'s Resp. to PCSOF ¶ 194 (Mr. Biggs "understood that [in October 2003], Japanese product was more expensive than $3,850" per MT).

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[21] Univar relies on the opinions of its proposed expert, Michael O'Rourke, as evidentiary support for some of its statements of fact. Because the court has previously determined that Mr. O'Rourke's testimony is inadmissible, *see* Order on Mots. *In Limine* at 29–36, it has not considered Univar's Rule 56.3 statements of fact that are supported only with Mr. O'Rourke's report, but has considered those statements that are supported with additional cited evidence.

[22] Shortly before Commerce issued the *AD Order*, in April of 2003, Mr. Biggs had inquired into purchasing saccharin from a Spanish company. *See* DSOF ¶ 156; Def.'s Mem., Attach. 47 (Univar USA, Inc.'s Resp. to Pl.'s First Set of Interrogs., Reqs. for Admiss. and Reqs. for Produc. of Docs. to Third-Party Def.) ("Univar's Resp. to Pl.'s First Set of Disc. Req.") at 26, ECF No. 143–5; *see also* Def.'s Mem., Attach. 53 (Email to Mr. Biggs), ECF No. 143–5. Upon receiving information that saccharin imported into the United States from the Spanish company would have originated in China, Mr. Biggs declined to purchase saccharin from this company. Univar's Resp. to Pl.'s First Set of Disc. Req. at 26.

[23] A "20–40" mesh size "refers to saccharin that will pass through a [Number] 20 mesh screen but not a Number 40 mesh screen." DSOF ¶ 87; PCSOF ¶ 87 (alteration in original). On the other hand, a "10–40" mesh size "refers to saccharin that will pass [through] a Number 10 mesh screen but not a Number 40 mesh screen." DSOF ¶ 87; PCSOF ¶ 87 (alteration in original).

"Univar began the process of approving LH Trading/LH Chemical as a supplier in late 2003, early 2004." PCSOF ¶ 195; Dep. Ex. 179.[24] At that time, LH Trading/LH Chemical were not registered with the FDA. *See* Dep. Ex. 179 at Univar_069041 ("FDA Registration NO: will advies [sic] !!!!!!"); Biggs. Dep. 79:22–23, 81:15–20. As of January 8, 2004, Univar completed the FDA registration for these companies, and listed LH Trading as the supplier and LH Chemical as the manufacturer in the registration documents. Dep. Ex. 215 (Univar email containing FDA registration number); Pl.'s Attach. 3 (Dep. of Annie Chang) ("Chang Dep.") 58:3–59:12 (discussing email). The final registration listed the address for both companies as: 19 Lane 142 Wen Chu Road 4FL Tso Ying Dist. Kaohsiung, Taiwan. Dep. Ex. 215; *see also* Chang Dep. 59:6–9.

In April 2004, Mr. Biggs visited Taiwan and met with Mr. Huang, the president of LH Trading. DSOF ¶ 124; PCSOF ¶¶ 124, 185; Def.'s Resp. to PCSOF ¶ 185. The purpose of this visit was to conduct "an inspection for . . . a new supplier." DSOF ¶ 124; PCSOF ¶ 124. Mr. Huang informed Mr. Biggs that he owned a factory in Taiwan that manufactured saccharin. PCSOF ¶ 187; Def.'s Resp. to PCSOF ¶ 187. During this visit, Mr. Biggs and Mr. Huang toured a factory in Taiwan. *See* PCSOF ¶ 189; Def.'s Resp. to PCSOF ¶ 189. However, the factory that they toured was owned by HTC. PCSOF ¶ 190; Def.'s Resp. to PCSOF ¶ 190. HTC's factory is located at 115 Qinan Road, Dashe District, Kaohsiung City 815. DSOF ¶ 17; PCSOF ¶ 17.

By May 2004, Univar had begun importing saccharin from Taiwan. *See* PCSOF ¶ 200; Dep. Ex. 316 at Univar_066465; Biggs Dep. 167:21–23. On August 30, 2004, Univar submitted an application for kosher certification to the Orthodox Union, indicating it promotes its "artificial sweetener" as a "food additive."[25] *See* Dep. Ex. 314 at Univar_065703. Univar listed LH Chemical—located at 4 Fl. Number 19, Lane 142, Wen Chu Road, Tso Ying District, in Kaoshiung, Taiwan—as the manufacturer, and Mr. Huang as LH Chemical's president. *Id.* at Univar_065704.

On or around March 10, 2005, Rabbi Grunberg from the Orthodox Union visited the plant owned by "[LH] Chemical," located in "Tso Ying Dist, Kaohsiung, Taiwan" to inspect the facility for purposes of

[24] Exhibit 179 is an internal Univar memorandum containing a December 9, 2003 Import Product/Vendor Request and a January 2, 2004 Import Product Profile. Dep. Ex. 179. The December 2003 request lists LH Trading as foreign supplier and manufacturer, and the January 2004 product profile lists LH Chemical as the manufacturer. *See id.* at Univar_069039, Univar_069041.

[25] The kosher certification application included a production process flow chart. *See* Dep. Ex. 314 at Univar_065709. According to this document, the source of Mr. Huang's acid saccharin was "Sei Cheng Chemical Co., Ltd, (Japan)." *Id.* ; Dep. Ex. 315; *see also* PCSOF ¶ 213; Def.'s Resp. to PCSOF ¶ 213 (O-Sulfobenzoic acid imide is acid saccharin).

certifying the plant as kosher. Def.'s Mem., Attach. 1 (Rabbi Grunberg Inspection Report), ECF No. 143–5; DSOF ¶¶ 144–45; PCSOF ¶¶ 144–45. That year, the Orthodox Union certified the plant as kosher. DSOF ¶ 145; PCSOF ¶ 145. Subsequent to Rabbi Grunsberg's visit, Rabbi Talmid flew to Taiwan three times to inspect the saccharin factory so that the Orthodox Union could continue to certify it as kosher. Talmid Dep. 53:1–68:13.[26] On each occasion, Rabbi Talmid was told that he could not inspect the plant because, respectively, the plant was shut down, there was a dangerous flood, or there was dangerous construction preventing access to the factory. *Id.* Between 2007 and 2012, the Orthodox Union was unable to inspect Mr. Huang's factory. Biggs Dep. 218:6–9, 219:12–220:4. Nonetheless, from 2005 to 2013, the Orthodox Union continuously certified the saccharin that Univar purchased from Mr. Huang as kosher. DSOF ¶ 145; PCSOF ¶ 145.

Between July 9, 2007, and April 3, 2012, Univar made 36 entries of saccharin into the United States. PCSOF ¶¶ 181, 183; Def.'s Resp. to PCSOF ¶¶ 181, 183; *see also* DSOF ¶¶ 2, 13; PCSOF ¶¶ 2, 13. Specifically, Univar made 20 entries in 2007 and 2008, and 16 entries between 2009 and 2012. DSOF ¶¶ 13, 48; PCSOF ¶¶ 13. 48. Univar declared Taiwan as the country of origin for all entries of subject merchandise. *See* DSOF ¶ 3 ("The '36 entries of saccharin' identified by the government in its [p]re[p]enalty [n]otice form the basis of this action); PCSOF ¶ 3; PCSOF ¶ 183; ("Univar entered, introduced, or caused to be entered or introduced, merchandise consisting of 'saccharin and its salts' under the entry numbers, entered values, and duties paid listed in the [p]re-[p]enalty [n]otice"); Def.'s Resp. to PCSOF ¶ 183; Univar's Resp. to Pl.'s First Set of Disc. Req. at 16 ("Univar admits that it asserted at the time of entry that the country of origin was Taiwan for all entries of [s]ubject [m]erchandise identified in the [p]re-[p]enalty [n]otice").

Univar received a certificate of origin issued by the Kaohsiung Yuan City Chamber of Commerce for each of the 36 entries. DSOF ¶ 133; PCSOF ¶ 133. "The Kaohsiung Yuan City Chamber of Commerce is authorized by the Taiwan Board of Foreign Trade to issue certificates of origin." DSOF ¶ 131; PCSOF ¶ 131. Issuance of the certificates "is a routine business activity," DSOF ¶ 132; PCSOF ¶ 132, and occurs upon receipt of an application by an exporter and "on the basis that the customs declaration information is verified to be correct," Chamber of Commerce Test. ¶ 5.

[26] In order to re-certify a product as kosher, the Orthodox Union requires annual inspection of the production facility. Talmid Dep. 60:9–15; *see also id.* 58:21–59:1.

In December 2008, Univar participated in a "[c]ustoms mock-audit" conducted by DHL Global Forwarding ("DHL"). *See* Def.'s Mem., Attach. 2 (Letter from DHL to Univar) at Univar_DHS-003553, ECF No. 143–5; Pl.'s Attach. 10 (Dep. Ex. 11), ECF No. 154–12. DHL is a licensed corporate U.S. Customs broker that helps importers with "the preparation and submission of the entry and entry summary documentation of Customs in association with their importations." Def.'s Mem., Attach. 15 (DHL Fed. R. Civ. P. 30(b)(6) Dep.) 17:16–18:2. DHL concluded that Univar is a "good importer," with a "culture of compliance." DSOF ¶ 160; PCSOF ¶ 160 (initial capitalization omitted). According to DHL's corporate representative, "[d]uring [the] approximately 18-year period" that DHL has conducted these audits, no company "received a perfect score," but Univar "received a score of 90 to 92 percent," which "is probably at or a little above the normal average." DSOF ¶ 161; PCSOF ¶ 161. Moreover, this representative believed that "a good importer" need not "actually visit the factory located in a foreign country before purchasing from that factory." DSOF ¶ 127; PCSOF ¶ 127.

C. Third Party Communications to Univar and Univar's Reactions

In August 2004, shortly after Univar began importing the saccharin it purchased from Mr. Huang, Univar received notice from a U.S. Producer—PMC Specialties Group, Inc. ("PMC")—that it believed Mr. Huang was not producing saccharin, but importing Chinese product and relabeling it. PCSOF ¶ 205; Pl.'s Attach. 1 at Univar_066462. Mr. Biggs relayed PMC's beliefs to Mr. Chin in an email, and asked Mr. Chin if there was "any proof that [Mr. Huang] can provide that [Univar] can use to kill this question." PCSOF ¶ 205; Pl.'s Attach. 1 at Univar_066462. In response, Mr. Chin stated that, according to Mr. Huang, Mr. Biggs's visit to the factory in 2004 was "good proof." PCSOF ¶ 206; Pl.'s Attach. 1 at Univar_011207.

A September 15, 2004 email indicates that Univar provided a sample of the saccharin it purchased from Mr. Huang to PMC for testing. PCSOF ¶ 209; Dep. Ex. 310; *see also* DSOF ¶ 158; Biggs. Dep. 150:3–23. After conducting the lab tests, PMC informed Mr. Biggs that it was "99.99 [percent] convinced" that the saccharin originated in China, not Taiwan, due to the method used to produce it, which was the Maumee process.[27] PCSOF ¶ 209; Dep. Ex. 310 at Univar_011211; *see also* Def.'s Resp. to PCSOF ¶ 209 ("Univar does not dispute that this is what PMC 'contended' in September 2004 . . . .").

[27] There are two main processes for producing saccharin: the Remsen-Fahlberg process and the Maumee process. Chyall Report ¶¶ 29–30; *id.* at 11–12 Figs.4 & 5.

PMC explained that it "very much doubt[ed]" that the Maumee process "exists anywhere else in the world except in the USA . . . and the PRC." Dep. Ex. 310 at Univar_011211. Mr. Biggs "distrusted PMC's claim" because Univar commonly encountered U.S.-based companies that had a "false" "understanding of what was going on in China."[28] DSOF ¶ 98; PCSOF ¶ 98.

Also in September 2004, Robert Spear, of PepsiCo, Inc. ("Pepsi"), a Univar customer, wrote an email to Mr. Biggs inquiring: "The Taiwan plant doesn't make the base saccharin molecule does it? I thought I heard the plant receives the base product from China."[29] Dep. Ex. 317 at Univar_066447; PCSOF ¶ 208Def.'s Mem., Attach. 26 (Decl. of Robert Spear) ("Spear Decl."), ECF No. 143–5 (expressing lack of recollection regarding the email, but otherwise not disputing that he sent it);[30] *see also* Compl. ¶ 16; Answer of Def. Univar USA Inc. to Pl.'s Compl. ("Answer") ¶ 16, ECF No. 8 (establishing that Pepsi is a Univar customer).

On April 7, 2006, Mr. Biggs received an email from a Univar colleague that relayed some information she heard during a meeting with one of Univar's customers. Dep. Ex. 322; Biggs. Dep. 182:9–16. She stated, "rumor has it that Mr. Biggs from Univar has already been buying Chinese material. Yes you were mentioned by name." PCSOF ¶ 216; Dep. Ex. 322; Biggs Dep. 182:9–16, 183:6–12. Mr.

[28] During fact discovery, the government confirmed that "the United States does not contend that the Maumee [p]rocess was not used to produce saccharin in Taiwan," and "[t]he process by which the saccharin [was produced] was not construed as a factor in the investigation once agents discovered that the Maumee process was not used exclusively in China." DSOF ¶ 99; PCSOF ¶ 99.

[29] The following month, in October 2004, Mr. Biggs requested confirmation from Mr. Huang regarding the origin of the "original saccharin molecule" used in the production of acid saccharin. PCSOF ¶ 210; Dep. Ex. 311. Mr. Biggs advised that if the origin was China, Univar's imports would be subject to the antidumping duties. Dep. Ex. 311. He went on to state: "[T]he 'best' answer is an answer from [Mr. Huang's] Japanese source that no raw materials originating from China were used in the production of the acid saccharin that it sells to [Mr. Huang.]" *Id.* Shortly thereafter, Mr. Huang informed Mr. Biggs the following:

> In some cases, we directly import 'saccharin acid,' and add other raw materials to manufacture the finished product (sodium saccharin). However, the imported quantity is very small. . . . [S]accharin acid[] is imported from two companies, Aisan Chemicals Ltd and Fuji Chemicals Ltd. . . . Only in the case that the product quantity demanded by the market is large, we will import a small quantity of . . . saccharin acid from Japan and further process them (through chemical reaction) into the finished products.

Def.'s Reply, Attach. 77 (Fax from Mr. Huang to Mr. Biggs) ("Huang Nov. 2004 Fax"), ECF No. 161–3 (emphasis omitted); Def.'s Resp. to PCSOF ¶ 238.

[30] During fact discovery in this case, Mr. Spear recognized that his name is referenced in the email communications with Univar in 2004, but he did not recall either sending or receiving the email. DSOF ¶ 104; PCSOF ¶ 104. Further, he affirmed that he "do[es] not recall ever informing Univar that an antidumping duty order covered imports of Taiwanese saccharin manufactured in plants that received Chinese-origin components," and that he did not "recall ever informing Univar (or Mr. Biggs) that 'Mr. Huang received subject saccharin base product from China.'" DSOF ¶ 103; PCSOF ¶ 103. Mr. Biggs testified to his receipt of the email in question. Biggs Dep. 170:7–171:17.

Biggs's reaction to this email was to "chuckl[e]"; he believed "there was a history of bad-unreliable information from this buyer." Biggs Dep. 183:14–22.

In January 2007, an account executive at Univar sent an email to the company's International Sourcing Group stating the following:

> I had one of my customers tell me that one of our competitors told her that we were getting product that is actually manufactured in China then shipped to Taiwan and then repackaged and marked as manufactured in Taiwan. She wanted me to look into this. We just secured this business at this account so it may be just a competitor who is upset over losing the business. Can you let me know about this. [sic]

PCSOF ¶ 217; Dep. Ex. 323 at Univar_012851.

John Lombard is the president of Lomco, Inc., a company that "assist[s] companies in managing inventories, by buy[ing] and sell-[ing] some of their surplus and obsolescent chemicals and sell[ing] them into the secondary markets." DSOF ¶¶ 107108; PCSOF ¶¶ 107–108 (second and third alteration in original) (internal quotation marks omitted). In or around October 2008, Lomco, Inc. attempted to sell Univar's saccharin and eventually identified PMC as a potential buyer of this material. DSOF ¶ 109; PCSOF ¶ 109. During the course of his attemps to sell this saccharin to PMC, a PMC employee told Mr. Lombard "that there was no factory, no production [of saccharin] in Taiwan," although this employee did not elaborate why she believed there were no such manufacturers.[31] DSOF ¶ 110; PCSOF ¶ 110.

In November 2008, Mr. Lombard informed Univar:

> Our major hurdle with assisting you is the following: Regardless of what they say, Lung Huang Trading are not manufacturers of Sodium Saccharin. They are buying material from mainland China and repackaging the material. As you probably know, several years ago dumping duites [sic] were implemented against Chinese producers of Sodium Saccharin. . . . I can't imagine that Univar didn't dot all the I's [sic] and cross all the Ts before beginning to import Sodium Saccharin.

PCOF ¶ 218; Dep. Ex. 259 at Univar_014646 (email from Mr. Lombard to Mr. Biggs), ECF No. 154–4. Mr. Lombard did not make those statements on personal knowledge, but rather based on "information supplied by . . . PMC as well as information that [he] could or could not find on the internet about manufacturing of [s]odium [s]accharin in Taiwan." DSOF ¶¶ 111, 113; PCSOF ¶¶ 111, 113. As he recalled

[31] Close to this time-frame, in a November 7, 2008 fax to Mr. Biggs, Mr. Huang stated that he "told [] the truth," and he "absolutely [had] not imported Chinese made saccharin acid. . . . please don't worry." PCSOF ¶ 218; Dep. Ex. 325 (capitalization omitted).

during his deposition in this case, "[he] was seeking information on Taiwanese manufacturers of [s]odium [s]accharin" on the internet and he didn't "believe [he] was able to find any." DSOF ¶ 112; PCSOF ¶ 112 (alteration in original).

D. Customs' Investigation of Univar's Entries

On February 20, 2010, ICE informed Univar's Chief Executive Officer that the company was under investigation for "possible transshipment of saccharin manufactured in [China] in order to avoid payment/deposit of anti-dumping duties associated with the commodity." PCSOF ¶ 220; Dep. Ex. 12 at Univar_065600.[32] At the time it issued this letter, the Government "had suspicions transshipment was occurring," but "[a]t that point[,] there was nothing confirmed." DSOF ¶ 118; PCSOF ¶ 118.

In April 2010, two Government employees, chemist Yogendra Raval and Agent Tsui, went to Taiwan. DSOF ¶ 25; PCSOF ¶ 25. They toured HTC's factory to determine the type of manufacturing process that HTC was using to produce saccharin. DSOF ¶¶ 25, 26; PCSOF ¶ 25, 26; *see also* Tsui Aff. ¶ 10 ("The purpose of the visit to HTC was to verify that HTC in fact manufactured the saccharin that it exported to the United States.") During this visit, Mr. Raval reviewed a "process flow chart," "[p]urchase documents for raw materials," and "took a sample for [his] lab" to ensure that the product was saccharin; he ultimately concluded that "saccharin [wa]s being manufactured according to the Maumee process" at HTC.[33] DSOF ¶ 27; PCSOF ¶ 27 (alteration in original).

Agent Tsui also testified that he saw raw materials, equipment, and employees at the HTC facility during this visit. DSOF ¶ 29; PCSOF ¶ 29. He testified he smelled a "sweet smell in the air," which the HTC officials described to be the saccharin smell, and tasted sweetness on his tongue. Def.'s Mem., Attach. 24 ("Tsui Dep.") 65:1–14, ECF No. 143–5. Based on the taste, HTC's statements to him, and the consistency of the end product, which he witnessed to be a "white powdery substance," Agent Tsui "believed it was saccharin" that was being produced at the [HTC] factory in Kaohsiung City." DSOF ¶ 30; PCSOF ¶ 30; Tsui Dep. 65:17–22, 66:5–9. During this visit, the "plant

[32] After receipt of the ICE letter in February 2010, Univar continued importing saccharin purchased from Mr. Huang for more than two years. PCSOF ¶ 220; DSCOF ¶ 220 (not objecting to this assertion).

[33] Mr. Raval documented his visit with photographs. DSOF ¶ 28; PCSOF ¶ 28. Univar's expert, Dr. Chyall, reviewed Mr. Raval's photographs, trip reports, and deposition testimony concerning his visit to the HTC plant in 2010, and, based on those sources, concluded that the HTC factory "is capable of producing acid saccharin and saccharin sodium." DSOF ¶ 31; PCSOF ¶ 31.

manager admitted" to Agent Tsui that HTC was "in violation of local fire and environmental regulations" but that it was "still successfully producing saccharin." DSOF ¶ 39; PCSOF ¶ 39.

On June 10, 2010, Agent Tsui determined that both LH Trading and LH Chemical were located at the following address: "Section 19, Lane 142, Wun Cih Road, Kaoshiung City, Taiwan." Tsui Aff. ¶¶ 13, 14. A week later, on June 17, 2010, Agent Tsui conducted a site visit to this address and observed that the building located at this address was "a 12-story residential apartment building located in a dense residential neighborhood." *Id.*¶ 15. He "did not observe any manufacturing, industrial activity, or distribution at this location or its vicinity." *Id.* ¶ 16. Agent Tsui provided photographs of "Google maps" images depicting "the site that [he] visited" on this date. *Id.*, Ex. 2 (referencing screenshots showing "Lane 142, WénCí Road, Zuoying District, Taiwan").

E. Taiwan's Economy and Regulation of Saccharin Production

"[I]n Taiwan, sodium saccharin is not a controlled item." DSOF ¶ 33; PCSOF ¶ 33. Taiwan requires a saccharin manufacturing license only if the sodium saccharin "is used [as a] food additive." DSOF ¶ 33; PCSOF ¶ 33. Single food additive production is regulated and managed by the Ministry of Health and Welfare. Def.'s Mem., Attach. 31 (Jyh-Quan Pan Aff.) ("Pan Aff."), ECF No. 143–5; Def.'s Mem., Attach. 10 at US007941 (email from Lisa Yang to Eben Roberts), ECF No. 143–5. Between 2004 and 2012, the Ministry of Health and Welfare did not issue any licenses for the manufacture of sodium saccharin. DSOF ¶ 34; Pan Aff.

According to Professor Jane Winn, Univar's proposed expert witness, the term informal economy "refers to economic activities that take place outside of government regulation." DSOF ¶ 37; PCSOF ¶ 37. Professor Winn's "primary focus in [her] analysis is on activities that would otherwise be legitimate economic activities if they had been undertaken in compliance with all relevant laws and regulations." DSOF ¶ 37; PCSOF ¶ 37 (alteration in original). According to Professor Winn, Taiwan's informal economy "remain[s] significant" and "the facts associated with [HTC] are consistent with companies in Taiwan that operate without a manufacturing license because they are facts that suggest that a company is operating partly or wholly in the informal economy." DSOF ¶ 38; PCSOF ¶ 38 (first alteration in original).

F. Administrative Proceedings

"In July 2014, CBP issued a pre-penalty notice to Univar," claiming a penalty of approximately $47.9 million and lost duties of $36.1 million. DSOF ¶ 165; PCSOF ¶ 165. On July 29, 2014, Univar requested that CBP identify the material facts supporting its pre-penalty notice. DSOF ¶ 166; PCSOF ¶ 166. In response, CBP directed Univar to submit a Freedom of Information Act request to obtain the requested information. DSOF ¶ 167; PCSOF ¶ 167. Univar complied with this directive "and subsequently responded to the pre-penalty notice." DSOF ¶ 168; PCSOF ¶ 168.

On October 1, 2014, CBP issued its penalty notice, which contained allegations identical to the pre-penalty notice. DSOF ¶¶ 169–170; PCSOF ¶¶ 169–170. "On October 31, 2014, Univar submitted a petition for relief." DSOF ¶ 171; PCSOF ¶ 171. In response, CBP's Office of International Trade – Regulations and Rulings ("CBP Headquarters") "provided a 'partial decision' to Univar's petition for relief." DSOF ¶ 172; PCSOF ¶ 172. In relevant part, this partial decision stated that the CBP Headquarters' "review of the case file revealed that the penalty notice does not include the material facts supporting CBP's allegation that the saccharin was of Chinese origin and supporting a degree of culpability of gross negligence." DSOF ¶ 173; PCSOF ¶ 173. Thus, CBP Headquarters denied without prejudice Univar's petition for relief and remanded the case back to the CBP office "to issue an amended penalty notice that includes the material facts supporting CBP's allegation that the saccharin was of Chinese origin and supporting a degree of culpability of gross negligence." DSOF ¶ 174; PCSOF ¶ 174. "On February 10, 2015, CBP issued a 'revised penalty notice' to Univar." DSOF ¶ 175; PCSOF ¶ 175.

III. Procedural History

Plaintiff commenced this action on August 6, 2015. *See* Summons, ECF No. 1; Compl. On October 6, 2015, Defendant filed an answer to the complaint. Answer.

Defendant previously moved for partial summary judgment in its favor with respect to 23 entries that occurred prior to March 2010. Univar's Mot. for Partial Summ. J., ECF No. 18. Plaintiff cross-moved for partial summary judgment in its favor with respect to 13 entries that occurred during or after March 2010. Confidential Pl.'s Opp'n to Univar's Mot. for Partial Summ. J. and Cross-Mot. for Partial Summ. J., ECF No. 30. Both motions were filed while discovery was ongoing. On December 22, 2016, recognizing that there were material facts in dispute and each party was in the process of conducting discovery on relevant issues, the court denied both motions and allowed discovery

to continue. *United States v. Univar USA, Inc.*, 40 CIT ___, 195 F. Supp. 3d 1312, 1320–23 (2016). The parties have completed discovery, and Univar now moves for summary judgment in its favor with respect to all entries.

DISCUSSION

I. Standard of Review

The Government brought this action against Defendant to recover unpaid duties and a monetary penalty owing from allegedly transshipped saccharin from China through Taiwan pursuant to 19 U.S.C. § 1592. *See generally* Compl. As such, the court has jurisdiction to hear this action pursuant to 28 U.S.C. § 1582.

The Court of International Trade reviews all issues in actions brought for the recovery of a monetary penalty pursuant to 19 U.S.C. § 1592 *de novo* and on the basis of the record made before the court. 19 U.S.C. § 1592(e)(1); 28 U.S.C. § 2640(a); *see also United States v. ITT Indus., Inc.*, 28 CIT 1028, 1035, 343 F. Supp. 2d 1322, 1329 (2004), *aff'd*, 168 F. App'x 942 (Fed. Cir. 2006). Summary judgment is proper when "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

The movant may discharge its burden of showing the absence of a genuine issue of material fact by demonstrating that the nonmovant "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," or by pointing to "an absence of evidence to support the nonmoving party's case." *Id.* at 322, 325; *see also Exigent Tech. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1307–1308 (Fed. Cir. 2006) (discussing *Celotex Corp.*). The movant may do so by "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323 (internal quotation marks omitted); *see also* USCIT Rule 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by [] citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . ., admissions, interrogatory answers, or other materials[.]").

To defeat summary judgment once the moving party has met its burden, the nonmoving party must "'cit[e] to particular parts of materials in the record' to establish the 'presence of a genuine dispute'

warranting trial." *Macclenny Prods. v. United States*, 38 CIT ___, ___, 963 F. Supp. 2d 1348, 1358 (2014) (alteration in original) (quoting USCIT Rule 56(c)). "'[I]f a party 'fails to properly address another party's assertion of fact,' that assertion of fact may be deemed 'undisputed for purposes of the motion.'" *Id.* (quoting USCIT Rule 56(e)(2)). There must exist more than "a scintilla of evidence" to support the non-moving party's claims, *Anderson v. Liberty Lobby, Inc.,*477 U.S. 242, 252 (1986); conclusory assertions will not suffice, *see* USCIT Rule 56(e).

The court must view the evidence in the light most favorable to the nonmovant and may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See Anderson*, 477 U.S. at 249, 255; *Netscape Comm.'s Corp. v. Konrad*, 295 F.3d 1315, 1319 (Fed. Cir. 2002).

II. Legal Framework

In relevant part, § 1592 bars the grossly negligent or negligent entry, introduction, or attempt to enter or introduce, merchandise into the commerce of the United States by means of a material false statement or material omission. 19 U.S.C. § 1592(a)(1)(A).[34]

A statement is material when it has the "potential to alter Customs' appraisement or liability for duty." *United States v. Horizon Prod. Int'l Inc.,* 39 CIT __, __, 82 F. Supp. 3d 1350, 1356 (2015) (citation omitted); *see also United States v. Menard, Inc*., 16 CIT 410, 417, 795 F. Supp. 1182, 1188 (1992) (materiality for purposes of § 1592 refers to the false statement's effect on CBP's determination of the applicable duty); 19 C.F.R. Pt. 171, App. B(B) (2013) (defining materiality for purposes of § 1592).

The statute does not define the term "false"; thus, it is defined according to its ordinary meaning. *United States v. Rockwell Automation Inc.*, 30 CIT 1552, 1557 462 F. Supp. 2d 1243, 1248 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). According to Black's Law Dictionary, a statement is "false" when it is "untrue" or

[34] In full, § 1592(a)(1) provides:

> (a) Prohibition
>
> (1) General rule
>
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a)(1).

"[n]ot genuine; inauthentic." *Id.* (quoting Black's Law Dictionary 635 (8th ed. 2004)) (citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994) (dictionaries may supply the common meaning of a term)).

Violations of § 1592(a) may be punishable by a civil penalty depending on the degree of culpability. 19 U.S.C. § 1592(c). "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254. "Parties must meet their burdens of proof regarding [culpability] by a preponderance of the evidence." *United States v. Matthews*, 31 CIT 2075, 2081, 533 F. Supp. 2d 1307, 1313 (2007) (citing *United States v. New–Form Mfg. Co., Ltd.*, 27 CIT 905, 918–19, 277 F. Supp. 2d 1313 (2003)); *cf. Anderson*, 477 U.S. at 252 (in determining whether summary judgment should issue, "[t]he judge's inquiry . . . unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [party bearing the burden of proof at trial] is entitled to a verdict").

A defendant's false statement or omission is negligent when it results from a "failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient." 19 C.F.R. Pt. 171, App. B(C)(1).[35] Plaintiff bears the initial burden of proving the act or omission constituting the violation; the burden then shifts to the alleged violator to "affirmatively demonstrate that it exercised reasonable care under the circumstances." *Ford Motor Co.*, 463 F.3d at 1279 (Fed. Cir. 2006); 19 U.S.C. § 1592(e)(4). To establish gross negligence, Plaintiff must prove "an act or acts (of commission or omission) [by Defendant] done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B(C)(2); *see also Ford Motor Co.*, 463 F.3d at 1292 ("An importer is guilty of gross negligence if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care."). "[A] determination of gross negligence involves a determination of intent"; thus, "it is an issue of fact, not law." *Ford Motor Co.*, 463 F.3d at 1292.

[35] "As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence . . . to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate." 19 C.F.R. Pt. 171, App. B(C)(1).

III. Analysis

A. Entry of Merchandise

Parties do not dispute that Univar, as the importer of record, made the subject entries. *See* PSOF ¶¶ 181, 183; Defs.' Resp. to PSOF ¶¶ 181, 183. Accordingly, there is no dispute that Univar "enter[ed]" merchandise for purposes of § 1592(a).

B. Material False Statement

Univar declared Taiwan as the country of origin for all entries of subject merchandise. *See* DSOF ¶ 3; PCSOF ¶¶ 3, 183; Def.'s Resp. to PCSOF ¶ 183; Univar's Resp. to Pl.'s First Set of Disc. Req. at 16. Plaintiff contends Univar misrepresented the country of origin as Taiwan because the country of origin was China. DSOF ¶ 6; PCSOF ¶ 6; Pl.'s Opp'n at 1–2.

Univar argues it is entitled to summary judgment because the Government has not established a violation of 19 U.S.C. § 1592; particularly "there is an absence of evidence supporting the government's theory." Def.'s Mem. at 23 (citation omitted) (internal quotation marks omitted); *see also* Def.'s Suppl. Mem. at 1. The Government urges the court to deny Univar's motion because it contends there is "direct evidence" establishing that each entry originated in China and was transshipped through Taiwan, and thus, Univar made material false statements to CBP concerning the country of origin of the imported merchandise. *See* Pl.'s Opp'n at 15–19. According to the Government, the available evidence "compels rejecting Univar's motion for summary judgment and presenting this case to a jury." *Id.* at 2. Generally, the Government relies on the same collective evidence as proof of transshipment for all of the entries. *See generally* Pl.'s Opp'n. Because Univar makes separate arguments concerning its entries in 2007 and 2008 and those in 2009 through 2012, the court bifurcates its discussion accordingly. *See* Def.'s Mem. at 24, 30; Def.'s Suppl. Mem. (addressing 2007–2008 entries).

1. The Presence of Disputed Facts Precludes Summary Judgment with Respect to the 2007 and 2008 Entries

With respect to the 2007 and 2008 entries, the Government relies on the expert report of Dr. McFarland that the "saccharin whose

origin is at issue in this case was very likely produced in China."[36] Pl.'s Opp'n at 15–16, 19; s*ee also id.* at 5–6 (discussing impossibility of Japanese origin). The Government further asserts that the address of Mr. Huang's factory that Univar provided to the FDA was an apartment building in a residential neighborhood, not capable of producing saccharin. *Id.* at 6. Additionally, the Government contends that several pieces of circumstantial evidence further demonstrate that none of the entries could have originated in Taiwan, or any country other than China. *Id.* at 19–22. The circumstantial evidence includes:

> (1) Univar itself understood that Mr. Huang was a Chinese manufacturer; (2) neither LH Trading nor LH Chemical possesses any manufacturing capability or license; (3) there was only one possible (unlicensed) saccharin producer in Taiwan (HTC) at all relevant times; (4) HTC exported saccharin only to Rit-Chem, a Univar competitor; (5) HTC did no business with Mr. Huang during the relevant period; and (6) the only third-country from which Univar's saccharin could have originated was China.

Id. at 19. Thus, the Government urges that the totality of circumstances would lead a rational trier of fact to find for the Government. *Id.* at 22.

Univar counters that Dr. McFarland's testimony fails to create a genuine dispute of material fact concerning the 2007 and 2008 entries because his opinion lacks factual foundation and is based upon a faulty syllogism. Def.'s Suppl. Mem. at 1–9. Univar further asserts that the street name that Agent Tsui identified as having visited on June 17, 2010, "Wen Cih Road," differs from that depicted on the Google maps photograph, "WénCí Road," and the Government has not proved that these addresses identify the same location. Def.'s Resp. to PCSOF ¶ 204; *see also* Def.'s Reply at 3–4. Univar further maintains that the Government has failed to establish that Taiwan required a manufacturing license for saccharin being produced in Taiwan for food use in a foreign country. Def.'s Mem. at 29; Def.'s Reply at 12. Univar argues that HTC produced the sodium saccharin in Taiwan, sold it to Mr. Huang, who then exported it to Univar. Def.'s Mem. at 4–5, 28; *see also* Def.'s Reply at 13–14. Even if the Government were to establish that HTC did not have a license to produce saccharin, Taiwan's informal economy remains significant, and the

[36] Dr. McFarland reached this conclusion with respect to all 36 entries after considering Taiwanese import and export statistics, Japanese export statistics, U.S import statistics, the Taiwan Customs Tables, and other evidence from discovery. *See* McFarland Report; Pl.'s Attach. 20 (Suppl. Report of Henry B. McFarland, Ph.D.) ("McFarland Suppl. Report"), ECF No. 154–3. Univar's challenges to the factual foundation of Dr. McFarland's opinion concerning the 2007 and 2008 entries are addressed *infra*.

facts associated with HTC "are consistent with companies in Taiwan" operating in the informal economy. Def.'s Mem. at 30; DSOF ¶ 38; PCSOF ¶ 38.

Conflicting evidence concerning the origin of the 2007 and 2008 entries precludes entry of summary judgment in Univar's favor. As a starting point, Univar reported to the FDA that the address of Univar's saccharin manufacturer was 19 Lane 142 Wen Chu Road 4FL Tso Ying Dist. Kaohsiung, Taiwan. *See* Dep. Ex. 215 (Univar email discussing FDA registration); Chang Dep. 58:3–59:12. The address that Rabbi Grunberg visited in March 2005 to inspect the plant of Univar's saccharin manufacturer for purposes of certifying the plant as kosher was also located in "Tso Ying Dist, Kaohsiung, Taiwan." Rabbi Grunberg Inspection Report. Agent Tsui observed that the building located on "Wun Cih Road, Kaoshiung City, Taiwan" was a residential apartment building; he "did not observe any manufacturing, industrial activity, or distribution at this location or its vicinity." Tsui Aff. ¶¶ 15, 16. Although the spelling of the street name varied, evidence suggests that the street name has been Romanized in various ways. *See* Tsui Dep. 114:9–116:10.

Next, Taiwan requires a saccharin manufacturing license if the sodium saccharin is used as a food additive, DSOF ¶ 33; PCSOF ¶ 33, and in the years 2007 and 2008, the Ministry of Health and Welfare did not issue any licenses for the manufacture of sodium saccharin, DSOF ¶ 34; Pan Aff. Univar promoted its saccharin as a food additive, *see* Dep. Ex. 314 at Univar_065703, and saccharin was "an important food product," for the company, Biggs Dep. at 43:20–44:4. While Univar argues that the Government has failed to establish that Taiwan required a manufacturing license when saccharin was being produced in Taiwan for food use in a foreign country, the Director of the Food and Safety Division of Taiwan's Food and Drug Administration that submitted the affidavit concerning Taiwan's licensing requirements unconditionally stated that "[s]ingle food additive production in Taiwan must be licensed." Pan Aff. To the extent there is any ambiguity in this unconditional statement, "[w]hen ruling on a motion for summary judgment, . . . all justifiable inferences are to be drawn in the nonmovant's favor." *Netscape Comm.'s*, 295 F.3d at 1319.

Further, relevant to the 2007 and 2008 entries, Dr. McFarland opined that: (1) "Taiwan had substantial saccharin imports from China and minimal saccharin imports from any other country;"[37] (2) "Taiwan had little or no domestic production of saccharin;" and (3) "by

[37] 97.8 percent of all of Taiwan's 2007 saccharin imports and 99.7 percent of all of its 2008 imports were from China. McFarland Report at 4 Table 1.

a process of elimination, the saccharin in question likely was in fact produced in China." Suppl. DSOF ¶ 1; Suppl. PCSOF ¶ 1.

Univar challenges the factual foundation of Dr. McFarland's conclusion that Taiwan had little or no domestic production of saccharin. Def.'s Suppl. Mem. at 4–5 (quoting *In re Nexium (Esomeprazole) Antitrust Litig.*, 42 F. Supp. 3d 231, 248 (D. Mass. 2014), *aff'd,* 842 F.3d 34 (1st Cir. 2016) ("[E]xpert testimony without . . . a factual foundation cannot defeat a motion for summary judgment."). Univar argues that "no reasonable juror would give any weight" to Dr. McFarland's assessment of the evidence upon which he relied, or the conclusions that he reached. Def.'s Suppl. Mem. at 3–9. Univar's challenges, however, are unpersuasive and go to the weight, rather than sufficiency of the evidence. *See* Def.'s Suppl. Mem. at 4–8 (challenging Dr. McFarland's interpretation of certain evidence, for example, or inviting the court to consider possible bias behind witness statements that Dr. McFarland considered). The court may not weigh the evidence or assess the credibility of witnesses at this summary judgment stage.[38] *See Anderson*, 477 U.S. at 249, 255. Dr. McFarland considered Taiwan's import and export statistics,[39] Taiwan's licensing requirements for the manufacture of saccharin, the possibility of illegal saccharin production in Taiwan, and the possibility that HTC produced the saccharin at issue.[40] Suppl. DSOF ¶¶ 2, 3, 25; Suppl.

[38] The court notes, however, that while Dr. McFarland articulated several reasons for his conclusion, two reasons provided were that "[a] document in evidence indicates there are [no saccharin producers in Taiwan]" and "the [U.S. International Trade Commission ("ITC")] was unable to identify a producer of saccharin in Taiwan." Suppl. DSOF ¶ 2; Suppl. PCSOF ¶ 2. Univar asserts that the referenced document and the ITC report concerned information related to production of saccharin in Taiwan in years other than 2007 and 2008. Def.'s Suppl. Mem. at 4–5. While Univar's complaints concerning those individual sources informing Dr. McFarland's opinion are accurate in that the referenced document pertained to Taiwanese production in 2010 and the ITC report pertained to production in 2009 through 2014, Def.'s Suppl. Mem. at 4–5, Pl.'s Resp. to Def.'s Suppl. Mem. at 5, Dr. McFarland's opinion was not founded exclusively on those sources.

[39] Taiwan's imports of saccharin were consistently greater than its exports: in 2007, Taiwan imported 817,886 kilograms ("kg") of saccharin and exported 398,320 kg, while in 2008, it imported 862,328 kg and exported 680,899 kg. McFarland Report at 14 Table 6. In both years, 99 percent of Taiwan's exports were to the United States. McFarland Report at 15, Table 7.

[40] Dr. McFarland also considered the possibility that saccharin in the unfinished form was imported from Japan into Taiwan and then converted to sodium saccharin in Taiwan. McFarland Report at 3; *see also* Pl.'s Opp'n at 5 (arguing that Mr. Huang's representation to Mr. Biggs that he converted Japanese acid saccharin into sodium saccharin in Taiwan was false) (citing Dep. Exs. 314, 315) (production process flow chart listing Sei Cheng Chemical Co. (Japan) as the supplier of acid saccharin). In his opinion, Taiwanese import data "discredit[ed] that explanation" because Taiwan had "[o]nly minimal amounts" of saccharin imports from Japan. McFarland Report at 3 (explaining that 98.8 percent of Taiwanese imports "of all forms of saccharin" came from China). Univar argues that Dr. McFarland relied on a "faulty assumption" that Mr. Huang claimed he imported *all* of his acid saccharin from Japan. Def.'s Reply at 3. It contends that Mr. Huang's "reliance on Japanese suppliers for saccharin acid was 'very small,'" and only "when 'product quantity

PCSOF ¶¶ 2, 3, 25. Thus, when viewing the collective evidence that Dr. McFarland considered, the court cannot conclude that his opinion lacks factual foundation.

There is evidence that one saccharin producer, HTC, was producing saccharin in Taiwan, albeit without a license, for its use as a food additive. Mr. Ritell visited the HTC plant in 2004 to observe the plant's manufacturing process. DSOF ¶¶ 20, 21; PCSOF ¶¶ 20, 21. During this visit, which lasted an entire day, Mr. Ritell witnessed "a chemical reaction in the kettles," "saw some packaging going on," "saw the raw material warehouse," and saw the then-current stock of product. DSOF ¶ 22; PCSOF ¶ 22. According to Mr. Ritell, he had previously visited saccharin plants, and he had "[n]o doubt" that "it was an actual saccharin[] factory" that he visited. DSOF ¶ 23; PCSOF ¶ 23; Ritell Dep. at 29:10–12. Mr. Ritell visited the HTC plant again in "2008 or 2009" for a "yearly meeting" that lasted "[h]alf a day," and did not "notice anything different about the [saccharin] production facility" during that visit. DSOF ¶¶ 20, 24; PCSOF ¶¶ 20, 24 (alterations in original); Ritell Dep. at 30:12. Additionally, as stated previously, two government employees, Mr. Raval and Agent Tsui, who toured the HTC factory in 2010, concluded that saccharin was being manufactured at HTC. DSOF ¶¶ 27, 29; PCSOF ¶ 27, 29. During this visit, the "plant manager admitted" to Agent Tsui that HTC was "in violation of local fire and environmental regulations" but that it was "still successfully producing saccharin." DSOF ¶ 39; PCSOF ¶ 39. "[T]he facts associated with [HTC] are consistent with companies in Taiwan that operate without a manufacturing license because they are facts that suggest that a company is operating partly or wholly in the informal economy." DSOF ¶ 38; PCSOF ¶ 38.

Although HTC was producing some saccharin in Taiwan during the relevant time period, there is conflicting evidence on whether HTC produced the saccharin that Univar imported.[41] Mr. Ritell, whose

demanded by the market [was] large.'" *Id.* (quoting Def.'s Resp. to PCSOF ¶ 203). However, although Mr. Huang claimed in November 4, 2004 that he imports only "very small" quantities of acid saccharin from Japan that he later converts to sodium saccharin in Taiwan, his purported suppliers listed in that fax were Aisan Chemicals Ltd. and Fuji Chemicals Ltd. Huang Nov. 2004 Fax; *see also* Def.'s Resp. to PCSOF ¶ 203. This claim was contradicted by his claim in the production process flow chart, listing Sei Cheng Chemical Co. as his supplier, which was adopted by Univar in its kosher certification application. *See* Dep. Exs. 314, 315.

[41] The evidence also is unclear as to whether Univar itself considered LH Trading as its "Chinese" saccharin supplier. *See* PCSOF ¶ 239; Def's Resp. to PCSOF ¶ 239. Plaintiff relies on an email from a Univar employee to Mr. Biggs that contains as an attachment "a letter [that was] composed by Legal." Pl.'s Opp'n at 19; Dep. Ex. 277. The letter, which was composed on June 1, 2007, states: "Recently, there have been requests for documentation on the use of melamine in Chinese food ingredients. In response, Univar has requested and received documentation from Chinese suppliers that suggests that the following FDA regulated products listed below do not contain Melamine." Dep. Ex. 277 at Univar_012958.

company was a customer of HTC, testified as to his personal knowledge of HTC's annual production of saccharin, and the degree to which Rit-Chem and HTC's other customer were responsible for that production amount. Specifically, Mr. Ritell testified that HTC's annual production capacity was "300 to 500 tons per year." Ritell Dep. 72:6–11. HTC's largest customer "was a Taiwan electric plating industry," and Rit-Chem purchased HTC's "excess volume," which peaked at "220 tons." *Id.* 72:12–16, 73:3–7; *see also* Dep. Ex. 297 (Univar's European affiliate's 2007 inspection of HTC's factory, noting that in 2007 HTC "was only producing" 100 metric tons of saccharin per year and that its main purpose was to produce for the Taiwanese market).

Univar contends that to the extent the court considers exhibit 297, "the evidence establishes that HTC did sell its saccharin within the domestic market – to Mr. William Huang." Def.'s Resp. to PCSOF ¶ 202; Def.'s Reply at 13–14. Univar relies on Mr. Huang's responses to the court's letter rogatory as proof. Mr. Huang testified before a district court in Taiwan that "[t]he country of origin of the saccharin sold by [LH Trading] to Univar was indeed Taiwan" and the saccharin was manufactured at a "plant located on Qinan Road." Def.'s Mem., Attach. 30 (Certified Translation of Confidential Letter Rogatory Resp. of Mr. Huang) ("Huang Letter Rogatory") at 7, ECF No. 143–5. The plant that Mr. Biggs toured in 2004 was the plant located on Qinan Road. DSOF ¶ 17; PCSOF ¶ 17; PCSOF ¶ 190; Def.'s Resp. to PCSOF ¶ 190. However, despite the uncontroverted fact that the only plant located on Qinan Road was owned by HTC, DSOF ¶ 17; PCSOF ¶ 17, Mr. Huang also testified in the same proceeding that that he did not have a business relationship with HTC:

> Judge: Are you familiar with the company known as 'High Trans Corporation'?
>
> Witness: I don't know this company.
>
> Judge: When I use the term 'HTC,' I am referring to 'High Trans Corporation.' Do you understand that?
>
> Witness: I am not familiar with this company.
>
> Judge: HTC once had a contract with Lung Huang Trading, is that correct?
>
> Witness: No, it didn't have a contract with Lung Huang Trading.

The letter lists sodium saccharin as a product produced by LH Trading. *Id.* Univar correctly asserts that this exhibit "does not indicate if this alleged list of 'Chinese suppliers' encompasses suppliers from the People's Republic of China, Republic of China ('Taiwan') or both." Def's Resp. to PCSOF ¶ 239.

Huang Letter Rogatory at 14. Univar attributes Mr. Huang's latter testimony to a translation issue, and asserts that HTC operated under different names, which may have been the cause of confusion in Mr. Huang's testimony. *See* Def.'s Resp. to PCSOF ¶ 202; Def.'s Reply at 2, 14. Univar's assertion is undermined by the fact that during another portion of Mr. Huang's testimony, he indicated he knew of HTC:

> Judge: Between July 2007 and 2012, did HTC own the saccharin plant that you showed to Thomas Biggs of Univar, in 2004?
>
> Witness: No, HTC was a new company at the time, and I didn't buy saccharin from it.

Huang Letter Rogatory 30 at 4–5.

In sum, conflicting evidence concerning the origin of the 2007 and 2008 entries precludes entry of summary judgment in Univar's favor. The court may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See Anderson*, 477 U.S. at 249, 255; *Netscape Comm.'s*, 295 F.3d at 1319. Because the court must weight evidence in favor of the non-movant, Univar's motion with respect to those entries will be denied. As to these entries, the Government has proffered enough evidence supporting its case such that "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson*, 477 U.S. at 252. For that reason, Univar's motion for summary judgment with respect to these entries will be denied.

2. The Presence of Disputed Facts Precludes Summary Judgment with Respect to the 2009–2012 Entries

In addition to the above evidence relating to the 2007 to 2008 entries, the Government relies on the Taiwan Customs Tables as "tantamount to DNA evidence" of Univar's wrongdoing. Pl.'s Opp'n at 3. One table purports to show 20 shipments of saccharin imported into Taiwan from China by LH Chemical from 2009 to 2011, and a second table purports to show 16 shipments of saccharin exported from Taiwan to the United States by LH Trading from 2009 to 2012. *See* Taiwan Customs Tables. The Government alleges that Mr. Huang imported the saccharin from China into Taiwan through LH Chemical, and exported same to the United States through LH Trading. Pl.'s Opp'n at 4–5.

Among the information included in the import table is that related to the "date of import declaration," "Taiwanese buyer," "commodity description" (i.e., mesh sizes), "quantity," and "weight." *See* Taiwan Customs Tables at ECF p. 5. Likewise, the export table includes information for "date of export declaration," U.S. buyer, "Taiwanese exporter," "commodity description," "quantity," and "weight." *Id.* at ECF p. 6. The Government contends that the 16 entries into the United States from 2009 to 2012 "'correspond' to shipments of saccharin from China to Taiwan." DSOF ¶ 52; PCSOF ¶ 52. There is, however, conflicting evidence on whether these entries truly "correspond."

First, the parties dispute whether Mr. Huang was the president of both LH Chemical and LH Trading. *See* PCSOF ¶ 186; Def.'s Resp. to PCSOF ¶ 186. In response to the letter rogatory, Mr. Huang testified that LH Chemical and LH Trading are not the same companies and he has "nothing to do with LH Chemical." Huang Letter Rogatory at 2–3, 7. However, several of Univar's internal documents and documents presented to the FDA and the Orthodox Union indicate that Mr. Huang was the president of LH Chemical or that LH Chemical was the manufacturer of the saccharin that Univar purchased from Mr. Huang. *See, e.g.*, Dep. Exs. 214, 215, 314; *see also* Chang Dep. 58:19–59:9 (identifying LH Trading as the supplier of Univar's saccharin, and LH Chemical as the manufacturer); DSOF ¶ 124 (citing Biggs. Dep. 115:25–116:13) (where Mr. Biggs identified "Long Hwang Chemical" as "William Huang's saccharin plant").

In addition, the parties disagree on whether the "mesh sizes" in the tables correspond to the actual sizes shipped. *See* DSOF ¶¶ 70–71, 76–79; PCSOF ¶ ¶¶ 7071, 76–79. While the Taiwan Customs Tables show some differences in mesh sizes between imports and exports, such differences may be explained by nothing more than inaccuracies, as demonstrated by evidence of customer complaints to Univar about receiving mislabeled saccharin. *See* PCSOF ¶ 231; Biggs Dep. 213:5–23; Dep. Ex. 165.

In sum, the court's inquiry is to determine whether "there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. Based on the evidence presented, the court finds that whether Univar misrepresented the country of origin with respect to the 2009–2012 entries is an issue requiring submission to the jury.

C. Culpability

1. Univar Has Not Established that it Acted with Reasonable Care

As discussed above, pursuant to the statutory negligence provision of § 1592, Customs has the burden to show that a materially false statement or omission occurred in order to shift to the Defendant the burden to establish affirmatively that it "exercised reasonable care under the circumstances." *Ford Motor Co*., 463 F.3d at 1279; 19 U.S.C. § 1592(e)(4). Univar has not established that it acted with reasonable care under the circumstances.

There is no genuine dispute that after Commerce issued the antidumping duty order, Mr. Biggs consulted the World Wide Directory of Chemical Producers to search for non-Chinese manufacturers [of saccharin]. DSOF ¶ 139; PCSOF ¶ 139; Def.'s Mem. at 18. As of October 2003, Univar had located Mr. Huang, DSOF ¶ 140; PCSOF ¶ 140; *see also* PCSOF ¶ 191; Dep. Ex. 288 at UNIVAR_013664–013665, and began the process of approving LH Trading/LH Chemical as a supplier, PCSOF ¶ 195; Dep. Ex. 179. Univar registered these companies with the FDA and provided the physical address of these companies to the federal agency. *See* Dep. Ex. 215; Chang Dep. 58:3–59:12. When Mr. Biggs subsequently visited Mr. Huang in April 2004, to "inspect[]" the "new supplier," the factory he toured was located at an address different than that provided to the FDA. *See* DSFO ¶ 124; PCSOF ¶¶ 124, 185, 189–90; Def.'s Resp. to PCSOF ¶¶ 185, 189–90. Mr. Huang informed Mr. Biggs that he owned the factory that Mr. Biggs toured, PCSOF ¶ 187; Def.'s Resp. to PCSOF ¶ 187; however, the factory was owned by HTC, PCSOF ¶ 190; Def.'s Resp. to PCSOF ¶ 190.

Shortly after Univar began importing the saccharin it purchased from Mr. Huang, Univar received notice from a U.S. producer, PMC, that it believed Mr. Huang was not producing saccharin, but importing Chinese product and relabeling it. PCSOF ¶ 205; Pl.'s Attach. 1 at Univar_066462. Univar requested from Mr. Huang "any proof . . . to kill this question." PCSOF ¶ 205; Pl.'s Attach. 1 at Univar_066462. Mr. Huang's response suggested that Mr. Biggs's visit to the factory in 2004 was "good proof." PCSOF ¶ 206; Pl.'s Attach. 1 at Univar_011207.

Sometime in late 2004, Univar provided a sample of the saccharin it purchased from Mr. Huang to PMC for testing. PCSOF ¶ 209; Dep. Ex. 310; *see also* DSOF ¶ 158 (citing Biggs. Dep. 150:3–5). After conducting the lab tests, PMC informed Univar that it was "99.99 [percent] convinced" that the saccharin originated in China, not Tai-

wan. PCSOF ¶ 209; Dep. Ex. 310 at Univar_011211. There is no evidence that Univar took any affirmative steps to investigate this claim. *Cf.* DSOF ¶ 98; PCSOF ¶ 98 (Mr. Biggs "distrusted PMC's claim" because Univar commonly encountered U.S.-based companies that had a "false" "understanding of what was going on in China").

In September 2004, Pepsi, a Univar customer, asked Univar whether Mr. Huang's factory was purchasing "the base product from China." PCSOF ¶ 208; Dep. Ex. 317 at Univar_066447; *see also* Compl. ¶ 16; Answer ¶ 16 (establishing that Pepsi is a Univar customer). The following month, Univar requested confirmation from Mr. Huang regarding the origin of the "original saccharin molecule" used in the production of acid saccharin. PCSOF ¶ 210; Dep. Ex. 311. This communication from Univar to Mr. Huang (through Mr. Chin) suggested what the "the 'best' answer" should be: "that no raw materials originating from China were used in the production of the acid saccharin." Dep. Ex. 311. Mr. Huang's response on the following month, November 2004, indicated that Mr. Huang sourced his acid saccharin from two Japanese producers. Huang Nov. 2004 Fax. "Univar knew it had an affirmative duty to ensure the source of its imports," DSOF ¶ 157; PCSOF ¶ 157; however, it never contacted any of Mr. Huang's purported suppliers to verify the accuracy of Mr. Huang's statements, PCSOF ¶ 214; Def.'s Resp. to PCSOF ¶ 214.

In April 2006, Mr. Biggs received yet another communication from a Univar colleague informing him that it was "mentioned via a competitor that rumor has it that . . . Univar has already been buying Chinese material." PCSOF ¶ 216; Dep. Ex. 322; Biggs Dep. 182:9–1:16, 183:6–12. Mr. Biggs did not take any steps to investigate this claim. *Cf.* Biggs Dep. 183:14–22 (his reaction to this email was to "chuckl[e]"; he believed "there was a history of bad-unreliable information from this buyer"). The following year, Univar received a similar notice. See PCSOF ¶ 217; Dep. Ex. 323 at Univar_012851 (January 2007 notice from customer that heard Univar was purchasing "product that is actually manufactured in China then shipped to Taiwan and then repackaged and marked as manufactured in Taiwan").

In November 2008, Mr. Lombard, who owned a company that was assisting Univar in selling excess saccharin inventory, warned Univar that the Taiwan saccharin was in fact Chinese product. *See* PCOF ¶ 218; Dep. Ex. 259 at Univar_014646. Mr. Lombard made those statements on "information supplied by . . . PMC as well as information that [he] could or could not find on the internet about manufac-

turing of [s]odium [s]accharin in Taiwan." DSOF ¶¶ 111–13; PCSOF ¶¶ 111–13 (alteration in original). It appears that Univar continued to rely on Mr. Huang's assertions without conducting further inquiry. *See* PCSOF ¶ 218; Dep. Ex. 325 (fax from Mr. Huang to Mr. Biggs stating: "we told you the truth," and "we absolutely have not imported Chinese made saccharin acid . . . please don't worry") (capitalization omitted).

Around this time frame, Rabbi Talmid from the Orthodox Union flew to Taiwan three times to inspect the saccharin factory so that the Orthodox Union could continue to certify it as kosher. *See* Talmid Dep. 53:1–68:13; Biggs Dep. 218:6–9, 219:12–220:4. Univar was aware that between 2007 and 2012, the Orthodox Union was unable to inspect Mr. Huang's factory. Biggs Dep. 218:6–9, 219:12–220:4. Mr. Biggs testified that he was aware the Orthodox Union "was having trouble gaining access to Mr. Huang's facility in Taiwan" and "[did not] recall [the Orthodox Union] reporting other incidents like that." Biggs Dep. at 220:3–4.

On February 2, 2010, ICE informed Univar that the company was under investigation for "possible transshipment of saccharin manufactured in [China] in order to avoid payment/deposit of anti-dumping duties associated with the commodity." PCSOF ¶ 220; Dep. Ex. 12 at Univar_065600. Nonetheless, after receipt of the ICE letter, Univar continued importing saccharin purchased from Mr. Huang for more than two years. PCSOF ¶ 220; DSCOF ¶ 220. Even in light of the repeated rumors and warnings it received and the Orthodox Union's inability to access the plant, Univar did not seek to visit Mr. Huang's purported factory until 2012, after the company learned of the investigation involving the entries at issue. PCSOF ¶ 223; Def.'s Resp. to PCSOF ¶ 223; *see also* DSOF ¶ 151; PCSOF ¶ 151.

Univar relies on its receipt of a certificate of origin from the Kaohsiung Yuan City Chamber of Commerce for each of the 36 entries as demonstrating that it exercised reasonable care. However, the Kaohsiung Yuan City Chamber of Commerce issues the certificates of origin as "a routine business activity," DSOF ¶ 132; PCSOF ¶ 132, upon receipt of an application by an exporter and "on the basis that the customs declaration information is verified to be correct," Chamber of Commerce Test. ¶ 4. There is no indication that the Kaohsiung Yuan City Chamber of Commerce independently scrutinizes exporters' facilities.

Univar also relies on its receipt of kosher certifications from 2005 to 2012 by the Orthodox Union as demonstrating that it acted with reasonable care. Def.'s Mem. at 38, 40. While the Orthodox Union testified in this proceeding that it "take[s] its certification process

seriously" and would "[n]ot knowingly . . . certify a product as kosher if the requirements of Jewish religious law are not met," DSOF ¶ 116; PCSOF ¶ 116 (alteration in original), it also continuously certified Mr. Huang's plant as kosher despite an inability to inspect the factory on at least three occasions, *see* Talmid Dep. 53:168:13; Biggs Dep. 218:6–9, 219:12–220:4; DSOF ¶ 145; PCSOF ¶ 145. In order to recertify a product as kosher, the Orthodox Union requires annual inspection of the production facility. Talmid Dep. 60:9–15; *see also id.* 58:21–59:1.

Univar further points to the facts that it provided PMC a sample of its saccharin for lab testing and later participated in a "mock audit," which concluded that Univar is a "good importer" with a culture of compliance. Def.'s Mem. at 38–39. However, Univar appears to have taken no action when PMC suggested that its lab results indicated the saccharin was of Chinese origin, and it is unclear to what extent Univar's saccharin practices were the focus of the mock audit.

Univar asserts that Mr. Biggs's conclusion in 2004 that the factory he toured produced saccharin aligns with that of Univar's chemistry expert, Dr. Chyall, who reviewed Mr. Biggs's factory tour photos and determined that "the chemical factory visited by Mr. Biggs in 2004 is capable of producing saccharin sodium and acid saccharin." *Id.* at 37 (quoting DSOF ¶ 125). While that may be true, in light of the foregoing discussion, Univar's failure to revisit its 2004 conclusion that its saccharin was coming from Taiwan could be found to be a failure to exercise reasonable care by the jury.[42]

2. Whether the Government Can Establish Univar Acted with Gross Negligence is a Triable Issue

As previously discussed, establishing gross negligence requires Plaintiff to prove that Univar acted "with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B(C)(2); *see also Ford Motor Co*., 463 F.3d at 1292 ("An importer is guilty of gross negligence if it behaved willfully, wantonly,

[42] Evidence indicates that Univar's actions may have been motivated by a financial incentive. In 2008, the market experienced a shortage of sodium saccharin. Biggs Dep. 198:1–5; *see also*PCSOF ¶ 241; Def.'s Resp. to PCSOF ¶ 241. In April 2008, Univar expressed that "the shortage has obviously been good for Univar." PCSOF ¶ 242; Dep. Ex. 328 at Univar 068865; *see also* PCSOF ¶ 245; Dep. Ex. 306 at Univar_006796 ("Due to the very rapidly increasing pricing, this volume now translates for Univar to a $30 million/[year] business!"), Univar_006794 (establishing date of document). By the end of 2008, the price of saccharin had dropped, although it is unclear at what rate. *See* Def's Resp. to PCSOF ¶¶ 241–43; Def.'s Reply, Attach. 71 (David Hansen Dep.) 40:7–41:21, 43:8–44:11, ECF No. 161–3.

or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care.").

The undisputed facts establish that "Univar knew that it had an affirmative duty to ensure the source of its imports." DSOF ¶ 157; PCSOF ¶ 157. Because of this uncontroverted fact, Univar asserts that the Government is unable to establish that Univar failed to ascertain its "statutory obligations" with regard to the antidumping duty order or reporting the proper country of origin. Def.'s Mem. at 41–42 (emphasis omitted) (citation omitted). However, Plaintiff has presented sufficient evidence in the form of Univar's limited follow-up on questions about the origin of its saccharin after Mr. Biggs's 2004 visit to HTC's plant, which could lead a reasonable jury to find by a preponderance of the evidence that Univar was indifferent to or disregarded its statutory obligations, and therefore acted with gross negligence. *See supra* Discussion III.C.1; 19 C.F.R. Pt. 171, App. B(C)(2); *Ford Motor Co*., 463 F.3d at 1292.

IV. Alleged Procedural Violations

Univar argues that the Government's penalty claims should be dismissed for failure to comply with the statutory obligations pursuant to § 1592(b)(2). Def.'s Mem. at 42–44. Univar asserts that the Government failed to meet the requirements of §1592(b)(2) when, after reviewing Univar's petition for mitigation, it determined, that "'the penalty notice does not include the material facts supporting CBP's allegation[s]' of Chinese origin and gross negligence." *Id.* at 43 (alteration in original) (quoting DSOF ¶¶ 171–73). According to Univar, at that point, CBP should have issued a decision setting "forth the final determination," rather than remanding the case to CBP headquarters. *Id.* (emphasis omitted) (citing *United States v. Tip Top Pants, Inc.*, 34 CIT 1020, 1027 (2010)). The Government contends that the obligation to end the § 1592 proceeding was not triggered when CBP reached the partial decision, and Univar points to no evidence "that CBP had concluded that there was no violation." Pl.'s Opp'n at 27–28.

If, after issuance of the pre-penalty notice and consideration of any representations by the person concerned, "the Customs Service determines that there was a violation [of 19 U.S.C. § 1592(a)], it shall issue a written penalty claim to such person." 19 U.S.C. § 1592(b)(2). Thereafter, the interested person may file a petition to mitigate the penalty. *See* 19 U.S.C. § 1618 (CBP "may remit or mitigate the [penalty] upon such terms and conditions as he deems reasonable and just"). "At the conclusion of any proceeding under [19 U.S.C. § 1618],

the Customs Service shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based." 19 U.S.C § 1592(b)(2). Customs regulations further provide that, "[i]f a petition for relief relates to a violation of section[] 592 . . ., the petitioner will be provided with a written statement setting forth the decision on the matter and the findings of fact and conclusions of law upon which the decision is based." 19 C.F.R. § 171.21.

"On October 1, 2014, CBP issued its penalty notice." DSOF ¶ 169; PCSOF ¶ 169. On October 31, 2014, Univar submitted its petition for relief, DSOF ¶ 171; PCSOF ¶ 171, pursuant to 19 U.S.C. § 1618. CBP Headquarters reviewed Univar's petition for relief and "provided a 'partial decision,'" asserting that "the penalty notice [did] not include the material facts supporting CBP's allegation that the saccharin was of Chinese origin and supporting a degree of culpability of gross negligence." DSOF ¶¶ 172, 173; PCSOF ¶¶ 172, 173. Thus, CBP Headquarters denied without prejudice Univar's petition for relief and remanded the case back to the CBP office "to issue an amended penalty notice that includes the material facts supporting CBP's allegation that the saccharin was of Chinese origin and supporting a degree of culpability of gross negligence." DSOF ¶ 174; PCSOF ¶ 174.

CBP's partial denial of Univar's petition did not conclude the proceeding under 19 U.S.C. § 1618. *See* 19 U.S.C. § 1618 (noting CBP's option to "order discontinuance of any prosecution relating" to a fine or penalty incurred "without willful negligence . . . or intention . . . to defraud the revenue or to violate the law," or in circumstances when CBP "finds the existence of such mitigating circumstances as to justify the remission or mitigation of [the penalty]"). Instead, CBP Headquarters requested an amended penalty notice containing the factual information "supporting CBP's allegation that the saccharin was of Chinese origin and supporting a degree of culpability of gross negligence." DSOF ¶ 174; PCSOF ¶ 174. On February 10, 2015, CBP issued an amended penalty notice to Univar. DSOF ¶ 175; PCSOF ¶ 175.

Defendant's reliance on *Tip Top* is inapposite. *Tip Top's* holding is dependent on Customs, in that case, having conceded that its allegation in the penalty notice was not a violation of section 1592. *Tip Top,* 34 CIT at 1027. The *Tip Top*court reasoned, "[a]t that point, [CBP] was required to set forth the decision on the matter, . . . including in particular the negative conclusion of law it had reached, in the written statement required by [19 U.S.C. § 1592(b)(2)], thus bringing to an end the proceeding under such [§] 1618 to which [19 U.S.C. §

1592(b)(2)] refers." *Id.* at 1027 (citations omitted) (internal quotation marks omitted).

CBP made no such non-violation determination in this case. Instead, it issued a partial decision denying, without prejudice, Univar's petition for relief and remanded the case to CBP with instructions to issue an amended penalty notice that includes the material facts supporting the allegations. CBP maintained that Univar violated § 1592 throughout and provided additional material facts to support that conclusion. *Cf.* 19 U.S.C. § 1592(b)(2) ("If the Customs Service determines that there was a violation, it shall issue a written penalty claim to such person.") Accordingly, Univar's claims of procedural violations by CBP are without merit.

CONCLUSION AND ORDER

For the foregoing reasons, Univar's motion for summary judgment will be denied. Accordingly, it is hereby

ORDERED that Defendant Univar USA Inc.'s motion for summary judgment (ECF No. 143) is **DENIED** ; it is further

ORDERED that no later than November 28, 2018, the parties shall file, via CM/ECF, a proposed Pretrial Order, substantially in the form of Standard Chambers Form 1–1 (SCP 1–1), including all Schedules provided for therein.

Dated: November 13, 2018
New York, New York

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

Slip Op. 18–160

ZHONGCE RUBBER GROUP COMPANY LIMITED, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00082

[Granting Defendant's Motion to Dismiss.]

Dated: November 20, 2018

Gregory S. Menegaz, *Alexandra H. Salzman*, *James K. Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff Zhongce Rubber Group Company Limited.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, 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, of Washington, D.C.

OPINION

Choe-Groves, Judge:

Plaintiff Zhongce Rubber Group Company Limited ("Zhongce") brings this action pursuant to 28 U.S.C. § 1581(c) (2012), contesting the application of adverse facts available ("AFA") by the U.S. Department of Commerce ("Commerce") in calculating the rate applied to Zhongce during an administrative review of the countervailing duty order on passenger vehicle and light truck tires from the People's Republic of China. Plaintiff argues that Commerce's application of AFA is unsupported by substantial evidence and that the "all others" rate should apply to Zhongce.

Before the court is the Motion to Dismiss filed by Defendant United States. *See* Def.'s Mot. Dismiss, July 27, 2018, ECF No. 17 ("Def.'s Mot."). Defendant requests that the court dismiss the action for failure to state a claim upon which relief can be granted under USCIT Rule 12(b)(6). *See id.* at 1. Plaintiff submitted a response in opposition to Defendant's motion. *See* Resp. Opp'n Mot. Dismiss, Aug. 30, 2018, ECF No. 18 ("Zhongce's Br."). For the following reasons, the court grants Defendant's motion.

PROCEDURAL HISTORY

Commerce conducted an administrative review of the countervailing duty order on passenger vehicle and light truck tires, concluding that the application of AFA was warranted in selecting a rate for Zhongce. *See Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 83 Fed. Reg. 11,694, 11,694 (Dep't Commerce Mar. 16, 2018) (final results of countervailing duty administrative review; 2014– 2015); *see also* Decision Memorandum for the Final Results of the Administrative Review of the Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China; 2014–2015, at 1, C-570–017, (Mar. 9, 2018), *available at* https://enforcement.trade.gov/frn/summary/prc/2018–05377–1.pdf (last visited Nov. 15, 2018). During the review, Zhongce submitted a no shipment certification on November 14, 2016. Decision Memorandum for the Preliminary Results of the Administrative Review of the Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China; 2014–2015 at 25, C-570–017, (Aug. 31, 2017), *available at* https://enforcement.trade.gov/frn/summary/prc/2017–18997–1.pdf (last visited Nov. 15, 2018). After Commerce placed U.S. Customs & Border Protection data on

the record, Zhongce reported shipping $15,000,000 of in-scope tires during the period of review in response to Commerce's May 31, 2017 questionnaire, rather than zero shipments. *Id.* Zhongce submitted an explanation for this discrepancy on July 5, 2017, stating that the employee preparing the submission thought Zhongce only had to report sales that were shipped during the period of review. *See* Compl. ¶ 18, Apr. 18, 2018, ECF No. 7. In actuality, the company had several sales that shipped prior to and entered during the period of review, in addition to sales that both shipped and entered during the period of review. *See id.* Commerce rejected the explanatory submission as unsolicited and untimely. *See id.* at ¶ 20. Zhongce initiated this action. *See id.* This court granted a statutory injunction upon consent on April 18, 2018. *See* Order Statutory Inj. Consent, Apr. 18, 2018, ECF No. 9.

ANALYSIS

Defendant moves to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to USCIT Rule 12(b)(6) and 28 U.S.C. § 2637(d). *See* Def.'s Mot. 1. Defendant argues also that Zhongce was not entitled to a statutory injunction because it failed to follow the procedures for obtaining an injunction, and an injunction is not appropriate because Zhongce failed to exhaust its administrative remedies. *See id.* at 12–13.

Section 2637(d) provides that the court shall, where appropriate, require the exhaustion of administrative remedies. 28 U.S.C. § 2637(d). The Court of Appeals for the Federal Circuit has stated that the language of section 2637(d) indicates a congressional intent that, absent a strong contrary reason, parties should exhaust their remedies before the pertinent administrative agencies. *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (citation omitted). Exhaustion allows agencies to apply their expertise, rectify administrative mistakes, and compile records adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency. *See Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1375, 452 F. Supp. 2d 1344, 1374–1375 (2006).

This Court recognizes certain exceptions to the exhaustion doctrine, including: (1) where raising the claim is futile and (2) where the question is one of pure law and does not require further factual development. *See Qingdao Maycarrier Imp. Exp. Co. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1335, 1345 (2013). The futility exception is a narrow one that requires a party to demonstrate that exhaustion would require it to go through obviously useless motions in

order to preserve its rights. *See Aluminum Extrusion Fair Trade Comm. v. United States*, 37 CIT __, ___, 938 F. Supp. 2d 1337, 1341 (2013). The pure law exception applies when (1) plaintiff raises a new argument; (2) this argument is of a purely legal nature; (3) the inquiry requires neither further agency involvement nor additional fact finding or opening up the record; and (4) the inquiry neither creates undue delay nor causes expenditure of scarce party time and resources. *See Consol. Bearings Co. v. United States*, 25 CIT 546, 553–554, 166 F. Supp. 2d 580, 587 (2001).

Commerce's regulations require a challenger to Commerce's countervailing duty determinations to submit a case brief to Commerce that must contain all arguments that the challenger deems relevant to the Secretary's final results, including any arguments presented before the date of publication of the preliminary results. *See* 19 C.F.R. § 351.309(c)(2) (2018); *see also Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

In this case, Zhongce failed to submit a case brief challenging Commerce's preliminary results, and instead waited to challenge Commerce's decision before this court. Zhongce contends that a full briefing on the merits is necessary before this court can decide whether Zhongce failed to exhaust its administrative remedies, and that the court's consideration of exhaustion at this stage is premature. *See* Zhongce's Br. 1–2. Zhongce admits that it did not file a case brief when Commerce applied total AFA to Zhongce in the preliminary results. *See id.* at 5. Because Zhongce failed to follow Commerce's requirements, this court disagrees that a full briefing on the merits is necessary to decide if Zhongce failed to exhaust its administrative remedies.

Zhongce argues that this court should not dismiss for failure to exhaust because the futility exception to the exhaustion doctrine applies. *See id.* Zhongce contends that because Commerce rejected Zhongce's initial brief as untimely, resubmitting the same facts would have been "an exercise in useless formality." *See id.* Commerce rejected Zhongce's brief originally because it was unsolicited and untimely pursuant to 19 C.F.R. § 351.302(d). *See* Rejection of Submission, PD 335, bar code 3593129–01 (July 13, 2017). Commerce's rejection of Zhongce's supplemental brief as untimely and unsolicited does not mean that Commerce would have rejected a brief containing the same arguments after Commerce issued the preliminary results. Commerce's regulations required Zhongce procedurally to submit a case brief with all arguments necessary to the final results. *See* 19 C.F.R. § 351.309(c)(2). Because the case brief would not have been an

obviously useless motion and was required in the administrative proceeding, the court concludes that the futility exception does not apply.

Zhongce contends also that the pure law exception to the exhaustion doctrine applies because the question of whether Commerce can apply AFA to Zhongce can be decided based only on two facts: (1) Zhongce filed a no shipment certification, and (2) Zhongce corrected its submission later. *See* Zhongce's Br. 6. Whether Commerce can apply AFA is a highly factual question based on the record evidence. Because this decision is not purely legal, the court finds that the pure law exception does not apply. The court concludes that Plaintiff should have exhausted its administrative remedies prior to filing its action, and this case is dismissed.

Defendant's argument that Zhongce was not entitled to a statutory injunction is moot.

CONCLUSION

For the aforementioned reasons, Defendant's Motion to Dismiss is granted. Judgment will be entered accordingly.

Dated: November 20, 2018
New York, New York

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

Slip Op. 18–161

NORTHERN TOOL & EQUIPMENT COMPANY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 14–00146

[Cross-motions for judgment on challenge to denial of protest over rate of antidumping duties assessed by U.S. Customs and Border Protection; judgment for the defendant.]

Decided: November 23, 2018

David P. Sanders and *Jonathan M. Zielinski*, Cassidy Levy KenW (USA) LLP, of Washington,DC, for the plaintiff. Also on the brief was *Katherine C. Thornton*, consultant.

Hardeep K. Josan, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. Also on the brief were *Chad A. Readler*, Acting Assistant Attorney General and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Paula S. Smith*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Musgrave, Senior Judge:

This action challenges the denial of a protest to Customs and Border Protection ("CBP") on the amount of antidumping ("AD") duties determined owing on hand trucks imported from the People's Republic of China ("PRC"). The parties cross-move for judgment pursuant to USCIT Rule 56. For the following reasons, judgment must be entered in favor of the defendant.

I. *Background*

In AD duty cases involving a non-market economy, AD duties are assessed based upon the rate assigned to the exporter. In the process of that determination, the U.S. Department of Commerce, International Trade Administration ("Commerce" or "DOC"), employs a rebuttable presumption that all exporters or producers operating within a non-market economy are subject to state control, and all producers and exporters that do not rebut that presumption are assigned the non-market economy rate. *See*, *e.g.*, *Michael Stores, Inc. v. United States*, 766 F.3d 1388, 1390 (Fed. Cir. 2014). The PRC's status as a non-market economy did not change during the proceeding at bar.

When non-market economy merchandise is exported by an exporter from a market economy third country, the applicable rate is that of the non-market economy supplier. *See Transcom, Inc. v. United States*, 24 CIT 1253, 121 F. Supp. 2d 690 (2000). The purpose of this is to ensure that high-rate suppliers do not funnel their products through market economy exporters and to ensure that market economy resellers "bear the consequences" of using non-market economy suppliers. 24 CIT at 1269, 121 F. Supp. 2d at 705.

In 2004, Commerce issued an amended affirmative final determination as part of an AD investigation of unfair pricing of hand trucks from the PRC. *See Amended Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof From the PRC*, 69 Fed. Reg. 65410 (Nov. 12, 2004); *see also Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the PRC*, 69 Fed. Reg. 60980 (Oct. 14, 2004). During the investigation, Commerce determined Qindao Taifa Group Co., Ltd. ("Taifa"), among other respondents, eligible for a rate separate from that of the PRC entity. 69 Fed. Reg. at 60981–82. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Hand Trucks and Certain Parts Thereof From the PRC*, 69 Fed. Reg. 29509, 29511 (May 24,

2004). The ultimate AD duty order instructed CBP to require cash deposits for PRC hand trucks produced or exported by Taifa equal to the specific weighted-average antidumping duty margin of 26.49 percent. *See Notice of AD Duty Order: Hand Trucks and Certain Parts Thereof From the People's Republic of China*, 69 Fed. Reg. 70122, 70123 (Dec. 2, 2004) ("Order"). The order instructed the cash deposit rate for the PRC-wide entity as 383.60 percent. *Id*.

When appropriate, interested parties may request an administrative review of the cash deposit rate and assessment. The triggering of a review suspends liquidation for all entries subject to an antidumping duty order until the conclusion thereof, whereupon Commerce will instruct CBP to assess antidumping duties on the merchandise through liquidation instructions. CBP's role in that process is ministerial, *i.e.*, following Commerce's instructions when assessing antidumping duties. *See Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1993).

Commerce published the final results of the AD administrative review for the period from December 1, 2007 to November 30, 2008 ("POR"), which covers the entries at issue in this case, in May 2010. *See Hand Trucks and Certain Parts Thereof from the PRC: Final Results of AD Duty Administrative Review*, 75 Fed. Reg. 29314 (May 25, 2010). No party requested administrative review of Taifa for the period in question. *See id.*

During the POR, the plaintiff Northern Tool & Equipment Company ("Northern Tool") had imported hand trucks from the PRC via eight entries. *See* Amended Compl. at ¶11; Amended Ans. at ¶11. Northern Tool negotiated the purchase of the hand trucks with ITI Co., Ltd. ("ITI"), a Western Samoa corporation headquartered in Hsi-Chih, Taipei, Taiwan ("ITI (Taiwan)"). ITI (Taiwan) relied on what may or may not have been a related-party purchasing agent, Intradin Co., Ltd. ("Intradin") in order to "coordinate" the sourcing of the hand trucks from Taifa. Regardless, during the relevant period ITI had an office in Shanghai ("ITI (Shangai)"), as did Intradin, and neither had established an AD duty rate separate from that of the PRC-wide entity.

Northern Tool identified Taifa as the manufacturer of the hand trucks on the entry documents and posted a cash deposit with CBP based upon Taifa's rate of 26.49%. More precisely, the *pro forma* invoices are on the letterhead of ITI (Shanghai), are signed by ITI Co., Ltd. as the "seller," name Northern Tool as the "buyer," and indicate the terms of sale as "FOB Chinese port (Qingdao)," "FOB Shanghai (Incoterms 2000)," or "FOB Chinese port (Shanghai)." Taifa is not

named on the *pro forma* invoices or on the sea waybills but is identified as the manufacturer of the subject hand trucks on the commercial invoices. The commercial invoices and packing lists presented at entry are on the letterhead of ITI (Shanghai). Title to the goods at issue in this case transferred to Northern Tool in the PRC. *See generally*, *e.g.*, Def's Statement of Undisputed Material Facts ¶¶ 10–12, 14–19 (citations omitted).

After publishing the final review results for the POR, Commerce issued two liquidation instructions. The first, which the port followed, stated:

> For all shipments of hand trucks and parts thereof from the . . . [PRC] exported by the PRC-wide entity (A-570–891–000) entered, or withdrawn from warehouses, for consumption during the period 12/01/2007 through 11/30/2008, assess an antidumping liability equal to 383.60 percent of the entered value, except for those exported by Qindao Taifa Group Co., Ltd. or Since Hardware (Guangzhou) Co., Ltd.

Message No. 0161304 (June 10, 2010), Pl's Ex. N. The second liquidation instruction stated:

> For all shipments of hand trucks and parts thereof from the . . . [PRC] exported by the firms listed below and entered, or withdrawn from warehouse, for consumption during the period 12/01/2007 through 07/27/2008, assess an antidumping liability equal to the cash deposit or bonding rate at the time of entry.
>
> Exporter
> Qindao Taifa Group Co., Ltd. (aka Qingdao Taifa Group Import & Export Co., Ltd)

Message No. 0166303 (June 15, 2010), Pl's Ex. O.

The port followed the first instruction. CBP found in August 2010 that Taifa was the producer but not the exporter of the hand tucks and assessed antidumping duties at the PRC-wide entity rate on Northern Tool's entries. *See* Notice of Action (CBP Form 29 dated 08/13/10), Pl's Ex. D. Northern Tool protested that assessment in November 2010, arguing that the duty rate deposited at entry was the proper rate. CBP denied Northern Tool's protest, as explained by Headquarters Ruling Letter H152586 (Dec. 20, 2013), Pl's Ex. H:

> The port determined the former instruction to be applicable because while the hand trucks were produced by Taifa, they were not exported by Taifa, but by ITI (Shanghai). The port relied upon the sales documents and two previous inquiries with Commerce that sought a clarification of which instruction was applicable on similarly situated entries, where Taifa was the

manufacturer, but not the exporter. Commerce stated in both instances that if there is no separate rate for the exporter, than the PRC-wide rate applied. Because ITI (Shanghai) did not have a separate rate, CBP applied the PRC-wide of 383.60 percent.

II. *Discussion*

Northern Tool argues this case concerns the denial of its protest to CBP; that it fulfilled the prerequisites of 28 U.S.C. §2637(a); that jurisdiction here is proper under 28 U.S.C. §1581(a); and that *de novo* review is therefore appropriate. *See* 28 U.S.C. § 2640(a)(1). On the merits, Northern Tool contends the "exporter" for purposes of the assessment of AD duties in this instance is ITI (Taiwan), not ITI (Shanghai), and that ITI (Taiwan) is a "third country exporter" not subject to the PRC-wide entity rate. Alternatively, Northern Tool contends that if the court finds the exporter not to be ITI (Taiwan), then Taifa is the exporter under the so-called "knowledge test" employed by Commerce because Taifa knew that the hand trucks were being sold to Northern Tool through ITI/Intradin and the hand trucks were shipped directly from Taifa's factory in the PRC to Northern Tool in the United States.

The defendant's cross-motion for judgment argues the court does not possess jurisdiction. It contends: that CBP's role in effectuating Commerce's liquidation instructions was merely ministerial; that CBP was only required to determine whether Taifa was the exporter for the entries at issue, and the only possible protestable decision by CBP that can be challenged under section 1581(a) on the case is CBP's factual finding that Taifa was not the exporter; that Northern Tool's (initial) argument admits this fact; that Taifa was not identified as the exporter on the commercial documents; that the two legal claims Northern Tool advances for why the rate assigned to Taifa should apply to its entries should not be heard because both relate to decisions that would have to have been made, if at all, by Commerce and incorporated into that agency's instructions to CBP; that Customs made no decision on whether Taifa knew that the hand trucks it sold were destined for the United States (*see, e.g.*, Pl. Br. at 18–19 — "CBP made no finding of whether Taifa had knowledge that its merchandise was destined for the United States"; H152586 at 6 — CBP declining to apply the knowledge test, recognizing that such a test is conducted by Commerce and that Commerce made no reference to the test in its instructions); and thus there is no protestable decision by CBP before the court under 28 U.S.C. §1581(a) of the type enumerated by 19 U.S.C. §1514. Def's Br. ay 6–10; Def's Reply at 5. *See Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir.

1994); *see also Corrpro Companies, Inc. v. United States*, 433 F.3d 1360, 1365 (Fed. Cir. 2006) ("the existence of a protestable decision of the type enumerated in 19 U.S.C. § 1514 is a condition precedent for jurisdiction to lie in the Court of International Trade under section 1581(a)"), quoting *Xerox v. United States*, 423 F.3d 1356, 1365 (Fed. Cir. 2005).

The court disagrees that it does not possess jurisdiction to review whether CBP *correctly* applied Commerce's liquidation instructions with respect to Northern Tool's entries. *See infra*. CBP will only permit further review of protests that are "valid," *see* 19 C.F.R. 174.26(a), and it acknowledged that Northern Tool's protest was valid by accepting Northern Tool's request for further review, stating explicitly "inasmuch as Northern Tool protests the liquidation, *i.e.*, disputes the application byCBP of Commerce's liquidation instructions, this matter is protestable." CBP still had to then consider factual data in order to determine which of the two instructions was to be applied.

CBP assessed the facts before it, addressed Northern Tool's claims, and reached a legal conclusion regarding how to apply the liquidation instructions in its denial of Northern Tool's protest. These included the findings that: (1) ITI (Taiwan) was not the exporter because it was not the invoicing party, (2) Taifa was not the exporter because it did not appear in any of the sales documents between Northern Tool and ITI (Shanghai), (3) a company's headquarters does not determine the exporter of the sale, (4) Northern Tool's payments were made to a bank in Shanghai; and (5) ITI (Taiwan)'s listing as the exporter in the sea waybill is not determinative of which entity is the exporter. All of these legal and factual findings led CBP to conclude that "ITI (Shanghai) was the company that purchased the hand trucks from Taifa, owned the merchandise, and then sold it to Northern Tool. Based on the provided documents, we determine that for purposes of this entry, ITI (Shanghai) was the exporter of the hand trucks." H152586 at 7.

In its brief contesting CBP's conclusion as to the exporter, Northern Tool points to two other protests involving the same AD order, period of review, liquidation instructions, and merchandise, and on those protests CBP granted the appeals. *See* HQ H155957 (Mar. 29, 2013); HQ H192395 (Jan. 6, 2014). While CBP rulings are to be accorded a measure of deference in proportion to their "power to persuade", *United States v. Mead Corp*., 533 U.S. 218, 235 (2001), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and both HQ H155957 and HQ H192395 might appear persuasive insofar as both rulings concerned exporters located in Hong Kong, and therefore a stronger argument might be made for an exporter located in Taiwan, the court

does not perceive clear error in CBP's analysis and consideration of the commercial documents that support its finding of ITA (Shanghai) as the exporter of Northern Tool's entries, as articulated in HQ H152586.

Northern Tool's papers proceed to argue otherwise, but the remainder thereof veer into territory controlled by the defendant's jurisdictional contention, to wit, that Northern Tool could have pressed the arguments on "third country exporter" and "knowledge test" to Commerce by requesting an administrative review and to challenge any determination by Commerce that it believed to be incorrect under 28 U.S.C. §1581(c). *See* 19 C.F.R. § 351.213(b)(3) (providing that an importer of the merchandise may request a review of an exporter or producer of the subject merchandise imported by that importer). The defendant characterizes that Northern Tool "improperly" sought such a determination from CBP and now "improperly" invokes the court's jurisdiction under 28 U.S.C. § 1581(a). Def's Br. at 10–11, referencing *Certain Frozen WarmwaterShrimp From the People's Republic of China: Final Results of Administrative Review; 2011–2012*, 78 Fed. Reg. 56,209 (Sep. 12, 2013) (finding that Hilltop, an entity who claimed to be a "Hong Kong exporter," failed to rebut the presumption that it and its PRC affiliates were free from government control and, thus, entitled to a separate rate); Pl's Ex. F (Inquiry No. 6009) (Commerce explaining that Taifa having prior knowledge that merchandise was destined for the United States "could be most pertinent to Commerce" but would not be relevant for determining the correct rate for assessment purposes). In other words, the defendant contends, Northern Tool did not avail itself of 28 U.S.C. §1581(c) recourse and should not be permitted to circumvent that process by action here under section 1581(a).

Ultimately, on the facts presented, the court must agree with the defendant insofar as 28 U.S.C. §1581(a) jurisdiction does not lie over what Northern Tool is seeking here: to establish that ITI was not a PRC exporter and that the relevant entries should not be subject to the PRC-wide entity rate. "[I]t is for Commerce to make such a determination, not CBP in its ministerial role." Def's Br. at 10. It is also plain from the correspondences between CBP and Commerce that the ultimate decision of which instruction applied to a particular circumstance rested with Commerce. *See* Pl's Exs F, G. And Northern Tool's own briefing appears to acknowledge the heavy hand of Commerce in determining the entity that is the exporter for antidumping duty purposes. *See* Pl. Br. at 10 ("when determining which entity is the exporter, CBP and Commerce do not make the decision based solely on which entity shipped the merchandise or issued the in-

voice"), 12 ("CBP and Commerce identify exporter by analyzing . . . which entity negotiates the price"), and 15 ("this reliance contradicts CBP's and Commerce's practice for determining which entity is the exporter").

Nonetheless, as above indicated the court has concluded that jurisdiction over the matter does lie, albeit not pursuant to 28 U.S.C. §1581 subsection (a) but pursuant to subsection (i)(4) concerning the "administration and enforcement" of the unfair trade laws. 28 U.S.C. § 2640(e) directs the court to evaluate 28 U.S.C. §1581(i) cases under the standards set forth in the Administrative Procedure Act, 5 U.S.C. §706. The only relevant standard thereof would be the arbitrary and capricious standard of subsection 706(2)(A). Under that standard, the court cannot conclude CBP's "decision making," upon which Northern Tool purports to base the denial of its protest on the implementation of Commerce's liquidation instructions, to have been arbitrary or capricious. Northern Tools arguments and evidence are, at best, only a different interpretation of what CBP concluded on the case, but the record evidence CBP iterates in support of its position, and its conclusion on the identity of the "exporter," is sufficient to satisfy the APA "rational" standard, *i.e.*, CBP has not "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

III. *Conclusion*

In accordance with the foregoing, judgment will be entered for the defendant.

So ordered.

Dated: November 23, 2018
New York, New York

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

Slip Op. 18–162

NEW MEXICO GARLIC GROWERS COALITION AND EL BOSQUE FARM, Plaintiffs, QINGDAO TIANTAIXING FOOD CO., LTD., Consolidated Plaintiff, and SHANDONG JINXIANG ZHENGYANG IMPORT & EXPORT CO., LTD. and JINING ALPHA FOOD CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and ZHENGZHOU HARMONI SPICE CO., LTD., HARMONI INTERNATIONAL SPICE, INC., FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY AND COMPANY, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 17–00146

[Sustaining the U.S. Department of Commerce's final results and partial rescission of the 21st administrative review of the antidumping duty order on fresh garlic from the People's Republic of China.]

Dated: November 26, 2018

Robert T. Hume, Hume & Associates LLC, of Taos, NM, argued for Plaintiffs New Mexico Garlic Growers Coalition and El Bosque Farm.

Yingchao Xiao, Lee & Xiao, of San Marino, CA, argued for Consolidated Plaintiff Qingdao Tiantaixing Foods Co., Ltd.

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington, DC, argued for Plaintiff-Intervenors Shandong Jinxiang Zhengyang Import & Export Co., Ltd. and Jining Alpha Food Co., Ltd. With him on the brief were *Gregory S. Menegaz*, *J. Kevin Horgan*, and *Alexandra H. Salzman*.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Ned H. Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, NY, argued for Defendant-Intervenors Zhengzhou Harmoni Spice Co., Ltd. and Harmoni International Spice Inc. With him on the brief were *Bruce M. Mitchell*, *Alan G. Lebowitz*, *Jordan C. Kahn*, and *Jamie L. Maguire*.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenor Fresh Garlic Producers Association. With him on the brief were *John M. Herrmann* and *Joshua R. Morey*.

OPINION

Barnett, Judge:

In this consolidated action, Plaintiffs New Mexico Garlic Growers Coalition and El Bosque Farms (collectively "NMGGC"), Consolidated Plaintiff, Qingdao Tiantaixing Foods Co., Ltd. ("QTF"), and Plaintiff-Intervenors, Shandong Jinxiang Zhengyang Import & Export Co., Ltd. ("Zhengyang") and Jining Alpha Food Co., Ltd. ("Alpha") (together with Zhengyang, "separate rate respondents"), challenge the

U.S. Department of Commerce's ("Commerce" or the "agency") final results and partial rescission of the 21st administrative review ("AR 21") of the antidumping duty order on fresh garlic from the People's Republic of China ("PRC" or "China"). *See Fresh Garlic from the People's Republic of China*, 82 Fed. Reg. 27,230 (Dep't Commerce June 14, 2017) (final results and partial rescission of the 21st antidumping duty admin. review; 2014–2015) ("*Final Results*"), ECF No. 23–5, and accompanying Issues and Decision Mem., A-570–831 (June 7, 2017) ("I&D Mem."), ECF No. 23–6.[1] For the reasons discussed below, the *Final Results* are sustained.

BACKGROUND

In 1994, Commerce issued an order imposing antidumping duties on fresh garlic from the PRC. *See Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59,209 (Dep't of Commerce Nov. 16, 1994) (*AD Order*). Commerce calculated a weighted-average duty margin for the PRC-wide entity of 376.67 percent. *AD Order*, 59 Fed. Reg. at 59,210.

In November 2015, Commerce published a notice informing interested parties of the opportunity to request an administrative review of the *AD Order* for the period of review ("POR") November 1, 2014, through October 31, 2015. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*; *Opportunity to Req. Admin. Review*, 80 Fed. Reg 67,706, 67,707 (Dep't Commerce Nov. 3, 2015). In response, Commerce received requests from multiple entities; three of those entities, Zhengzhou Harmoni Spice Co., Ltd. ("Harmoni"), Fresh Garlic Producers Association and its individual members (collectively, "FGPA"),[2] and NMGGC, requested a review of Harmoni. *See* Req. for Admin. Review of the Antidumping Duty Order on Fresh Garlic from the PRC (Nov. 30, 2015), PR 6, CJA Vol. I, PJA Vol. I; Pet'rs' Review Req.; Req. for Antidumping Review of Zhenghou [sic] Harmoni Spice Co., Ltd. and Affiliates (Nov. 28, 2015) ("NMGGC Review Req."), PR 4, CJA Vol. I, PJA Vol. I; Respondent Selection

[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 23–2, and a Confidential Administrative Record ("CR"), ECF Nos. 23–3, 23–4. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF Nos. 82 (Vol. I), 82–1 (Vol. II), 82–2 (Vol. III), 82–3 (Vol. IV); Confidential J.A. ("CJA"), ECF Nos. 83 (Vol. I), 81–1 (Vol. II), 81–2 (Vol. III), 81–3 (Vol. IV). The court references the confidential versions of the relevant record documents, if applicable, throughout this opinion, unless otherwise specified.

[2] The Fresh Garlic Producers Association and its individual members (Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.) are Defendant-Intervenors in this case. *See* Pet'rs' Reqs. for Admin. Review (Nov. 30, 2015) ("Pet'rs' Review Req.") at 1 n.1, PR 7, CJA Vol. I, PJA Vol. I; Order (July 3, 2017), ECF No. 21 (granting motion to intervene).

Mem. (March 1, 2016) ("Selection Mem.") at 2, CR 15, PR 47, CJA Vol. I, PJA Vol. I (noting that the agency received requests for review of 44 Chinese exporters).

Commerce initiated AR 21 on January 7, 2016. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 736 (Dep't Commerce Jan. 7, 2016) ("*Initiation Notice*"). Due to the large number of producers and exporters involved, Commerce selected Harmoni and QTF, the two producers and exporters "with the largest volume of imports of subject merchandise during the POR," as mandatory respondents.[3] Selection Mem. at 4. After Commerce initiated AR 21 but before it published its preliminary results, FGPA and Harmoni withdrew their review requests with respect to Harmoni. Harmoni Withdrawal of Review Req. (Mar. 4, 2016), PR 49, CJA Vol. I PJA Vol. I; Pet'rs' Withdrawal of Certain Reqs. for Admin. Review (Mar. 11, 2016), PR 71, CJA Vol. I, PJA Vol. I.

Commerce published its preliminary results on December 9, 2016. *Fresh Garlic from the People's Republic of China*, 81 Fed. Reg. 89,050 (Dep't Commerce Dec. 9, 2016) (prelim. results and partial rescission of the 21st antidumping duty admin. review; 2014–2015), PR 401, CJA Vol. IV, PJA Vol. IV, and accompanying Decision Mem., A570–831 (Dec. 5, 2016) ("Prelim. Mem."), PR 389, CJA Vol. III, PJA Vol. III. Commerce preliminarily determined that QTF timely submitted a separate rate certification and demonstrated its eligibility for a separate rate. Prelim. Mem. at 2 & n.9 (citation omitted); *id.* at 13. Commerce found, however, that QTF failed to cooperate to the best of its ability and significantly impeded the proceeding because it provided false or incomplete information regarding its affiliations. *Id.* at 10–11, 17. The agency used facts available with an adverse inference (referred to as "adverse facts available" or "AFA") to find that QTF and four other companies should be collapsed into a single entity, termed the "QTF-entity." *Id.* at 17. Using AFA, Commerce assigned the QTF-entity a rate of $4.71 per kilogram, which was the highest margin on the record of this proceeding.[4] *Id.*

Commerce likewise found that Harmoni withheld information requested by the agency, failed to provide information within the es-

[3] Generally, the agency must determine an individual weighted-average dumping margin for each known exporter and producer of the merchandise under review. 19 U.S.C. § 1677f-1(c)(1). However, if it is not practicable to do so because of the large number of exporters or producers involved, the agency 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." 19 U.S.C. § 1677f1(c)(2)(B).

[4] At the time of the instant review, the PRC-wide entity rate was $4.71 per kilogram. Prelim. Mem. at 14 & n. 66 (citing *Fresh Garlic from the People's Republic of China*, 80 Fed. Reg. 34,141, 34,142 (Dep't Commerce June 15, 2015) (final results and partial rescission of the 19th antidumping duty admin. review; 2012–2013).

tablished deadlines, and significantly impeded the proceeding. *Id.* at 16. Commerce determined that Harmoni was not eligible for a separate rate, and considered Harmoni part of the PRC-wide entity. *Id.* at 16–17.

Commerce issued its final results in June 2017. *See Final Results*; I&D Mem. Commerce continued to find that QTF provided false or incomplete information regarding its affiliations and failed to act to the best of its ability. I&D Mem. at 31. Commerce found that QTF was affiliated with two additional entities beyond the four addressed in the preliminary results, including Hebei Golden Bird Trading Co., Ltd. ("Golden Bird"). *Id.* Commerce determined that some of the six companies with which QTF was affiliated were part of the PRC-wide entity and, therefore, denied the QTF-entity a separate rate, finding that it was part of the PRC-wide entity and subject to the China-wide rate of $4.71 per kilogram. *Id.* at 30–36, 37. Commerce rescinded the review of Harmoni because it found that NMGGC's review request—the only remaining review request with respect to Harmoni—"was illegitimate *ab initio*."[5] *Id.* at 18.

Before the court, QTF and the separate rate respondents challenge Commerce's decisions to collapse QTF with six other entities, deny it a separate rate, and apply to QTF the PRC-wide rate. *See generally* Consol. Pl. Mem. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. ("QTF Br."), ECF No. 38; Pl.'s Reply Br. ("QTF Reply"), ECF No. 64; Pl.-Int. Shandong Jinxiang Zhengyang Import & Export Co., Ltd. et al.'s Rule 56.2 Mot. for J. Upon the Agency R., ECF No. 36, and Mem. of Law in Supp. of Mot. for J. Upon the Agency R. ("Z&A Br."), ECF No. 36–1. NMGGC challenges Commerce's decision to rescind its review of Harmoni. *See generally* Mot. of Pls. New Mexico Garlic Growers Coalition and El Bosque Farm for J. on the Agency R. and Revised Mem. in Supp. of the Mot. of Pls. New Mexico Garlic Growers Coalition and El Bosque Farm for J. on the Agency R. ("NMGGC Br."), ECF No. 42. The court heard oral argument on September 25, 2018. *See* Docket Entry, ECF No. 86; Oral Arg. Tr., ECF No. 89.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930,[6] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012), and 28 U.S.C. § 1581(c). The court will uphold an agency determina-

[5] Further factual background is provided below.

[6] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the United States Code are to the 2012 edition, except that citations to 19 U.S.C. § 1677e are to the 2016 edition, which reflects amendments to § 1677e pursuant to the Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). The TPEA amendments affect all antidumping determinations made on or

tion that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. QTF's and the Separate Rate Respondents' Motions

A. Relevant Legal Framework

1. Separate Rate Status in Non-Market Economy Proceedings

In antidumping duty proceedings involving a nonmarket economy country, such as China, "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). A respondent may rebut that presumption and obtain a "separate" antidumping duty rate by demonstrating the absence of both *de jure* (in law) and *de facto* (in fact) government control over its export activities. *See id.* at 1353.

An entity wishing to secure a separate rate must submit to the agency a separate rate application or, for an entity who received a separate rate in the most recent segment of the proceeding, a certification that the entity continues to meet the criteria for obtaining a separate rate. *Initiation Notice*, 81 Fed. Reg. at 737. Commerce may disregard a respondent's separate rate submission when the agency determines that the information submitted is unreliable. *See, e.g., Ad Hoc Shrimp,* 802 F.3d at 1355–57*; Jiangsu Changbao Steel Tube Co. Ltd. v. United States*, 36 CIT __, __, 884 F. Supp. 2d 1295, 1309–1310 (2012). In that circumstance, Commerce continues to rely on the presumption of government control and use the country-wide rate for the named respondent. *See Jiangsu Changbao Steel Tube*, 884 F. Supp. 2d at 1303. However, "Commerce's determination that a party is not entitled to a separate rate because its separate rate information is unreliable must be based on substantial evidence." *Fresh Garlic Producers Ass'n v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1313, 1328 (2015) (citation omitted).

2. Collapsing

The antidumping duty statute does not address the consequences of finding that two or more entities are affiliated when calculating the

after August 6, 2015, and, therefore, apply to this proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793 (Dep't Commerce Aug. 6, 2015).

dumping margin. *Jinko Solar Co., Ltd. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1333, 1344 (2017) (citing 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677b(a)). Rather, Commerce has promulgated regulations that treat closely related companies as a single entity (a process referred to as "collapsing") for purposes of the dumping inquiry. *See* 19 C.F.R. § 351.401(f). Specifically, the regulations provide that Commerce

> will treat two or more affiliated producers as a single entity [when] those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the [agency] concludes that there is a significant potential for the manipulation of price or production.

Id. § 351.401(f)(1). When assessing whether there is "significant potential for manipulation," Commerce considers relevant factors including, but not limited to:

> (i) The level of common ownership;
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Id. § 351.401(f)(2).

3. Facts Available and Adverse Facts Available

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a). Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[7]

[7] Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e. Section 1677m(d) provides the procedures Commerce must follow when a party files a deficient submission. *See id.* § 1677m(d).

Id. § 1677e(b). Commerce uses total adverse facts available when "none of the reported data is reliable or usable," such as when all of the "submitted data exhibit[s] pervasive and persistent deficiencies that cut across all aspects of the data." *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citation omitted).

Commerce employs adverse inferences to "ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 ("SAA").[8] Commerce determines whether a party has acted to the "best of its ability" by assessing whether that party "has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce may apply an adverse inference "under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made." *Id.*

B. Relevant Facts

After QTF submitted a separate rate certification, Commerce issued a questionnaire to the company. *See* Prelim. Mem. at 2 & n.9 (citation omitted); Req. for Information (Mar. 7, 2016) ("Initial QTF Questionnaire"), PR 52, CJA Vol. I, PJA Vol. I. Section A of the questionnaire requested information regarding QTF's corporate structure and disclosure of any affiliations with other Chinese garlic entities. Initial QTF Questionnaire at A-1—A-2, A-5—A-6. In response, QTF stated that it "has no relationship with any other producers or exporters" of fresh garlic from the PRC, and it "does not share any managers or owners with any other entity." SAQR in 21st Antidumping Admin. Review filed on Behalf of QTF (Apr. 1, 2016) ("QTF Initial Sec. A Resp.") at A-3, CR 48, PR 98, CJA Vol. II, PJA Vol. II. It also asserted that it "does not have any affiliated producers of the merchandise under consideration." *Id.* at A-13.

Following QTF's responses and before the preliminary results, FGPA alleged that QTF had misreported its affiliations. *See* Comments on Deficiencies in QTF's Initial Questionnaire Resps. (May 12, 2016) ("Pet'rs' Deficiency Cmts."), CR 81, PR 175, CJA Vol. III, PJA Vol. III. Relying on affidavits of three different individuals claiming personal knowledge of the allegations, FGPA alleged that an indi-

[8] 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).

vidual named Wenxuan Bai ("Mr. Bai"), and his immediate family members and a business partner named Roupeng Wang ("Mr. Wang"), own or control a number of Chinese garlic exporters or producers, including QTF and Golden Bird.[9] *Id.* at 5–6. They alleged that Mr. Wang also was the "founder of Huamei [Consulting] and [Robert] Hume's Chinese co-counsel."[10] *Id.* at 6 (citation omitted). FGPA further alleged that QTF shipped fresh garlic to the United States in packages that identified Golden Bird as the processor. *Id.* at 8. Based on these allegations, FGPA urged the agency to issue a supplemental questionnaire requiring that QTF address the deficiencies in its Section A responses. *Id.* at 15.

Commerce issued a supplemental questionnaire to QTF on August 12, 2016, asking numerous questions related to QTF's possible affiliation with other entities, including Golden Bird and Mr. Bai. Second Suppl. Questionnaire to QTF (Aug. 12, 2016) ("QTF 2nd Suppl. Questionnaire"), CR 109, PR 301, CJA Vol. III, PJA Vol. III. QTF denied any connection to Mr. Bai or Golden Bird and denied having exported any "fresh garlic that was processed or packaged by Golden Bird." Resp. to Second Suppl. Questionnaire (Sept. 6, 2016) ("QTF's Second Suppl. Resp.") at 1, CR 114, PR 325, CJA Vol. III, PJA Vol. III. Notwithstanding its assertion that it had no connection to Mr. Bai, QTF acknowledged that Mr. Bai is the brother of QTF's legal representative at that time, Leiwen Bai. *Id.*

In its preliminary results, Commerce explained that it had discovered, through publicly available documents, that QTF was affiliated with four Chinese entities—Qingdao Tianhefeng Foods Co., Ltd. ("QTHF"), an agricultural processor; Qingdao Beixing Trading Co., Ltd. ("QBT"), a garlic trading company; QXF, a garlic producer subject to AR 21; and Lianghe, another garlic producer subject to the review.[11] Prelim. Mem. at 10–11. Commerce found that these companies were affiliated by way of common control by a single family—the

[9] The other named companies were Qingdao Xintianfeng Food Co., Ltd. ("QXF") and Qingdao Lianghe International Trade Co., Ltd. ("Lianghe"). Pet'rs' Deficiency Cmts. at 5–6.

[10] "Huamei Consulting is a Chinese consulting firm [that was] working with several Chinese garlic exporters, including QTF and Golden Bird." I&D Mem. at 8. Huamei Consulting also worked with Hume & Associates LLC ("Hume & Associates"), Robert T. Hume's law firm. *Id.* Mr. Hume initially represented QTF in this review, but later withdrew his representation of QTF and represented NMGGC for the remainder of the review. *See* Entry of Appearance and Appl. for Admin. Protective Order on behalf of QTF (Jan. 12, 2016), PR 23, CJA Vol. I, PJA Vol. I; I&D Mem. at 7; Letter from Hume & Associates LLC to Secretary of Commerce Pertaining to QTF Withdrawal as Councel [sic] to QTF (June 22, 2016), PR 220, ECF No. 23–2.

[11] The publicly available documents that Commerce reviewed were reports from China's State Administration of Industry and Commerce's National Credit Information System pertaining to the individual entities. *See* Prelim. Mem. at 10–11 & nn.43, 45–48 (citations omitted); QTF Affiliation Docs. (Dec. 5, 2016) ("Affiliation Docs."), PR 394, CJA Vol. IV, PJA Vol. IV.

Bai family. *Id.* at 11. Based on this information, Commerce determined that QTF provided false and incomplete information regarding its affiliations, significantly impeded the proceeding, and failed to cooperate to the best of its ability; therefore, the agency used adverse facts available to preliminarily determine that QTF, QXF, QTHF, QBT, and Lianghe "should be collapsed into a single entity," the QTF-entity. *Id.* at 17.

In the *Final Results*, Commerce revised its findings and included Golden Bird and Huamei Consulting in the group of affiliated companies referred to as the QTF-entity. I&D Mem. at 31. Moreover, Commerce found that the QTF-entity included companies that were not eligible for separate rates and, on that basis, determined that the QTF-entity was part of the PRC-wide entity. *Id.* at 34–35. Consequently, based on "total AFA," the agency continued to collapse the QTF-entity, declined to use any of the other information QTF reported in its Section A response, and found the QTF entity to be part of the PRC-wide entity and subject to the China-wide rate. *Id.* at 32–36.

C. Parties' Arguments

QTF and the separate rate respondents challenge Commerce's decisions to apply an adverse inference and to collapse the QTF entity. *See generally* QTF Br.; QTF Reply; Z&A Br. at 7–8. In particular, they argue that QTF's failure to provide the requested information was due to inadvertence and misunderstanding;[12] Commerce failed to comply with 19 U.S.C. § 1677m(d) because the agency did not provide QTF with an opportunity to cure its deficient responses; and Commerce's collapsing determination failed to comply with 19 C.F.R. 351.401(f) because the agency did not make a finding, supported by substantial evidence, that there is a "significant potential for manipulation" by the QTF-entity. QTF Br. at 7–8, 11–13, 15–21, 23–26; Z&A Br. at 7–11. QTF also contends that Commerce's selection of the China-wide rate as an adverse inference is overly punitive and runs counter to the fundamental principles of equity and fairness in antidumping duty proceedings. *See* QTF Br. at 19–20.

The Government and FGPA argue that Commerce's finding that QTF submitted false and incomplete information is supported by substantial evidence, and the agency's issuance of the supplemental questionnaire provided QTF an opportunity to correct the deficiencies

[12] Zhengyang and Alpha argue that "QTF fully answered each question," and Commerce failed to "show that QTF's failure involved anything more than inadvertence." Z&A Br. at 2, 8.

in its initial Section A response.[13] Confidential Def.'s Opp'n to Pls.', Consol. Pl.'s and Pl.-Ints.' Rule 56.2 Mots. For J. on the Agency R. ("Gov. Resp.") at 16–21, ECF No. 60; FGPA's Resp. in Opp'n to Pls.' Mots. For J. on the Agency R. ("FGPA Resp.") at 41–42, ECF No. 49. The Government and FGPA further contend that Commerce properly found QTF to be part of the PRC-wide entity. Gov. Resp. at 25–26; FGPA Resp. 42–43. According to the Government, QTF impeded Commerce's ability to conduct the collapsing analysis because it withheld affiliation information that is integral to that analysis; therefore, Commerce properly based its collapsing determination on AFA. *Id.* at 25. Likewise, without the affiliation information, QTF's separate rate information was unreliable and, combined with the finding of affiliation with other companies not entitled to separate rates, the agency's denial of a separate rate to the entire QTF-entity was supported by substantial evidence. *Id.* at 26–28.

D. Analysis

1. Commerce's Application of Adverse Facts Available is Supported by Substantial Evidence on the Record And is Otherwise in Accordance with Law

Substantial evidence supports Commerce's finding that QTF provided false or incomplete information regarding its affiliations. Section A of Commerce's questionnaire instructed QTF to identify all affiliated companies. Initial QTF Questionnaire at A-2, A-6. The Glossary of Terms appended to the questionnaire defined affiliated persons as including "members of a family," and "an officer or director of an organization and that organization." *Id.*, App. I. The Glossary also referenced the statutory and regulatory provisions for the definition of "affiliated" or "affiliated persons." *Id.*, App. I. (citing 19 U.S.C. § 1677(33); 19 C.F.R. § 351.02(b)). Both the statutory and regulatory provisions include members of a family and officers or directors of an organization within the definition of affiliated persons. *See* 19 U.S.C. § 1677(33)(A)-(B); 19 C.F.R. § 351.02(b).

QTF responded that it was not affiliated with any other exporters or producers of fresh garlic from the PRC. QTF Initial Sec. A Resp. at A-3. In point of fact, QTF was affiliated with at least four other entities through family relationships.[14] I&D Mem. at 31, 33 & n.222

[13] Harmoni has not presented any arguments concerning issues raised in QTF's and the separate rate respondents' briefs.

[14] Commerce described the nature of these affiliations as follows:

> QTF's legal representative and manager, Bai Leiwen, is a [50] percent shareholder in [QTHF]. . . . In addition, QTF states that Bai Leiwen is brother to Bai Wenxuan[who], according to publicly-available documents, is the legal representative of QXF. . . . Furthermore, QXF's only public shareholder is [QBT] . . . and all of its registered capital

(citation omitted); Prelim. Mem. at 11 & nn.43, 45–48; Affiliation Docs. Furthermore, QTF does not dispute that it was affiliated with most of those entities or that it failed to provide information responsive to Commerce's request. *See* QTF Br. at 18 (acknowledging that the "common denominator" for QTF, QTHF, QBT, and Lianghe "is the familial relationship through the Bai brothers"); *id.* at 8, 15–16 (arguing that QTF's failure to provide the information was due to inadvertence, misunderstanding, or mistake); QTF Reply at 3. Accordingly, Commerce's finding that QTF failed to comply with Commerce's request for information is supported by substantial evidence.[15]

Substantial evidence also supports Commerce's decision to apply an adverse inference. Commerce may use an adverse inference when the respondent "fail[s] to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1)(A). Commerce concluded that the QTF-entity failed to cooperate to the best of its ability because the information in question was "standard affiliation information requested of all respondents in [antidumping] proceedings," I&D Mem. at 32, 33 & n.223 (citation omitted), and the "QTF-entity should have been able to provide this information if it had made the appropriate effort" when it received the initial questionnaire, *id.* at 35. Commerce's factual findings are supported by substantial evidence.

Commerce's questionnaire requested information for all companies affiliated with QTF, and clearly defined the scope of its request. Initial QTF Questionnaire at A-6, App. I. QTF asserts that its failure to provide the requested information was inadvertent and based on the assumption that "'control[]' was a requisite component of affiliation." QTF Br. at 16. QTF did not seek guidance from Commerce, even in light of FGPA's allegations raising concerns regarding QTF's initial Section A responses and Commerce's issuance of a supplemental questionnaire requesting further affiliation information. QTF, therefore, failed to act to the best of its ability. *See Reiner Brach GmbH & Co.KG v. United States*, 26 CIT 549, 556–557, 563–64, 206 F. Supp. 2d 1323, 1330–31, 1337–38 (2002) (application of an adverse inference merited when Commerce requested information about "'all' home market sales [] for 'identical or similar merchandise'" and respondent "never asked Commerce to clarify whether its assumption was correct," instead, using its own interpretation of the relevant term).

was provided by Bai Wenxuan. According to publicly-available documents, the brothers' father, Bai Xuezhong, is a shareholder in QBT. Furthermore, the wife of Bai Wenxuan, Chen Hongxia, is the manager and legal representative of . . . Lianghe.

Prelim. Mem. at 10–11; *see also* Affiliation Docs.

[15] "The focus of [19 U.S.C. § 1677e(a)] is respondent's *failure to provide information*. The reason for the failure is of no moment." *Nippon Steel*, 337 F.3d at 1381.

Although QTF admits that its assumption was ultimately erroneous, QTF claims "inadvertence," "misunderstanding," or "mistake." QTF Br. at 7, 16; QTF Reply at 3. QTF's conduct is more appropriately described as an inadequate inquiry into the proper scope of Commerce's request for information and the company's obligation to respond accordingly. QTF is "a sophisticated company with experienced counsel," I&D Mem. at 34, and both the entity and its counsel have a history of prior participation in multiple segments of this and other proceedings before the agency, *id.* at 32 & n.219 (citing previous administrative reviews in which QTF and its counsel participated and U.S. Court of International Trade cases that QTF's counsel litigated). Thus, QTF could and should have made further efforts to understand the relevant provisions of the statute and regulations pertaining to the definition of "affiliated persons" or entities.[16] *See Nippon Steel*, 337 F. 3d at 1382 (the "best of its ability" standard "assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken").[17]

QTF's and the separate rate respondents' arguments that Commerce failed to comply with 19 U.S.C. § 1677m(d) are also unavailing. As discussed above, following QTF's responses and before the preliminary results, the agency received comments from FGPA regarding QTF's misreporting and issued a supplemental questionnaire. *See* Pet'rs' Deficiency Cmts. at 15; QTF 2nd Suppl. Questionnaire at 3–4. Although QTF did disclose at that time that its legal representative was Mr. Bai's brother, it nevertheless maintained that QTF itself "has never had any connection to Mr. Bai."[18] QTF 2nd Suppl. Resp. at 1.

[16] QTF asserts, without citation to any record evidence, that it is a "simple and rural company, lacking [in] many [] resources." QTF Br. at 21. However, that QTF was selected as a mandatory respondent because it was one of the two largest exporters subject to the review undermines QTF's assertion.

[17] The information in question concerned basic affiliation information, "the type that a respondent should reasonably be able to provide." I&D Mem. at 35. In fact, "once QTF confirmed that Mr. Bai [] was the brother of QTF's legal representative," Commerce was able to identify QTF's affiliates. *Id.* at 33. The availability of the information in public documents further evinces QTF's failure to exert "maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382.

[18] QTF appears to attribute its purported misunderstanding of the initial question to its former counsel's failure to adequately explain the question. *See* QTF Reply at 3. QTF was represented by Mr. Hume at the time it submitted its initial response and by Ms. Xiao when it submitted the supplemental response. *See* QTF Initial Sec. A Resp.; QTF 2nd Suppl. Questionnaire Resp. QTF states that once its new counsel "explained the definition of 'affiliation,'" QTF disclosed the familial relationship between Mr. Bai and QTF's legal representative in the supplemental response. QTF Reply at 3. However, even with its newfound understanding of the definition of affiliation, QTF maintained that it "never had any connection to Mr. Bai" or Golden Bird. QTF 2nd Suppl. Resp. at 1.

Thus, QTF had the opportunity to remedy the deficiencies in its earlier submission, but failed to do so.[19]

QTF relies on *Mukand, Ltd. v. United States*, Slip Op. 13–41, 2013 WL 1339399 (CIT Mar. 25, 2013), to suggest that Commerce's supplemental questionnaire was insufficient. *See* QTF Br. at 19. While Commerce chose to elicit the same information on five separate occasions in *Mukand*, the case does not stand for the proposition that Commerce is required to issue multiple supplemental questionnaires. 2013 WL 1339399 at *6. Rather, one supplemental questionnaire is enough. *See Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (Commerce satisfied its obligation under 19 U.S.C. § 1677m(d) when the respondent "failed to provide the information requested in Commerce's original questionnaire, and the supplemental questionnaire notified [the respondent] of that defect").

Commerce explained that additional questionnaires in this review were unnecessary because "once QTF confirmed that Mr. Bai Wenxuan was the brother of QTF's legal representative," the agency "had already collected [on its own] the required information to complete its analysis of the QTF-entity's affiliations." I&D Mem. at 33. In sum, the agency provided QTF two opportunities to provide accurate affiliation information, and QTF failed to do so. Commerce was not required to provide additional supplemental questionnaires seeking the same information.

2. Commerce's Collapsing Determination is Supported by Substantial Evidence and in Accordance with Law

As set forth above, Commerce's regulations guide its decision to collapse two or more entities. *See* 19 C.F.R. § 351.401(f). In this case, however, Commerce found that QTF withheld information necessary to conduct that analysis. I&D Mem. at 35. Instead, due to QTF's failure to cooperate to the best of its ability, the agency based its collapsing decision on the application of adverse facts available. *Id.* at 32, 35.

QTF and the separate rate respondents argue that Commerce failed to comply with 19 C.F.R. § 351.401(f) by not making a finding, supported by substantial evidence, that there is a "significant potential for manipulation" by the QTF-entity. QTF Br. at 22—30; Z&A Br. at 9–11. Normally, Commerce determines whether there is a "significant

[19] QTF's assertion that Commerce took no action between QTF's initial questionnaire response and the preliminary results of review is belied by the record. *See* QTF Br. at 12–13. During this time, the agency received and reviewed FGPA's allegations that QTF had misreported its affiliations, and issued a supplemental questionnaire to QTF addressing those allegations. *See* Pet'rs' Deficiency Cmts.; QTF 2nd Suppl. Questionnaire.

potential for manipulation" by evaluating the levels of common ownership, whether directors, managers, or officers within firms are affiliated, and whether operations of relevant entities are intertwined. 19 C.F.R. § 351.401(f)(2). However, because QTF did not provide requested information on its affiliates, the agency lacked the information to evaluate this factor. I&D Mem. at 35.

QTF should have been able to provide the basic affiliation information to which it had ready access. I&D Mem. at 32–33. "Because Commerce lacks subpoena power, Commerce's ability to apply adverse facts is an important one." *Maverick Tube*, 857 F.3d at 1360 (quoting *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012)). In this case, Commerce pointed to evidence on the record, which showed that garlic shipped to the United States in "Golden Bird's name[] was actually QTF's garlic". I&D Mem. at 35 & n.231 (citation omitted). To the agency, this "indicate[d that] there is a significant potential for the manipulation of price or production of QTF's garlic."[20] *Id.* at 35. Moreover, because QTF failed to cooperate by providing necessary information, the agency reasonably concluded that "QTF cannot benefit from [its] failure." *Id.*

The agency properly filled a gap in the record that QTF itself created. *Cf. Zhaoqing New Zhongya Aluminum Co. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1298, 1305–06 (2015) (holding that that Commerce's decision to collapse three affiliated producers into a single entity was reasonable when "evidence regarding intertwined operations during the period of review was limited due to [two of those producers'] failure to cooperate"). With regard to QTF's assertion that Commerce's collapsing determination runs counter to the statutory mandate to calculate dumping margins as accurately as possible, any inaccuracies resulting from Commerce's use of adverse facts available are a function of QTF's failure to cooperate and provide accurate information. *See id.* at 1306 (collapsing to address possible future manipulation "arises out of the basic purposes of the statue—

[20] Commerce also found that Golden Bird was licensing its previous low rate to other Chinese exporters through a "scheme" where Golden Bird (owned by Mr. Bai) would ship the garlic to the United States, and the U.S. customers would pay Lianghe, a member of the QTF-entity (whose manager and legal representative was Mr. Bai's wife). I&D Mem. at 31 & n.210 (describing the scheme) (citing, *inter alia*, Pet'rs Comments in Supp. of Harmoni's Fraud Claim, Part 1 (Apr. 5, 2016) ("Pet'rs 4/5/16 Letter Pt. 1") at 5, PR 102, CJA Vol. II, PJA Vol. II); *id.* at 8 (identifying Mr. Bai as owner or controller of Golden Bird); Prelim. Mem. at 10–11 (describing Mr. Bai's wife's role at Lianghe). Evidence also showed that "following Golden Bird's receipt of an AFA rate at the conclusion of the 18th administrative review, QTF began shipping large amounts of garlic to the United States." I&D Mem. at 31 & n.211 (citing, *inter alia*, Pet'rs 4/5/16 Letter Pt. 1). Commerce thus found that QTF was "attempting to undermine the administrative review process," further necessitating the use of an adverse inference and need to collapse the QTF-entity. *See id.* at 32.

determining current margins as accurately as possible") (internal quotation marks and citation omitted).

3. Commerce's Denial of QTF's Request for Separate Rate is Supported by Substantial Evidence

Commerce concluded that QTF was not eligible for a separate rate and offered several reasons for its decision. QTF's "inaccurate responses with respect to its affiliations were in response to questions in the 'Separate Rate' section of the [agency's initial] questionnaire." I&D Mem. at 34. Without this critical information, Commerce lacked the basic information necessary for determining whether QTF was eligible for a separate rate. *Id.* Moreover, record evidence confirmed that the QTF-entity is affiliated with companies that are part of the PRC-wide entity; thus, the other information that QTF provided in its Section A response was unreliable.[21] *Id.* at 34–35 & n.228 (citing Affiliation Docs.). Having found all of QTF's information unreliable, Commerce used total AFA to find that the QTF-entity was not entitled to a separate rate. *Id.* at 31, 35; *see also id.* at 37.

QTF asserts that the agency's use of total AFA is "unfairly and improperly punitive." QTF Br. at 15. The court is not persuaded. The instant case is analogous to *Ad Hoc Shrimp*, in which a respondent repeatedly denied its affiliation with a third-country company "until confronted with the public registration documents unequivocally revealing the affiliation." 802 F.3d at 1356. As a consequence, Commerce rejected the respondent's separate rate information because it deemed "the entirety of [the respondent's] submissions unreliable," and found that the respondent did not rebut the presumption that it [was] part of the China-wide entity. *See id.* at 1357–58. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") affirmed Commerce's determination to rely on total AFA rate because "the necessary information missing from the record was . . . an accurate representation of [the respondent's] corporate structure and indications of government control exercised through the company's Chinese affiliates," and such information was deemed "core, not tangential" to Commerce's separate rate analysis because it went "to the heart of [the respondent's] corporate ownership and control." *Id.* at 1356, 1357 (citations omitted).

Here, Commerce properly determined that QTF's misrepresentations rendered the entirety of its submissions unreliable when the information it withheld included the identity of its affiliates, at least

[21] In its preliminary results, Commerce stated that two QTF-entity members, Lianghe and QXF, were subject to the instant review. Prelim. Mem. at 10–11. Neither of those companies submitted a separate rate certification or application. *See id.* at 2 (listing the companies that made submissions).

some of which are part of the PRC-wide entity. QTF's failure to provide the necessary affiliation information prevented Commerce from evaluating QTF's eligibility for a separate rate. That separate rate inquiry is a binary question—QTF either is or is not eligible for a separate rate. In that circumstance, when the agency is permitted to make an adverse inference, that inference must manifest itself in the answer to that binary question, in this case resulting in the denial of a separate rate.

4. Commerce's decisions to apply an adverse inference and collapse the QTF entity were not arbitrary and capricious

QTF also argues that the agency's decisions to apply an adverse inference and collapse the QTF entity were arbitrary and capricious. QTF Br. at 7–10, 22. "'[A]n agency's finding may be supported by substantial evidence,' yet 'nonetheless reflect arbitrary and capricious action.'" *Changzhou Wujin Fine Chem. Factory Co. Ltd. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (quoting *Bowman Transp., Inc. v. Ark.–Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)). While "the substantial evidence standard applies to review of factual determinations," the "the arbitrary and capricious (or contrary to law) standard" applies to review of the agency's reasoning. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983)). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In reviewing the agency's explanation, the court finds that the agency considered the relevant factors with respect to both determinations that QTF challenges. The agency's decision evinces a rational connection between the record facts and the choice made. The court finds no "clear error of judgment" on the agency's part. *See id.* (quoting *Bowman*, 371 U.S. at 168).

E. Conclusion

For the reasons set forth above, QTF's and Zhengyang and Alpha's motions for judgment on the agency record are denied. Commerce's application of total adverse facts available and its determination to deny QTF a separate rate and collapse QTF with six other entities are supported by substantial evidence and otherwise in accordance with law.

II. NMGGC's Motion

A. Relevant Legal Framework

The antidumping duty statute provides that, in the anniversary month of an antidumping duty order, "if a request for such a review has been received," Commerce shall "review, and determine ... the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1). Although the current statute requires Commerce to conduct such a review if properly requested, the statute does not provide for "how Commerce should proceed if a request, once made, is withdrawn." *Glycine & More, Inc. v. United States*, 880 F.3d 1335, 1337 (Fed. Cir. 2018). To address this situation, Commerce has promulgated a regulation, which states:

> The [agency] will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The [agency] may extend this time limit if the [agency] decides that it is reasonable to do so.

19 C.F.R. § 351.213(d)(1).[22] The regulation further provides: (1) a domestic interested party may request a review "of specified individual exporters or producers covered by an order" if it explains the reasons for the request;[23] (2) an exporter or producer covered by the order may request a review of itself; and (3) an importer of the merchandise may request a review of the exporter or producer of the merchandise imported by that importer.[24] 19 C.F.R. § 351.213(b).

B. Relevant Facts

On November 28, 2015, NMGGC timely requested a review of Harmoni and Jinxiang Jinma Fruits Vegetables Products Co., Ltd., a Harmoni affiliate.[25] *See* NMGGC Review Req. Joey Montoya, Esq. ("Mr. Montoya") of Hume & Associates filed the request on behalf of

[22] The predecessor to the current regulation was 19 C.F.R. § 353.22. *See* 19 C.F.R. § Pt. 351, Annex V; *Antidumping Duties*, 54 Fed. Reg. 12,742 (Dep't Commerce Mar. 28, 1989) (final rule).

[23] A domestic interested party is "a manufacturer, producer, or wholesaler in the United States of a domestic product." 19 U.S.C. § 1677(9)(C).

[24] Commerce also has the ability to self-initiate a review. *See* 19 C.F.R. § 351.213(d)(2).

[25] While NMGGC included both Harmoni and Jinxiang Jinma Fruits Vegetables Products Co., Ltd. in its request, Commerce only selected Harmoni as a mandatory respondent. I&D Mem. at 7 n.36. To that end, the court limits its discussion to Harmoni.

NMGGC,[26] and advised the agency that Mr. Montoya was "handling this case independent from any member of [Hume & Associates] for the purpose of avoiding the appearance of a conflict of interest." *Id.* at 2. NMGGC asserted that its members are producers or wholesalers in the United States of fresh garlic, seeking the review as a "domestic interested party" pursuant to 19 U.S.C. § 1677(9)(C). *See id.*

NMGGC supplemented its initial review request on December 3, 2015 with additional comments explaining to the agency "why investigating Harmoni [was] important to the ability of NMGGC and to similar garlic producers throughout New Mexico to compete in the fresh garlic market." Suppl. Comments for the 21st Admin. Review on behalf of NMGGC (Dec. 3, 2015) ("NMGGC Suppl. Review Req. Cmts") at 2, PR 8, CJA Vol. I, PJA Vol. I. NMGGC stated that Mr. Crawford had requested a review of Harmoni in the preceding period of review ("AR 20"), but "Mr. Crawford was scared off and withdrew his request after private investigators were sent [by Harmoni and FGPA] to inspect his facility and pry into his business." *Id.* at 4–5.

On January 9, 2016, two days after the initiation of AR 21, Mr. Montoya entered an appearance on behalf of NMGGC and informed Commerce that he would be representing NMGGC "without collaboration, conjunction, or advisement of any other attorney of Hume & Associates []." Application for Admin. Protective Order and Entry of Appearance on Behalf of NMGGC (Jan. 9, 2016) ("Montoya Entry of Appearance") at 1—2, PR 21, CJA Vol. I, PJA Vol. I. He further stated that Hume & Associates "has counsel representing opposing parties for [AR 21], however, said counsel has built a so-called 'Chinese Wall' to avoid conflict of interest issues arising from representing clients with adverse interest in the same proceeding." *Id.* at 2. Following Mr. Montoya's appearance on behalf of NMGGC, Mr. Hume entered an appearance on behalf of QTF. Entry of Appearance and Appl. for Admin. Protective Order on behalf of QTF (Jan. 12, 2016) ("Hume First Entry of Appearance"), PR 23, CJA Vol. I, PJA Vol. I.

On March 8, 2016, NMGGC notified the agency that Mr. Montoya was withdrawing from representation of NMGGC and stated that Hume & Associates would continue to represent NMGGC. *See* 21st Admin. Review Withdrawal (Mar. 8, 2016), PR 56, CJA Vol. I, PJA Vol. I. The following day, Mr. Hume entered an appearance on behalf of NMGGC. *See* Notice of Appearance (Mar. 9, 2016) ("Hume Second Entry of Appearance"), PR 59, CJA Vol. I, PJA Vol. I.

[26] NMGGC identified its members as Stanley Crawford ("Mr. Crawford"), owner and operator of El Bosque Farm of Dixon, New Mexico and Avrum Katz ("Mr. Katz"), owner and operator of Boxcar Farm of Penasco, New Mexico. NMGGC Review Req. at 1 n.1.

On April 8, 2016, the agency issued a set of questions to NMGGC to evaluate whether its members are producers or wholesalers of fresh garlic and, thus, domestic interested parties that may request an administrative review. *See* Letter from Commerce to NMGGC (Apr. 8, 2016), PR 116, CJA Vol. II, PJA Vol. II. The agency requested information regarding the quantity of fresh garlic produced during the POR, the total production value, the total amount of investment in garlic production, the employment numbers for the POR, and other costs and activities related to fresh garlic production in the United States. *See id.* at Attach. II. NMGGC provided its members' responses to those questions on April 15, 2016. *See* NMGGC Resp. to Gilgunn Letter Confirming NMGGC Members are Domestic Interested Parties as they are Producers or Wholesalers Within the United States of the Domestic Like Product – filed on Behalf of NMGGC Parts 1–3 (Apr. 15, 2016) ("NMGGC Questionnaire Resp."), CR 60–62, PR 137–39, CJA Vol. III, PJA Vol. III. Relying on those responses, the agency issued a memorandum on June 3, 2016, finding that NMGGC and its individual members are domestic producers of fresh garlic and had standing to request an administrative review of Harmoni. *See* Commerce's Mem. on Whether the Members of NMGGC are U.S. Domestic Producers of Fresh Garlic (June 3, 2016) at 4 & nn.23–29, CR 104, PR 214, CJA Vol. III, PJA Vol. III (citations omitted).

Specifically, the agency relied on information that Mr. Katz and Mr. Crawford provided regarding each member's output, sales, investments, and labor expenses. *Id.* at 4. The agency also relied on a statement by Mr. Katz with respect to NMGGC's "stake" in the proceeding, which read:

> The price of my garlic is absolutely affected by changes in imported garlic price. Cheap, imported Chinese garlic is used to set price. People at my market stand ask us all the time why the supermarket prices are so much cheaper. It is not unusual for someone to place their garlic on the scale, hear our price, and walk away.

Id. at 4–5 & n.32 (quoting NMGGC Questionnaire Resp. at page 1 of Mr. Katz's response). In this memorandum, Commerce acknowledged that Harmoni had made several allegations of fraud by NMGGC members, but stated it would fully address the arguments in the preliminary results, after giving the parties an opportunity to address those allegations and other record filings. *Id.* at 5.

In its preliminary results, Commerce continued to find that NMGGC's members are domestic producers of fresh garlic and, therefore, the requested review of Harmoni would continue. Prelim. Mem.

at 8. Commerce also noted, however, that it had not had time to consider all the recent factual submissions. *Id.*

On December 14, 2016, shortly after Commerce issued the preliminary results, Mr. Katz withdrew from NMGGC. *See* Withdrawal of Avrum Katz from NMGGC (Dec. 14, 2016), PR 402, CJA Vol. IV, PJA Vol. IV. Subsequently, on February 2017, Mr. Katz submitted a letter to Commerce containing various allegations pertaining to NMGGC and Mr. Hume. I&D Mem. at 2 & n.11 (citing untitled Letter from Avrum Katz to Commerce (Feb. 10, 2017) ("Katz 2/10/17 Letter"), PR 440, CJA Vol. IV, PJA Vol. IV).[27] Mr. Katz wanted to address "fraud recently discovered in connection with [AR 21] concerning the fraudulent and misleading scheme perpetrated by Mr. Hume and Mr. Crawford." Katz 2/10/17 Letter at 1. Among other things, he alleged that Mr. Hume "intentionally misled" Mr. Katz on the nature and purpose of AR 21. *Id.* at 2. Mr. Katz stated that he was unaware that Mr. Hume was simultaneously representing Chinese clients, and alleged that Mr. Hume was using "small New Mexico farmers as puppets to petition the government for his Chinese clients." *Id.* at 2–3. He further alleged that Mr. Hume was compensated $100,000 by his Chinese clients to initiate a review request with respect to Harmoni, and Mr. Crawford received $50,000 and garlic harvesting equipment for participating in the review request. *Id.* at 3. Mr. Katz expected he would receive similar payment in exchange for his participation. *Id.* at 3–4. Moreover, contradicting his earlier statement in the questionnaire response, Mr. Katz stated:

> Boxfarm's fundamental problem was, and is, a lack of capital for infrastructure to increase our production. [Mr.] Hume and [Mr.] Crawford led us to believe that if we went along with their narrative and forced Harmoni out of business, money would come from China to take care of some of those infrastructure problems.

Id. at 5.

In light of this information, Commerce established deadlines by which parties could submit comments and rebuttal information about Mr. Katz's allegations. *See* I&D Mem. at 2–5. The agency also held a public hearing on May 11, 2017. *Id.* at 5.

After reviewing the additional information placed on the record, Commerce concluded that it could no longer credit NMGGC's submissions. *See id.* at 17–23. Commerce noted three examples to demonstrate that NMGGC and Mr. Hume made representations to the

[27] Mr. Katz filed the submission on February 2, 2017, but Commerce rejected it on procedural grounds. Mr. Katz then resubmitted the letter on February 10, 2017, and Commerce accepted the letter. *See* I&D Mem. at 2 n.11 (citations omitted).

agency that were contradicted by record evidence. *Id.* at 18–21. Those representations undermined NMGGC's and Mr. Hume's credibility and the credibility of their remaining submissions on the record, including claims that NMGGC is a domestic interested party. *See id.* at 18, 20. Thus, "because [] NMGGC lack[ed] credibility, its review request was illegitimate *ab initio*," and the agency rescinded its review of Harmoni. *Id.* at 18.

The three factual claims made by NMGGC and Mr. Hume that Commerce discussed were whether: (1) Chinese exporters and businessmen were involved in NMGGC's review request; (2) members of NMGGC and Mr. Hume received any direct or indirect compensation for their participation in AR 21; (3) Mr. Crawford withdrew his previous review request because he was intimidated by a private investigator sent by Harmoni. *Id.* at 18–21. Commerce identified additional issues that caused the agency concern regarding NMGGC's submissions. Commerce explained that Mr. Katz's February 2017 submission raised questions about NMGGC's initial questionnaire responses upon which Commerce had relied in determining that NMGGC was a domestic interested party. *Id.* at 21. Commerce also identified "serious problems" with NMGGC's certifications. *Id.* at 22. In sum, Commerce concluded that it could not consider any of the information that NMGGC submitted to be reliable, and therefore, NMGGC failed to demonstrate that it was a domestic interested party. *Id.* at 23.

C. Parties' Arguments

NMGGC challenges Commerce's authority to rescind its review of Harmoni, Commerce's factual findings and credibility determinations with respect to NMGGC, and Commerce's decision not to refer the allegations of collusion between Harmoni and FGPA to the U.S. Department of Justice ("DOJ"). *See* NMGGC Br. at 8–13, 16–39. NMGGC frames the issue of Commerce's authority to rescind its review of Harmoni as a *Chevron* step one inquiry, arguing that once a review is initiated of any producer/exporter, all producers/exporters from the subject country must be reviewed and rescission of the review is not permitted.[28] *Id.* at 8, 16–21. Next, NMGGC contends

[28] The two-step framework provided in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), guides judicial review of Commerce's interpretation and implementation of the antidumping and countervailing duty statutes. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "if the statute is silent or ambiguous," the court must determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843).

that Commerce's factual findings and credibility determinations with respect to NMGGC were arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence. *Id.* at 21–35. Further, NMGGC claims that Commerce abused its discretion by failing to request that the DOJ investigate and prosecute NMGGC's allegations that Harmoni and the FGPA "engag[ed] in collusion" and "effectively established a monopoly in trade for Chinese garlic." *Id.* at 39.

The Government and FGPA aver that 19 U.S.C. § 1675 is silent on the issue of rescission and, therefore, Commerce's authority to rescind a review of a producer/exporter when no requests are pending is a *Chevron* step two inquiry. *See* Gov. Resp. at 42; FGPA Resp. at 23–25. They argue that under the *Chevron* step two analysis, Commerce's rescission policy is a permissible construction of the statute.[29] Gov. Resp. at 42–46; FGPA Resp. at 26–27. Moreover, the Government, FGPA, and Harmoni argue that the agency's factual findings are supported by substantial evidence, and urge the court to defer to Commerce's credibility findings. *See* Gov. Resp. at 3741; Harmoni Resp. at 24–38; FGPA Resp. at 28–29. FGPA and Harmoni further aver that the agency properly concluded it lacked authority to pursue a criminal action against Harmoni.[30] FGPA Resp. at 39; Harmoni Resp. at 45.

D. Analysis

1. Commerce's Rescission Policy is a Permissible Construction of the Statute

As previously stated, the statute provides for a review of an antidumping duty order when Commerce receives a request for such a review. 19 U.S.C. § 1675(a)(1). While specifying that Commerce shall conduct a review upon request, the statute does not provide for "how Commerce should proceed if a request, once made, is withdrawn."[31] *See Glycine & More,* 880 F.3d at 1337. Accordingly, pursuant to *Chevron*, the court must determine whether Commerce's interpretation of

[29] Harmoni likewise argues that NMGGC's arguments "ignore directly controlling congressional intent, judicial precedent, and longstanding administrative practice." Confidential Def.-Int. Harmoni's Am. Resp. to Pls.' Rule 56.2 Mot. for J. on the Agency R. ("Harmoni Resp.") at 40–44, ECF No. 52.

[30] The Government did not address this issue in its brief.

[31] Commerce's regulation, 19 C.F.R. § 351.213(d)(1), contains two provisions that address how Commerce proceeds when a review request is withdrawn: the first deals with the effect of a party's withdrawal of a review request, if such withdrawal occurs within 90 days, and the second deals with Commerce's discretion to extend the 90-day time limit to withdraw a request. While *Glycine & More* concerned Commerce's discretion to extend the 90-day time limit, 880 F.3d at 1339, the court reached that question only after finding that, while § 1675 required Commerce to commence a review if properly requested, it left open the question whether any such review must continue upon withdrawal of the underlying request.

19 U.S.C. § 1675(a)(1) as allowing the agency to rescind a review upon the withdrawal of the request(s) upon which the review was initiated is a "permissible construction of the statue."[32] *Chevron*, 467 U.S. at 842–43.

Section 1675(a) previously provided for mandatory annual reviews of antidumping duty orders. *Floral Trade Council of Davis, Cal. v. United States*, 888 F.2d 1366, 1369 (Fed. Cir. 1989) (citing 19 U.S.C. § 1675(a)(1) (1982)); *see also* Trade Agreement Act of 1979, Pub. L. No. 96–39, § 751, 93 Stat 144. In 1984, Congress amended the statute to require review only when the agency received such a request or upon the agency's initiative. Trade and Tariff Act of 1984, Pub. L. No. 98–573, tit. VI, § 611(a)(2), 98 Stat. 2948, 3031; *Floral Trade Council of Davis*, 888 F.2d at 1369. The legislative history associated with the 1984 amendments demonstrates that Congress recognized that an "increasing number of outstanding orders subject to review each year impose[d] an unnecessarily heavy burden on [Commerce's] limited staff resources." H.R. REP. No. 98–725, at 22–23 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 5127, 5149. This amendment was intended "to reduce the administrative burden on [Commerce] of automatically reviewing every outstanding order even though circumstances do not warrant it or parties to the case are satisfied with the existing order." *Id.*; *see also* H.R. REP. NO. 98–1156, at 181 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 5220, 5298 (explaining that the amendment was intended to "limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority"). The House Conference Report also indicates that Commerce was to "provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested. . . ." H.R. REP. NO. 98–1156, at 181 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 5220, 5298.

"Commerce promulgated the [withdrawal] regulation in essentially its current form in 1989." *Glycine & More, Inc. v. United States*, 39 CIT __, __, 107 F. Supp. 3d 1356, 1365 (2015), *aff'd,* 880 F.3d 1335 (Fed. Cir. 2018); *see also Antidumping Duties,* 54 Fed. Reg. at 12,778. Consistent with the statute's legislative intent, the regulation provides that Commerce will rescind a review "if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review." 19 C.F.R. §

[32] NMGGC did not withdraw its request for review of Harmoni; nevertheless, it led with this argument, suggesting that even if Commerce's reconsideration of NMGGC's status was supported by substantial evidence, Commerce was legally obligated to complete the review of Harmoni.

351.213(d)(1). In other words, the regulation is on par with the legislative intent that Commerce not conduct a review when interest in such a review is absent.

Congress adopted a statutory provision that requires Commerce to conduct an administrative review upon request, but does not answer what Commerce is to do when that requisite request is withdrawn. Commerce acted upon this implicit legislative delegation by adopting 19 C.F.R. § 351.213(d)(1) and, so long as that regulation provides a reasonable construction of the statute, it is not to be disturbed. *Chevron*, 467 U.S. 843–44. NMGGC's claims that Commerce's regulation is contrary to the statute are unpersuasive. While recognizing that the statute is silent on withdrawals of review requests, NMGGC contends that "the Act specifies affirmatively the procedures Commerce must follow and these procedures negate rescissions once Commerce publishes a notice of the review in the Federal Register." NMGGC Br. at 8 (citing 19 U.S.C. § 1675(a)(1),(2)); *id.* at 16–17.

Section 1675(a)(1) establishes the procedural groundwork for when reviews must commence once Commerce receives a request for review. *See* 19 U.S.C. § 1675(a)(1) (instructing Commerce to initiate reviews "[a]t least once during each 12-month period . . . if a request for such review has been received . . ."). This language predicates Commerce's obligation to conduct a review only upon receiving a review request (and after publishing the notice). The language does not address a situation when the request is later withdrawn, let alone mandate that Commerce complete the review in all circumstances once the agency publishes the notice. Such a reading would run contrary to the legislative intent of easing the administrative burden on Commerce and preserving its limited staff resources when industry interest is lacking.

In *Glycine & More*, the Federal Circuit analyzed whether the Court of International Trade properly remanded Commerce's decision to continue a review of a company for which all review requests had been withdrawn, even though the last request was withdrawn after the 90-day deadline set forth in the agency's regulations. *See* 880 F.3d at 1342–44. The Federal Circuit affirmed the lower court's opinion that Commerce could have reasonably granted an extension to allow the requesting party to withdraw the review request because Commerce received the request a few days after the deadline, the agency had not devoted significant resources to the review, and all other parties that had requested review of the company had filed timely

withdrawals.[33] *Id.* at 1342, 1345. If NMGGC's interpretation of the statute is correct, that once initiated, a review may not be rescinded by Commerce, then the Federal Circuit could not have reached the result it did—Commerce would have been statutorily required to complete the review.

NMGGC cites to 19 U.S.C. § 1675(a)(2) and 19 U.S.C. § 1677f-1(c)(1) to suggest that Commerce is required to review each entry of merchandise for *all* exporters and producers when it conducts a review, regardless of whether a request is made for the particular producer/exporter of the entry. *See* NMGGC Br. at 18–19 (arguing that "the Act does not authorize Commerce to allow requests that specify 'individual exporters or producers'"). NMGGC, however, fundamentally misunderstands the antidumping duty law.

Section 1675(a)(2) requires Commerce, for purposes of determining the amount of a dumping duty pursuant to section 1675(a)(1)(B) to "determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2). Nothing in subsection (a)(2) expands the breadth of the review being conducted pursuant to subsection (a)(1) to all entries subject to the order. In fact, while section 1675(a)(1) provides for a review upon request, nothing in that provision suggests that it must be a review of the order as a whole. Because the review is to "determine ... the amount of any antidumping duty" and such duties are calculated on a company-specific basis, the better reading of section 1675(a)(1) is that it provides for company-specific reviews upon request.[34]

Simple reference to the conduct of "a review" does not predetermine the breadth of the proceeding. Instead, the breadth of any "review" is determined by the context of the provision giving rise to the proceeding. For example, section 1675(a)(2)(B) provides for company-specific reviews of new exporters and producers. On the other hand, section 1675(b) provides for changed circumstance reviews, whereby Congress specified that it is the determination resulting in the antidumping order that is reviewed. Similarly, section 1675(c) provides for five

[33] The agency's initial decision to complete the review was based on a guidance document interpreting 19 C.F.R. § 351.213(d)(1), which impermissibly limited the scope of granting an extension to withdraw a review request. *Glycine & More*, 880 F.3d at 1344.

[34] Indeed, subsection (a) is titled, "[p]eriodic review of amount of duty," not "periodic review of an order," with subsection (a)(1)(B) referring to the review and determination of "the amount of any antidumping duty." Thus, the "request for such a review" provided for in subsection (a)(1) is a request for a review of an amount of duty, which amounts are company-specific. Because antidumping duties are imposed pursuant to a particular antidumping duty order, the request for review is temporally aligned with publication of that order; however, that does not mean that the review must encompass the order as a whole, or all exporters/producers subject thereto.

year (sunset) reviews and, therein, Congress specified that the review is of the continued need for the order. Thus, as considered herein, it is clear that Commerce's interpretation of a review pursuant to section 1675(a)(1) as a company-specific exercise is a reasonable interpretation of the statute.

NMGGC's argument regarding section 1677f-1(c)(1) is similarly unconvincing. That subsection provides that, generally, the agency must determine an individual weighted-average dumping margin for each known exporter and producer of the merchandise under review, but allows the agency, in certain circumstances, to 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." 19 U.S.C. § 1677f-1(c). While the starting point for the application of the provision allowing selection of the largest exporters is the number of companies involved in the review, nothing in this language suggests that it requires Commerce to expand the review to include exporters or producers for which a review was not requested. Plaintiff's argument again fails.

Furthermore, Commerce's regulations provide that a domestic interested party may request a review "of specified individual exporters or producers covered by an order" if it explains the reasons for the request. 19 C.F.R. § 351.213(b)(1). Commerce's ability to rely on this regulation to review named producers/exporters and to decline to review other exporters not expressly named in the review request was tested and affirmed soon after its adoption by the agency in its original form.[35] In *Floral Trade Council*, 888 F.2d at 1369, the Federal Circuit held that requiring the review requester to name the specific party to be reviewed is "consistent with and promotes the articulated statutory purpose of reducing [Commerce's] burden in reviewing outstanding orders." The court affirmed Commerce's decision not to review certain companies not adequately identified in the review request, while the review of other identified companies went forward.

[35] Neither passage of the Uruguay Round Agreements Act ("URAA") in 1994 nor the implementing regulations adopted by Commerce thereafter changed the statutory or regulatory landscape in any way relevant to this analysis. Moreover, Commerce's interpretation of the statute, as implemented by its regulations, as providing for company-specific review upon request, was well-established and well-known during consideration of the URAA, and Congress took no steps to alter or clarify the statute in any relevant fashion in that Act. *See N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 275 (1974) (Congressional failure to revise or repeal an agency's interpretation of the statue it administers is persuasive evidence that the interpretation is the one intended by Congress).

NMGGC's argument cannot be squared with *Floral Trade Council's* affirmance of the review of some, but not all, foreign producers and exporters subject to the order in question.[36] Rather than attempt to distinguish or explain *Floral Trade Council*, NMGGC ignores it.[37]

For these reasons, Commerce has authority to conduct reviews limited to named companies and to rescind reviews when the request has been withdrawn. Consequently, NMGGC's appeal of Commerce's rescission of the review of Harmoni turns on the reasonableness of the agency's decision that NMGGC's review request was illegitimate, leading to the rescission of the review *ab initio*, the issue to which the court now turns.

2. Commerce's Factual Findings and Credibility Determinations Are Supported by Substantial Evidence

In the *Final Results*, Commerce identified three examples of misrepresentations by Mr. Hume and NMGGC that undermined their credibility and led the agency to conclude that NMGGC's submissions were unreliable. I&D Mem. at 18–21. Commerce noted additional concerns that caused the agency to question many of NMGGC's questionnaire responses and other submissions. *Id.* at 21–23. Ultimately, because the agency "determine[d] that the entirety of [] NMGGC's information, including its garlic production information, [was] unusable," it found that NMGGC "failed to demonstrate that it is a domestic interested party. As such, there [was] no valid review request of Harmoni." *Id.* at 23. For the reasons discussed below, the agency's credibility determinations and factual findings are supported by substantial evidence.

i. Commerce's finding that NMGGC misrepresented that Chinese exporters and businessmen were not involved in NMGGC's review request

Substantial evidence supports Commerce's credibility finding with respect to NMGGC's claim that Chinese exporters or businessman did not have any involvement in its review request. I&D Mem. at 18 & n.109 (citation omitted). Specifically, Commerce cited email ex-

[36] Similarly, in *Transcom, Inc. v. United States,* 182 F.3d 876, 880–83 (Fed. Cir. 1999), the Federal Circuit held that Commerce violated its statutory and regulatory notice obligations when it reviewed an exporter from a non-market economy country which had not been named in the notice of initiation, and the notice contained no indication that unnamed exporters were subject to the review. Again, the Federal Circuit would not have reached this decision if Commerce was required to calculate antidumping duty margins for all exporters.

[37] Plaintiff generally cites *Floral Trade Council of Davi* s as setting the standard for reviewing the validity of a regulation, NMGGC Br. at 6, but does not otherwise address its holding.

changes from 2010 in which Mr. Hume and Mr. Wang discussed a plan to "attack [the] Harmoni issue," (i.e. to get Commerce to review Harmoni). I&D Mem. at 18–19 & nn.110–111 (citing Harmoni New Factual Information in Resp. to Mar. 7, 2017 Mem. (Mar. 9, 2017) ("Harmoni 3/9/17 Letter"), Ex 6 (email), CR 239, PR 466, CJA Vol. IV at ECF p. 771, PJA Vol. IV). Commerce then cited a more detailed outline of a plan, discussed between Mr. Hume and an employee of Mr. Wang in 2014, to get Commerce to review Harmoni. I&D Mem. at 19 & n.112 (citing Harmoni Rebuttal Factual Information (Feb. 21, 2017) – Part 2 ("Harmoni 2/21/17 Letter Pt. 2"), Ex. 3 (email), PR 455, CJA Vol. IV, PJA Vol. IV). Specifically, Mr. Hume told his Chinese client:

> I have been considering [] filing a review request against Harmoni in my name (H[ume] & A[ssociates]) and letting [another Hume & Associates employee] do the responses. We could "create a Chinese wall" where lawyers in the same firm represent clients on different sides of a proceeding . . . to give teh [sic] appearance they are not working together. Of course, I need a "client" that is a US garlic producer. NOTE: This is only an option, but one that can work since I know most of the issues and Huamei can do the other work. In fact, Huamei can do the filings from China. . .

Harmoni 2/21/17 Letter Pt. 2, Ex. 3 (email).

The following year, Hume & Associates attempted to locate U.S. garlic producers and, when contacting solicitants, "[did] not indicate [the firm was] Chinese affiliated." NMGGC Reply to 3/3/17 Harmoni Submission (Mar. 9, 2017) – Part 6 ("NMGGC 3/9/17 Letter Pt. 6"), Ex. 9 (email), PR 472, CJA Vol. IV at ECF p. 937, PJA Vol. IV; *see also* I&D Mem. at 19 & n.113. Commerce also had an email communication, dated November 12, 2015, in which Mr. Hume directed Mr. Montoya on the contents of NMGGC's review request for AR 21. I&D Mem. at 19 & n.114 (citing NMGGC 3/9/17 Letter Pt. 6, Ex. 9 (email) at ECF p. 939). This direction, however, was inconsistent with Mr. Montoya's representation in the review request itself, that he was representing NMGGC "without collaboration, conjunction, or advisement of any other attorney of Hume & Associates."[38] Montoya Entry of Appearance. Thus, Mr. Hume's and NMGGC's actions before the

[38] As stated above, in the beginning of the underlying proceeding, Mr. Hume entered an appearance on behalf of QTF, a Chinese respondent. *See* Hume First Entry of Appearance. Mr. Montoya entered an appearance on behalf of NMGGC, the purported domestic producer. *See* Montoya Entry of Appearance. After Mr. Montoya withdrew his representation of NMGGC, Mr. Hume entered an appearance on behalf of NMGGC. *See* Hume Second Entry of Appearance. The record indicates that Mr. Hume represented both QTF and NMGGC for several months. *Compare* Hume Second Entry of Appearance (dated March 9, 2016), *with*

agency were consistent with Mr. Hume's 2014 plan of finding a "client" and creating a so-called "Chinese wall" to give the "appearance" that the attorneys within the same firm are not working together. *See* Harmoni 2/21/17 Letter Pt. 2, Ex. 3 (email).

Plaintiff disputes that the cited evidence reflects "involvement by Chinese businessmen," and argues that "the absence of involvement is obvious by the fact that Harmoni had all of [Hume & Associates] emails and produced no evidence of involvement in [AR 21]." NMGGC Br. at 10 (citing Harmoni Pre-Prelim. Comments (Nov. 21, 2016), Ex. 2, CR 171, PR 376, CJA Vol. III, PJA Vol. III; Harmoni 2/21/17 Letter Pt. 2, Exs. 6–7; Harmoni 3/9/17 Letter, Ex. 6; Harmoni 3/9/17 Letter, Ex. 7, ECF No. 87). However, while it is clear that Harmoni did obtain access to some of Hume & Associates' emails, the record does not indicate that Harmoni had all of the firm's emails. Moreover, those emails do reflect involvement by Mr. Wang in Mr. Hume's plan to get Commerce to review Harmoni as early as 2010.[39] *See* Harmoni 3/9/17 Letter, Ex 6. Mr. Wang is part owner of Huamei Consulting and, from November 2015 to November 2016, owned Golden Bird, a Chinese garlic company found to be affiliated with QTF. NMGGC Reply to 2/10/2017 Katz Submission (Feb. 20, 2017) ("NMGGC 2/20/17 Letter"), Ex. 2 (Decl. of Wang Ruopeng) ("Wang Decl.") ¶ 1, PR 450, CJA Vol. IV, PJA Vol. IV; *see also* I&D Mem. at 8.

NMGGC also argues that Commerce failed to address other evidence supporting the conclusion that Chinese exporters and businessmen were not involved in NMGGC's review request. *See* NMGGC Br. at 24. In particular, NMGGC points to Mr. Wang's declaration wherein he stated that NMGGC's review request "was done on their own" (referring to NMGGC) and "ha[d] nothing to do with any Chi-

Letter from Hume & Associates LLC to Secretary of Commerce Pertaining to QTF Withdrawal as Councel [sic] to QTF (June 22, 2016), PR 220, ECF No. 23–2. Representing both the domestic producer and foreign exporter simultaneously in the same proceeding would undoubtedly raise conflict of interest concerns. Indeed, Mr. Montoya acknowledged that the interests of NMGGC and QTF were "adverse" when he represented to the agency that Hume & Associates had created a "Chinese Wall" to address the conflict of interest. *See* Montoya Entry of Appearance. The court raised these ethical concerns with Mr. Hume during oral argument, but did not receive a satisfactory response. While those concerns remain to be addressed, the court's task here is to determine whether substantial evidence supports Commerce's decision to rescind its review of Harmoni, and whether that decision is in accordance with law. After careful consideration, the court has determined that it is able to apply that standard of review based on the record before it and need not resolve its ethical concerns with Mr. Hume's conduct prior to rendering a decision in this case.

[39] NMGGC also supports its position with a citation to its March 31, 2017 rebuttal brief to the agency. NMGGC Br. at 25 & n.62 (citation omitted). That brief relies on Mr. Crawford's declaration that he and Mr. Katz were not paid by any Chinese company. Rebuttal Br. Filed on Behalf of NMGGC and El Bosque Farm – Part 1 (Mar. 31, 2017) at 13 & n.38, PR 509, CJA Vol. IV, PJA Vol. IV). Commerce, however, found Mr. Crawford not credible. *See* I&D Mem. at 18 (finding that NMGGC lacks credibility); *id.* at 23 (finding that Mr. Crawford's inability to provide complete and accurate responses tainted all of his statements). Commerce's decision not to credit Mr. Crawford's self-serving declaration was reasonable.

nese garlic company." NMGGC Br. at 24 & n.57 (quoting Wang Decl. ¶ 10). NMGGC also points to Mr. Hume's declaration wherein he stated that he was "pursuing [his] interest in finding a garlic farmer to file a review request." NMGGC Br. at 24 & n.59 (citing I&D Mem. at 19).

As noted, Mr. Wang is associated with Huamei Consulting, Wang Declaration ¶ 1, "a Chinese consulting firm" that "works with [Hume & Associates]," I&D Mem. at 8. Although not explicitly stated, it may reasonably be inferred that by concluding Mr. Hume and NMGGC were not credible, Commerce also discredited Mr. Wang's declaration. *See* I&D Mem. at 23 (stating NMGGC's "inability to provide complete and accurate responses taint all of the . . . information that [it has] submitted on the record of this review"). Alternatively, "it may be inferred" from Commerce's failure to discuss certain evidence that the agency "determined that the [] evidence was insignificant, immaterial, or not seriously undermining enough to merit discussion." *Diamond Sawblades Mfrs. Coal. v. United States*, Slip Op. 13–130, 2013 WL 5878684, at *7 (CIT Oct. 11, 2013). The substantial evidence standard does not preclude the possibility that some record evidence may support an alternative conclusion. Here, when the record actions of Mr. Hume, his associate, and his client (about whom Commerce identified serious questions) are consistent with the documented plan Mr. Hume concocted with his Chinese clients, the court has no difficulty in finding that the agency's decision was based on substantial evidence.

ii. Commerce's finding that NMGGC misrepresented whether its members or Mr. Hume received direct or indirect compensation for their participation in AR 21

NMGGC made several claims to the agency that neither its members nor Mr. Hume received direct or indirect compensation for their participation in AR 21.[40] I&D Mem. at 20 & n.117 (citation omitted). Substantial evidence supports Commerce's finding that NMGGC's representations were unreliable.

[40] *See* NMGGC's 2/20/17 Letter at 15 ("NMGGC was not financed by any Chinese entity; there were no promises of any future compensation"); *id.*, Ex. 4 (Decl. of Robert T. Hume (Feb. 16, 2017) ¶ 4 ("I was not compensated, nor did I expect any compensation, for my time or expertise in representing the NNMGGC [sic] in [AR 21]"); Stanley Crawford Decl. in Resp. to Avrum Katz's Req. for Recons. (Feb. 6, 2017) ("Crawford Decl.") ¶ 13, PR 428, CJA Vol. IV, PJA Vol. IV ("I have received no compensation for my participation in AR 21").

The record shows that Mr. Hume paid Mr. Crawford $50,000 following his withdrawal of the Harmoni review request in AR 20.[41] I&D Mem. at 20 & n.119 (citing Boxcar Farm Rebuttal Comments (Feb. 21, 2017) ("Katz 2/21/17 Letter"), Ex. 1 (email), CR 235, PR 452, CJA Vol. IV at ECF pp. 511–15, PJA Vol. IV) (Mr. Crawford stating "I received payment re: AR 20"); s*ee also* Katz 2/10/17 Letter at 3 (stating that "Mr. Crawford had received $50,000 from some 'very nice' Chinese businessman in March 2015 for withdrawing his review request in AR 20"). Shortly thereafter, in July of 2015, Mr. Hume and Mr. Crawford traveled to China, and Mr. Wang partially paid for their trip. I&D Mem. at 20 & n.120 (citing Wang Decl.); *see also* Wang Decl. ¶ 11.

Evidence also shows that Mr. Hume provided $15,000 to Mr. Katz between June and November 2016. *Id.* at 20 & n.118 (citing NMGGC 2/9/17 Letter, Ex. 4 (personal checks for $5,000 and $10,000 from Mr. Hume to Mr. Katz), ECF No. 87. Thereafter, in March of 2017, Mr. Crawford received garlic processing equipment, "shipped from China for use by coalition members." *Id.* at 20 & n.121–122 (citing Crawford Decl. Harmoni 3/9/17 Letter, Ex. 4 (importation of processing equipment shipped from Qingdao, China to Hume & Associates)); *see also* Crawford Decl. ¶ 15.

NMGGC does not dispute any of these transfers of funds or equipment or that Mr. Wang partially paid for Mr. Crawford's and Mr. Hume's trip to China in July of 2015. *See* NMGGC Br. at 32. Instead, NMGGC asserts that the $50,000 payment to Mr. Crawford was "was an unexpected gift from Mr. Hume," arising out of Mr. Crawford's participation in AR 20 and "willing[ness] to fight Harmoni." *Id.* at 31. Regarding Mr. Wang's partial payment of Mr. Crawford's and Mr. Hume's trip to China, NMGGC attributes those expenses to Chinese hospitality. *Id.* at 12. NMGGC states that Mr. Crawford's payment of $5,000 to Mr. Katz was "charity to a beleaguered farmer," whereas the $10,000 was a loan. *Id.* at 11–12.

Commerce identified record evidence, which showed that Mr. Hume's Chinese clients made monthly payments to Hume & Associates throughout 2016.[42] I&D Mem. at 20–21 & nn.123–24 (citations

[41] This payment occurred shortly before Mr. Montoya commenced efforts to contact additional U.S. garlic growers to establish a group to request that Commerce review Harmoni in AR 21. *See* I&D Mem. at 19 & n.113 (citing NMGGC 3/9/17 Letter Pt. 6, Ex. 9).

[42] Commerce stated that Mr. Hume also received a $100,000 payment between February and May of 2016 from his Chinese clients. I&D Mem. at 20–21 & n.124 (citations omitted). The record evidence upon which Commerce relied in support of this statement does not establish that Mr. Hume received $100,000 between February and May of 2016. *See* Harmoni 2/21/17 Letter Pt. 2, Ex. 6 at ECF pp. 587–94 (Aug & Sep. 2016 emails); NMGGC Reply to 3/3/17 Harmoni Submission (Mar. 9, 2017) – Part 5 ("NMGGC 3/9/17 Letter Pt. 5"), Ex. 7 (retainer agreement between Hume & Associates & Huamei Consulting), PR 471, CJA

omitted). Commerce concluded that while his Chinese clients were compensating Mr. Hume, Mr. Hume was compensating Mr. Katz and Mr. Crawford. *Id.* at 21. In fact, a retainer agreement, dated January 1, 2016, between Hume & Associates and Huamei Consulting states that Hume & Associates was to receive $13,500 per month to represent clients of Huamei Consulting at the Court of International Trade in cases concerning the 16th through 19th administrative reviews of the *AD Order*. NMGGC 3/9/17 Letter Pt. 5, Ex. 7; *see also* Wang Decl. ¶ 16 (the $13,500 monthly payments were for "office expenses, office rent, payments for [Mr. Hume's] staff, and his work, [including] . . . travel expenses.").

While NMGGC attempts to explain the evidence and invites the court to interpret the evidence in a different way, "[a]n agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence." *Ad Hoc Shrimp*, 802 F.3d at 1348 (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). To the extent NMGGC argues that the evidence before the agency "could be open to multiple interpretations, its argument does not require, or even allow, reversal." *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) (citing *Matsushita Elec. Indus. Co. Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984)). Instead, given the temporal overlap between these receipts and payments, the court finds that substantial evidence supports the agency's finding that "Mr. Hume was compensated by his Chinese clients during the entire course of his representation of NMGGC," and at the same time, "Mr. Katz and Mr. Crawford were compensated by Mr. Hume." I&D Mem. at 21.

iii. Commerce's finding that NMGGC misreported the reasons behind Mr. Crawford's withdrawal of his previous review request concerning Harmoni

As noted in the factual background section, NMGGC represented to the agency that Mr. Crawford had requested a review of Harmoni in AR 20, but "withdrew his request after private investigators were sent [by Harmoni and the FGPA] to inspect his facility and pry into his business." NMGGC Suppl. Review Req. Cmts at 4–5. Commerce determined this statement was contradicted by record evidence,

Vol. IV at ECF pp. 921–23, PJA Vol. IV. The Government points to additional evidence as establishing that Hume & Associates received $100,000 from Mr. Hume's Chinese clients during the pendency of the instant review. Gov. Resp. at 33 (citing Katz 2/10/17 Letter at 3; Harmoni Pre-Prelim. Comments (Nov. 21, 2016), Ex. 2 (email exchange on August 7 and 13, 2014), CR 171, PR 376, CJA Vol. III, PJA Vol. III). While the cited evidence does not adequately support a conclusion that Mr. Hume received "a payment" of $100,000 during the pendency of the instant review, the fact that this subsidiary finding is unsupported by substantial evidence does not undermine Commerce's overall conclusion such that remand would be necessary.

which showed that Mr. Hume and Mr. Crawford withdrew the request in AR 20 "at the behest of Mr. Hume's Chinese clients." I&D Mem. at 21. Indeed, in sworn declarations to the agency, Mr. Hume stated the reason for the withdrawal as follows:

> Harmoni went after Mr. Bai in China. . . . When I learned (and communicated with [Mr.] Crawford) that Harmoni was jeopardizing [Mr. Bai's] business and [Mr.] Wang [] asked me to consider asking [Mr.] Crawford to withdraw his review request. [Mr.] Crawford agreed, and we did.

I&D Mem. at 21 & n.126 (quoting NMGGC Refiling of 3/22/16 Submission (Apr. 8, 2016) – Part 2, Ex. 5 (Decl. of Robert T. Hume) (Mar. 22, 2016), PR 115, CJA Vol. II, PJA Vol. II).

NMGGC asserts that events relating to the withdrawal of the review request in AR 20 are not relevant to the current review because each review is a separate segment. NMGGC Br. at 34. Regardless of the actual reason for the withdrawal of the review request in AR 20, these inconsistent representations were made to the agency in AR 21 and support the agency's credibility assessment in this review.

iv. Commerce's other findings and credibility determinations

In addition to the foregoing examples, the agency also noted other contradictions between Mr. Katz' statements in his February 2017 submission and NMGGC's questionnaire response upon which Commerce relied to make its initial finding that NMGGC qualified as a domestic interested party. *See* I&D Mem. at 21. Specifically, the agency explained:

> [R]regarding its status as a domestic producer, [] NMGGC claimed that "[g]arlic farmers in the United States cannot compete with the Chinese garlic funneled into the United States by Harmoni that is exempt from the [agency's] administrative reviews." However, Mr. Katz later stated that "Boxcar Farm's fundamental problem is not competition from cheap garlic coming in from China," and that "[b]ased on nearly two years of conversation with Crawford and Hume, there was usually never any pretense otherwise in verbal conversation." Referring again to Mr. Crawford and Mr. Hume, Mr. Katz stated that "[o]ur stated moral high ground – 'leveling the playing field,' etc., etc. – inevitably came with a 'wink, wink' whenever we talked about it."

Id. at 21 & nn.128–31 (citing NMGGC Questionnaire Resp. at 4; Katz 2/10/17 Letter; Katz 2/21/17 Letter at 7) (second, fourth, and fifth alterations in original).

The agency further noted "serious problems with the certifications" that NMGGC submitted pursuant to 19 C.F.R. § 351.303(g).[43] *Id.* at 22. Mr. Katz claimed that he had not personally signed company certifications that his counsel submitted to Commerce on his behalf, and had not provided his approval to counsel to make those submissions. *Id.* at 22 & n.136 (citing Katz 2/21/17 Letter at 7) (Mr. Katz stating that he "only signed one Certification document -at the very beginning"). NMGGC confirmed that its counsel "adopted a procedure of compliance similar to the use of an autopen." NMGGC Reply to 3/3/17 Harmoni Submission – Part 1 (Mar. 8, 2017) ("NMGGC 3/8/17 Letter Pt. 1") at 2, PR 461, CJA Vol. IV at ECF p. 461, PJA Vol. IV; *see also* I&D Mem. at 22. Commerce acknowledged that while Mr. Hume produced some emails in which he or his office staff requested permission from Mr. Katz and Mr. Crawford for the placement of their "e-signature" on documents or approval of drafts prepared, this evidence did not account for all of the submissions. I&D Mem. at 22; *see also* NMGGC 3/8/17 Letter Pt. 1, Exs. 3 (sample emails seeking authorization), 4 (sample approvals). Moreover, "Mr. Crawford attempt[ed] to retroactively approve certain submissions" by belatedly signing certifications, but Commerce determined that "the contradictions and inconsistencies present in the statements made by the members of [] NMGGC raise[d] further concerns regarding the reliability of all of [] NMGGC's submissions." I&D Mem. at 23. Overall, the court finds Commerce's reliance on these additional concerns to be supported by substantial evidence.

v. Commerce's rescission of its review of Harmoni

The agency "possesses inherent authority to protect the integrity of its yearly administrative review decisions." *Tokyo Kikai Seisakusho, Ltd. v. United States,* 529 F.3d 1352, 1361 (Fed. Cir. 2008). Having concluded that Commerce's individual findings and credibility determinations with respect to NMGGC are supported by substantial evidence, the court affirms Commerce's decision that NMGGC's review request was illegitimate *ab initio.*

[43] Pursuant to 19 C.F.R. § 351.303(g), "person(s) officially responsible for presentation of factual information" and "the legal counsel or other representative," if applicable, must certify to the accuracy of each document submitted to the agency and indicate the date the certification.

3. Commerce's decision not to refer NMGCC's claims to the DOJ

As noted previously, NMGCC claims that Commerce abused its discretion in failing to request that the DOJ investigate and prosecute NMGGC's allegations that Harmoni and the FGPA "engag[ed] in collusion" and "effectively established a monopoly in trade for Chinese garlic." NMGGC Br. at 39. Commerce concluded that it did not have the authority to enforce the criminal laws of the United States, and declined to offer an opinion on NMGGC's allegations. I&D Mem. at 23. In challenging that conclusion before the court, NMGGC simply cites to 18 U.S.C. § 1001 and 18 U.S.C. § 371, both of which are criminal statutes. *See* NMGGC Br. at 39.

Plaintiff has failed to develop this argument in that it does not provide any authority that would have obligated Commerce to accept NMGGC's suggestion of referring the matter to the DOJ, let alone any precedent establishing that Commerce abused any discretion in declining to do so here. Moreover, NMGGC has not addressed whether Commerce's refusal to exercise that discretion is judicially reviewable by this court pursuant to 28 U.S.C. § 1581(c), the jurisdictional basis of NMGGC's complaint. *See* Compl. ¶ 12, ECF No. 12. Based on NMGGC's failure to develop its argument, the court deems it waived. *See Home Prods. Int'l., Inc. v. United States,* 36 CIT __, __, 837 F. Supp. 2d 1294, 1301 (2012) (quoting *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")).

E. Conclusion

For the reasons set forth above, NMGGC's motion for judgment on the agency record also is denied.

Judgment will enter accordingly.

Dated: November 26, 2018
New York, New York

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

Slip Op. 18–163

FINE FURNITURE (SHANGHAI) LIMITED, et al., Plaintiffs, and ARMSTRONG WOOD PRODUCTS (KUNSHAN) CO., LTD., GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., OLD MASTER PRODUCTS, INC., LUMBER LIQUIDATORS SERVICES, LLC, SHANGHAI LAIRUNDE WOOD CO., LTD., CHANGZHOU HAWD FLOORING CO., LTD., DALIAN HUILONG WOODEN PRODUCTS CO., LTD., DUNHUA CITY JISEN WOOD INDUSTRY CO., LTD., DUNHUA CITY DEXIN WOOD INDUSTRY CO., LTD., DUNHUA CITY HONGYUAN WOOD INDUSTRY CO., LTD., JIAXING HENGTONG WOOD CO., LTD., KARLY WOOD PRODUCT LIMITED, YINGYI-NATURE (KUNSHAN) WOOD INDUSTRY CO., LTD., XIAMEN YUNG DE ORNAMENT CO., LTD., ZHEJIANG SHUIMOJIANGNAN NEW MATERIAL TECHNOLOGY CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 16–00145

[United States Department of Commerce's Final Results are sustained.]

Dated: November 26, 2018

Sarah M. Wyss, Mowry & Grimson, PLLC, of Washington DC, argued for plaintiff. With her on the brief were *Kristin H. Mowry*, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Yuzhe PengLing*, and *James C. Beaty*.

Gregory S. Menegaz, *J. Kevin Horgan*, *Alexandra H. Salzman*, and *Judith L. Holdsworth*, of deKieffer & Horgan, PLLC, of Washington DC, for consolidated plaintiffs Changzhou Hawd Flooring Co., Ltd., Dalian Huilong Wooden Products Co. Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Dunhua City Hongyuan Wood Industry Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Karly Wood Product Limited, Yingyi-Nature (Kunshan) Wood Industry Co., Ltd., Xiamen Yung De Ornament Co., Ltd., and Zhejiang Shuimojiangnan New Material Technology Co., Ltd.

Lizbeth R. Levinson, *Ronald M. Wisla* and *Brittney R. McClain*, Kutak Rock LLP, of Washington DC, for consolidated plaintiffs Zhejiang Dadongwu GreenHome Wood Co., Ltd., Johnson's Premium Hardwood Flooring, Inc., Struxtur, Inc., Wego Chemical & Mineral Corp., Floor and Décor Outlets of America, Inc., Hangzhou Hanje Tec Co., Ltd., Huzhou Chenghang Wood Co., Ltd., Jilin Forest Industry Jinqiao Flooring Group Co., Ltd., MuDanJiang Bosen Wood Industry Co., Ltd., Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd., Shenyang Haobainian Wooden Co., Ltd., Dalian Dajen Wood Co., Ltd., and Dunhua City Wanrong Wood Industry Co., Ltd.

Francis J. Sailer and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington DC, for plaintiff-intervenor Shanghai Lairunde Wood Co., Ltd.

John R. Magnus and *Sheridan S. McKinney*, TradeWins LLC, of Washington DC, for plaintiff-intervenor Old Master Products, Inc.

H. Deen Kaplan and *Craig A. Lewis*, Hogan Lovells US LLP, of Washington, DC, for plaintiff-intervenor Armstrong Wood Products (Kunshan) Co. Ltd.

Mark Ludwikowski, *Kristen Smith*, *Arthur K. Purcell*, and *Emi Ito Ortiz*, Sandler, Travis & Rosenberg, P.A., of Washington DC, for plaintiff-intervenor Lumber Liquidators Services, LLC.

Jonathan M. Zielinski and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP, of Washington DC, for plaintiff-intervenor Guangdong Yihua Timber Industry Co., Ltd.

Tara K. Hogan, Senior Trial Counsel, U.S. Department of Justice, Commercial Litigation Branch, of Washington DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Mercedes C. Morno*, Office of Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION

Eaton, Judge:

In this consolidated action, plaintiff Fine Furniture (Shanghai) Limited ("Fine Furniture" or "plaintiff") moves for judgment on the agency record, challenging the United States Department of Commerce's ("Commerce" or "Department") final results in the third administrative review of the antidumping duty order on multilayered wood flooring from the People's Republic of China. *See Multilayered Wood Flooring From the People's Rep. of China*, 81 Fed. Reg. 46,899 (Dep't Commerce July 19, 2016), *as amended* 81 Fed. Reg. 53,120 (Dep't Commerce Aug. 11, 2016) ("Final Results"); *see also* Final Issues & Dec. Mem. (July 12, 2016) ("Final IDM") (P.R. 359–361). Fine Furniture, consolidated plaintiffs,[1] and plaintiff-intervenors[2] (collectively, "plaintiffs") contend that Commerce's Final Results were unsupported by substantial evidence on the record. *See*Fine Furniture's Mem. Supp. Mot. J. Agency R., ECF No. 90–1 ("Fine Furniture Br.").

Plaintiffs are producers and/or exporters of multilayered wood flooring from China. By their motions for judgment on the agency record, plaintiff and plaintiff-intervenors challenge Commerce's (1) selection of Romania as the primary surrogate country, (2) calculation of the surrogate financial ratios, and (3) calculation of the surrogate

[1] The consolidated plaintiffs are Zhejiang Dadongwu GreenHome Wood Co., Ltd., Johnson's Premium Hardwood Flooring, Inc., Struxtur, Inc., Wego Chemical & Mineral Corp., Floor and Décor Outlets of America, Inc., Hangzhou Hanje Tec Co., Ltd., Huzhou Chenghang Wood Co., Ltd., Jilin Forest Industry Jinqiao Flooring Group Co., Ltd., MuDanJiang Bosen Wood Industry Co., Ltd., Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd., Shenyang Haobainian Wooden Co., Ltd., Dalian Dajen Wood Co., Ltd., and Dunhua City Wanrong Wood Industry Co., Ltd.

[2] The plaintiff-intervenors are Armstrong Wood Products (Kunshan) Co., Ltd.; Guangdong Yihua Timber Industry Co., Ltd.; Old Master Products Inc. ("Old Master"); Lumber Liquidators Services, LLC; Shanghai Lairunde Wood Co., Ltd. ("Shanghai Lairunde"); and consolidated plaintiffs Changzhou Hawd Flooring Co., Ltd., Dalian Huilong Wooden Products Co. Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Dunhua City Hongyuan Wood Industry Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Karly Wood Product Limited, Yingyi-Nature (Kunshan) Wood Industry Co., Ltd., Xiamen Yung De Ornament Co., Ltd., and Zhejiang Shuimojiangnan New Material Technology Co., Ltd. ("Changzhou Hawd plaintiffs").

value for Fine Furniture's face veneer. *See generally* Fine Furniture Br.[3] Plaintiff-Intervenor Old Master also challenges Commerce's (4) calculation of the antidumping duty margin assigned to the separate rate companies who were not selected for individual examination. *See* Old Master's Mem. Supp. Mot. J. Agency R., ECF No. 92–1 ("Old Master Br.").[4]

Defendant the United States, on behalf of Commerce, maintains that the Final Results should be sustained because they are in accordance with law and supported by substantial evidence. *See* Def.'s Resp. Opp'n Mots. J. Admin. R., ECF No. 101 ("Def.'s Br.").

The court has jurisdiction under 28 U.S.C. § 1581(c) (2012). For the reasons stated below, the court sustains Commerce's Final Results.

BACKGROUND

On October 18, 2011, Commerce published its final affirmative dumping determination and an antidumping duty order on multilayered wood flooring from China. *See Multilayered Wood Flooring From the People's Rep. of China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011). The order was amended twice and remains in effect. *See Multilayered Wood Flooring From the People's Rep. of China*, 76 Fed. Reg. 76,690 (Dep't Commerce Dec. 8, 2011) (amended final dumping determination and order); *Multilayered Wood Flooring From the People's Rep. of China*, 77 Fed. Reg. 5484 (Dep't Commerce Feb. 3, 2012) (amended antidumping and countervailing duty orders).

On February 4, 2015, Commerce initiated its third administrative review of the order covering the period of December 1, 2013, through November 30, 2014 ("POR"). *See* Initiation of Antidumping and Countervailing Duty Admin. Reviews, 80 Fed. Reg. 6041 (Dep't Commerce Feb. 4, 2015). Fine Furniture and Dalian Penghong Floor Products Co., Ltd. ("Penghong") were selected as mandatory respondents. *See* Final Results, 81 Fed. Reg. at 46,899. Because China is considered a nonmarket economy, Commerce was required to select a surrogate

[3] The plaintiff-intervenors incorporate by reference the surrogate country and surrogate value arguments made by plaintiff Fine Furniture. Accordingly, the court will generally refer to Fine Furniture's papers. Any arguments not specifically addressed in Fine Furniture's papers will be expressly noted.

[4] The plaintiff-intervenors incorporate by reference the separate rate assessment arguments made by plaintiff-intervenor Old Master. Accordingly, citations to this argument will be made by reference to the motion filed by Old Master. Any argument on this matter not specifically addressed in Old Master's papers shall be expressly noted.

market economy country to value the factors of production of the subject imports.[5]

As part of its review, on May 15, 2015, Commerce's Import Administration Office of Policy issued a non-exhaustive list of countries at the same or comparable level of economic development as China based on per capita gross national income as reported in the World Bank's 2015 Development Report (the "OP list"). This list included Romania, Bulgaria, South Africa, Ecuador, Thailand, and Ukraine.[6] Commerce then set a deadline of June 15, 2015, for comments on surrogate country selection regarding the listed countries' (1) significant production of comparable merchandise, (2) data availability and quality, to value factors of production, and (3) financial statements availability and quality (*i.e.*, whether the countries were acceptable as surrogate countries or to propose other economically comparable countries); and a deadline of June 29, 2015, to submit proposed surrogate values.[7] *See* Letter to All Interested Parties Re: Request for

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[5] In antidumping proceedings involving nonmarket economy countries—such as China—19 U.S.C. § 1677b(c)(1) requires Commerce to calculate the normal value of the subject merchandise based on surrogate values offered in a comparable market economy country, *i.e.*, a surrogate country. Subsection 1677b(c)(1) provides:

> [If] (A) the subject merchandise is exported from a nonmarket economy country, and (B) . . . available information does not permit the normal value of the subject merchandise to be determined . . . , the normal value of the subject merchandise [shall be determined] on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . . [T]he 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 . . . .

19 U.S.C. § 1677b(c)(1). Subsection 1677b(c)(4) requires commerce to use the prices or costs of factors of production in "one or more market economy countries" that are "(A) at a level of economic development comparable to that of the nonmarket economy country" and "(B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)-(B).

[6] Commerce selects a primary surrogate country using a process that tracks the requirements of 19 U.S.C. § 1677b(c)(1) and (4), described above. The Department's practice in identifying countries that are at the same level of economic development is described in the Department's Policy Bulletin No. 04.1. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004) ("Policy Bulletin 04.1"), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Nov. 20, 2018). As an initial matter,

> [t]he operations team sends the Office of Policy ("OP") a written request for a list of potential surrogate countries. In response, OP provides a list of potential surrogate countries that are at a comparable level of economic development to the [nonmarket economy] country. OP determines economic comparability on the basis of per capita gross national income, as reported in the most current annual issue of the World Development Report (The World Bank).

Policy Bulletin 04.1 at 2.

[7] The Department states that it will generally select

> a surrogate country that is at the same level of economic development as the [nonmarket economy] unless it is determined that none of the countries are viable options because (a) they . . . are not significant producers of comparable merchandise, (b) do not provide sufficient reliable sources of publicly available [surrogate value] data, or (c) are not suitable for use based on other reasons.

Selection of a Surrogate Country Mem. (Dec. 31, 2015) (P.R. 294) at 4.

Surrogate Country and Surrogate Value Comments and Information (May 15, 2015) (P.R. 169).

In its initial response, filed on June 15, 2015, petitioner Coalition for American Hardwood Parity ("petitioner")[8] stated that the six potential surrogate countries on Commerce's OP list were (1) significant producers of comparable merchandise and (2) that data of reasonable availability and quality, for the factors of production, and financial statements were available (*i.e.*, that all six countries met the requirements for use as the primary surrogate country), but because "one of the mandatory respondents [Fine Furniture] . . . was not due for submission to the Department until June 12, 2016," and therefore petitioner "d[id] not know the specific factors of production for that respondent," petitioner did not make any arguments as to which country was the most appropriate surrogate country. *See* Pet. Comments on Surrogate Selection (P.R. 185) at 3. In fact, on June 15, 2015, Fine Furniture timely submitted a letter arguing that Thailand should serve as the surrogate country. *See* Fine Furniture's Surrogate Country Comments (June 15, 2015) (P.R. 186) at 2.

Thereafter, on June 29, 2015, petitioner submitted proposed surrogate values from Romania and, for the first time, argued that Romania was the most appropriate surrogate country. *See* Letter from Levin Trade Law, P.C. to Commerce (June 26, 2015) (P.R. 190–192). On November 20, 2015, Commerce rejected a portion of this submission because it contained "untimely filed comments on surrogate country selection" (which were due by June 15, 2015), but allowed petitioner to resubmit the document without those comments. *See* Letter from Commerce to Levin Trade Law, P.C. (Nov. 20, 2015) (P.R. 279). Petitioner resubmitted the document with the necessary adjustments on November 24, 2015. *See* Letter from Levin Trade Law, P.C. to Commerce (Nov. 24, 2015) (P.R. 281–282).

Also, on November 2, 2015, petitioner submitted additional proposed surrogate values and commented that "these suggestions demonstrate the superiority of Romania as a surrogate country versus Thailand." Letter from Levin Trade Law, P.C. to Commerce (Nov. 2, 2015) (P.R. 254) at 2. On November 5, 2015, Commerce held an *ex parte* meeting with petitioner regarding the selection of the appropriate surrogate country. *See* Memo to File Re: Ex Parte Meeting (Nov. 5, 2015) (P.R. 268). At the *ex parte* meeting, petitioner presented a data spreadsheet titled "Comparison of Surrogate Values for Key Inputs," with one column titled "Why Romanian [Surrogate Value] is better." Letter from Levin Trade Law, P.C. to Commerce (Nov. 6, 2015) (P.R. 269); *see also* Meeting Handout (P.R. 270).

[8] Petitioner is not a party to this action or any of the consolidated cases.

On January 8, 2016, Commerce published its preliminary results. *See Multilayered Wood Flooring From the People's Rep. of China*, 81 Fed. Reg. 903 (Dep't Commerce Jan. 8, 2016) ("Preliminary Results"), and accompanying Prelim. Dec. Mem. (Dec. 31, 2015) (P.R. 292–293) ("Preliminary Decision Mem."). In the Preliminary Results, Commerce found that "Bulgaria, Romania, Ecuador, Ukraine, South Africa, and Thailand [were] all at the same level of economic development as [China]" and were "all significant producers of comparable merchandise." Preliminary Decision Mem. at 10–11.

In the Preliminary Results, Commerce selected Romania as the primary surrogate country based, on what it said, was the "availability and reliability" of the surrogate value data. *See* Preliminary Decision Mem. at 11. Although Commerce stated that "the record of this review contains specific, contemporaneous, and high-quality data from Thailand and Romania to value all [factors of production]," it found that "Romania contains the best available information for valuing respondents' [factors of production]" because "the import data from Romania contains greater specificity for certain major inputs (*i.e.*, logs and lumber)." Selection of a Surrogate Country Mem. (Dec. 31, 2015) (P.R. 294) ("Surrogate Country Mem.") at 7. Specifically, Commerce found that "the Romanian HTS schedule contains categories specific to [the] wood species and thicknesses reported by the mandatory respondents," whereas "the Thai HTS schedule does not contain species-specific categories." Surrogate Country Mem. at 7. Moreover, Commerce preliminarily found that because "the record lacks a contemporaneous labor [surrogate value] from Thailand," and that the "Romanian labor rates are contemporaneous with the POR," there was further support for a finding that Romania was the more appropriate surrogate country. Surrogate Country Mem. at 7. Also, Fine Furniture's arguments to the contrary notwithstanding, Commerce preliminarily determined that "both [Romania and Thailand] provide equally specific data on non-wood raw materials, such as [surrogate values] for glue, thinner, and other chemicals." Surrogate Country Mem. at 7.

Next, the record contained surrogate financial statements from Romania and Thailand.[9] Specifically, usable financial statements came from three producers: Neotech Plywood Co., Ltd ("Neotech") and Lampang Product Ordinary Partnership ("Lampang"), of Thailand; and SC Sigstrat SA ("Sigstrat"), of Romania. *See* Preliminary Decision Mem. at 21–22. Commerce then found that, although the financial statements of Romanian company Sigstrat, and Thai

[9] Commerce uses surrogate financial statements to derive the financial ratio.

companies Neotech, and Lampang were all "useable[,] . . . contemporaneous financial statements of producers of comparable merchandise, contain no evidence of countervailable subsidies, and contain no qualified opinions," the financial statement for Romanian producer Sigstrat contained the best available information. *See* Preliminary Decision Mem. at 22. Commerce stated that this decision was, among other things, in accordance with its longstanding preference of valuing all factors of production in a single surrogate country (with the exception of labor). Preliminary Decision Mem. at 22. Using Romanian data to value all of the factors of production, Commerce preliminarily assigned weighted-average dumping margins[10] of 13.34 percent and 0.00 percent for Fine Furniture and Penghong, respectively.[11] *See* Preliminary Results, 81 Fed. Reg. at 905.

Subsequently, Fine Furniture, Penghong, Shanghai Lairunde, Lumber Liquidators, the Changzhou Hawd plaintiffs, and some of the consolidated-plaintiffs submitted comments on Commerce's Preliminary Results. *See* Final Results, 81 Fed. Reg. at 46,900; *see also* Letter from Fine Furniture to Commerce Re: Case Brief for Consideration Prior to the Final Results (Feb. 12, 2016) (P.R. 340) ("Fine Furniture Case Br."). Based on a review of the record and the comments received, Commerce made certain revisions to its margin calculations for Fine Furniture and the separate rate respondents not selected for individual examination. *See* Final Results, 81 Fed Reg. at 46,901.

On July 19, 2016, Commerce issued the Final Results in which Commerce continued to find Romania to be "the most appropriate surrogate country." Final IDM at 10. Commerce then assigned weighted-average dumping rates of 17.37 percent and 0.00 percent to Fine Furniture and Penghong, respectively. *See* Final Results, 81 Fed Reg. at 46,901. In calculating the separate rate, Commerce excluded from averaging the 0.00 percent rate calculated for Penghong,

[10] "The term 'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B).

[11] Commerce determined that twenty of the plaintiffs in this case were entitled to separate rates. *See* Preliminary Results, 81 Fed. Reg. at 904–05. Because Commerce calculated a 0.00 percent margin for Penghong, this rate was excluded from the average in the determination of the separate rate margin. Accordingly, Commerce preliminarily assigned to each separate rate company a margin of 13.34 percent based on the weighted-average of the weighted-average dumping margin calculated for Fine Furniture. Preliminary Results, 81 Fed. Reg. at 905. The rate was amended upward in the Final Results as a result of Fine Furniture's rate being adjusted to 17.37 percent. *See* Final Results, 81 Fed. Reg. at 46,901.

resulting in a 17.37 percent rate for the separate rate respondents. *See* Final Results, 81 Fed Reg. at 46,901; *see* 19 U.S.C. § 1673d(c)(5)(A).[12]

The rate changes resulted from three adjustments to the calculations of the factors of production valuations used by Commerce in the Preliminary Results. *See* Multilayered Wood Flooring from the People's Rep. of China: Final Surrogate Value Mem. (July 12, 2016) (P.R. 364) ("Final Surrogate Value Mem."). Consistent with the Preliminary Results, Commerce retained Romania as the primary surrogate country for calculating the factors of production. *See* Final IDM at 10, 23. First, Commerce revised Fine Furniture's surrogate values for certain lumber raw materials, including white and European oak, tigerwood lumber, and jatoba lumber, and also corrected an error in the valuation of sapelli lumber. *See* Final Surrogate Value Mem. at 1. Second, Commerce revised its calculation of the surrogate financial ratios by relying on Note 4[13] of the Sigstrat financial statement "to calculate Fine Furniture's and [Penghong's] factory overhead, selling, general, and administrative expense, and profit ratios." Final Surrogate Value Mem. at 2. Third, Commerce also "revised the calculation of B&H [(brokerage and handling)] by deducting the cost of obtaining letters of credit, in the amount of $60.00, from the total cost of B&H reflected in the data." Final Surrogate Value Mem. at 2. Finally, to value the face veneer wood consumed by Fine Furniture, Commerce used a simple average of the value of imports into Romania under two HTS subheadings, which include a "Planed; sanded; end-jointed, whether or not planed or sanded" category and an "Other" category. *See* Final IDM at 23.

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[12] In administrative reviews involving nonmarket economy countries, the statute is silent as to how Commerce establishes a rate for unselected respondents who establish their independence from the government (*i.e.*, the separate rate). *See, e.g.*, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013) (citation omitted) ("The separate rate for eligible non-mandatory respondents is generally calculated following the statutory method for determining the 'all others rate' under § 1673d(c)(5)(A)."). To fill the statutory gap, Commerce generally follows the method for determining the all-others rate in market economy investigations. *See, e.g.*, *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Rep. of China*, 80 Fed. Reg. 4244, 4245 (Dep't Commerce Jan. 27, 2015) (final results). Accordingly, Commerce looks to 19 U.S.C. § 1673d(c)(5)(A), which provides that

> the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title.

19 U.S.C. § 1673d(c)(5)(A).

[13] Note 4 of the Sigstrat financial statement details various expenses in 2013 and 2014. *See* Letter from Levin Trade Law, P.C. to Commerce Re: Petitioners' Comments Prior to Preliminary Results and Submission of Factual Information (Nov. 2, 2015) (P.R. 254–264), Ex. 4.

On September 1, 2016, Fine Furniture filed its complaint, seeking judicial review of Commerce's calculation of its antidumping duty rate in the Final Results. The plaintiff-intervenors subsequently filed their motions to intervene, which the court granted.

STANDARD OF REVIEW

In reviewing Commerce's Final Results, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

LEGAL FRAMEWORK

"The United States imposes duties on foreign-produced goods that are sold in the United States at less-than-fair value." *Clearon Corp. v. United States*, 37 CIT __, __, Slip Op. 13–22 at 4 (Feb. 20, 2013). In determining "whether [the] subject merchandise is being, or is likely to be, sold at less than fair value," the statute requires Commerce to make "a fair comparison . . . between the export price[14] or constructed export price[15] and normal value.[16] " 19 U.S.C. § 1677b(a). When, as here, the merchandise in question is exported from a nonmarket economy country,[17] "the normal value of the subject merchan-

[14] The "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, as adjusted under subsection (c) of this section.

19 U.S.C. § 1677a(a).

[15] The "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, as adjusted under subsections (c) and (d) of this section.

19 U.S.C. § 1677a(b).

[16] Generally, "normal value" is defined as "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade . . . ." 19 U.S.C. § 1677b(a)(1)(B)(i).

[17] A nonmarket economy country is a "foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). Because Commerce deems the PRC "to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal

dise [is based on] the value of the factors of production[18] utilized in producing the merchandise and [an] added . . . amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1)(B). To determine the normal value of the subject merchandise in a nonmarket economy, Commerce must calculate surrogate values using "the best available information regarding the values of such factors in a [comparable] market economy." *Id.* In doing so, Commerce relies on one or more comparable market economy countries that are (1) "at a level of economic development comparable to that of the nonmarket economy country," and (2) "significant producers of comparable merchandise."[19] *Id.* § 1677b(c)(4). In other words, Commerce's task is to "attempt to construct a hypothetical market value" of the subject merchandise in the nonmarket economy. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

When Commerce finds that "there is more than one country that is at the same level of economic development as the [nonmarket economy] country and is a significant producer of comparable merchandise, [Commerce] will consider the quality and availability of the [surrogate value] data." Surrogate Country Mem. at 6; *see also Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1079, 638 F. Supp. 2d 1325, 1350 (2009) ("Data considerations may be a determining factor for surrogate country selection."). In evaluating surrogate value data, Commerce "considers several factors, including whether the [surrogate values] are publicly available, contemporaneous with the POR, representative of a broad market average, tax and duty-exclusive, and specific to the inputs being valued." Surrogate Country Mem. at 6 (citing Policy Bulletin No. 04.1); *see also Qingdao Sealine Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citing the same factors). Importantly, "[t]here is no hierarchy among these criteria, and [Commerce] must weigh available information

value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004).

[18] Factors of production are "the factors of production utilized in producing merchandise [which] include, but are not limited to—(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and] (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3). In valuing the factors of production, the statute further provides that Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4).

[19] "Comparability is not defined in the antidumping statute or the regulation. Commerce's typical practice in analyzing comparability is to consider the similarities in production, end uses, and physical characteristics between two products." *Jiaxing Brother Fastener Co., Ltd. v. United States*, 34 CIT 1455, 1463–64, 751 F. Supp. 2d 1345, 1354 (2010).

with respect to each [factor of production] and make a product-specific and segment-specific decision as to what the best [surrogate value] is for each [factor of production]." Surrogate Country Mem. at 6–7; *see also Xiamen Int'l Trade and Indus. Co. v. United States*, 37 CIT __, __, 953 F. Supp. 2d 1307, 1313 (2013) ("Commerce has not identified a hierarchy among these factors, and the weight accorded to a factor varies depending on the facts of each case.").

Commerce's regulatory preference is to value all factors of production with surrogate values from a single surrogate country. 19 C.F.R. § 351.408(c)(2) (2016) ("Except for labor . . . , the Secretary normally will value all factors in a single surrogate country."). This preference has been approved by the Federal Circuit. *See Jiaxing Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1302 (Fed. Cir. 2016) ("[W]e find no error in Commerce's determination to use Thai import statistics to value HCl, a conclusion in accordance with its administrative preference to appraise surrogate values from a single surrogate country." (citing 19 C.F.R. § 351.408(c)(2)). After comparing the available data sets, "where there exist on the record 'alternative sources of data that would be equally or more reliable . . . it is within Commerce's discretion to use either set of data.'" *Zhejiang Native Produce & Animal By-Prods. Import & Export Grp. Corp. v. United States*, 41 CIT __, __, 227 F. Supp. 3d 1375, 1381 (2017) (quoting *Geum Poong Corp. v. United States*, 26 CIT 322, 326, 193 F. Supp. 2d 1363, 1369 (2002)); *Jiaxing Brother Fastener Co.*, 822 F.3d at 1302 (finding that because "[t]he record evidence shows that the HCl import statistics from India and Thailand were equally usable, . . . Commerce's choice to use the Thai import statistics is supported by substantial evidence.").

DISCUSSION

I. Commerce's Selection of Romania over Thailand as the Surrogate Country Is Supported by Substantial Evidence and Is in Accordance with Law

Plaintiff first argues that Commerce's selection of Romania, and not Thailand, as the primary surrogate country was unsupported by substantial evidence and contrary to law. In particular, plaintiff maintains that (1) "the decision was improperly grounded in the Petitioner's untimely surrogate country comments," and (2) "Thailand provides the highest quality [surrogate value] data under the factors examined by Commerce." Fine Furniture Br. 8.

A. Commerce Did Not Err in Accepting Defendant's November 2, 2015 and November 5, 2015 Submissions

Initially, plaintiff argues that Commerce erred as a matter of law when it permitted petitioner to submit comments supporting the selection of Romania as the surrogate country after the June 15, 2015 deadline. *See* Fine Furniture Br. 8–12 (citing 19 C.F.R. § 351.302(d)[20]). In particular, plaintiff maintains that "Commerce set a deadline of June 15, 2015 for comments on surrogate country selection," and because petitioner, in its June 15, 2015 response, "chose not to comment on the availability and quality of [factors of production] data and financial statements," and instead argued "that the six potential surrogate countries on Commerce's list were equally significant producers," Romania was "not placed into consideration as a potential surrogate country for the first time until after the [surrogate value] comment stage." Fine Furniture Br. 9, 12. For plaintiff, by accepting petitioner's November 2, 2015 letter stating that Romania's surrogate value suggestions "demonstrate the superiority of Romania as a surrogate country versus Thailand," and by considering surrogate country comments in an *ex parte* meeting, Commerce acted "contrary to the agency's regulations," and therefore, arbitrarily. Letter from Levin Trade Law, P.C. to Commerce (Nov. 2, 2015) (P.R. 254) at 2; *see also* Fine Furniture Br. 11 (citing *Anderson v. U.S. Sec'y of Agric.*, 30 CIT 1742, 1749, 462 F. Supp. 2d 1333, 1339 (2006)), 10–11 ("Commerce determined that 'the exhibit from the *ex parte* meeting and November 2, 2015 language are merely a comparison of data already on the record and do not provide any factual information.' This determination directly contradicts Commerce's own rejection of [petitioner's] untimely surrogate country comments filed as part of [petitioner's] June 29 surrogate submission." (citing Final IDM at 12)).

Plaintiff, therefore, asks the court to enforce the filing deadlines and direct Commerce to reject petitioner's surrogate country submissions because, it argues, "[i]t is hard to imagine that Commerce would have come to the same conclusion if Petitioners had not submitted any arguments alleging that Romania is the appropriate surrogate country . . . ." Fine Furniture Reply Br. Supp. Mot. J. Agency R., ECF No. 111 ("Fine Furniture Reply Br.") 2 ("Without the benefit of Petitioners' arguments, Commerce could not have reasonably supported its selection of Romania with substantial evidence."). Moreover, plain-

[20] This regulation directs Commerce not to "consider or retain in the official record of the proceeding . . . [u]ntimely filed *factual information*." 19 C.F.R. § 351.302(d)(1)(i) (emphasis added).

tiff claims that Commerce's "disciplined approach to enforcing filing deadlines [is] a policy upheld by this Court and the Federal Circuit." Fine Furniture Br. 8 (citing *Juancheng Kangtai Chem. Co. v. United States*, 39 CIT __, __, Slip Op. 15–93 at 19 (Aug. 21, 2015) (upholding Commerce's rejection of untimely surrogate country submissions because Commerce found they would "'create undue administrative difficulties' and be 'potentially unfair to the parties'")); *see also Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1352–53 (Fed. Cir. 2015). Accordingly, plaintiff asks for a "remand [of the Final Results] to Commerce with instructions to first reject [petitioner's] untimely comments and then re-consider its surrogate country determination without relying on these untimely comments." Fine Furniture Br. 12.

The court finds that Commerce's determination to retain petitioner's surrogate country comments was not unlawful. Romania was on Commerce's OP list, and petitioner, prior to the June 15, 2015 deadline, wrote that Romania (along with the other countries) was a "significant producer[] of merchandise comparable to the merchandise subject to this review" and that it believed that "data of at least reasonable availability and quality are available." Letter from Levin Trade Law, P.C. to Commerce Re: Multilayered Wood Flooring from the People's Rep. of China (June 15, 2015) (P.R. 185) at 2–3. Therefore, at the outset of the administrative proceeding, Commerce identified Romania as a viable option for primary surrogate country selection, and, by providing its view that Romania was a significant producer of comparable merchandise, petitioner timely placed Romania into consideration during the surrogate country selection stage. *See* Final IDM at 11 ("The previous surrogate country comments supporting Romania as the surrogate country, submitted on June 15, 2015 were submitted timely, and thus remain on the record."). Plaintiff's citations to *Juancheng* do not persuade the court that Commerce should have rejected petitioner's November submissions because in *Juancheng*, "consideration of India as a potential surrogate country" was not raised until the post-preliminary stage in a respondent's brief (*i.e.*, India was not on Commerce's Import Administration Office of Policy list of countries at the same or comparable level of economic development as China). *See Juancheng*, 39 CIT at __, Slip Op. 15–93 at 19.

Moreover, as Commerce noted, petitioner timely submitted "Romanian surrogate value data" in its June 29, 2015 submission, and that submission "remain[ed] on the record, and the Department is duly required to consider the information." Final IDM at 11. Indeed, as a result of petitioner's timely submission of the Romanian surrogate

value data (which was resubmitted on November 24, 2015 without any arguments regarding the "appropriate" surrogate country), Commerce was required to "justify its selection of the surrogates based on substantial evidence on the record," including addressing the Romanian data. *DuPont Teijin Films v. United States*, 37 CIT __, __, 931 F. Supp. 2d 1297, 1307 (2013). Also, Commerce, having considered the surrogate value information submitted by the petitioner, found that Romanian surrogate value data was superior to Thailand's. Having made this finding, Commerce had a duty to select the Romanian information. *See id.*

With respect to plaintiff's argument that Commerce would not have selected Romania as a surrogate country but for subsequent submissions to Commerce, it is not clear that this is the case. As Commerce stated, petitioner

> added no new information to the record in the [November 5, 2015] meeting, neither in its discussions nor in documentary form. The exhibit from the *ex parte* meeting and November 2, 2015 language are merely a comparison of data already on the record and do not provide any new factual information. As stated in the Preliminary Results, [petitioner] timely placed information supporting Romania as the surrogate country on the record with its June 15, 2015, submission, and, at the time of the meeting, in its June 29, 2015, submission, as well as later in its November 24, 2015, submission.

Final IDM at 11–12. Thus, Romania was on the OP list as of May 15, 2015, and the Romanian surrogate value data were properly before Commerce based on the timely June 29, 2015 submission. Thus, the Department was required to compare this data with the Thai surrogate value data timely submitted by Fine Furniture, which is precisely what it did.

Finally, plaintiff both had and took the opportunity to rebut the Romanian data. On November 12, 2015, Fine Furniture presented arguments as to why Thailand is the superior choice to Romania. *See* Letter from Mowry & Grimson, PLLC to Commerce Re: Rebuttal Surrogate Value Comments (P.R. 274–276); Letter from Mowry & Grimson, PLLC to Commerce Re: Pre-Prelim. Results Comments (P.R. 286). As a result, there is no evidence that plaintiff suffered substantial prejudice, or indeed, any prejudice at all, from Commerce's acts. *See PAM S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006). Accordingly, Commerce's consideration of the petitioner's submissions was in accordance with law.

B. Commerce Did Not Fail to Consider Record Evidence Regarding the Thai Data

Next, plaintiff argues that "[e]ven if the Court does not remand Commerce's improper procedural selection of Romania, it must nevertheless reject Commerce's selection as a matter of substantial evidence review," because Commerce "inadequately considered record evidence that established the quality and superiority of the data from Thailand" and failed to "address disqualifying flaws in the Romanian data as required under the best available information standard." Fine Furniture Br. 13. In particular, plaintiff claims that "Commerce did not adequately weigh the strengths and weaknesses of the available data options from Romania and Thailand for labor, financial ratios, electricity and material inputs." Fine Furniture Br. 14. Thus, for plaintiff, the overall weight of the evidence supports the selection of Thailand as the surrogate country because the Thai data is more specific "across the seven categories of data: labor, financial ratios, utilities, materials, packing, materials, freight and by-products." Fine Furniture Br. 40–41. Accordingly, plaintiff maintains that "Commerce's determination . . . was unsupported by substantial evidence and must be remanded to Commerce." Fine Furniture Br. 40. The court will address these arguments in turn.

1. Commerce Reasonably Determined that the Contemporaneous Romanian Labor Data Supported the Selection of Romania as the Primary Surrogate Country

Plaintiff first argues that the "Romanian data are inferior to the Thai data with respect to labor" because the Thai data is more industry-specific. Fine Furniture Br. 14. In particular, plaintiff claims that "Commerce conceded that 'the Thai labor [surrogate values] are more specific than the Romanian labor [surrogate values] because they are only for the '[m]anufacturing of veneer sheets and wood-based panels [which are key components of Fine Furniture's production],' whereas the Romanian [data] also includes [the manufacturing of] 'articles of straw and plaiting materials [products not produced by Fine Furniture].'" Fine Furniture Br. 14 (quoting Final IDM at 20). Plaintiff makes this argument even though the Romanian data is more contemporaneous. Because plaintiff maintains that specificity to the manufacturing process is more important than contemporaneity, it argues that Commerce erred when it "concluded that the Romanian labor data are superior because they are contemporaneous

(2013) with the POR . . . .” Fine Furniture Br. 14. Thus, plaintiff asks that the court “remand with instructions to prioritize specificity . . . .” Fine Furniture Br. 16.

In *Dorbest Limited v. United States*, the Federal Circuit found that Commerce's regression method for determining labor surrogate values in nonmarket economy countries (by averaging wage rate data collected from multiple countries) was not consistent with 19 U.S.C. § 1677b(c)(4), and thus, invalidated Commerce's regulation codifying the regression-based method (19 C.F.R. § 351.408(c)(3)). *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010). Commerce subsequently published its New Labor Rate Policy, in which it stated that it would begin using wage rate data found in Chapter 6A of the International Labor Organization's (“ILO”) *Yearbook of Labor Statistics*[21] from the primary surrogate country to value labor. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093 (Dep't Commerce June 21, 2011) (“New Labor Rate Policy”).

Plaintiff claims that that the notice announcing the New Labor Rate Policy states a preference for industry-specificity over contemporaneity. Plaintiff refers to the following language:

> [Commerce] will value the [nonmarket economy] respondent's labor input using industry specific costs prevailing in the primary surrogate country, as reported in Chapter 6A of the ILO Yearbook of Labor Statistics . . . [Commerce] sorts the ILO data *based on data parameters* **in the following order** : **1. “Subclassification,”** i.e., if there is no industry-specific data available for the surrogate country within the primary data source, [*i.e.*, ILO Chapter 6A data] . . .; 2. “Type of Data,” i.e., reported under categories compensation of employees and labor cost . . . **3. “Contemporaneity,”** i.e., [Commerce] uses the most recent earnings/wage rate data point available. 4. The unit of time for which the wage is reported . . . . [Commerce selects from the following categories *in the following hierarchy*: (1) per hour; (2) per day; (3) per week; or (4) per month.]

Fine Furniture Br. 14 (quoting New Labor Rate Policy, 76 Fed. Reg. at 36,094 n.11) (boldface as in original; italics supplied). For plaintiff,

[21] As Commerce stated in its New Labor Rate Policy, “[t]he ILO collects labor cost data by country and industry, which is reported on the basis of the United Nations' International Standard Classification of All Economic Activities . . . . The industry-specific data is revised periodically, and not all revisions report data for all industries.” New Labor Rate Policy, 76 Fed. Reg. at 36,094. Chapter 6A of the ILO *Yearbook of Labor Statistics* covers all costs related to labor including wages, benefits, housing, training, etc. (as distinct from, for example, Chapter 5B data, which reflects only direct compensation and bonuses). New Labor Rate Policy, 76 Fed. Reg. at 36,093.

"[t]he plain language of this statement ('data parameters in the following order') unquestionably elevates the importance of industry specificity over contemporaneity in Commerce's choice of labor data within the selected surrogate country." Fine Furniture Br. 15. Plaintiff, therefore, maintains that "[t]his same policy should not be ignored when comparing sources from two countries and based on Commerce's own admission, the Thai data are more industry-specific . . . ." Fine Furniture Br. 15.

Commerce's selection of the Romanian labor data is supported by substantial evidence. As an initial matter, the court is not convinced that the list plaintiff cites to in the New Labor Rate Policy constitutes a "hierarchy" of anything other than the types of data within each "data parameter." The list (notably described as a list of "filters" to "determine the most appropriate labor cost data to use") breaks out four main categories, or "data parameters": (1) "Sub-Classification"; (2) "Type of Data"; (3) "Contemporaneity"; and (4) "The unit of time for which the wage is reported." Within each data parameter, however, is an express hierarchy:

The Department sorts the ILO data based on data parameters in the following order:

1. "Sub-classification," i.e., *If there is no industry-specific data available for the surrogate country within the primary data source*, i.e., ILO Chapter 6A data, the Department *will then look to national data* for the surrogate country for calculating the wage rate;
2. "Type of Data," i.e., reported under categories compensation of employees and labor cost. *We use labor cost data if available and compensation of employees where labor cost data are not available*;
3. "Contemporaneity," i.e., the Department uses *the most recent* earnings/wage rate data point available;
4. The unit of time for which the wage is reported. The Department selects from the following categories *in the following hierarchy*: (1) per hour; (2) per day; (3) per week; or (4) per month. Where data is not available on a per-hour basis, the Department converts that data to an hourly basis based on the premise that there are 8 working hours per day, 5.5 working days a week and 24 working days per month.

New Labor Rate Policy, 76 Fed. Reg. at 36,094 n.11 (emphasis added). Thus, the list does not establish a hierarchy among the "data parameters" themselves, but rather, provides a way for Commerce to pri-

oritize different data within each category. That is, there is no indication that the order in which the categories themselves are listed has any significance.

Indeed, as has often been noted when Commerce evaluates surrogate value data generally, it "prefers surrogate[] values that are contemporaneous with the period of review, publicly available, product-specific, representative of broad market average prices, and free of taxes and import duties," and it "has not identified a hierarchy among these factors, and the weight accorded to a factor varies depending on the facts of each case." *Xiamen Int'l Trade and Indus. Co.*, 37 CIT at __, 953 F. Supp. 2d at 1312–13. Therefore, it is unlikely that Commerce established such a hierarchy between contemporaneity and specificity for the labor surrogate value alone while having no hierarchy for other factors of production.

Moreover, plaintiffs do not argue that the Romanian labor data is not industry-specific. Rather, they argue that the Thai data is more specific. But plaintiffs have provided no reason for the court to conclude that it was unreasonable for Commerce to find that less specific, contemporaneous data is preferable to non-contemporaneous data that is more specific. As both contemporaneity and specificity are generally given equal weight by Commerce, it was reasonable for Commerce to find that the Romanian data was specific enough and to prefer contemporaneous data in this instance. *See id.* Accordingly, the court finds that Commerce's selection of the contemporaneous Romanian labor data is supported by substantial evidence, and supports its selection of Romania as the primary surrogate country.

2. Commerce Reasonably Determined that the Romanian Electricity Data Is More Specific than the Thai Electricity Data

In the Final Results, Commerce valued electricity using Eurostat data for Romania, averaging all bands (or classifications based on consumption rate) of industrial consumers for the second half of 2013 and the first half of 2014. *See* Surrogate Value Mem. for the Preliminary Results (Dec. 31, 2015) (P.R. 298) at 5; Final Surrogate Value Mem. at 1. Plaintiff argues that "the Thai electricity rates . . . are specifically for Large General Service, which Fine Furniture selected as the most comparable classification to its own user category in China." Fine Furniture Br. 22–23. Plaintiff then states that the Romanian electricity data "represent six different bands that are differentiated by annual consumption and maximum demand," and "represent various rates for industrial electricity — small to large." Fine

Furniture Br. 22. Thus, plaintiff argues that because Large General Service," the Thai electricity data is more specific. Fine Furniture Br. 23.

Fine Furniture next contends that in its submission it "used its own actual POR monthly [electrical] consumption data along with the Thai demand charge to calculate a Demand Charge per KWH, making this portion of the electricity [surrogate value] more specific to Fine Furniture's production of subject merchandise." Fine Furniture Br. 23. Plaintiff argues that its approach is an "established practice," and Commerce was required to provide a reasonable explanation for departing from this method and instead valuing the electricity input using Romanian Eurostat data without employing Fine Furniture's actual POR monthly electrical consumption data.[22] Plaintiff maintains that Commerce failed to provide such an explanation. Therefore, plaintiff contends that "Thailand provides more specific and accurate electricity [surrogate value] data than Romania and, thus, Commerce's reliance on Romania's electricity [surrogate value] as part of its surrogate country determination was unsupported by substantial evidence." Fine Furniture Br. 23.

Fine Furniture then argues that the "Thai electricity data are also of better quality than the Romanian data." Fine Furniture Br. 21. In particular, plaintiff claims that the Thai electricity data is more detailed because it "provide[s] both peak and off-peak charges that allow Commerce to calculate a weighted-average," which "is a more precise representation of the actual costs for an energy consumer," when compared to the "Romanian single-tariff electricity data." Fine Furniture Br. 21–22. In other words, because the Thai data provides peak and off-peak rates, plaintiff claims that they "account for natural difference[s] in price structure" caused by varying electricity rates during peak and off-peak hours. Fine Furniture Br. 22.

The court finds that Commerce's selection of the Romanian single-tariff electricity data was supported by substantial evidence. As an initial matter, Fine Furniture's arguments that (1) the Thai electricity rates are specifically for "Large General Service," and therefore are more specific to Fine Furniture, and (2) Commerce should have used Fine Furniture's "own actual POR monthly consumption data along with the Thai demand charge to calculate a Demand Charge per KWH," were not made before Commerce, and thus, have not been properly exhausted. Accordingly, the court will not take these issues up for the first time here. *See, e.g.*, *Gerber Food (Yunnan) Co. v.*

[22] The Romanian electricity rates were reported as biannual kilowatts per hour (KWH), and Commerce obtained the average rate of 0.3271 Lei per kilowatt-hour. Commerce did not inflate this electricity rate, because it was contemporaneous with the POR. *See* Surrogate Value Mem. for the Preliminary Results (Dec. 31, 2015) (P.R. 298) at 5.

United States, 33 CIT 186, 194, 601 F. Supp. 2d 1370, 1379 (2009); *Mid Continent Nail Corp. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1247, 1259–60 n.10 (2013) ("Issues that are not addressed in an administrative case brief filed with the agency are generally deemed abandoned.").

As to plaintiff's claim that the Thai electricity rates are more specific because they provide both peak and off-peak charges from which the Department could calculate a weighted average, the court finds that Commerce's decision to use the Romanian electricity data is supported by substantial evidence. In the Final Results, Commerce emphasized that Fine Furniture itself did not report different values for its own electricity consumption based on peak or off-peak hours, nor did it provide the Department with any proposed calculations for using peak and off-peak rates. *See* Final IDM at 21. Thus, because Fine Furniture never documented any difference in its electricity consumption during peak or off-peak hours, the Thai prices do not add greater accuracy. *See* Final IDM at 21 ("[T]here is only one surrogate value applied to Fine Furniture's consumption per CONNUM, which represents an average of the period." (citing, *inter alia*, Fine Furniture's Sec. D Resp. (June 12, 2015), at Ex. D-15, D-15)). In addition, Commerce found that because the Romanian electricity data "is an average of twelve data points" contemporaneous with the POR, whereas the Thai data would have been an average of only three data points, the Romanian data was of better quality. *See* Final IDM at 21; *Dorbest Ltd. v. United States*, 30 CIT 1671, 1708, 462 F. Supp. 2d 1262, 1294 (2006) ("Commerce has acknowledged . . . the desirability of a broader data set . . . ."). In other words, because the Romanian data represents a greater number of data points regarding industrial electricity consumption, its average will be more precise. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,367 (Dep't Commerce May 19, 1997) ("In general, we believe that more data is better than less data, and that averaging of multiple data points . . . should lead to more accurate results in valuing any factor of production."). Thus, the court finds this decision to be supported by substantial evidence.

3. Commerce Reasonably Determined that the Romanian Data Are More Specific for Important Raw Materials than the Thai Data

Next, plaintiff argues that "Commerce's determination that the Romanian HTS is more specific overall for material inputs [as distinct from labor and electricity] is unsupported by substantial evidence as

shown by a close examination of three key inputs — lumber, glue and veneers — as well as a summary comparison of all additional inputs . . . .” Fine Furniture Br. 23.

a. Lumber

Plaintiff first claims that Commerce’s finding that “five of Fine Furniture’s seven lumber inputs are more specifically classified using the Romanian HTS” is unsupported by substantial evidence because it “improperly elevates the importance of lumber species over the planed characteristic and it relies on an erroneous HTS classification for Sapelli lumber.” Fine Furniture Br. 23–24 (citing Final IDM at 17). Plaintiff’s argument stems from Commerce’s recognition that Fine Furniture’s lumber is “planed” because “Fine Furniture’s production process does not list the process of ‘planing.’” Fine Furniture Br. 24 (quoting Final IDM at 24 n.70). For plaintiff, this statement confirms that Commerce was aware that the lumber it bought was already planed. According to Fine Furniture, if it had purchased “rough lumber that was not planed, it would have [had] to take an additional production step to further finish the rough lumber into a planed form to make its finished flooring product.” Fine Furniture Br. 24. Thus, plaintiff argues that “once the most accurate HTS [subheadings] are selected” (*i.e.*, HTS subheadings that describe planed wood), the Thai HTS schedule offers greater specificity for five[23] lumber inputs and equal specificity for the rest. Fine Furniture Br. 24 (“Commerce was required to consider [surrogate values that are] as representative of the production process in the NME country as possible.” (internal quotations and emphasis omitted).

Relying on the planing characteristic, plaintiff claims the Thai HTS offers greater specificity for five of the seven species it uses in its manufacturing process—tigerwood, jatoba, santos mahogany, poplar, and sapelli lumber. The Romanian HTS description, on the other hand, contains “rough, un-planed” lumber. Fine Furniture Br. 23–32, 26 (“The HTS descriptions show that the Romanian HTS classifications represent non-planed lumber but the Thai classifications specifically *include* ‘planed’ lumber.”). Plaintiff makes its specificity argument even though the Thai HTS subheadings are not species-specific to most of the lumber species it used to make its products, while the Romanian subheadings are species-specific.

Although plaintiff accepts that “species is one characteristic of Fine Furniture’s lumber inputs,” and although the Thai subheadings

[23] Plaintiff actually argues that the Thai HTS schedule offers greater specificity for four of the seven lumber species, but this is because plaintiff treats tigerwood and jatoba as one input.

plaintiff proposes are not species-specific, it nevertheless maintains that "Commerce was wrong to elevate . . . [species] over the importance of planing . . . because the latter is directly linked to an additional step in the production process, which would by nature include additional equipment, materials and maintenance costs." Fine Furniture Br. 25. Therefore, given a choice between planed lumber of a different species or rough lumber of the same species, Fine Furniture maintains that Commerce's "only reasonable choice" was to select the Thai HTS reflecting planed lumber. Fine Furniture Br. 26.

With regard to the remaining lumber inputs (white oak and European white oak), plaintiff contends that the Thai and Romanian HTS schedules are equal in specificity because they are species-specific in both countries, and both HTS classifications represent planed lumber. *See* Fine Furniture Br. 24, 30.

Commerce's selection of the Romanian HTS for lumber inputs is supported by substantial evidence. The evidence cited by plaintiff suggests that, at best, Commerce was presented with two permissible HTS subheadings (*i.e.*, categories describing only planed lumber which were not specific as to wood species and categories that did not include planed lumber, but were specific to wood species). As Commerce states, species of wood is an important characteristic in producing Fine Furniture's product, as demonstrated by it being the first product characteristic in the CONNUM for Fine Furniture's flooring.[24] Final IDM at 18. Indeed, Fine Furniture's final factors of production descriptions for surrogate value purposes describe all lumber inputs by species. *See* Fine Furniture's Suppl. Sec. D Resp. (C.R. 166), at Ex. D-6, D-10.

Moreover, if an HTS subheading was both species-specific and included planed lumber, Commerce chose that subheading (*e.g.*, Commerce's HTS selection for white oak[25]), however, because "no imports occurred in either country" during the period of review under certain

[24] Commerce collects data from each respondent to determine the cost of production on a product-specific CONNUM basis, as defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding. The hierarchy of product characteristics defining a unique CONNUM varies from case to case depending on the nature of the merchandise.

[25] In the case of oak inputs (both white and European), Commerce chose the Romanian HTS because it specifically excluded "blocks strips and friezes for parquet of wood block flooring, not assembled," and was therefore more specific than the Thai HTS subheading. *See* Final IDM at 24.

subheadings that were both species-specific and planed (*e.g.*, in the case of sapelli[26] lumber), the Department reasonably found that it had to use "an alternative classification," which in these circumstances, prioritized wood species over the "planed" characteristic. Final IDM at 18.

Plaintiff makes no convincing argument as to why planed wood should be found to be more specific than a wood's species. Although Commerce recognized the importance of planed wood in Fine Furniture's production process, it ultimately determined (at least in part due to Fine Furniture's own description of its inputs) that species specificity was of greater importance. Plaintiff would have it otherwise, but gives no reason as to why planing should be more important than species. Had Fine Furniture shown that planed lumber was more important to the cost of the lumber input than its species, for instance, the court might find otherwise. Having failed to provide a rationale for finding that Commerce's choice was unreasonable, Fine Furniture cannot prevail. Thus, the court finds that Commerce's determination regarding lumber inputs is supported by substantial evidence.

b. Veneers

Plaintiff also argues that "Commerce improperly determined that the Romanian HTS [subheadings] for veneers are more specific" than the Thai HTS subheadings because Commerce "improperly understated the face veneer specificity and failed to adequately consider the planed characteristic." Fine Furniture Br. 35. Thus, as with the lumber input, plaintiff maintains that Thai HTS subheadings, which specifically include the "planed" characteristic and because they specifically break out "face veneer sheets," should outweigh Romanian HTS subheadings, which are more specific in terms of veneer thickness and wood species. *See* Fine Furniture Br. 37. Thus, plaintiff argues that "Thailand provides overall greater specificity on veneers." Fine Furniture Br. 38.

[26] As stated in the Final Results, Commerce was unable to use either the Thai or Romanian HTS categories describing both species-specific and planed sapelli lumber. This was because no imports occurred in either country under those particular subheadings during the POR. *See* Final Results at 18. There were, however, imports under the species-specific, un-planed Romanian HTS category, and therefore Commerce chose this subheading over a non-specific, planed Thai alternative. Plaintiff's attempt to call this a "misreading of the relevant HTS schedules," is puzzling. *See* Fine Furniture Br. 31. Commerce did not claim that there were no Thai HTS categories that were species-specific, but simply found that there were no imports during the relevant period under the Thai HTS category. *See* Final IDM at 18 ("Unlike Thailand, which had no imports during the period under the "Sapelli" specific headings, there were imports to Romania under the 4407.27.99 "Sapelli" specific heading. Therefore, the Department finds that the Romanian HTS is more specific for valuation of Fine Furniture's "Sapelli" lumber than the Thai HTS.").

It is uncontested that the Thai subheading is more specific within the coniferous category for face veneers. Nevertheless, defendant responds that "the Romanian HTS [subheadings] presented greater specificity" because "[f]or all veneers, and particularly 'face veneers,' *pricing varies significantly based on relative thickness* . . . ." Def.'s Br. 22 (emphasis added). Defendant argues that "[t]he second product characteristic in the [product] control number [listed by Fine Furniture] . . . is 'Face (Veneer) Thickness,' thus indicating its importance in the hierarchy of the product characteristics." Def.'s Br. 22. Therefore, the Department maintains that because "the Romanian HTS provides greater thickness specificity for 'tropical' and 'other' face veneers" by providing a "break down by thickness," its decision to use the Romanian data is supported by substantial evidence. Def.'s Br. 23.

Commerce's decision to use the Romanian HTS subheadings to value Fine Furniture's veneers is indeed supported by substantial evidence. As Commerce states, "For all veneers and particularly 'face veneers' pricing varies significantly based on relative thickness and whether or not they are planed, sanded or end jointed." Final IDM at 19. Thus, Commerce recognized that specificity in both thickness and in the "planed" characteristic is important in valuing Fine Furniture's veneers. To break the tie, however, Commerce reasonably relied on Fine Furniture's listing as its second product characteristic in the multilayered wood flooring CONNUM "thickness of face veneer," which, for Commerce, suggested the characteristic's greater importance in the "hierarchy of product characteristics," and tipped Commerce in favor of preferring specificity in wood thickness over the planed characteristic. Final IDM at 19–20. This decision is not unreasonable. A manufacturer would normally list product characteristics in order of importance. Therefore, because the Romanian HTS subheadings for "tropical" and "other" face veneers provide specific breakouts for wood thickness, Commerce's decision to use the Romanian HTS subheadings for these inputs was supported by substantial evidence.

With regard to the "coniferous" category, although plaintiff is correct that the Thai HTS subheading is more specific for this category as it is not only species-specific, but also provides a breakout for Fine Furniture's product (*i.e.*, "face veneer sheets"), the court nevertheless finds that Commerce's decision to use the Romanian HTS subheading is reasonable. Specifically, based on the observation that cost varies with thickness, the court finds Commerce reasonably determined that greater specificity in one out of the three categories does not

outweigh "the species and thickness attribute specificity" applicable to all of the Romanian HTS subheadings for veneers. As Commerce stated,

> While there are specific break outs in the Thai HTS for "Teak Veneer" and coniferous "Face Veneers," the Department must determine the most specific [surrogate value] for all veneers. Additionally, Fine Furniture has not stated why the teak veneer HTS is applicable to its [normal value] calculation. The Department has determined that the species and thickness attribute specificity, applicable to all veneers, outweighs the one or two specific "face veneer" break outs that may occur in the Thai HTS.

Final IDM at 20. The court finds it reasonable that, overall, Commerce concluded the specificity in thickness applicable to all veneers outweighs having specific breakouts for coniferous veneers because using veneer thickness results in a more accurate cost. Therefore, the court finds Commerce's determination is supported by substantial evidence.

c. Glues

In the Final Results, Commerce selected various eight-digit Romanian HTS categories to value Fine Furniture's glue, which Commerce found to be "the most specific category in the Romanian HTS." Final IDM at 17. Plaintiff argues that "Commerce erred in relying on the 8-digit Romanian HTS [subheadings] for numerous glues consumed by Fine Furniture in its manufacturing process when the more specific 11-digit Thai HTS [subheadings] are available" in the Thai data. Fine Furniture Br. 32. For plaintiff, because "all Thai 11 digit HTS [subheadings] listed [by it] specify 'other,'" then "by definition," they exclude "additional irrelevant products that Fine Furniture did not consume." Fine Furniture at 34. Thus, for plaintiff, the Thai HTS "other" subheadings are "more specific than the . . . Romanian codes that do not offer the further 'other' description." Fine Furniture Br. 34 ("Looking at the big picture, any time an HTS [subheading] uses 'other,' it is excluding some other descriptive language. 'Other' can be read as 'other than.'"). Therefore, plaintiff argues that the additional descriptive "others" in the Thai HTS subheadings makes the Thai data the best available information.

Plaintiff then points out that Fine Furniture provided Commerce with a surrogate value spreadsheet containing a summary of the relevant inputs, surrogate values, and sources of the surrogate values, including a table of suggested Thai HTS subheadings for its glue inputs, in its June 29, 2015 surrogate value submission. Plaintiff

maintains that Commerce should have relied on this information and found the Thai data was more specific than the Romanian data on glue inputs. *See* Fine Furniture Br. 34 ("[T]he very fact that Fine Furniture selected these 11-digit [Thai] codes in a certified factual submission establishes that these codes best represent Fine Furniture's glues and should have been given weight by Commerce.") (citing *Polyethylene Retail Carrier Bag Comm. v. United States*, 232 Fed. Appx. 965, 972 (Fed. Cir. 2007)). For plaintiff, "Commerce's own practice supports relying upon a respondent's own representations as to the actual input used in their production process," Fine Furniture Br. 34 (citing *Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1436, Slip Op. 5–157 at 30 (Dec. 13, 2005)), and therefore, "Commerce was required to accept Fine Furniture's own representation of its glue inputs . . . ." Fine Furniture Br. 34–35.

The court finds that Commerce's selection of the Romanian HTS subheadings to value Fine Furniture's glue inputs is supported by substantial evidence. In making this holding, the court first emphasizes that there is nothing on the record regarding the specific composition of Fine Furniture's glue, and therefore, any "claims of greater specificity of the HTS subheadings that can be applied to them are immaterial." Final IDM at 17. It is the parties' obligation to create the agency record. *See Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (citation omitted) ("The burden of production [belongs] to the party in possession of the necessary information."); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) (respondent has burden to create an accurate record). Indeed, where, as here, plaintiff provided no record of the chemical composition of its glue, there is also no way to determine if plaintiff's claim that additional "other" descriptions afforded by an eleven-digit HTS subheading would actually be more specific to Fine Furniture's glue input. In other words, there is no way to verify whether the "excluded" definitions in an eleven-digit code should be excluded or not. Thus, Fine Furniture's claim that the Thai data is more specific simply because Fine Furniture used Thai data on its surrogate value spreadsheet is unconvincing. Moreover, Commerce found that the Romanian data matched the types of glue Fine Furniture used (*i.e.*, glue urea, glue melamine, etc.). *See* Final IDM at 17. Fine Furniture's mere claim, with no basis in the record, that the Thai HTS excludes "irrelevant products," is not enough to make Commerce's selection unreasonable. Therefore, Commerce did not act unreasonably in selecting the Romanian data.

As to Fine Furniture's June 29, 2015 surrogate value submission that provided a table containing specific Thai HTS subheadings the

company considered to best fit its own glue inputs, the court notes that Fine Furniture did not provide any comparison between the HTS descriptions and its own submitted factors of production descriptions. Although such a comparison is not required, it would have provided Commerce with some evidence as to the accuracy of Fine Furniture's suggested HTS categories. Lacking any record evidence as to the composition of Fine Furniture's glues, and because Commerce's preference to value all factors from the primary surrogate country is reasonable, the court finds that Fine Furniture's table provides no reason why the government's decision not to accept the suggested Thai HTS categories at face value was unreasonable.

4. Fine Furniture Failed to Exhaust Its Administrative Remedies Regarding the Claimed Superiority of Thai Data for Additional Inputs

Next, plaintiff argues that Thailand provides more specific surrogate value data for valuing certain additional inputs, including chemical materials and freight. Fine Furniture Br. 39–40. Plaintiff also claims that there is equal specificity between Romania and Thailand for purposes of valuing water, coal, finishing materials, and by-products. *See* Fine Furniture Br. 39–40.

In response, defendant states that "Fine Furniture did not raise these claims before Commerce in its administrative case brief," and "[t]he Court should decline to address them now." Def.'s Br. 28.

Plaintiff's arguments were not properly exhausted before Commerce. Before the Department, Fine Furniture argued that specific "key surrogate values" "demonstrate[] that the record overwhelmingly supports the choice of Thailand as the surrogate country over Romania": (1) various raw materials, including oak lumber, thinner, glues, lumber, and veneers; (2) labor; and (3) electricity. *See* Fine Furniture Case Br. at 26, 15–26. Although plaintiff claims it can raise arguments regarding additional surrogate values for the first time in its brief before the court because "Commerce revised numerous surrogate values in the Final Results and thus, a re-framing of the overall picture of all inputs [is] necessary to the Court," Fine Furniture Reply Br. 19, the court is unconvinced. As the Final Surrogate Value Memorandum makes clear, "[m]any of the factor valuations remain unchanged since the publication of the preliminary results." Final Surrogate Value Mem. at 1. Indeed, the Final Surrogate Value Memorandum shows that the Department only revised surrogate values for white and European oak lumber, tigerwood lumber, jatoba lumber, sapelli lumber, the calculation of surrogate financial ratios, and the calculation of brokerage and handling. Final Surrogate Value Mem. at 1–2. None of these revisions involve the "additional" surro-

gate values newly raised in plaintiff's brief, and thus, it is not the case that "plaintiff had no opportunity to raise the issue at the administrative level." *LTV Steel Co., Inc. v. United States*, 21 CIT 838, 869, 985 F. Supp. 95, 120 (1997). Therefore, because no contrary reason exists for departing from the exhaustion requirement, the court declines to entertain these new arguments. *See, e.g.*, *Mid Continent Nail Corp.*, 37 CIT at __, 949 F. Supp. 2d at 1259–60 n.10.

II. Commerce Reasonably Relied on the Sigstrat Financial Statement

In the Final Results, Commerce "concluded that the Romanian financial statement from Sigstrat [was] [the] best available [information] on the record of th[e] proceeding." Final IND at 15. Plaintiff argues that Commerce's decision to use a Romanian financial statement is unsupported by substantial evidence because there are "more and better financial statements available from Thailand than Romania." Fine Furniture Br. 16.

First, plaintiff argues that the "Romanian financial statement on the record [(Sigstrat's)] is distorted by significant government influence," and therefore is not usable. Fine Furniture Br. 18. To support its position that the financial statement is distorted, plaintiff points to the Sigstrat financial statement itself, which notes "[i]ncreasing costs of wood dictated by the state or confirmed by the state policy" and "[i]ncreasing energy costs 'dictated' by the state or state confirmed." Fine Furniture Br. 18. Plaintiff also points to portions of the Sigstrat financial statement stating that "[t]he company cannot increase prices by 15–20%, as the state can" and that "'due to state policy within the industry,' the company 'will have to fight bankruptcy in 2015.'" Fine Furniture Br. 19. For plaintiff, these statements support a finding that "[g]overnment influence severely jeopardizes Sigstrat's financial health." Fine Furniture Br. 19. Thus, plaintiff maintains that Sigstrat's financial statements cannot be used.

Plaintiff further maintains that by "acknowledg[ing] that Romsilva [(a state-owned company)] is a domestic competitor to Sigstrat and as such has an influence on the market in Romania," Commerce has conceded its point. *See* Fine Furniture Br. 19. In other words, plaintiff rejects Commerce's conclusion that "the existence of a competitor that is much larger than Sigstrat do[es] not amount to an argument of a potential distortive influence over" Sigstrat's financial results and that "there is no information in Sigstrat's financial statement to support the contention that Sigstrat is restricted with regard to its pricing or production by Romsilva's activities." Final IDM at 12. Plaintiff then argues that Sigstrat "cannot be accurately classified as

a *market-economy* company . . . when its own financial statements show that it is operating in an industry with significant state control" and that the company "faced bankruptcy 'due to state policy within the industry.'" Fine Furniture Br. 19 (quoting Final IDM at 12). Thus, plaintiff maintains that "Commerce's decision to use Sigstrat in the final results, especially in the face of two other accurate statements, must be overturned by this Court as unsupported by substantial evidence." Fine Furniture Br. 19–20.

Second, plaintiff argues that Commerce "failed to adequately consider evidence that Sigstrat received countervailable subsidies in the form of investment subsidies." Fine Furniture Br. 20. That is, plaintiff claims that because "Commerce's consistent practice is to disregard financial statements that include evidence of subsidies," Commerce should have found that the line item in Sigstrat's annual report listing an "investment subsidy" was enough to cause Commerce to "believe or suspect" that Sigstrat was receiving a countervailable subsidy. Fine Furniture Br. 20 (first citing *Goldlink Indus. Co. v. United States*, 30 CIT 616, 629, 431 F. Supp. 2d 1323, 1334–35 (2006) and then citing *Fuyao Glass Indus. Grp. v. United States*, 29 CIT 109, 119, Slip Op. 5–6 at 16–17 (Jan. 25, 2005)); *see also* Fine Furniture Br. 20 ("By requiring such a high bar to even consider evidence of subsidies [(*i.e.*, by requiring a CVD determination on the particular program in the particular country)], Commerce goes beyond Congress's intention in the governing statute, which was *not* for Commerce to conduct a full investigation regarding subsidies received by a surrogate producer." (citing H.R. Conf. Rep. No. 100–576 at 590–91, *reprinted in* 1988 U.S.C.C.A.N. at 1623–24)).

Finally, plaintiff claims that because there are two Thai financial statements (those of Neotech and Lampang) on the record, the Thai financial statements are necessarily "more accurate" than the single Romanian financial statement. Fine Furniture Br. 17. For plaintiff, this is because "'*multiple* financial statements . . . eliminate distortions.'" Fine Furniture Br. 17 (quoting *Jiaxing Brother Fastener Co. v. United States*, 38 CIT __, __, 961 F. Supp. 2d 1323, 1332 (2014)); *see also* Fine Furniture Br. 17 ("Commerce has recognized that multiple financial statements lead to more accurate surrogate financial ratios." (citations omitted)).

The court finds Commerce reasonably determined the Sigstrat financial statement was usable and not distorted by government influence or subsidies. Commerce has provided adequate reasons why the mere presence of a large state-owned entity within the wood industry did not render Sigstrat's financial statement unusable. Specifically, Commerce found that "there is no information in Sigstrat's financial

statement to support the contention that Sigstrat is restricted with regard to its pricing or production by Romsilva's activities, or that Sigstrat is itself directly under the control of the Romanian Government." Final IDM at 12 ("[P]rice increases in a non-contemporaneous period (*i.e.*, 2012), and the existence of a competitor that is much larger than Sigstrat do not amount to an argument of a potential distortive influence . . . .").

With respect to the statements cited by plaintiff concerning increasing costs, the court notes that these statements were forward-looking, and therefore did not address the actual period of time to be used to calculate the financial ratios. Moreover, other record evidence seems to demonstrate that Sigstrat was not under the control of any single supplier. *See* Final IDM at 13 ("Sigstrat reported in its annual report . . . that it had 'no significant reliance on a single supplier whose loss would affect the company's business.' Thus, while it is possible in theory for a government supplier to place restrictions on an industry that influence pricing and production, the above statement supports the Department's determination that . . . [the Romanian government] did not significantly impact Sigstrat's operations."). In other words, since Sigstrat was not restricted to buying its wood from primarily a single source, there was no evidence that the purchases were not market-based.

In addition, Commerce reasonably found that the Sigstrat financial statement did not give it "reason to believe or suspect" that the company had received a specific countervailable subsidy. While Sigstrat's financial statement does contain a line item titled "Investment Subsidy," there is no additional information on the record as to the specific nature of this line item or where it comes from (*e.g.*, whether the "subsidy" is conferred under a government program). Moreover, the Department stated that it has "never found any subsidy programs in Romania to be countervailable, and none have even been alleged to be countervailable in a petition," which reasonably gave Commerce even less "reason to believe or suspect" that Sigstrat was in receipt of a countervailable subsidy. Final IDM at 14; *see also Clearon Corp. v. United States*, 35 CIT 1685, 1688, 800 F. Supp. 2d 1355, 1359 (2011) (citation omitted) ("If a financial statement contains only a mere mention that a subsidy was received, and for which there is no additional information as to the specific nature of the subsidy, Commerce will not exclude the financial statement from consideration."); *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1275–76, 641 F. Supp. 2d 1362, 1379–80 (2009) (sustaining Commerce's determination that the "reason to believe or suspect" standard was not sat-

isfied although the selected financial statement mentioning "subsidy" was received because there was no additional substantiating evidence of countervailability).

Not all subsidies are countervailable subsidies. *See Almond Bros. Lumber Co. v. United States*, 721 F.3d 1320, 1323 n.2 (Fed. Cir. 2013) ("We note that not all subsidies are countervailable under U.S. trade laws."); *see also, e.g.*, *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 112 F. Supp. 2d 1141 (2000) (finding that Commerce reasonably determined that loans made to the Belgian steel industry by a public credit institution were not specific, and thus, not countervailable); *PPG Indus., Inc. v United States*, 978 F.2d 1232 (Fed. Cir. 1992) (finding that substantial evidence supported the Commerce's determination that a trust fund program established by the Mexican government and Bank of Mexico assisting all Mexican firms with foreign indebtedness did not provide benefits to specific industry and therefore was not countervailable). As a general rule, a subsidy is countervailable if a government provides a financial contribution, a benefit is conferred, and the subsidy is specific.[27] *See* 19 U.S.C. § 1677(5). Thus, the mention of a subsidy in a financial statement does not necessarily give Commerce a reason to believe or suspect that the subsidy is countervailable. Accordingly, the court finds that Commerce reasonably found that it did not have "reason to believe or suspect" that Sigstrat was receiving countervailable subsidies.

In light of evidence directly contradicting plaintiff's theories, and an adequate explanation for Commerce's preference, the court finds that Commerce's decision to use the Sigstrat financial statement is reasonable, and supported by substantial evidence on the record. *See Goldlink Indus. Co.*, 30 CIT at 628–29, 431 F. Supp. 2d at 1334–35.

Finally, despite plaintiff's arguments to the contrary, Commerce's use of the single Romanian financial statement is reasonable. As an initial matter, before Commerce, Fine Furniture did not argue that using multiple financial statements would necessarily lead to more accurate results. *See* Fine Furniture Case Br. at 28. Rather, it argued that "there is no basis to conclude that the distorted financial statement of Sigstrat provides superior data, especially when the Department itself recognizes the usability of *two* financial statements from Thailand." Fine Furniture Case Br. at 14 (emphasis in original). In other words, Fine Furniture argued that Romania had no usable financial statements, whereas Thailand had two usable financial statements. Fine Furniture did not mention anything, however, about

[27] Whether a subsidy is "specific" depends on the type of subsidy, *i.e.*, whether it is an "export subsidy," an "import substitution subsidy," or a "domestic subsidy," all of which must meet specific statutory requirements before being deemed "specific." *See* 19 U.S.C. § 1677(5A).

multiple financial statements resulting in more accurate surrogate values. Therefore, plaintiff's argument regarding the greater accuracy of multiple financial statements is not properly before the court. *See Gerber Food*, 33 CIT at 194, 601 F. Supp. 2d at 1378.

Even if this argument were before the court, however, it would not carry the day. As shall be seen, given the totality of factors supporting Romania's selection as the primary surrogate country, Commerce's decision to use the Sigstrat financial statement was reasonable considering its reasonable preference to value all factors from a single country. *See Clearon Corp.*, 37 CIT at __, Slip Op. 13–22 at 13 ("[T]he use of a 'single surrogate country' is justified when . . . all other factors are 'fairly equal' because minimizing distortion supports a finding that Commerce relied upon the best available information on the record."); *Jacobi Carbons AB v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1360, 1376–77 (2014) ("This preference [(*i.e.*, to value all factors of production with a single surrogate country)] stems from the sensible conclusion that 'deriving the surrogate data from one surrogate country limits the amount of distortion introduced into [the Department's] calculations because a domestic producer would be more likely to purchase a product available' domestically." (quoting *Clearon Corp.*, 37 CIT at __, Slip Op. 13–22 at 13)); *see also Certain Frozen Warmwater Shrimp From the Socialist Rep. of Vietnam*, 76 Fed. Reg. 56,158 (Dep't Commerce Aug. 31, 2011), and accompanying Issues and Dec. Mem., cmt. 2 ¶ J (noting the Department's practice "to rely upon the primary surrogate country for all surrogate values whenever possible"). Here, unlike in *Jiaxing Brother*, where the single financial statement selected by Commerce had also been rejected in a contemporaneous proceeding, none of the three financial statements at issue had been previously rejected, and all were deemed usable. Thus, unless the record contained evidence that the Sigstrat financial statement was unusable, which it did not, Commerce acted in a manner consistent with its own practice by selecting the financial statement from the primary surrogate country, notwithstanding the fact that there were two financial statements from an alternative country (*i.e.*, Thailand).

III. Commerce's Selection of Face Veneer Surrogate Values Is Supported by Substantial Evidence and in Accordance with Law

Although, as discussed above, the court finds that Romanian data, including Romanian HTS subheadings for face veneer inputs, supports Commerce's selection of Romania as the primary surrogate country, plaintiff argues that "[i]f the Court sustains Commerce's use of Romania as the primary surrogate country, despite superior data

from Thailand, the Court should overturn Commerce's selection of face veneer [surrogate values] as unsupported by substantial evidence and contrary to law." Fine Furniture Br. 42.

A. Commerce's Selection and Calculation of Face Veneer Surrogate Values Properly Included End-Jointed Veneers

In its questionnaire response, Fine Furniture said it used face veneers from several different species, but did not indicate that it purchased end-jointed veneers. Plaintiff argues that Commerce's selection of Romanian face veneer surrogate values improperly included end-jointed veneers. *See* Fine Furniture Br. 42–43. In the Final Results, in order to value Fine Furniture's face veneers, Commerce first selected HTS subheadings within Romania's three main species categories for face veneers (*i.e.*, "coniferous," "tropical," and "other") relating to both (1) "Planed; sanded; end-jointed, whether or not planed or sanded" face veneers (*i.e.*, 4408.1015, 4408.3955, and 4408.9015); and (2) "Other" face veneers (*i.e.*, 4408.1098, 4408.3995, 4408.9095). *See* Final IDM at 22. Commerce then took a simple average of imports into Romania[28] under both the "Planed; sanded; end-jointed, whether or not planed or sanded" HTS subheadings and the "Other" HTS subheadings.[29] Final IDM at 23.

Fine Furniture argues that Commerce's subheading selection "improperly included imports of face veneers that are 'end-jointed,' which is not representative of Fine Furniture's face veneer inputs." Fine Furniture Br. 42–43 ("The requirement that Commerce use the best available information mandates selecting the most specific product to calculate the [surrogate values] and thus, precludes HTS [subheadings] that represent end-jointed veneers.").

In making its argument, plaintiff insists that under the Romanian subheadings Commerce selected, planing or sanding is optional, but end-jointing is a requirement. Fine Furniture Br. 43 ("[T]he final descriptive element in the face veneer HTS [subheading] 'Planed; sanded; end-jointed, whether or not planed or sanded,' indicates that end-jointed sheets for veneering are explicitly *included*."). That is, plaintiff argues that the "whether or not planed or sanded" language makes the first two descriptions ("planed; sanded") optional, but the "end-jointed" characteristic remains the "one and only mandatory

[28] Commerce used the average unit values from Romanian Global Trade Atlas import data to come up with this figure. *See* Final IDM at 23.

[29] As mentioned above, these subheadings varied depending on the face veneer input species (*i.e.*, coniferous, tropical, or other) and thus, the two HTS subheadings that Commerce averaged were either 4408.1015 and 4408.1098 (for "coniferous"), 4408.3955 and 4408.3995 (for "tropical"), or 4408.9015 and 4408.9095 (for "other"). *See* Final IDM at 23.

characteristic." Fine Furniture Br. 43. Therefore, plaintiff argues that because its veneer inputs are not end-jointed, "Commerce's determination cannot be upheld as supported by substantial evidence and must be remanded to Commerce to remove the end-jointed HTS [subheadings] from the veneer [surrogate value] calculations." Fine Furniture Br. 43–44. Plaintiff then claims that the Thai HTS subheadings are more specific.[30]

The court finds that the Romanian HTS data that Commerce selected to calculate the surrogate value for Fine Furniture's face veneers is supported by substantial evidence. Commerce's reading of the descriptive clause ("Planed; sanded; end-jointed, whether or not planed or sanded") is correct. *See* Final IDM at 23 ("We find that 'whether planed or sanded' refers only to 'end-jointed' because of the separation with a comma and not a semi-colon."). That is, although the Romanian HTS subheading includes end-jointed veneers, it also includes planed or sanded face veneers of the types used by the Fine Furniture in its production process, and the court does not read this description as making end-jointed veneers a "mandatory" characteristic because, as noted by Commerce, the description is separated by a comma rather than a semicolon. Indeed, plaintiff's reading of the HTS subheading would render superfluous the need to describe the first two characteristics ("planed; sanded").[31] Accordingly,

[30] Plaintiff preferred the following Thai HTS subheadings for the various wood species:

> 4408 Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm:
>
> 4408 10 — Coniferous:
> 4408.10.10.000 — Cedar wood stats of a kind used for pencil manufactur[e], radiate pinewood of a kind used for blockboard manufacture
> 4408.10.30.000 — Face Veneer Sheets
> 4408.10.90.000 — Other
>
> 4408.31 — Of tropical wood specified in subheading note 2 to this chapter:
> 440831.00.000 — Dark Meranti, Light Red Meranti and Meranti Bakau
> 4408.39 — Other
> 4408.39.10.000 — Jelutong wood slats of a kin[d] used for pencil manufacture
> 4408.39.90.000 — Other
>
> 4408 90 — Other
> 4408.90.00.010 — Teak Veneer
> 4408.90.00.090 — Other

Fine Furniture Case Br. 23 (citation omitted).

[31] Thus, as noted in the Final Results, the subheading could include any of the following veneer types:

> (1) only planed; (2) only sanded; (3) both planed and sanded; (4) only end-jointed; (5) both planed and end-jointed; (6) both sanded and end-jointed; and finally, (7) planed, sanded, and end-jointed.

Final IDM at 22–23.

Commerce's selection ofthe HTS subheading to value Fine Furniture's face veneers is sustained.

B. Commerce Properly Used a Simple Average When Calculating Fine Furniture's Face Veneer Surrogate Values

Plaintiff next argues that "[i]f the Court sustains Commerce's use of the end-jointed veneers . . . , the Court should overturn Commerce's use of a simple average to calculate Fine Furniture's face veneer [surrogate values]." Fine Furniture Br. 44. For plaintiff, Commerce should not have used a simple average of the import data from the two HTS subheadings,[32] but should have used a weighted average of the two categories. Fine Furniture Br. 46 ("Taking a weighted average based on the import data quantities will more accurately estimate the true commercial reality in Romania for these imports."). Plaintiff attempts to support its position by noting that Commerce has used the weight-averaging method in "numerous past determinations" under similar circumstances. Fine Furniture Br. 44 (citing *Xanthan Gum from the People's Rep. of China*, 80 Fed. Reg. 29,615 (Dep't Commerce May 22, 2015)). Moreover, plaintiff claims that a weighted average would limit the "distortive effect of including . . . a high-cost input that Fine Furniture did not consume." Fine Furniture Br. 5; *see also* Fine Furniture Reply Br. 22 ("[B]y using a simple average, the Department is giving equal importance to each specific tariff classification, which accords disproportionately higher weight to the data under the HTS heading reporting a lesser quantity of imports."). Accordingly, plaintiff asks the court to remand to Commerce with instructions to "use a weighted average of data reported under the two relevant HTS codes" to calculate Fine Furniture's face veneer surrogate values. Fine Furniture Br. 46.

Commerce's application of a simple average to calculate the surrogate value for Fine Furniture's face veneers is in accordance with law and supported by substantial evidence. Commerce is "required to 'articulate in what way the surrogate value chosen relates to the factor input.'" *Gleason Indus. Prods., Inc. v. United States*, 32 CIT 382, 388, 559 F. Supp. 2d 1364, 1369 (2008) (quoting *Dorbest*, 30 CIT at 1725, 462 F. Supp. 2d at 1308). Here, plaintiff does not argue that a weighted average would better represent Fine Furniture's actual use of particular veneers. Rather, plaintiff would have Commerce use a method that would more closely approximate the "actual commer-

[32] That is, depending on input species, a simple average of the Romanian Global Trade Atlas import data for the relevant "Planed; sanded; end-jointed, whether or not planed or sanded" category (either 4408.1015, 4408.3955, or 4408.9015) and the corresponding "Other" category (either 4408.1098, 4408.3995, or 4408.9095).

cial sales happening in Romania." Fine Furniture Reply Br. 21. As Commerce stated, however, the "quantities used in calculation of the [average unit values] based on the Romanian import statistics have no relation to Fine Furniture's own consumption," and therefore a "weight-averaged [Global Trade Atlas]-based [surrogate value] is not a match to Fine Furniture's purchasing experience." Final IDM at 23 & n.64. Thus, without any evidence tending to support the argument that Fine Furniture's purchasing history is similar to the import data on the record for Romania, Commerce reasonably determined that a simple average was the better calculation method because "the record does not inform [it] where Fine Furniture's inputs precisely fit" within the two selected HTS subheadings. Final IDM at 23.

IV. Commerce's Separate Rate Method Is Supported by Substantial Evidence and in Accordance with Law

Finally, Old Master argues that Commerce's determination of the assessment rate for unexamined separate rate respondents[33] is both unlawful and unsupported by substantial evidence because Commerce assigned "an assessment rate three to five times the deposit rate without any evidence that the dumping of that material had grown more severe." Old Master Br. 5. According to Old Master, Commerce's use of the method set out in 19 U.S.C. § 1673d(c)(5) (which is normally used to determine the all-others rate in market economy investigations) was "plainly unreasonable here" because the "result reflected not an average result, but analysis of a single company," Fine Furniture, "whose 17.37% result was assigned to all [unexamined separate rate companies]." Old Master Br. 6. As such, Old Master claims that there was no representative sample of exporter pricing behavior, and that Commerce "could have dealt with [the unexamined separate rate respondents] by other reasonable means." Old Master Br. 6 (citations omitted). Ultimately, Old Master contends that Commerce's determination "announced an assessment rate that was not 'logically connected' to the 'commercial reality' of the [separate rate] companies." Old Master Br. 6.

The court finds that Commerce's assignment of the 17.37 percent margin calculated for Fine Furniture to the unexamined separate rate respondents was both lawful and supported by substantial evidence. Subsection 1673d(c)(5) provides that "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters

[33] Old Master's brief actually refers to the Department's assignment of an assessment rate to "Section A material." Based on the context of Old Master's arguments, as well as its administrative case brief, the court considers these arguments to be challenging the Department's separate rate method.

and producers individually investigated, excluding any zero and de minimis margins . . . .” 19 U.S.C. § 1673d(c)(5)(A). Here, Commerce followed its statutorily directed approach to assigning separate rates in nonmarket economy reviews by calculating the separate rate using the “all-others” method from § 1673d(c)(5). *See Albemarle Corp. v. United States*, 821 F.3d 1345, 1351 (Fed. Cir. 2016) (citation omitted) (“Under the statute, Commerce normally calculates the separate rate by averaging the ‘dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins.”); *see also id.* at 1352 (“[T]he statutory framework contemplates that Commerce will employ the same methods for calculating a separate rate in periodic administrative reviews as it does in initial investigations.” (citing 19 U.S.C. § 1675(a)); *see also Mid Continent Steel & Wire, Inc. v. United States*, 42 CIT __, __, Slip Op. 18–73 at 10 (June 19, 2018). Applying that framework, Commerce’s separate rate of 17.37 percent was reasonable because it was the only rate calculated for an individually investigated respondent (Fine Furniture) that was not zero, *de minimis*, or based entirely on facts available, and generally, mandatory respondents are “representative [of the market] at the very least in terms of aggregate volume.” *Albemarle*, 821 F.3d at 1353; *see also Nat’l Knitwear & Sportswear Ass’n v. United States*, 15 CIT 548, 559, 779 F. Supp. 1364, 1373 (1991) (citation omitted) (“The representativeness of the investigated exporters is the essential characteristic that justifies an ‘all others’ rate based on a weighted average for such respondents.”). Therefore, Commerce followed the statute, which, it is worth noting, leaves little room for discretion.

Furthermore, although the assessment rate for Old Master’s entries exceeds the amounts deposited as estimated duties, cash deposits are estimates derived from a different time period (here, the period of investigation), whereas Commerce’s assessment rate reflects actual duty liabilities based on the examination of contemporaneous pricing data for the mandatory respondents. *See* 19 C.F.R. § 351.212(a); *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1343 (Fed. Cir. 2016) (citation omitted) (finding that although commercial reality is a “reliable guidepost[] for Commerce’s determinations,” that term “must be considered against what the antidumping statutory scheme demands.”). It is difficult to see how following the statute and using a result derived from contemporaneous information could be found unreasonable.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's Final Results. Judgment shall be entered accordingly.

Dated: November 26, 2018
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE