U.S. Court of International Trade

Slip Op. 19–141

PERRY CHEMICAL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 15–00168
PUBLIC VERSION

[Denying Defendant's motion for reconsideration and rejecting its notice of errata.]

Dated: November 13, 2019

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

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Meen Geu Oh*, Trial Attorney. Of Counsel on the brief was *Jessica M. Link*, Assistant Chief Counsel, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Justice, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court is a notice of errata and motion for reconsideration filed by Defendant pursuant to Rule 60(b) of the Rules of the U.S. Court of International Trade ("USCIT"). *See* Def.'s Not. Errata & Mot. Reconsideration Based Upon Erroneous Resp. to Ct.'s Mar. 12, 2019 Letter, June 24, 2019, ECF No. 58 ("Def.'s Mot."). Defendant requests the court to accept the notice of errata and reconsider its decision to deny a motion partially dismissing Perry Chemical Corporation's ("Perry" or "Plaintiff") complaint in Slip Opinion 19–43, dated April 5, 2019, *Perry Chemical Corporation v. United States*, 43 CIT __, __, 375 F. Supp. 3d 1324, 1339 (2019) ("*Perry I*"), claiming the court relied on an erroneous statement made by Defendant to reach its holding. *See* Def.'s Mot. at 1–2; *see also* Def.'s Reply Supp. Not. Errata & Mot. Reconsideration at 1–2, 9, Oct. 10, 2019, ECF No. 74 ("Def.'s Reply Br."). Plaintiff argues that Defendant's motion is procedurally inappropriate and also disagrees that Defendant erred. *See* Pl. [Perry's] Resp. to [Def.'s Mot.] at 1–2, 8–9, Sept. 5, 2019, ECF No. 69 ("Pl.'s Resp. Br."). Plaintiff therefore requests the court to reject the notice of errata and deny the motion for reconsideration.[1] *Id.* For the reasons that follow, Defendant's notice of errata is rejected and its motion for reconsideration is denied.

BACKGROUND

In *Perry I*, Perry sought a writ of mandamus directing Commerce to issue instructions to Customs and Border Protection ("CBP") to reliquidate certain entries of polyvinyl alcohol ("PVA") from Taiwan, produced and exported by Chang Chun Petrochemical Co. Ltd. ("Chang Chun"), without regard to antidumping duties, because the Department of Commerce's ("Department" or "Commerce") January 28, 2014 Timken notice revoked the relevant antidumping duty ("ADD") order.[2] *Perry I*, 375 F. Supp. 3d at 1330–31; *see also* Compl. at ¶¶ 1, 11–35, June 19, 2015, ECF No. 4; Def.'s Partial Mot. Dismiss Pl.'s Compl. With Respect Previously Liquidated Entries & Entries For Which Pl. Had No Injury, Sept. 16, 2015, ECF No. 14 ("Def.'s Partial Mot. Dismiss"). Specifically, Perry asked the court to order reliquidation of entries relating to the period of the second administrative review (AR2)[3] as well as entries in connection with a timeframe following that period ("Open Period"). *See Perry I*, 375 F. Supp. 3d at 1330–31, 1333; *see also* Compl. at ¶ 33. Perry claimed that because the ADD order had been revoked, Commerce's post-Timken instructions were unlawful and any entries that had been liquidated should be reliquidated. *See Perry I*, 375 F. Supp. 3d at 1333. Defendant argued that Perry's claim should be dismissed with respect to the AR2 entries,[4] as Perry had failed to protect itself from possible liquidation by either participating in the administrative processes, or seeking an injunction against liquidation from the court, and therefore it had failed to state a claim. *Id.*

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[1] Plaintiff views Defendant's notice of errata as support for Defendant's motion for reconsideration, rather than separate requests. *See* Pl.'s Resp. Br. at 2. As Plaintiff asserts that the Government's notice of errata is in error, Plaintiff argues that the motion for reconsideration is unwarranted. *See id.* at 2, 4–5. Therefore, the court understands Plaintiff's opposition to Defendant's motion for reconsideration to encompass opposition to the notice of errata.

[2] The Timken notice stems from *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), where the Court of Appeals for the Federal Circuit interpreted 19 U.S.C. § 1516a(c)(1) to require Commerce to notify the public when a court's final judgment in a case is "not in harmony" with an original agency determination. *See id.* at 341.

[3] The second administrative review covered the period March 1, 2012 through February 28, 2013. *See Perry I*, 375, F. Supp. 3d at 1328–29 (citing *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 25,418, 25,420 (Dep't Commerce May 1, 2013)).

[4] Defendant did not seek to dismiss Perry's claim with respect to the Open Period entries. *See generally* Def.'s Partial Mot. Dismiss at 1, 7–15.

Prior to issuing *Perry I*, following briefing and oral argument, the court notified the parties that it was unclear whether all the AR2 "entries were liquidated prior to January 28, 2014, the date on which [Commerce] published the Timken Notice." *See* Letter, Mar. 12, 2019, ECF No. 47. The court requested that the parties confirm whether "all the entries made during the AR2 period were in fact liquidated . . . prior [to] the Timken notice." *Id.* In response, Plaintiff stated that "[t]o the best of [its] knowledge . . . all such entries were in fact liquidated prior to January 28, 2014." Pl.'s Resp. to Ct.'s Mar. 12, 2019 Letter, Mar. 20, 2019, ECF No. 48. Defendant, however, reported that "there were a small number of entries . . . that liquidated after January 28, 2014." Def.'s Resp. to Ct.'s Mar. 12, 2019 Letter, Mar. 20, 2019, ECF No. 49. Subsequently, this court held that Perry had failed to state a claim for which relief could be granted for those AR2 entries that had liquidated prior to the revocation of the order on January 28, 2014. *Id.* at 1334, 1339. Prior to that time, Commerce's instructions were lawful, and Perry failed to protect its interests by forestalling liquidation. *Id.* at 1337.

Although the court dismissed Perry's complaint with respect to AR2 entries of PVA that had liquidated prior to the revocation of the order, the court declined to dismiss Perry's complaint with respect to entries "entered or withdrawn from warehouse during [AR2] that were not liquidated on or before January 28, 2014, the date on which Commerce issued the Timken/Revocation Notice[.]" *Perry I*, 375 F. Supp. 3d at 1339. Defendant now, in its notice of errata and motion for reconsideration, represents that "all entries produced and exported by [Chang Chun] and imported by Perry during the AR2 period were liquidated before January 28, 2014." Def.'s Mot. at 2–3 (emphasis omitted). Defendant asks the court to reconsider its order partially dismissing the complaint. *Id.* at 1; *see also* Def.'s Reply Br. at 1–3. Defendant contends that its misstatement that there were unliquidated AR2 entries at the time of the revocation order was the result of an overly broad search of relevant CBP data. Def.'s Mot. at 3. As support, Defendant provided the results of its search[5] for all entries with ADD number [[ ]] imported by Perry, which identify entries from both Chang Chun and another entity.[6] *See* Def.'s Not. Filing Confid. Info. at Spreadsheet 1, July 16, 2019, ECF No. 64

[5] In the notice of errata and motion for reconsideration, Defendant informed the court that Perry was unable to view the underlying confidential CBP data and provide its position on the motion. *See* Def.'s Mot. at 5. Therefore, to facilitate the exchange of confidential information, the court instructed the parties to confer and propose a joint protective order. *See* Letter, June 25, 2019, ECF No. 59. The court then granted the parties' motion for a protective order. *See* Protective Order, July 10, 2019, ECF No. 61.

[6] The other entity is [[ ]]. *See* Def.'s Confid. Info.; *see also* Pl.'s Resp. Br. at 8.

("Def.'s Confid. Info."); *see also* Def.'s Reply Br. at 2.[7] Defendant explains that it "included in [its] search entries produced by Perry's other apparent trading partner, . . . which included entries that were liquidated after [January 28, 2014]." Def.'s Reply Br. at 2. However, "these entries were never defined as part of Perry's complaint." *Id.* (citing Compl. at ¶ 1). Defendant contends that this other entity is "not subject to the scope of this litigation." *See id.* at 6, 8–9. Perry claims that the Defendant's query, which identified this other entity as the producer and exporter, is itself in error; further, Perry submits documentation to show that the entries which were purportedly exported by this other entity were in fact produced and exported by Chang Chun. Pl.'s Resp. Br. at 6–8, Exs. 1–20.[8]

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) (2012), which authorizes the court to review the administration and enforcement of, inter alia, ADD determinations under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a.[9]

A USCIT Rule 60 motion for reconsideration, appropriate where there has been a final judgment, "serves as 'a mechanism to correct a significant flaw in the original judgment' by directing the court to review material points of law or fact previously overlooked[.]" *RHI Refractories Liaoning Co. v. United States*, 35 CIT 130, 131, 752 F. Supp. 2d 1377, 1380 (2011) (quoting *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT 745, 748, 714 F. Supp. 2d 1296, 1301 (2010)). A court may reconsider a non-final judgment, pursuant to USCIT Rule 54 "'as justice requires,' meaning when the court determines that 'reconsideration is necessary under the relevant circumstances.'" *Irwin Indus. Tool Co. v. United States*, 41 CIT __, __, 269 F. Supp. 3d 1294, 1300–01 (2017) (quoting *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005)), *aff'd*, 920 F.3d 1356 (Fed. Cir. 2019).

DISCUSSION

Defendant requests the court to reconsider its decision in *Perry I* pursuant to USCIT Rule 60(b), which may relieve a party from an order or final judgment. *See* Def.'s Mot. at 1, 3–5. Defendant claims

[7] Defendant contends that "Perry used the same [ADD] case number, [[

]], to identify entries from two independent manufacturers, each with its own manufacturing identification number." Def.'s Reply Br. at 6.

[8] According to Plaintiff, "review of the packages attached as Exhibits 1–20 and reconciliation of the data . . . prove that Perry did have entries of subject PVA during [AR2] which liquidated after January 28, 2019 [sic]." Pl.'s Resp. Br. at 8.

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

that it mistakenly represented there were exports of PVA produced by Chang Chun and imported by Plaintiff that were not liquidated at the time of the revocation of the relevant ADD order. *See id.* at 2–3; *see also* Def.'s Reply Br. at 2–3. Plaintiff opposes Defendant's motion arguing that Rule 60(b) does not apply to interlocutory decisions and, even if it did, Defendant has not made the requisite showing under Rule 60(b) that would warrant the relief it seeks. *See* Pl.'s Resp. Br. at 1–2. Plaintiff further claims that Defendant's "correction" in its notice of errata and motion for reconsideration is in fact a mistake, because there were exports of PVA produced by Chang Chun and imported by Plaintiff which were not liquidated at the time of the revocation. *Id.* at 2, 6–9. Defendant's notice of errata is rejected, and its motion is denied. Although the court has the power to reconsider its interlocutory order, Defendant has not demonstrated that doing so is necessary in this case.[10]

Although the Defendant moves under Rule 60, which pertains to final orders,[11] the court nonetheless retains the general power to reconsider non-final orders. *See, e.g., Union Steel v. United States*, 35 CIT 1647, 1659, 804 F. Supp. 2d 1356, 1367 (2011). USCIT Rule 54(b), which mirrors Rule 54(b) of the Federal Rules of Civil Procedure, allows the court to revisit non-final determinations, as justice requires, meaning when necessary under the relevant circumstances.[12]

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[10] While the court also rejects Defendant's notice of errata, it does so without prejudice to assertions the parties may make at a future point.

[11] Pursuant to USCIT Rule 60(b), a party may seek relief from "a final judgment, order, or proceeding" for reason of, inter alia, "mistake, inadvertence, surprise, or excusable neglect[.]" *See* USCIT R. 60(b)(1). The language of USCIT Rule 60(b) is nearly identical to Federal Rule of Civil Procedure Rule 60(b). *Compare* USCIT R. 60(b) *with* Fed. R. Civ. P. 60(b). "In some circumstances, a court may use the Federal Rules of Civil Procedure as a guide to construe the USCIT Rules." *Gilmore Steel Corp., Or. Steel Mills Div. v. United States*, 11 CIT 39, 44, 652 F. Supp. 1545, 1549 n.5 (1987) and USCIT R. 1 ("The court may refer for guidance to the rules of other courts."). Courts have held that Federal Rule of Civil Procedure Rule 60(b) allows relief only from final judgments, final orders, and final proceedings. *See* Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2852 (3d ed.) ("[T]he power of a court to modify an interlocutory judgment or order at any time prior to final judgment . . . is not limited by the provisions of Rule 60(b)."); *see also Yancheng Baolong Biochemical Products Co., Ltd. v. United States*, 28 CIT 578, 589, 343 F. Supp. 2d 1226, 1231 (2004). Accordingly, District Courts have denied parties' motions to reconsider interlocutory orders, such as an order granting a partial motion to dismiss. *See, e.g., Evans v. Inmate Calling Solutions*, No. 3:08–CV–0353–RCJ, 2010 WL 1727841 (D. Nev. 2010); *Tofsrud v. Potter*, No. CV–10–90–JLQ, 2010 WL 3938173 (E.D. Wash. 2010). Here, the court's order in *Perry I* is interlocutory, because it addressed only Perry's PVA entries during AR2, but not during the Open Period. *Compare* Compl. at ¶ 35 *with Perry I*, 375 F. Supp. 3d at 1339. Therefore, those latter entries remain at issue in this proceeding, which renders Rule 60(b) an inappropriate basis for Defendant to seek reconsideration of the court's interlocutory order in *Perry I*.

[12] USCIT Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." USCIT R. 54(b); *see also* Fed. R. Civ. P. 54(b).

See Irwin Indus. Tool, 269 F. Supp. 3d at 1300–01. The court may consider “whether there has been a controlling or significant change in the law or whether the court previously ‘patently’ misunderstood the parties, decided issues beyond those presented, or failed to consider controlling decisions or data.” *Id.* at 1301 (citations omitted). The movant carries the burden of proving that “some harm, legal or at least tangible,” would accompany a denial of the motion. *Cobell*, 355 F. Supp. 2d at 540.

Reconsideration is not necessary under these circumstances. Even if Defendant is correct that its prior statement is incorrect, nothing would change in the court’s order in *Perry I*. Specifically, the court ordered Defendant’s motion to dismiss denied “with respect to entries of PVA from Taiwan entered or withdrawn from warehouse during [AR2] that were not liquidated on or before January 28, 2014, the date on which Commerce issued the Timken/Revocation Notice[.]” *Perry I*, 375 F. Supp. 3d at 1339. Whether or not there were in fact unliquidated AR2 entries prior to the revocation may be a question of fact which the parties can continue to litigate, but it has no impact on the court’s reasoning or its holding. It appears that Defendant hopes to cut-off any potential litigation concerning Perry’s pre-Timken notice, unliquidated AR2 entries, contending that any such entries are not Chang Chun’s exports and therefore not properly before the court. *See* Def.’s Mot. at 4; Def.’s Reply Br. at 7–9. Perry’s position seems to be that any unliquidated entries are in fact Chang Chun’s exports and therefore the proper subject of this lawsuit. *See* Pl.’s Resp. Br. at 6–9. Nothing in *Perry I*’s order prejudices either party’s position concerning the scope of the complaint, and the court only denied Defendant’s partial motion to dismiss with respect to any AR2 entries that were in fact unliquidated at the time of the revocation. *See Perry I*, 375 F. Supp. 3d at 1339. Given that no harm would accompany the denial of Defendant’s motion for reconsideration, it is denied, and its notice of errata is rejected.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendant’s Notice of Errata is rejected and its Motion for Reconsideration is denied.

Dated: November 13, 2019
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 19–147

UNITED STATES, Plaintiff, v. GREENLIGHT ORGANIC, INC., AND PARAMBIR SINGH "SONNY" AULAKH, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00031

[Granting Defendant's motion to dismiss for failure to state a claim upon which relief may be granted. Judgment will be entered in 45 days.]

Dated: November 25, 2019

William Kanellis and *Kelly Krystyniak,* Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff United States. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Robert Silverman, Robert Seely, and *Angela Santos*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, NY, for Defendant Parambir Singh Aulakh.

OPINION

Choe-Groves, Judge:

Plaintiff United States ("Plaintiff" or "Government") brings this civil enforcement action against Greenlight Organic, Inc. ("Greenlight") and Parambir Singh "Sonny" Aulakh ("Aulakh") (together, "Defendants") to recover unpaid duties and fees and affix penalties for violations of 19 U.S.C. § 1592(a) and (d) (2012). Summons, Feb. 8, 2017, ECF No. 1; First Am. Compl. ¶ 1, ECF No. 111 ("Am. Compl."). The Government alleges that "Greenlight, under the direction of Aulakh," "knowingly made material false statements" about the classification and valuation of "approximately 122 entries" of wearing apparel imported into the commerce of the United States. Am. Compl. ¶ 5. Defendant Aulakh moves to dismiss the complaint under Rules 9(b) and 12(b)(6) of the United States Court of International Trade ("USCIT") for failure to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss, June 3, 2019, ECF No. 120 ("Def.'s Mot."), and Mem. of Law in Supp. of Def.'s Mot. to Dismiss ("Def.'s Mem."), ECF No. 120–1.[1] Plaintiff opposed Aulakh's motion.Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n"), July 8, 2019, ECF No. 121. Aulakh replied. Reply Mem. in Supp. of Def.'s Mot. to Dismiss ("Def.'s Reply"), July 29, 2019, ECF No. 122. For the following reasons, Aulakh's motion to dismiss is granted, and judgment will be entered if Plaintiff fails to file an amended complaint within 45 days of the issuance of this opinion.

[1] Greenlight does not join in Aulakh's motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

The Government asserts that at all relevant times, Aulakh was owner and president of Greenlight, a California corporation with a place of business in Nevada. Am. Compl. ¶¶ 3–4. Plaintiff alleges that from January 1, 2007 to December 31, 2011, "Greenlight, under the direction of Aulakh," misclassified and undervalued shipments of athletic wearing apparel into the United States under cover of approximately 122 entries from a manufacturer in Vietnam. *Id.* ¶ 5. The Government alleges that "Greenlight, under the direction of Aulakh and other Greenlight agents, falsely represented to CBP [U.S. Customs and Border Protection]" that the wearing apparel was comprised of woven materials even though the subject merchandise was comprised of knitted materials subject to higher tariff levels under the Harmonized Tariff Schedule of United States ("HTSUS"). *Id.* ¶¶ 6–7. The complaint asserts that "Greenlight, Aulakh, and other Greenlight agents" "instructed the manufacturer of [the approximately 122] entries to falsely state" that the wearing apparel was comprised of recycled polyester, instead of first-run polyester. *Id.* ¶ 8. The Government alleges that misclassification of "approximately 122 entries of wearing apparel" resulted in Greenlight paying lower duty amounts than it would have paid had the subject entries been classified correctly. *Id.* ¶ 9.

When entering the wearing apparel, the Government argues that "Greenlight, under the direction of Aulakh and other Greenlight agents," understated the value of approximately 122 entries by taking the following actions: (1) creating and providing CBP a second set of invoices understating the subject entries' transaction costs, *id.* ¶¶ 10–12; (2) subtracting unsupported freight and insurance costs, *id.* ¶ 13; and (3) failing to notify CBP that they "had supplied its manufacturer source fabric materials for certain entries," *id.* ¶ 14.

CBP issued a pre-penalty notice to Greenlight on or about April 15, 2014, alleging that the company's violations were the result of fraud. *Id.* ¶ 18; Def.'s Mot., Ex. A. The pre-penalty statement showed that the Section 1592 violation was for "Entries made through various Ports of Entry during the period of July 18, 2007 through September

[2] In deciding a Rule 12(b)(6) motion to dismiss, the court takes the facts alleged in the complaint, and all reasonable inferences drawn from those facts, in the plaintiff's favor. *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In a Rule 12(b)(6) setting, the court may also consider documents "incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *A & D Auto Sales, Inc.*, 748 F.3d at 1147 (internal quotation marks and citation omitted).

07, 2012." *Compare* Def.'s Mot., Ex. A *with* Am. Compl. ¶ 5 (alleging that Defendants entered the subject merchandise between January 1, 2007 and December 31, 2011).

Just over two weeks later, then-counsel for Greenlight submitted to CBP a Freedom of Information Act ("FOIA") request on April 30, 2014. Def.'s Mot., Ex. B. Greenlight sought records that would aid in responding to the pre-penalty notice because Greenlight was unable to discern what entries CBP found to be misclassified and how the agency calculated the duties and fees owed. Def.'s Mot., Exs. B, F.

While the FOIA request remained pending, Greenlight sought a 30-day extension in responding to the pre-penalty notice on May 15, 2014. Def.'s Mot., Ex. C. CBP denied Greenlight's extension request that same day. *Id.* In denying the extension, CBP noted that Greenlight had declined to execute a voluntary statute of limitations waiver and, even if Greenlight had executed the waiver, CBP would only "consider" any extension request. *Id.* Greenlight filed no response to the pre-penalty notice. Am. Compl. ¶ 20; Def.'s Mot., Ex. E.

CBP issued Greenlight a penalty notice and duty demand alleging fraud the day after denying the company's extension request on May 16, 2014. Am. Compl. ¶ 21; Def.'s Mot., Ex E.[3] Absent a properly executed statute of limitations waiver, Greenlight had seven business days to explain why the company should not pay the monetary penalty. Def.'s Mot., Ex. E. Greenlight responded to the amended penalty notice on June 28, 2014. Def.'s Mot., Ex. F. Greenlight informed CBP that it had received the payment demand and had appealed CBP's FOIA response with the aim of using the responsive records to ascertain how much Greenlight could afford to pay. *Id.* Greenlight did not pay the duties or penalty owed. Am. Compl. ¶ 22.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. Courts are not required to

[3] CBP's penalty notice demanded payment of $238,516.56 in duties representing the actual loss of revenue. Def.'s Mot., Ex. E. In the pre-penalty notice, CBP demanded a lower amount—$217,968.22—as payment representing the actual loss of revenue. Def.'s Mot., Ex. A.

accept as true "legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]" *Id.; Kam-Almaz v. United States*, 682 F.3d 1364, 1368 (Fed. Cir. 2012) (citations omitted).

Although intent or knowledge may be alleged generally, "the circumstances constituting fraud" must be stated "with particularity[.]" USCIT R. 9(b); Exergen Corp. v. Wal-Mart Stores, Inc ., 575 F.3d 1312, 1326 (Fed. Cir. 2009). The plaintiff must inject factual precision or some measure of substantiation, i.e., pleading in detail "the who, what, when, where, and how of the alleged fraud." *Exergen*, 575 F.3d at 1327 (citation omitted).

III. DISCUSSION

The Government seeks to recover a monetary penalty and unpaid duties under 19 U.S.C. § 1592(a) and (d) for Defendants' importation of approximately 122 entries of athletic wearing apparel into the United States. Am. Compl. ¶¶ 32–34 (Count I); ¶¶ 35–37 (Count II). Aulakh moves to dismiss on two grounds: (1) administrative exhaustion and (2) failure to state a claim. *See* Def.'s Mem. 8–23.

1. Exhaustion

Aulakh argues that dismissal is warranted because Plaintiff failed to exhaust its administrative remedies. *Id.* at 8–17. Aulakh contends that the Government failed to perfect its penalty claim at the administrative level because CBP failed to identify with specificity the subject entries, the alleged violations (i.e., value, misclassification, or assists), or each entry's loss of revenue calculation. *Id.* at 12. The Government responds that, even if true, any deficiencies about CBP's penalty process "would have no legal import because all issues, including the amount of the penalty, shall be tried *de novo*." Pl.'s Opp'n 11. Plaintiff then argues that Aulakh had notice and opportunities to be heard because Aulakh participated in the administrative penalty process on Greenlight's behalf, authorized counsel to represent Greenlight, and directed Greenlight's FOIA application. *Id.* at 15.

The exhaustion doctrine compels pursuing the prescribed administrative remedies before seeking judicial review. *United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986)). "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). "[E]xhaustion is not strictly a jurisdictional requirement" and may be waived at the court's discretion. *United States v. Nitek Elecs., Inc.*, 806 F.3d 1376, 1381 (Fed. Cir. 2015).

To perfect its administrative penalty claim, CBP must issue pre-penalty and penalty notices containing certain information. *United States v. Jean Roberts*, 30 CIT 2027, 2030 (2006) (citing 19 U.S.C. §§ 1592(b)(1)–(2)). The pre-penalty notice must identify and describe the subject entries, the laws and regulations violated, the material facts satisfying the alleged violation, the assigned culpability determination (fraud, gross negligence, or negligence), the estimated loss of lawful duties and fees and amount of the proposed monetary penalty, and inform the alleged violator of the opportunity to make oral and written representations as to why the penalty claim should not issue in the amount stated. 19 U.S.C. § 1592(b)(1). If CBP finds that a violation occurred, then the agency issues a penalty claim. 19 U.S.C. § 1592(b)(2). CBP must then give the importer "a reasonable opportunity . . . to make representations, both oral and written, seeking remission or mitigation of the monetary penalty." *Id.* If the importer declines to pay the penalty, then Plaintiff may file suit seeking satisfaction of the payment obligation. 19 U.S.C. §§ 1592(b)(2), (e)(2).

Aulakh's contention that Plaintiff failed to perfect the penalty claim at the administrative level is without merit. The record reflects that Aulakh, represented by counsel, received notice that CBP intended to assert liability against him for customs penalties owed by Greenlight and was given notice and a right to be heard throughout the administrative penalty process. *See* Pl.'s Opp'n, Exs. A–H; Def.'s Mot, Exs. A, E, F. The court affords no deference to CBP's findings because the facts and penalty amount are decided *de novo* on the record before the court. *Nitek Elecs., Inc.*, 806 F.3d at 1380 ("[I]f Customs determines that the importer violated [Section 1592] based on negligence, the court does not need to give any deference to Customs' finding that the importer was negligent.").

2. Sufficiency of the Allegations

Aulakh avers that even if Plaintiff perfected its penalty claim at the administrative level, the fraud allegations lack the requisite level of particularity. *See* Def.'s Mem. 17–22. Aulakh finds fault with Plaintiff alleging generally that Aulakh directed Greenlight to knowingly make material false statements as to the composition, value, and source of fabrics of wearing apparel. *Id.* Nowhere in the complaint does the Government identify the who, what, when, where, and how supporting the fraud claim and, to that end, identify the entries for which Aulakh allegedly directed the material false statements that perpetrated the fraudulent misclassification and undervaluation scheme. *Id.* at 20. The Government responds by merely reciting the facts alleged in the complaint, such as pleading the time of the affirmative misrepresentations (from January 1, 2007 to December

31, 2011), the fact that the subject merchandise involved approximately 122 entries of wearing apparel from a manufacturer in Vietnam, and that Aulakh made material false statements aimed at misclassifying and undervaluing the subject merchandise. *See* Pl.'s Opp'n 17–21.

To sustain a Section 1592(a) violation, Plaintiff must show that a person entered, introduced, or attempted to enter or introduce merchandise into the United States by means of a material and false statement, document or act, or a material omission. 19 U.S.C. § 1592(a)(1)(A)(i)–(ii); *see United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1343 (Fed. Cir. 2009). Entry or introduction of merchandise occurs when a person "bring[s] goods to the threshold of the process of entry by moving goods into CBP custody in the United States and providing critical documents[.]" *United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1299 (Fed. Cir. 2014) (en banc). A statement, document, act, or omission is "material" if it had the potential to "influence [CBP]'s decision in assessing duties." *United States v. Thorson Chem. Corp.*, 16 CIT 441, 448, 795 F. Supp. 1190, 1196 & n.9 (1992) (citing CBP regulation 19 C.F.R. Part 171, Appendix B, which "define[s] a material statement as one which has the potential to alter the classification or admissibility of merchandise, or the liability for duty"). Plaintiff bears the elevated burden of proving fraud by clear and convincing evidence. 19 U.S.C. § 1592(e)(2).

In this case, the fraud allegations lack the factual precision or substantiation required under USCIT Rule 9(b). Nowhere in or attached to the complaint does the Government identify necessary and relevant information needed to substantiate a plausible fraud claim, such as identifying with specificity the "approximately 122 entries of wearing apparel" at issue here, a loss of revenue calculation, and the applicable HTSUS provision. *See* Am. Compl. ¶¶ 1, 5–7, 9. And nowhere does Plaintiff identify or attribute to a specific Defendant who made what statements that were false and material, or critically, the degree of each Defendant's participation in the fraudulent scheme. *See, e.g., id.* ¶¶ 7–10 (alleging that Aulakh directed Greenlight to create two sets of invoices without identifying the extent of each Defendant's involvement); Def.'s Reply, Exs. H–M (reflecting invoices that were issued by vendors, not Greenlight). Instead, Plaintiff combines Greenlight, Aulakh, and "and other Greenlight agents" together to allege that they "knowingly made material false statements" about the classification and value of the subject merchandise. *See* Am. Compl. ¶¶ 6–8, 10–16, 24 (alleging as a group that "Greenlight, under the direction of Aulakh, and other Greenlight agents," made false statements aimed at misclassifying and undervaluing the subject merchandise).

The complaint is replete with allegations that, because of his high-level role as Greenlight's owner and president, Aulakh must have directed Greenlight to make materially false and misleading statements. *Id.* ¶ 6 ("Greenlight, under the direction of Aulakh and other Greenlight agents, falsely represented to CBP" the composition of "approximately 122 entries of wearing apparel"), ¶¶ 10, 12 ("Greenlight, under the direction of Aulakh and other Greenlight agents, knowingly understated the value of the athletic wearing apparel by creating more than one set of invoices for the same entries" and submitted invoices with understated transaction costs), ¶ 13 ("Greenlight, under the direction of Aulakh and other Greenlight agents, knowingly deducted freight and insurance costs for the wearing apparel when . . . no basis existed"), ¶ 14 ("Greenlight, under the direction of Aulakh and other Greenlight agents," undervalued the subject merchandise when they "failed to notify CBP that it had supplied its manufacturer source fabric materials for certain entries"), ¶ 16 ("Greenlight, under the direction of Aulakh, and other Greenlight agents, made [ ] false statements to CBP regarding misclassification and undervaluation knowing that [the statements] were false"). Absent adequate facts supporting the fraud allegations, Plaintiff cannot impute knowledge to Aulakh merely by virtue of his position of power and influence over Greenlight. *See Exergen*, 575 F.3d at 1327 & n.4.

Plaintiff contends that a pre-*Iqbal* case, *United States v. Rotek, Inc.*, 22 CIT 503 (1993), provides support for meeting Rule 9(b)'s heightened pleading requirements. In *Rotek, Inc.*, the Court held that the plaintiff adequately pleaded a Section 1592 penalty claim based on a lower culpability finding of negligence. *Id.* at 513. Plaintiff overlooks that this court must apply *Iqbal-Twombly* plausibility pleading standards to "all civil actions," with limited exceptions that are not relevant in this case. *Iqbal*, 556 U.S. at 684; *see also United States v. Nitek Elecs., Inc.*, 36 CIT 546, 548–49, 840 F. Supp. 2d 1298, 1302 (2012), *aff'd* 806 F.3d 1376 (Fed. Cir. 2015) (reviewing a Section 1592 claim for plausibility under *Twombly* and *Iqbal* when ruling on a Rule 12(b)(6) motion to dismiss).

3. Leave to Amend

Without filing a motion to amend the complaint, Plaintiff nonetheless seeks leave to file a more definite statement if the court finds the allegations to be pled inadequately. Pl.'s Opp'n 21 (citing *United States v. Koo Chow*, 17 CIT 1372, 1377, 841 F. Supp. 1286, 1290 (1993)). The court construes Plaintiff's request as one seeking to leave to amend.

A party may move for a more definite statement if the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." USCIT R. 12(e). Allegations lacking sufficient factual detail may be cured through amendment "when justice so requires." USCIT R. 15(a)(2).[4] Generally, courts should allow repleading if the complaint gives any indication that a valid claim might be stated. *A & D Auto Sales, Inc.*, 748 F.3d at 1158. Courts have discretion to deny leave for certain reasons, including futility, bad faith, undue delay, or undue prejudice to the opposing party. *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In this case, the court will permit a curative amendment because it does not appear that repleading the claims would be inequitable or futile.

4. Greenlight Organic, Inc.'s Failures to Obtain Counsel, Plead, and Otherwise Defend Itself in this Action

The court granted the motion of Greenlight's counsel to withdraw its appearance in this matter on February 27, 2019. Order, ECF No. 108. The court gave Greenlight 30 days to retain substitute counsel and cautioned that a failure to obtain counsel would support entertaining a motion for default judgment under USCIT Rule 55. *Id.* Over eight months later, Greenlight has neither retained licensed counsel nor pleaded or otherwise defended itself in this action.

"It has been the law for the better part of two centuries . . . that a corporation may appear in federal courts only through licensed counsel." *Rowland v. California Men's Colony*, 506 U.S. 194, 201–02 (1993). In this case, absent action by Greenlight and as directed per this court's Order of February 27, 2019, Greenlight may be subject to potential consequences for its failure to plead or otherwise defend, including an entry of default and entry of a default judgment. USCIT R. 55 (noting that, under USCIT Rule 55(a), the clerk must enter a default against a party that "has failed to plead or otherwise defend"). The Government has not yet filed a motion for default judgment against Greenlight.

[4] The Rules of the Court are, to the extent practicable, in conformity with the Federal Rules of Civil Procedure. The Rules of the Court at times deviate from the Federal Rules of Civil Procedure when required to tailor the rules to the actions ordinarily brought before the Court. *See, e.g.*, USCIT R. 56.2. Except for minor differences in USCIT Rule 15(c)(2), USCIT Rule 15 is identical to Rule 15 of the Federal Rules of Civil Procedure.

IV. CONCLUSION

For the reasons set forth above, Defendant Aulakh's motion to dismiss is granted. The court will defer filing an order of judgment for forty-five (45) days. If the Government fails to file a second amended complaint addressing the deficiencies noted herein within forty-five (45) days from the date of this opinion, the court will file an order of judgment dismissing the complaint with prejudice.

Dated: November 25, 2019
New York, New York

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

Slip Op. 19–148

HYUNDAI STEEL COMPANY, Plaintiff, and SEAH STEEL CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00154

[Remanding the U.S. Department of Commerce's final results in the 2015–2016 administrative review of the antidumping duty order covering circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: November 25, 2019

Henry D. Almond and *Kang Woo Lee*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., argued for Plaintiff Shandong Yongtai Group Co., Ltd. With them on the briefs were *J. David Park* and *Daniel R. Wilson*.

Jeffrey M. Winton and *Amrietha Nellan*, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., argued for Consolidated Plaintiff SeAH Steel Corp.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., and *Hardeep K. Josan*, International Trade Field Office, U.S. Department of Justice, of New York, NY, argued for Defendant United States. With them on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the briefs was *James Ahrens*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Paul W. Jameson, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenor Wheatland Tube Company. With him on the brief was *Roger B. Schagrin*.

OPINION

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company ("Plaintiff" or "Hyundai") and SeAH Steel Corporation ("Consolidated Plaintiff" or "SeAH") (collectively, "Plaintiffs") bring this consolidated action contesting Commerce's final results in the administrative review of the antidumping duty order covering circular welded non-alloy steel pipe ("CWP") from the Republic of Korea ("Korea"). *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 83 Fed. Reg. 27,541 (Dep't Commerce June 13, 2018) (final results of antidumping duty administrative review; 2015–2016) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; 2015–2016, bar code 3716138–01 (June 7, 2018) ("Final IDM"). Before the court are Plaintiffs' Rule 56.2 motions for judgment on the agency record. For the reasons discussed below, the court remands Commerce's *Final Results*.

ISSUES PRESENTED

1. Whether Commerce's particular market situation finding was supported by substantial evidence; and
2. Whether Commerce's calculation of a combined single assessment rate for Hyundai Steel USA ("HSU") and Hyundai Corporation USA ("HCU") was supported by substantial evidence and in accordance with law.

BACKGROUND

The U.S. Department of Commerce ("Commerce") published the *Final Results* on June 13, 2018. *Final Results*. Plaintiff commenced this action to contest certain aspects of the *Final Results* on June 28, 2018. Summons, June 28, 2018, ECF No. 1; Compl., June 28, 2018, ECF No. 5. The court entered a statutory injunction on July 6, 2018. Order for Statutory Inj. Upon Consent, July 6, 2018, ECF. No. 9. Wheatland Tube Company ("Defendant-Intervenor" or "Wheatland") intervened on July 30, 2018. Order, July 30, 2018, ECF No. 21. The administrative record was filed on August 7, 2018. Letter from Zachary Simmons, Office of Chief Counsel for Trade Enforcement & Compliance, Commerce, to Mario Toscano, Clerk of the Court, U.S. Court of International Trade, Aug. 7, 2018, ECF No. 22. This case was consolidated with Court No. 18–00164 on August 27, 2018. Order, Aug. 27, 2018, ECF No. 25.

Hyundai and SeAH moved for judgment on the agency record. Pl.'s Mot. J. Agency R. ("Pl.'s Mot."), Jan. 15, 2019, ECF No. 38; Consol. Pl.'s Mot. J. Agency R. ("Consol. Pl.'s Mot."), Jan. 14, 2019, ECF No. 36. Defendant United States ("Defendant" or "United States") and Defendant-Intervenor responded. Def.'s Resp. Opp'n Mots. J. Agency R. ("Def.'s Resp.") May 7, 2019, ECF No. 44; Def.-Intervenor's Resp. Opp'n Mots. J. Agency R. ("Def.-Intervenor's Resp."), May 7, 2019, ECF No. 42. Plaintiff and Consolidated Plaintiff replied. Pl.'s Reply, June 6, 2019, ECF No. 47; Consol. Pl.'s Reply, June 6, 2019, ECF No. 46. The joint appendix was filed on June 20, 2019. Joint App'x, June 20, 2019, ECF No. 51. The court heard oral argument on September 11, 2019. Oral Argument Hr'g, Sept. 11, 2019, ECF No. 58. The Parties filed supplemental briefing. Wheatland's Resp., Sept. 13, 2019, ECF No. 59; Hyundai's Resp., Sept. 13, 2019, ECF No. 60; SeAH's Resp., Sept. 13, 2019, ECF No. 61; Commerce's Resp., Sept. 13, 2019, ECF No. 61.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the court the authority to review actions contesting the final results of an administrative review of an antidumping duty order. The court will uphold Commerce's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Particular Market Situation

A. Governing Law

Under the Tariff Act of 1930, as amended, Commerce conducts antidumping duty investigations and determines whether goods are being sold at less-than-fair value. *See* 19 U.S.C. § 1673. If the Department finds that subject merchandise is being sold at less-than-fair value, and if the U.S. International Trade Commission finds that these less-than-fair value imports materially injure a domestic industry, the Department issues an antidumping duty order imposing antidumping duties equivalent to "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* Generally, export price is defined as the price at which the subject merchandise is first sold in the United States, whereas the normal value represents the price at which the subject merchandise is sold in the exporting country. *See id.*§§ 1677a(a), 1677b(a)(1)(B)(i). If Commerce cannot determine the normal value of the subject merchandise based on price, then the statute authorizes Commerce to calculate a constructed value. *Id.*§ 1677b(a)(4). The constructed value shall be an amount equal to the sum of, for instance, "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade." *Id.* § 1677b(e)(1).

The Trade Preferences Extension Act of 2015 ("TPEA") amended the Tariff Act to allow Commerce to consider certain sales and transactions to be outside of the ordinary course of trade when "the particular market situation prevents a proper comparison with the export price or constructed export price." *Id.* § 1677(15). When calculating constructed value under the revised version of the statute, if Commerce finds the existence of a particular market situation "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." *Id.* § 1677b(e).

The legislative history of the TPEA reflects a desire to give Commerce the ability to choose the appropriate methodology when a particular market situation exists. One Senate Report stated that modifications to the Tariff Act under the TPEA "provide that where a particular market situation exists that distorts pricing or cost in a foreign producer's home market, the Department of Commerce has flexibility in calculating a duty that is not based on distorted pricing or costs." S. Rep. No. 114–45, at 37 (2015). In a hearing before the House of Representatives, Representative Patrick Meehan noted that under the TPEA, Commerce would be "empowered . . . to disregard prices or costs of inputs that foreign producers purchase if the Department of Commerce has reason to believe or suspects that the inputs in question have been subsidized or dumped" in the interest of creating an accurate record and protecting domestic workers. 161 Cong. Rec. H4690 (daily ed. June 25, 2015) (statement of Rep. Meehan).

Commerce has the ability to choose the appropriate methodology so long as it comports with its statutory mandate and provides a reasoned explanation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). The statute's language and legislative history permit Commerce to consider the cumulative effect and the totality of the conditions in the foreign market when making a finding of a particular market situation. *See Nexteel Co., Ltd. v. United States*, 43 CIT ___, ___, 355 F. Supp. 3d 1336, 1349 (2019) ("*Nexteel I*").

Plaintiffs challenge Commerce's finding that a particular market situation existed in Korea that distorted the cost of production of CWP. Plaintiffs contend that in finding the existence of a particular market situation, Commerce relied upon the same insufficient facts and record evidence that formed the basis of its unsupported finding of a particular market situation in the first administrative review of the antidumping duty order covering oil country tubular goods ("OCTG") from Korea. Pl.'s Reply 1–3; Consol. Pl.'s Reply 1–5.[1]

B. Commerce's Findings Pertaining to a Particular Market Situation in the First Administrative Review of OCTG and the Court's Ruling in *Nexteel I*

Plaintiffs assert that because the U.S. Court of International Trade concluded that Commerce's finding of a particular market situation in the OCTG first administrative review was unsupported by substantial evidence, *see Nexteel I*, 43 CIT at ___, 355 F. Supp. 3d at 1350–51, Commerce's finding of a particular market situation in this administrative review of the antidumping duty order covering CWP is similarly unsupported by substantial evidence. Pl.'s Reply 1–3; Consol. Pl.'s Reply 1–5.

In the OCTG first administrative review, Maverick Tube Corporation ("Maverick") alleged the existence of four particular market situations based on the following: (1) subsidies provided by the Government of Korea to producers of hot-rolled coil; (2) the flood of Chinese hot-rolled flat products and the resulting pressure on Korean domestic hot-rolled coil prices; (3) strategic alliances between Korean hot-rolled coil suppliers and Korean oil country tubular good producers; and (4) the Government of Korea's influence on the cost of electricity. *See Nexteel I*, 43 CIT at ___, 355 F. Supp. 3d at 1345–46. Taking each of these allegations in turn, Commerce found preliminarily that no particular market situation existed based upon the evidence in the record. *See* 43 CIT at ___, 355 F. Supp. 3d at 1346, 1349.

As to Maverick's allegation that the Korean Government subsidized the production of hot-rolled coil, the Department noted that Maverick submitted documents from a countervailing duty investigation on hot-rolled coil but found that "the record d[id] not contain evidence that the Government of Korea ha[d] introduced policies or mandates with regard to [hot-rolled coil] that distort the cost to produce the subject merchandise for either NEXTEEL or SeAH." 43 CIT at ___, 355 F. Supp. 3d at 1350 (quoting Commerce's Particular Market Situation Memorandum 15 ("Commerce's Particular Market Situation Mem.") (rejecting each allegation of Maverick's assertion of a particular market situation)).

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[1] The main physical input for the production of both the CWP at issue here and OCTG is hot-rolled steel.

As to Maverick's allegation that the flood of Chinese hot-rolled flat products caused the global price of hot-rolled coil to fall, Commerce found that Maverick had not demonstrated that the price distortions were specific to the Korean market. *See id.* (citing Commerce's Particular Market Situation Mem. 15).

As to Maverick's allegation that "strategic alliances" between Korean hot-rolled coil suppliers and oil country tubular goods producers resulted in favorable pricing that constituted a particular market situation, Commerce discounted an affidavit provided by Maverick because it pertained to discussions that occurred before the period of review and did not contain information about specific agreements. *See id.* (citing Commerce's Particular Market Situation Mem. 16). Maverick also pointed to the fact that NEXTEEL and SeAH purchased hot-rolled coil from POSCO during the period of review as indicative of a "strategic alliance." *See id.* (citing Commerce's Particular Market Situation Mem. 17). Commerce found this evidence unpersuasive because POSCO is a major supplier of hot-rolled coil in Korea and because NEXTEEL and SeAH also purchased hot-rolled coil from other suppliers. *See id.* (citing Commerce's Particular Market Situation Mem. 17).

As to Maverick's allegation that the Korean Government's "pervasive intervention" in the electricity market distorted the price of electricity, Commerce found that "there is no evidence to suggest that electricity prices charged to producers of either [hot-rolled coil] or [oil country tubular goods] in Korea do not reasonably reflect the cost of production for the electricity or are otherwise anomalous." *See id.* at 1351 (quoting Commerce's Particular Market Situation Mem. 18).

After issuance of Commerce's Particular Market Situation Memorandum in OCTG, Commerce did not receive any new factual information before issuance of its final results. *See* 43 CIT at ___, 355 F. Supp. 3d at 1349. Nevertheless, Commerce reversed its conclusion and determined in its final results in the OCTG first administrative review that the same record supported finding the existence of a particular market situation. *See* 43 CIT at ___, 355 F. Supp. 3d at 1346. As noted in *Nexteel I*, Commerce attempted to justify its reversal on the "cumulative effect" of the four allegations on the Korean oil country tubular goods market through the cost of oil country tubular goods inputs. *See id.* Commerce explained that it had "refocused the analysis on the totality of the conditions in the Korean market" and found "that the allegations represent, instead, facets of a single particular market situation." *See id.*

In *Nexteel I*, upon review of the governing statute and the administrative record, the Court held that while Commerce's finding of a single particular market situation based on the totality of circumstances was reasonable in theory, Commerce's finding in the first administrative review was unsupported by substantial evidence. *See* 43 CIT at ___, 355 F. Supp. 3d at 1349–51. The record lacked evidence to demonstrate that any of allegations made by Maverick, as to Korean hot-rolled coil subsidies, imports from China, strategic alliances, and electricity pricing interference, established the existence of a particular market situation that distorted the cost of production of OCTG. *See id.* The Court rejected Commerce's position "that individually, the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion. *See* 43 CIT at ___, 355 F. Supp. 3d at 1351.

C. Commerce's Findings Pertaining to a Particular Market Situation in the Second Administrative Review of OCTG and the Court's Ruling in *Nexteel II*

In the OCTG second administrative review, Commerce again determined that a particular market situation existed in Korea that distorted the cost of production of OCTG. *See Nexteel Co. v. United States*, 43 CIT ___, ___, 392 F. Supp. 3d 1276, 1287–88 (2019) ("*Nexteel II*"). In the OCTG second administrative review, Maverick made the same four allegations that it had made in the OCTG first administrative review and submitted the same supporting evidence. *See* 43 CIT at ___, 392 F. Supp. 3d at 1288. In determining that a particular market situation existed in the OCTG second administrative review, Commerce relied on its prior finding of the existence of a particular market situation in the first administrative review and continued to find that the circumstances remained "largely unchanged." *See* 43 CIT at ___, 392 F. Supp. 3d at 1287. Commerce noted that "facts in the [second] review are largely identical to the facts in the first administrative review, and the same evidence is on the record of the instant review." *See* 43 CIT at ___, 392 F. Supp. 3d at 1288.

Because Commerce's original finding of a particular market situation was not supported by substantial evidence, in *Nexteel II*, the Court held that Commerce's finding of a particular market situation in the second administrative review was not supported by substantial evidence. *See id.* The Court rejected Defendant-Intervenor United States Steel Corporation's attempt to argue that the record in the second administrative review was materially distinguishable from the record of the first administrative review because the record in the second review contained more exhibits. *See id.*The Court found that Commerce did not rely on the new exhibits in making its determination. *See id.* Instead, Commerce expressly relied on substantially the same facts and the same record evidence to support its finding of a particular market situation in the second administrative review. *See id.* As a result, the Court concluded that Commerce's finding of a particular market situation that distorted the cost of production of OCTG lacked substantial evidence. *See id.*

D. Commerce's Findings Pertaining to a Particular Market Situation in the Instant Administrative Review of CWP

In the instant administrative review of CWP from Korea, Commerce determined that a particular market situation existed in Korea that distorted the cost of production of CWP. Final IDM 11–13. In reaching that determination, Commerce relied on its prior finding of the existence of a particular market situation in the first administrative review of OCTG from Korea. *Id.* Defendant-Intervenor Wheatland made the same four allegations that Maverick made in the OCTG first administrative review and submitted the same supporting exhibits that were submitted in the first and second OCTG administrative reviews. *See* Final IDM 11–12 (citing documents provided in the OCTG administrative reviews). Commerce found that the circumstances remained "largely unchanged" from the allegations and the evidence that led to the finding of a particular market situation as to OCTG in Korea. *Id.* at 11. Commerce itself stated that "the facts in the instant review are largely identical to the facts in *OCTG from Korea POR 1*, and the same evidence is on the record of the instant review." *Id.* at 13. Because Commerce's finding of a particular market situation in the administrative review of OCTG from Korea was not supported by substantial evidence, *see Nexteel I*, 43 CIT at ___, 355 F. Supp. 3d at 1351, and Commerce's finding of a particular market situation in the instant review was based upon "the same evidence . . . on the record," Final IDM 13, the court is compelled to conclude that Commerce's finding of a particular market situation in the instant review is also not supported by substantial evidence.

The court rejects Defendant-Intervenor Wheatland's contention that this court should sustain Commerce's finding because the record in the CWP administrative review contains more factual information. Wheatland states that it submitted twenty-four exhibits to Commerce in support of its October 16, 2017, Allegation of a Particular Market Situation in the administrative review of CWP, and Wheatland emphasizes that only seven of those exhibits were in the record before Commerce in the OCTG reviews. Def.-Intervenor's Resp. 4; Wheatland's Allegation of a Particular Market Situation, Oct. 16, 2017, ECF No. 50–3.

Despite the more expansive record, the court finds that Commerce relied upon virtually the same record evidence that was present in the OCTG record in making its particular market situation determination in the instant review. *Compare id.* at 4 (acknowledging that Attachments 12 and 13 to Wheatland's Allegation of a Particular Market Situation were part of the OCTG record) *with* Final IDM 11–12 (relying upon Attachments 12 and 13 to Wheatland's Allegation of a Particular Market Situation in finding a particular market situation). Based upon Commerce's record citations in the Final IDM, there is one exhibit upon which Commerce purportedly relied in making its particular market situation finding that was not in the OCTG record. *See* Final IDM 12 n.22 (citing Attachment 11 to Wheatland's Allegation of a Particular Market Situation). Yet, when pressed at oral argument, Commerce's counsel conceded that there is no additional evidence whatsoever in this record that supports its finding of a particular market situation that was not present in the OCTG review. Oral Argument Hr'g at 25:40–26:26, 29:52–31:10, Sept. 11, 2019, ECF No. 58.[2] As in *Nexteel II*, Commerce's reliance on its previous finding of a particular market situation in this administrative review is clear on the record. *See* Final IDM 11–13.

The court also rejects Wheatland's contention that under a totality of the circumstances approach, Commerce can demonstrate the existence of a particular market situation based upon the combination of Korean hot-rolled coil subsidies, imports from China, strategic alliances, and electricity pricing interference, even though there is a lack of persuasive evidence to support any one of these allegations. In

[2] Court: Wouldn't you agree that even if the conclusion was that the totality of the four factors equaled the particular market situation, the evidence that supported that was the same evidence that was looked at in *Nexteel I*and *II*, which, individually, the Government found did not support a particular market situation? Individually, on that record evidence.

Defendant: In the preliminary determination? In the *OCTG I*, yes. The evidence for the . . . preliminary determination in *OCTG* underlying the four factors is, as Commerce stated, the IDM is largely identical to the one in this case. Yes.

Oral Argument Hr'g at 25:40–26:26.

Court: The thing that troubles me, though, is that didn't the Government make findings though that each of those four factors did not give rise to a particular market situation, individually, when it looked at the facts in the record? So, for example, just taking the second factor. . . whether the distorted effects of Chinese hot-rolled steel created a distortion. . . the Government found specifically . . . that was not supported by substantial evidence when it looked at the record and yet here it's making a finding that it is a particular market situation.

Defendant: And again, that's, again going back to each record, each review, each proceeding is separate, Commerce did not make that finding in this review. . . . That was in the preliminary determination of *OCTG*—

Court: But it's based on the same evidence, correct?

Defendant: It's largely identical, the evidence. Yes. . . .

Oral Argument Hr'g at 29:52–31:10.

support, Wheatland relies on *US Magnesium LLC v. United States*, 839 F.3d 1023, 1028 (Fed. Cir. 2016), which is inapposite. In that case, the court sustained Commerce's classification of retorts as indirect materials instead of direct materials. *Id.* While the domestic producer argued that Commerce should have followed a four-factor test, the court held that Commerce was not bound to any particular factors and properly applied a totality of the circumstances test. *Id. US Magnesium* does not stand for the proposition that under a totality of the circumstances test, a collection of unsubstantiated allegations can be combined into a substantiated one. Not even their collective impact can fill the evidentiary void that has plagued Commerce's particular market situation finding through the OCTG reviews and now this review.

For these reasons, the court concludes that Commerce's determination of the existence of a particular market situation in the *Final Results* is unsupported by substantial evidence. The *Final Results* are remanded for further proceedings.[3]

II. Combined Assessment Rate

Commerce calculated a combined assessment rate for Hyundai's affiliated importers, HSU and HCU, without a concomitant finding of evidence that the affiliated importers were manipulating their individual assessment rates to their advantage. Hyundai contends that Commerce's calculation of a combined rate for the affiliated importers without evidence of possible manipulation represents a departure from Commerce's prior practice without a reasonable explanation for such a departure.

"When an agency changes its practice, it is obligated to provide an adequate explanation for the change." *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011). Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology. *Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009). If Commerce acted differently than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions are arbitrary. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003).

In general, Commerce calculates a dumping margin for each entry of the subject merchandise under review. 19 U.S.C. § 1675(a)(2)(A). Pursuant to 19 C.F.R. § 351.212(b)(1), Commerce "normally will calculate an assessment rate for each importer of subject merchandise

[3] Plaintiffs have presented challenges to other aspects of Commerce's particular market situation finding, including Commerce's failure to conduct a respondent-specific analysis and its use of adverse facts available from another proceeding. The court does not reach those issues.

covered by the review." 19 C.F.R. § 351.212(b)(1). Commerce has confirmed its normal practice of calculating importer-specific assessment rates:

> When an administrative review is conducted, and where the weighted-average margin of dumping for the exporter or producer is determined to be greater than de minimis, the Department will calculate an importer-specific ad valorem assessment rate for each importer of subject merchandise covered by the review. 19 CFR [§] 351.212(b)(1).

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8101–01, 8103 (Dep't Commerce Feb. 14, 2012).

Notwithstanding Commerce's regular practice of calculating an assessment rate for each importer consistent with 19 C.F.R. § 351.212(b)(1), Commerce points out that it has a longstanding practice of calculating a combined assessment rate when two or more importers are affiliated with one another and a foreign exporter. Def.'s Resp. 38–39. Defendant invokes that practice as a basis for Commerce's decision not to calculate individual assessment rates for Hyundai's affiliates, HSU and HCU. *Id.* Defendant explains that the purpose behind Commerce's practice of calculating a combined rate for affiliated importers is to prevent affiliated importers from manipulating individual assessment rates. *Id.*

Hyundai does not dispute that Commerce has a past practice of aggregating affiliated importers but argues that Commerce has adopted such a practice only when the administrative record contains evidence of possible manipulation. Pl's Reply 20–21. Hyundai argues that, in the absence of record evidence of possible manipulation, such as evidence of the affiliates' purchases of the subject merchandise from each other, Commerce should follow its normal practice of calculating a separate rate for each importer. *Id.* Hyundai contends that Commerce's calculation of a combined rate for its affiliated importers without evidence of possible manipulation represents a departure from Commerce's prior practice without a reasonable explanation for such a departure. *Id.* Defendant contends that Commerce has established a practice of determining combined assessment rates even in the absence of record evidence of actual manipulation. Def.'s Resp. 38–39.

The court finds that Defendant has not established that Commerce's practice of calculating combined assessment rates for affiliated importers extends to cases where there is no evidence of potential manipulation. The record does not contain sufficient evidence to show Commerce's practice in cases where there is no actual evidence of potential manipulation. Indeed, Defendant does not cite to a single instance in which Commerce has calculated a combined assessment rate for affiliated importers despite an absence of actual manipulation evidence. Defendant does not explain why such a practice would be reasonable in light of 19 C.F.R. § 351.212(b)(1) or that it is unable to consider the record in determining whether to impose an importer-specific or combined assessment rate. As a result, the court remands the *Final Results* for further proceedings.

CONCLUSION

For the foregoing reasons, the court concludes as follows:

1. Commerce's particular market situation analysis is unsupported by substantial evidence; and
2. Commerce's calculation of a combined assessment rate for Hyundai's affiliated importers is unsupported by substantial evidence and not in accordance with law.

An order will issue accordingly.

Dated: November 25, 2019
New York, New York

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Slip Op. 19–149

Prysm, Inc., Plaintiff, v. United States, Defendant.

Before: Jane A. Restani, Judge
Court No. 18–00151
PUBLIC VERSION

[In Customs classification matter, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted.]

Dated: November 26, 2019

Munford Page Hall, II and *Lydia C. Pardini*, Adduci, Mastriani & Schaumberg, L.L.P., of Washington, D.C., for Plaintiff Prysm, Inc.

Marcella Powell, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, and *Amy M. Rubin*, Assistant Director, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., for Defendant United States of America. With them on the brief was *Joseph H. Hunt*, Assistant Attorney General, Civil Division, U.S. Department of Justice, of Washington, D.C. Of counsel on the brief was *Paula S. Smith*, Senior Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs & Border Protection, of New York, N.Y.

OPINION

Restani, Judge:

This matter is before the court on cross-motions for summary judgment. Plaintiff Prysm, Inc. ("Prysm") commenced this action against Defendant United States (the "government") to contest the denial by U.S. Customs and Border Protection ("Customs") of its administrative protests. Prysm principally claims that Customs incorrectly determined the tariff classification of its imported laser phosphor displays ("LPDs"), which Prysm claims were manufactured for use as "parts of" its Display Wall System, a "monitor." The government replies that Prysm's LPDs were manufactured for use as independent "monitors" and are classifiable accordingly.

There are two issues in this case. First, the court must determine whether Prysm's merchandise is a "monitor," classifiable under heading 8528, Harmonized Tariff Schedule of the United States ("HTSUS"),[1] or a "part" of a monitor, classifiable under heading 8529, HTSUS. If the merchandise is a monitor, then the court must also determine whether the monitor is principally used in an automatic data processing system and classifiable under subheading 8528.51.00, HTSUS, as claimed by Prysm.[2] For the reasons that follow, the court concludes that the LPDs are properly classifiable under subheading 8528.59.33, HTSUS as a color monitor, not incorporating television reception apparatus, with a video display diagonally greater than 34.29 centimeters, with a flat panel screen, other; other, subject to a 5 percent *ad valorem* duty, as asserted by the government.

BACKGROUND

On December 7, 2016, Prysm entered the subject LPDs at San Francisco. *See* Customs Entry Form 1651–0024, ECF No. 31–3 at 40 (Dec. 8, 2016) ("Pl. Ex. 2"). Customs classified the LPDs under sub-

[1] All citations to the HTSUS, including Section and Chapter Notes, are to the 2016 edition. This version was in effect on December 7, 2016, when Prysm entered the merchandise. *See* 19 C.F.R. § 141.69.

As of January 1, 2017, subheading 8528.51.00 was deleted and replaced with subheading 8528.51 (for monitors "[c]apable of directly connecting to and designed for use with an automatic data processing machine of heading 8471"). Subheading 8528.59.31 was also deleted. Those changes, which might have precluded some of Prysm's arguments here, are inapplicable to the instant case.

[2] At oral argument, Prysm abandoned its secondary alternative claim that its merchandise is a flat panel display device classifiable under heading 8528.59.31, HTSUS. *See* Oral Arg. Recording at 28:20–29:06 (Nov. 14, 2019). Many subheadings of heading 8528, HTSUS, reference flat panel screens, such as the one applicable here. A flat panel screen is distinct from the complete object, known as a flat panel display *device*, of which a flat panel screen is a part. Flat panel display devices are classified under subheading 8528.59.31, HTSUS. By contrast, a device with a flat panel screen, but that is not wholly a flat panel display device, is not classified under that subheading.

heading 8528.59.33, HTSUS. *See* [Pl.'s] Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried ¶¶ 10–11, ECF No. 31–1 (Mar. 15, 2019) ("Pl. Facts"); Def.'s Resp. to Pl.'s Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried ¶¶ 10–11, ECF No. 37 (May 24, 2019) ("Gov. Facts"). Prysm timely filed a protest on December 13, 2017. Pl. Facts ¶ 12; Gov. Facts ¶ 12. Prysm disagrees with this classification and claims that the LPDs are properly classified under subheading 8529.90.99, HTSUS, as "[p]arts suitable for use solely or principally with the apparatus of headings 8525 to 8528," free of duty. *See* Corrected Compl. ¶¶ 36–38, ECF No. 9 (July 20, 2018). Prysm requested an accelerated disposition of its protest, and the protest was deemed denied on June 23, 2018, pursuant to 19 U.S.C. § 1515(b). Pl. Facts ¶ 13; Gov. Facts ¶ 13. Prysm timely commenced the instant action on June 25, 2018. Pl. Facts ¶ 1; Gov. Facts ¶ 1. Prysm moved for summary judgment on March 15, 2019, and the government cross-moved for summary judgment on May 24, 2019. *See* Pl.'s Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J., ECF No. 31 (Mar. 15, 2019) ("Pl. Br."); Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. & in Support of Def.'s Cross-Mot. for Summ. J., ECF No. 37 (May 24, 2019) ("Gov. Br.").

JURISDICTION

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a), which vests the Court of International Trade with exclusive jurisdiction over any civil action commenced against the United States to contest the denial of a protest under Section 515 of the Tariff Act of 1930, *codified as amended*, 19 U.S.C. § 1515.

STANDARD OF REVIEW

The court reviews the denial of a Customs classification protest *de novo*. *See Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999); *FANUC Robotics Am., Inc.*, 393 F. Supp. 3d 1254, 1258 (CIT 2019). The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). A factual dispute is material if it potentially affects the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In a tariff classification dispute, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). The court's inquiry is two-fold. First, the court ascertains the proper meaning of specific terms in the tariff provision. *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006). Second, the court determines whether the merchandise meets the provision's terms as properly construed. *Id.*

PRYSM'S DISPLAY WALL SYSTEM

Prysm imports certain tile displays, known as "TD1 Tiles" (first generation) and "TD2 Tiles" (second generation). Pl. Facts ¶¶ 8–9, 14; Gov. Facts ¶¶ 8–9, 14. These tile displays are types of laser phosphor displays. Pl. Facts ¶ 15; Gov. Facts ¶ 15.[3] On December 7, 2016, Prysm entered 92 LPDs. *See* Pl. Ex. 2 at 39–41. Prysm contends that the "subject merchandise," its LPDs, "when combined with other LPDs and one or more" separate, proprietary components, form a Display Wall System. Pl. Br. at 4. The government agrees. *See* Gov. Facts ¶¶ 54–61. The LPDs are designed to be stacked in groups onto metal frame walls, with a gap of ½-millimeter between each. Pl. Facts ¶ 54; Gov. Facts ¶ 54.

The LPD can neither accept video signals nor display content unless it is connected directly to one of two specialized, independent, proprietary apparatuses: either a first-generation proprietary image processer ("IP1") or a second-generation proprietary image processor ("IP2") (collectively, the "Image Processors"). Pl. Facts ¶¶ 27, 35–36; Gov. Facts ¶¶ 27, 35–36. The Image Processor receives its input video source from a separate display wall processor or other image source. Pl. Facts ¶ 67; Gov. Facts ¶ 67.[4] A single Image Processor can control up to 30 LPDs. Pl. Facts ¶¶ 57–58; Gov. Facts ¶¶ 57–58. The proprietary image data and control signals that the Image Processors send

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[3] Prysm imports the TD1 Tiles separately from their power supply and fan assembly components, while the TD2 Tiles are imported with their power supply and fan assembly components attached. Pl. Facts ¶ 17; Gov. Facts ¶ 17. Nevertheless, the parties agree that the TD1 Tiles and the TD2 Tiles are the same product for the purposes of classification. Pl. Facts ¶ 16; Gov. Facts ¶ 16. The parties also agree that both species of LPD are imported as complete units. *See* Def.'s Add'l Statement of Undisputed Material Facts in Supp. of its Cross-Mot. for Summ. J. ¶ 4, ECF No. 37 at 21–25 (May 24, 2019) ("Gov. Add'l Facts); Pl.'s Resp. to Def.'s Add'l Statement of Undisputed Material Facts in Supp. of its Cross-Mot. for Summ. J. ¶ 4, ECF No. 42 (June 28, 2019) ("Pl. Add'l Facts"). Accordingly, the court, like the parties, refers to the TD1 and TD2 collectively as the LPDs. Pl. Facts ¶ 18; Gov. Facts ¶ 18. Wiring diagrams for the original configuration of Prysm's Display Wall System are attached in Confidential Appendix I.

[4] Although Prysm markets and sells separately a proprietary display wall processor that is designed for use with its Display Wall System, the Image Processors can accept incoming, commercial signals from "any video source with HDMI, DVI, or VGA output," including, *inter alia*, PCs and DVD players. Gov. Add'l Facts ¶ 18; Pl. Add'l Facts ¶ 18. Thus, the display wall processors are not essential to the LPD's operation. *See* Dep. of Dimitris Katsis, Ph.D. at 66:6–14, ECF No. 31–3 (Jan. 31, 2017) ("Pl. Ex. 3"); Dep. of Scott Norder at 11:6–18, ECF No. 37–1 (Nov. 3, 2017) ("Gov. Ex. F"). Where a Display Wall System operates with a display wall processor, the display wall processor's function is to execute programs that integrate multiple video signal sources into a single pixel canvas, and then to transmit those data to each LPD through the Image Processors. Pl. Facts ¶ 79; Gov. Facts ¶ 79.

to the LPDs "are shared in a 'daisy chain' manner from the first LPD to other LPDs in an array of tiles." Pl. Br. at 13; Pl. Facts ¶ 60; Gov. Facts ¶ 60. This arrangement is known as a Display Wall System, which displays a larger, single image to the end-user. Pl. Facts ¶¶ 56, 59–61; Gov. Facts ¶ 56, 59–61. In short, the Display Wall System contains two integral components: (1) the Image Processor, a proprietary device that (a) accepts incoming, commercially-coded incoming video signal data, (b) converts those data into proprietary signal data, and then (c) sends those signals to the LPDs; and (2) the LPDs, which collectively display a unified image to the end-user.[5] Because the interaction between these parts is essential to the court's determination of whether the LPDs are monitors classifiable in heading 8528 or are, instead, parts of monitors classifiable in heading 8529, the court briefly explains how the LPDs interact with the Image Processors within Prysm's Display Wall System.

A. The LPDs, the Subject Merchandise

As relevant for classification purposes, the LPD consists of an anti-glare panel, a phosphor panel, a laser processor, and a laser engine, all of which are enclosed within a single apparatus. Pl. Facts ¶¶ 19–20; Gov. Facts ¶¶ 19–20. It does not contain a television reception apparatus. Pl. Facts ¶ 44; Gov. Facts ¶ 44. The LPD has a

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[5] A "basic" Display Wall System consists solely of LPDs and Image Processors, and may, but need not, include a display wall processor. Gov. Add'l Facts ¶¶ 1–2; Pl. Add'l Facts ¶¶ 1–2. *See* Confidential Appendix I. Yet, in its moving brief, Prysm's principal argument in support of the LPDs' classification under subheading 8528.51.00 was that "the display wall processor" in the Display Wall System "is an automatic data processing machine," so that its Display Wall System "is an automatic data processing system," and therefore "an array of LPDs is an output unit for an automatic data processing system." Pl. Br. at 25–26. In its reply, Prysm appears to abandon its original argument, claiming instead that the LPDs, coupled with a series of additional LPDs and remote automatic data processing machines, means that the LIPDs are principally used in an automatic data processing system within the meaning of heading 8471, HTSUS; specifically, the Display Wall System. Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. & Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. at 10, ECF No. 40 (June 28, 2019) ("Pl. Reply"). According to Prysm, the Display Wall System "includes the LPDs, one or more IPs, and a direct or indirect connection to an ADP machine." *Id.* at 1. *But see id.* at 6 (the Display Wall System is a "complete monitor" that is "composed of four or more LPDs and an I[mage] P[rocessor]."). Prysm now claims that whether a display wall processor is an automatic data processing machine that meets the definitional requirements of such machines "is irrelevant" for classification purposes. *Id.* at 14.

At oral argument, the court requested the parties to inform it if a detailed discussion of Prysm's proprietary display wall processor was necessary. *See* Oral Arg. Recording at 45:30–51:10 (Nov. 14, 2019). Prysm was not required to, and did not, file a response. The government agrees with the court that the display wall processors "are irrelevant to the classification of the LPDs at issue." Def.'s Resp. to the Issues Raised by the Ct. During Oral Arg. on the Parties' Cross Mots. for Summ. J. at 2, ECF No. 55 (Nov. 14, 2019). Prysm's most recent contention that whether a display wall processor is an automatic data processing machine "is irrelevant" for classification purposes accords with the government's position. Pl. Reply at 14.

flat screen that measures 63.6 centimeters diagonally. Pl. Facts ¶¶ 102, 108; Gov. Facts ¶¶ 102, 108. Each LPD also contains an internal central processing unit [[

]]. Def.'s Add'l Statement of Undisputed Material Facts in Supp. of its Cross-Mot. for Summ. J. ¶¶ 10, 14, ECF No. 37 at 21–25 (May 24, 2019) ("Gov. Add'l Facts); Pl.'s Resp. to Def.'s Add'l Statement of Undisputed Material Facts in Supp. of its Cross-Mot. for Summ. J. ¶¶ 10, 14, ECF No. 42 (June 28, 2019) ("Pl. Add'l Facts"). Prysm admits that "[e]ach [LPD] is equipped" with this system, which it describes as a]], or a central processing unit ("CPU"). Pl.'s First Suppl. Resp. to Def.'s First Set of Interrogs. at 20, ECF No. 31–3 (Feb. 5, 2019) ("Pl. Ex. 9"). This CPU contains two main processors. Gov. Add'l Facts ¶ 12; Pl. Add'l Facts ¶ 12; Dep. of Dimitris Katsis, Ph.D.[6] at 47:13–21, ECF No. 40–1 at 6 (Jan. 31, 2017) ("Pl. Ex. 17"); Pl.'s Resp. to Def.'s Second Set of Interrogs. at 226, ECF No. 37–2 (Oct. 20, 2017) ("Gov. Ex. L").[7] The CPU controls the LPD's internal machinery, video data, and image display intensity, and also distributes incoming data, processes video signals, and stores multiple frames. Pl. Ex. 17 at 47:13–48:4; Dep. of Dimitris Katsis, Ph.D. at 190:4–13, ECF No. 37–1 (Nov. 2, 2017) ("Gov. Ex. E."). The CPU thus controls which "part of the image" to display on a given LPD among an arrangement of LPDs that comprise the Display Wall System. Dep. of Dimitris Katsis, Ph.D. at 34:12–20, ECF No. 31–3 (Jan. 31, 2017) ("Pl. Ex. 3"). *See also* Pl. Facts ¶¶ 99–102; Gov. Facts ¶¶ 99–102.

B. The Image Processors

To display an image, the LPD must first receive a signal through a Category 7 ("CAT 7") cable from a proprietary Image Processor, a second, independent apparatus that Prysm imports separately from the LPDs. Pl. Facts ¶¶ 18, 24, 31, 36, 42; Gov. Facts ¶¶ 18, 24, 31, 36,

[6] Dr. Katsis is the Director of Global Technical Applications and a Technical Fellow at Prysm. Pl. Ex. 9 at 5.

[7] Specifically, the LPD contains a (1) [[ ]] processor and (2) [[ ]] processor. Gov. Add'l Facts ¶ 12; Pl. Add'l Facts ¶ 12. The first processor monitors the health of the LPD unit and reads the incoming control signals from the Image Processors. *See* Dep. of Dimitris Katsis, Ph.D. at 22:22–24, ECF No. 31–3 (Jan. 31, 2017) ("Pl. Ex. 3"). The second processor's main purpose is to distribute the incoming signal data to the LPD's image display machinery; namely, the lasers. *See* Dep. of Dimitris Katsis, Ph.D. at 47:13–21, ECF No. 40–1 at 6 (Jan. 31, 2017) ("Pl. Ex. 17"); Pl.'s Resp. to Def.'s Second Set of Interrogs. at 226, ECF No. 37–2 (Oct. 20, 2017) ("Gov. Ex. L"). According to Dr. Katsis, "both the TD1 Tile and the TD2 Tile contain this processor system. Decl. of Dimitris Katsis, Ph.D. ¶ 2, ECF No. 37–1 (Feb. 20, 2019) ("Gov. Ex. G"). "The difference is that that TD2 Tile uses a different model of the [[ ]], instead of the [[ ]] as used in the TD1 Tile. Even though the [[ ]] are different models, they perform the same functions[.]" *Id.*

42. The LPD can neither accept video signals nor display content unless it is connected directly to an Image Processor. Pl. Facts ¶¶ 27, 35; Gov. Facts ¶¶ 27, 35. The Image Processors convert "consumer-level digital signals" and data from a separate apparatus into [[ ]] and then transmit that data to the LPD through a CAT 7 cable linking the LPD and the Image Processor. Pl. Ex. 3 at 20:7–10; Pl. Facts ¶¶ 91–92; Gov. Facts ¶¶ 91–92. These signals "contain[] information for every pixel in the form of RGB triads" (*i.e.*, "red-green-blue" triads). Pl. Ex. 9 at 22; Gov. Add'l Facts ¶ 17; Pl. Add'l Facts ¶ 17.

DISCUSSION

The HTSUS is organized by classification headings, each of which has one or more subheadings. The headings set forth "general categories of merchandise," while the subheadings "provide a more particularized segregation of the goods within each category." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013) (internal quotation and citation omitted). The HTSUS also contains General Notes, Section Notes, Chapter Notes, General Rules of Interpretation ("GRI"), the Additional United States Rules of Interpretation ("ARI"), and several appendices for particular categories of goods. *See* 19 U.S.C. § 3004. Each of these has the binding effect of statutory law. *See BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). Thus, the GRIs and ARIs govern merchandise classification, and the court applies them in numerical order. *Id.* While not binding upon the court, the court also may consider the Explanatory Notes ("ENs"), developed by the World Customs Organization ("WCO"), which are "generally indicative of proper interpretation" of the tariff schedule. *See Lemans Corp. v. United States*, 660 F.3d 1311, 1316 (Fed. Cir. 2011). "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citation omitted). To ascertain the proper heading under GRI 1, the court compares only the language of the headings and not the language of the subheadings. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998).

A. Heading 8528, HTSUS v. Heading 8529, HTSUS

In the instant case, Prysm contends that the LPD is classifiable under heading 8529, HTSUS, which covers "[p]arts suitable for use solely or principally with the apparatus of headings 8525 to 8528."[8]

[8] Headings 8525, 8526, and 8527 are inapposite and need not be addressed.

Meanwhile, the government argues that the LPD is to be classified under heading 8528, HTSUS, which covers "[m]onitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus."[9] Thus, the court must determine if the LPDs are "monitors," and thus classifiable under heading 8528, or "parts" of monitors, classifiable under heading 8529. Where a tariff classification is in dispute, "the court first considers whether 'the government's classification is correct, both independently and in comparison with the importer's alternative.'" *FANUC Robotics*, 393 F. Supp. 3d at 1260 (quoting *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)). The relevant Section and Chapter Notes define neither "monitors" nor "parts of monitors." While the WCO ENs likewise fail to define the terms expressly, the court will consider them here because they are informative as to the scope of the bounds of heading 8528. *See, e.g.*, *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644–45 (Fed. Cir. 2013). The General EN to heading 8528, HTSUS provides that all monitors are apparatuses that employ a wide array of technologies "to display images," and they "may be capable of receiving a variety of signals from different sources." EN 85.28 (General). As there is no legislative intent to the contrary, the court will construe the term "monitor" in accordance with its "common and commercial meaning[]." *Carl Zeiss, Inc.*, 195 F.3d at 1379. To do so, the court will first consider the parties' proffered "lexicographic and scientific authorities, dictionaries, and other reliable information sources" or, if those sources prove unavailing, it will "rely upon its own understanding" of the definition. *Irwin Indus. Tool Co. v. United States*, 920 F.3d 1356, 1360 (Fed. Cir. 2019) (citations omitted).

For its part, the government points the court to four dictionaries,[10] each of which generally defines a "monitor" in one of two ways; either, broadly, as a screen used to display various media or, more specifically, a cathode ray tube used to display various media. *See* Gov. Br. at 11–12. The government thus concludes that a "'monitor' is a device

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[9] In the alternative, the government argues that heading 8543, HTSUS, which covers "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof," applies to the LPDs. The court rejects this argument at the outset because heading 8528, HTSUS wholly describes the LPDs. *Cf.* GRI 1. Additionally, the parties agree that the LPDs are imported as complete units. Gov. Add'l Facts ¶ 4; Pl. Add'l Facts ¶ 4. Accordingly, the court need not inquire as to the potential applicability of headings, such as heading 8543, which do not wholly describe the LPDs. *See Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

[10] Specifically, the government points to the OXFORD ONLINE ENGLISH DICTIONARY (3d ed. 2002); the MERRIAM-WEBSTER ONLINE DICTIONARY (unknown edition); the MACMILLAN DICTIONARY (edition unknown); and the CAMBRIDGE ENGLISH DICTIONARY (edition unknown). *See* Gov. Br. at 11–12; Gov. Dictionary Excerpts, ECF No. 37–2 (May 24, 2019) ("Gov. Ex. K").

that displays the output of a system, or a device with a screen that shows or displays pictures or information." Gov. Br. at 12. Accordingly, the government contends that the term "monitor" describes the LPDs "precisely," as they "contain a screen and . . . pictures or images are displayed on them." *Id.* Prysm, by contrast, offers one dictionary definition and one scientific definition.[11] *See* Pl. Br. at 14. According to Prysm, while a common dictionary definition of "monitor" is "a screen which displays an image generated by a computer," the term is defined more precisely in "scientific authorities," which define "monitor" as "an automatic data processing ("ADP") output device." *Id.* (alterations and citations omitted). Because Prysm urges the court to adopt an uncommon definition of the term "monitor," Prysm bears the burden to prove that the term "has a different commercial meaning that is definite, uniform, and general throughout the trade." *See Carl Zeiss, Inc.*, 195 F.3d at 1379 (citation omitted).

Despite its assertion that "scientific authorities" afford a more precise definition of the term "monitor," Prysm offers only one such source for support. Specifically, Prysm points to the expert report of Samuel Miller,[12] who explains that an automatic data processing (ADP) output device "is an electronic visual display for an automatic data processing device." Expert Report of Samuel Miller at 1, ECF No. 31–3 ("Pl. Ex. 5"). Mr. Miller explains that such devices generally include "a display element, electronic circuitry that performs various functions, a power supply, and a case to contain the various components." Pl. Ex. 5 at 1. He provides a lengthy recitation of the evolution of automatic data processing output devices and notes, in passing, that younger-generation automatic data processing output devices with flat screens were once known as "computer monitors." Pl. Ex. 5 at 1. It remains unclear exactly who understood and used this definition and whether "the vernacular" to which he refers is or was that of individuals who deal in the importation of such devices. Pl. Ex. 5 at 1–2. Mr. Miller then explains that, "[i]n the vernacular," the combination of the Image Processor and the LPD "is not only a 'monitor,' it is [also] a 'flat screen display device, a 'flat screen monitor.'" Pl. Ex. 5 at 12.

Even if Mr. Miller's explanation were specific enough to support Prysm's proffered definition, the overwhelming quantity of Prysm's own evidence is to the contrary. For example, Dr. Katsis, a Prysm employee, purports to distinguish the LPDs from other monitors by

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[11] Specifically, Prysm points to "https://en.oxforddictionaries.com" and to the expert testimony of Mr. Samuel Miller. *See* Pl. Br. at 14.

[12] Mr. Miller holds a Master of Science in Electrical Engineering from Case Western Reserve University and identifies himself as an "Engineering Vice President." Pl. Ex. 5, Attach. B.

claiming that most individuals in the trade associate "monitors" with liquid-crystal displays ("LCDs"), which "can directly interface" with "a laptop or a PC," and not with laser phosphor displays, which cannot. Pl. Ex. 3 at 161:6–162:22. Dr. Katsis also claims that LPDs are distinguishable from monitors, because whereas "the controller electronics" are "affixed" to "monitors," the "brains" of the LPD system are contained within the separate Image Processor, a detached device. *Id.* at 161:1–22. Dr. Katsis bases his definition upon his years of experience in the display industry, during which he concedes that he has never seen such a definition "written anywhere," and that he "just know[s]." *Id.* at 161:19–21. Yet, Dr. Katsis readily admits that LPDs contain [[ ]] known collectively as the computer processing unit. Pl. Ex. 17 at 47:13–25. Dr. Katsis later explains that this computer processing unit processes the incoming data [[ ]] within the LPD unit. Gov. Ex. E at 189:22–190:1. Moreover, in its interrogatory responses, Prysm stated that the LPD is a "monitor" and explained that "[a]n embedded processor [[ ]]. Pl.'s Objs. & Resp. to Def.'s First Set of Interrogs. at 15–16, ECF No. 37–1 (Nov. 2, 2016) ("Gov. Ex. B").

Quite plainly, the LPDs employ internal technology to display images and are capable of receiving signals from the Image Processors. Gov. Add'l Facts ¶¶ 5–9, 11; Pl. Add'l Facts ¶¶ 5–9, 11; *accord* EN 85.28 (General). Prysm contends that a given Display Wall System requires at least four LPDs to operate. Pl. Facts ¶ 65. The parties agree that a single Image Processor can control up to 30 LPDs "arranged in matrices of up to six columns containing five LPDs each." Pl. Facts ¶ 57; Gov. Facts ¶ 57. Thus, it is possible for a given Display Wall System, as sold by Prysm, to contain as few as four LPDs, or as many as several hundred.[13] Dr. Katsis explains, and there is no genuine dispute, that a single LPD, when connected to an Image Processor, can display a usable image. *See* Pl. Ex. 3 at 163:12–20.[14] The parties further agree that the Display Wall System displays "a full image" to which each LPD contributes, "as if it were displayed on a giant LCD monitor" on the Display Wall. Pl. Facts ¶ 116; Gov. Facts

[13] Prysm alleges that its agents sold "full" Display Wall Systems with as few as [[ ]] LPDs and as many as [[ ]] LPDs. Pl. Facts ¶¶ 112–13.

[14] In a "Wall of One" arrangement, by contrast, Prysm is unsure of whether a "Wall of One" arrangement could display text data clearly. *See* Pl. Ex. 3 at 163:15–16. But because the court finds that a device need not be capable of displaying text to satisfy the definition of "monitor," this fact is immaterial for ascertaining the proper classification heading. *See infra*.

¶ 116. Given Prysm's own description of its Display Wall System and marketing strategy, it is clear that there is no uniform, set configuration of which any single LPD can constitute a "part," because the "whole," in the sense of a full Display Wall System, is undefinable at the time of importation. The large and the small of it is that each LPD is a monitor that is capable of displaying an image.[15] Thus, the court accepts the Oxford English Dictionary's definition[16] of "monitor" as elucidated by the interpretative guidance of EN 85.28, and concludes that, for tariff purposes, the following definition of "monitor" applies: a monitor is a machine that receives data from an external source, and then processes and converts that data into physical output commands to display an image. Accordingly, the LPDs are "monitors" within the meaning of the HTSUS, and thus they are properly classified under heading 8528.

B. Subheading 8528.59.33, HTSUS is the proper classification.

After determining the appropriate heading in which to classify a product, the court next determines the appropriate subheading. *See* GRI 6; *Orlando Food Corp.*, 140 F.3d at 1440. Prysm contends that if "the LPD is a monitor classified in heading 8528, the LPD should be classified in subheading 8528.51.00, HTSUS," which provides for "[m]onitors and projectors, not incorporating television reception apparatus; other monitors: [non-cathode-ray tube monitors] of a kind solely or principally used in an automatic data processing system of heading 8471," free of duty. *See* Pl. Br. at 25. The government maintains that the LPD is properly classifiable in subheading 8528.59.33, which provides for "[m]onitors and projectors, not incorporating television reception apparatus; other monitors: [non-cathode ray tube monitors]; other: color with a flat panel screen; other: other." Gov. Br. at 2, 15.[17] To resolve this issue, the court must ascertain whether the LPD is a monitor that is designed solely or principally for use with an

[15] Even if, *arguendo*, the Display Wall System is also a "monitor" within the meaning of heading 8528, there is no authority that forecloses the notion that a monitor's component parts cannot also be "monitors." Indeed, taking Prysm's argument to its most expansive reach would cause two interconnected monitors that display a unified image to each lose their status as independent monitors, each being a "part" of the other. The court rejects such a strained interpretation.

[16] *See* Monitor, n.7, OXFORD ENGLISH DICTIONARY (3d ed. 2002).

[17] The government contends that the Federal Circuit's opinion in *Optrex* forecloses Prysm's argument. *See* Gov. Br. at 15 (citing *Optrex Am., Inc. v. United States*, 475 F.3d 1367 (Fed. Cir. 2007)). But, given the change in focus explained *supra* in note 5, *Optrex* is no longer helpful here. Further, in *Optrex*, the goods at issue were imported "[b]etween 1998 and 1999," prior to the enactment of the governing HTSUS provision. *Optrex*, 475 F.3d at 1368.

automatic data processing system, as that term is defined in heading 8471, HTSUS.[18]

The court begins with the text of the HTSUS and the relevant Section and Chapter Notes, as these are statutory law. *BenQ Am.*, 646 F.3d at 1376. For classification within subheading 8528.51.00, the LPD must be a monitor "of a kind solely or principally used in an automatic data processing system of heading 8471," which provides for, *inter alia*, "[a]utomatic data processing machines and units thereof." *Compare* heading 8471, HTSUS *with* subheading 8528.51.00, HTSUS. Chapter Note 5 to Chapter 84 deals explicitly with those "machines" and "systems" that are properly classifiable in subheading 8471, HTSUS. *See* Ch. 84, HTSUS n.5.

a. The LPD is not solely or principally used in an automatic data processing system, within the meaning of subheading 8528.51.00 and Note 5(C) to Chapter 84, HTSUS.

Preliminarily, the court observes that there is no argument that the LPDs themselves are classified under heading 8471, HTSUS. The EN to heading 8471 emphatically "*excludes* machines, instruments or apparatus incorporating or working in conjunction with an automatic data processing machine and performing a specific function" from the definition of "automatic data processing machine." EN 84.71(I) (emphasis in original). Such machines "are classified in the headings appropriate to their respective functions." *Id.* Here, that heading is 8528. The parties agree that the LPD's specific function is to display an image to an end-user. Pl. Facts ¶¶ 18, 24, 31, 36, 42; Gov. Facts ¶¶ 18, 24, 31, 36, 42. This is so whether the LPD operates in an expansive Display Wall System that contains a display wall processor, several Image Processors, and several other LPDs, wherein each LPD's function is to display image data, or whether instead the LPD operates as a "Wall of One," wherein the LPD's function likewise is to

[18] Prysm does not argue that the Image Processors, by themselves, are automatic data processing machines within the meaning of heading 8471, HTSUS. Nevertheless, it is the court's duty to reach the correct result, "by whatever procedure is best suited to the case at hand." *Jarvis Clark*, 733 F.2d at 878. The record evidence does not support a conclusion that the Image Processors meet the statutory definition of "automatic data processing machines" covered by heading 8471, HTSUS. *See* Ch. 84 n.5(A). Such machines must be "capable of" four functions: (1) storing a processing program and data that are immediately necessary for executing that program, (2) being freely programmable with a user's requirements, (3) performing user-specified arithmetical computations, and (4) executing a processing program that requires logical decision-making, without human intervention. *Id.* Prysm presents the court with no evidence to demonstrate whether the Image Processors store a processing program, are freely programmable, or perform user-specified arithmetical computations. When parties cross-move for summary judgment, "each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts." *Massey v. Del Labs, Inc.*, 118 F.3d 1568, 1573 (Fed. Cir. 1997). Prysm has not carried that burden here.

display image data. Pl. Ex. 3 at 40:11–13, 163:1–14; Pl. Ex. 5 at 6; Dep. of Dimitris Katsis, Ph.D. at 200:10–12, ECF No. 313 (Nov. 2, 2017) (“Pl. Ex. 12”); Gov. Ex. B at 11–19.

As indicated,[19] Prysm maintains that even if the LPDs are not parts of a monitor, they are nonetheless classifiable as components of an automatic data processing system within the meaning of Note 5(C) to Chapter 84, which provides, in relevant part, that:

> [A] unit is to be regarded as being part of an automatic data processing system if it meets all of the following conditions:
>
> (i) It is of a kind solely or principally used in an automatic data processing system;
>
> (ii) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Ch. 84 HTSUS, n.5(C). The parties agree that the LPDs satisfiy the second and third prongs of this definition, but they dispute both the scope and application of the first, which mirrors subheading 8528.51.00, HTSUS. According to Prysm, the LPDs meet this definition because “[i]mmediately prior to importation, the principal use of LPDs was with ADP machines,” so that even if its merchandise was “‘put to some atypical use’” after importation, the first prong is satisfied. Pl.’s Reply to Def.’s Opp’n to Pl.’s Mot. for Summ. J. & Pl.’s Resp. to Def.’s Cross-Mot. for Summ. J. at 11, ECF No. 40 (June 28, 2019) (“Pl. Reply”) (quoting *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999)). The government avers that there is insufficient evidence in the record to show that the LPDs are “commercially fungible with the class or kind of goods that are principally used in ADP systems of heading 8471, HTSUS,” so that the LPDs do not satisfy the first prong. [Def.’s] Reply Mem. in Further Supp. of Def.’s Cross-Mot. for Summ. J. at 9–10, ECF No. 47 (Aug. 2, 2019) (“Gov. Reply”) (citing *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976)).

i. Subheading 8528.51.00, HTSUS is a use provision.

The court construes HTSUS terms “according to their common and commercial meanings,” *only* in the absence of “contrary legislative intent.” *Carl Zeiss, Inc.*, 195 F.3d at 1379. Where the text of the statute inescapably contours the scope of the applicable heading with

[19] *See supra* Part A and notes 5 & 18.

a specific, complete, and binding definition that centers upon "principal use," the court must construe the statute cohesively, applying relative provisions to their appropriate objects, to give effect to the expressed legislative intent. *See, e.g.*, *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 n.5 (Fed. Cir. 2017); *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312–16 (Fed. Cir. 2012). Accordingly, because Note 5(C)(i) to Chapter 84 inescapably requires the subject merchandise to be a "unit" that is "of a kind solely or principally used with an automatic data processing system," the court concludes that Chapter Note 5(C)(i) clearly defines a use, as does subheading 8528.51.00, HTSUS. Thus, the applicable subheading is a principal use provision.

ii. The LPDs are not monitors of a kind solely or principally used in an automatic data processing system.

The court begins with ARI 1(a), the statute by which "[p]rincipal use provisions are governed." *Aromont*, 671 F.3d at 1312. ARI 1(a) provides that

> In the absence of special language or context which otherwise requires[,] a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

ARI 1(a). An article's "principal use is defined as the use that 'exceeds any other single use' in the United States." *GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1362 (Fed. Cir. 2014) (citing *Aromont*, 671 F.3d at 1312). In turn, the "class or kind" inquiry examines "the group of goods that are commercially fungible with" the subject merchandise. *Primal Lite, Inc.*, 182 F.3d at 1365. To ascertain the class or kind of merchandise in a "principal use" analysis under ARI 1(a), the court evaluates "all the pertinent circumstances." *Carborundum*, 536 F.2d at 377.[20] (collecting cases). Because the *Carborundum* test consideration of all pertinent circumstances, the court refers to the applicable ENs because, although they are not binding, they "clarify the scope of HTSUS subheadings" and afford interpretive guidance of

[20] These circumstances include, but are not limited to (1) "the general physical characteristics of the merchandise," (2) "the expectation of the ultimate purchasers," (3) "the channels, class, or kind of trade in which the merchandise moves," (4) "the environment of the sale," (5) "the use, if any, in the same manner as merchandise which defines the class," (6) "the economic practicality of so using the import," and (7) "the recognition in the trade of this use." *Carborundum*, 536 F.2d at 377 (collecting cases). Application of these factors to the subject merchandise is but "[o]ne method" of determining the "class or kind" of the goods covered by a use provision. *BenQ Am.*, 646 F.3d at 1380.

legislative intent. *Len-Rong Mfg. Co., Inc. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003).

The issue, then, is whether the LPD is a monitor "of a kind solely or principally used in an automatic data processing system of heading 8471." Subheading 8528.51.00, HTSUS. The ENs to heading 8528 are instructive because they distinguish qualifying monitors from non-qualifying monitors based upon a device's physical characteristics and manner of use. *Compare* EN 85.28(A) (defining monitors "of a kind solely or principally used in an automatic data processing system of heading 84.71") *with* EN 85.28(B) (defining monitors "other than those of a kind solely or principally used in" such a system). Monitors that are classifiable in subheading 8528.51.00 "are distinguishable from other types of monitors," and "frequently incorporate tilt and swivel adjusting mechanisms" and "other ergonomic design characteristics to facilitate prolonged periods of viewing at close proximity to the monitor." EN 85.28(A). Prysm's own evidence indicates that its LPDs do not have these features at the time of importation. Indeed, according to Prysm, "the LPDs are not meant to be installed in any other way than onto the metal frame(s)" that comprise "a metal frame wall consisting of kinematic mounts" that "precise[ly]" affix each LPD's position. Pl. Facts ¶¶ 54–55; Gov. Facts ¶¶ 54–55. The LPDs "are not made to sit on a desk or be used as a television device." Pl. Facts ¶ 55; Gov. Facts ¶ 55. The Display Wall System, in turn, creates "one very large display screen." Pl. Ex. 5.

By contrast, monitors that are not classifiable in subheading 8528.51.00 include those "devices which can generate a point of light and display it on a screen synchronously with the source signals." EN 85.28(B). These monitors may receive coded signals, and "must be equipped with a decoding device covering (the separation of) the R, G and B signals." *Id.* The LPD fits squarely within the bounds of this definition. Indeed, the LPD's dedicated internal CPU receives "the proprietary packetized data generated by" the Image Processor, which it uses to control "the intensity of the laser beam that illuminates the phosphor screen." Gov. Add'l Facts ¶ 11; Pl. Add'l Facts ¶ 11. The CPU also converts the image data "into timing data," which "guide the laser beams to light up the correct pixel location at the appropriate intensity." Gov. Add'l Facts ¶ 12; Pl. Add'l Facts ¶ 12. These processors thus "decide" which "part of the image" to display on a given LPD among the arrangement of LPDs that comprise the Display Wall System. Pl. Ex. 3 at 61; Pl. Facts ¶¶ 99–102; Gov. Facts ¶¶ 99–102. Moreover, the proprietary signals are in the form of R, G, B signals, and the LPD's CPU decodes these signals. *See* Pl.'s Resp. to Def.'s First Set of Interrogs. at 21, ECF No. 37–3 (Jan. 21, 2019)

("Gov. Ex. O"). Thus, whether or not the LPDs are now intended to receive image data from a remote automatic data processing machine, they are not units or components of automatic data processing systems as contemplated by subheading 8528.51.00 and Note 5(C) of Chapter 84. Accordingly, in the light of the uncontroverted evidence of record, the court concludes that the LPDs are plainly commercially fungible with monitors other than those of a kind solely or principally used with automatic data processing systems, rendering classification in 8528.51.00, HTSUS incorrect. Because the LPDs are "monitors" with flat panel screens whose display diagonal exceeds 34.29 centimeters, without a television reception apparatus or a cathode-ray tube, they are properly classified in 8528.59.33, HTSUS.

CONCLUSION

For the foregoing reasons, the court holds that the subject imports are properly classified in 8528.59.33, HTSUS, subject to a duty at 5 percent *ad valorem*. The court denies Prysm's motion for summary judgment and grants the government's cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: November 26, 2019
New York, New York

/s/ Jane A. Restani
Jane A. Restani, Judge

Slip Op. 19–150

Shandong Yongtai Group Co., Ltd., Plaintiff, and Qingdao Sentury Tire Co., Ltd., Sentury Tire USA Inc., Sentury (Hong Kong) Trading Co., Limited, Pirelli Tyre Co., Ltd., Pirelli Tyre S.P.A., and Pirelli Tire LLC, Consolidated Plaintiffs, v. United States, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00077

[Sustaining in part and remanding in part the U.S. Department of Commerce's Final Results in the antidumping duty administrative review of certain passenger vehicle and light truck tires from the People's Republic of China.]

Dated: November 27, 2019

Jordan C. Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., argued for Plaintiff Shandong Yongtai Group Co., Ltd. With him on the briefs were *Ned H. Marshak* and *Brandon M. Petelin*.

Dharmendra N. Choudhary, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y., argued for Consolidated Plaintiffs Qingdao Sentury Tire Co., Ltd., Sentury Tire USA Inc., and Sentury (Hong Kong) Trading Co., Limited. With him on the briefs were *Andrew T. Schutz, Brandon M. Petelin, Jordan C. Kahn*, and *Ned H.*

Marshak. *Elaine F. Wong* also appeared.

Daniel L. Porter and *James P. Durling*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for Consolidated Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC. With them on the briefs were *Tung A. Nguyen, Kimberly Reynolds*, and *Gina Colarusso*.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Ayat Mujais*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce. Of counsel on the briefs were *David Campbell* and *Jessica R. DiPietro*, Attorney-Advisor, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION

Choe-Groves, Judge:

This action arises from the U.S. Department of Commerce's ("Commerce") administrative review of certain passenger vehicle and light truck tires ("PVLT") from the People's Republic of China ("China" or "PRC"). *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 83 Fed. Reg. 11,690 (Dep't Commerce Mar. 16, 2018) (final results of antidumping duty administrative review and final determination of no shipments) ("*Final Results*"); *see* Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2015–2016 Antidumping Duty Administrative Review, PD 502 (Mar. 9, 2018) ("Final IDM"). Before the court are the motions for judgment on the agency record of Plaintiff Shandong Yongtai Group Co., Ltd. ("Plaintiff," "Shandong Yongtai," or "Shandong Yongtai Group"), Consolidated Plaintiffs Qingdao Sentury Tire Co., Ltd., Sentury Tire USA Inc., Sentury (Hong Kong) Trading Co., Limited (collectively, "Sentury"), and Consolidated Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., Pirelli Tire LLC (collectively, "Pirelli"). For the reasons that follow, the court sustains in part and remands in part the *Final Results* to Commerce for further consideration.

ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's notice and initiation of the administrative review as to Plaintiff was in accordance with the law;

2. Whether Commerce's determination not to grant a separate rate as to Shandong Yongtai Chemical Co., Ltd. was supported by substantial evidence;

3. Whether Commerce's calculation of a value-added tax ("VAT") deduction to Sentury's U.S. price was supported by substantial evidence and in accordance with the law;

4. Whether Commerce's decision not to make an adjustment for the Export Buyer's Credit Program ("EBCP"), as accounted for in the companion countervailing duty administrative review, was supported by substantial evidence and in accordance with the law; and

5. Whether Commerce's determination that Pirelli was ineligible for a separate rate and Commerce's assignment of the China-wide entity rate was supported by substantial evidence and in accordance with the law.

PROCEDURAL HISTORY

Commerce published the *Final Results* of the administrative review of PVLT from China on March 16, 2018. *Final Results* at 11,690. Plaintiff initiated this action on April 12, 2018, challenging certain aspects of Commerce's *Final Results*. *See* Summons, Apr. 12, 2018, ECF No. 1; Compl. ¶ 1, Apr. 12, 2018, ECF No. 6 ("Compl."). The court entered a statutory injunction on April 16, 2018. *See* Order for Statutory Inj. Upon Consent, Apr. 16, 2018, ECF No. 10. The administrative record was filed on May 29, 2018. Ltr. from David W. Campbell, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, to Mario Toscano, Clerk of the Court, U.S. Court of International Trade, May 29, 2018, ECF No. 15. The court consolidated this case with Court Numbers 18–00079 and 1800080 on June 14, 2018. Order, Jun. 14, 2018, ECF No. 17.

Shandong Yongtai, Sentury, and Pirelli moved for judgment on the agency record. Plaintiff's Mot. for J. on the Agency R., Oct. 2, 2018, ECF No. 20 ("Shandong Yongtai's Mot."); Consol. Pl. Sentury's Mot. for J. on the Agency R. Pursuant to Rule 56.2, Oct. 2, 2018, ECF No. 21 ("Sentury's Mot."); Mot. for J. on the Agency R., Oct. 3, 2019, ECF No. 24 ("Pirelli's Mot.").

The court stayed this case following the lapse in appropriations for the Department of Justice on January 8, 2019. Order, Jan. 8, 2019, ECF No. 32. Defendant moved to continue the stay following restoration of appropriations on January 30, 2019. Status Report and Request for Continuation of Stay, Jan. 30, 2019, ECF No. 33. The court denied Defendant's motion and lifted the stay on January 30, 2019. Second Am. Scheduling Order, Jan. 30, 2019, ECF No. 34.

Defendant responded. Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mots. for J. Upon the Agency R., Mar. 4, 2019, ECF No. 37 ("Def.'s Resp."). Shandong Yongtai, Sentury, and Pirelli replied. Reply Br. of Pl. Shandong Yongtai Group Co., Ltd. (Formerly Known as Shandong Yongtai Chemical Co., Ltd.), Apr. 19, 2019, ECF No. 44 ("Pl.'s Reply"); Reply Br. of Consol. Pl. Sentury, Apr. 19, 2019, ECF No. 45 ("Sentury's Reply"); Reply Br. of Consol. Pls. Pirelli Tyre Co., Ltd., Pirelli Tyre

S.p.A., and Pirelli Tire LLC, Apr. 19, 2019, ECF No. 46 ("Pirelli's Reply"). The joint appendix was filed on May 3, 2019. Joint App'x to Opening Resp., and Reply Brs. Regarding Pls.' Mot. for J. on the Agency R. Pursuant to Rule 56.2, May 3, 2019, ECF No. 48. Sentury filed notices of supplemental authority on May 17, 2019, and May 24, 2019. Notice of Supplemental Authority, May 17, 2019, ECF No. 53; Notice of Supplemental Authority, May 24, 2019, ECF No. 54. The court heard oral arguments on June 18, 2019. Oral Argument Hr'g, Jun. 18, 2019, ECF No. 61.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii). The court will hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. Notice and Initiation of the Administrative Review as to Shandong Yongtai

A. Background

Plaintiff was formed under the name Shandong Yongtai Chemical Group Co., Ltd. ("Shandong Yongtai Chemical Group") in August, 1995. Shandong Yongtai Mot. 5; Shandong Yongtai Separate Rate Appl., Ex. 7, Art. 1, PD 149 (Nov. 14, 2016) ("Shandong Yongtai SRA"). Plaintiff changed the company's name to Shandong Yongtai Chemical Co., Ltd. ("Shandong Yongtai Chemical") in 2012.

Commerce initiated antidumping and countervailing duty investigations into PVLT from China on July 21, 2014. *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 79 Fed. Reg. 42,292 (Dep't Commerce July 21, 2014) (initiation of antidumping duty investigation); *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 79 Fed. Reg. 42,285 (Dep't Commerce July 21, 2014) (initiation of countervailing duty investigation). Plaintiff participated in the investigation and sought a separate rate. *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 80 Fed. Reg. 4,250, 4,251–52 (preliminary determination). Commerce issued an antidumping duty order as to PVLT from China on August 10, 2015. *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 80 Fed. Reg. 47,902 (Dep't Commerce Aug. 10, 2015) ("AD Order"). Commerce assigned Plaintiff, identified as Shandong Yongtai

Chemical, a separate rate in the AD Order. *Id.* at 47,905–47,906.

After Commerce issued the AD Order, Plaintiff changed its name to Shandong Yongtai Group Co., Ltd. ("Shandong Yongtai Group") via an amendment to the company's Articles of Association ("AOA"). Shandong Yongtai SRA, Exs. 3–7; *see also* Pl.'s Br. 6. The name change became effective on January 20, 2015 when the new business license was issued. Shandong Yongtai SRA, Exs. 3 & 7. Shandong Yongtai Group and Shandong Yongtai Chemical shared the same business license registration number. *See id.*[1]

Commerce published the notice to request an administrative review on August 5, 2016. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 81 Fed. Reg. 51,850 (Dep't Commerce Aug. 5, 2016). Shandong Yongtai, identified as "Shandong Yongtai Group Co., Ltd. (formerly Shandong Yongtai Chemical Co., Ltd.)," filed a request for administrative review. Ltr. from Gaopeng & Partners to Commerce at 1, PD 10 (Aug. 22, 2016) ("Pl. Request for Administrative Review") (emphasis omitted); *see also* Ltr. from Stewart and Stewart to Commerce, Attach. 1 at 7, PD 24 (Aug. 31, 2016).

Commerce published the initiation notice for antidumping and countervailing duty administrative reviews with August anniversary dates on October 14, 2016. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 71,061 (Dep't Commerce Oct. 14, 2016) ("October Initiation Notice"). In that notice, Commerce initiated the first administrative review of the antidumping duty order and findings for the period of January 27, 2015 to July 31, 2016. October Initiation Notice, 81 Fed. Reg. at 71,065–71,066. Commerce identified "Shandong Yongtai Group Co., Ltd. (formerly known as Shandong Yongtai Chemical Co., Ltd.)" in the October Initiation Notice. *Id*. During the period of review, Plaintiff used both the old name, Shandong Yongtai Chemical Co., Ltd., and the new name, Shandong Yongtai Group Co., Ltd., in sales and entry documents when exporting PVLT from China. *See* Case Brief of Shandong Yongtai Group Co., Ltd. (formerly known as Shandong Yongtai Chemical Co., Ltd.), 14, PD 481 (Feb. 8, 2018).

[1] Plaintiff offers the following summary of its name changes and the corresponding periods each name was in use:

Full Company Name	***Short Company Name***	***Time in Use***
Shandong Yongtai Group Co., Ltd.	Yongtai Group	Jan. 2015 — Present
Shandong Yongtai Chemical Co., Ltd.	Yongtai Chemical	Nov. 2012 — Jan. 2015
Shandong Yongtai Chemical Group Co., Ltd.	Yongtai Chemical Group	Aug. 1995 — Nov. 2012

Shandong Yongtai Mot. 1.

Commerce subsequently included “Shandong Yongtai Chemical Co., Ltd.,” (not the new name, “Shandong Yongtai Group Co., Ltd.”) in the administrative review of PVLT for the period January 27, 2015 to July 31, 2016. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778, 77,784 (Dep’t of Commerce Nov. 9, 2016) (“November Initiation Notice”). In the November Initiation Notice, Commerce noted that “[t]he name of this company was listed incorrectly in the initiation notice that published on October 14, 2016 (81 FR 71061). The correct name of the company is listed in this notice.” *Id.*

B. Legal Framework

Under 19 U.S.C. § 1675, when a review of an antidumping duty order by Commerce is requested, Commerce must publish notice of the initiation of an administrative review in the Federal Register. *See* 19 U.S.C. § 1675(a)(1). Pursuant to 44 U.S.C. § 1507, the filing of a document in the Federal Register is sufficient to give notice of the contents of the document to a person subject to or affected by the document. 44 U.S.C. § 1507; *see also* 44 U.S.C. § 1505(a)(3).

C. Discussion

Plaintiff argues that Commerce did not provide adequate notice of the initiation of the administrative review as to Shandong Yongtai Chemical and that Commerce did not place the November Initiation Notice on the administrative record. Pl.’s Br. 17–21; Pl.’s Reply 2–7. Plaintiff contends that, as a result, Commerce lacked the authority to separately review Shandong Yongtai Chemical in this administrative review. *Id.* Plaintiff also argues that it lacked notice because the version of the November Initiation Notice posted on Commerce’s website used “embedded graphics” and the November Initiation Notice was not text-searchable. *See* Pl.’s Reply 4–7; *see also* Pl.’s Reply, Addendum 1. Defendant counters that Commerce gave notice in accordance with 19 U.S.C. § 1675(a)(1) by naming Shandong Yongtai Chemical in the subsequent Federal Register notice, and that Plaintiff cannot claim that it was improperly included in the administrative review because Plaintiff submitted a request to be reviewed. Def.’s Resp. 5–6, 10–12.

Plaintiff’s arguments are not persuasive. Not only did Plaintiff request its administrative review, but Commerce published initiation notices identifying Plaintiff in the Federal Register. *See* Pl. Request for Administrative Review 1–2; October Initiation Notice, 81 Fed. Reg. at 71,065; November Initiation Notice, 81 Fed. Reg. at 78,784. Because Commerce published the initiation notices in the Federal Register as required by 19 U.S.C. § 1675, and publication in the

Federal Register is sufficient to give notice under 44 U.S.C. § 1507, the court concludes that Commerce's notice in the Federal Register and initiation of the administrative review as to Plaintiff was in accordance with the law.

II. Commerce's Determination Not to Grant Separate Rate Status to Shandong Yongtai Chemical Co., Ltd.

A. Background

Plaintiff submitted a single SRA on November 14, 2016. *See* Shandong Yongtai SRA 1–2. In the letter accompanying Plaintiff's SRA, Plaintiff asserted that the SRA was submitted "[o]n behalf of Shandong Yongtai Group Co., Ltd. ('Shandong Yongtai', formerly known as 'Shandong Yongtai Chemical Co., Ltd.')." Shandong Yongtai's SRA 44, PD 149 (Nov. 14, 2016) (emphasis omitted). In response to SRA Section II, Question 1, Plaintiff stated:

> Name: Shandong Yongtai Group Co., Ltd. (formerly known as 'Shandong Yongtai Chemical Co., Ltd.". [sic] It is noted that the name of the applicant was Shandong Yongtai Chemical Co., Ltd. during the period of investigation of the Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China. The applicant was previously granted separate rate status under the name of 'Shandong Yongtai Chemical Co., Ltd.' as part of the final determination/results in the investigation of certain passenger vehicle and light truck tires from China 10/1/13–3/31/14; published in Federal Register 80 FR 47902 (August 10, 2015). The name of the applicant was changed from Shandong Yongtai Chemical Co., Ltd. to Shandong Yongtai Group Co., Ltd. on January 20, 2015. Please refer to the business license before and after the name change in Exhibit 3 for evidence. The Registration No. 370523018069534 on the business license before and after the name change in Exhibit 3 is the same.)

Id. at 10. In response to Questions 2a and 2b, Plaintiff stated:

> 2a. Is the applicant identified by any other names, such as trade names or 'doing-business-as' ('d.b.a.') names, as a legal matter in the home market, in third countries, or in the United States?[]
>
> ______ Yes (complete the chart below, in full)
>
> __✔__ No
>
> . . . .
>
> *2b Is the applicant requesting separate rate status for any of the trade names listed in the table above? . . .
>
> Response: Not applicable.

Id. at 11.

In the *Final Results*, Commerce granted separate rate status to Shandong Yongtai Group, but not to Shandong Yongtai Chemical. *See Final Results* at 11,691–92; IDM at 24–26, 32. Plaintiff argues, *inter alia*, that (1) Commerce may not conduct a separate rate analysis as to Shandong Yongtai Chemical separately from Shandong Yongtai Group, (2) Plaintiff provided the necessary information to determine that Shandong Yongtai Chemical was entitled to a separate rate, and (3) Commerce may not disregard the content of the SRA simply because Plaintiff did not identify Shandong Yongtai Chemical in the SRA Section II, Question 2. *See* Pl.'s Br. 18–28. Defendant contends that Commerce reviewed both Shandong Yongtai Group and Shandong Yongtai Chemical, and Commerce determined that Shandong Yongtai Chemical was not entitled to separate rate status based on Plaintiff's responses to SRA Section II Question 2a and Question 2b. *See* Def.'s Br. 12–15. Defendant further argues that Plaintiff's SRA lacked sufficient information that showed the separate rate eligibility of Shandong Yongtai Chemical or that Shandong Yongtai Group was the successor-in-interest of Shandong Yongtai Chemical, which would extend the separate rate eligibility to Shandong Yongtai Chemical's entries. *Id.* at 16–17.

B. Discussion

Defendant's arguments fail. The court examines the record as a whole, taking into account both the evidence that justifies and detracts from an agency's opinion. *See A.L. Patterson, Inc. v. United States*, 585 F. App'x 778, 782 (Fed. Cir. 2014). Commerce relies on an isolated reading of Plaintiff's responses to Questions 2a and 2b. Such a reading ignores the immediately preceding context to the questions, in which Plaintiff identified that Shandong Yongtai Group was the same entity as Shandong Yongtai Chemical. In the letter accompanying Plaintiff's SRA, Plaintiff stated that the SRA was submitted "[o]n behalf of Shandong Yongtai Group Co., Ltd. ('Shandong Yongtai', formerly known as 'Shandong Yongtai Chemical Co., Ltd.')." Shandong Yongtai SRA 44. Plaintiff also identified that Shandong Yongtai Group was the same entity in response to SRA Section II, Question 1. *Id.* at 53. Although this information was not reported in the Question 2a table, Plaintiff's answer provides the same information that Commerce seeks to elicit through Question 2a, including whether the other name was covered by the business license, the capacity in which the trade name or doing-business-as ("DBA") name was used, whether the name was used in the period of review, and an identification of what evidentiary support was provided.

Commerce's finding that "[Shandong] Yongtai Group did not submit any documentation in its application showing its former name was [Shandong] Yongtai Chemical or regarding the purported namechange" is unreasonable and not supported by substantial evidence. *See* IDM at 25. As part of the SRA, Plaintiff provided business licenses, its AOA, and amendments to its AOA. *See* Shandong Yongtai SRA Exs. 3–7. Plaintiff's SRA exhibits demonstrate that the business license issued to Shandong Yongtai Group shared the same registration number as Shandong Yongtai Chemical's business license. *See id.* Plaintiff's SRA exhibits show the transition in the entity's name from Shandong Yongtai Chemical Group to Shandong Yongtai Chemical, and to Shandong Yongtai Group Co., Ltd. *See id.* On this record, Commerce's position that "[w]hile the [Shandong] Yongtai Group's separate rate application had sufficient information to grant the [Shandong] Yongtai Group a separate rate, it provided no details with respect to [Shandong] Yongtai Chemical," is not supported by substantial evidence.

The court concludes that Commerce's conclusion not to grant separate rate status as to Shandong Yongtai Chemical was not supported by substantial evidence. *See* IDM at 25. The court remands to Commerce for further consideration of separate rate status as to Shandong Yongtai Chemical, either independently, or as to whether Shandong Yongtai Group is the successor-in-interest to Shandong Yongtai Chemical.

C. Notice of Deficiencies in Shandong Yongtai's SRA

Shandong Yongtai argues that Commerce violated 19 U.S.C. § 1677m because Commerce did not provide Shandong Yongtai with notice of any deficiencies in its SRA and Commerce was required to use the SRA submitted by Shandong Yongtai to confer separate rate status. Shandong Yongtai's Mot. 16, 28–32; *see also* 19 U.S.C. § 1677m(d)–(e). Defendant counters that the provisions of 19 U.S.C. § 1677m(d) do not apply in this case. Def.'s Resp. 19–22. Under 19 U.S.C. § 1677m(d), if Commerce determines that a submission is deficient, then Commerce must "promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of . . . reviews." 19 U.S.C. § 1677m(d). Pursuant to 19 U.S.C. § 1677m(e), Commerce may not decline to consider information submitted by an interested party which is necessary to a determination but does not meet all of the requirements established by

Commerce under certain circumstances. *See* 19 U.S.C. § 1677m(e). Because the court remands for reconsideration of Commerce's denial of Shandong Yongtai's SRA, the court does not reach this issue.

D. Agency Practice as to Prior Name and Name Variation of Entities Granted Separate Rate Status

Shandong Yongtai argues that Commerce contradicted its agency practice that recognizes separate rates for entities using prior names and minor variations of names of entities granted separate rates. Shandong Yongtai's Mot. 16, 32–35; *see also SDC Int'l Austl. Pty. Ltd. v. United States*, 41 CIT __, 234 F. Supp. 3d 1320, 1321 (2017). Defendant counters that the example cited by Shandong Yongtai involved minor changes in punctuation and capitalization, and did not involve changes involving different words. Def.'s Resp. 24–25. Because the court remands for reconsideration of Commerce's denial of Shandong Yongtai's SRA, the court does not reach this issue.

III. Irrecoverable VAT Adjustment

A. Legal Framework

Commerce must reduce the export price and constructed export price of subject merchandise by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(2)(B). Pursuant to this provision, Commerce reduces the export price in nonmarket economy dumping margin calculations by "the amount of export taxes and similar charges, including [VATs] not rebated upon export." Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings, 77 Fed. Reg. 36,481 (Dep't Commerce June 19, 2012).

B. Background

In the present case, Commerce adjusted Sentury's U.S. price for irrecoverable VAT. *See* Final IDM at 12–17. Commerce identified irrecoverable VAT as the portion of the input VAT that was not fully refunded on exportation.[2] *See* Sentury C&D Questionnaire Resps. 41–45, PD 376 (July 21, 2017) ("Sentury's Section C&D Resp."). Com-

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[2] Defendant further explains in its response that:

> VAT is an indirect, ad valorem, consumption tax imposed on the purchase or sale of goods. It is levied on the purchase or sale price of the good, i.e., it is paid by the buyer and collected by the seller for remittance to the government. Thus, a party (1) pays VAT on its purchases of inputs and raw materials (i.e., input VAT) as well as (2) collects VAT on its sales of their output products (i.e., output VAT). Firms calculate input VAT and output VAT for tax purposes on a company-wide (not transaction-specific) basis, and in the case of output VAT, on the basis of all sales to all markets, foreign and domestic. Firms claim a credit for input VAT paid against the output VAT collected, and remit any

merce's irrecoverable VAT calculation methodology included two steps: "(1) determining the irrecoverable VAT on subject merchandise, and (2) reducing the U.S. price by the amount determined in step one." Final IDM at 16. Commerce determined that irrecoverable VAT was "(1) the [Free On Board] FOB value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods." Final IDM at 16. Commerce noted that "[t]he first variable, export value, is unique to each respondent while the rates in [variable] (2) and [variable] (3), as well as the formula for determining irrecoverable VAT, are each explicitly set forth in Chinese law and regulations." *Id.*

Commerce explained that the Chinese VAT schedule indicates that the "standard" VAT rate was seventeen percent, and the VAT rebate for the subject merchandise was nine percent. *See* IDM at 16 (citing Sentury's Section C&D Resp. at 42, Sentury's Section C&D Resp. Exs. C-8B and C-8C); *see also* Def.'s Resp. 77–78. In the *Final Results*, Commerce "removed from the U.S. price the amount calculated based on the difference between these rates (i.e., eight percent) applied to the export sales value." Final IDM at 16; *see also* Def.'s Resp. 77–78.

Sentury avers that "the only VAT Sentury pays with respect to export sales is the VAT paid for domestic purchases of inputs used to produce tires." Sentury Br. 10–12.

C. Discussion

Sentury argues that Commerce's deduction for VAT was not authorized by the plain language of the statute, that even if the statute permitted the VAT deduction, the record contradicts Commerce's interpretation of China's Circular on Value-Added Tax and Consumption Tax Policies on Exported Goods and Services ("Circular 39"), and that Commerce's methodology for VAT deduction was unreasonable and contrary to record evidence. Sentury Br. 5–29; *see also* Circular 39, Ex. C–8B, bar code 3596327–02 (Jul. 21, 2017) ("Ex. C–8B").

Defendant responds by further attempting to explain Commerce's methodology for the VAT deduction at issue in this case. In the alternative, Defendant requests remand to provide further explanation of Commerce's methodology for calculating irrecoverable VAT under 19 U.S.C. § 1677a(c)(2)(B). Def.'s Resp. 83.

In support of Commerce's methodology, Defendant contends that

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remaining output VAT to the government. However, under Chinese law producers in China, in most cases, do not recover (i.e., they are not refunded) the total input VAT they paid. Chinese tax law requires a reduction in or offset to the input VAT that can be credited against output VAT; the amount of tax that may not be exempted or offset is the irrevocable VAT.

Def.'s Resp. 81.

under Chinese law, the irrecoverable VAT, *i.e.*, in Commerce's terms, the difference between input and output VAT, "is defined in terms of, and applies to, total (company-wide) input VAT across purchases of all inputs, whether used in the production of goods for export or domestic consumption" and that "[t]he reduction/offset does not distinguish the VAT treatment of export sales from the VAT treatment of domestic sales from an input VAT recovery standpoint, for the simple reason that such treatment under Chinese law applies to the company as a whole, not specific markets or sales." Def.'s Resp. 83. Defendant contends that because irrecoverable VAT in China is calculated on the basis of the FOB value of exported goods, irrecoverable VAT "can be thought of as a tax on the company . . . that the company would not incur but for the export sales it makes, a tax fully allocable to export sales because the firm under Chinese law must book it as a cost of exported goods." Def.'s Resp. 83; *see also* Circular 39. In this case, Commerce presents the calculation as: "Reduction/Offset = P (P – c) x (T1 – T2)," where "P = (VAT-free) FOB value of export sales; c = value of bonded (duty- and VAT-free) imports of inputs used in the production of goods for export; T1 = VAT rate; and T2 = refund rate specific to the export good," from which a firm must calculate creditable input VAT by applying the formula "Creditable input VAT = Total input VAT – Reduction/Offset." Def.'s Resp. 82.

Commerce's *Final Results* do not provide a convincing explanation of how VAT, whether or not recoverable upon export, is properly the subject of a downward adjustment to U.S. price under 19 U.S.C. § 1677a(c)(2)(B). The court remands to Commerce for additional explanation of Commerce's methodology for calculating irrecoverable VAT under 19 U.S.C. § 1677a(c)(2)(B).

Commerce further asserts that "[t]he record evidence demonstrates that Sentury was not refunded 8 percent of the value of exports of subject merchandise." Def.'s Resp. 76–77 (citing P.R. 376 at 42, Exhibits C–8B & C–8C; P.R. 377 at Exhibit C–8C, C–9). Commerce's statement fails to explain how the cited exhibits show that Sentury was not refunded eight percent of the value of the exports of subject merchandise. On remand, Commerce should provide a detailed explanation of how Commerce applied the record to reach its conclusion that Sentury was not refunded eight percent of the value of the exports of subject merchandise. *See* Def.'s Resp. 77, 82; *see also* Qingdao Sentury Tire Co., Ltd. Sections C&D Questionnaire Responses (July 21, 2017) Exhibits C–8C, C–9, C–10, P.R. 375 –78; C.R. 390–409, May 3, 2019, ECF No. 47.

The court concludes that Commerce's *Final Results* as to VAT are not supported by substantial evidence and are not in accordance with the law. The court remands for further explanation consistent with this opinion.

IV. Adjustment for Export Buyer's Credit Program

A. Background

In the counterpart countervailing duty ("CVD") review, Commerce found that the EBCP constituted a financial contribution and met the specificity requirements of the statute, but Commerce did not make an explicit statement that the EBCP was an export subsidy contingent upon export performance. Def.'s Resp. 63–64; *see* Issues and Decision Memorandum for Certain Passenger Vehicle and Light Truck Tires at 23, C-570–017 (Aug. 31, 2017), *available at* https://enforcement.trade.gov/frn/summary/prc/2017–18997–1.pdf (last visited November 27, 2019) ("CVD AR Preliminary Results").

In the *Final Results*, Commerce granted Sentury certain double-remedies adjustments pursuant to 19 U.S.C. § 1677f–1(f)(1)(A)–(C), but made no adjustment for the CVD rates applied to the EBCP in the companion CVD administrative review. U.S. Department of Commerce Memorandum to File, Re: Export Subsidy and Double-Remedy Adjustments, accompanying Final Results, 1–3, PD 506 (Mar. 9, 2018). Commerce contended that it found the EBCP to be countervailable on the basis of adverse facts available ("AFA") and that Commerce applied CVD rates based on AFA. *Id.* at 2. Commerce concluded that without a determination that the EBCP provided an export subsidy in the companion CVD administrative review, Commerce was not required to adjust Sentury's U.S. prices for the EBCP in the present AD administrative review. *Id.* at 2–3.

B. Legal Framework

A subsidy is countervailable when an authority provides a financial contribution to a person, a benefit is conferred, and the subsidy is specific, as described in 19 U.S.C. § 1677(5A). 19 U.S.C. § 1677(5)(A)–(B). A subsidy is specific if it is an export subsidy, an import substitution subsidy, or a domestic subsidy under 19 U.S.C. § 1677(5A)(A)–(D). Under 19 U.S.C. § 1677(5A)(B), an export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as one of two or more conditions. 19 U.S.C. § 1677(5A)(B). Pursuant to 19 U.S.C. § 1677a, Commerce is required to increase the price used to establish export price and constructed export price by "the amount of any countervailing duty imposed on the subject merchandise. . . to offset an export subsidy." 19 U.S.C. § 1677a(c)(1)(C).

C. Discussion

Sentury claims that Commerce's decision to not adjust Sentury's U.S. price for the EBCP addressed in the companion CVD review was unreasonable and contrary to law. Sentury's Mot. 2–3, 30; 19 U.S.C. § 1677a(c)(1)(C). First, Sentury argues that 19 U.S.C. § 1677a(c)(1)(C) does not permit Commerce to decline to make an adjustment under the rationale that a CVD rate was based on AFA. *Id.* at 31–32; *see* 19 U.S.C. § 1677a(c)(1)(C). Second, Sentury argues that Commerce improperly determined the EBCP did not qualify for a double-remedy offset because Commerce found the EBCP was an export subsidy in the underlying PVLT investigation. Sentury's Mot. 36–37. Sentury also contends there are no unique facts or situations present in this administrative review that justify deviation from Commerce's past practices. *Id.* at 38.

Defendant argues that although Commerce applied AFA in the CVD review and Commerce determined that the EBCP was specific and constituted a financial contribution, Commerce did not make a finding that the EBCP was an export subsidy within the meaning of 19 U.S.C. § 1677(5A)(B). Def.'s Resp. 63. Defendant contends that "when Commerce has not found that a program is an export subsidy within the meaning of 19 U.S.C. § 1677(5A)(B), but has instead, based on the facts otherwise available with an adverse inference found that the program is specific within the meaning of 19 U.S.C. § 1677(5A), Commerce does not have a basis on which to make an export subsidy adjustment pursuant to 19 U.S.C. § 1677a(c)(1)(C)." Def.'s Resp. 67. Defendant argues that Commerce's practices regarding double-remedy offsets changed following the original investigation, and Commerce does not make an adjustment to U.S. price when a subsidy is specific, but not export contingent. Def.'s Resp. 65.

Defendant's arguments are unavailing. Commerce determined that the EBCP met the specificity requirements of the statute. *See* Def.'s Resp. 63–64; CVD AR Preliminary Results 23. Although Commerce made no explicit findings as to export contingency, Commerce stated that "[t]hrough this program, the [Chinese] Ex[port]-Im[port] Bank provides loans at preferential rates for the purchase of exported goods from [China]." CVD AR Preliminary IDM 32. Commerce's conclusion that the EBCP is specific includes a finding that the program is contingent on export performance in this case, even though Commerce did not explicitly state its reasoning. *See Changzhou Trina Solar Energy Co., Ltd. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1329, 1340 (2019). After having made a finding of specificity in the counterpart CVD administrative review, which necessarily includes an export subsidy finding, Defendant may not now say that such a finding is lacking simply because Commerce failed to make the finding explicit. Commerce's determination not to make an adjustment for the ECBP is not supported by substantial evidence and is not in accordance with law. The court remands the *Final Results* to Commerce for reconsideration of an adjustment for the ECBP in the counterpart CVD review.

V. *Commerce's Determination Not to Grant Separate Rate Status to Pirelli*

A. Background

Pirelli Tyre was established as a Sino-foreign joint venture between the Dutch subsidiary of Pirelli & C. S.p.A. and Hixih Group in 2005. Pirelli's Mot. 33; Pirelli Tyre's Separate Rate Application 16, PD 192–193 (Nov. 17, 2016) ("Pirelli SRA"); Pirelli SRA Attach. A. Pirelli & C. S.p.A. was the Italian holding company of the Pirelli Group. Pirelli's Mot. 32; Pirelli SRA 16–17. Chem China acquired Pirelli S.p.A. in October 2015. Pirelli's Mot. 38; Pirelli SRA, Attach. G(3). Chem China is a government-owned company. *See* Pirelli's Mot. 1, 3, 29. Pirelli & C. S.p.A. was delisted from the Milan stock exchange in November 2015. *Id.* at 50; Pirelli SRA 2.

Pirelli applied for a separate rate in the administrative review. Pirelli's Mot. 1; Pirelli SRA 1–2. In the *Preliminary Results*, Commerce determined that Pirelli did not qualify for separate rate status because "there was *de facto* Chinese government control over the company through Chem China's ownership of Pirelli S.p.A." Final IDM at 28; Preliminary IDM 16; U.S. Dep't of Commerce Mem. re: Preliminary Denial of Separate Rate Status at 2, PD 427 (Aug. 31, 2017). In the *Final Results*, Commerce noted that "[i]n proceedings involving NME countries, Commerce maintains a rebuttable presumption that all companies within the country are subject to government control and, therefore, should be assessed a single weighted-average dumping margin" and that "Commerce will only grant separate rate status to entities that can demonstrate the absence of both *de jure* and *de facto* government control over its export activities." Final IDM at 27–28. Commerce concluded that Pirelli was not eligible for separate rate status in the *Final Results* because Pirelli did not demonstrate the absence of both *de jure* and *de facto* government control over its export activities. Final IDM at 26–28.

B. Legal Framework

Commerce has the authority to determine if a country is a nonmarket economy pursuant to 19 U.S.C. § 1677(18). *See* 19 U.S.C. § 1677(18); *see also Sigma Corp. v. United States*, 117 F.3d 1401, 1404–06 (Fed. Cir. 1997). In proceedings involving a nonmarket economy, such as China, there is a rebuttable presumption that all companies within the country are subject to government control and should be assigned a single, country-wide antidumping duty rate. *See Sigma Corp*, 117 F.3d at 1405. An exporter will receive the country-wide rate by default unless it affirmatively demonstrates that it enjoys both *de jure* and *de facto* independence from the government and receives a separate rate status. *See id.* The burden of rebutting the presumption of government control rests with the exporter. *See id.* at 1405–06. The *de jure* criteria are: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT __, __, 925 F. Supp. 2d 1315, 1320 n. 21 (2013); *see also Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) (final determination of sales at less than fair value). The *de facto* criteria are: (1) whether the export prices are set by or are subject to the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Ad Hoc Shrimp Action Trade Comm.* , 925 F. Supp. 2d at 1320 n.21; *see also Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585–01, 22,587 (Dep't Commerce May 2, 1994) (notice of final determination of sales at less than fair value).

C. Discussion

Pirelli argues that Commerce did not apply the appropriate legal criteria for determining when a Chinese exporter has demonstrated an absence of *de facto* control to justify separate rate status. Pirelli's Mot. 2–3. Pirelli contends that Commerce incorrectly denied Pirelli a separate rate status because Commerce improperly applied the legal criteria for separate rate eligibility by considering only the extent of government ownership. Pirelli's Mot. 27. Pirelli also argues that Commerce's determination of PRC government control was not supported by substantial evidence. Pirelli's Mot. 27. Defendant argues that Pirelli's acquisition by Chem China created a presumption against entitlement to a separate rate, and that Pirelli was under *de facto* control of the Chinese government. Def.'s Resp. 58.[3]

Defendant's argument is not persuasive. Defendant fails to adequately explain how the acquisition of Pirelli S.p.A. by Chem China *in Italy* altered the ownership of Pirelli entities *in China* such that the rebuttable presumption of government ownership applies or that if the presumption applies, that evidence on the record was not sufficient to rebut the presumption. *See Sigma Corp*, 117 F.3d at 1405–06 (addressing the rebuttable presumption as to companies *within the country* being subject to government control). Defendant's position is not aided by Commerce's limited review of Pirelli as to the extent of government ownership without a more fulsome discussion of the criteria for *de jure* and *de facto* governmental control as those criteria apply in this case. *See* Final IDM at 26–28. Absent that analysis here, the court cannot conclude that Commerce's inference of *de facto* government control over Pirelli's China-based entities by means of Chem China's ownership of Pirelli S.p.A is either supported by substantial evidence or in accordance with the law.

D. Denial of Separate Rate Status as to Pirelli for a Bifurcated Period

Pirelli contends that Commerce's decision not to grant Pirelli separate rate status for the period of time before Chem China's acquisition was not supported by substantial evidence and was not in accordance with law. Pirelli's Mot. 48–52. Pirelli argues that the record contained sufficient evidence to demonstrate Pirelli's status as a publicly listed company without Chinese ownership prior to Chem China's acquisition. Pirelli's Mot. 50. Defendant argues that Commerce denied Pirelli separate rate status for the segment of the period of review before Chem China's acquisition because Pirelli did not provide complete ownership information for that segment of time. Def.'s Resp. 49–51.

In the *Final Results*, Commerce asserted that Pirelli did not provide complete ownership information for the period before China acquired Pirelli S.p.A, but did provide complete ownership information for the period after Chem China acquired Pirelli S.p.A. *See* Final IDM at 28; Def.'s Resp. 25. Commerce assessed that Pirelli did not provide complete ownership information as to Pirelli's intermediate and ultimate owners from January through October 2015. Final IDM at 28. Commerce concluded that Pirelli's claim, that Pirelli's ownership struc-

[3] Defendant also argues that Pirelli's claim should be waived for failure to exhaust administrative remedies. Def.'s Resp. 30. Pirelli asserts, *inter alia*, that it presented these arguments in its separate rate application and in its case brief, that the *Final Results* indicate that Commerce was on notice of Pirelli's argument. *See* Pirelli Reply 14–16. The court concludes that Pirelli's argument is not waived in this case. *See* 28 U.S.C. § 2637.

ture prior to October 2015 was the same as Pirelli's ownership structure during the underlying investigation, was not supported by the record in the administrative review. *Id.* Because the court remands for reconsideration of Pirelli's separate rate status, the court does not reach this issue.

E. Application of the China-Wide Entity Rate to Pirelli

Because Pirelli did not receive separate rate status, Commerce assigned Pirelli the China-wide entity rate. Pirelli argues, *inter alia*, that Commerce lacks statutory authority to establish a China-wide entity rate. Pirelli Br. 7–26. Defendant counters that Commerce may assign a China-wide entity rate to exporters that cannot demonstrate both *de jure* and *de facto* independence and that the U.S. Court of Appeals for the Federal Circuit has upheld the application of PRC-wide entity rates to respondents. Def.'s Resp. 26, 33 (citing *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1312 (Fed. Cir. 2017)). Because the court remands for reconsideration of separate rate status as to Pirelli, the court does not reach the issue of Commerce's assignment of the PRC-wide rate to Pirelli.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. Commerce's notice and initiation of the administrative review as to Plaintiff was in accordance with the law;

2. Commerce's determination not to grant a separate rate as to Shandong Yongtai Chemical was not supported by substantial evidence;

3. Commerce's calculation of a VAT deduction to Sentury's U.S. price was not supported by substantial evidence and not in accordance with the law;

4. Commerce's decision not to make an adjustment for the EBCP in the companion countervailing duty administrative review was not supported by substantial evidence and not in accordance with the law; and

5. Commerce's decision to deny Pirelli separate rate status was not supported by substantial evidence and not in accordance with the law.

Upon consideration of all papers and proceedings in this action, it is hereby

ORDERED that Commerce shall file its remand determination on or before January 27, 2020; and it is further

ORDERED that Commerce shall file the administrative record on or before February 10, 2020; and it is further

ORDERED that Parties' comments in opposition to the remand determination shall be filed on or before February 26, 2020; and it is further

ORDERED that Parties' comments in support of the remand determination shall be filed on or before March 27, 2020; and it is further

ORDERED that the Joint Appendix shall be filed on or before April 10, 2020.

Dated: November 27, 2019
New York, New York

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