Slip Op. 20–112

DANZE, INC., Plaintiff, v. UNITED STATES, Defendant,

Before: Mark A. Barnett, Judge
Court No. 15–00033 and the cases identified in the Annex attached hereto

[Plaintiff's motions for test case designation and suspension are denied. The court adopts Plaintiff's proposal for consolidating certain cases and staying certain cases.]

Dated: August, 2020

John M. Peterson and *Patrick B. Klein*, Neville Peterson LLP, of New York, NY, for Plaintiff Danze, Inc.

Edward F. Kenny, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of counsel was *Sheryl A. French*, Attorney, U.S. Customs and Border Protection.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court on Plaintiff Danze, Inc.'s ("Danze") two motions to designate this case as a test case and suspend 13 cases thereunder. *See* Pl.'s Mot. to Designate a Test Case and to Suspend Actions Thereunder ("Danze's First Mot."), ECF No. 13; Pl.'s Unopposed Mot. to Designate a Test Case and to Suspend Actions Thereunder ("Danze's Second Mot."), ECF No. 33.

On July 8, 2020, the court held a telephonic conference with the Parties and denied Danze's First and Second Motions and indicated its intention to consolidate as many as all 14 of the pending cases. Order (July 8, 2020), ECF No. 36. The court requested the Parties to inform the court whether any cases should not be consolidated and the reasons therefore. *Id*. On July 17, 2020, Danze filed a consent proposal requesting that the court combine the 14 cases into three consolidated cases. *See* Pl.'s Status Report Pursuant to Court Order and Pl.'s Consent Mot. for Consol. of Cases ("Danze's Status Report") at 1, ECF No. 38. The court now explains its reasons for denying the motions for test case designation and consolidates the 14 cases into three in accordance with the Parties' proposal.

BACKGROUND

In February 2016, the court suspended this case and several others under the test case *Danze, Inc. v. United States*, Court No. 13–00381 ("Court No. 13–00381"). *See* Order (Feb. 19, 2016), ECF No. 10. At issue in that case was the tariff classification of imported toilets. When installed with the included toilet seat, the height of Danze's toilets "from the finished floor to the top of the toilet seat was at least 17 inches." *Danze, Inc. v. United States*, 42 CIT ___, ___, 319 F. Supp. 3d 1312, 1317 (2018). This, along with other factors, including the height of the flushing handle and the amount of force required to flush the toilet, allowed the toilet to be advertised as compliant with the Americans with Disabilities Act. *Id.* at 1318.

In Court No. 13–00381, the Government maintained that U.S. Customs and Border Protection "correctly classified the merchandise under subheading 6010.10.00, HTSUS." *Id.* at 1315. While Danze did not dispute that primary classification, Danze contended that its toilets were secondarily eligible for classification under subheading 9817.00.96 of the Harmonized Tariff Schedule of the United States ("HTSUS") and duty-free entry "because the products were specially designed to meet the requirements of the Americans with Disabilities Act of 1990." *See id*.

Upon consideration of the Parties' cross-motions for summary judgment, the court denied Danze's motion and granted Defendant United States' ("the Government") motion. *Id.* at 1327. The court found that the subject merchandise was not "specially designed for the use or benefit of handicapped persons" and did not qualify for duty-free treatment pursuant to HTSUS subheading 9817.00.96. *Id.* at 1324. While Danze initially appealed the court's ruling, the Parties voluntarily dismissed the appeal. *See* Court. No. 13–00381, Order of Dismissal from the U.S. Court of Appeals for the Federal Circuit (Oct. 16, 2018), ECF No. 50.

On October 30, 2019, Danze moved pursuant to U.S. Court of International Trade ("USCIT") Rule 83 to designate this action as a test case and to suspend 13 cases thereunder.[1] *See* Danze's First Mot. The Government objected to the motion, arguing that Danze was seeking to relitigate the previous test case and had not identified a new common legal issue in the cases proposed for suspension. *See* Def.'s Opp'n to Pl.'s Mot. to Designate a Test Case and Suspend Actions Thereunder, ECF No. 14. The court held a status conference

[1] Danze's First and Second Motions cite USCIT Rule 84. Danze's First Mot. at 1; Danze's Second Mot. at 1. USCIT Rule 84 was incorporated into USCIT Rule 83(e)–(l) on October 23, 2017. USCIT Rule 84.

with the Parties on December 4, 2019, and deferred ruling on Danze's motion pending Danze filing a renewed motion for test case designation that addressed issues discussed at the status conference. *See* Docket Entry (Dec. 4, 2019), ECF No. 16.

On June 5, 2020, Danze filed its second motion for test case designation and suspension. *See* Danze's Second Mot. Therein, Danze claimed that the U.S. Court of Appeals for the Federal Circuit recently "adopted a new standard for interpreting [HTSUS] subheading 9817.00.96 in [*Sigvaris, Inc. v. United States*, 899 F.3d 1308 (Fed. Cir. 2018)]." *Id.* at 3. Danze contended that the first test case did not focus on the design of the toilets because *Sigvaris* had not been decided; thus, there were new grounds to litigate factual and legal issues not previously decided. *Id.* at 3–4. The Government did not oppose Danze's Second Motion but maintained "that this proposed test case is merely a [re]litigation, albeit with different entries, of the prior test case." *Id.* at 4.

As noted above, the court denied the motions for test case designation and ordered the parties to indicate whether any of the 14 cases should not be consolidated into a single action. On July 17, 2020, Danze proposed consolidating seven cases (Court Nos. 15–00033, 13–00379, 13–00382, 13–00383, 14–00177, 14–00324, and 1500211) filed by Danze and its affiliated company Gerber Plumbing Fixtures, LLC ("Gerber"). Danze's Status Report at 1. Danze also proposed that the six cases filed by AS America, Inc. ("AS America") (Court Nos. 14–00164, 14–00231, 15–00223, 15–00280, 16–00111, 19–00023), be consolidated in a separate case and that the consolidated AS America case and the single Western Pottery Group Inc. ("Western Pottery") case (Court No. 15–00274) be stayed pending resolution of the consolidated Danze/Gerber case. *Id*.[2] Danze also represents that all plaintiffs "intend to abandon any claims relating to sinks in the involved cases." *Id.* at 4.

JURISDICTION

The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a).

[2] Danze's proposed order requests that the AS America cases be consolidated under the Danze case. *See* Danze's Status Report, Proposed Order (proposing that the AS America court numbers be consolidated under the lead case 15–00033 (i.e., Danze)). However, in its status report Danze clearly requests that the Gerber cases be consolidated under the Danze case, *id.* at 1–2, 5, and that the AS America cases be consolidated in a separate action, *id.* at 1, 3, 5. Thus, the court construes the proposed consolidations and suspensions in Danze's proposed order as an inadvertent error to the extent it is inconsistent with Danze's Status Report.

DISCUSSION

I. Legal Framework

Both test case designation and consolidation "serve to achieve economies of time, effort and expense, and to promote uniformity of decisions" by resolving "a common question of law or fact" shared by multiple cases. *Generra Sportswear, Inc. v. United States*, 16 CIT 313, 314 (1992). In consolidation, various actions are merged into a single action, and "the final decision in [that] action has binding legal effect on all of the merged actions." *Id.* ; *see also* USCIT Rule 42(a). In a test case, "the suspended actions maintain their separate identities" such that the disposition of the test case "is not necessarily legally binding on the suspended actions." *Generra*, 16 CIT at 314; *see also* USCIT Rule 83(e).

Consolidation is preferable to test case designation when the cases at issue share "a single discreet factual issue" with little variation between the entries involved. *Junior Gallery, Ltd. v. United States*, 16 CIT 687, 689 (1992). However, consolidation is "not appropriate when the actions are so numerous that consolidation will complicate discovery, [or] make trial preparation overly burdensome." *Peg Bandage, Inc. v. United States,* 16 CIT 319, 321 (1992) (citation omitted). Thus, the test case procedure "is preferable when consolidation poses a potential for an unwieldly and chaotic proceeding." *A.T. Clayton & Co. v. United States*, 16 CIT 456, 458 (1992) (citation omitted).

Nevertheless, the purpose of a test case is not "to create a reservoir of future litigation"; but "to encourage disposition in accordance with [the] test case[]." *Intercontinental Fibres Inc. v. United States,* 2 CIT 133, 135 (1981). Consequently, when identical or nearly identical issues have been fully litigated in a test case, but the parties have not used the disposition of that test case to facilitate a final disposition of the suspended actions, it is incumbent upon the court to consider carefully whether repetition of the test case procedure will lead to the just, speedy, and inexpensive resolution of the actions.[3] *Cf. Junior Gallery*, 16 CIT at 690 (expressing "reluctan[ce] to suspend th[e] cases once again," when the disposition of the first test case should have caused those cases to settle).

[3] When considering whether test case designation or consolidation is most appropriate, the court is mindful that, in customs law, prior related litigation is generally not afforded preclusive effect. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 233–37 (1927) (holding that, in customs law, a decision in one case does not serve as *res judicata* in respect of subsequent importations involving the same issue of fact and question of law). Thus, neither the court's denial of the test case motions nor the consolidation of the cases as set forth in this Opinion implicates *res judicata* with respect to issues litigated in Court No. 13–00381.

II. Test Case Designation and Suspension

Here, judicial economy would not be served by granting Danze's motions for test case designation and suspension. This case and eight of the cases for which Danze requests suspension were previously suspended under the first test case. Following the resolution of that case, Danze did not use that judicial determination to facilitate the disposition of the cases suspended thereunder.

Instead, Danze seeks to continue litigating these cases based on its legal theory that *Sigvaris* announced a standard that renders the original design of the subject merchandise relevant. If Danze is permitted to proceed with a test case, none of the cases suspended thereunder would be decided in the disposition of that test case and Danze could seek to litigate additional suspended cases on other theories. Upon consideration of Danze's motions, the court is not persuaded that test case designation and suspension is the most efficient method of reaching a final disposition of these cases. *See Junior Gallery*, 16 CIT at 690.

By consolidating some or all of the cases proposed for suspension, those cases would be conclusively decided upon the disposition of the consolidated action. These cases satisfy the consolidation requirement of a shared issue of law or fact: whether Danze's toilet bowls, which are 16½ to 17 inches high, are classifiable under HTSUS subheading 9817.00.96. *See* Danze's Second Mot. at 1–2. Thus, "consolidation will enable the court to meet its responsibility to manage [its] dockets to provide for the efficient and expeditious termination of controversies." *Peg Bandage*, 16 CIT at 320 (alteration in original) (citation omitted).

The court is unconvinced by Danze's suggestion that because "the instant actions involve a relatively large number of individual import entries[,] . . . consolidation would be likely to produce an action which is unwieldly." Danze's Second Mot. at 3. The circumstances of the instant action do not raise concerns of "unwieldy and chaotic" proceedings found in other cases. *See, e.g.*, *Peg Bandage*, 16 CIT at 321 (discussing circumstances under which consolidation has been disfavored and finding that such circumstances were not present when the "actions involve[d] identical parties, counsel, legal claims, and imported merchandise"). Indeed, the court in *Junior Gallery* stated that concerns of "unwieldly and chaotic" proceedings were not "well-founded" in that case, 16 CIT at 689, which consolidated 96 cases involving different types of merchandise and four plaintiffs, *id.* at 687, 691. By contrast, this case is much less complex: there are just 14 cases that all involve the same "subject bowls" and all plaintiffs are

represented by the same counsel. *See* Danze's Second Mot. at 1, Sched. A. Thus, Danze's concerns do not demonstrate that consolidation will result in chaotic or unwieldly proceedings.

III. Consolidation

In response to the court's order, Danze proposed a consolidated action involving seven Danze and Gerber cases. Danze also proposed that the six cases involving AS America be consolidated in a separate action, and that such action, and a single Western Pottery case, be stayed pending resolution of the consolidated Danze/Gerber case. *See* Danze's Status Report at 1.

Danze contends that because Danze and Gerber are part of the same corporate group and AS America and Western Pottery are separate plaintiffs, consolidation into three different cases is the most effective way to proceed. *See* Danze's Status Report at 2. Danze asserts that cross-party consolidation "would likely produce an unwieldy and chaotic case," necessitating efforts to shield confidential business information from disclosure across plaintiffs and to depose multiple company representatives pursuant to USCIT Rule 30(b)(6). *Id.* at 3. Danze also submits that it is likely that final adjudication of the Danze/Gerber case will lead to the quick resolution of the other two cases, either through the plaintiffs declining to litigate or through stipulated judgments. *Id.* at 4. While the court questions whether a single consolidated case would be "unwieldy and chaotic," the court accepts that such a case would be more challenging than the proposed three-way consolidation given the need for separate corporate witnesses and to maintain confidentiality among the plaintiffs, and the representations that resolution of the consolidated Danze/Gerber case should permit the parties to resolve the remaining cases. Therefore, the court accepts the consent proposal for consolidation into three cases.

CONCLUSION AND ORDER

In sum, judicial economy and the public interest in expeditious determination of these customs law disputes will best be served by consolidating these cases rather than by test case designation and suspension procedures. Thus, during the July 8, 2020 telephonic status conference, Danze's First Motion, ECF No. 13, and Danze's Second Motion, ECF No. 33, were **DENIED**. *See* Order (July 8, 2020), ECF No. 36. Furthermore, pursuant to the proposal of the parties in Danze's Status Report, it is hereby:

ORDERED that the cases identified in "Group A" of the Annex attached hereto are consolidated under this lead case, *Danze, Inc. v. United States*, Consolidated Court No. 15–00033; and it is further

ORDERED that the cases identified in "Group B" of the Annex attached hereto are consolidated under the lead case, *AS America, Inc. v. United States*, Consolidated Court No. 14–00164; and it is further

ORDERED that the case identified in "Group C" of the Annex attached hereto shall neither be consolidated nor suspended under either of these cases; and it is further

ORDERED that *AS America, Inc. v. United States*, Consolidated Case No. 1400164, and *Western Pottery Group Inc. v. United States*, Court No. 15–00274, shall be stayed pending the resolution of *Danze, Inc v. United States*, Consolidated Court No. 15–00033, and the Parties to those cases must file a Joint Status Reports in each case within 75 days of this court's resolution of *Danze, Inc. v. United States*, Consolidated Court No. 15–00033.

Dated: August 7, 2020
New York, New York

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

Annex

GROUP A: Consolidated: Danze, Inc. and Gerber Plumbing Fixtures LLC

Danze, Inc. v. United States, Court No. 15–00033;

Gerber Plumbing Fixtures LLC v. United States, Court No. 13–00379;

Gerber Plumbing Fixtures LLC v. United States, Court No. 13–00382;

Gerber Plumbing Fixtures LLC v. United States, Court No. 13–00383;

Gerber Plumbing Fixtures LLC v. United States, Court No. 14–00177;

Gerber Plumbing Fixtures LLC v. United States, Court No. 14–00324;

Gerber Plumbing Fixtures LLC v. United States, Court No. 15–00211.

GROUP B: Consolidated: AS, America Inc.

AS America, Inc. v. United States, Court No. 14–00164;

AS America, Inc. v. United States, Court No. 14–00231;

AS America, Inc. v. United States, Court No. 15–00223;

AS America, Inc. v. United States, Court No. 15–00280;

AS America, Inc. v. United States, Court No. 16–00111;

AS America, Inc. v. United States, Court No. 19–00023.

GROUP C: Western Pottery Group Inc.

Western Pottery Group Inc. v. United States, Court No. 15–00274.

Slip Op. 20–113

SGS SPORTS, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00128

[The court finds that U.S. Customs and Border Protection correctly classified the subject imports, and that Plaintiff's subject imports are not entitled to duty-free treatment. Accordingly, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.]

Dated: August 7, 2020

John M. Peterson and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., for Plaintiff SGS Sports, Inc. With them on the briefs was *Richard F. O'Neill*.

Monica P. Triana, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Aimee Lee*, Assistant Director. Of counsel on the briefs was *Sheryl French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION

Choe-Groves, Judge:

This action addresses whether swimwear and related accessories are reimported articles that were "exported under lease or similar use agreements" and are therefore entitled to duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Before the court are cross-motions for summary judgment. Pl.'s Mot. for Summ. J., ECF No. 26; Mem. Of Points and Authorities In Supp. Of Pl.'s Mot. for Summ. J. ("Pl.'s Mem."), ECF No. 26–2; Def.'s Cross-Mot. for Summ. J., ECF No. 30 at 2–3; Def.'s Mem. Of Law In Opp'n to Pl.'s Mot. for Summ. J. and in Supp. Of Its Cross-Mot. for Summ. J. ("Def.'s Mem."), ECF No. 30 at 4–36; Pl.'s Opp'n to Def.'s Cross-Mot. for Summ. J. and Reply in Supp. Of Its Mot. for Summ. J. ("Pl.'s Opp'n and Reply"), ECF No. 32; Def.'s Reply Mem. in Further Supp. Of Gov.'s Cross-Mot. for Summ. J. ("Def.'s Reply"), ECF Nos. 33, 34. SGS Sports, Inc. ("SGS" or "Plaintiff") brings this action to contest the denial of its administrative protest by U.S. Customs and Border Protection ("Customs").

The court examines in this opinion whether Plaintiff's subject merchandise meet the requirements for duty-free treatment under HTSUS subheading 9801.00.20, which states:

> 9801.00.20.00 Articles, previously imported, with respect to which the duty was paid upon such previous importation . . . , if (1) reimported, without having been advanced in value or im-

> proved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

HTSUS subheading 9801.00.20.

For the reasons discussed below, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.

BACKGROUND

A. Material Facts Not in Dispute

The party moving for summary judgment must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." United States Court of International Trade ("USCIT") Rule 56(a). The parties filed cross-motions for summary judgment and submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. *See* Pl.'s R. 56.3 Statement of Material Facts Not in Dispute, ECF No. 26–3 ("Pl.'s SMF"); Def.'s Resp. to Pl. SGS Sports, Inc.'s R. 56.3 Statement of Material Facts, ECF No. 30–3 ("Def.'s Resp. to Pl.'s SMF"); Def.'s Statement of Undisputed Material Facts, ECF No. 30–2 ("Def.'s SMF"); Pl.'s Resp. to Def.'s R. 56.3 Statement of Material Facts Not in Dispute, ECF No. 32–2 ("Pl.'s Resp. to Def.'s SMF"). Upon review of the parties' statements of material facts and supporting exhibits, the court finds the following undisputed material facts.

SGS was incorporated in 1988 and is a Canada-based importer of swimwear. Pl.'s SMF ¶ 1; Def.'s Resp. to Pl.'s SMF ¶ 1. 147483 Canada Inc. ("147483") is a company wholly-owned by Steven Gellis ("Gellis") and was incorporated in 1985. Pl.'s SMF ¶ 2; Def.'s Resp. to Pl.'s SMF ¶ 2. Gellis serves as President of both SGS and 147483. Pl.'s SMF ¶ 1–2; Def.'s Resp. to Pl.'s SMF ¶ 1–2. Gellis is the owner and sole officer of 147483. Def.'s SMF ¶ 3; Pl.'s Resp. to Def.'s SMF ¶ 3. Gellis is the sole officer of SGS. Def.'s SMF ¶8; Pl.'s Resp. to Def.'s SMF ¶ 8. Gellis possessed ultimate control of SGS as of 2013, and all officer-assigned decisions vest in Gellis. Pl.'s SMF ¶ 1; Def.'s SMF ¶¶ 8, 9, 104–15; Def.'s Resp. to Pl.'s SMF ¶ 1; Pl.'s Resp. to Def.'s SMF ¶¶ 8, 9, 104–15.

In 2005, SGS and 147483 executed a Warehousing Agreement setting forth specific responsibilities to be performed by 147483, including managing inventory. Pl.'s SMF ¶ 10; Def.'s SMF ¶ 42; Def.'s Resp. to Pl.'s SMF ¶ 10; Pl.'s Resp. to Def.'s SMF ¶ 42. Gellis signed the

Warehousing Agreement on behalf of both SGS and 147483. Def.'s SMF ¶¶ 42, 47; Pl.'s Resp. to Def.'s SMF ¶¶ 42, 47. SGS and 147483 are co-located in the same building. Pl.'s SMF ¶¶ 9–10; Def.'s Resp. to Pl.'s SMF ¶¶9–10. Before 2005, SGS imported merchandise directly from foreign manufacturers to SGS' premises in Canada. Def.'s SMF ¶ 30; Pl.'s Resp. to Def.'s SMF ¶ 30. SGS shifted its business model to import foreign-supplied merchandise to the United States, which were exported immediately, unaltered, to SGS' warehouse in Canada. Def.'s SMF ¶ 37; Pl.'s Resp. to Def.'s SMF ¶ 37. The Duty Relief Ledger contains an internal shipment number, a corresponding U.S. entry number, the B3 consumption entry number, and the quantity of each item (by style and color). Def.'s SMF ¶ 88; Pl.'s Resp. to Def.'s SMF ¶ 88.

B. Procedural History

SGS entered the subject merchandise pursuant to HTSUS subheading 9801.00.20. Pl.'s SMF ¶ 7; Def.'s Resp. to Pl.'s SMF ¶ 7. Customs liquidated the entries, reclassified the merchandise, and denied Plaintiff's claim for duty-free treatment under HTSUS subheading 9801.00.20. Pl.'s SMF ¶ 8; Def.'s Resp. to Pl.'s SMF ¶ 8. Thereafter, SGS filed a timely protest challenging Customs' classification determination. Pl.'s SMF ¶ 8; Def.'s Resp. to Pl.'s SMF ¶8. When denying SGS' protest, Customs stated that the subject merchandise had not been properly exported under a lease or similar use agreement as required under the duty-free HTSUS subheading 9801.00.20. *See* HQ H276403 (Dec. 12, 2017). SGS filed suit challenging the denial of its protest.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

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). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, U.S. 242, 248–49 (1986); *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006).

A two-step process guides the court in determining the correct classification of merchandise. First, the court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing

Sigma-Tau HealthScience, Inc. v. United States, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the court determines whether the subject merchandise fall within the parameters of the tariff provision. *See id.* The former is a question of law and the latter is a question of fact. *See id.* "[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis 'collapses entirely into a question of law.'" *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The court reviews classification cases *de novo*. *See* 28 U.S.C. § 2640(a)(1). The court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citation omitted). Thus, the court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

ANALYSIS

I. Legal Framework

In construing the terms of the HTSUS headings, "[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999). The court may also consult the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes"), which "are not legally binding or dispositive," *Kahrs Int'l., Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013), but "provide a commentary on the scope of each heading of the Harmonized System" and are "generally indicative of proper interpretation of the various provisions." H.R. Rep. No. 100–576, 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

II. Analysis of The Terms of HTSUS Subheading 9801.00.20

The court first ascertains the proper meaning and scope of HTSUS subheading 9801.00.20. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). HTSUS subheading 9801.00.20

covers reimported merchandise: (1) upon which duty was paid at the time of previous importation; (2) that has not been advanced in value or improved in condition by any process of manufacture or other means while abroad; (3) that was exported under a lease or similar use agreement; and (4) that is reimported by or for the account of the person who imported the merchandise into, and exported it from, the United States. HTSUS subheading 9801.00.20; *Skaraborg Invest USA, Inc. v. United States*, 22 CIT 413, 417 (1998).

Generally, an importer must pay a duty on previously imported merchandise that were exported and then re-imported into the United States. 19 C.F.R. § 141.2. HTSUS subheading 9801.00.20 provides an exception to this general rule by allowing duty-free treatment if articles were originally imported into the United States and duties were paid, the articles were exported outside the United States, and then reimported back into the United States while meeting certain conditions related to a lease or similar use agreement. The purpose of this provision is to prevent subheading 9801.00.20. Customs shall determine whether to allow for duty-free treatment under HTSUS subheading 9801.00.20, as set forth in the relevant implementing regulation as follows:

> **Entry of reimported articles exported under lease.**
> Free entry shall be accorded under subheading 9801.00.20, Harmonized Tariff Schedule of the United States (HTSUS), whenever it is established to the satisfaction of the Center director that the article for which free entry is claimed was duty paid on a previous importation . . . , is being re-imported without having been advanced in value or improved in condition by any process of manufacture or other means, was exported from the United States under a lease or similar use agreement, and is being reimported by or for the account of the person who imported it into, and exported it from, the United States.

19 C.F.R. § 10.108.

a. Reimported merchandise with duties paid upon previous importation

The court examines each requirement of HTSUS subheading 9801.00.20 in turn. First, an importer must show that the subject merchandise are "[a]rticles, previously imported, with respect to which the duty was paid upon such previous importation." HTSUS subheading 9801.00.20. The court construes the term "[a]rticles" within the ordinary, plain usage of the term. The terms "previously imported" and "duty . . . paid upon such previous importation" are construed by the court according to the relevant dictionary definitions. "[P]reviously imported" means "to bring from a foreign or ex-

ternal source" and "going before in time or order." *Previously, Merriam-Webster's Collegiate Dictionary* 984 (11th ed. 2020); *imported, id.* at 625. "Duty paid" means "a tax on imports" and "a disposal or transfer of (money)." *Duty, id.* at 388; *paid, id.* at 910. The court concludes that the tariff terms "[a]rticles, previously imported, with respect to which the duty was paid upon such previous importation" mean that the subject merchandise must have been imported into the United States from a foreign country and the importer paid a duty to Customs when the merchandise were first imported into the United States.

Plaintiff SGS asserts that the entries at issue in this case were previously imported from China into the United States and duties were paid upon first importation. Pl.'s SMF ¶4. To support its claim, SGS cites inventory records that purport to establish the date and place of entry into the United States, as well as the quantity, style, size, and color of the goods being re-imported. Pl.'s Mem. at 8–9 (citing Pl.'s SMF, Exhs. K, P). The Government disputes that the subject merchandise were previously imported and that duties were paid upon first importation into the United States. Def.'s Resp. to Pl.'s SMF ¶ 4. The Government argues also that the exhibits cited by Plaintiff fail to "make a connection between the two U.S. entries" (i.e. the first importation and the re-importation into the United States), noting omissions of relevant information in the exhibits such as the date and place of entry into the United States of the original shipments, the quantity, style, size, and color of the goods being re-imported into the United States, whether the merchandise originally imported were eventually sold to customers in the United States, or whether duties were originally paid on the re-imported entries at issue. Def.'s Mem. at 34–35. Upon examining Exhibits K and P provided by Plaintiff, the court notes that both documents consist of voluminous print outs of tables containing numbers and codes. The court observes that the numbers and codes in Exhibits K and P do not clearly show that the merchandise listed therein were imported to the United States, that duties were paid upon that first importation, that the merchandise were exported from the United States to Canada, that the merchandise were re-imported into the United States, or that the merchandise listed therein are the same articles as the subject entries in this case.

The court concludes that Plaintiff has failed to meet its burden to provide a sufficient showing to establish the existence of an element essential to Plaintiff's case, namely the first factor under HTSUS subheading 9801.00.20 requiring that the subject merchandise were previously imported into the United States and that duties were paid

on the subject merchandise at first importation. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("*Celotex*") (Summary judgment should be granted against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); *XY, LLC v. Trans Ova Genetics*, 890 F.3d 1282, 1292 (Fed. Cir. 2018) (citing *Celotex*).

b. Reimported articles have not been advanced in value

Second, an importer must show that the subject merchandise are articles that have not been "advanced in value or improved in condition . . . while abroad." HTSUS subheading 9801.00.20. The court construes the terms "advanced in value or improved in condition . . . while abroad" by examining dictionary definitions of the relevant terms. "Advanced" means "greatly developed beyond an initial stage." *Advanced*, *Merriam-Webster's Collegiate Dictionary* 18 (11th ed. 2020). "Value" means "the monetary worth of something." *Value*, *id.* at 1382. "Improved" means "to enhance in value or quality." *Improved*, *id.* at 626. "Condition" means "a state of being." *Condition*, *id.* at 259. "Abroad" means "beyond the boundaries of one's country." *Abroad*, *id.* at 4. The court confirms that the tariff terms "advanced in value or improved in condition . . . while abroad" mean that the subject merchandise have not developed their monetary worth or enhanced their state of being while in the exported country (i.e. Canada in this case). Plaintiff SGS asserts that the subject merchandise were neither advanced in value nor improved in condition while abroad. Pl.'s SMF ¶ 20. To support its claim, SGS alleges that the subject merchandise were stored in a warehouse and sometimes repackaged. Pl.'s Mem. at 9–11. Defendant disputes Plaintiff's assertion that the subject merchandise were neither advanced in value nor improved in condition while abroad. Def.'s Resp. to Pl.'s SMF ¶ 20. Defendant contends that Plaintiff failed to provide any evidence to prove that SGS exported the merchandise to Canada and that the subject merchandise were not advanced in value or improved in condition. Def.'s Mem. at 35–36; Def.'s Reply at 13. Defendant notes also that because Plaintiff failed to connect the subject entries to show that the first imported merchandise were the same as the reimported subject merchandise, Plaintiff failed to establish that the previously imported merchandise were not advanced in value or improved in condition while in Canada. Def.'s Reply at 13. The court observes that Plaintiff failed to cite any evidence to support its contention that the subject merchandise were not advanced in value or improved in condition while in Canada.

A party moving for summary judgment must make a sufficient showing to establish the existence of an element essential to that party's case. *Celotex*, 477 U.S. at 322; *XY, LLC*, 890 F.3d at 1292. Here, Plaintiff failed to provide any proof that the subject merchandise were not advanced in value or improved in condition while in Canada, which is an essential element to proving that Plaintiff's merchandise were entitled to duty-free treatment under HTSUS subheading 9801.00.20. The court concludes, therefore, that Plaintiff has failed to meet its burden on the second requirement of HTSUS subheading 9801.00.20.

c. Exported under a lease or similar use agreement

Third, the importer must show that the subject merchandise were "exported under [a] lease or similar use agreement[]." HTSUS subheading 9801.00.20. SGS does not argue that its arrangement with 147483 is a lease. See Pl.'s Mem. at 11–12. SGS argues, rather, that its arrangement with 147483 is a bailment agreement that is equivalent to a "similar use agreement." *Id.*

In construing the tariff terms "exported under [a] . . . similar use agreement[]," the court looks to dictionary definitions to construe the term "similar use agreement." "Similar" is defined as "alike in substance or essentials." *Similar, Merriam-Webster's Collegiate Dictionary* 1161 (11th ed. 2020). "Use" is defined as "to carry out a purpose or action." *Use, id.* at 1378. "Agreement" is defined by *Black's Law Dictionary* as a "mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." *Agreement*, *Black's Law Dictionary* (7th ed. 1999). Accordingly, the court construes the term "similar use agreement" under HTSUS subheading 9801.00.20 to mean an understanding between two or more parties expressing a mutual assent to carry out a purpose or action that is alike in substance.

SGS argues that its arrangement is a bailment agreement that equates to a "similar use agreement." *See* Pl.'s Mem. at 11–12. The court notes at the outset that Plaintiff's characterization of SGS' arrangement with 147483 as a "bailment agreement" presupposes a legal conclusion, and the court does not entertain an analysis of whether there is a bailment agreement in this case. Rather, the court examines whether the undisputed material facts alleged by the movant support a showing of a similar use agreement within the court's understanding of the meaning of the tariff terms.

Under the court's construction of "similar use agreement," Plaintiff must show an understanding between two or more parties expressing a mutual assent to carry out a purpose or action that is alike in

substance. Plaintiff contends that SGS maintains an arrangement with 147483 that acts as a similar use agreement, citing to a Warehousing Agreement executed between SGS and 147483. SGS asserts that this Warehousing Agreement demonstrates use of the subject merchandise for the purpose of warehousing by more than one party. Pl.'s SMF ¶¶ 9–15. The parties agree on several facts with respect to whether there is use of the subject merchandise by more than one party. For example:

- The parties agree that SGS and 147483 are co-located in the same building, though Plaintiff and Defendant dispute whether SGS and 147483 act as separate companies. Pl.'s SMF ¶¶ 9–10; Def.'s Resp. to Pl.'s SMF ¶¶ 9–10.
- The parties agree that Gellis is the owner and sole officer of 147483. Def.'s SMF ¶3; Pl.'s Resp. to Def.'s SMF ¶3.
- The parties agree that Gellis is the sole officer of SGS. Def.'s SMF ¶ 8; Pl.'s Resp. to Def.'s SMF ¶ 8. The parties further agree that Gellis possessed ultimate control of SGS as of 2013, and do not dispute that all officer-assigned decisions vest in Gellis. Pl.'s SMF ¶ 1; Def.'s SMF ¶¶ 8, 9, 104–15; Def.'s Resp. to Pl.'s SMF ¶ 1; Pl.'s Resp. to Def.'s SMF ¶¶ 8, 9, 104–15.
- The parties agree that Gellis signed the Warehousing Agreement on behalf of both SGS and 147483. Def.'s SMF ¶¶ 42, 47; Pl.'s Resp. to Def.'s SMF ¶¶ 42, 47.

The parties dispute numerous material aspects, however, of whether the subject merchandise are used by more than one party. For example:

- Defendant disputes Plaintiff's characterization of the arrangement between SGS and 147483, arguing that the Warehousing Agreement cannot be a similar use agreement because the activities covered under the Warehousing Agreement do not involve the use of merchandise, and because SGS and 147483 are the same entity. Def.'s Resp. to Pl.'s SMF ¶¶ 9–15; Def. Br. at 23–33.
- Plaintiff and Defendant dispute whether SGS and 147483 are the same or separate entities. Pl.'s SMF ¶¶ 3, 10; Def.'s Resp. to Pl.'s SMF ¶¶ 3, 10.
- The parties dispute whether the 147483 company was formed to conduct warehousing operations. Pl.'s SMF ¶ 2; Def.'s Resp. to Pl.'s SMF ¶2.

- The parties dispute whether the Warehousing Agreement demonstrates use of the subject merchandise by more than one party. Pl.'s SMF ¶¶ 9–15; Def.'s Resp. to Pl.'s SMF ¶¶ 9–15.

Relevant to the court's consideration of the parties' cross-motions for summary judgment, the court concludes that disputes over genuine issues of material fact exist with respect to questions of whether the subject merchandise were exported to Canada under a similar use agreement, and whether the agreement between SGS and 147483 was between two parties. In any event, because Plaintiff has failed to make a sufficient showing on the first and second factors under HTSUS subheading 9801.00.20 (whether the subject merchandise were reimported with duties paid, and whether the subject merchandise did not advance in value or improve in condition), any genuine issues of material fact with respect to a lease or similar use agreement do not warrant resolution at trial.

d. Reimported by or for the account of the person who imported it into and exported it from the United States.

The fourth issue is whether the subject merchandise were reimported "by or for the account of the person who imported it into, and exported it from, the United States." HTSUS subheading 9801.00.20. The court construes the terms in the fourth factor to mean that a showing must be made that the subject merchandise were brought back into the United States by the original importer, or for the original importer. In other words, SGS must show that the subject merchandise were originally imported into the United States, exported to another country, and reimported into the United States either by SGS or for SGS.

Plaintiff alleges that "all of the goods in question were imported by SGS, exported by SGS and reimported by SGS." Pl.'s SMF ¶ 19. Defendant disputes this statement, stating that SGS has provided no evidence to support the allegation made in ¶19 of Plaintiff's statement of material facts. Def.'s Resp. to Pl.'s SMF ¶ 19. The evidence before the court shows generally that SGS imported goods and subsequently reimported some goods under the terms of the Warehousing Agreement. *See* Pl.'s SMF Ex. K ("Receiving Journal");Pl.'s SMF Ex. P ("Duty Relief Ledger"). Defendant asserts that there is no evidence to track the goods leaving the Canadian warehouse back to the original consumption entry number. Def. Br. at 34; Def. Reply at

13. The court observes that Plaintiff's cited evidence does not detail whether the entries at issue in this case are the same merchandise originally imported and exported.

HTSUS requires a showing that "[a]rticles, previously imported," are the subject merchandise at issue. HTSUS subheading 9801.00.20. It is not enough to show that *generally* SGS' business plan provides for import, export, and reimport of swimwear. A showing must be made that the entries identified in the protest were imported, duties were paid, were exported, and reimported. This interpretation is consistent with the implementing regulations, which state that "[f]ree entry shall be accorded under [HTSUS] subheading 9801.00.20, ... [upon a showing] that the article for which free entry is claimed was duty paid on a previous importation . . . ." 19 C.F.R. § 10.108. Similarly, the court in *Skaraborg* found that the importer failed to qualify for duty free treatment under HTSUS subheading 9801.00.20 when "Skaraborg ha[d] not presented one iota of evidence that duty was paid on the subject merchandise at the time of previous importation." *Skaraborg*, 22 CIT at 417. Plaintiff argues that the Receiving Journal documents (Exhibit K) "are self-authenticating and show the date and place of original importation." Pl.'s Opp'n and Reply at 25. The court has examined this Receiving Journal document and observes that the document fails to show clearly the date of first importation, that duties were paid upon first importation, that the goods were exported to Canada, were held in a warehouse without increasing in value or changing condition, and reimported back to the United States for or by SGS. The Receiving Journal appears to be a lengthy printed spreadsheet containing codes and numbers, with headings such as, "Receiving Number, Shipment No, PO No, Style/Color, Whse, Bin, Receiving Date, LC No, UM, Qty To Receive, Qty Received, Cancel B/O, Price, Extension." *See generally* Receiving Journal. Plaintiff's evidence fails to demonstrate to the court that the subject merchandise meet the requirements of HTSUS subheading 9801.00.20.

As noted earlier, a party moving for summary judgment must make a sufficient showing to establish the existence of an element essential to that party's case. *Celotex*, 477 U.S. at 322; *XY, LLC*, 890 F.3d at 1292. Here, Plaintiff failed to provide sufficient proof that the subject merchandise had been imported, exported, and reimported by or for SGS. The court concludes that Plaintiff failed to prove the fourth essential element required under HTSUS subheading 9801.00.20.

In summary, Plaintiff has not proven any of the necessary requirements for duty-free treatment under HTSUS subheading 9801.00.20. Plaintiff failed to make a sufficient showing to establish that three of

the essential elements of HTSUS subheading 9801.00.20 have been satisfied, and at best there are genuine issues of disputed material fact with respect to the essential element of export under a similar use agreement. A party's failure to make a sufficient showing on even one essential element is cause for the granting of summary judgment against the movant. *Celotex*, 477 U.S. at 322–23; *XY, LLC*, 890 F.3d at 1292. The court recognizes, in addition, that "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses," *Celotex*, 477 U.S. at 323–24; *Minkin v. Gibbons, P.C.*, 680 F.3d 1341, 1351 (Fed. Cir. 2012) (citing *Celotex*). Because Plaintiff has proven none of the essential elements of HTSUS subheading 9801.00.20, the court holds that Plaintiff's subject merchandise are not entitled to duty-free treatment and denies Plaintiff's motion for summary judgment.

III. HTSUS Chapters 61 to 63

The next inquiry concerns whether Customs classified Plaintiff's merchandise correctly. *Jarvis Clark Co.*, 733 F.2d at 878. According to Plaintiff, SGS' merchandise were classified "under various HTSUS provisions of Chapters 61 through 63 and assessed duties thereon at the Column 1 rates." Pl.'s Mem. at 1. Plaintiff indicated to the court that it does not challenge Customs' classification other than the denial of duty-free treatment under HTSUS subheading 9801.00.20. *Conference Call with the Court*, held by the Court of International Trade (July 20, 2020). The court concludes, therefore, that Customs classified Plaintiff's imported swimwear correctly under HTSUS Chapters 61 to 63.

CONCLUSION

For the foregoing reasons, the court holds that Customs correctly classified the subject merchandise under Chapters 61 to 63, and that Plaintiff's subject merchandise are not entitled to duty-free treatment as a matter of law under HTSUS subheading 9801.00.20. The court denies Plaintiff's motion for summary judgment. The court sustains Customs' decision to deny duty-free treatment to Plaintiff under HTSUS subheading 9801.00.20 and grants Defendant's cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: August 7, 2020
New York, New York

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

Slip Op. 20–114

STAR PIPE PRODUCTS, Plaintiff, v. UNITED STATES, Defendant, and ANVIL INTERNATIONAL, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 17–00236

[Remanding an agency decision issued in response to court order in litigation contesting a scope ruling interpreting an antidumping duty order on certain non-malleable cast iron pipe fittings from the People's Republic of China]

Dated: August 11, 2020

Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for plaintiff. With him on the brief were *Ned H. Marshak* and *Kavita Mohan*.

Sarah Choi, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Kristen E. McCannon* and David W. Richardson, Attorneys, Office of the Chief Counsel For Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

J. Michael Taylor, King & Spalding LLP, of Washington, D.C., for defendant-intervenor. With him on the brief was *Daniel L. Schneiderman*.

OPINION AND ORDER

Stanceu, Chief Judge:

Before the court is a decision (the "Remand Redetermination") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") submitted in response to the court's previous Opinion and Order in litigation contesting a scope ruling. *Star Pipe Prods. v. United States*, 43 CIT __, 365 F. Supp. 3d 1277 (2019) ("*Star Pipe I*"); *Final Results of Redetermination Pursuant to Ct. Order* (June 27, 2019) (Rem. P.R. Doc. 39) ("*Remand Redetermination*").[1] Concluding that Commerce has misinterpreted information in one of the sources of information its regulations require it to consider, the court orders reconsideration of the Remand Redetermination.

I. BACKGROUND

The court presumes familiarity with the background of this litigation, as set forth in the court's prior Opinion and Order, which is

[1] All citations to documents from the administrative record are to public documents. References cited as "P.R. Doc.__" are to documents that were on the record in *Star Pipe Prods. v. United States*, 43 CIT __, 365 F. Supp. 3d 1277 (2019) ("*Star Pipe I*") while references cited as "Rem. P.R. Doc. __" are to documents placed on the agency record during Commerce's redetermination proceedings.

summarized and supplemented herein. *See Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1278–79.

A. Proceedings Culminating in the Contested Determination

Commerce issued the contested decision ("Final Scope Ruling") on August 17, 2017. *See Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Request by Star Pipe Products* (Aug. 17, 2017) (P.R. Doc. 13) ("*Final Scope Ruling*"). In the Final Scope Ruling, the Department determined that goods Star Pipe Products ("Star Pipe") identified as "flanges" made of ductile iron are included within the scope of an antidumping duty order on non-malleable cast iron pipe fittings from China ("Order"). *Id.* at 1; *see Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe Fittings From the People's Republic of China*, 68 Fed. Reg. 16,765 (Apr. 7, 2003) ("*Order*").

The Order resulted from an antidumping duty petition filed in 2002. *See Petition for Imposition of Antidumping Duties: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China* (Feb. 21, 2002) (Rem. P.R. Doc. Nos. 30–32, Ex. 1) ("*Petition*").

Commerce issued the Final Scope Ruling in response to a request for a scope ruling ("Scope Ruling Request") that Star Pipe submitted to Commerce in 2017. *Star Pipe Products Scope Request: Ductile Iron Flanges* (June 21, 2017) (P.R. Docs. 1–2) ("*Scope Ruling Request*"). The Scope Ruling Request stated that "[a] flange is an iron casting used to modify a straight end pipe to enable its connection either to a flanged pipe, a flanged pipe fitting or another flange attached to the otherwise straight end of another pipe, in order to connect pipes, valves, pumps and other equipment to form a piping system." *Id.* at 3 (footnote omitted). As described in the Scope Ruling Request, the flanges at issue are disc shaped and produced to be assembled to a ductile iron pipe. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1280 (citing *Scope Ruling Request*, Ex. 1). The flanges are described as follows:

> In the thicker center portion (the 'hub') of each flange is a large hole with tapered thread to facilitate attachment of the flange to the end of a threaded pipe. The outer, thinner portion of each flange is drilled with eight holes (either tapped or untapped), arranged in a circle, for insertion of fasteners. A photograph in the Scope Ruling Request illustrates how two pipes to which flanges have been assembled can be joined at the ends using bolts and nuts through the eight holes, with a gasket fitted between the two flanges to seal the joint.

Id. (citing *Scope Ruling Request*) (citations omitted).

B. Proceedings Before the Court of International Trade

Plaintiff Star Pipe Products commenced this action on September 15, 2017. Summons, ECF No. 1; Compl., ECF No. 4. On May 10, 2018, Star Pipe moved for judgment on the agency record. Pl.'s Mot. for J. on the Agency R. under Rule 56.2, ECF No. 29. Defendant United States responded in opposition on August 24, 2018. Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 37. Defendant-intervenor Anvil International LLC ("Anvil") responded in opposition on September 7, 2018. Def.-Inter.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 38. Star Pipe replied on September 25, 2018. Pl.'s Reply, ECF No. 41.

Following the court's decision in *Star Pipe I* remanding the Final Scope Ruling to Commerce for reconsideration, Commerce placed "new factual information" ("NFI") on the record on May 9, 2019 and provided interested parties an opportunity to comment and submit additional information. *See Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Star Pipe Prod[u]cts Scope Remand Redetermination* (May 9, 2019) (Rem. P.R. Doc. 25) ("*Department's NFI*"). The information includes excerpts from the Petition. *See id.* at Attach. 1. On May 20, 2019, Star Pipe and Anvil commented on the new information and placed other new factual information on the record. *See Star Pipe's New Factual Information in the Scope Inquiry on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China* (May 20, 2019) (Rem. P.R. Doc. Nos. 30–32) ("*Star Pipe's NFI*"); *Non-Malleable Cast Iron Pipe Fittings From The People's Republic of China / Submission Of Factual Information* (May 20, 2019) (Rem. P.R. Doc. No. 33). Star Pipe's new factual information includes, *inter alia*, all pages of and exhibits to the Petition. *See Star Pipe's NFI,* Ex. 1.

In response to *Star Pipe I*, Commerce submitted the Remand Redetermination on June 27, 2019, again determining that Star Pipe's ductile iron flanges were within the scope of the Order. *Remand Redetermination* 3–14. Star Pipe and Anvil filed comments on the Remand Redetermination. *See* Star Pipe Prods.' Comments on Final Remand Redetermination (Aug. 23, 2019), ECF No. 62 (conf.) & ECF No. 63 (public) ("Star Pipe's Comments"); Def.-Inter.'s Comments on Commerce's Final Redetermination (Aug. 23, 2019), ECF No. 61, *incorporating* [*Anvil's*] *Comments On Draft Results Of Redetermination* (May 29, 2019) (Rem. P.R. Doc. 38). On October 1, 2019, defendant responded to the comments. *See* Def.'s Resp. to Comments on Remand Results, ECF No. 66. On December 3, 2019, Star Pipe filed a

Notice of Supplemental Authority, *see* ECF No. 69, to which defendant responded on January 13, 2020. *See* Def.'s Resp. to Pl.'s Notice of Suppl. Authority, ECF No. 72.

II. DISCUSSION

A. Jurisdiction and Standard of Review

Pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), the court exercises subject matter jurisdiction of a civil action arising under section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(vi).[2] The court will uphold the Department's determinations, findings, and conclusions in the scope ruling 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).

B. The Court's Directive in *Star Pipe I*

Star Pipe I held that Commerce, in issuing the Final Scope Ruling, failed to comply with its own regulation, 19 C.F.R. § 351.225(k)(1), which specifies factors Commerce is required to consider when deciding whether merchandise is within the scope of an antidumping or countervailing duty order.[3] *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1286. The court held that the Final Scope Ruling did not give "thorough and fair consideration" to "'[t]he descriptions of the merchandise contained in the petition ... and the determinations of the ... [U.S. International Trade] Commission,'" in deciding that the ductile iron flanges were within the scope of the Order. *Id*. (quoting 19 C.F.R. § 351.225(k)(1)). The court concluded that Commerce "did not consider the petition, and its analysis of the [U.S. International Trade Commission's] Report was so selective and cursory as to ignore a substantial amount of information relevant to the scope question presented in this case." *Id*.; *see* Non-Malleable Pipe Fittings From China, Inv. No. 731-TA-990 (Final), USITC Pub. No. 3586 (Mar. 2003) ("*ITC Report*"). The court directed Commerce to reconsider the Final Scope Ruling and submit a redetermination after placing the antidumping duty petition or the relevant portions thereof on the record. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1282–83.

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[2] All statutory citations herein are to the 2012 edition of the United States Code and all regulatory citations herein are to the 2017 edition of the Code of Federal Regulations.

[3] The regulation provides that Commerce "will take into account the following: ... [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary [of Commerce] (including prior scope determinations) and the [U.S. International Trade] Commission." 19 C.F.R. § 351.225(k)(1).

C. The Department's Remand Redetermination

In the Remand Redetermination, Commerce began its analysis with the scope language of the Order. *Remand Redetermination* 4. Commerce addressed the first two paragraphs of the scope language, the first of which is directed only to nonmalleable (gray iron) products and the second of which adds to the scope certain products made instead of ductile iron.[4] *Id*. Commerce identified a two-part inquiry, first considering whether the ductile iron flanges are described by the first sentence of the second paragraph of the scope language. *Id.* In pertinent part, that sentence reads: "[f]ittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above . . ., threaded to ASME B1.20.1 specifications and UL certified, regardless of metallurgical differences between gray and ductile iron, are also included in the scope of the petition." *Order*, 68 Fed. Reg. at 16,765. Second, Commerce considered "whether Star Pipe's flanges are 'fittings' within the meaning of the scope." *Remand Redetermination* 4.

Commerce concluded that ductile iron flanges at issue are described by the first sentence in the second paragraph, reasoning that Star Pipe's flanges, being threaded and produced to be fitted to pipes with outside diameters between 2.5 and 4.8 inches, conform to the two pertinent physical characteristics, the "threaded or unthreaded" requirement and the inside diameter specification of ¼ inch to 6 inches. *Id*. at 4–5. The Remand Redetermination proceeds to examine sources of information identified in 19 C.F.R. § 351.225(k)(1), address-

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[4] The first two paragraphs of the scope language in the Order are as follows:

> The products covered by this order are finished and unfinished non-malleable cast iron pipe fittings with an inside diameter ranging from 1/4 inch to 6 inches, whether threaded or unthreaded, regardless of industry or proprietary specifications. The subject fittings include elbows, ells, tees, crosses, and reducers as well as flanged fittings. These pipe fittings are also known as "cast iron pipe fittings" or "gray iron pipe fittings." These cast iron pipe fittings are normally produced to ASTM A-126 and ASME B.16.4 specifications and are threaded to ASME B1.20.1 specifications. Most building codes require that these products are Underwriters Laboratories (UL) certified. The scope does not include cast iron soil pipe fittings or grooved fittings or grooved couplings.
>
> Fittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above or which have the same physical characteristics and are produced to ASME B.16.3, ASME B.16.4, or ASTM A-395 specifications, threaded to ASME B1.20.1 specifications and UL certified, regardless of metallurgical differences between gray and ductile iron, are also included in the scope of this petition. These ductile fittings do not include grooved fittings or grooved couplings. Ductile cast iron fittings with mechanical joint ends (MJ), or push on ends (PO), or flanged ends and produced to American Water Works Association (AWWA) specifications AWWA C110 or AWWA C153 are not included.

Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe Fittings From the People's Republic of China, 68 Fed. Reg. 16,765, 16,765 (Apr. 7, 2003) (the "*Order*").

ing the Petition, the ITC Report, and its past scope rulings. *Id*. at 5–14. Commerce concluded that all three of these sources support a determination that Star Pipe's flanges are subject to the Order. *Id*.

Addressing the Petition, the Remand Redetermination relies upon brochures of Anvil and Ward Manufacturing, Inc. ("Ward") that were attached as Exhibit 2 to the Petition, concluding that this evidence "indicates that the petitioners intended to cover flanges in the scope of the *Order*." *Id.* at 5.[5] As to the ITC Report, the Remand Redetermination concludes that Star Pipe's flanges, as described in the Scope Ruling Request, meet the definition of "pipe fitting" included in the ITC Report, *id.* at 7, and that the report "specifically references certain types of flanges as being included within its definition of a pipe fitting," *id.* at 8. On the third source of information, Commerce concluded that its current ruling on scope is supported by certain of its prior scope rulings. *Id.* at 13–14.

D. The Petition Contains Evidence Supporting a Finding that Petitioners Considered Flanges to Be "Pipe Fittings"

The Anvil brochure is titled "Pipe Fittings." *Petition*, Ex. 2. On page PF-71, the brochure depicts a "flange union gasket type" appearing to be similar to the flanges under consideration. It also includes (on a page with no number showing in the exhibit) a "floor flange" that also resembles one of Star Pipe's flanges. *Petition*, Ex. 2. As Commerce found, this evidence supports the Department's conclusion that petitioner Anvil considered flanges similar to Star Pipe's to be "pipe fittings." *Remand Redetermination* 21–22.

The Ward brochure, also titled "Pipe Fittings," *id*., also supports a finding that the petitioners considered products identified as "flanges" to be pipe fittings, although it is less probative than the Anvil brochure because the pages of the Ward brochure illustrating these "flanges" are not attached to the Petition. *Petition*, Ex. 2. According to a page labeled "Table of Contents," the Ward brochure displays the following products: "Standard Malleable Fittings" (Section 1), "Extra Heavy Malleable Fittings" (Section 2), "Quality Pipe

[5] In its analysis of the meaning of the term "pipe fitting" as used in the Petition (Rem. P.R. Doc. 30–32, Ex. 1), (the "Petition"), Commerce also relied on a publication of U.S. Customs and Border Protection, "What Every Member of the Trade Community Should Know About: Classification and Marking of Pipe Fittings under Heading 7307," that it placed on the record for the Remand Redetermination. *Final Results of Redetermination Pursuant to Ct. Order* 5–6 (June 27, 2019) (Rem. P.R. Doc. 39) *("Remand Redetermination")*. That publication quotes EN 73.07 of the Explanatory Notes to the Harmonized Commodity Description and Coding System, which lists "flanges" among other exemplars of articles within the scope of international heading 7307 ("Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel"). *Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Star Pipe Prod[u]cts Scope Remand Redetermination*, Attach. II at 7 (May 9, 2019) (Rem. P.R. Doc. 25).

Unions" (Section 3), "Plugs & Bushings" (Section 4), "Top Beam Clamps and 'C' clamps" (Section 5), "Standard Cast Iron Pipe Fittings" (Section 6), "Flanges, Flange Unions, Companion Flanges, Flanged Fittings" (Section 7), and "Cast Iron Drainage Fittings" (Section 8). Of the eight sections, petitioners attached to the Petition only pages 30–39 of the brochure, which comprise Section 6 and describe and illustrate "Standard Cast Iron Pipe Fittings." No pages of any other section of the brochure were attached. Section 6 illustrates, and provides dimensions for, the following cast iron products: 90° straight ells (Figure 21), 90° reducing ells (Figure 22), 45° ells (Figure 23), straight tees (Figure 24), reducing tees (Figure 25), reducing couplings (Figure 29), pipe caps (Figure 30), and crosses (Figure 30A). Absent from the exhibit is Section 7 of the brochure, which includes "flanges." *Id*. Without the pages from Section 7, the included portion of the brochure is insufficient to support a finding that the characteristics of Ward's "flanges" necessarily are those described in Star Pipe's Scope Ruling Request. Nevertheless, the title of the brochure and the title of Section 7, considered together, are evidence supporting findings that: (1) Ward considered "flanges" (however described) to be a product separate from flanged fittings, and (2) Ward considered both to be "pipe fittings."

Star Pipe argues that the failure to attach Section 7 of the Ward brochure to the Petition and the fact that the body of the Petition mentions flanged fittings as an exemplar but makes no reference to flanges in the narrative is evidence that the petitioners intended that flanges would be outside the scope of the investigation they were proposing. Star Pipe's Comments 6–8. The court agrees that the absence of any mention of flanges in the body of the Petition detracts from an inference that petitioners intended for flanges to be subject to the investigation. The description in the Petition of the proposed scope of the investigation includes this sentence: "[t]he subject fittings include elbows, ells, tees, crosses, and reducers as well as flanged fittings." *Id.* at 2 (quoting *Order*, 68 Fed. Reg. at 16,765). There is no specific mention of "flanges" among the exemplars or anywhere within Section E of the Petition (*Petition* at "Scope of Commerce Department Investigation of Subject Merchandise (19 C.F.R. § 351.202(b)(5)"). *Petition* at 3. In support of plaintiff's argument, it can be argued that the specific inclusion among the exemplars of "flanged fittings" (a product with some physical characteristics and uses similar to those of flanges but which, as discussed later in this Opinion and Order, Commerce does not consider flanges to be) supports an inference that the petition would have mentioned flanges specifically at this point in the text had petitioners intended to in-

clude them in the proposed scope. But at best, this is an inference. By itself, the absence of a reference to flanges in the body of the Petition does not establish that the petitioners intended that flanges would *not* be among the products subject to the investigation they were proposing.

Star Pipe argues, further, that Anvil's brochure lists merchandise that was proposed to be outside the scope of the investigation. Star Pipe's Comments 8. Both brochures are evidence that the petitioners considered "flanges" to be pipe fittings, and nothing in the Petition expressly excludes flanges from the proposed scope of the investigation.

On remand, to satisfy the requirements of 19 C.F.R. § 351.225(k)(1), Commerce must review the relevant evidence contained in the Petition (as well as the other sources) and fully and fairly consider that evidence in light of the record as a whole.

E. The Remand Redetermination Erroneously Relies on the ITC Report to Support Its Conclusion that Star Pipe's Flanges Are Within the Scope of the Order

In *Star Pipe I*, the court addressed the Department's reliance on the ITC report, concluding that "[r]ead in the entirety, the ITC Report contains evidence lending weight to a conclusion that Star Pipe's flanges are not subject merchandise. Under 19 C.F.R. § 351.225(k)(1), Commerce was not free to ignore this evidence." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1286. In the Remand Redetermination, Commerce again concludes that its decision on Star Pipe's flanges is supported by evidence in the ITC report. *Remand Redetermination* 7. This conclusion remains erroneous.

The ITC report does not support the Department's decision as to scope and, as the court concluded in *Star Pipe I*, instead contains some evidence detracting from it. As the court mentioned, the ITC Report did not discuss "flanges" as products within the scope of the investigation and considered all ductile flanged *fittings* to be outside the scope of the investigation (and outside the scope of the domestic like product), all of which casts doubt on a premise that the ITC considered ductile iron *flanges* to be within that scope. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1286.

The court noted, additionally, that the ITC contemplated that the subject imports are those used in pipe fitting applications, whereas Star Pipe's products are intended for use, and are used, in pipe fabrication applications (i.e., the assembling of a flange to a straight pipe). *Id.* at __, 365 F. Supp. 3d at 1283.

1. The Remand Redetermination Erred in Concluding that Star Pipe's Flanges Conform to a Description in the ITC Report

Commerce concluded in the Remand Redetermination that Star Pipe's ductile iron flanges conformed to the term "pipe fittings" as used in the scope language of the Order. *Remand Redetermination* 5. Commerce recognized that neither the scope language of the Order nor the Petition defined the term, *id.* at 7, but relied on a statement in the ITC report that, according to Commerce, "defines a pipe fitting as an iron casting 'generally used to connect the bores of two or more tubes, connect a pipe to another apparatus, change the direction of fluid flow, or close a pipe.'" *Id.* (quoting *ITC Report* at 4). Commerce concluded that Star Pipe's flanges conformed to this description based on Star Pipe's own description of a flange in the Scope Ruling Request: "Star Pipe claimed in its *Scope Ruling Request* that a flange is 'an iron casting used to modify a straight end pipe to enable its connection either to a flanged pipe, a flanged pipe fitting or another flange attached to the otherwise straight end of another pipe, in order to connect pipes, valves, pumps and other equipment to form a piping system.'" *Id.* (quoting *Scope Ruling Request* 3).

The Department's reasoning disregards the uncontradicted record evidence that a flange does not satisfy the ITC's description in the form in which it is imported, i.e., before it becomes part of an assembly with a straight end pipe. As the court discussed in *Star Pipe I*, Star Pipe's descriptive statement in the Scope Ruling Request, consistent with all other record evidence, supports a finding that Star Pipe's flanges are produced for and suitable for only one purpose: attachment to a straight end pipe, after importation, to form such an assembly. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1283. The Department's reliance on Star Pipe's statement in the Scope Ruling Request only confirms this point.[6] Commerce itself states in the Remand Redetermination that "[t]he purpose of Star Pipe's flanges is to modify pipes in such a way as to enable their connection to other pipes or other objects within a piping system." *Remand Redetermination* 23. As the court concluded in *Star Pipe I*, "[s]ubstantial evidence is not available on the administrative record to support a finding that Star Pipe's flanges, in the form in which they are imported, are suitable for, or approved for, joining the bores of two pipes

[6] *Star Pipe I* also directed Commerce to record evidence pertaining to the AWWA C115 industry standard to which the flanges are described as conforming. Under that standard, flanges are approved for attachment to straight end pipes only at the point of fabrication, not in the field, by means of processing that involves more than simple assembly. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1283–84.

or joining a pipe to another apparatus." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1284. Furthermore:

> Seen in light of the record evidence on the whole, the Department's finding appears to describe the use of the flange only after the flange has become a component in the downstream product resulting from post-importation processing, i.e., a pipe to which a fabricator has added one or more flanges. That product, however, is not the subject of the Scope Ruling Request and is not within the scope of the Order (which applies only to pipe fittings, not pipes or assemblies containing pipes).

Id., 43 CIT at __, 365 F. Supp. 3d at 1284. In its imported form, i.e., prior to becoming part of an assembly, a Star Pipe flange cannot be used "to connect the bores of two or more pipes or tubes, connect a pipe to another apparatus, change the direction of fluid flow, or close a pipe," *id.*, 43 CIT at __, 365 F. Supp. 3d at 1281 (quoting *ITC Report* at 4), as, for example, can "elbows, ells, tees, crosses, and reducers as well as flanged fittings," *id.*, 43 CIT at __, 365 F. Supp. 3d at 1280–81 (quoting *Order*, 68 Fed. Reg. at 16,765). Star Pipe's flanges differ in this respect from each of the exemplars in the scope language. The Remand Redetermination does not attempt to resolve this issue, which the court fully raised in *Star Pipe I*.[7] Instead, Commerce continues to rely on a strained interpretation of the description of pipe fittings in the ITC Report. *See Remand Redetermination* 23. Read on the whole, the ITC Report does not provide evidence that the ITC meant for this description to describe flanges such as Star Pipe's flanges.

2. The Remand Redetermination Misinterpreted the ITC Report by Confusing Star Pipe's Flanges with "Flanged Fittings"

In *Star Pipe I*, the court opined that "[t]he absence of any mention of ductile iron flanges, as opposed to ductile flanged fittings, in the ITC Report (and, according to plaintiff, in the petition) casts doubt on the premise that ductile iron flanges were contemplated as part of either the scope of the investigation or the scope of the domestic like product." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1286. The Remand Redetermination asserts, to the contrary, that "the ITC report also specifically references certain types of flanges as being

[7] Instead, the Remand Redetermination asserts that there is no record evidence that the attachment of flanges to straight end pipes at the point of fabrication could not be performed by "pipe fitters." *Remand Redetermination* 8–11. This tangential point fails to address the issue the court raised and, moreover, impermissibly attempts to support a finding or inference from the *absence* of record evidence.

included within its definition of a pipe fitting." *Remand Redetermination* 8. The document continues, "[a] footnote on page I-6 of the ITC Investigation Final states that '{a}nother use for these {subject} non-malleable flanged fittings is as so-called floor flanges to affix pipes as hand (or other) railings to floors or other surfaces.'" *Id.* (quoting *ITC Report* at I-6). From this footnote, Commerce concluded in the Remand Redetermination that "[c]learly, the ITC considered at least one type of flange to be a type of pipe fitting." *Id.* In positing that the ITC considered a type of flange to be a type of flanged fitting, the Department's analysis of the ITC Report again fell into error.

The quoted footnote is addressed to certain "non-malleable flanged fittings," the use of which "is as so-called floor flanges." *ITC Report* at I-6 n.28. But the reference unmistakably is to a "use" of a type of flanged fitting, a product that is distinct from a "flange" of the type at issue in this case. As Commerce itself stated later in the Remand Redetermination, "Star Pipe and Commerce both agree that Star Pipe's flanges are not the same as flanged fittings." *Remand Redetermination* at 13. Nor can the ITC Report be interpreted to regard as "flanged fittings" the flanges on which Star Pipe sought a ruling. As the court observed in *Star Pipe I*, "Star Pipe's flanges do not conform to the description of 'flanged fittings' in the ITC Report because they are not 'cast with an integral rim, or flange, at the end of the fitting.'" *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1285 (quoting *ITC Report* at I-9). The cited footnote in the ITC Report does not support a decision to place Star Pipe's flanges within the scope of the Order.[8]

F. The Remand Redetermination Correctly Concludes that Commerce Placed Flanges Within the Scope of the Order in a Past Scope Ruling

The Remand Redetermination relies upon three prior scope rulings by Commerce: the "UV Ruling," "Napac Ruling," and "Taco Ruling."[9]

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[8] Another footnote in the ITC Report also mentions "use as floor flanges" in reference to non-malleable pipe fittings. Non-Malleable Pipe Fittings from China, Inv. No. 731-TA-990 (Final), USITC Pub. No. 3586 at 5 n.12 (Mar. 2003) (citation omitted)

[9] *See Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Request by U.V. International LLC* (May 12, 2017) ("*UV Ruling*"); *see also Final Scope Ruling on the Antidumping Duty Order on Finished and Unfinished Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Request by Napac for Flanged Fittings* (Sept. 19, 2016) (*"Napac Ruling"); Final Scope Ruling on the Black Cast Iron Flange, Green Ductile Flange, and the Twin Tee* (Sept. 19, 2008) (*"Taco Ruling"), appended to the Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Request by Star Pipe Products* (Aug. 17, 2017) (P.R. Doc. 13) as Attach. 1, 2, and 4, respectively.

Remand Redetermination 13–14. In *Star Pipe I*, the court noted that neither the Taco Ruling nor the Napac Ruling supported a determination that Star Pipe's flanges are pipe fittings within the meaning of the Order. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1285 n.8.

As *Star Pipe I* stated, in the Taco Ruling, "Commerce found that the black and green flanges at issue in that proceeding were 'flanged fittings'; Commerce reached this finding 'because they are fittings that are cast with an integral rim, or flange, at the end of the fitting.'" *Id.* (quoting *Taco Ruling 9*). The Remand Redetermination states that "[w]e continue to rely on the *Taco Ruling* for the proposition that Commerce has previously found some types of flanges to be included in the scope, even though they were different than Star Pipe's flanges." *Remand Redetermination* 14. This reasoning is unpersuasive in considering flanged fittings to be "types of flanges," ignoring the distinction made elsewhere in the Remand Redetermination, *see, e.g., Remand Redetermination* 12–13.

Star Pipe I stated that "[s]ome of the articles at issue in the Napac Ruling were described as gray iron flanged fittings, *Napac Ruling* 3, and the court is unable to conclude from the descriptions therein that the remaining articles were identical to Star Pipe's flanges." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1285 n.8. The Remand Redetermination does not question the court's inability to conclude that the Napac Ruling covered the same product as that at issue in this case. Instead, Remand Redetermination states that "we continue to rely on the *Napac Ruling* for the proposition that Commerce has previously found that ductile iron fittings are covered by the scope of the *Order*, unless they meet AWWA C110 or AWWA C153." *Remand Redetermination* 14. This proposition does not address the question of whether Star Pipe's flanges are "pipe fittings" within the intended meaning of that term as used in the scope language of the Order. Moreover, the underlying premise of the Department's statement is misguided. Not all ductile iron pipe fittings are within the scope of the Order, regardless of whether they meet one of those two standards. As is relevant here, ductile iron pipe fittings are within the scope of the Orders only if they are "[f]ittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above." *Order*, 68 Fed. Reg. at 16,765. Also, the Order contains an exclusion for certain ductile iron products—grooved fittings and couplings—in addition to the exclusion for those that meet the AWWA C110 or the AWWA C153 standard. *Id*.

The Remand Redetermination relies on the UV Ruling "for the proposition that Commerce has previously found that some ductile iron flanges similar to Star Pipe's flanges were included with the

scope of the *Order*." *Remand Redetermination* 14 (footnote omitted). In contrast to the other two rulings, the UV Ruling appears to be on point and in that respect, when considered according to 19 C.F.R. § 351.225(k)(1), provides support for a determination placing Star Pipe's flanges within the scope of the Order. This is not to suggest that the support it lends is unqualified; to the contrary, the support it provides is limited by the errors in that ruling. The UV ruling states as follows:

> In reviewing the product documentation submitted by U.V. International, the Department finds that U.V. International's flanges conform to the ITC's definition of pipe fittings. Specifically, as demonstrated in U.V. International's original submission, its flanges can be threaded onto the ends of two pipes, and then those flanges can be bolted together so as to connect the pipes. Alternatively, a flange may be threaded onto one pipe and then used to connect that pipe to an apparatus with a compatible connector. Moreover, the Department has found that flanges are fittings in both the Taco and Napac scope rulings. *UV Ruling* 3. This is the same reliance on the description of "pipe fittings" in the ITC Report that the court finds to be misplaced in this case. Again, the problem is that the flanges in question do not satisfy the ITC's description in the form in which they are imported, and the strained interpretation of the ITC's description casts doubt on a conclusion that the ITC considered flanges to be within the scope of the investigation, particularly when viewed in light of other evidence in the ITC Report. Also, the statement that Commerce has found that "flanges" are fittings in the Taco and Napac rulings is unavailing, as there is no indication that either of those rulings addressed flanges of the type at issue in this case.

G. Star Pipe's Notice of Supplemental Authority

Throughout this proceeding, Star Pipe has argued that the exclusion for "[d]uctile cast iron fittings with ... flanged ends and produced to American Water Works Association (AWWA) specifications AWWA C110 or AWWA C153," *Order*, 68 Fed. Reg. at 16,765, is a basis upon which its flanges, even if presumed to be "pipe fittings," must be excluded from the scope of the Order. Star Pipe maintains that its flanges conform to AWWA C115 and argues that "Star Pipe has provided substantial record evidence that AWWA C115 is a complementary standard to AWWA C110 and C153; the only difference is that C115 covers flanges while C110 and C153 are for flanged fittings."

Star Pipe's Comments 5 (citing *Scope Ruling Request* 3 & Ex. 3). In the Final Scope Ruling, Commerce rejected Star Pipe's argument, reasoning that "Star Pipe has not provided documentation from AWWA that describes C115 as the companion specification to C110 or C153. Just because AWWA shares all the relevant product characteristics of C110 and C153 does not make it a companion specification." *Final Scope Ruling* 11. The Final Scope Ruling added that even had Star Pipe shown that AWWA C115 is the companion specification to AWWA C110 and C153, "such a showing would be irrelevant because the *Order* only excludes specifications AWWA C110 and AWWA C153, and makes no mention of any companion specifications" and that "if the petitioner had intended to exclude AWWA C115 from the scope of the *Order*, it would have done so." *Id.* at 11–12.

The Remand Redetermination reiterates the Department's earlier position that it is irrelevant whether AWWA C115 is a companion specification to AWWA C110 and C153 because only products meeting the named specifications, and not those meeting companion specifications, are the subject of the scope exclusion. *Remand Redetermination* 19. The Remand Redetermination did not reiterate, and therefore did not maintain, the Department's rationale in the Final Scope Ruling that Star Pipe had failed to demonstrate that AWWA C115 is a companion specification to AWWA C110 and C153.[10]

In its December 3, 2019 Notice of Supplemental Authority, Star Pipe directs the court's attention to a scope ruling (the "ProPulse Ruling") on certain steel hose fittings, which Commerce issued during the course of this litigation, after briefing was completed. *See* Notice of Suppl. Authority, Ex. 1; *Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Forged Steel Fittings: Request by ProPulse, A Scheiffer Company* (Oct. 15, 2019) ("*ProPulse Ruling*"). Drawing an analogy to this case, Star Pipe argues that "[i]n the ProPulse Scope Ruling, Commerce found that ProPulse's fittings manufactured to ISO 12151–2 and ISO 12151–6 were excluded from the scope of the Order on Forged Steel Fittings from the People's Republic of China because 'the two ISO hose fitting standards are essentially equivalent to SAEJ516, which is expressly excluded from the Orders.'" *Notice of Suppl. Authority* 1 (quoting *ProPulse Ruling* 5).

Defendant responds to Star Pipe's argument by asserting that [t]here are no ... relevant identical or similar terms . . . that would

[10] Although the word "companion" is not used in the excerpts, there is record evidence of the relationship between the standards. For example, AWWA C115 provides that "[f]langes shall conform to the respective chemical and physical properties for gray-iron and ductile-iron fittings, according to ANSI/AWWA C110/A21.10." *Star Pipe Products Scope Request: Ductile Iron Flanges*, Ex. 3 at 7, 4.3.3 (June 21, 2017) (P.R. Docs. 1–2). The submission also includes record evidence that AWWA C110 applies to flanged fittings, 3 inches to 48 inches, AWWA C153 applies to larger flanged fittings, and C115 applies to flanges. *Id.*, Ex. 3 at ix.

affect any of the analysis in this case" and that the hose fittings at issue, in the words of the ProPulse Ruling, "differ from the subject merchandise, which is primarily used to distribute high pressure or corrosive liquids in the end markets of oil and gas, natural gas, chemical plants, petrochemical plants, and power plants." *Def.'s Resp. to Pl.'s Notice of Suppl. Authority* 2 (quoting *ProPulse Ruling* 4–6) (emphasis omitted).

Defendant's Response to the Notice of Supplemental Authority fails to draw a meaningful distinction between the reasoning in the ProPulse Ruling and that of the Remand Redetermination. The ProPulse Ruling specifically relied upon the Department's conclusion that the standards involved "are essentially equivalent." *ProPulse Ruling* 5 ("Specifically, the two ISO hose fitting standards are essentially equivalent to SAE J516, which is expressly excluded from the *Orders*"). Defendant's purported distinction regarding the treatment of use in the two proceedings is also unconvincing because in this case Star Pipe also draws a distinction as to use, pointing out that the general use of its flanges is for water supply and wastewater applications while the subject merchandise is used almost exclusively in fire prevention/sprinkler and steam conveyance systems. *See Petition* 4 ("Virtually all subject fittings are used in fire protection systems and in the steam heat conveyance systems used in old inner cities."); *Scope Ruling Request* 10 ("In contrast, the flanges subject [to] this request are for the water and wastewater industries and are not generally used in fire protection systems or steam heat conveyance systems."). In the redetermination it submits in response to this Opinion and Order, Commerce may take the opportunity to address the issue plaintiff raises in its Notice of Supplemental Authority.

III. CONCLUSION AND ORDER

In summary, the Remand Redetermination, unlike the Final Scope Ruling, considered all three sources of information that its regulation, 19 C.F.R § 351.225(k)(1), required it to consider. The court concludes that Commerce committed errors in analyzing the evidence in one of those sources, the ITC Report. The Remand Redetermination permissibly found certain evidentiary support for its determination in the other two sources of information, the Petition and one of its own past scope rulings, the UV Ruling.

On remand, Commerce must issue a new decision that is consistent with this Opinion and Order. In particular, the new decision must recognize that the ITC Report does not contain evidence supporting a conclusion that Star Pipe's flanges are within the scope of the Order and contains some evidence that detracts from such a conclusion. At

this point in the litigation, the court declines to decide the question of whether or not the record evidence Commerce found in the Petition and the UV Ruling is sufficient to support such a conclusion in light of all record evidence, including the record evidence detracting from such a conclusion. Upon correcting the errors the court identifies, Commerce must make that determination in the first instance.

Therefore, upon consideration of the Remand Redetermination and all papers and proceedings had herein, it is hereby

ORDERED that Commerce, within 90 days of the issuance of this Opinion and Order, shall submit a second decision upon remand ("Second Remand Redetermination") that is consistent with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor shall have 30 days from the filing of the Second Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that defendant shall have 15 days from the date of filing of the last comment on which to submit a response to the comments that have been submitted.

Dated: August 11, 2020
New York, New York

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

Slip Op. 20–115

WILMAR TRADING PTE LTD., PT WILMAR BIOENERGI INDONESIA, AND WILMAR OLEO NORTH AMERICA LLC, Plaintiffs, and GOVERNMENT OF THE REPUBLIC OF INDONESIA AND P.T. MUSIM MAS, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 18–00006

[U.S. Department of Commerce's final determination is remanded.]

Dated: August 11, 2020

Devin S. Sikes, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for Plaintiffs. With him on the brief was *Bernd G. Janzen*.

Lynn G. Kamarck, Hughes Hubbard & Reed LLP, of Washington, DC, argued for Consolidated Plaintiff Government of the Republic of Indonesia. With her on the brief were *Matthew R. Nicely* and *Julia K. Eppard*.

Kelly A. Slater, Appleton Luff Pte Ltd, of Washington, DC, argued for Consolidated Plaintiff P.T. Musim Mas. With her on the brief were *Edmund W. Sim*, and *Jay Y. Nee*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Catherine D. Miller*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Myles S. Getlan, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *Jack A. Levy* and *Thomas M. Beline*.

OPINION and ORDER

Eaton, Judge:

This dispute arises from the imposition of countervailing duties on certain shipments of biodiesel fuel[1] from the Republic of Indonesia following the United States Department of Commerce's ("Commerce" or the "Department") determination that the Government of the Republic of Indonesia (the "Government of Indonesia") had provided subsidies to the plaintiff biodiesel producer-exporters. According to Commerce, these subsidies took the form of (1) monetary grants from Indonesia's Biodiesel Subsidy Fund, and (2) goods supplied for less than adequate remuneration resulting from the imposition of two export taxes on biodiesel's main input—crude palm oil. The period of investigation was January 1, 2016, through December 31, 2016. *See*

[1] Generally, the subject biodiesel fuel is made primarily from crude palm oil and is used for the same purposes as petrodiesel made from crude oil. *See, e.g.*, *Biodiesel From Argentina and Indonesia*, 82 Fed. Reg. 18,423, app. I (Dep't Commerce Apr. 19, 2017) (notice of initiation of countervailing duty investigations). For example, both products can be used as fuel for diesel engines.

Biodiesel From the Rep. of Indonesia, 82 Fed. Reg. 53,471 (Dep't Commerce Nov. 16, 2017) ("Final Determination") and accompanying Issues and Dec. Mem. (Nov. 6, 2017), P.R. 240 ("Final IDM").

Plaintiffs Wilmar Trading Pte Ltd., PT Wilmar Bioenergi Indonesia, and Wilmar Oleo North America LLC (collectively, "Wilmar"); and Consolidated Plaintiffs the Government of Indonesia and P.T. Musim Mas ("Musim Mas") challenge Commerce's final countervailing duty determination. Defendant the United States on behalf of Commerce ("Defendant"), and Defendant-Intervenor the National Biodiesel Board Fair Trade Coalition ("Petitioner" or "Defendant-Intervenor"), ask the court to uphold Commerce's Final Determination.

Jurisdiction is found under 19 U.S.C. § 1516a(a)(2)(B)(i) (2012) and 28 U.S.C. § 1581(c) (2012).

For the reasons set forth below, the court holds that two of Commerce's three countervailability findings are supported by substantial evidence and otherwise in accordance with law. First, Commerce did not err in finding that the Government of Indonesia provided countervailable financial contributions in the form of monetary grants to Wilmar and Musim Mas through the Biodiesel Subsidy Fund. Second, Commerce did not err in finding that the Government of Indonesia's 2015 export levy[2] on crude palm oil (the "2015 Export Levy") provided countervailable financial contributions in the form of the provision of goods for less than adequate remuneration.

The court further finds, however, that Commerce's determination that Indonesia's 1994 differential export tariff[3] (the "1994 Export Tariff") on crude palm oil resulted in a financial contribution in the form of goods provided for less than adequate remuneration, is neither supported by substantial evidence nor in accordance with law.

BACKGROUND

Over more than two decades, the Government of Indonesia has taken both direct and indirect measures to advance domestic biofuel production. At issue in this case are (1) direct payments from the Government of Indonesia to Plaintiffs, and (2) two separate export taxes that, for Commerce, restrained the export of crude palm oil, thus increasing the domestic supply of this input and driving down its price so that it was more cheaply available to Plaintiffs.

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[2] For purposes of this case, a levy is a flat tax applied to all export sales of crude palm oil. *See* Government of Indonesia Initial Questionnaire Resp. (June 29, 2017), P.R. 120 ("GOI Initial Quest. Resp.") at 67; GOI Initial Quest. Resp., Ex. Pt. 12 (June 29, 2017), P.R. 132, at Ex. GOI-CPO-5 (Minister of Finance Regulation No. 133/PMK.05/2015).

[3] For purposes of this case, a tariff is a changeable rate tax applied to certain export sales of crude palm oil. *See* GOI Initial Quest. Resp., Ex. Pt. 13 (June 29, 2017), P.R. 133, at Ex. GOI-CPO-15.

Biodiesel costs more than petrodiesel in an open market. In order to market biodiesel at a price competitive with petrodiesel, Indonesia set up a program to pay biodiesel producers an amount roughly equal to the difference in price between the cheap petrodiesel and the expensive biodiesel. Thus, Indonesia subsidized biodiesel so that it could be sold at a price competitive with the price of petrodiesel. Plaintiffs took advantage of this program.

In addition, Indonesia, over the years, enacted export taxes that, according to Commerce, had the effect of keeping crude palm oil in the country, thus increasing its supply and lowering its domestic price. Commerce determined that the export taxes lowered the domestic price of crude palm oil and consequently provided Plaintiffs with crude palm oil "for less than adequate remuneration." *See* 19 U.S.C. § 1677(5)(D), (E)(iv).

I. Direct Payments Through the Biodiesel Subsidy Fund

In 2015, the Government of Indonesia implemented a regulatory scheme intended to support its biodiesel industry. One regulation created the "Biodiesel Subsidy Fund." *See* Government of Indonesia Initial Questionnaire Resp. (June 29, 2017), P.R. 120 ("GOI Initial Quest. Resp.") at 13; GOI Initial Quest. Resp., Ex. Pt. 8 (June 29, 2017), P.R. 128, at Ex. GOIBSF-1) (Presidential Regulation No. 61/2015). The Biodiesel Subsidy Fund (or the "Fund") directly paid biodiesel producers amounts in addition to the sales price they received from their customers. *See* GOI Initial Quest. Resp. at 15. The monies for these Fund payments were wholly provided for by the proceeds of the Government of Indonesia's 2015 Export Levy on crude palm oil. *See* Government of Indonesia Suppl. Questionnaire Resp. (Aug. 7, 2017), P.R. 184 ("GOI Suppl. Quest. Resp.") at 1.

II. Export Restraints on Crude Palm Oil

A. 2015 Export Levy

At the same time the Biodiesel Subsidy Fund was created, the Government of Indonesia enacted the 2015 Export Levy, at $50 per metric ton on all exports of crude palm oil. *See* GOI Initial Quest. Resp. at 67; GOI Initial Quest. Resp., Ex. Pt. 12 (June 29, 2017), P.R. 132, at Ex. GOI-CPO-5 (Minister of Finance Regulation No. 133/PMK.05/2015). This levy is collected from producers on their export sales of crude palm oil. The levies paid are then deposited into the Fund. Crude palm oil is a major input for biodiesel. *See* Preliminary Decision Mem. (Aug. 21, 2017), P.R. 199 ("Prelim. Dec. Mem.") at 10

("[Crude palm oil] is the key feedstock from which biodiesel is manufactured in the Indonesian biodiesel industry."); GOI Initial Quest. Resp. at 65–66 ("[Crude palm oil] can be used for . . . non-food industries (fatty acids, fatty alcohol, glycerin, biofuels)."). The Government of Indonesia represented that "[p]roceeds from this export levy are specifically earmarked for the Biodiesel Subsidy Fund . . . [and are] the Fund's exclusive source of funding." GOI Initial Quest. Resp. at 67.

B. 1994 Differential Export Tariff

Prior to the 2015 Export Levy, the Government of Indonesia had implemented another tax on crude palm oil: the 1994 Differential Export Tariff. *See, e.g.*, GOI Initial Quest. Resp., Ex. Pt. 11 (June 29, 2017), P.R. 131, at Ex. GOI-CPO-3 (Minister of Finance Regulation No. 136/PMK.010/2015); GOI Initial Quest. Resp., Ex. Pt. 14 (June 29, 2017), P.R. 134, at Ex. GOICPO-23 (Minister of Finance Regulation No. 140/PMK.010/2016 app. I). Under the 1994 Export Tariff's schedules, a tariff is imposed on exports of crude palm oil when the export price of crude palm oil exceeds $750 per metric ton. See GOI Initial Quest. Resp., Ex. Pt. 13 (June 29, 2017), P.R. 133, at Ex. GOI-CPO-15. No tariff is collected unless the threshold of $750 per metric ton is reached. *See* GOI Initial Quest. Resp. at 66; GOI Initial Quest. Resp., Ex. Pt. 13, at Ex. GOI-CPO-15. The export price of crude palm oil changes from year to year, or even month to month.

III. Commerce's Investigation

On March 23, 2017, Petitioner and Defendant-Intervenor National Biodiesel Board Fair Trade Coalition, a U.S. trade association comprised of domestic producers of biodiesel,[4] filed a countervailing duty petition with the Department and the United States International Trade Commission ("ITC"), covering imports of biodiesel from Indonesia. *See* Prelim. Dec. Mem. at 1; *Biodiesel From Argentina and Indonesia*, 82 Fed. Reg. 22,155 (Int'l Trade Comm'n May 12, 2017) ("ITC Prelim. Determination"); *Biodiesel from Argentina and Indonesia*, Inv. Nos. 701-TA-571572, 731-TA-1347–1348, USITC Pub. 4690 (May 2017) (Preliminary). According to Petitioner, some of the cheap, subsidized biodiesel entered the U.S. market, and injured the domestic U.S. renewable fuel industry. *See* ITC Prelim. Determination, 82 Fed. Reg. at 22,155 ("[Before the ITC, Petitioner alleged] that an

[4] The majority of American biodiesel is ethanol (corn-based). *See, e.g.*, *U.S. Bionergy Statistics*, U.S. DEP'T AGRIC. (last updated Jul. 21, 2020), https://www.ers.usda.gov/data-products/us-bioenergy-statistics/ ("Ethanol, made mostly from corn starch from kernels, is by far the most significant biofuel in the United States.").

industry in the United States [was] materially injured or threatened with material injury by reason of [less than fair value] and subsidized imports of biodiesel from . . . Indonesia.").

On March 29, 2017, the ITC commenced its material injury investigation. *See Biodiesel From Argentina and Indonesia*, 82 Fed. Reg. 15,541 (Int'l Trade Comm'n Mar. 29, 2017).[5]

On April 19, 2017, Commerce published the notice of initiation of its countervailing duty investigation. *See Biodiesel From Argentina and Indonesia: Initiation of Countervailing Duty Investigations*, 82 Fed. Reg. 18,423 (Dep't Commerce Apr. 19, 2017).

Wilmar and Musim Mas were selected as mandatory respondents[6] because they were the "two largest publicly identifiable producers/exporters, by volume, of subject merchandise [*i.e.*, biodiesel] exported to the United States from Indonesia during the [period of investigation]." Prelim. Dec. Mem. at 2; *see also* 19 U.S.C. § 1677f-1(e)(2)(A)(ii).

On November 6, 2017, Commerce issued its Final Determination. There, Commerce found that the Biodiesel Subsidy Fund payments provided Plaintiffs with countervailable subsidies because they were financial contributions, by a government, that benefitted Wilmar and Musim Mas in the amount of each Fund payment. *See* Final IDM at 7 (citation omitted). The Department also found the payments to be specific to the biodiesel industry.[7] *See* Prelim. Dec. Mem. at 10. Although the payments were only available in connection with domestic sales, the Department also found that the subsidies stemming from the Fund payments were attributable to all of Wilmar's and Musim Mas' biodiesel sales, including their exports. *See* Final IDM at 11.

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[5] On May 8, 2017, the ITC made its preliminary affirmative material injury determination. *See* ITC Prelim. Determination, 82 Fed. Reg. at 22,155; *see also Biodiesel from Argentina and Indonesia*, Inv. No. 701-TA-571–572, 731-TA-1347–1348, USITC Pub. 4690 (May 2017) (Preliminary) at 31 (footnotes omitted) ("Because the domestic industry, despite having the ability to increase its production and shipments, was unable to increase its shipments commensurately with growing demand, it lost revenues that it otherwise would have obtained. These lost revenues were reflected in its poor and declining gross and operating income. We accordingly find that the significant volume of cumulated subject imports, which gained market share at the expense of the domestic industry through significant underselling, had a significant impact on the domestic industry.").

The ITC issued its final affirmative determination of material injury after Commerce's Final Determination in this case. *See Biodiesel From Argentina And Indonesia*, Inv. No. 701-TA571–572, USITC Pub. 4748 (Dec. 2017) (Final).

[6] In general, Commerce determines "an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise." 19 U.S.C. § 1677f-1(e)(1). Where, however, the "large number of exporters or producers involved in the investigation" makes it impracticable for Commerce to calculate an individual rate for each one, Commerce may limit individual examination to mandatory respondents, *e.g.*, "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country." *Id.* § 1677f-1(e)(2)(A)(ii).

[7] Plaintiffs do not challenge Commerce's subsidy determination with respect to the Fund payments on the issue of specificity.

Commerce further found that both the 2015 Export Levy and the 1994 Export Tariff resulted in the provision of countervailable subsidies in the form of goods provided for less than adequate remuneration, because they caused Indonesian crude palm oil (the primary biodiesel input) to remain within the country, available at below-international market prices to Wilmar and Musim Mas. *See* Final IDM at 16.

The Department calculated individual subsidy rates for Wilmar and Musim Mas of 34.45 percent and 64.73 percent, respectively. The All-Others rate was 38.95 percent.[8] *See* Final Determination, 82 Fed. Reg. at 53,472. Of the individual rates, for Musim Mas, 51.97 percent ad valorem was attributed to the Biodiesel Subsidy Fund; 12.74 percent ad valorem was attributed to the "Provision of Palm Oil Feedstock for Less Than Adequate Remuneration," which included both the 2015 Export Levy and the 1994 Export Tariff; and 0.02 percent ad valorem was attributed to another, uncontested subsidy. *See* Final IDM at 4–5. For Wilmar, the percentages were, respectively: 24.92; 9.47; and 0.06. *See* Final IDM at 4–5.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

"The Tariff Act provides that before Commerce imposes a countervailing duty on merchandise imported into the United States, it must determine that a government is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of that merchandise." *Delverde, SrL v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000) (citing 19 U.S.C. § 1671(a)(1) (1994)).

A countervailable subsidy exists where "an authority [a government or governmental actor] . . . provides a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). A financial contribution may consist of a "direct transfer of funds," such as a grant. *Id.* § 1677(5)(D)(i). It may also consist of goods and services, when they "are provided for less than adequate remuneration." *Id*. § 1677(5)(D), (E)(iv). Although normally the government provides such a contribution directly, a contribution may exist where

[8] When only mandatory respondents are examined, Commerce uses their rates to determine an "all-others rate for all exporters and producers not individually investigated and for new exporters and producers." *See* 19 U.S.C. § 1671d(c)(1)(B)(i)(I).

a government authority "entrusts or directs a private entity to make [it]," so long as "providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments." *Id*. § 1677(5)(B)(iii).

Commerce measures the benefit according to the type of financial contribution provided. *See id.* § 1677(5)(E). When the subsidy takes the form of a grant, the benefit is measured "in the amount of the grant." *See* 19 C.F.R. § 351.504(a) (2019). When goods are provided for less than adequate remuneration, Commerce measures the benefit using the three-tiered hierarchy of "benchmark" prices against which to test the actual remuneration provided in exchange for the goods. *See* 19 C.F.R. § 351.511(a)(2)(i)-(iii) (setting the benchmark preference for (i) "a market-determined price for the good or service resulting from actual transactions in the country in question," then, if (i) is not available, (ii) "a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question," and finally (iii) "measur[ing] the adequacy of remuneration by assessing whether the government price is consistent with market principles.").

Further, a countervailable subsidy—either direct or indirect—must meet the requirement of specificity under the subpart of § 1677(5A) that corresponds with the subsidy's type. *See* 19 U.S.C. § 1677(5)(A), (5A). Domestic subsidies are *de jure* specific "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an *enterprise or industry*." *Id.*§ 1677(5A)(D)(i) (emphasis added). Certain domestic subsidies may be *de facto* specific if "[t]he actual recipients of the subsidy, *whether considered on an enterprise or industry basis, are limited in number*." *Id.* § 1677(5A)(D)(iii)(I) (emphasis added).

Once Commerce determines that a countervailable subsidy exists, it imposes a countervailing duty on the subject merchandise, "equal to the amount of the net countervailable subsidy." *Id.* § 1671(a). Pursuant to its regulations, Commerce calculates "an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the [Department] attributes the subsidy." 19 C.F.R. § 351.525(a). The resulting rate (or percentage) is added with any other ad valorem rate to constitute a respondent's total individual subsidy rate. *See* 19 U.S.C. § 1671(a).

Finally, by finding attribution, Commerce determines which sales were affected by the otherwise countervailable subsidies, and thus which sales will serve as the basis for the ad valorem subsidy rate.

Attribution means that, if the Department finds that a subsidy is "tied to a particular market," it will "*attribute* the subsidy only to products sold by the [respondent] to that market." 19 C.F.R. § 351.525(b)(4) (emphasis added). On the other hand, if a subsidy is "tied to a particular product," it will be attributable to all sales of that product. *See id.* § 351.525(b)(5)(i) ("If a subsidy is tied to the production or sale of a particular product, [Commerce] will attribute the subsidy only to that product.").

DISCUSSION

I. Commerce Reasonably Determined that the Biodiesel Subsidy Fund Payments to Wilmar and Musim Mas Were Countervailable

By creating the Biodiesel Subsidy Fund, Indonesia hoped to encourage the development of its biodiesel industry by establishing a program through which designated buyers (both state-owned and privately owned) would purchase Plaintiffs' biodiesel at the lower, petrodiesel price. Eligibility for payments from the Fund resulted from the sale of biodiesel to designated domestic purchasers such as Pertamina (Indonesia's state-owned oil and gas company) and Corporindo (a private Indonesian fuel blender). *See* GOI Initial Quest. Resp. at 13; Prelim. Dec. Mem. at 9. Plaintiffs would first make a sale of biodiesel to Pertamina or Corporindo at the lower, petrodiesel price. Then, Plaintiffs would apply for and receive a payment from the Fund, equal to the difference between the international petrodiesel price and the higher, domestic biodiesel price (both as adjusted by the Government of Indonesia).[9] Plaintiffs would thus receive, in total, an amount roughly equal to the domestic "market price" for biodiesel. *See* GOI Initial Quest. Resp. at 13–15.

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[9] In its initial questionnaire response, the Government of Indonesia explained how "market" prices for biodiesel and petrodiesel were calculated:

> [Pursuant to regulation,] the Directorate General for Oil and Gas determines the market price index for [petro]diesel oil, usually every three months. The Directorate General of New Renewable Energy and Energy Conversion . . . determines the market price index for biodiesel on a monthly basis. The reference price for [petro]diesel is determined by referring to the price reported in the Means of Platts Singapore (MOPS) and the production cost of [petro]diesel in Indonesia[,] while the reference price for biodiesel is determined based on the price for [crude palm oil] plus the operation cost of biodiesel. MOPS is the average of Singapore-based oil prices published by Platts, which is a global energy, petrochemicals, metals, and agriculture information provider. Operation costs consist of methanol, power, and labor, for example.

GOI Initial Quest. Resp. at 13–14. In other words, the Government of Indonesia's energy agencies calculate a "market price index" on a monthly or tri-monthly basis to determine the "market price" for petrodiesel and biodiesel.

The stated purpose of the Fund is "to cover [that] difference" between the price of biodiesel and petrodiesel in support of "provision and utilization of biodiesel." *See* GOI Initial Quest. Resp. at 15. Thus, Indonesia hoped to foster increased biodiesel production by allowing Wilmar and Musim Mas to receive a competitive price for their biodiesel, even though their purchasers paid the reduced petrodiesel price.

Whatever the Government of Indonesia's claimed purpose, Commerce found the payments from the Fund to be countervailable subsidies. Plaintiffs object to Commerce's analysis of the Biodiesel Subsidy Fund in three respects: first, they maintain that Commerce erred by finding that the Fund payments were financial contributions in the form of grants to Wilmar and Musim Mas; second, they argue that, even if Commerce's grant determination is correct, the Department erred in its benefit determination, both in measuring the benefit, and by refusing to allow an offset to any payment from the Fund equal to the amount they paid in. Finally, Plaintiffs contest Commerce's decision to attribute the Fund payments to *all* of Wilmar's and Musim Mas' biodiesel sales during the period of investigation.

The first two issues concern distinct elements of Commerce's countervailability analysis: the existence of financial contributions from the Biodiesel Subsidy Fund to Plaintiffs, and the amount of potential benefit conferred by payments from the Fund upon Wilmar and Musim Mas. The attribution issue concerns Commerce's calculation of countervailing subsidy rates for Wilmar and Musim Mas.

A. Commerce Correctly Classified the Biodiesel Subsidy Fund Payments as Financial Contributions in the Form of "Grants"

The statute provides that a financial contribution includes the making of grants. *See* 19 U.S.C. § 1677(5)(D)(i) ("The term 'financial contribution' means . . . the direct transfer of funds, such as grants . . . ."). This Court has interpreted "grant" in accordance with the ordinary meaning of the word: that is, a grant is a "gift-like transfer." *See Gov't of Sri Lanka v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1373, 1383 (2018). The payments to biodiesel producers Wilmar and Musim Mas were made by the Government of Indonesia, through a program that required the producers to submit applications for approval and payment following the sales of their biodiesel at the petrodiesel price. *See* Final IDM at 7. As noted, these Fund payments were designed to bring the total amount received by Plaintiffs up to the domestic market price for biodiesel. The payment application

would inform the Government of Indonesia of the sales price for their biodiesel. *See* GOI Initial Quest. Resp. at 24. The Government, through the Fund, would then pay to Wilmar and Musim Mas roughly the difference between the payment they had received and the domestic market price for biodiesel. The Government of Indonesia received nothing in exchange for the payments from the Fund. *See* Final IDM at 7. Based on these facts, Commerce determined that the payments from the Fund were grants.

During the investigation and before the court, Plaintiffs have argued that the Biodiesel Subsidy Fund payments were not grants, but were instead part of the sales price for their biodiesel, because the amount they received was the difference between the market price for biodiesel and that for petrodiesel. *See* Pls.' & Consol. Pls.' Mot. J. Agency R., ECF No. 38 ("Pls.' Br.") 17–18 ("The record unequivocally shows that [Fund] payments constitute part of the full payment for purchases of biodiesel. . . . [T]he [Government of Indonesia] makes the payments in return for biodiesel sold [to Pertamina and Corporindo]. . . . Commerce *explicitly* found that Wilmar and Musim Mas treat the payments as 'revenue' for their respective sales of biodiesel [to those two companies] . . . , a finding that squarely contradicts Commerce's assertion that the [Government of Indonesia] received nothing in return for the payments.").

This argument cannot be credited. While the amount of the grant may have been calculated to bring the amount received up to the constructed market value of Plaintiffs' product, the Government of Indonesia bought nothing and received nothing for the Fund's money other than the possibility of achieving the governmental goal of fostering a domestic biodiesel industry in Indonesia.[10] Wilmar's and Musim Mas' classification of Fund payments as revenue is not dispositive, because, to obtain funding from the Biodiesel Subsidy Fund, they did not contract with the Government of Indonesia to sell biodiesel or anything else. Therefore, Commerce was reasonable in its

[10] Plaintiffs argued before the agency that, because one of the energy companies (Pertamina) that purchased biodiesel is state-owned, the Government of Indonesia effectually purchased biodiesel from Wilmar and Musim Mas. *See* Final IDM at 9. While it is true that Pertamina is state-owned, Corporindo is not. Thus, the Department found that "[t]he [Fund] payments are made regardless of the [Government of Indonesia's] receipt of the goods in question, and could – in theory – be made without any participation of Pertamina." Final IDM at 9. In other words, although Pertamina was a state-owned company, it was not the sole purchaser of the biodiesel for which Wilmar and Musim Mas received Fund payments. *See* Final IDM at 9 ("[The argument] that, because Pertamina is a state-owned company, it 'might be . . . purchasing biodiesel on the [Government of Indonesia's] behalf' . . . cannot be made with regard to Corporindo[, the private company that also receive[d] Fund payments]."). Therefore, even if the court were to find that Pertamina's purchases counted as purchases by the Government of Indonesia, the Biodiesel Subsidy Fund payments would still constitute grants because Pertamina's involvement was not required.

finding that these Fund transfers, clearly distinct from the price paid by the actual purchasers, were financial contributions in the form of grants.

In other words, the Fund's payment system provided contributions to Wilmar and Musim Mas. The Fund was created to provide a subsidy to biodiesel producers as a way of supporting the biodiesel industry. The Government of Indonesia made payments from the Fund, but received nothing in return. Therefore, Commerce's finding that the Fund payments were countervailable financial contributions to Wilmar and Musim Mas is supported by substantial evidence.

B. Commerce Reasonably Measured the Benefit of the Grants

1. Commerce Relied on the Appropriate Regulatory Standard for Measuring Benefit

After finding that the Government of Indonesia had made financial contributions in the form of grants to Wilmar and Musim Mas, Commerce measured the amount of benefit Wilmar and Musim Mas received from those grants. *See* 19 U.S.C. § 1677(5)(E) (outlining the rules for measuring benefit). Commerce's regulations provide that, where the countervailable subsidy takes the form of a grant, "a benefit exists in the amount of the grant." 19 C.F.R. § 351.504(a).

Plaintiffs urge the court to find that Commerce should have measured the benefit, if any, under "either the adequacy of remuneration standard in 19 C.F.R. § 351.511,[11] or the 'receives more revenues than it otherwise would earn' standard in 19 C.F.R. § 351.503.[12]" Pls.' Br. 22, 24. Once again, Plaintiffs try to make their case by claiming that the payments were part of the price paid to Wilmar and Musim Mas in exchange for their biodiesel, and, therefore, a benefit analysis should analyze the payments from the Fund as part of the total biodiesel price.[13] The gist of Plaintiffs' argument is that Commerce

[11] When a subsidy takes the form of the provision of goods, the benefit is generally found to exist "to the extent that such goods or services are provided for less than adequate remuneration." 19 C.F.R. § 351.511(a)(1).

[12] For otherwise uncategorized subsidies, Commerce "normally will consider a benefit to be conferred where a firm pays less for its inputs (e.g., money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn." 19 C.F.R. § 351.503(b)(1).

[13] As support for their position, Plaintiffs cite *Government of Sri Lanka*. Pls.' Br. 19 (citing *Gov't of Sri Lanka*, 42 CIT at __, 308 F. Supp. 3d at 1383) ("The Court's recent decision in *Government of Sri Lanka* confirms that the [Fund] payments do not meet the [gift-like transfer] definition of a 'grant,' whether in the financial contribution statute or in Commerce's regulations."). The *Government of Sri Lanka* Court, however, found that the alleged financial contributions in that case were "interest-free repayment" of debts owed by the Sri Lankan government to the respondents, that were "unlike a grant, loan, or equity infusion."

should have treated the Fund payments as part of the payment for biodiesel sales, and then determined whether the total amount received from the purchasers, and the Fund, was more or less than an "adequate" price to pay for biodiesel.

Despite Plaintiffs' arguments, since the court has sustained Commerce's finding that the financial contributions here were in the form of grants, the standard for measuring the benefit from those financial contributions is the standard in § 351.504(a). *See* 19 C.F.R. § 351.504(a) ("In the case of a grant, a benefit exists in the amount of the grant."). Commerce, therefore, reasonably determined that the grants benefitted Wilmar and Musim Mas in an amount equal to the amount of the grants, which is to say, in the amount of the Fund transfers.

2. Plaintiffs Were Not Entitled to an Offset Based on Their Levy Payments

Both Wilmar and Musim Mas exported crude palm oil, and consequently paid levies under the 2015 Export Levy. These levies were then deposited into the Fund. *See* Final IDM at 13. Based on these payments, Plaintiffs insist that they are entitled to an offset to the amount of the benefit they received equal to their contributions to the Fund. In their view, Commerce should have deducted their Fund contributions when measuring the benefit received by Wilmar and Musim Mas. Thus, Plaintiffs would have the benefit reduced by an amount equal to the total amount each contributed to the Fund under the 2015 Export Levy. *See* Pls.' Br. 25.

The Department declined to make this offset because it found that Plaintiffs' payments into the Fund, collected under the 2015 Export Levy, were unrelated to the amount of the grants subsequently paid from the Fund. *See* Final IDM at 13 ("[A] company does not need to make any payments into the [Fund] in order to be eligible for [Fund] payments, and a company that makes payments into the [Fund] through [crude palm oil] export levies is not automatically, by virtue of such payments, eligible for [Fund] payments.").

While both Wilmar and Musim Mas paid into the Fund, there is no necessary relationship between the source or the amount of the levies collected and eligibility to receive payments from the Fund or the amount of the payments. That is, a company need not pay into the

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See Gov't of Sri Lanka, 42 CIT at __, 308 F. Supp. 3d at 1381. Here, the payments from the Government of Indonesia were not loans or repayments of loans, because the amounts paid into the Fund and the amounts paid out to Wilmar and Musim Mas bore no relation to each other.

Fund in order to draw payments from it. In order to be eligible for payments from the Biodiesel Subsidy Fund, Plaintiffs need only make domestic sales of biodiesel and complete the application process dictated by Indonesian regulation. *See* Final IDM at 13; *see also* GOI Initial Quest. Resp. at 15 (outlining application process). So, had Wilmar and Musim Mas made no payments into the Fund, they still would have been entitled to receive grants from it because they sold their biodiesel at the petrodiesel price to companies designated by the Government of Indonesia.

Moreover, despite Plaintiffs' claim to an offset, it is worth noting that there is no indication in the record that the Government of Indonesia "specifically intended" to offset the levy payments made by exporters of crude palm oil, by means of the Biodiesel Subsidy Fund or in any other manner. *See* 19 U.S.C. § 1677(6)(C) (emphasis added) ("For the purpose of determining the net countervailable subsidy, [Commerce] may subtract from the gross countervailable subsidy the amount of . . . export taxes, duties, or other charges levied on the export of merchandise to the United States *specifically intended to offset the countervailable subsidy received*."). Therefore, because there is no legal or factual connection between the amounts Plaintiffs paid into the Fund and the amounts they received, Commerce reasonably declined to offset Wilmar's and Musim Mas' payments into the Fund against the amounts received from the Fund.

C. Commerce Reasonably Attributed the Biodiesel Subsidy Fund Grants to All of Plaintiffs' Sales of Biodiesel

Commerce calculates "an ad valorem [per program] subsidy rate by dividing the amount of the benefit . . . by the sales value . . . of the product or products to which the [Department] attributes the subsidy." 19 C.F.R. § 351.525(a). In other words, before calculating an ad valorem subsidy rate, Commerce must address the issue of attribution by determining which, if any, of respondents' U.S. sales were targeted by the subsidies.

In its Final Determination, Commerce found that the Biodiesel Subsidy Fund provided grants that were tied (*i.e.*, attributed) to all sales of biodiesel by Wilmar and Musim Mas, not just those made in the Indonesian market. *See* Final IDM at 11. Thus, Commerce found that the Fund grants, though paid only in connection with domestic Indonesian sales of biodiesel, also subsidized Wilmar's and Musim Mas' *U.S. sales* of biodiesel. *See* Final IDM at 11 (stating that the Fund "is intended to promote the production of biodiesel" without any limitation on how its payments are used). Thus, although the grants

resulted from domestic sales, and the amount of the grant was determined by using domestic sales, the grant money served to subsidize all of Plaintiffs' biodiesel product. For Commerce, the Government of Indonesia "inten[ded] to ensure the existence of the biodiesel industry as a whole," including the U.S. sales segment. Final IDM at 11.

Plaintiffs' U.S. sales were under investigation in this case, and, since Commerce found them to be subsidized by the Fund grants, these sales formed the basis for an ad valorem subsidy rate for the Biodiesel Subsidy Fund payments. *See* 19 C.F.R. § 351.525(a). Commerce calculated Wilmar's and Musim Mas' ad valorem subsidy rates for the Fund grants by dividing the total amount of the Fund payments the companies received by the sales value of all their sales of biodiesel during the period of investigation. *See id.*; *see also id.* § 351.504(a) ("In the case of a grant, a benefit exists in the amount of the grant.").

Plaintiffs object that Commerce unlawfully attributed the grants "to all biodiesel sales," including exports to the United States, "rather than attribut[ing] those alleged subsidies only to Wilmar's and Musim Mas's sales of biodiesel in Indonesia." Pls.' Br. 10, 13. In Plaintiffs' view, the ad valorem subsidy rate for the Fund payments should be zero, because neither Wilmar nor Musim Mas received any Fund payments for sales of biodiesel in the U.S. market. According to Plaintiffs, the Biodiesel Subsidy Fund payments were only tied to biodiesel transactions that occurred in Indonesia. *See* Pls.' Br. 11 ("Substantial record evidence demonstrates that the [Fund] payments were tied only to one market—domestic biodiesel sales in Indonesia [because] Commerce . . . confirmed that the payments are limited [in availability] to domestic biodiesel sales in Indonesia.").

Commerce's determination is sustained, however, because it reasonably found that the purpose of the Fund was to subsidize biodiesel *as a product*, whether sold domestically or exported, and that there were no restrictions on how the grant money would be used. *See* Final IDM at 11 (citing 19 C.F.R. § 351.525(b)(5)) ("The [Government of Indonesia's] application for [companies to seek payments] demonstrates only a concern with the commitment, capacity, and quality of the producers of biodiesel. [It does not favor] producers that target the domestic market over the export market but, rather, the [Fund] is intended to promote the production of biodiesel. Therefore, we are continuing to tie [Fund] payments to all biodiesel sales."). This Court has recognized that "Commerce, as a matter of practice, determines whether a subsidy is tied by evaluating the purpose of the subsidy

based on information available at the time of bestowal; Commerce does not trace how the subsidy is actually used by recipients." *Jindal Poly Films Ltd. of India v. United States*, 44 CIT __, __, 439 F. Supp. 3d 1354, 1360 (2020) (citations omitted). In accordance with its practice, Commerce thus concluded that the Government of Indonesia was subsidizing the production of biodiesel whether or not it stayed in Indonesia or found its way into the world market. The subsidy stayed with the product.

Commerce is right that the Fund subsidies should be attributed to all of Wilmar's and Musim Mas' sales of biodiesel (*i.e.*, in Indonesia and the United States) during the period of investigation. *See* 19 C.F.R. § 351.525(b)(5)(i) ("If a subsidy is tied to the production or sale of a particular product, [Commerce] will attribute the subsidy only to that product."). Indeed, the Indonesian regulation that created the Fund described the Fund's purpose as "ensur[ing] the sustainable development of oil palm plantation . . . [and] . . . provision and utilization of biodiesel type of biofuel." *See* GOI Initial Quest. Resp., Ex. Pt. 8, at Ex. GOI-BSF-1; *see also* Final IDM at 11 ("[T]he configuration of the [Fund] suggests part of [its] intent is to ensure the existence of the biodiesel industry as a whole, not just the domestic sales segment."). The regulation says nothing about providing cheap domestic biodiesel. The provision of cheap domestic biodiesel, then, is just a means to an end—sustaining Indonesia's biodiesel industry. Thus, Commerce found that even though the Fund payments were made only upon domestic sales of the biodiesel, the purpose of the payments was to subsidize biodiesel in both the domestic and U.S. markets.

The court agrees that "the [Fund] is intended to promote the production of biodiesel" without regard to whether producers such as Wilmar and Musim Mas sold their biodiesel domestically or internationally, and that it resulted in lowering the price of Indonesian biodiesel in the U.S. market. *See* Final IDM at 11. Therefore, Commerce's decision to attribute the benefit of the Fund payments to all of Wilmar's and Musim Mas' exports of biodiesel is sustained.

II. Commerce's Determination That Crude Palm Oil, a Biodiesel Input, Was Being Provided to Wilmar and Musim Mas for Less than Adequate Remuneration Was Reasonable Only with Respect to the 2015 Export Levy

In addition to its finding that the payments from the Biodiesel Subsidy Fund constituted grants, Commerce also found that the Government of Indonesia made countervailable financial contributions to Plaintiffs by providing them with goods for less than adequate remuneration. Specifically, the Department found that the

Government of Indonesia had used (1) the 2015 Export Levy and (2) the 1994 Export Tariff to artificially lower crude palm oil's domestic price. The court finds that, while Commerce's determination is reasonable as to the 2015 Export Levy, its finding as to the 1994 Export Tariff is not supported by substantial evidence or in accordance with law.

Under the statute, a financial contribution may take the form of goods or services. *See* 19 U.S.C. § 1677(5)(D). In such cases, the additional requirement of benefit conferred is met "if such goods or services are provided for less than adequate remuneration." *Id.* § 1677(5)(E)(iv). Further, a financial contribution of any kind may exist where a government authority "entrusts or directs a private entity to make a financial contribution," so long as "providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments." 19 U.S.C. § 1677(5)(B)(iii).

Here, Commerce determined that, through the use of the 2015 Export Levy on crude palm oil and the 1994 Export Tariff, the Government of Indonesia kept crude palm oil in Indonesia, increasing the domestic supply, and thus lowering its price in the Indonesian market.

A. The 2015 Export Levy Resulted in Goods Provided to Wilmar and Musim Mas for Less than Adequate Remuneration

Plaintiffs challenge Commerce's subsidy determination on three grounds. First, Plaintiffs challenge the Department's finding that the Government of Indonesia entrusted and directed private producers of crude palm oil to provide their product to Wilmar and Musim Mas for less than adequate remuneration. Next, Plaintiffs challenge the Department's measurement of the benefit Plaintiffs allegedly received: that is, Plaintiffs disagree with the benchmark that Commerce established for measuring the adequacy of remuneration received for crude palm oil. Finally, Plaintiffs argue that the alleged subsidy was not sufficiently specific.

The court sustains all three of Commerce's findings in support of its subsidy determination with respect to the 2015 Export Levy.

1. The Government of Indonesia Entrusted and Directed Private Producers to Provide Wilmar and Musim Mas with Cheap Crude Palm Oil

Under the statute, a countervailable financial contribution may be made indirectly where a government authority "entrusts or directs a

private entity to make a financial contribution," so long as "providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments." 19 U.S.C. § 1677(5)(B)(iii).

The Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA")[14] provides additional guidance for this type of financial contribution:

> Commerce has found a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) [1] a formal, *enforceable measure* [2] which *directly led to* [3] a discernible benefit being provided to the industry under investigation. In cases where the government acts through a private party . . . the Administration intends that the law continue to be administered on a case-by-case basis....

Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 926 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4239 (emphasis added). The SAA acknowledges that "[t]he specific manner in which the government act[s] through the private party to [make a financial contribution resulting in a benefit] varie[s] widely." *Id.* (emphasis added).

i. Private Crude Palm Oil Producers Provided Cheap Crude Palm Oil for Less than Adequate Remuneration to Wilmar and Musim Mas

Commerce found that the 2015 Export Levy on the Indonesian crude palm oil market resulted in indirect financial contributions to Wilmar and Musim Mas in the form of goods provided for less than adequate remuneration. Specifically, the Department stated that "export restraints can amount to government entrustment or direction of private entities to provide financial contributions," and that the 2015 Export Levy "encourage[d] . . . private producers to sell their products to Indonesian biodiesel producers[, thus keeping] domestic prices of [crude palm oil] below world prices." Final IDM at 16.

Plaintiffs insist that, for the 2015 Export Levy to constitute a financial contribution qualifying as a subsidy, Commerce was required to find that the 2015 Export Levy *compelled* Indonesian crude

[14] The SAA is authoritative. *See* 19 U.S.C. § 3512(d) ("The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

palm oil producers to sell their product at low prices to Wilmar and Musim Mas. *See* Pls.' Br. 32 (emphasis added) ("The [levy] fail[s] to meet the [entrustment and direction] test. The [levy does] not *affirmatively obligate* private parties to supply [crude palm oil] to Indonesian biodiesel producers at all, and certainly do not require them to provide [crude palm oil] at any particular price."). Plaintiffs also cite the SAA's statement that "Commerce has found a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) a formal, *enforceable measure* which *directly led to* a discernible benefit being provided to the industry under investigation." *See* SAA at 926, *as reprinted in* 1994 U.S.C.C.A.N. at 4239.

Finally, Plaintiffs argue that Commerce could not reasonably have made a subsidy determination with respect to the 2015 Export Levy because "[p]rivate parties were free to export [crude palm oil] from Indonesia and, in fact, more than half of the [crude palm oil] that they produced during the [period of investigation was exported from] Indonesia [to] foreign markets." Pls.' Br. 34 (citing GOI Initial Quest. Resp. at 62–63). For Plaintiffs, these foreign sales indicate that the 2015 Export Levy did not deter crude palm oil exports, and that the 2015 Export Levy did not keep crude palm oil in Indonesia, thus increasing the supply and lowering its domestic price.

On behalf of Commerce, Defendant argues that Plaintiffs assert an overly stringent standard by requiring Commerce to find evidence that the Government of Indonesia "affirmatively obligate[d]" crude palm oil producers to sell their product at reduced prices. Pls.' Br. 32; *see* Def.'s Resp. Pls.' & Consol. Pls.' Mot. J. Agency R., ECF No. 52 ("Def.'s Br.") 38 ("[T]he SAA makes clear that the 'entrusts or directs' standard should be interpreted broadly, so that 'indirect provision' of a subsidy does not become a 'loophole' for unfairly traded imports to injure a United States industry."). Likewise, in its Final Determination, Commerce rejected Plaintiffs' notion that, in order to satisfy the statute and the SAA, the 2015 Export Levy must compel the sale of crude palm oil in the domestic market at below-market rates. Rather, the Department believes that it only needed to confirm that, following the imposition of the 2015 Export Levy, prices of crude palm oil fell and Wilmar and Musim Mas were able to buy cheap crude palm oil. Based on more than two years of data comparing Indonesian prices for crude palm oil to world prices, Commerce determined that the 2015 Export Levy "represented a [Government of Indonesia] policy supporting the respondents in the ultimate and indirect form of

cheaper [crude palm oil] prices." Final IDM at 17 (emphasis added) ("From October 2014 through June 2015, after deducting freight expenses, the price of [crude palm oil] was always higher in Indonesia than it was on the world market. *In July 2015, when the $50/MT export levy was implemented, prices of [crude palm oil] in Indonesia dropped well below world market prices for 15 out of the next 18 months.*").

As additional evidence, the Department noted that Indonesia has conceded that its purpose for imposing the 2015 Export Levy was to increase the domestic supply and lower domestic prices. In an explanation to the World Trade Organization, the Government of Indonesia stated:

> The Government is making further use of export taxes [including a levy on crude palm oil]. . . . According to the authorities, export taxes on primary commodities *can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries*. In this way, *export taxes provide an incentive for the development of domestic manufacturing* or processing industries with higher value-added exports.

Petition Exs., Vol. V.15 (Mar. 23, 2017), P.R. 20, at Ex. CVD-IND-28 (WTO Trade Policy Review of Indonesia) (emphasis added).

Further, Commerce's subsidy determination as to the 2015 Export Levy relied on language in the Indonesian regulation which created the Fund and made the levy its source of funding. *See* Final IDM at 18; *see also* GOI Initial Quest. Resp., Ex. Pt. 8, at Ex. GOI-BSF-1 ("[The Fund's purpose is] to ensure the sustainable development of oil palm plantation . . . [for among other things, the] [p]rovision and utilization of biodiesel type of biofuels."); GOI Suppl. Quest. Resp. at 2 ("The export levies are primarily used to fund the [Biodiesel Subsidy Fund]."). All in all, Commerce was satisfied that the Government of Indonesia's 2015 Export Levy fulfilled the intentions declared to the WTO, and that the 2015 Export Levy "ensure[s] that . . . private [crude palm oil] producers play [the] role [of government] instruments to guarantee supply of [crude palm oil] to biodiesel producers." Final IDM at 17.

With respect to Plaintiffs' argument that the 2015 Export Levy failed to create the necessary market conditions for an indirect subsidy because exports from Indonesia continued, Commerce justified its finding as follows:

> The fact that the [Government of Indonesia] attempts to balance [its objective of providing cheaper crude palm oil to Wilmar and Musim Mas] with competing objectives such as ensuring continued revenue from [crude palm oil] exports does not negate the conclusion . . . that the policy has, in fact, succeeded in causing domestic sales and lowering domestic prices. The [Government of Indonesia] has simply struck a balance between different aspects of its economy and different development objectives by choosing a "softer" restraint over a full-out embargo.

Final IDM at 19. In sum, for Commerce, the Government of Indonesia "use[d] private [crude palm oil] producers as its instruments to guarantee supply of [crude palm oil] to biodiesel producers." Final IDM at 17. The levy "ensure[d] that the private [crude palm oil] producers play [the] role" of providing product to Indonesian biodiesel producers. Final IDM at 17. Put another way, the 2015 Export Levy was enacted, at least in part, to increase the amount of crude palm oil in the domestic market and lower its price by increasing the price of Indonesian crude palm oil on the world market. Because the levy fulfilled its intended purpose, and crude palm oil prices fell, domestic consumers, including biodiesel producers such as Wilmar and Musim Mas, were subsidized.

In addition, Commerce satisfied the statute and the SAA by finding that the Government of Indonesia *had* implemented a "formal, enforceable measure" in the form of the 2015 Export Levy, which the Government of Indonesia had put in place as part of a plan to suppress the domestic price, thereby providing a cheap input for downstream products (*e.g.*, biodiesel). *See* GOI Initial Quest. Resp., Ex. Pt. 8, at Ex. GOI-BSF-1 (linking the levy to biodiesel); *see also* Petition Exs., Vol. V.15, at Ex. CVD-IND-28.

Moreover, Commerce showed that the 2015 Export Levy *did* directly lead to the intended contribution: consistently lower prices for crude palm oil sold in the Indonesian market. *See* Final IDM at 17; *See* Pet.'s Rebuttal Br. (Oct. 17, 2017), P.R. 237, at 23 tbl. 1 (showing, from a summary of Plaintiffs' submitted data, that the Indonesian prices for crude palm oil went down after the implementation of the

levy).[15] As noted, during the nine months prior to the implementation of the 2015 Export Levy, Indonesian prices were always higher than world prices for crude palm oil.[16] Conversely, for the eighteen months following the implementation of the 2015 Export Levy, including the twelve-month period of investigation, Indonesian prices only exceeded world prices on three occasions. *See* Final IDM at 17; Pet.'s Rebuttal Br. at 23 tbl. 1. The court holds that Commerce reasonably relied on this evidence in making a finding that Indonesian prices for crude palm oil were lowered by the 2015 Export Levy.

As for Plaintiffs' argument relating to evidence of continuing exports of crude palm oil after the implementation of the levy, Commerce rightly recognized that nothing in the statute or the SAA required it to show that a majority of exports had ceased, or even that

[15] Below is a modified version of "Table 1" from Petitioner's Rebuttal Brief, illustrating the difference between Indonesian prices for crude palm oil and world prices for crude palm oil. The italicized dollar amounts represent the amount by which Indonesian prices for crude palm oil rose above world prices. The non-italicized dollar amounts, preceded by minus signs, represent the amount by which Indonesian prices fell below world prices.

Pre-Imposition of 2015 Export Levy		**Post-Imposition of 2015 Export Levy**	
Month	Difference b/t Indonesian & World Price for CPO (w/freight deductions)	**Month**	Difference b/t Indonesian & World Price for CPO (w/freight deductions)
Oct. 2014	*$77.05 per metric ton*	**Jul. 2015**	-$14.50 per metric ton
Nov. 2014	*$60.58 per metric ton*	**Aug. 2015**	-$91.75 per metric ton
Dec. 2014	*$13.62 per metric ton*	**Sep. 2015**	-$17.53 per metric ton
Jan. 2015	*$74.77 per metric ton*	**Oct. 2015**	*$40.98 per metric ton*
Feb. 2015	*$78.53 per metric ton*	**Nov. 2015**	-$40.14 per metric ton
Mar. 2015	*$54.04 per metric ton*	**Dec. 2015**	*$10.80 per metric ton*
Apr. 2015	*$15.09 per metric ton*	**Jan. 2016**	-$55.78 per metric ton
May 2015	*$39.99 per metric ton*	**Feb. 2016**	-$129.58 per metric ton
Jun. 2015	*$50.59 per metric ton*	**Mar. 2016**	-$122.13 per metric ton
		Apr. 2016	-$80.91 per metric ton
		May 2016	-$1.46 per metric ton
		Jun. 2016	-$9.51 per metric ton
		Jul. 2016	*$3.02 per metric ton*
		Aug. 2016	-$127.96 per metric ton
		Sep. 2016	-$84.98 per metric ton
		Oct. 2016	-$5.84 per metric ton
		Nov. 2016	-$93.76 per metric ton
		Dec. 2016	-$94.85 per metric ton

[16] Indonesian prices were always higher than world prices for crude palm oil when accounting for the deduction of freight. *See* Final IDM at 17.

a complete embargo on crude palm oil had occurred.[17] *See* Final IDM at 18–19 ("Our analysis is not whether there is a complete embargo or whether the [Government of Indonesia] seeks to support the respondents through the complete prohibition of [crude palm oil]. Rather, the analysis is whether the [Government of Indonesia] seeks to support the respondents through a policy and a pattern of practice that lowers [crude palm oil] prices paid domestically by altering the attractiveness of the domestic market vis-à-vis the export market, thereby causing private [crude palm oil] producers to sell more of their product domestically."); *see also, e.g.*, SAA at 926, *as reprinted in* 1994 U.S.C.C.A.N. at 4239 ("Commerce has found a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation."). In other words, substantial evidence of cheaper prices resulting from the 2015 Export Levy supports Commerce's subsidy determination.

Finally, the law speaks of enforceable measures leading to a contribution that provides a benefit. The law does not require that private actors be *compelled* to perform a government function for entrustment and direction to be found. *See* SAA at 926, *as reprinted in* 1994 U.S.C.C.A.N. at 4239 ("The specific manner in which the government act[s] through the private party to [make a financial contribution resulting in a benefit] varie[s] widely.").

Therefore, the Department's financial contribution finding, based on the Government of Indonesia's entrustment and direction of private parties through the 2015 Export Levy, is sustained.

ii. The Use of the Export Levy to Lower Prices Was a Practice That Would Normally Be Vested in a Government

The court also finds that Commerce did not err in finding that providing crude palm oil for below-market prices, by means of a governmentally enacted tax system, qualified as a practice normally vested in a government. *See* 19 U.S.C. § 1677(5)(B)(iii) (emphasis added) ("A subsidy [exists when] an authority . . . makes a payment to a funding mechanism to provide a financial contribution, or en-

[17] Plaintiffs also claim that Commerce was required to look at more than the thirty months of price data that it analyzed, because it has examined longer periods of time in other proceedings concerning "export restraints." *See* Pls.' Br. 36. As the Department points out, however, this argument is not properly before the court because Plaintiffs failed to raise it before the agency. *See* Def.'s Br. 40; *compare* Pls.' & Consol. Pls.' Joint Case Br. (Oct. 12, 2017), P.R. 230–234, at 15–24, *with* Pls.' Br. 35–37; *see also* 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.").

trusts or directs a private entity to make a financial contribution, *if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments*.").

Plaintiffs maintain that "Commerce took the position that [the statute] requires . . . an assessment of 'whether the activity would constitute a financial contribution if performed by the government directly, rather than by the private entity that was entrusted or directed.'" Pls.' Br. 39–40 (quoting Final IDM at 19). In so doing, they claim, Commerce duplicated its financial contribution analysis and "render[ed] portions of the statutory text superfluous." *See* Pls.' Br. 40. Plaintiffs argue that more is required than a finding that a financial contribution exists. To satisfy the "entrusts or directs" standard, they argue, Commerce must have shown that the type of contribution was one that would be "normally vested in the government"—*i.e.*, Commerce had to do more than repeat its determination that a financial contribution existed. *See* Pls.' Br. 39–40.

Commerce, relying on this Court's holding in *Hynix Semiconductor Inc. v. United States*, stated that "the question is whether the activity would constitute a financial contribution if performed by the government directly, rather than by the private entity that was entrusted or directed." Final IDM at 19 (citing *Hynix Semiconductor Inc. v. United States*, 30 CIT 288, 308, 425 F. Supp. 2d 1287, 1305 (2006)) (approving Commerce's decision to countervail a financial contribution that "could be characterized as fulfilling a 'governmental subsidy function'")).

Plaintiffs' arguments are without merit. As has been established, the Government of Indonesia created the 2015 Export Levy on crude palm oil, with the intention of supporting the biodiesel industry by providing crude palm oil at below-market prices. By imposing the levy, the Government of Indonesia increased the price of Indonesian crude palm oil on the world market and lowered it on the domestic market. The upshot was that the Indonesian Government used the domestic producers of crude palm oil as its instrument to supply buyers with inexpensive crude palm oil. Therefore, the Government of Indonesia entrusted and directed Indonesian crude palm oil producers to provide their product, a primary biodiesel input, to biodiesel producers such as Wilmar and Musim Mas at lower prices.

Also, Commerce reasonably found that a government's use of a tax regulation to drive down prices within the domestic market was uniquely within that government's powers. Delegating the actual provision of goods to private producers of crude palm oil is exactly the sort of action that the entrustment and direction statute is meant to

govern. *See* 19 U.S.C. § 1677(5)(B)(iii). And, in fact, that is what happened. The crude palm oil producers provided goods for less than adequate remuneration as a result of a tax program, put in place by the Government of Indonesia, designed to have crude palm oil producers do just that.

Therefore, the court sustains Commerce's entrustment and direction finding with respect to the 2015 Export Levy.

2. Commerce Reasonably Used a World Price Benchmark to Measure the Benefit Resulting from the 2015 Export Levy

Commerce must make distinct findings as to the elements of financial contribution and benefit. *See* 19 U.S.C. § 1677(5)(B)(i) (financial contribution); *id.* § 1677(5)(E) (benefit). The benefit derived from a countervailable subsidy is measured according to the type of financial contribution made. *See id.* § 1677(5)(E).

When a subsidy takes the form of goods or services provided for less than adequate remuneration, it must have a comparison price by which to measure any benefit. By regulation, Commerce finds this comparison price by establishing a "benchmark" price by means of "a three-tiered, hierarchical approach" that "determin[es] the adequacy of remuneration of an investigated good or service." *Maverick Tube Corp. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1293, 1299 (2017) (citation omitted); *see* 19 C.F.R. § 351.511(a)(2)(i)-(iii). Commerce's first benchmark preference is for "a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i).

If, however, the "[a]ctual market-determined price [is] unavailable," Commerce will compare

> the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the [Department] will average such prices to the extent practicable, making due allowance for factors affecting comparability.

Id. § 351.511(a)(2)(ii).

Thus, the regulation provides for the establishment of a benchmark. Here, Commerce determined that crude palm oil prices from Indonesia were too distorted by the effects of the 2015 Export Levy to be used as a benchmark for measuring "adequate remuneration." *See* Final IDM at 20–21 ("[T]he record empirically demonstrates that there are no market prices of [crude palm oil] due to market distor-

tion. Comparing the respondents' distorted domestic purchase prices to similarly distorted domestic prices via a 'tier one' benchmark would not measure the extent of the distortion and, thus, the extent of the benefit."). That is, because Commerce found that the 2015 Export Levy had artificially lowered crude palm oil prices within Indonesia, it could not depend on those same prices to stand in for "adequate remuneration" when evaluating the prices of the subset of crude palm oil sales made to Wilmar and Musim Mas. Commerce then turned to the world market price for crude palm oil.

Plaintiffs argue that "Commerce has no such evidence of market distortion on the record, much less evidence of 'significant' market distortion. . . . Commerce simply assumed domestic sales were distorted based on pricing differentials with no basis in the statute or regulations for doing so." Pls.' Br. 44, 45. To bolster their arguments, Plaintiffs point to "substantial exports" of crude palm oil, a "large number of domestic suppliers competing for business," and claim that "[crude palm oil] prices in Indonesia are set by open bids and auctions on a daily basis. . . . Market participants in Indonesia are also free to sell their [crude palm oil] to domestic buyers, or export it." Pls.' Br. 45. Plaintiffs, then, would have Commerce use Indonesian domestic prices for crude palm oil as the benchmark for comparison with the allegedly cheaper prices at which Wilmar and Musim Mas purchased crude palm oil.

Substantial evidence, however, supports the Department's benchmark choice. After the 2015 Export Levy was enacted in July 2015, Indonesian crude palm oil prices frequently and sharply fell below world market prices, though they had often surpassed world market prices before July 2015. *See* Final IDM at 17; Pet.'s Rebuttal Br. at 23 tbl. 1 (summarizing Plaintiffs' submitted data). During the period of investigation, therefore (January 2016 to December 2016), the crude palm oil market in Indonesia experienced increased supply and lowered prices. *See* Final IDM at 17. Although Plaintiffs propose alternative reasons for these changes, Commerce reasonably concluded that the timing of the imposition of the 2015 Export Levy and the supply and price change was not merely a coincidence. *See* Final IDM at 20 ("Our conclusion [that prices were distorted] was not a theoretical assertion based solely on the 'alleged' effects, but was instead an analysis of how and whether the price data on the record, discussed above and in the *Preliminary Determination*, demonstrated a significant price differential between Indonesian and global [crude palm oil] prices occurring alongside the implementation of the export

levy."). Therefore, the Department reasonably found that domestic prices were distorted, and turned to a world price benchmark in accordance with the regulation.

3. The 2015 Export Levy Was Sufficiently Specific for Purposes of the Statute

To constitute countervailable subsidies, both direct and indirect financial contributions that benefit a recipient must also be "specific." *See* 19 U.S.C. § 1677(5)(A). The statute provides:

> Where there are reasons to believe that a [domestic] subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:
>
> *(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.*

19 U.S.C. § 1677(5A)(D)(iii) (emphasis added). The SAA additionally states that the specificity analysis is intended to "avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy *is spread throughout an economy*." SAA at 930, *as reprinted in* 1994 U.S.C.C.A.N. at 4242 (emphasis added).

The issue here is whether the indirect financial contribution, that is, the provision of goods for less than adequate remuneration stemming from the 2015 Export Levy on crude palm oil, was *de facto* specific. In its Final Determination, Commerce found that crude palm oil's usage was limited to fourteen Indonesian industries, as identified by the Government of Indonesia. *See* Final IDM at 19 (citing 19 U.S.C. § 1677(5A)(D)(iii)(I)).

Plaintiffs maintain that these fourteen industries are distinct and diverse from one another,[18] and that Commerce "summarily decided that 14 industries is a 'limited' number," and failed to "reveal against what standard the agency measured whether 14 users reflects a sufficiently large number for *de facto* specificity purposes." Pls.' Br. 43. In Plaintiffs' view, fourteen industries were too many to support a finding of specificity because the use of crude palm oil was so wide-

[18] Supported by the Government of Indonesia's questionnaire response, Plaintiffs list the fourteen industries as follows:

> (1) olein; (2) palm fatty acid distillates; (3) fatty acid; (4) monoglycerides, diglycerides, and triglycerides; (5) ice cream and margarine; (6) soap chip; (7) edible oil and salad oil; (8) biodiesel; (9) surfactant; (10) palmitate, stearate, oleate/glycol, and propylene glycol; (11) fatty amines; (12) fatty alcohol; (13) glycerol; and (14) food emulsifier.

Pls.' Br. 43 (citing GOI Initial Quest. Resp. at 73–74).

spread (from ice cream and margarine to fatty alcohol), and because the relevant use—producing biodiesel—accounted for a relatively small percentage of crude palm oil used in Indonesia. *See* Pls.' Br. 42 (citing Petition Exs., Vol. V.16 (Mar. 23, 2017), P.R. 21, at Ex. CVD-IND-28) ("The record also shows that a relatively small amount of [crude palm oil] is used for the production of biodiesel, as opposed to the many other uses of [crude palm oil]. According to the WTO Trade Policy Review of Indonesia,[19] the use of [crude palm oil] for biofuels represents less than 10 percent of total [crude palm oil] usage."). Plaintiffs thus argue that the specificity standard was not met.

Commerce justified its specificity determination, however, by finding that the number of industries benefitting from crude palm oil being provided for less than adequate remuneration did not "encompass all possible subsidy recipients within the economy of Indonesia." Final IDM at 19. In other words, Commerce complied with both the statute's requirement of *de facto* specificity, and the SAA's direction to avoid countervailing subsidies with a widespread benefit throughout an economy. The Department "recognize[d] that the nature of the products' uses as listed by the [Government of Indonesia] (food additives, soap, and biodiesel) are clearly not uses that would be beneficial to every industry within the Indonesian economy." Final IDM at 19; *see also* Prelim. Dec. Mem. at 16 ("Because only certain industries make use of [crude palm oil] . . . for the production of further processed products such as biodiesel, a limited number of enterprises and industries use this subsidy. . . . [The levy is therefore] *de facto* specific.").

The court finds that Commerce's specificity determination is both supported by substantial evidence and in accordance with law. The statute permits the Department to rely on a single factor, if need be, in finding that a subsidy is *de facto* specific. *See* 19 U.S.C. § 1677(5A)(D)(iii) ("[T]he subsidy is specific if one or more of the following factors exist . . ."). Commerce used the first of four factors, the "limited number of industries" factor, which required that "[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." *Id.* § 1677(5A)(D)(iii)(I).

The law of specificity does not mandate that a subsidy be limited to the product under investigation, here, biodiesel. Rather, the law requires that the subsidy not be spread throughout the economy. *See,*

[19] The most recent WTO Trade Policy Review of Indonesia, cited by Plaintiffs in their brief, was published in 2013. *See* Trade Policy Review Body, *Report by the Secretariat: Indonesia*, WTO Doc. TPR/S/278/Rev.1 (July 16, 2013).

e.g., SAA at 930, *as reprinted in* 1994 U.S.C.C.A.N. at 4242 (emphasis added) ("The specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is *spread throughout an economy*.").

The evidence before Commerce supported its specificity finding because the industries that used crude palm oil were sufficiently discrete and clearly defined subsets of the Indonesian economy. All parties agreed that the identified industries encompassed *all* usage of crude palm oil within the country. *See* Final IDM at 19; Pls.' Br. 43. Industries such as biodiesel or soap chip describe not widespread availability and use of a subsidized product, but rather, a finite list of identifiable, *actual* users of crude palm oil in Indonesia.

In other words, Commerce reasonably determined that the identified industries were sufficiently defined and limited for purposes of the statute, so as to escape a finding that the subsidy was widespread throughout the economy, and generally available and used. Accordingly, the court upholds the Department's specificity determination with regard to the 2015 Export Levy on crude palm oil.

B. Commerce's Subsidy Determination as to the 1994 Export Tariff Was Not Reasonable

In addition to its subsidy determination regarding the 2015 Export Levy on crude palm oil, Commerce also found that the 1994 Export Tariff on crude palm oil resulted in the same type of subsidy. Unlike the 2015 Export Levy, which is collected on all exports of crude palm oil, the 1994 Export Tariff was only collected if a threshold price per metric ton of crude palm oil was reached in a sale for export. *See* GOI Initial Quest. Resp., Ex. Pt. 13, at Ex. GOI-CPO-15.

Prior to and during the first part of the period of investigation, from October 2014 to May 2016, no export tariff revenue was collected on crude palm oil exports because the threshold price had not been reached. *See* GOI Initial Quest. Resp., Ex. Pt. 13, at Ex. GOI-CPO-15. From May 2016 to December 2016 (the end of the period of investigation), the threshold having been reached for three of those months, a tariff of three dollars per metric ton was imposed. *See* GOI Initial Quest. Resp., Ex. Pt. 13, at Ex. GOI-CPO-15. While the period during which the tariff was collected was limited and the amount of the tariff collected was small, Commerce nonetheless found the 1994 Export Tariff to be countervailable.

The Department's reasoning was that, since the tariff rate for crude palm oil increased when export prices for crude palm oil increased, the Government of Indonesia intended to use the tariff to keep crude palm oil in the country to increase the supply and lower the domestic

sales price. *See* Final IDM at 17–18 ("The fact that the [1994 Export Tariff] increases along with world market prices further supports the conclusion that lowering domestic prices is an aim of the overall regime.").

Commerce's subsidy determination is not supported by substantial evidence, nor is it in accordance with law. Under the statute, Commerce must demonstrate, based on substantial evidence, that the Government of Indonesia entrusted or directed crude palm oil sellers to make a financial contribution that was otherwise countervailable. *See* 19 U.S.C. § 1677(5)(B)(iii). Here, Commerce failed to make an independent financial contribution finding with respect to the 1994 Export Tariff. Rather, Commerce justified its subsidy determination using the same reasoning it applied to the 2015 Export Levy, and relied on evidence related to the 2015 Export Levy rather than the 1994 Export Tariff. *See* Final IDM at 17–18 (discussing how the Indonesian price for crude palm oil dropped after the implementation of the 2015 Export Levy). Therefore, Commerce cites no evidence tending to demonstrate that the 1994 Export Tariff, independently, resulted in cheap crude palm oil.

Also, under the statute, it was not sufficient for Commerce to demonstrate with substantial evidence that the underlying *intention* of the 1994 Export Tariff was to provide biodiesel producers with cheaper crude palm oil. Rather, Commerce was required to show that crude palm oil, a good, was provided for less than adequate remuneration—*i.e.*, that the Government of Indonesia used the 1994 Export Tariff to make a financial contribution to Wilmar and Musim Mas. Therefore, Commerce's subsidy determination was not in accordance with law because the Department applied the wrong legal standard. That is, intention is not enough; evidence of an actual financial contribution is required.

Commerce failed to support a subsidy determination because it pointed to no compelling evidence of lower crude palm oil prices in Indonesia, connected to the 1994 Export Tariff. Indeed, it acknowledged that, during the period of investigation, the 1994 Export Tariff barely had an effect. *See* Final IDM at 17 ("[T]he [export tariff] was very low during the [period of investigation] ($0 or $3 [per metric ton])."). Yet, Commerce still made a subsidy determination with respect to the 1994 Export Tariff, claiming that it was part of Indonesia's overall "aim" of supporting the biodiesel industry, and relying on evidence related to the 2015 Export Levy. *See* Final IDM at 17, 18 (emphasis added) ("The export taxes and levies ensure that the private [crude palm oil] producers [provide cheaper crude palm oil to

biodiesel producers]. From October 2014 through June 2015, after deducting freight expenses, the price of [crude palm oil] was always higher in Indonesia than it was on the world market. In July 2015, *when the [2015 Export Levy] was implemented*, prices of [crude palm oil] in Indonesia dropped well below world market prices for 15 out of the next 18 months."). But evidence of the 2015 Export Levy is not relevant here, and Commerce cannot rely on it without a reason for doing so. Commerce points to no evidence that the 1994 Export Tariff, separate from the 2015 Export Levy, yielded financial contributions to Wilmar and Musim Mas in the form of goods provided for less than adequate remuneration.

Therefore, the court remands the Department's subsidy determination with regard to the 1994 Export Tariff. To the extent that Commerce attributed the alleged effects of the 1994 Export Tariff to Wilmar's and Musim Mas' sales during the period of investigation, the court directs the Department to recalculate its ad valorem subsidy rates for this program.

CONCLUSION and ORDER

Commerce's Final Determination that the Government of Indonesia's 1994 Export Tariff constituted a countervailable subsidy is neither supported by substantial evidence nor in accordance with law. Therefore, it is hereby

ORDERED that the Final Determination is sustained in part and remanded; it is further

ORDERED that, on remand, Commerce issue a revised Final Determination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that Commerce shall make a new subsidy determination as to the 1994 Export Tariff that is supported by substantial evidence and in accordance with law; or, in the alternative, recalculate its ad valorem subsidy rate for goods provided for less than adequate remuneration, excluding any claimed effects of the 1994 Export Tariff; and it is further

ORDERED that the revised Final Determination shall be due ninety (90) days following the date of this Opinion and Order; any comments to the revised Final Determination shall be due thirty (30) days following the filing of the revised Final Determination; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: August 11, 2020
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE