U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A COOKIE ASSORTMENT

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of a cookie assortment.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of a cookie assortment under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 6, on February 16, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 5, 2022.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0062.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and

related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 6, on February 16, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of a cookie assortment. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N303994, dated April 24, 2019, CBP classified a cookie assortment in heading 1905, HTSUS, specifically in subheading 1905.90.10, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Other: Bread, pastry, cakes, biscuits and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery." CBP has reviewed NY N303994 and has determined the ruling letter to be in error. It is now CBP's position that the sweet biscuits in the assortment are properly classified in subheading 1905.31.00, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Sweet biscuits" and the wafers in the assortment are properly classified in subheading 1905.32.00, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules

of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: waffles and wafers."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N303994 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H317110, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated:

For

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H317110
March 21, 2022
OT:RR:CTF:FTM H317110 TJS
CATEGORY: Classification
TARIFF NO.: 1905.31.00; 1905.32.00

MR. PHILLIP ALLMENDINGER
GRIESSON-DEBEUKELAER GMBH & CO.
AUGUST-HORCH-STRABE 23
POLCH 56751
GERMANY

RE: Revocation of NY N303994; Tariff classification of a chocolate-covered cookie assortment from Germany

DEAR MR. ALLMENDINGER:

This is in reference to New York Ruling Letter ("NY") N303994, dated April 24, 2019, concerning the tariff classification of a chocolate-covered cookie assortment under the Harmonized Tariff Schedule of the United States ("HTSUS"). In that ruling, U.S. Customs and Border Protection ("CBP") classified the cookie assortment at issue under subheading 1905.90.1050, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Other: Bread, pastry, cakes, biscuits and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery: Other: Pastries, cakes and similar sweet baked products; puddings." Upon additional review, we have found the classification of this product under subheading 1905.90.1050, HTSUS, to be incorrect. For the reasons set forth below, we hereby revoke NY N303994.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on February 16, 2022, in Volume 56, Number 6, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

NY N303994 described the cookie assortment at issue as follows:

> The product is a chocolate covered cookie assortment said to contain approximately 37 percent sugar, 21 percent wheat flour, 11 percent chocolate, 10 percent cocoa butter, 8 percent vegetable shortening, 5 percent skim milk, 2 percent butterfat, and 6 percent total including trace amounts of vegetable oils, butter, eggs, almonds, salt lemon, caramel, sugar, and citric acid among others. The assortment consists of fifteen different varieties of decorated chocolate covered cookies shaped in circles, squares, sticks and a heart. The product is said to be packaged for retail sale in tins printed and embossed as a seasonal item suitable for gifting, weighing 1 kilogram per tin, net packed.

According to the product information submitted with the ruling request, including a photo of the assortment, the cookies are organized by variety in a plastic tray with a plastic film in the tin box. The product information also

describes three of the fifteen cookies as wafers with cream fillings. Specifically, the "Coca Wafer with Dark Chocolate" is described as a wafer with cocoa cream filling, covered with dark chocolate, and decor of milk chocolate. The "Cocoa Wafer with Milk Chocolate" is described as a wafer with cocoa cream filling, covered with milk chocolate, and decor of white chocolate. The "Dark Chocolate Cream Roll" is described as a wrapped crispy light brown wafer with brown filling and a rough surface. According to the product specification, the target water content in the finished product is 2% with a maximum of 4%.

ISSUE:

What is the tariff classification of the chocolate-covered cookie assortment?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI 2 through 6 may then be applied in order. GRI 6 provides that for legal purposes, classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes, and *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. GRI 6 thus incorporates GRIs 1 through 5 in classifying goods at the subheading level.

The HTSUS headings under consideration are as follows:

1905	Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products:
	Sweet biscuits; waffles and wafers:
1905.31.00:	Sweet biscuits...
1905.32.00	Waffles and wafers...
1905.90:	Other:
1905.90.10:	Bread, pastry, cakes, biscuits and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery...
	* * *

GRI 3(a) and (b) provide as follows:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings

are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The EN to heading 1905, HTSUS, provides in pertinent part as follows:

The heading includes the following products:

...

(8) **Biscuits**. These are usually made from flour and fat to which may have been added sugar or certain of the substances mentioned in Item (10) below. They are baked for a long time to improve the keeping qualities and are generally put up in closed packages. There are various types of biscuits including:

(a) **Plain biscuits** containing little or no sweetening matter but a relatively high proportion of fat; this type includes cream crackers and water biscuits.

(b) **Sweet biscuits**, which are fine bakers' wares with long-keeping qualities and a base of flour, sugar or other sweetening matter and fat (these ingredients constituting at least 50% of the product by weight), whether or not containing added salt, almonds, hazelnuts, flavouring, chocolate, coffee, etc. The water content of the finished product must be 12 % or less by weight and the maximum fat content 35% by weight (fillings and coatings are not to be taken into consideration in determining these contents). Commercial biscuits are not usually filled, but they may sometimes contain a solid or other filling (sugar, vegetable fat, chocolate, etc.). They are almost always industrially manufactured products.

(c) **Savoury and salted biscuits**, which usually have a low sucrose content.

(9) **Waffles and wafers**, which are light fine bakers' wares baked between patterned metal plates. This category also includes thin waffle products, which may be rolled, waffles consisting of a tasty filling sandwiched between two or more layers of thin waffle pastry, and products made by extruding waffle dough through a special machine (ice cream cornets, for example). Waffles may also be chocolate covered. Wafers are products similar to waffles.

* * *

The EN to GRI 3(b) state in pertinent part:

(VI) This second method relates only to:

(i) Mixtures.

(ii) Composite goods consisting of different materials.

(iii) Composite goods consisting of different components.

(iv) Goods put up in sets for retail sales.

It applies only if Rule 3 (a) fails.

...

(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

...

(X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:

(a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;

(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

"Retail sale" does not include sales of products which are intended to be re-sold after further manufacture, preparation, repacking or incorporation with or into other goods.

The term "goods put up in sets for retail sale" therefore only covers sets consisting of goods which are intended to be sold to the end user where the individual goods are intended to be used together. For example, different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal, packaged together and intended for consumption by the purchaser would be a "set put up for retail sale".

...

The Rule does not, however, cover selections of products put up together and consisting, for example, of:

- a can of shrimps (heading 16.05), a can of pâté de foie (heading 16.02), a can of cheese (heading 04.06), a can of sliced bacon (heading 16.02), and a can of cocktail sausages (heading 16.01); or
- a bottle of spirits of heading 22.08 and a bottle of wine of heading 22.04.

> In the case of these two examples and similar selections of products, each item is to be classified separately in its own appropriate heading...
>
> * * *

In NY N303994, CBP classified the subject cookie assortment under subheading 1905.90.10, HTSUS, which provides, in pertinent part, for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa...: Other." There is no dispute that the subject merchandise is classified in heading 1905, HTSUS. The present issue is resolved at the six-digit classification level. We note that the assortment contains both biscuits and wafers, which are classifiable in different subheadings. The wafers are classified under subheading 1905.32.00, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa...: Sweet biscuits; waffles and wafers: Waffles and wafers." The term "biscuit" as used in the tariff refers to both the cookie, its sweetened form, and the cracker, its unsweetened form. *See* Headquarters Ruling Letter ("HQ") 087386 (July 13, 1990). Subheading 1905.31.00, HTSUS, covers sweet biscuits and subheading 1905.90.10, HTSUS, covers crackers.

We find that the biscuits at issue meet the criteria of a sweet biscuit and are commonly recognizable as cookies. According to the EN to heading 1905, HTSUS, sweet biscuits must have (1) a base of flour, sugar or other sweetening matter, and fat, which altogether constitutes at least 50% of the product by weight; (2) water content 12% or less by weight; and (3) maximum fat content 35% by weight. Fillings and coatings are not taken into consideration when determining these contents. The biscuits are issue contain approximately 37% sugar, 21% wheat flour, 11% chocolate, 10% cocoa butter, 8% vegetable shortening, 5% skim milk, 2% butterfat, and trace amounts of other ingredients. The flour, sugar, and fat content of the cookies constitute over 50% of the product by weight, thereby meeting the first criteria. The biscuits also meet the second criteria since the water content of the finished product is at most 4%. Last, the total fat content, including the cocoa butter, shortening, and butterfat, is below the 35% threshold provided in the EN. Because the biscuits at issue meet the definition of sweet biscuits in the EN, they are classified as sweet biscuits in subheading 1905.31.00, HTSUS.

In considering the classification of the assortment containing sweet biscuits of subheading 1905.31.00 and wafers of subheading 1905.32.00, HTSUS, a GRI 3(b) analysis is appropriate as no single subheading describes all the products which are packaged and sold together. The assortment is not a mixture because the sweet biscuits and the wafers are not comingled in the package. Likewise, the assortment is not a composite good because the sweet biscuits and the wafers are not attached to each other to form a practically inseparable whole nor are they mutually complementary components that form a whole. The EN to GRI 3(b) provides that merchandise is a "set put up for retail sale" if it (1) is composed of at least two different articles which are, *prima facie*, classifiable in different headings; (2) contains products or articles put up together to meet a particular need or carry out a specific activity; and (3) is "put up in a manner suitable for sale directly to end users without repacking." The EN further states that the rule does not cover certain selections of products put up together, and that each item in these selections is to be classified separately in its own appropriate heading or, by application of GRI 6, subheading. We find that the cookie assortment is a compartmentalized selection of discrete foods that does not meet the second requirement of

a "set put up for retail sale" because the biscuits and wafers are not put up together to meet a particular need or carry out a specific activity. The biscuits and wafers individually carry out the activity of consuming a sweet treat and are not intended to be eaten in tandem. Rather, the assortment provides a selection from which consumers can choose a certain flavor among the biscuits or wafers. Therefore, the biscuit and wafer assortment does not qualify as a set under GRI 3(b) for classification purposes and will be classified separately in subheading 1905.31.00, HTSUS, and 1905.32.00, HTSUS, respectively.

This conclusion is consistent with NY N053826, dated March 13, 2009, which concerned the tariff classification of a cookie assortment similar to the one at issue. The product in that ruling was an assortment of various cookies consisting of baked biscuits, wafers, or filled wafers wholly or partially covered with dark, milk, or white chocolate, or a combination of two different chocolates. The cookies were packaged in plastic trays in a rectangular metal tin. CBP classified the biscuits in subheading 1905.31.00, HTSUS, and the wafers and filled wafers in subheading 1905.32.00, HTSUS.

In view of the foregoing, we find the biscuits in the cookie assortment are classified under subheading 1905.31.00, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Sweet biscuits." The wafers are classified under subheading 1905.32.00, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Waffles and wafers."

HOLDING:

Based on the information provided, by application of GRI 1 and 6, the biscuits in the cookie assortment are classified under subheading 1905.31.00, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Sweet biscuits." The wafers are classified under subheading 1905.32.00, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Waffles and wafers." The 2022 column one, general rate of duty for both provisions is free.

EFFECT ON OTHER RULINGS:

NY N303994, dated April 24, 2019, is hereby REVOKED.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Sincerely,
For

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF TWO RULING LETTERS, MODIFICATION OF ONE RULING LETTER, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF BANDAGE SCISSORS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of two ruling letters, modification of one ruling letter and of revocation of treatment relating to the tariff classification of bandage scissors.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters and modifying one ruling letter concerning tariff classification of bandage scissors under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 2, on January 19, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 5, 2022.

FOR FURTHER INFORMATION CONTACT: Nataline Viray-Fung, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@cbp.dhs.gov

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 2, on January 19, 2022, proposing to revoke two ruling letters and modify a ruling letter pertaining to the tariff classification of bandage scissors. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In HQ 957534, NY N014017, and NY 810138 CBP classified bandage scissors in heading 9018, HTSUS, specifically in subheading 9018.90.80, HTSUS, which provides for "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Other: Other." CBP has reviewed these rulings and has determined them to be in error. It is now CBP's position that bandage scissors are properly classified, in heading 8213, HTSUS, specifically in subheading 8213.00.90, HTSUS, which provides for "Scissors, tailors' shears and

similar shears, and blades and other base metal parts thereof: Valued over $1.75/dozen: Other (including parts)."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking HQ 957534 and NY N01401, modifying NY 810138 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H318631, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated:

GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H318631
March 22, 2022
CLA-2 OT:RR:CTF:EMAIN H318631 NVF
CATEGORY: Classification
TARIFF NO.: 8213.00.90

PORT DIRECTOR,
PORT OF NEW YORK
70 HAMILTON AVE
BROOKLYN, NY 11231

MS. PAMELA PINTER
BIG APPLE CUSTOMS BROKERS INC.
151–02 132ND AVE
JAMAICA, NY 11434

MR JOSE MUNOZ
JOSE MUNOZ & ASSOCIATES
1717 S. 50TH STREET
TAMPA, FL 33619–7507

RE: Revocation of HQ 957534 and NY N014017; Modification of NY 810138; Medicut Shears; Lister Bandage Scissors; Gripsors Bandage Scissors

DEAR PORT DIRECTOR, MS. PINTER AND MR. MUNOZ:

This letter is in reference to Headquarters Ruling Letter ("HQ") 957534 (August 7, 1995), New York Ruling Letter ("NY") 81038 (May 15, 1995), and NY N014017 (July 25, 2007), regarding the classification of various bandage and fabric scissors under the Harmonized Tariff Schedule of the United States (HTSUS). In these rulings, U.S. Customs and Border Protection ("CBP") classified Medicut shears, Gripsors bandage scissors, and Lister bandage scissors in subheading 9018.90.80, HTSUS, which provides for, "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Other: Other." Upon reconsideration, CBP has determined that HQ 957534 and NY N014017 are in error and is revoking these rulings in accordance with the reasoning below. CBP has also determined that NY 810138 is in error as pertains to Lister bandage scissors and is therefore modifying the ruling accordingly. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 2, on January 19, 2022. No comments were received in response to that notice.

FACTS:

In HQ 957534 the subject merchandise is described as Medicut brand shears, which are 7" scissors with offset stainless steel blades and plastic handles. One blade edge is serrated, the other sharpened. They feature a safety bandage tip on the longer blade, which is designed to facilitate safe blade access between a bandage and the patient's skin. The plastic handle has one large ring to accommodate the third, fourth and fifth finger, and a smaller thumb ring. Medicut Shears are used by health care professionals in a variety of non-surgical applications, such as, cutting gauze and other bandage material, including casts. They can be used to cut wire or metal in

instances where those materials are used, such as, in rigid splints. They are designed to withstand repeated autoclaving at temperatures of up to 290 degrees Fahrenheit for use in sterile environments. The Medicut shears are made from 420 surgical grade stainless steel (high chromium content). They have a blade rivet that is machine-affixed and is designed to withstand a pull force of 88kg. They have a Rockwell hardness of C58 and a sandblasted finish.

In NY N014017, the subject merchandise consists of various models of Gripsors brand scissors. They are stainless steel scissors to be used by personnel in the nursing care profession specifically designed for removing and applying medical bandages with the additional feature of having grooves in the handles that can grip IV and G tubing, vials, etc. They are angled at about 45 degrees and have a bulbous ending on the longer cutting blade

In NY 81038, the subject merchandise is described as Lister bandage scissors in lengths of 3.5", 4.5", 5.5" and 7.5". They are made of stainless steel.

ISSUE:

Whether scissors used for removing bandages are classified as instruments used in in medical, surgical, dental or veterinary sciences of heading 9018, HTSUS, or as scissors of heading 8213, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS subheadings under consideration are as follows:

8213 Scissors, tailors' shears and similar shears, and blades and other base metal parts thereof.

9018 Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electromedical apparatus and sight-testing instruments; parts and accessories thereof

Note 1(h) to Section XV, HTSUS states that Section XV, which includes Chapter 82, does not cover the "[i]nstruments or apparatus of section XVIII." Thus, if the subject scissors are classifiable under heading 9018, HTSUS, a Section XVIII heading, they cannot be classified as scissors under heading 8213, HTSUS.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the HTSUS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN 90.18 states that heading 9018 "covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or

to operate, etc." The EN further states that "a number of the instruments used in medicine or surgery (human or veterinary) are, in effect, tools (e.g., hammers, mallets, saws, chisels, gouges, forceps, pliers, spatulae, etc.), or articles of cutlery (scissors, knives, shears, etc.)." According to EN 90.18, articles can only be classified under heading 9018, HTSUS, if "they are clearly identifiable as being for medical or surgical use by reason of their special shape, the ease with which they are dismantled for sterilisation, their better quality manufacture, the nature of the constituent metals or by their get-up . . . ."

In this case, we have various scissors that are used to remove bandages and other fabric. We observe that these scissors are very similar to scissors used by EMTs and first responders to cut off patients' clothing. Some of the scissors have offset blades and/or blunted safety tips. The scissors are used to remove bandages after a medical procedure has been completed. Thus, the scissors at issue are not used to diagnose or treat an illness, nor in a surgical setting, but rather after a medical procedure is performed when healing is underway or completed.

We are further convinced that these scissors are not medical or surgical instruments because they are used on fabric that is outside the human body and not actively used by a medical professional to diagnose or treat an illness, or perform surgery. Indeed, a brief search of the Unified Medical Language System, a database maintained by the National Institute for Health, yielded a long list of exemplars that more clearly fall under surgical or medical use, such as: Aebli corneal scissors, Craig brain scissors, hysterectomy scissors, microsurgery scissors, and Ragnell undermining scissors. These exemplars suggest the existence of a wide variety of specialized medical instruments that are used by doctors or surgeons during a medical procedure, and generally used to cut human tissue rather than fabric bandages after the procedure is completed. Indeed, Customs has previously classified iris dissecting scissors in heading 9018 because they are specially designed and manufactured for eye surgery. HQ 088876 (Feb. 3, 1992); *see also* NY D83744 (Nov. 9, 1998) (classifying surgical scissors in heading 9018, HTSUS). By contrast, Customs has also previously recognized that various tactical shears designed to cut clothing or seat belts in an emergency setting do not rise to the level of medical or surgical instruments. NY N271492 (Jan. 7, 2016).

Finally, we observe that the subject scissors are not sufficiently specialized to be considered instruments used in medical or surgical sciences. While they have offset blades and blunted safety tips, we observe that many consumer fabric scissors have offset blades and that all child safety scissors have blunted safety tips. The serration in the Medicut shears and the grooved edges of the Gripsors are features that are not integral to the function of the scissors, and thus do not render these ordinary scissors into specialized medical instruments. Although the Medicut shears are said to withstand heat of autoclaving, the same could be said of virtually all scissors made from stainless steel; there is no indication that the Medicut shears can be dismantled for sterilization.

In light of the foregoing, we find that the subject scissors used to cut bandages are classified under heading 8213 as scissors.

HOLDING:

By application of GRIs 1 and 6, bandage scissors are classified in heading 8213, specifically subheading 8213.00.90, HTSUS which provides for "Scissors, tailors' shears and similar shears, and blades and other base metal parts thereof: Valued over $1.75/dozen: Other (including parts)." The column one, general rate of duty is 3¢ each + 3% *ad valorem*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

HQ 957534 (August 7, 1995) and NY N014017 (July 25, 2007) are REVOKED and NY 81038 (May 15, 1995) is MODIFIED.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

GREGORY CONNOR
for

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase from the previous quarter. For the calendar quarter beginning April 1, 2022, the interest rates for overpayments will be 3 percent for corporations and 4 percent for non-corporations, and the interest rate for underpayments will be 4 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of April 1, 2022.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2022–05, the IRS determined the rates of interest for the calendar quarter beginning April 1, 2022, and ending on June 30, 2022. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties are increased from the previous quarter. These interest rates are subject to change for the calendar quarter beginning July 1, 2022, and ending on September 30, 2022.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	063075	6	6	.....

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3

Dated: March 11, 2022.

JEFFREY CAINE,
Chief Financial Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, March 18, 2022 (85 FR 15445)]

STREAMLINING I–94 ISSUANCE AT THE LAND BORDER

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: To increase efficiency, reduce operating costs, and streamline the admissions process, U.S. Customs and Border Protection (CBP) is now issuing electronic Form I–94s (Arrival/ Departure Record) at land ports of entry. The Form I–94 documents nonimmigrants' status in the United States, the approved length of stay, and departure information. CBP has automated the Form I–94 process for the majority of nonimmigrants arriving by air and sea. However, CBP previously issued paper Form I–94s to nonimmigrants arriving by land. For land arrivals, CBP is no longer issuing paper forms to nonimmigrants upon arrival except in limited circumstances and

upon nonimmigrant request if feasible. Nonimmigrants can access Form I–94s online or via mobile application.

FOR FURTHER INFORMATION CONTACT: Tricia Kennedy, Office of Field Operations, U.S. Customs and Border Protection at *Tricia.Kennedy@cbp.dhs.gov* or (813) 927–6420.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Form I–94

The Department of Homeland Security (DHS) delegated its authority to issue and process the Form I–94 (Arrival/Departure Record) to U.S. Customs and Border Protection (CBP). *See* DHS Delegation 7010.3 II.B.5 (May 11, 2006). CBP issues a Form I–94 to certain nonimmigrants who are eligible for admission or parole in the United States. Each arriving nonimmigrant who is admitted to the United States, including nonimmigrants arriving by commercial conveyances, must be issued a Form I–94 as evidence of the terms of admission, unless otherwise exempted.[1] *See* section 235.1(h) of title 8 of the Code of Federal Regulations (8 CFR 235.1(h)). CBP generally issues the Form I–94 to nonimmigrants at the time they lawfully enter the United States. The current Form I–94 documents nonimmigrants' arrival and departure information, as well as their biographical information, such as name, birth date, sex, country of citizenship, visa and passport information or Alien Registration Number for certain categories of nonimmigrant, country of residence, address and telephone number while in the United States, and email address. For nonimmigrants admitted to the United States, the Form I–94 becomes the evidence of the terms of their admission. For nonimmigrants paroled into the United States, the Form I–94 reflects the duration and classification of parole. Currently, the Form I–94 process is automated for nonimmigrants arriving by air or sea. For nonimmigrants arriving by land, CBP utilized a paper I–94 process that included a nonautomated electronic submission option. These processes are described below.

[1] The Form I–94 is not required for nonimmigrants seeking admission to the United States under the Visa Waiver Program (VWP). Rather, the Form I–94W is the form required for nonimmigrants seeking admission into the United States under the VWP. The other categories of nonimmigrants not subject to the I–94 requirement are enumerated in 8 CFR 235.1(h)(1).

B. Previous Paper I–94 Process for Land Arrivals

CBP previously used a paper Form I–94 process for all eligible nonimmigrants arriving at land ports of entry (POEs). The paper Form I–94 consists of two parts: The arrival portion and the departure portion. Each nonimmigrant arriving by land for whom a Form I–94 is required completes both the arrival and departure portions of the form either en route to or upon arrival in the United States when applicable.[2] The information requested on the arrival portion of the I–94 includes: Family name, first (given) name, birth date, country of citizenship, sex, passport number, passport expiration date, passport issue date, airline and flight number (if applicable), country of residence, country of boarding, city where visa was issued, date visa was issued, address and telephone number while in the United States, and email address. The departure portion includes fields for the nonimmigrant's full name, birth date, and country of citizenship.

After the nonimmigrant completes the Form I–94, he or she presents it to a CBP officer at primary inspection, along with his or her travel documents and any other applicable information. Previously, after a successful completion of the inspection process, a CBP officer stamped the nonimmigrant's Form I–94 and passport with either an admission or parole stamp. The CBP officer retained the arrival portion of the Form I–94 and returned the departure portion to the nonimmigrant. The departure portion of the form was provided to the nonimmigrant to retain in his or her possession for the duration of his or her stay and to surrender upon departure. In some circumstances, a nonimmigrant is required to have the Form I–94 in his or her possession at all times while in the United States. The nonimmigrant could present the departure portion to establish, where applicable, eligibility for employment, enrollment in a university, or benefits.

CBP collects the arrival portions of the paper Forms I–94 daily at each POE and boxes and mails them to a centralized data processing center for logging, processing, scanning, and data capture.

C. Automation of Form I–94 for Air and Sea Arrivals

Prior to the automation of the Form I–94 for air and sea arrivals, CBP followed the same paper Form I–94 process described above for all air and sea arrivals. In order to transition to an automated process, DHS published an interim final rule (IFR), which amended DHS regulations to specify that the Form I–94 could be created and issued

[2] Previously all eligible nonimmigrants would complete the paper Form I–94. Now nonimmigrants may continue to submit their information via the paper Form I–94 on arrival, but CBP strongly encourages nonimmigrants to submit their I–94 information via the website or mobile application up to seven days in advance instead.

in either paper or electronic format. *See* 78 FR 18457 (Mar. 27, 2013). On December 19, 2016, CBP finalized the changes announced in the IFR with the publication of a Final Rule in the **Federal Register** (81 FR 91646). Although the regulatory changes permitted DHS to automate the Form I–94 process for all modes of travel (air, sea, or land), CBP stated in the IFR that it was transitioning to an automated Form I–94 process for only air and sea arrivals at that time. Pursuant to the automated process, CBP no longer requires nonimmigrants arriving by air and sea to fill out a paper Form I–94 in most circumstances. Instead, an electronic version of the Form I–94 is populated with information available in CBP's databases, including the information electronically transmitted by air and sea carriers, as well as data from the Department of State's Consular Consolidated Databases (CCD). Any data element not available electronically is collected by the CBP officer at the time of inspection and recorded in the relevant electronic system.

After a successful inspection, CBP issues an electronic Form I–94, which the nonimmigrant can access on a CBP website, *https://i94.cbp.dhs.gov,* or via the CBP One™ mobile application, by entering details from his or her passport or Alien Registration Number for certain categories of nonimmigrants. The nonimmigrant can print a paper version of the Form I–94 to present as evidence of admission or parole. The printed version is the functional equivalent of the paper Form I–94. CBP may issue paper Form I–94s in limited circumstances and may provide a paper Form I–94 upon request from a nonimmigrant if feasible.

D. Enhanced Form I–94 Land Border Process

As detailed in the Final Rule, in addition to the automation of the Form I–94 at air and sea POEs started by the 2013 IFR, CBP modified the process by which a nonimmigrant arriving at the land border can provide Form I–94 information and pay the related fee by adding a nonautomated electronic option on September 29, 2016. 81 FR 91646, 91648 (Dec. 19, 2016). Specifically, CBP enhanced the I–94 website to enable nonimmigrants arriving at a land POE to submit the Form I–94 information to CBP and pay the required fee prior to arrival. Using the I–94 website, the nonimmigrant enters all of the required data for I–94 processing that would be collected by CBP at the POE. Upon paying the fee, the nonimmigrant receives an electronic "provisional I–94". This "provisional I–94" becomes effective after the nonimmigrant appears at a land POE and completes the I–94 issuance process with a CBP officer. If the "provisional I–94" is not processed within seven days of submitting the application, it will expire and the fee will be forfeited.

The I–94 website instructs the nonimmigrant to appear at the land POE for an interview and biometric collection. When the nonimmigrant arrives at the POE, the nonimmigrant completes the issuance process with a CBP officer. The CBP officer will locate the nonimmigrant's information in CBP's database using the nonimmigrant's passport or other travel document. This will verify that the fee was paid and pre-populate the data fields from the document and the information provided in advance by the nonimmigrant on the I–94 website. Prior to May 26, 2021, if the CBP officer determined that the nonimmigrant was admissible, the CBP officer would print out a Form I–94 and give it to the nonimmigrant.

However, as of May 26, 2021, CBP is no longer providing a paper form to these nonimmigrants, who may now access their Form I–94 via the website or the CBP One™ mobile application. As of June 11, 2021, in addition to accessing their I–94 via the CBP One™ mobile application, nonimmigrants now also have the option of submitting their Form I–94 information and paying the related fee via the CBP One™ mobile application to receive a "provisional I–94" prior to arriving at land POEs.

II. Legal Authority

The IFR added to the regulations a definition of "Form I–94" that allows DHS to issue the Form I–94 in either paper or electronic format.[3] The introductory text of 8 CFR 1.4 states that the term "Form I–94" includes the collection of arrival/departure and admission or parole information by DHS, whether in paper or electronic format. Additionally, the "issuance" of a Form I–94 includes, but is not limited to, the creation of an electronic record of admission or arrival/departure by DHS following an inspection performed by an immigration officer. 8 CFR 1.4(c). Together, these regulations authorize CBP to issue Form I–94 in either a paper or electronic format to any nonimmigrant eligible to receive a Form I–94.

III. Streamlining I–94 Issuance at the Land Border

To increase efficiency, reduce operating costs, and streamline the admissions process, CBP is now issuing Form I–94s electronically and nonimmigrants no longer receive a paper I–94 receipt. Nonimmigrants can access their Form I–94s online through a website or via a mobile application. CBP will no longer provide a paper version of Form I–94 in the majority of circumstances. CBP continues to issue a Form I–94 at land POEs only upon payment of a fee.

[3] *See* 8 CFR 1.4. CBP finalized the changes announced in the IFR with the publication of the 2016 Final Rule.

A. The Electronic Form I–94

As of May 26, 2021, CBP officers no longer issue most eligible nonimmigrants a paper version of the I–94 at the time of admission or parole. Rather, CBP issues an electronic Form I–94, which the nonimmigrant can access on a CBP website, *https://i94.cbp.dhs.gov,* or via the CBP One™ mobile application. However, CBP may issue a paper Form I–94 in limited circumstances and may provide a paper Form I–94 upon request from a nonimmigrant if feasible.

The printout from the website or mobile application is the functional equivalent of the departure portion of the paper Form I–94 and includes the terms and duration of admission or parole. Nonimmigrants may print out a copy of the Form I–94 from the website or mobile application and present it to third parties to establish, where applicable, eligibility for benefits, enrollment at a university, or eligibility for employment.

The streamlining of Form I–94 for nonimmigrants arriving by land by providing an electronic Form I–94 saves time and money for both the traveling public and CBP. The electronic process eliminates some of the paper Form I–94 processing performed by CBP and will reduce wait times at passenger processing, which will also facilitate inspection of all nonimmigrants. The electronic Form I–94 will save the time and expenses associated with lost Form I–94s, as nonimmigrants will simply be able to print out new copies from the website or mobile application as necessary, as opposed to filing a Form I–102 and paying a fee, as previously required. This will result in cost savings for nonimmigrants, carriers, and CBP.

B. Form I–94 Fee

For land border admissions, CBP issues a Form I–94 only upon payment of a fee. *See* 8 CFR 235.1(h). Nonimmigrants intending to enter the United States at land POEs have the option either to pay the required fee at the border during processing or pay the required fee online or via the CBP One™ mobile application up to seven days in advance of arrival.[4] At this time, CBP is not changing the procedures regarding the payment of the Form I–94 fee. Accordingly, nonimmigrants arriving by land will continue to have the option to either pay the required fee at the POE or pay online or via the mobile application prior to arrival.

CBP strongly encourages nonimmigrants to apply and pay for I–94s via the website or mobile application.

[4] For more information on the electronic prepayment of the I–94 fee for land border POEs online see 81 FR 91646, 91648. For more information on the CBP One™ mobile application see *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

IV. Privacy

CBP will ensure that all Privacy Act requirements and applicable policies are adhered to during the streamlining of Form I–94 at land border POEs.

V. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. The Form I–94 is covered by OMB control number 1651–0111. There is no change to the information collection associated with this notice.

VI. Signing Authority

Commissioner Chris Magnus, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: March 14, 2022.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, March 18, 2022 (85 FR 15446)]

CERTIFICATE OF REGISTRATION (CBP FORMS 4455 AND 4457)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than May 23, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0010 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Certificate of Registration.

OMB Number: 1651–0010.

Form Number: CBP Forms 4455 and 4457.

Current Actions: Extension without change of an existing information collection.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Travelers who do not have proof of prior possession in the United States of foreign made articles and who do not want to be assessed duty on these items can register them prior to departing on travel. In order to register these articles, the traveler must complete CBP Form 4457, *Certificate of Registration for Personal Effects Taken Abroad,* and present it at the port at the time of export for examination of the articles of foreign origin and verification of the description. After the official has signed the document, it will be returned to the applicant for signature, for presentation to CBP upon return to United States, and for subsequent reuse. CBP Form 4457 is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=4457&=Apply.*

CBP Form 4455, *Certificate of Registration,* is used primarily for the registration, examination, and supervised lading of commercial shipments of articles exported for repair, alteration, or processing, which will subsequently be returned to the United States either duty free or at a reduced duty rate. The CBP Form 4455 may be required when a person, wishing to claim the status of a nonresident upon arrival for a short visit to the United States before returning abroad, imports articles free of duty under subheadings 9804.00.20, 9804.00.25, 9804.00.30, 9804.00.35, Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202). It may also be used for the replacement of articles previously exempted from duty when the unsatisfactory articles are exported under the provisions 9804.00.75 and fall under the $800 or $1,00 exemption limits. The export and return of theatrical scenery, properties, motion-picture films and effects or tools of a trade occupation or employment of domestic or foreign origin must also be reported on CBP Form 4555. The CBP Form 4455, may also be required in any case in which CBP Form 4457 will not adequately serve the purpose of registration. CBP Form 4455 must be presented to CBP for examination of the articles and verification of the articles' description. After the official has signed the document, it will be returned to the applicant for signature, for presentation to CBP upon return to United States, and for subsequent reuse. CBP Form 4455 is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=4455&=Apply.*

CBP Forms 4457 and 4455 are used to provide a convenient means of showing proof of prior possession of a foreign made item taken on

a trip abroad and later returned to the United States. This registration is restricted to articles with serial numbers or other distinctive, permanently affixed unique markings, and are valid for reuse as long as the document legible to identify the registered articles. CBP Forms 4457 and CBP Form 4455 are provided for by 19 CFR 10.8, 10.9, 10.68, 148.1, 148.8, 148.32 and 148.37.

Type of Information Collection: CBP Form 4455.

Estimated Number of Respondents: 60,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 60,000.

Estimated Time per Response: 10 minutes (0.166 hours).

Estimated Total Annual Burden Hours: 9,960.

Type of Information Collection: CBP Form 4457.

Estimated Number of Respondents: 140,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 140,000.

Estimated Time per Response: 3 minutes (0.05 hours).

Estimated Total Annual Burden Hours: 7,000.

Dated: March 17, 2022.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, March 22, 2022 (85 FR 16219)]

U.S. Court of International Trade

Slip Op. 22–18

GARG TUBE EXPORT LLP and GARG TUBE LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00026
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand redetermination and final results in the 2017–2018 administrative review of the antidumping duty order covering welded carbon steel standard pipes and tubes from India.]

Dated: March 11, 2022

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OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") redetermination filed pursuant to the court's order in *Garg Tube Export LLP and Garg Tube Ltd. v. United States*, 527 F. Supp. 3d 1362 (Ct. Int'l Trade 2021) ("*Garg I*") in connection with Commerce's 2017–2018 administrative review of the antidumping duty ("ADD") order on welded carbon steel standard pipes and tubes ("CWP") from India, covering the period of May 1, 2017 to April 30, 2018. Final Results of Redetermination Pursuant to Ct. Remand, Oct. 7, 2021, ECF Nos. 73–1–2 ("Remand Results"); *see generally Garg I*, 527 F. Supp. 3d 1362; *[CWP] From India*, 85 Fed. Reg. 2,715 (Dep't Commerce Jan. 16, 2020) (final results of [ADD] admin. review;

2017–2018) ("*Final Results*") and accompanying Issues and Decision Memo., A-533–502, (Jan. 9, 2020), ECF No. 24–5 ("Final Decision Memo."). On remand, Commerce no longer relies on facts available with an adverse inference for the missing cost of production data. Remand Results at 17–22. Commerce's Remand Results with respect to the use of neutral facts available are sustained.

Also before the court is Commerce's determination in the *Final Results* regarding the finding of and subsequent adjustment for a particular market situation ("PMS"). Final Decision Memo. at 3–31; *see also* Remand Results at 4–10. Because Commerce's application of the PMS adjustment to the sales-below-cost test was improper under the statute, the court remanded to Commerce and declined to reach the issues of whether Commerce's PMS finding was supported by substantial evidence and the reasonableness of the regression model as a methodology for calculating the PMS adjustment. *Garg I*, 527 F. Supp. 3d at 1371–73. Although Commerce is no longer applying a PMS adjustment to the sales-below-cost test, it continues to find that a cost-based PMS exists in India for hot-rolled coil ("HRC") and applies a PMS adjustment to the cost of production for sales based on constructed value. Remand Results at 8–10. For the reasons that follow, Commerce's determination with respect to the finding of a PMS and the corresponding adjustment to Garg's cost of production are remanded.

BACKGROUND

The court presumes familiarity with the facts of this case as set forth in its previous opinion ordering remand to Commerce, and now recounts those facts relevant to the court's review of the Remand Results as well as the *Final Results'* finding and subsequent adjustment for a PMS. *See generally Garg I*, 527 F. Supp. 3d at 1365–70. Commerce conducted an administrative review of the ADD order covering certain CWP from India, for the period of review covering May 1, 2017 through April 30, 2018. *See generally Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 32,270, 32,270 (Dep't Commerce July 12, 2018); *see also id.* at 1365. In calculating the dumping margin for Garg, Commerce relied on facts available with an adverse inference to fill the gap in the record stemming from the refusal of one of Garg's unaffiliated suppliers to provide the requested cost information. *See* Final Decision Memo. at 32–41; *Garg I*, 527 F. Supp. 3d at 1371–73.

Commerce found that a PMS existed in India distorting the price of HRC, an input used in CWP, based on the cumulative and collective impact of global steel overcapacity, subsidization of the Indian HRC

market by the Government of India ("GOI"), trade interventions by the GOI, and Garg's nonpayment of antidumping and safeguard duties on imports of HRC on the Indian steel market. Final Decision Memo. at 19; *see also [CWP] from India*, 84 Fed. Reg. 33,916 (Dep't Commerce July 16, 2019) (prelim. results of [ADD] admin. review; 2017–2018) ("*Prelim. Results*") and accompanying Prelim. Decision Memo. at 19–21, A-533–502, PD 207, bar code 3859225–01 (July 11, 2019) ("Prelim. Decision Memo."); Memo. Re: Decisions on [PMS] Allegations at 18–27, PD 209, bar code 3859233–01 (July 10, 2019) ("PMS Memo.").[1] Commerce adjusted the cost of production in its sales-below-cost test to account for its PMS finding. Final Decision Memo. at 50.

The court remanded Commerce's decision to rely on an adverse inference when selecting from facts available to fill the gap in Garg's cost of production data for further explanation or reconsideration because it could not discern how Commerce applied Section 776 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e (2018),[2] from Commerce's explanation in the Final Decision Memo. *Garg I*, 527 F. Supp. 3d at 1371–73 (setting forth contradictory statements from the Final Decision Memo. indicating that Commerce's rationale may have relied on 19 U.S.C. § 1677e(a) and/or § 1677e(b)). The court also remanded Commerce's determination to use a PMS adjustment in its sales-below-cost test finding "the statute does not empower Commerce to adjust a respondent's reported costs to account for a cost-based PMS when Commerce relies on home market or third country market sales to determine normal value."[3] *Garg I*, 527 F. Supp. 3d at 1370.

Commerce filed the Remand Results on October 7, 2021. Remand Results. Under respectful protest,[4] Commerce made several revisions

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[1] On March 10, 2020, Commerce filed indices to the public and confidential administrative records underlying Commerce's final determination on the docket at ECF No. 24–1–2. On October 21, 2021, Commerce filed indices to the public and confidential administrative records underlying Commerce's remand redetermination on the docket at ECF No. 78–2–3. All references in this opinion to documents from the administrative record underlying Commerce's final determination and remand redetermination are identified by the numbers assigned by Commerce in those indices and preceded by "PD" and "CD" to denote public or confidential documents.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

[3] Where there are sales at less than cost of production, under certain circumstances such sales may be disregarded for the purposes of normal value. *See* 19 U.S.C. § 1677b(b). "If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise." *Id.*

[4] By adopting a position "under protest," Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

to the Final Results. *See generally id.* First, Commerce clarifies that it is operating under 19 U.S.C. § 1677e(a) to fill the gap in the record and explains that it is no longer using facts available with an adverse inference and instead relies on neutral facts available. *Id.* at 17–22. Second, Commerce removes the PMS adjustment to the cost of production in its sales-below-cost test. *Id.* at 33. Commerce continues to find that a PMS in India distorted the cost of HRC and applies an upward adjustment to Garg's reported cost of production for sales where normal value was based on constructed value. *Id.* at 8–9.

Garg and Nucor filed comments and replies to the remand redetermination. Pls.' Comments on Remand Redetermination, Nov. 8, 2021, ECF No. 79 ("Garg's Remand Comments"); Pls.' Reply to Comments on Remand Redetermination, Dec. 15, 2021, ECF No. 85 ("Garg's Reply"); Def.-Intervenor [Nucor]'s Comments on [Remand Results], Nov. 8, 2021, ECF No. 80 ("Nucor's Remand Comments"); Def.-Intervenor [Nucor's] Reply Comments on [Remand Results] at 1–4, Dec. 15, 2021, ECF No. 84 ("Nucor's Reply"). Neither party objects to Commerce's decision to use neutral facts available to fill in the missing cost of production data before the court. Garg's Remand Comments at 3; *see* Nucor's Remand Comments; Nucor's Reply. However, the parties disagree about whether Commerce's decision to remove the PMS adjustment to costs of production from the sales-below-cost test, the existence of a PMS, and the methodology used to quantify the PMS adjustment should be sustained. *Compare* Garg's Remand Comments at 3–5; Garg's Reply *with* Nucor's Remand Comments at 2–3; Nucor's Reply at 1–5. Garg argues that Commerce's continued finding of a PMS is not supported by substantial evidence and Commerce's use of the regression analysis to quantify the PMS adjustment is arbitrary; therefore, a second remand is required. Garg's Remand Comments at 3–5.

Nucor argues that Commerce may adjust costs of production to account for a PMS when Commerce performs the sales-below-cost test. Nucor's Remand Comments at 2; Nucor's Reply at 4–5; *but see Hyundai Steel Co. v. United States*, 19 F.4th 1346 (Fed. Cir. 2021). However, in light of the court's remand order, Nucor agrees with Commerce's decision to remove the PMS adjustment in the sales-below-cost test under respectful protest. Nucor's Remand Comments at 2; *see also* Nucor's Reply at 4–5 (suggesting the court reconsider its position because the Court of Appeals for the Federal Circuit has not issued a mandate in *Hyundai*). Nucor further argues that Commerce's continued finding of a PMS and the corresponding regression-based adjustment are supported by substantial evidence and otherwise in accordance with law. Nucor's Reply at 1–4. On

December 15, 2021, Defendant filed its reply to the remand comments. Def.'s Resp. to Comments on Remand Redetermination, Dec. 15, 2021, ECF No. 83 ("Def.'s Reply"). Defendant incorporates its previous arguments in support of Commerce's PMS finding and the resulting adjustment. *Id.* at 6–7 (citing Def.'s Resp. to Pls.' Mot. for J. on Agency R. 13–21, 24–33, Feb. 1, 2021, ECF No. 45). Defendant asks the court to sustain Commerce's remand redetermination in its entirety. *Id.* at 8.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274 (2008)).

DISCUSSION

I. Application of Facts Available

On remand, Commerce relies on neutral facts available to fill the gap created by the missing cost of production data from Garg's Unaffiliated Supplier[5] and articulates its reasoning for its determination. Remand Results at 3, 17–22. No party challenges Commerce's decision before the court. Def.'s Reply at 7; Garg's Remand Comments at 3; *see* Nucor Remand Comments; Nucor Reply. Commerce has complied with the court's remand instructions and its determination is supported by substantial evidence; therefore, Commerce's determination is sustained.

When Commerce is missing information necessary to make an ADD determination, it must use facts otherwise available to fill the gap in the record created by the missing information. *See* 19 U.S.C. § 1677e(a); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380–81 (Fed. Cir. 2003). If a gap exists because a party failed to cooperate to the best of its ability, Commerce may use an adverse inference when selecting facts available to fill the gap. 19 U.S.C. § 1677e(b). However, under 19 U.S.C. § 1677e(a) Commerce may use adverse inferences

[5] The Unaffiliated Supplier is [[ ]].

against a cooperative respondent, if doing so will yield an accurate rate, promote cooperation, and thwart duty evasion. *Mueller Comercial De Mexico v. United States*, 753 F.3d 1227, 1232–36 (Fed. Cir. 2014). Here, the court remanded Commerce's decision to use an adverse inference when selecting from facts otherwise available to fill the gap created by the Unaffiliated Supplier's non-cooperation for reconsideration or additional explanation because the court could not discern if Commerce was acting under 19 U.S.C. § 1677e(a) or (b). *Garg I*, 527 F. Supp. 3d at 1371–73. To the extent that Commerce chose to rely on 19 U.S.C. § 1677e(a) on remand, the court instructed Commerce to "do more to support its determination" and explain how the decision to use facts available with an adverse inference was appropriate in light of the detracting evidence provided by Garg.[6] *Garg I*, 527 F. Supp. 3d at 1372–73.

Commerce clarifies that it is relying on 19 U.S.C. § 1677e(a) to determine the missing cost of production data from the Unaffiliated Supplier because the Unaffiliated Supplier is an interested party as defined by 19 U.S.C. § 1677(9)(A). Remand Results 3, 17–22. Commerce explains that it relies on neutral facts available because it is unable to support a determination that Garg possesses sufficient "market power" or "leverage" to induce the cooperation of the Unaffiliated Supplier with substantial evidence.[7] *Id.* at 17–19. Commerce has complied with the remand order and no party objects to its decision; therefore, its determination is sustained.

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[6] Garg provided unrebutted evidence that it lacked the market power necessary to induce the cooperation of the Unaffiliated Supplier. *See* Garg's Suppl. Resp. at Ex. S1-D-2(f) Part-1 at 30, Part-2; Resp. from [Garg] to [Commerce] Re: Section A Questionnaire Resp. at Ex.A-11(b),(d), PDs 33–36, CDs 7–11, bar codes 3754219–01–04, 3754211–01–05 (Sept. 17, 2018) ("Garg's Section A Questionnaire Resp."); *see also* Garg's Section A Questionnaire Resp. at Part-1. Garg further demonstrated that it made multiple attempts to induce the cooperation of the Unaffiliated Supplier. Resp. to Commerce Re: Section A–D Suppl. Questionnaire 51–53, PDs 110–34, CDs 69–101, bar codes 3794286–01–25, 3794250–01–33 (Feb. 19, 2019); *see also Garg I*, 527 F. Supp. 3d at 1366 n.8, 1366–67.

[7] Commerce maintains that *Mueller* does not require Commerce to demonstrate that Garg has "market power" or "leverage" over the Unaffiliated Supplier. Remand Results at 17; *but see Mueller*, 753 F.3d at 1234–36 (explaining that for Commerce to induce the cooperation of a non-cooperating supplier through a cooperating party, there must be substantial evidence that the cooperating party has leverage over the non-cooperating supplier). Commerce complains that it is "troubled by the implications of the Court's opinion" because it is difficult for Commerce to obtain the evidence necessary to support a finding of Garg's "market power" or "leverage" to induce the Unaffiliated Supplier's cooperation without the cooperation of the Unaffiliated Supplier. Remand Results at 20–21. However, *Mueller* explains that the statutory scheme allows adverse inferences against a cooperative respondent, who has leverage, to compel the cooperation of the uncooperative party. *Mueller*, 753 F.3d at 1232–36. Lastly, Commerce argues that it does "not have the privilege of time in accumulating evidence of a 'long-term' relationship between Garg[] and [the Unaffiliated Supplier]" because this is the first review in which Commerce reviewed Garg individually. Remand Results at 21. Yet providing evidence of leverage is not confined to demonstrating a long-term relationship. *See Mueller*, 753 F.3d at 1234–36.

II. PMS and the Sales-Below-Cost Test

Commerce removed the PMS adjustment from its sales-below-cost test. Remand Results at 3, 8–9. Garg and Defendant argue that this removal complies with the court's remand instructions and should be sustained. Garg's Remand Comments at 3–4; Garg's Reply Comments at 1–2; Def.'s Reply at 5–7. Nucor argues that the statute permits Commerce to apply a PMS adjustment to the cost of production during the sales-below-cost test and urges the court to reconsider its position because the issue is currently on appeal. Nucor's Remand Comments at 2–3; Nucor's Reply at 4–5. The court's remand instructed Commerce to remove the PMS adjustment from the sales-below-cost test. *Garg I*, 527 F. Supp. 3d at 1369–71. Furthermore, in *Hyundai Steel*, the Court of Appeals found that 19 U.S.C. § 1677b(b) does not authorize the application of a PMS adjustment to the cost of production in the sales-below-cost test. 19 F.4th 1346 (Fed. Cir. 2021). Commerce's determination complies with the court's remand order is sustained.

III. Particular Market Situation Determination

The court remands Commerce's PMS determination for reconsideration or additional explanation. A finding of a PMS in the constructed value context requires Commerce to identify what unique fact or set of facts in the market prevents a respondent's reported "cost of materials and fabrication or other processing" from "accurately reflecting the cost of production in the ordinary course of trade."[8] *See* 19 U.S.C. § 1677b(e), (f)(1). Commerce relies on the cumulative and collective impact of multiple market phenomena to support its PMS determination. *See* Final Decision Memo. at 19. Commerce must demonstrate the existence of each market phenomenon and support its determination with substantial evidence. *See* 19 U.S.C. § 1677b(e). Commerce must then explain how these market phenomena create a PMS, i.e., a unique set of facts distorting the cost of materials and fabrication or other processing in the country. *Id.* Lastly, Commerce must demonstrate that this PMS renders the cost of materials and fabrication inaccurate. *Id.* Although Commerce demonstrates the existence of each market phenomenon that it contends contributes to a PMS in the Indian HRC market, it fails to explain how, when combined, these market phenomena give rise to a unique

[8] "For the purposes of [19 U.S.C. § 1677b(b) and (e)] . . . Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A).

set of facts distorting the cost of materials and fabrication or other processing of any kind, such that Garg's reported costs do not accurately reflect the cost of production in the ordinary course of trade. *See* Final Decision Memo. at 3–31.

To determine "whether subject merchandise is being sold, or is likely to be sold at less than fair value" Commerce compares the export price or constructed export price with the normal value of the subject merchandise. 19 U.S.C. § 1677b(a). Commerce may determine the normal value of the subject merchandise using one of several methodologies. *See* 19 U.S.C. § 1677b(a)(1)-(5). Commerce may use the constructed value of the subject merchandise if the normal value cannot be determined under paragraph (1)(B)(i) or (ii). 19 U.S.C. § 1677b(a)(4); *see* 19 U.S.C. § 1677b(a)(1)(B)(i), (ii). Constructed value is the sum of:

> (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade; (2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country [; and] (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States.

19 U.S.C. § 1677b(e). However, "for the purposes of paragraph (1)" if Commerce determines that "a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [Commerce] may use another calculation methodology under this part or any other calculation methodology." 19 U.S.C. § 1677b(e).

Neither the statute nor the legislative history defines a PMS. The legislative history to the Trade Preferences Extension Act of 2015 ("TPEA"), which added the PMS language to 19 U.S.C. § 1677b(e), offers no examples of what may constitute a PMS. The phrase "particular market situation" existed prior to TPEA in 19 U.S.C. § 1677b(a)(1)(B) and (C) which inquire whether a "particular market situation prevents proper comparison of normal value with export price." 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), (C)(iii). The Statement of

Administrative Action to the Uruguay Round Agreements Act ("URAA"), which added these provisions, does give some clue as to what a PMS may include.

> The Agreement does not define "particular market situation," but such a situation might exist where a single sale in the home market constitutes five percent of sales to the United States or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 822 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4162 ("SAA"). The SAA examples involve unique facts in a given country that render the home market price unsuitable for comparison to the U.S. price.

The TPEA, in providing Commerce the alternative to use any other methodology to calculate costs under 19 U.S.C. § 1677b(e)(1), adopts both a comparative requirement and a causal requirement. *See* 19 U.S.C. § 1677b(e). The statute provides "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade." *Id.* The use of the causal phrase "such that" requires that in addition to finding unique market phenomena, Commerce must demonstrate that those market phenomena prevent the cost of materials and fabrication from accurately reflecting the cost of production. Commerce must therefore identify what unique facts render the cost of materials and fabrication an inaccurate reflection of the cost of production in the ordinary course of trade.[9]

[9] Ordinary course of trade "means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(15). Commerce shall consider sales and transactions to be outside of the ordinary course of trade where "the particular market situation prevents a proper comparison with the export price or constructed export price." 19 U.S.C. § 1677(15)(C). However, the language of 19 U.S.C. § 1677(15)(C) does not negate 19 U.S.C. § 1677b(e)'s causal requirement. To suggest otherwise would render the inclusion of "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production" meaningless. 19 U.S.C. § 1677b(e).

Commerce may choose the appropriate methodology to identify what unique facts render the cost of materials and fabrication an inaccurate reflection of the cost of production, so long as it comports with its statutory mandate and provides a reasoned explanation supported by substantial evidence. *See Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05 (1986) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996); *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951) (substantial evidence "must take into account whatever in the record fairly detracts from its weight"). The evidence must be sufficient such that a reasonable mind might accept the evidence as adequate to support its conclusion while considering contradictory evidence. *See Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Commerce identifies various market phenomena to support its determination that a PMS exists in the Indian HRC market. Final Decision Memo. 19–33. In light of the latitude afforded by the statute, Commerce reasonably concluded that the global steel overcapacity crisis is one of several market phenomena it could consider as contributory to a PMS in India.[10] *Id.* at 19–27. Commerce explains that the global steel overcapacity crisis is well documented, existed prior to the period of review, and continued throughout the period of review, creating serious market distortions resulting in negative effects and downward pressure on the global steel market.[11] PMS Memo. at 19 n.124; *id.* at 20–27. Commerce supports its finding of the ongoing global overcapacity crisis with record evidence.[12] Final Decision

[10] *Contra NEXTEEL Co. v. United States*, 355 F. Supp. 3d 1336, 1350 (Ct. Int'l Trade 2019); *NEXTEEL Co. v. United States*, 450 F. Supp. 3d 1333,1340–41 (Ct. Int'l Trade 2020); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317, 1337 (Ct. Int'l Trade 2020); *Seah Steel Corp. v. United States*, 513 F. Supp. 3d 1367, 1396 (Ct. Int'l Trade 2021); *Husteel Co. v. United States*, 426 F. Supp. 3d 1376, 1392 (Ct. Int'l Trade 2020), *aff'd sub nom. Hyundai Steel Co. v. United States*, 19 F.4th 1346 (Fed. Cir. 2021).

[11] Commerce lists "significant price suppression, displaced markets, unsustainable capacity utilization, negative financial performance, shutdowns, and lay-offs" as negative effects of the global overcapacity crisis. PMS Memo. at 19 n.124 (citing *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 82 Fed. Reg. 57,583 (Dep't Commerce Dec. 6, 2017) (Prelim. Results of [ADD] Admin. Review; 2015–2016) and accompanying Prelim. Decision Memo. at 14).

[12] Garg disputes the evidence Commerce relies on to identify global capacity as a market phenomenon contributing to its PMS determination, arguing that steel overcapacity and suppression of HRC prices did not exist during the period of review in either the Indian market or the global market. Pls.' Br. at 9–17; Garg's Remand Comments at 4. In support of its argument, Garg proffered evidence that the steel market had recovered. Letter Re: Rebuttal Resp. to Pet'rs' [PMS] Allegations: Admin. Review of the [ADD] Order on [CWP] from India at 69, Exs. 2A, 2B, 3A, 3B, 3C, 17,22, C.R. 102–06, P.R. 142–46 (Mar. 4, 2019)

Memo. at 26 (citing PMS Memo. at 19); *see generally* [PMS] Allegation, Resubmitted Market Viability Allegation, & Supp. Info., PDs 72–99, CDs 33–61, bar codes 3785365–01–28, 3785322–01–29 (Dec. 21, 2018) ("PMS Allegation")). Although a global phenomenon cannot be considered unique, nothing in the statute precludes Commerce from finding that a global market condition contributes to a PMS in India if it were to combine with other market phenomena unique to India.

In addition to the overcapacity crisis, Commerce relied on GOI subsidies as a contributing market phenomenon to the PMS in the Indian HRC market. Final Decision Memo. at 27–30. Commerce explains "the GOI's subsidization of large Indian HRC producers permeates the entire Indian HRC market" contributing additional downward pressure on Indian HRC prices. *Id.* at 29. The decision to include GOI subsidies as one of the market phenomena is informed by Commerce's findings in *Circular Welded-Carbon-Quality Steel Pipe from India*, 77 Fed. Reg. 66,468 (Oct. 12, 2012) (final affirmative countervailing duty deter.) and accompanying Issue and Decision Memo. at 21–22 (countervailing the provision of HRC for less than adequate remuneration to producers of carbon quality steel pipe and Tube in India)[13] and the PMS Allegation. Final Decision Memo. at 27–28; *see* PMS Memo. at 4, 4 n.29; PMS Allegation at 18–27 (listing the programs that Commerce has found to benefit Indian HRC producers). Commerce reasonably explained that it used the existence of subsidies in the Indian market as evidence that distortions were present in the market. *See* Final Decision Memo. at 27–30.

Commerce believes both the global overcapacity crisis and the subsidies provided by the GOI depress the price of HRC in the Indian market and that the GOI attempted to remedy the distortion caused by the global overcapacity crisis through the enactment of trade remedies. *Id.* at 21–31; PMS Memo. at 22. Commerce points to evidence of an influx of cheap steel imports into the Indian market and explains that in response to the unfairly traded HRC, the GOI attempted to "level the [domestic] playing field" by imposing a variety of safeguard and antidumping duties.[14] PMS Memo. at 6 n.40 (listing

("PMS Rebuttal"). Commerce rejected Garg's argument, explaining that evidence of short-term recovery does not suggest that the distortive effects of the overcapacity crisis have been mitigated in their entirety. PMS Memo. at 20–21; Final Decision Memo. at 20–23.

[13] Although Commerce found a countervailable subsidy, no countervailing duty order was issued because the U.S. International Trade Commission did not find that the subsidy materially injured the domestic industry. PMS Allegation at 23.

[14] Petitioners state that during the period of review there were antidumping duty orders covering HRC imports from Brazil, China, Indonesia, Japan, Korea, and Russia into India. PMS Memo. at 6. Additionally, safeguard measures for imports of HRC into India were in effect "for nearly all of the [period of review]." *Id.*

GOI safeguard duty orders), 22, 22 n.138–40; *see* Final Decision Memo. at 29; *See also* PMS Allegation at Ex. 63.

Commerce also points to evidence on the record that Garg and two of its suppliers were exempt from paying safeguard and antidumping duties.[15] Final Decision Memo. at 31 (relying on PMS Memo. at 26–27). Commerce explains that although Garg was exempt from paying antidumping and safeguard duties, nonpayment of antidumping and safeguard duties can be evidence of a PMS. *Id.* at 30–32 (relying on PMS Memo. at 25–27). Commerce explains that when safeguard duties are implemented to remedy price distortions, nonpayment of safeguard duties, that should be paid but for an exemption, evidences that the distortive effect of global overcapacity still exists in the market because the exemptions prevent the purpose of the safeguard duties from being fulfilled. *See id.* at 30 (relying on PMS Memo. at 25–26.) With respect to the nonpayment of antidumping duties, Commerce explains that nonpayment of antidumping duties is relevant to its PMS analysis because it creates another entry point for the distortive impacts of global overcapacity into the market.[16] *See* Final Decision Memo. at 31 (relying on PMS Memo. at 26–27). Therefore, the trade remedies enacted by the GOI evidence distortions and the exceptions to those remedies evidence that the distortions persist in the Indian HRC market.[17] *Id.* (relying on PMS Memo. at 26–27). In sum, Commerce supports with substantial evidence its determination that a variety of factors exist in the Indian market that affect the price of HRC.

Despite identifying market phenomena which might distort the price of HRC, Commerce fails to explain how the cumulative and

[15] Garg reported to Commerce that it was exempt from paying antidumping or safeguard duties on the imported HRC used to produce the subject merchandise during the period of review because Garg Tube Export LLP is located in a special economic zone and Garg Tube Limited imports HRC under the Advance Authorization Scheme. Id. at 25.

[16] For example, Commerce states that all of Garg's import purchases on the record from China were made below the non-injurious price set in the GOI's antidumping order. *Id.* Commerce believes that the existence of an antidumping duty order covering HRC imports from China demonstrates that the Chinese market is distorted due to the overcapacity crisis. *Id.* Because Garg was exempt from paying antidumping duties, the corrective measures of the antidumping duty order were not effectuated; therefore, the distortive effects of overcapacity entered the market. *Id.* at 26–27.

[17] Garg argues that Commerce misconstrued Garg's non-payment of safeguard and antidumping duties. Pls.' Br. at 27–29. Garg misunderstands the core of Commerce's argument. Commerce explains that it does not base its PMS determination on "whether a respondent's specific purchase prices of HRC were distorted and, thus, outside of the ordinary course of trade." Final Decision Memo. at 29. Instead, Commerce bases its PMS determination on "whether prices reflected in the entire Indian HRC market, as a whole, are distorted." *Id.* In light of this explanation, it is reasonably discernable that Commerce points to Garg's non-payment of safeguard and antidumping duties as evidence that the trade remedies put in place to cure the distortive impact of the overcapacity crisis can be circumvented, calling into question their effectiveness. *See id*. at 29–31.

collective impact of the market phenomena upon which it relies are unique to the Indian market and therefore constitute a PMS. Commerce states that "the GOI actively pursued measures, such as subsidization and trade remedies, all aimed at supporting the domestic steel producers and their ambitions for capacity expansions, a scenario of further distortions that is unique to India." Final Decision Memo. at 23 (quoting PMS Memo. at 21). Yet, Commerce itself acknowledges that the overcapacity crisis impacted markets globally and suppressed steel prices. *Id.* at 20. A global market condition is not a unique market phenomenon. The existence of trade remedies and subsidies are not unique market phenomena, nor are the exceptions to the imposition of trade remedies.

Also absent from Commerce's Final Decision Memo. is an explanation of how the alleged PMS distorts the cost of production so that Garg's reported costs of production are not accurate in the ordinary course of trade. Commerce's explanation implies that it believes the distortions created by the market phenomena automatically render the market unsuitable for comparison. *See id.* at 19–32. The statute requires that the existence of a PMS must be "such that" it renders the cost of fabrication and materials inaccurate. *See* 19 U.S.C. § 1677b(e).

In the explanation currently before the court Commerce has identified market phenomena which affect the market price of the HRC inputs and conclusively states that a PMS exists. *Id*. at 21–32. On remand, Commerce must either reconsider its determination or explain how the combination of each of the market phenomenon upon which it relies creates a PMS in the Indian HRC market such that "the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade" and support its explanation with substantial evidence.

IV. The Regression Analysis

Although the statute permits Commerce to choose any reasonable methodology to quantify a PMS adjustment, any adjustment must be supported by substantial evidence. Here, Commerce fails to explain its determination in light of detracting evidence on the record. Therefore, should Commerce continue to find a PMS on remand, Commerce must either reconsider or further explain its PMS adjustment consistent with this opinion.

Where Commerce identifies a PMS such that the cost of materials and fabrication are not accurate 19 U.S.C. § 1677b(e) permits Commerce to use any other calculation methodology to quantify the

impact of the PMS on the costs of materials and fabrication. 19 U.S.C. § 1677b(e). The chosen methodology must be reasonable, and the determination must be supported by substantial evidence. *See Vicentin S.A.I.C.* v. United States, 404 F. Supp. 3d 1323, 1342 (Ct. Int'l Trade 2019). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477 (quoting *Consol. Edison Co.*, 305 U.S. at 229). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. In providing its explanation Commerce must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Commerce calculated the PMS adjustment using an ordinary least squares regression model provided in petitioners' PMS submissions with certain modifications by Commerce (the "OLS Regression Model").[18] *See* Final Decision Memo. at 65; Letter from Petitioners Re: Revised PMS Valuation Methodology 18–22, Exs. 1.1, 1.7, PDs 152–64, CDs 107–26, bar codes 3810691–01–13, 3810640–01–20 (Mar. 22, 2019) ("Revised PMS Methodology Memo."). The OLS Regression Model attempts to calculate the 2017 counterfactual HRC price using domestic HRC prices from eight countries, including In-

[18] Multiple regression models estimate the relationship between explanatory variables and a dependent variable, holding all other variables equal. Final Decision Memo. at 64; Jeffrey M. Wooldridge, *Introductory Econometrics A Modern Approach* 68 (South-Western Cengage Learning 5th ed.) (2013) ("Wooldridge, Econometrics"); Letter from Petitioners Re: Revised PMS Valuation Methodology 1, PDs 152–64, CDs 107–26, bar codes 3810691–01–13, 3810640–01–20 (Mar. 22, 2019) ("Revised PMS Methodology Memo."). Multiple regression models use a variety of estimators, i.e., rules "for combining data to produce a numerical value for the population parameter" to estimate relationships. Wooldridge, Econometrics at 757, 848. Ordinary least squares is an estimator that obtains estimates by "minimizing the sum of squared residuals." *Id*. at 854. The OLS Regression Model estimated the relationship between the domestic price of HRC, the dependent variable; and uneconomic capacity, iron ore prices, scrap metal pieces, aluminum prices, country specific exchange rates and country specific gross fixed capital formation ("GFCF"), the explanatory variables, for the selected countries from 2008 to 2017, using the following equation: $\ln(\text{HRC } Price_{i,t}) = \beta_o + \beta_1 \times \ln(UneconomicCapacity_t) + \beta_2 \times \ln(IronOre_t) + \beta_3 \times \ln(Scrap_t) + \beta_4 \times \ln(ExRate_{i,t}) + \beta_5 \times \ln(GFCF_{i,t}) + \beta_6 \times \ln(Aluminium_t) + \alpha_i + \varepsilon_{i,t}$ where "i" is the country, "t" is the year, "α_i" is a country-specific dummy variable, and "ε" is the error term. *See* Revised PMS Methodology Memo. at Ex. 1.1 p. 1; Final Decision Memo. at 65. A dummy variable "represents whether, in each time period, a certain event has occurred." Wooldridge, Econometrics at 357. The error term is "the variable in a . . . multiple regression equation that contains unobserved factors which affect the dependent variable. The error term may also include measurement errors in the observed dependent or [explanatory] variables." *Id*. at 848. Commerce cites to the Petitioners' "model iteration number 11" at Exhibit 1.7a in the Regression Analysis, *see* Final Decision Memo. at 65 n.329, however, such exhibit does not exist. The court believes Commerce relies on model iteration 11: "The OLS model using [[ ]] prices instead of import AUVs for all countries (restricted to the 8 countries with available prices)" contained in exhibit 1.7 of the Revised PMS Methodology Memo. Revised PMS Methodology Memo. at Ex. 1.7 p. 1–2. Additionally, Commerce does not explain whether model iteration 11 accurately measures the relationship between HRC prices and the explanatory variables.

dia, assuming a utilization rate of 80%.[19] Final Decision Memo. at 65. Rather than relying on the OLS Regression Model's counterfactual HRC price to quantify the PMS adjustment, Commerce took the estimated regression coefficient for uneconomic capacity[20] calculated by the OLS Regression Model and multiplied it by the "the percent reduction in uneconomic capacity that is required to reduce overall production capacity to the 'implied capacity' level,[21] resulting in a 10.30% increase in Indian HRC prices." *Id.* 65–66.

Commerce's decision to quantify a PMS adjustment using an ordinary least squares regression model is reasonable. Commerce asserts that ordinary least squares regression models are an acceptable means for quantifying PMS adjustments if the model includes a sufficient number of explanatory variables and data points accounting "for all relevant categories of factors from a price determination standpoint (i.e. supply and demand)" and minimizes the endogeneity problem,[22] through proxies[23] if necessary. *Id.* at 64. Commerce supports its assertion with record evidence recognizing ordinary least squares regression models as "the best unbiased estimator for determining a linear relationship between variables." Final Decision Memo. at 64, 64 n.327 (citing Revised PMS Methodology Memo. at Ex. 1.1 p. 5 and Jeffrey M. Wooldridge, Econometrics at 101–02); *see also* Revised PMS Methodology Memo. at 6 (explaining that ordinary least squares is unbiased and more efficient than other estimators "provided the necessary assumptions are met").

Commerce's reliance on the regression coefficient for uneconomic capacity of the counterfactual HRC price is also reasonable. Com-

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[19] Commerce has determined that a capacity utilization rate of 80% is sufficient for sustaining profitable operations and the operational efficiency of the steel industry. Final Decision Memo. at 66.

[20] Uneconomic capacity is "the amount of steel capacity in a given year in excess of the largest possible quantity of steel that may be demanded in that year (i.e., global capacity minus the highest global production ever experienced prior to that year)." Revised PMS Methodology Memo. at 12–13. The OLS Regression Model calculated an estimated regression coefficient for uneconomic capacity of -0.4338 meaning that "a 10 percent decrease in uneconomic capacity will result in a 4.338 percent increase in domestic Indian HRC prices." Final Decision Memo. at 65; *see also id.* at Ex. 1.7 p. 1.

[21] The implied capacity level is the 2017 production amount divided by a capacity utilization rate of 80%. Final Decision Memo. at 65.

[22] A linear regression suffers from an endogeneity problem if one of the explanatory variables is correlated with the error term. *See* Wooldridge, Econometrics at 86–87.

[23] Occasionally when attempting to estimate and quantify the relationship between a dependent variable and explanatory variables using a multiple linear regression one or more of the explanatory variables may be unobservable, impossible to quantify, or the data may be missing. *Id.* at 308–09. In those cases, a proxy variable may be used in place of the explanatory variable that the creator of the linear regression would like to control for. *Id.* A proxy variable is a variable correlated with the unobservable explanatory variable. *Id.*

merce explains that the regression coefficient for uneconomic capacity directly relates to the global overcapacity crisis,[24] which it asserts is the primary cause of the alleged PMS. *See* Final Decision Memo. at 66. However, the counterfactual HRC price is dependent on five explanatory variables unrelated to the global overcapacity crisis. *See id.* Commerce concluded that the regression coefficient for uneconomic capacity captures the impact of the global overcapacity crisis on Indian HRC prices better than the counterfactual HRC price. *Id.* 19 U.S.C. § 1677b(e) allows Commerce to select a calculation methodology of its choosing, bound by the principles of reasonableness and substantial evidence. Commerce articulates a rational connection between its decision to use an ordinary least squares regression model to quantify a PMS adjustment via the regression coefficient for uneconomic capacity and the record evidence. Final Decision Memo. at 63–66. For those reasons, Commerce's choice of calculation methodology is reasonable.

Commerce's application of its selected methodology via the OLS Regression Model is unsupported by substantial evidence because Commerce does not adequately address record evidence detracting from the validity of the OLS Regression Model. Both Commerce and Petitioners rely upon Wooldridge, Econometrics to explain that the validity and efficiency of an ordinary least squares linear regression for time series data are informed by whether the input data returns results which satisfy the Gauss-Markov assumptions. *See* Final Decision Memo. at 63–64; Revised PMS Methodology Memo. *passim*, Ex. 1.6 (excerpt of Wooldridge, Econometrics); Wooldridge, Econometrics at 349–355. For ordinary least squares regressions based on time series data, the Gauss-Markov assumptions require the model to be linear in parameters, have no perfect collinearity between the explanatory variables,[25] have an error term with a population mean of zero, have no serial correlation, have a constant variance of the error

[24] Commerce explains that the OLS Regression Model's uneconomic capacity variable "imperfectly" attempts to capture the "weight" that "global excess capacity, driven by Chinese excess capacity" places on the market. PMS Memo. at 29. Nonetheless, the uneconomic capacity variable is "consistent with expert, third-party research [confirming] a link between capacity and price." *Id.*

[25] When explanatory variables are correlated in a multiple regression model, multicollinearity is present in the model. *See* Wooldridge, Econometrics at 853. The Gauss-Markov assumptions for multiple linear regressions using time series data prohibit perfect multicollinearity, i.e., one explanatory variable is an exact linear function of one or more other explanatory variables, *id.* at 854, but some level of multicollinearity is expected in multiple linear regression models. *id.* at 94–95. Since the presence of multicollinearity does not violate one of the Gauss-Markov assumptions, the magnitude of an improper correlation is not well defined. *Id.* at 95. Multicollinearity can be problematic because as the correlation between two or more explanatory variables gets stronger, it becomes harder for the model to estimate the relationship between the dependent variable and each explanatory variable. *See id.* at 94–96.

term over time, and have normality.[26] *See* Wooldridge, Econometrics at 349–55, 374. Garg challenges Commerce's use of the OLS Regression Model arguing that it is unsupported by substantial evidence because it does not satisfy the Gauss-Markov assumptions which guarantee that ordinary least squares is the best linear unbiased estimator for the data set chosen. *See* Pls.' Br. at 32–36 ("In sum, the OLS regression model did not constitute a sufficiently accurate and undistorted methodology needed to compute the PMS adjustment"); *see also* Wooldridge, Econometrics at 354.

Commerce fails to explain whether and to what extent a significant reduction in the number of countries selected impacts the OLS Regression Model. Commerce explains that in response to comments made by the parties, it made three changes to the PMS adjustment calculation used in the preliminary results. Final Decision Memo. at 65. One of those changes was a reduction in the number of countries analyzed from 38 countries to eight. *Id.* A significant reduction in the sample size without further explanation calls into question whether the eight remaining countries are a representative sample of the population or cherry-picked to favorably manipulate the results of the OLS Regression Model. *See* Wooldridge, Econometrics at 324–26 (explaining that nonrandom sampling and sample size reduction can lead to biased results). Without further explanation, the court cannot determine if Commerce's decision is reasonable.

Commerce fails to address evidence proffered by Garg disputing the inverse relationship between uneconomic capacity and HRC prices. *See* PMS Rebuttal at 81–83, Ex. 28 pp. 65–66; Pls.' Br. at 34–35. Commerce argues that an "inverse relationship between steel overcapacity and HRC prices is an empirical fact" asserting Garg "offers no formable evidence that disputes the inverse relationship between uneconomic capacity and HRC prices." Final Decision Memo. at 68–69. Yet, as part of its PMS Rebuttal, Garg submitted a study contradicting the inverse relationship between global steel overcapacity and HRC prices. Pls.' Br. at 34–35; PMS Rebuttal Ex. 28. Commerce does not address this study in either the Final Decision Memo. or the PMS Memo. *See* Final Decision Memo.; PMS Memo. Commerce's use of the regression coefficient for uneconomic capacity to calculate the PMS adjustment stems from its belief that the global

[26] If the model is linear in parameters, has no perfect collinearity between the explanatory variables, and has an error term with a population mean of zero, the model is procedurally unbiased, however bias may still be introduced through the sample selected. *See* Wooldridge, Econometrics at 87–88, 353. If the first five Gauss-Markov assumptions are met, no alternative unbiased estimator will be better than the ordinary least squares estimator. *See id.* at 354. An OLS regression model has normality if the error term "is independent of the explanatory variables . . . and is normally distributed with zero mean and variance." Wooldridge, Econometrics at 118, 355.

overcapacity crisis is the primary cause of the alleged PMS in India. Final Decision Memo. at 66. In order to continue relying on the regression coefficient for uneconomic capacity Commerce must address the evidence submitted by Garg either by explaining why it disregarded the evidence or why its determination is reasonable in light of the evidence.

Nor does Commerce adequately respond to arguments proffered by Garg that the OLS Regression Model is skewed. Garg proffers evidence suggesting the OLS Regression Model is unstable and argues that some of the variables selected by Commerce are over inclusive, while other "critical" explanatory variables are omitted completely. Garg Tube's PMS Comments at 3–4, Exs. 1–2, PD 237 CD 162–163 bar code 3879948–02 (Aug. 16, 2019) ("PMS Rebuttal Comments"); Garg Tube's Admin. Case Br. at 65–70, PD 240, CD 164, bar code 3884484–01 (Aug. 27, 2019) ("Garg's Agency Br."). Garg's argument suggests that due to the problems it identifies with the variables, the OLS Regression Model does not satisfy the Gauss-Markov assumptions for unbiasedness of the estimator, thus the OLS Regression Model cannot be the best estimator for the relationship between the explanatory variables and the dependent variable and any results it produces are of questionable validity. *See* Garg's Agency Br. at 65–70.

Commerce relies on gross fixed capital formation ("GFCF") as a proxy variable for the explanatory HRC demand variable, arguing that GFCF is an appropriate proxy variable for demand because "it is indisputable that conditions that lead to changes in investment goods also lead to changes in demand for HRC."[27] Final Decision Memo. at 69. Related to the use of GFCF as a proxy for the demand variable, Garg argues that Commerce omitted critical explanatory variables from the OLS Regression Model. Garg's Agency Br. at 68–70 ("Since the OLS regression model entirely fails to account for such fiscal/monetary/taxation factors, it is an oversimplified and incomplete model," providing the sub-prime mortgage crisis as an example). Implicit in Garg's argument is that the omission of fiscal, monetary, and taxation explanatory variables leads to omitted variable bias, a violation of the Gauss-Markov zero conditional mean assumption. *See* Garg's Agency Br. at 65–70; Wooldridge, Econometrics at 350–51. The violation of this Gauss-Markov assumption calls into question the validity of the regression model. *See* Wooldridge, Econometrics at 88–94. Omitted variable bias occurs when a variable is correlated with one or more explanatory variables and is a determinant of the

[27] Garg's argument that GFCF is an overly inclusive proxy for macroeconomic demand asks the court to reweigh the evidence. *See* Pls.' Br. at 35.

dependent variable but is omitted from the regression model. *Id.* If a variable meets both conditions, it is considered a relevant variable. *Id.* The exclusion of a relevant variable introduces bias[28] into a regression model, distorting all other regression coefficients. *See id.* (explaining the impact of omitted variable bias on a multiple regression model). Omitted variable bias can be corrected by including the omitted variable in the regression.[29] *See id.* at 88–91. Garg's argument has merit. Commerce argues that demand for HRC is captured by the GFCF explanatory variable and admits that fiscal, monetary, and taxation policies "lead to changes in the demand for HRC." Final Decision Memo. at 69. Commerce's admission demonstrates a relationship between fiscal, monetary, and taxation policies and demand for HRC. It is unclear to the court how Commerce isolates the impact of fiscal, monetary, and taxation policies on the explanatory HRC demand variable. Furthermore, Commerce asserts that India's fiscal policies such as safeguard duties and antidumping duties were put in place to alter the price of domestic HRC, the dependent variable. *Id.* at 23. Commerce's explanation suggests fiscal, monetary, and taxation polices may be relevant variables and if so, failure to control for them introduces bias into the OLS Regression Model.

The court cannot determine if Commerce's decision to exclude variables for fiscal, monetary, and taxation policies is reasonable because Commerce does not explain whether the variables are relevant or whether their omission introduced an unacceptable amount of bias into the regression. The OLS Regression Model is designed to examine how the price of HRC is impacted by the identified explanatory variables. *Id.* at 65. Commerce seeks to isolate the impact that uneconomic capacity has on the price of HRC using the OLS Regression Model in order to calculate the appropriate PMS adjustment. *Id.* Yet, if a relevant variable has been omitted from the OLS Regression Model, the identified explanatory variables will suffer from distortion. *See* Wooldridge, Econometrics at 88–91. On remand, Commerce must explain what impact, if any, the exclusion of these variables has on the OLS Regression Model.[30] To the extent that the exclusion of these variables introduces bias into the OLS Regression Model, Com-

[28] Bias is "[t]he difference between the expected value of an estimator and the population value that the estimator is supposed to be estimating." *Id.* at 845.

[29] The choice to include a relevant explanatory variable requires an analysis of the trade-off between bias and variance. *Id.* at 98. Introduction of the relevant variable may reduce bias while increasing the variance of the explanatory variables. *Id.* at 94–98. Variance of the explanatory variables is an important consideration because a larger variance results in a less precise estimation and less accurate hypotheses tests. Id. at 94.

[30] The OLS Regression Model is by necessity a simplification of the observed economy, limited by the availability of economic data and Commerce's resources. *See* Final Decision Memo. at 63–64. The court's remand order does not require Commerce to control for every

merce must either include them or provide an adequate explanation for their exclusion. If the variables are not relevant, Commerce must explain why.

Finally, Garg submitted evidence demonstrating that changing the time period analyzed by the regression significantly impacts the relationship between the explanatory variable and dependent variable.[31] PMS Rebuttal Comments at 3–4, Exs. 1–2 ("the coefficient for uneconomic capacity . . . was negative for the 2008–17 and 2009–17 runs, but then abruptly switched to a positive sign for the runs from 2010–17 and onward"). Garg's argument suggests that the explanatory variables time and uneconomic capacity are highly correlated. Pls.' Br. at 36; *see also* Final Decision Memo. at 54 (arguing that the explanatory variables are "highly correlated" with one another). In response, Commerce explained that because the relationship between uneconomic capacity and domestic prices is constant over time, the inclusion or exclusion of data from 2008 and 2009 does not change the overall nature of the relationship. Final Decision Memo. at 69. However, Garg provides evidence in its PMS rebuttal comments demonstrating that the overall nature of the relationship does change with the inclusion or exclusion of the 2008 and 2009 data. PMS Rebuttal Comments at 3–4, Exs. 1–2; *see also* Garg's Agency Br. at 86–Br. (explaining the relevance of the regression output in the PMS Rebuttal Comments.); Pls.' Br. at 36 (same). Depending on the time period examined, the direction of the relationship between uneconomic capacity and HRC price changes. PMS Rebuttal Comments at 3–4, Exs. 1–2; *see also* Garg's Agency Br. at 86–87. The directional change in the relationship depending on the time period examined suggests a correlation between time and uneconomic capacity.

Commerce must either reconsider its determination or explain its determination and support it with substantial evidence. Commerce explains that the inclusion of the 2008 and 2009 data is necessary to demonstrate the origins of the overcapacity crisis and avoid the degrees of freedom problem, but it does not address Garg's argument regarding the correlation between the explanatory variables. *See* Final Decision Memo. at 69. Until Commerce addresses Garg's correlation argument, the court cannot say if Commerce's decision to use

possible explanatory variable. It only requires Commerce to control for relevant explanatory variables or explain to the court why the exclusion of a relevant explanatory variable does not result in a significantly less accurate PMS adjustment calculation.

[31] The impact of the years regressed is best defined as an influential observation. An observation is influential "if dropping it from the analysis changes the key OLS estimates by a practically 'large' amount." Wooldridge, Econometrics at 326–27. Although ordinary least squares regressions are sensitive to influential observations, there is cause for concern when slight modifications of the sample result in large changes to the estimates. *See id.*

the OLS Regression Model is reasonable in light of the evidence detracting from its determination.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determinations to remove the PMS adjustment from the sales-below-cost test and rely on neutral facts available for the missing cost of production data. Commerce's PMS determination and adjustment are remanded. In accordance with the foregoing, it is

ORDERED that Commerce's remand redetermination is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its remand redetermination.

Dated: March 11, 2022
New York, New York

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

Slip Op. 22–21

The GOVERNMENT OF QUÉBEC, Plaintiff, and MARMEN INC., MARMEN ÉNERGIE INC., MARMEN ENERGY CO., Consolidated Plaintiffs, and the GOVERNMENT OF CANADA, Plaintiff-Intervenor, v. the UNITED STATES, Defendant, and WIND TOWER TRADE COALITION, Defendant-Intervenor, and the GOVERNMENT OF ONTARIO, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 20–00168
PUBLIC VERSION

[Plaintiff's, Consolidated-Plaintiffs', Plaintiff-Intervenor's and Defendant-Intervenor's Motions for Judgment on the Agency Record are Denied, and Commerce's *Final Results* are Sustained.]

Dated: March 18, 2022

Nancy A. Noonan, ArentFox Schiff LLP, of Washington, D.C., argued for Plaintiff Government of Québec. With her on the joint brief were *Matthew J. Clark*, *Jessica J. DiPietro*, and *Aman Kakar*. With them on the prior briefs were Arent Fox LLP, of Washington, D.C.

Jay C. Campbell, White & Case, LLP, of Washington, D.C., argued for Consolidated Plaintiffs Marmen, Inc.; Marmen Énergie Inc.; and Marmen Energy Co. With him on the brief were *Allison J.G.Kepkay*, *Ting-Ting Kao*, and *Ron Kendler*.

Alan G. Kashdan, McDermott Will & Emery LLP, of Washington, D.C., argued for Plaintiff-Intervenor Government of Canada. With him on the brief were *Joanne E. Osendarp*, *Tim Hruby*, and *Conor Gilligan*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With him on the brief were *Brian M. Boyton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance.

Maureen E. Thorson, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor Wind Tower Trade Coalition. With him on the brief were *Alan H. Price*, *Daniel B. Pickard*, *Robert E. DeFrancesco, III*, *Laura El-Sabaawi*, and *Cynthia C. Galvez*.

H. Deen Kaplan, Hogan Lovells US LLP, of Washington, D.C., for Defendant-Intervenor Government of Ontario.

OPINION

Katzmann, Judge:

Wind towers are used to convert the energy from wind to electrical energy. Utility scale wind towers, now before the court, are tubular steel structures upon which other wind turbine components are mounted, and are used primarily in utility scale electrical power generation projections. Petitions for the Imposition of Antidumping and Countervailing Duties, Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam at 7–18 (July 9, 2019), P.R. 1, 2, 7, 9, 15, C.R. 1, 2, 7, 9, 15 ("Petitions"). This case presents five issues arising from the United States Department of Commerce's ("Commerce") final determination after countervailing duty ("CVD") investigation that in derogation of U.S. fair trade laws, subsidies are being provided to producers and exporters of utility wind towers from Canada, and from Commerce's consequent issuance of CVD orders based on assessment of remedial CVD subsidy rates. *Utility Scale Wind Towers from Canada: Final Affirmative Countervailing Duty Determ. and Final Negative Determ. of Critical Circumstances*, 85 Fed. Reg. 40,245 (July 6, 2020), P.R. 401 ("*Final Results*"). The *Final Results* are now challenged for a variety of reasons by Plaintiff Government of Québec ("GoQ"), Plaintiff-Intervenor Government of Canada ("GoC"), and Consolidated Plaintiffs Marmen Énergie and Marmen Inc. (collectively, "Marmen"), as well as by Defendant-Intervenor Wind Tower Trade Coalition ("WTTC"). First, Marmen challenges Commerce's determination that

Marmen's proposed foreign currency adjustment from its auditor was unverified and unreliable, and accordingly properly excluded from the total sales denominator used to calculate the subsidy rate. Second, WTTC challenges Commerce's determination that the Québec Local Content Requirement program constitutes a "recurring benefit" such that it was not countervailable during the period of investigation ("POI"). Third, GoQ and GoC challenge Commerce's determination that the Québec On-the-Job Training Tax Credit is de facto specific as required by 19 U.S.C. § 1677(5A). Fourth, GoQ and Marmen challenge Commerce's exclusion of tax liabilities in computing the benefit conferred by the GASPÉTC tax credit. Fifth, GoQ, GoC and Marmen challenge Commerce's determination of financial contribution and benefit for additional depreciation allowed for buildings used in manufacturing in Canada's and Québec's tax systems. The court sustains all of Commerce's challenged determinations and denies the motions of Plaintiff, Consolidated Plaintiff, Plaintiff-Intervenors, and Defendant-Intervenor for judgment on the agency record.

BACKGROUND

I. Legal Background

The Tariff Act of 1930 (the "Tariff Act") was enacted to empower Commerce to address trade distortions caused by unfair economic practices.[1] In particular, it provides for the investigation of potential government subsidization and for the imposition of duties on subject merchandise. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012); *see also Bebitz Flanges Works Pvt. Ltd. v. United States*, 44 CIT __, __, 433 F. Supp. 3d 1309, 1314 (2020). These CVD actions are intended to be remedial rather than punitive in nature, *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990), and it is therefore Commerce's duty to determine rates "as accurately as possible," *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

In order to impose duties under Section 701 of the Tariff Act of 1930, Commerce must first find the existence of a countervailable subsidy. A countervailable subsidy is one which satisfies the following ele-

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. §§ 1677e, 1677m however, are not to the U.S. Code, 2012 edition, but to the unofficial U.S. Code Annotated 2018 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. §§ 1677e, 1677m (2012) by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). The TPEA amendments are applicable to all determinations made on or after August 6, 2015, and therefore, are applicable to this proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2015).

ments: (1) a government or public authority has directly or indirectly provided a financial contribution; (2) a benefit is thereby conferred upon the recipient of the financial contribution; and (3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. *See* 19 U.S.C. §§ 1677(5), (5A). If Commerce determines that a foreign government is providing a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, sold, or likely to be sold for import into the United States, and the International Trade Commission determines that an industry in the United States thereby is materially injured or threatened with material injury, Commerce is required by statute to impose a CVD upon such merchandise equal to the net countervailable subsidy. *See id.* § 1677(5).

With respect to the first factor, the Tariff Act defines financial contribution not only as "the direct transfer of funds" but also as "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." *Id.* § 1677(5)(D)(i)–(ii).

With respect to the second factor, the Tariff Act and Commerce regulations set out how Commerce must define, quantify and allocate benefits. In relevant part: (i) The Tariff Act provides that "a benefit shall normally be treated as conferred . . . in the case where goods or services are provided . . . if such goods are purchased for more than adequate remuneration[,]" *id.* § 1677(5)(E); (ii) 19 C.F.R. § 351.503 provides the general rules for identifying and delimiting a benefit; and, (iii) 19 C.F.R. § 351.509 provides specific rules for benefits provided by means of direct taxes.

With respect to the third factor, the statute requires that a countervailable subsidy must exhibit either de jure or de facto specificity. *See* 19 U.S.C. § 1677(5A). A subsidy is de jure specific where the authority providing the subsidy, or its authorizing legislation, expressly limits access to the subsidy to an enterprise or industry. *See id.* § 1677(5A)(D)(i). To avoid a designation of de jure specificity, the administering authority must ensure that access to the subsidy is governed by objective industry- or enterprise-neutral criteria resulting in automatic eligibility, and that the criteria for eligibility are both strictly followed and clearly set forth in the relevant official materials so as to be verifiable. *See id.* § 1677(5A)(D)(ii). A subsidy that escapes de jure specificity may nevertheless be designated de facto specific if one or more of the following criteria are satisfied: (1) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (2) an enterprise or industry is a predominant user of the subsidy; (3) an enterprise or

industry receives a disproportionately large amount of the subsidy; or (4) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others. *Id.* § 1677(5A)(D)(iii)(I)–(IV).

II. Factual and Procedural History

On July 9, 2019, WTTC filed AD and CVD petitions with Commerce, alleging in relevant part that utility scale wind towers from Canada were subsidized, and that imports of these products were causing material injury to the U.S. wind tower industry. *See generally*, Petitions. On August 6, 2019, Commerce began its investigation of Marmen for the period of investigation ("POI") from January 1, 2018, through December 31, 2018. *See Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations*, 84 Fed. Reg. 38,216 (Dep't Commerce Aug. 6, 2019); *see also* Mem. from J. Maeder to J. Kessler, re: Issues and Decision Mem. for the Final Determ. of the Countervailing Duty Investigation of Utility Scale Wind Towers from Canada at 3 (Dep't Commerce June 29, 2020), P.R. 399 ("IDM"). Commerce then selected "the two largest producers/exporters of the subject merchandise, by volume," as mandatory respondents: Marmen Énergie and Marmen Inc. (collectively, "Marmen").[2] Mem. from J. Maeder to J. Kessler, re: Decision Mem. for the Prelim. Determ. of the Countervailing Duty Investigation of Utility Scale Wind Towers from Canada at 2 (Dep't Commerce Dec. 6, 2019), P.R. 308 ("PDM"). On December 13, 2019, Commerce preliminarily determined that countervailable subsidies are being provided to producers and exporters of wind towers from Canada through eight identified programs or credits; among them, a Québécois tax credit for on-the-job training, Québec's

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

> If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may—
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or
>
> (B) determine a single country-wide subsidy rate to be applied to all exporters and producers.
>
> The individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5) of this title.

Tax Credit to Promote Employment in Gaspésie and Certain Maritime Regions of Québec (GASPÉTC), and Canada's and Québec's treatment of depreciation for the taxation of certain buildings used in manufacturing. *Utility Scale Wind Towers From Canada: Prelim. Affirmative Countervailing Duty Determ., and Alignment of Final Determ. With Final Antidumping Duty Determ.*, 84 Fed. Reg. 68,126. (Dep't Commerce Dec. 13, 2019), P.R. 313 ("*Preliminary Results*"); *see also* PDM at 8–16. Commerce further preliminarily determined that the Québec Local Content Requirement, a component of the wind farm energy production and purchase process, was not countervailable. PDM at 19–20.

Subsequently, Commerce conducted a verification of the information submitted by Marmen[3] and published its *Final Results*.[4] *Final Results*; IDM at 9. In Commerce's *Final Results*, it concluded that wind towers from Canada were being subsidized at a rate of 1.18% for the mandatory respondent and all others. 85 Fed. Reg at 40,246. Relevant here, Commerce again found that Québec's on-the-job training tax credit, the GASPÉTC program, and Canada's and Québec's tax treatment of manufacturing facilities provide countervailable benefits, and determined that the Québec Local Content Requirement was not countervailable.

On September 4, 2020, GoQ filed a complaint challenging Commerce's final determination in the investigation of wind towers from Canada. Compl., ECF No. 2. On October 5, 2020, GoC joined the case as a Plaintiff-Intervenor,[5] Order, ECF No. 20, and WTTC joined the case as a Defendant-Intervenor, Order, ECF No. 19. Marmen and WTTC additionally initiated separate appeals of Commerce's determination, which were consolidated into the present case on November 21, 2020. Order, ECF No. 26.[6] On February 11, 2021, GoQ, GoC, Marmen and WTTC each moved for judgment on the agency record. Pl.'s Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 28 ("GoQ's Br."); Consol. Pl.-Int. GoC's Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 32 ("GoC's Br."); Mem. of Points &

[3] Commerce declined to formally verify the responses from GoQ and GoC as a result of travel restrictions imposed in response to the Covid-19 pandemic.

[4] The final countervailing duty order was signed by Commerce on August 20, 2020, and published in the Federal Register on August 26, 2020. *Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Am. Final Affirmative Countervailing Duty Determ. and Countervailing Duty Orders*, 85 Fed. Reg. 52,543, 52,545 (Dep't Commerce Aug. 26, 2020), P.R. 425 (reducing the subsidy rate to 1.13% in response to a ministerial error allegation for reasons unrelated to this action).

[5] GoC qualifies as an interested party pursuant to 19 U.S.C. § 1677(9)(B), and is therefore entitled to intervene as a matter of right pursuant to 28 U.S.C. § 2631(j)(1)(B).

[6] The Government of Ontario also joined the action as Defendant-Intervenor, but has not further participated in the litigation.

Auths. in Supp. of Pls.' Rule 56.2 Mot. for J. on the Agency R., ECF No. 34–1 ("Marmen's Br."); WTTC's Revised Mem. in Supp. of its Rule 56.2 Mot. for J. upon the Agency R., ECF No. 36 ("WTTC's Br.") (revised Feb. 12, 2021). On June 10, 2021, the Government responded to each of these motions. Def.'s Resp. to Pls.' Rule 56.2 Mots. for J. on the Agency R., ECF No. 44 ("Def.'s Br."). Also on June 10, 2021, (i) GoQ and Marmen responded to WTTC's motion (regarding the Québec Local Content Requirement), GoQ's Resp. in Opp'n to WTTC's Rule 56.2 Mot. for J. on the Agency R., ECF No. 42 ("GoQ's Resp."); Consol. Pl.'s Resp. Br., ECF No. 47 ("Marmen's Resp."), and (ii) WTTC responded to GoC's, GoQ's and Marmen's motions for judgment on the agency record, WTTC's Resp. Br., ECF No. 45 ("WTTC's Resp."). Next, on July 8, 2021, (i) GoQ, GoC and Marmen replied to the responses filed by the Government and WTTC, Reply Br. of Pl. GoQ, ECF No. 56 ("GoQ's Reply"); Consol. Pl.-Int. GoC's Rule 56.2 Reply Br., ECF No. 55 (GoC's Reply"); Reply Br. in Supp. of Pls.' Rule 56.2 Mot. for J. on the Agency R., ECF No. 58 ("Marmen's Reply"); and (ii) WTTC replied to the Government, GoQ and Marmen, WTTC's Reply Br., ECF No. 53 ("WTTC's Reply").

On November 12, 2021, the parties submitted responses to questions presented by the court in advance of oral argument. Pl. GoQ Resp. to Questions for Oral Arg, ECF No. 74 ("GoQ's Oral Arg. Subm."); GoC's Resp. to Ct.'s Questions for Oral Arg., ECF No. 76 ("GoC's Oral Arg. Subm."); Marmen's Resp. to Ct.'s Questions for Oral Arg., ECF No. 75; Def.'s Resp. to Ct.'s Nov. 1, 2021 Questions for Oral Arg., ECF No. 77; WTTC Resp. to Ct.'s Questions for Oral Arg, ECF No. 73. Oral argument was held on November 17, 2021. Oral Arg., ECF No. 80. Finally, on November 23, 2021, the parties, except WTTC, provided post-oral argument submissions. Pl. GoQ's Post Arg. Subm., ECF No. 83; GoC's Post-Arg. Subm., ECF No. 81; Marmen's Post-Arg. Subm., ECF No. 85; Def.'s Post-Arg. Subm., ECF No. 82.

III. Programs Assessed

Québec Local Content Requirement

The Québec Local Content Requirement is a program in which the electric utility of Québec, Hydro-Québec, issues calls for tender ("CFTs") for blocks of wind-produced electricity.[7] To be eligible for the program, wind farm developers attempting to sell electricity to Hydro-Québec are required to make certain minimum expenditures in Québec in connection with their wind farms — some tenders further specified minimum expenditures for specific regions of Qué-

[7] A CFT is the process by which a public company solicits bids from companies competing for works, supply or service contracts.

bec. PDM at 19. Purchases from Marmen (including from wind turbine manufacturers that sourced their towers from Marmen), as a Québécois wind tower manufacturer (and, later, with a facility in the specific subregions), were eligible for inclusion in the required minimum. Marmen's Resp. at 4–9.

Commerce determined that, insofar as the GoQ "entrusted and directed" the purchase of wind towers from Marmen via the Québec Local Content Requirement, it involved a purchase for more-than-adequate remuneration ("MTAR"). PDM at 20; IDM at 37–38; 19 U.S.C. § 1677(5)(B)(iii). Commerce further concluded, based on the past treatment of purchases of goods and services for MTAR, that the Local Content Requirement was a recurring benefit. IDM at 36. A recurring benefit is allocated to the year the benefit is received.[8] 19 C.F.R. § 351.524(a). Because Marmen did not make sales of wind towers to turbine manufacturers for local content requirement tenders during the POI, Commerce found no benefit during the POI and declined to countervail the program. IDM at 38; *see also* Marmen's Resp. at 4.

Québec's On-the-Job Tax Credit Program.

Québec's On-the-Job tax credit "encourages businesses to take on trainees and improve the professional skills of young workers" by allowing those businesses which do so to "claim a tax credit at a rate of 24% in respect to the salary or wages paid to the student or apprentice, and the salary or wages paid to an employee for hours devoted to the supervision of the student or apprentice." GoQ's Initial Questionnaire Resp., Ex.QC-C09-A at 1 (Oct. 9, 2019), P.R. 132; *see also* PDM at 15. Ultimately, Commerce determined that the On-the-Job tax credit provided a de facto specific subsidy because the "actual number of recipients that benefited from the tax credit during the POI relative to the total number of tax filers during the POI are limited in number on an enterprise basis." IDM at 56. It accordingly found a 0.01% ad valorem subsidy. *Id.* at 7.

GASPÉTC

GoQ's GASPÉTC tax program provides a 15% tax credit for qualifying salary and wages paid by an eligible company to eligible employees. PDM at 15–16. However, the amount of GASPÉTC credit claimed by an eligible company in a given tax year is treated as taxable income in the subsequent year. *Id.* On Marmen's tax-year 2017 return (filed in 2018), it claimed GASPÉTC credit toward

[8] Generally, Commerce allocates a non-recurring benefit over the number of years corresponding to the average useful life of a physical asset. *See* 19 C.F.R. § 351.524 (explaining the criteria for identifying and allocating recurring and non-recurring benefits).

provincial income taxes payable in Québec and included the amount of GASPÉTC credit it claimed in tax-year 2016 as income. IDM at 52; *see also* Marmen's Br. at 11.

Commerce found the benefit conferred to be the value of the tax credit claimed in tax-year 2017 and declined to reduce the value of the benefit by the additional 2017 tax liabilities Marmen incurred by including its tax-year 2016 GASPÉTC credit as income in tax-year 2017. Ultimately, Commerce found a 0.78% ad valorem subsidy. *Id.* at 7.

Additional Depreciation

Both Federal and Provincial (Québecois) tax systems provide a depreciation deduction, called the Capital Cost Allowance ("CCA"), for property used to earn business or property income. Both systems divide assets into classes, which are then assigned their own rates and methods of depreciation over the useful life of the asset.

Under the Canadian CCA, Class 1 includes three kinds of buildings: residential buildings, non-residential buildings primarily used for manufacturing or processing and other non-residential buildings (e.g., buildings used in retail). GoC's Br. at 1. In Québec, Class 1 is designated for nonresidential buildings. GoQ's Br. at 28. In both systems, the generally applicable rate of CCA for Class 1 assets is 4%, but taxpayers can claim a higher rate of depreciation for certain types of non-residential property. An additional 6% depreciation is allowed when at least 90% of an eligible building's floor space is used for manufacturing or processing and the building was acquired after March 18, 2007. IDM at 22. Similarly, an additional 2% depreciation is provided for eligible buildings acquired after March 18, 2007 when at least 90% is used for non-residential use. *Id.* Taxpayers in both systems must place the asset into a separate class to receive the additional depreciation. GoC's Br. at 12; GoQ's Br. at 28. This additional deprecation purportedly reflects differences in the useful life of assets used in manufacturing or other non-residential capacities, according to an empirical study conducted by an agency of GoC, Statistics Canada.

Marmen claimed the 10% depreciation on certain buildings. Marmen's Br. at 9–10. Commerce treated the additional depreciation as a financial contribution and quantified the benefit as the 6% difference from the otherwise applicable rate for Class 1 assets. IDM at 24. Commerce ultimately determined a subsidy rate of 0.07% ad valorem. *Id.* at 6.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581 and 19 U.S.C. § 1516a(a)(2). As noted above, a subsidy is countervailable if it satisfies the elements of 19 U.S.C. § 1677(5): (i) a government or public authority has provided a financial contribution; (ii) a benefit is thereby conferred upon the recipient of the financial contribution; and (iii) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. *See* 19 U.S.C. §§ 1677(5), (5A).

The court sustains Commerce's CVD determinations, findings, and conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "has been defined as 'more than a mere scintilla,' [and] as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The substantiality of evidence must account for anything in the record that "fairly detracts from its weight." *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). Commerce must also examine the record and provide a satisfactory explanation for its findings such that the record demonstrates a rational connection between the facts accepted and the determination made. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Jindal Poly Films Ltd. of India v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1379, 1383 (2019). Commerce's findings may be found to be supported by substantial evidence even where two inconsistent conclusions could be drawn from the record. *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT 1370, 1373 (2012) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1996)). However, agencies act contrary to law if their decision-making is not reasoned. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962).

DISCUSSION

The court concludes that Commerce's final determination was in accordance with law and supported by substantial evidence. First, Commerce permissibly excluded the foreign auditor's adjustment as

unreliable. Second, Commerce reasonably and lawfully determined that the Québec Local Content Requirement provided a recurring benefit. Third, Commerce acted reasonably within its statutory authority under 19 U.S.C. § 1677(5A)(D)(iii) in determining that the Québec On-the-Job Training tax credit was a de facto specific subsidy. Fourth, Commerce acted in accordance with law in excluding increased tax liabilities when conducting the benefit calculation for GASPÉTC. Fifth and finally, Commerce acted reasonably and in accordance with law when finding that the additional depreciation rate for Class 1 assets constituted a financial contribution and benefit equal to the difference between the rate assessed and the rate applicable if the additional depreciation were not claimed.

I. Commerce's Exclusion of Marmen's Foreign Currency Auditor Adjustment Was Supported by Substantial Evidence and in Accordance with Law.

To calculate the total sales denominator for assessing the subsidy rate, Commerce used the total free-on-board sales less intercompany sales. IDM at 40–44. In both the *Preliminary Results* and *Final Results*, Commerce relied on sales figures provided by Marmen in response to Commerce's Initial Questionnaire instead of on a later submission that included an adjustment from Marmen's auditor. IDM at 41. This later submission was provided in response to Commerce's request, prior to making its preliminary determination, for reconciliation of Marmen's reported sales figures. *Id.* Marmen's response included both revised sales figures and an exhibit that provided for "necessary adjustments," including one for "Year End auditor adjustment in GL[] for Gain(loss) exchange rate." *Id.* at 41. This adjustment was not further explained by the submission, except where Marmen noted that its "foreign currency transactions are translated into Canadian dollars using the exchange rate in effect at the date of transaction." Letter from Marmen to W. Ross, re: Utility Scale Wind Towers from Canada: Ministerial Error Comments at 2 (Dec. 18, 2019) P.R. 318 ("Marmen's Ministerial Error Comments"). Commerce used the initial sales figures in its *Preliminary Results* without making any adjustments, and subsequently declined to amend the *Preliminary Results* in response to Marmen's filed comment arguing that failure to make the adjustments constituted ministerial error. IDM at 41–44; *see generally* Marmen's Ministerial Error Comments.

At verification, Commerce learned that during the POI Marmen recorded the value of sales denominated in United States dollars ("USD") in its general ledger sales accounts in the amount of the USD-value of the sale, which were then treated on a one-to-one basis with Canadian dollars ("CAD"). IDM at 42; Mem. from Y. Bordas to

File, re: Verification of Questionnaire Resps. of Marmen, Inc. Marmen Énergie Inc., and Gestion Marmen at 24 (Dep't Commerce Apr. 16, 2020), P.R. 374, C.R. 309 ("Marmen Verification Report"). Thus, Marmen's listed USD sales were undercounted in the total sales figures provided to Commerce, which Marmen reported in CAD. Marmen explained that to reach its final sales figures, it made year-end currency conversions through an auditor's adjustment. IDM at 42. Accordingly, it argued that its total sales denominator should reflect the foreign currency exchange adjustments. *Id.*

When Commerce examined the sales accounts that were identified as needing to be converted from USD into CAD, it discovered five sales that were actually coded in the general ledgers as having been transacted in Euros. IDM at 42. Moreover, upon further investigation, Commerce discovered that two of the sales coded in the general ledgers as Euro-denominated were, in fact, transacted in CAD. *Id.* The other three were, indeed, transacted in Euros. *Marmen Verification Report* at 26–28. As the USD to CAD currency conversion would be inappropriate for at least these five sales, Commerce found the auditor's adjustment to be unverified and unreliable. IDM at 43. Instead, relying on facts available pursuant to 19 U.S.C. § 1677e, Commerce calculated the total sales denominator using Marmen's reported information, as it had in the *Preliminary Results*. IDM at 43. In so doing, Commerce explained that it conducts spot checks because it is unable to review every sale, but was satisfied with the accuracy of the data without the auditor's adjustment: "we find that the vast majority of the sales-related and other tests Commerce performed throughout the verification uncovered no other errors." *Id.*

Marmen now makes two primary arguments:[9] (i) Commerce acted contrary to law by failing to identify compelling evidence that the independent auditor was not in good standing prior to rejecting its report, Marmen's Br. at 14–17, and (ii) Commerce unreasonably inferred from the record that the auditor's adjustment was unreliable, *id.* at 17–21. The court rejects each, and concludes that Commerce acted in accordance with law and with the support of substantial evidence when it applied facts available after identifying evidence of errors in the proposed foreign currency adjustment.

Marmen's argument that Commerce must accept an independent auditor's analysis of a respondent's financial statements, in the absence of "compelling evidence" that the auditor is not in good stand-

[9] Marmen also argues that "[c]ertain mistaken findings clouded Commerce's judgment[.]" Marmen's Br. at 22–24. The court declines the invitation to theorize about Commerce's unstated reasoning. Just as it may not consider post-hoc rationalizations, "the court must judge the propriety of [agency] action solely by the grounds invoked by the agency." *Burlington Truck Lines*, 371 U.S. at 169.

ing, is unavailing. *Id.* at 15–16. In support of the compelling evidence requirement, Marmen cites one case from this court, *SeAH Steel VINA Corp. v. United States*, 41 CIT __, __, 269 F. Supp. 3d 1335, 1352 (2017), and two administrative determinations, *Notice of Final Results and Final Rescission in Part of Antidumping Duty Admin. Rev.: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan; 2005–2006*, 73 Fed. Reg. 1,202 (Dep't Commerce Jan. 7, 2008) ("*2008 Pipe Fittings A.R.*") and *Notice of Final Results and Final Rescission in Part of Antidumping Duty Admin. Rev.: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan; 2004–2005*, 71 Fed. Reg. 67,098 (Dep't Commerce Nov. 20, 2006) ("*2006 Pipe Fittings A.R.*"). *Id.* Even if the court were bound by the logic of *SeAH Steel*, that decision does not impose a rule requiring compelling evidence to set aside information provided by an auditor. *See* WTTC's Resp. at 15–16 (arguing this interpretation). Rather, *SeAH Steel* provides only that Commerce "*can* . . . accept the independent auditor's report as reliable unless 'compelling evidence' exists that the auditor is not in 'good standing.'" 269 F. Supp. 3d at 1352 (quoting *2006 Pipe Fittings A.R.*) (emphasis added). Nor does Commerce's ability to accept the findings of independent auditors supersede its duty to verify the information it relies upon in making its final determination. 19 U.S.C. § 1677m(i). Moreover, the administrative determinations cited by Marmen each involve Commerce's review of an auditor's judgment as to the reasonableness of various exclusions from otherwise accurate financial statements — not, as in this case, Commerce's determination to reject an auditor's erroneous currency adjustments. *See* Issues and Decision Mem. at Cmt. 1 accompanying 2008 Pipe Fittings A.R. Nor was there any evidence, in the 2006 or 2008 Pipe Fittings A.R., that contradicted the independent auditor's conclusions. *Id.*; *see also* 2006 Pipe Fittings A.R. This is in sharp contrast to the present case, where the auditor's adjustments were shown to be at least partially in error. Accordingly, Marmen has not established that Commerce acted contrary to law or past practice when it rejected the auditor's adjustment without compelling evidence that the auditor was not in good standing.

Second, Marmen has not established that Commerce was unreasonable to conclude based on the record that the auditor's adjustment was unreliable. Marmen, in effect, argues that Commerce could not infer that there might be further errors from the five erroneously Euro-coded sales comprising less than 0.2% of the total value of Deloitte's exchange rate adjustment.[10] Marmen's Br. at 17. Specifi-

[10] Marmen also argues that Commerce did not conduct a "spot check" at all because it reviewed a Marmen-prepared list of USD sales. Marmen's Reply at 4–7. Instead, Marmen

cally, Marmen argues (i) the only errors identified were the five Euro-coded errors; (ii) Commerce checked all the other Euro-coded sales and found no errors; and (iii) Commerce's other spot-checking revealed no additional errors. Marmen's Reply at 4, 13. However, as the Government notes, "errors uncovered in a spot check undermine the reliability of data more broadly." Def.'s Br. at 33–34.[11] While the impact of the discovered errors, taken alone, on the proposed foreign currency adjustment may be small, Commerce could reasonably infer that there may remain other errors. Thus, Commerce's determination that the auditor adjustment is unreliable is not unreasonable. Accordingly, Commerce's determination was supported by substantial evidence and not contrary to law. It is sustained.

II. Commerce's Finding that the Québec Local Content Requirement Provided a Recurring Benefit Is Reasonable and in Accordance with Law.

Commerce determined that the Québec Local Content Requirement was a recurring benefit such that, under 19 C.F.R. § 351.524(a), it is appropriately allocated to the year it was received. IDM at 36–37. Because Marmen did not make sales of wind towers in connection with CFT during the POI, Commerce therefore concluded that the Québec Local Content Requirement program did not confer any benefit on Marmen during the POI. *Id.* at 36. Accordingly, Commerce did not impose a countervailing duty. *Id.* at 38.

Commerce found that the Québec Local Content Requirement program provided a recurring benefit because it was a benefit in the form of the purchase of goods and services for MTAR ("MTAR benefit"). While Commerce has reserved formal regulation of MTAR benefits for a later date, it has stated that its intended approach is similar to the treatment of benefits in the form of less-than-adequate remuneration ("LTAR"). 63 Fed. Reg. 65,348, 65,379 (the "*Preamble*"); *see* 19 C.F.R. § 351.512. Here, Commerce explained that its determination relied on

contends, Commerce only conducted spot checks later when it selected invoices at random and found no discrepancies. This argument is not persuasive for two reasons. First, it would lead to undue interference in how Commerce conducts verification (including altering investigated party's impetus for compliance) if the court assessed and attributed significance to who identified what during verification. Second, as discussed, the very existence of errors has significance. *See also infra* note 11.

[11] The fact that the Euro-coded errors were identified is a sufficient basis for Commerce's determination that other USD-coded sales proposed to be converted might also be in error. Even if the Euro-coded errors have been comprehensively accounted for, the causes of those errors have not. Commerce was not unreasonable to conclude that the proposed adjustments may include transactions denominated in the general ledger in a currency different than that in which they were actually transacted or other errors not identified by the auditor. The fact that the additional spot checks did not uncover errors does not negate the inference of unreliability given the auditor's failure to identify and resolve the Euro-coded errors.

past treatment of MTAR benefits and LTAR regulations that indicate that the provision of goods and services for LTAR ("LTAR benefits") are normally treated as recurring benefits.[12]

If a subsidy is not on the illustrative lists or if a party challenges the treatment of a specific subsidy according to its position on one of the lists, the regulations also provides a three-part "test for determining whether a benefit is recurring or non-recurring." 19 C.F.R. § 351.524(c)(2). In this case, after the publication of the *Preliminary Results*, WTTC challenged Commerce's recurring benefit determination and its failure to apply the three-part test. *See* IDM at 33; Petitioner Case Brief at 20 (May 6, 2020), P.R. 381, C.R. 312. Subsequently, in its IDM, Commerce considered each component of the three-part test and concluded that "Marmen's *sales of wind towers*" (emphasis added) under the Québec Local Content Requirement program did not meet these criteria such that they would be considered a non-recurring benefit. IDM at 37.

The three-part test for the existence of a recurring benefit requires Commerce to consider:

(i) Whether the subsidy is exceptional in the sense that the recipient cannot expect to receive additional subsidies under the same program on an ongoing basis from year to year;

(ii) Whether the subsidy required or received the government's express authorization or approval (i.e., receipt of benefits is not automatic), or

(iii) Whether the subsidy was provided for, or tied to, the capital structure or capital assets of the firm.

19 CFR 351.524(c)(2). With respect to the first part, Commerce explained that "[a]lthough issued as four discrete tranches, the CFTs were for purchases of wind energy, *i.e.*, electricity, not wind towers. Marmen did not sell wind energy. Instead, it sold wind towers on a regular basis." IDM at 37. With respect to the second part, Commerce found that the sales of wind towers did not require approval from the

[12] Following the same principles as in LTAR analyses, Commerce has previously treated MTAR benefits as recurring benefits allocated to the year of receipt. PDM at 20. Commerce's analysis of LTAR benefits is guided by the regulation on "[a]llocation of benefit to a particular time period." 19 C.F.R. § 351.524. That regulation provides "non-binding illustrative lists of recurring and non-recurring benefits" and includes the provision of goods and services for LTAR as an example of a recurring benefit. 19 C.F.R. § 351.524(c). In addition, that regulation provides that LTAR benefits are allocated to the year received: either the year in which the recipient pays for the low-cost goods, or when the recipient was due to have paid the government for goods or services. 19 C.F.R. § 351.511(b)–(c). Citing both the past treatment of MTAR benefits and the LTAR analysis, Commerce found that the Québec Local Content Requirement program provided a recurring benefit, which was not conferred during the period of investigation. IDM at 36.

GoQ. *Id.* at 38. Commerce explained that while Marmen produced some certification documents that were provided to Hydro-Québec, they were product specification documents, not sales approval documents for GoQ to expressly authorize or approve. *Id.* at 37. Finally, Commerce explained that, regarding the third part, the sales under the Québec Local Content Requirement program did not benefit "Marmen's capital structure or assets any more than any sale normally benefits a company." *Id.*[13]

WTTC now argues that Commerce acted unreasonably and unlawfully when it applied the three-part test to determine the program provided a recurring benefit because it failed to take into account material record evidence and deviated from its regulations without explanation. WTTC's Br. at 11–12. First, WTTC contends that Marmen could not expect to receive subsidies on a regular basis because Marmen made wind tower sales "contingent on Marmen's ability to meet the [local content requirements] provided in each specific CFT," and therefore, "the limitation of these CFTs to four discrete tranches necessarily limited the benefit that Marmen received from the sales" stemming from the four CFTs. *Id.* at 14. Second, WTTC maintains that Commerce failed to adequately address evidence that the subsidies under the program were not automatic but required the government's express authorization or approval — including evidence that Marmen's contracts with customer-wind turbine manufacturers explicitly referred to the local content requirement and included documentation for GoQ's "compliance processes [that] demonstrated . .. GOQ expressly approved and monitored each and every project."[14] *Id.* at 16–18. Finally, WTTC asserts that Commerce mistakenly determined that the Québec Local Content Requirement program did not benefit Marmen's capital structure because it failed to consider, as required by regulation, how the program affected the "continued

[13] In addition, Commerce specifically considered an earlier supply agreement between Marmen and General Electric [[ ]]. IDM at 37–38. Commerce explained that the relationship of the [[ ]] to the benefits in the form of wind tower sales for MTAR was indirect and retroactive and thus not tied to capital assets. *Id.* For contrast, under past practice, Commerce found a benefit to be non-recurring when a "government financial contribution [] directly and/or indirectly prospectively support or contributes to a company's capital assets." *Id.* at 37. Moreover, Commerce explained that, even if those advanced funds were under investigation as a potential subsidy — Commerce noted that WTTC did not make the proper allegation as to the elements of a subsidy — they were provided prior to the POR and would have fallen outside the scope of its analysis. *Id.* at 38.

[14] In addition, WTTC argues that Commerce did not make a specific determination as to which documents it identified as "product specifications" in the IDM. WTTC's Reply at 13–15. But, Commerce need not have cited to the evidence binder so long as "the path of its decision" is otherwise reasonably discernible. *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009).

existence" of Marmen, WTTC's Br. at 19, 21–22,[15] and further failed to consider how the Québec Local Content Requirement program promoted the continued existence of the firm when it "spurred the creation of demand for wind energy generation and required the fulfilment of this demand from wind tower manufacturing facilities in Québec," WTTC's Br. at 21–22. The court considers each of WTTC's arguments in turn, and concludes that each fails to establish that Commerce acted unreasonably or unlawfully.

Regarding WTTC's first contention, Commerce reasonably concluded that the benefits under the local content requirement were conferred on a regular basis through the regular, frequent purchase of wind towers based on the record of substantial sales under the program each year until 2017.[16] IDM at 37 ("Marmen's regular, frequent sales of wind towers to its customers . . . were not exceptional events. Although issued as four discrete tranches, the CFTs were for purchases of wind energy, *i.e.*, electricity, not wind towers. Marmen did not sell wind energy. Instead, it sold wind towers on a regular basis."). While the analysis of the subsidy is complicated by how GoQ effectuates the serial transactions which relay the benefit from Hydro-Québec to Marmen, the IDM shows that Commerce extensively considered the nature of the transactions before concluding that the subsidies were regular and non-exceptional. *Id.* WTTC has not established that Commerce's consideration was unreasonable or otherwise inconsistent with the record, and the court therefore rejects WTTC's first argument.

With respect to WTTC's second contention, WTTC argues that Commerce's determination that GoQ was not required to provide express approval or authorization was unsupported by substantial evidence as a determination based on the singular and unsupported assertion

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[15] WTTC argues that Commerce failed to address evidence that the [[
]] were linked to subsequent purchases of wind towers when Commerce found that those funds did not directly benefit Marmen's capital structure. WTTC's Br. at 25. In relevant part, WTTC contends that the Québec Local Content Requirement program prompted General Electric to enter into an agreement with Marmen that [[

]], and that this agreement was linked to wind tower sales because [[

]]. *Id.* at 23–24. However, as Commerce correctly notes, the funds contributed were outside the scope of Commerce's analysis as they were provided prior to the average useful life in question. IDM at 38.

[16] WTTC argues that "'it is not use of a benefit that determines whether it is a recurring or non-recurring subsidy,' but the conditions under which the relevant authority offers the subsidy." WTTC's Reply at 9 (citing Issues and Decision Mem. accompanying *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determ. and Final Negative Determ. of Critical Circumstances*, 73 Fed. Reg. 40,480 (Dep't Commerce July 15, 2008)). Nonetheless, Commerce's determination is consistent with this contention.

that the Marmen's certification documents provided product specifications, not certifications for approval. WTTC's Br. at 14, 19. The extent of Commerce's stated reasoning with regard to this second point is indeed sparse: "Further, we do not find that the certification Marmen provided to [Hydro-Québec] with its Québec LCR sales constitute express authorization or approval by the GOQ. Marmen's certifications are product specification, not sales approval, documents." IDM at 37. While brief, Commerce's conclusion is nevertheless sufficiently reasoned. As no one contends that particular sales from Marmen to turbine manufacturers were themselves subject to GoQ approval, the natural expectation is that the component of these serial transactions that GoQ might have expressly approved were the certification documents. Accordingly, it follows logically that — as Commerce determined — GoQ did not expressly authorize or approve the subsidy as it relates to Marmen. Accordingly, the court concludes that, with respect to the second prong of the recurring benefit test, Commerce adequately considered the record evidence and its rationale was reasonably discernible. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009).

Lastly, with respect to the third part of the test, WTTC's argument that Commerce must consider how the program benefitted the "continued existence of the firm" is not persuasive. The Government correctly identifies that the text WTTC cites in the *Preamble*, 63 Fed. Reg. at 65,393, explains *why* Commerce considers whether a benefit is tied to capital structure or assets, not *how*. Def.'s Br. at 16. More generally, WTTC has not persuaded the court that Commerce unreasonably concluded that sales under the program did not "benefit[] Marmen's capital structure or assets any more than any sale normally benefits a company." IDM at 37. Rather, although the CFTs may have driven demand for Marmen's wind towers, there is no evidence in the record suggesting that the resultant sales were materially distinguishable from Marmen's everyday tower sales. Commerce's determination that the Québec Local Content Requirement conferred a recurring benefit outside the POI and is thus not countervailable is sustained.

III. Commerce's Finding that the Québec On-the-Job Training Tax Credit Is De Facto Specific Is Reasonable and in Accordance with Law.

The Tariff Act provides that Commerce can find de facto specificity 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.

(II) An enterprise or industry is a predominant user of the subsidy.

(III) An enterprise or industry receives a disproportionately large amount of the subsidy.

(IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

19 U.S.C. § 1677(5A)(D)(iii). In its final rule implementing the Uruguay Round Agreements, Commerce explained that it considers each of these factors sequentially in order of appearance, and if one factor warrants a finding of specificity, it will undertake no further analysis. 63 Fed. Reg. at 65,355.

In this case, Commerce found the On-the-Job training tax credit to be de facto specific because the actual number of recipients was limited in number on an enterprise basis. IDM at 56 (citing 19 U.S.C. § 1677(5A)(D)(iii)(I)). To make its "limited in number" determination, Commerce compared "the actual number of companies that received the tax credit in 2018 to the total number of tax filers, inclusive of corporations and individuals in business, within Québec for 2018." *Id.* GoQ and GoC argue that Commerce's determination was methodologically unsound because (1) the comparison of credit recipients to total tax filers is an impermissible application of 19 U.S.C. § 1677(5A)(D)(iii)(I),[17] and (2) Commerce's comparison deviates from past practice without explanation. GoQ's Br. at 16, 20–22; GoC's Br. at 24; GoC's Reply at 15 n.19, 16; GoQ's Reply at 5–6 (proposing that Commerce should have considered only tax filers who provided a training program to trainees). In addition, both GoQ and GoC contend that Commerce's finding that the credit recipients are "limited in number" is unsupported by substantial evidence given the number

[17] The statutory evidence cited includes: (i) the statute's first factor says "actual recipients . . . are limited in number," without mentioning potential recipients; (ii) the statute's four factors mirror language in the Agreement on Subsidies and Countervailing Measures; (iii) the Statement of Administrative Action's statement that "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," Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 ("SAA"); (iv) the SAA's embrace of *Carlisle Tire & Rubber Co. v. United States*, 5 CIT 229, 564 F. Supp. 834 (1983), which counseled against finding specificity in generally available benefits to avoid the absurd consequence of countervailing "public highways and bridges, as well as a tax credit for expenditures on capital investment even if available to all industries and sector," 5 CIT at 234; and (v) language in the SAA wherein, in discussing the four factors, "number" is qualified by words suggesting absolute rather than comparative evaluation.

and variety of companies participating in the credit program.[18] GoQ's Br. at 15–16, 19–20; GoC's Br. at 25–26.

The court concludes that Commerce's finding of de facto specificity was in accordance with law. GoQ and GoC agree that the statute does not preclude Commerce from comparing the actual number of users to potential users, but nevertheless argue that Commerce's methodology is contrary to the statutory requirements. GoQ Oral Arg. Subm. at 5–15; GoC Oral Arg. Subm. at 16–17. It is not. In applying 19 U.S.C. § 1677(5A)(D)(iii), Commerce found that "the actual number of recipients that benefited from the tax credit during the POI relative to the total number of tax filers during the POI are limited in number on an enterprise basis." IDM at 56. This comparison both assesses whether "the actual recipients of the subsidy," on an enterprise basis, "are limited in number," 19 U.S.C. § 1677(5A)(D)(iii)(I), as well as whether the subsidy in question is "truly . . . broadly available and widely used throughout [the] economy," IDM at 56 (citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act at 929, H.R. Doc. No. 103–316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040) ("SAA").[19] Accordingly, Commerce's approach neither fails to comply with the statutory language nor contravenes the underlying aims set out in the SAA.

Nor did Commerce err by using all corporate tax filers as the comparator group when assessing subsidy specificity. The Plaintiffs' arguments urging comparison to entities that employ trainees would improperly convert this test into a standard for predominant use — a result which is particularly apparent when considering a limited-in-number analysis on an industry, rather than enterprise, basis. Neither the statute's text nor the SAA prohibit Commerce's approach, and it was reasonable to think that a comparison to corporate tax filers would be instructive in determining whether the subsidy is widely spread throughout the economy or limited to a small number of enterprises. GoQ's attempts to argue otherwise by relying on the court's (and Federal Circuit's) prior decisions fail. *Bethlehem Steel Corp. v. United States*, 25 CIT 307, 140 F. Supp. 2d. 1354 (2001)

[18] GoC further argues that Commerce's hierarchical approach is inconsistent with the SAA. GoC's Reply at 14 ("In particular, the SAA directs [Commerce] to 'seek and consider information relevant to *all* of {the four} factors.'") (citing SAA at 931) (emphasis in original)). This argument is unavailing because the SAA continues by providing that (i) "where the number of enterprises or industries using a subsidy is not large, the first factor alone would justify a finding of specificity" (as Commerce found here); and (ii) that "[b]ecause the weight accorded to the individual de facto specificity factors is likely to differ from case to case, Commerce shall find de facto specificity if one or more of the factors exists." SAA at 931.

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

cannot provide the basis for determining Commerce's past practice with respect to the de facto specificity analysis relevant here, as the determination in that case employed an industry- rather than enterprise-level comparison, and further weighed all four rather than merely one of the factors required for a finding of specificity. Likewise, neither *Royal Thai Gov't v. United States*, 28 CIT 1218, 341 F. Supp. 2d 1315 (2004), *aff'd in part, rev'd in part, and remanded* 436 F.3d 1330 (Fed. Cir. 2006) nor the Federal Circuit's decision in *AK Steel Corp. v. United States*, 192 F.3d 1367 (Fed. Cir. 1999) involve a finding of "limited in number" specificity alone. Moreover, in each of these three cases, Commerce's non-specificity determination was sustained, so they offer weak evidence that the court here should second-guess Commerce's exercise of its expertise. On the other hand, Commerce has previously employed similar comparator groups in its past investigations. *See, e.g.*, Issues and Decision Mem. at Cmt. 17 accompanying *Final Determ. in the Countervailing Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada*, 82 Fed. Reg. 61,252 (Dep't Commerce Dec. 27, 2017). In sum, the court finds that Commerce did not act contrary to law when considering corporate tax filers as the comparator group in its specificity analysis.

Finally, the court concludes that Commerce acted reasonably in determining that the actual recipients were limited in number. It is instructive that Congress provided this factor for Commerce to consider without specifying how Commerce should consider the factor. While GoC and GoQ are concerned that permitting Commerce to decide the scope of limited use would risk implicating any subsidy or benefit with less than (near) universal usage, the law itself permits Commerce to determine the appropriate reach of its specificity determinations. Although the court has the authority to consider the reasonableness of Commerce's determination, in this case, where only 2% of taxpayers received the disputed benefit, it cannot be said (without more) that Commerce's identification of a limited benefit, and thus of a de facto specific subsidy, is unreasonable. Accordingly, Commerce's determination is sustained.

IV. Commerce's Exclusion of Increased Tax Liabilities to Calculate the Total Benefit of the GASPÉTC Program Was Not Contrary to Law.

Commerce declined to consider the increased tax liabilities incurred through GASPÉTC in calculating the program's benefit during the period of investigation. In so doing, Commerce cited 19 C.F.R. § 351.503(e), which provides that "[i]n calculating the amount of a benefit, the Secretary will not consider the tax consequences of the benefit." IDM at 53. Commerce noted that it has consistently treated

income taxes as outside the statutorily-limited circumstances in which Commerce will subtract offsets from the gross countervailable subsidy amount. *Id.* (citing 19 U.S.C. § 1677(6)). Commerce therefore concluded that the regulation regarding "Direct Taxes" that specifically instructs Commerce to calculate the benefit as the difference between "'tax paid as a result of the program' and 'the tax the firm would have paid in the absence of the program' . . . simply provides direction in assessing how the program results in a benefit in the year at issue (the POI), with no regard to any consequences from the prior year's benefit." *Id.* at 54.

GoQ and Marmen contest Commerce's determination and argue that the "Direct Taxes" regulation sets out the only way Commerce may assess the value of the benefit. Accordingly, GoQ and Marmen argue that Commerce erred by failing to consider the increased tax liability in determining the size of the benefit conferred by GASPÉTC. They contend that the regulation directing Commerce not to consider tax consequences in calculating benefit, 19 C.F.R. § 351.503(e), is inapplicable because subsection (a) of that regulation and the *Preamble* each state that a specific rule on how to measure a benefit will be followed when provided. Marmen's Reply at 17–18; GoQ's Br. at 26; 63 Fed. Reg. at 65,359. Last, they argue that the exclusive list of statutory offsets is not implicated because Commerce must, in the first instance, determine the tax savings net of increased liabilities according to the "Direct Taxes" regulation's "in the absence of the program" test before those offsets would even apply. Marmen's Reply at 15–18; GoQ's Br. at 25–26; GoQ's Reply at 9–13.

The court concludes that Commerce acted in accordance with law when it excluded the taxation of the previous year's tax credit in computing the benefit of GASPÉTC. It is true that Commerce may not disregard an existing policy determination manifest in the regulations without amending the regulations. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (citation omitted) ("[The Administrative Procedure Act mandates] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"). However, the court is not persuaded that the regulations require that Commerce consider increased tax liabilities in determining tax benefits. As Commerce's benefit determination was a reasonable interpretation of the statute and regulations, its determination was in accordance with law.

Contrary to the arguments made by GoQ and Marmen, "tax paid by a firm as a result of the program" does not necessarily mean that tax liabilities from a previous year's use of the program are a component "result of the program." 19 C.F.R. § 351.509(a)(1). Counselling against

this interpretation of the regulation is Commerce's past practice of not considering tax consequences and the expectation of less ambiguous language if Commerce intended to implement a substantial shift in policy. While the parties have not identified a case or investigation involving exactly the circumstances at issue here (i.e., the direct inclusion of a tax benefit as taxable income), Commerce's prior investigations reflect a uniform policy of ignoring tax consequences. *See, e.g.*, Issues and Decision Mem. at 23–24 accompanying *Final Determ. in the Countervailing Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 Fed. Reg. 17,410 (Dep't Commerce Mar. 26, 2012); *see also*, Issues and Decision Mem. accompanying *Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determ., and Final Negative Determ. of Critical Circumstances*, 82 Fed. Reg. 51,814 (Dep't Commerce Nov. 8, 2017) (declining to offset a tax credit's effect of reducing available depreciation). To read the regulations as GoQ and Marmen urge would create an island where Commerce considers income tax effects in an ocean where it does not. Furthermore, it could radically reshape how Commerce conducts its investigations. For example, the "total impact" interpretation might also require Commerce to reduce benefit determinations of accelerated depreciation programs where a declining balance method confers less depreciation than otherwise afforded or where earlier additional depreciation results in recognizing a later, higher gain upon disposition. These considerations, taken in tandem with the language of the regulation, strongly suggest that Commerce did not amend its policy of uniformly disregarding tax consequences through the "Direct Taxes" regulation by embarking on a fundamentally different method of computing the benefit of tax programs contrary to its practice since the rulemaking. As Commerce's interpretation of the regulation is therefore reasonable, and is further consistent with past practice, its determination is sustained.

V. Commerce's Determination that GoQ's and GoC's Additional Depreciation for Buildings Used in Manufacturing Provided a Countervailable Financial Contribution and Benefit is Reasonable and in Accordance with Law.

Commerce determined that the additional depreciation for qualifying buildings used in manufacturing under the GoC and GoQ tax systems constituted a countervailable financial contribution by reference to the revenue foregone relative to the general Class 1 depreciation rate. IDM at 24, 26. Similarly, Commerce determined the benefit amount using the additional 6% depreciation over the CCA treatment

those buildings would have otherwise received in the absence of the additional depreciation provision (that is, a 4% otherwise-applicable rate and a 10% total rate with additional depreciation). *Id.* at 24 (applying the above-discussed "in the absence of the program test" from 19 C.F.R. § 351.509(a)(1)). In its benefit analysis, Commerce noted that "in order to receive an additional deduction, a taxpayer needs to file an election by using a Schedule 8 form with its income tax return . . . [o]therwise, they would not receive the additional six percent deduction and instead receive the basic four percent of the CCA." *Id.* at 25 (citations omitted). Commerce rejected the argument that the 10% depreciation rate was just the "normal rate of depreciation that reflects the actual shorter useful life of the assets used for manufacturing purposes." *Id.* In so doing, Commerce noted that such argument relies on an implicit assumption that the relevant universe of taxpayers was those eligible for the special treatment, whereas "the proper universe of the taxpayers is not limited to the taxpayers who used the non-residential building within Class 1 assets for manufacturing but includes all taxpayers whose assets satisfy the scope of the entire Class 1 assets" because only the former can "can file for, and subsequently receive, the additional CCA." *Id.*

GoQ, GoC and Marmen oppose Commerce's determination. First, they each argue that Commerce's determination that a countervailable benefit exists is contrary to law. They claim that this additional depreciation does not meet the statutory definition of "financial contribution," which, in relevant part, reads "foregoing or not collecting revenue that is otherwise due." *See* GoQ's Br. at 29; GoC's Br. at 18–19; Marmen's Br. at 26–27 (each citing 19 U.S.C. § 1677(5)(D)(ii)). They contend that there was no revenue otherwise due as the depreciation allowed is consistent with the policy of CCA and underlying empirical evidence of the average useful life of the different types of assets. GoQ's Br. at 30; GoC's Br. at 18–23; Marmen's Br. at 26–27. Accordingly, the Plaintiffs each argue that the 10% rate is simply the "normal" rate of depreciation, and not a financial contribution.

Second, GoQ and GoC also argue that Commerce's countervailable benefit determination was contrary to law. In particular, they argue that Commerce's reliance on the "in the absence of the program" quantification in the "Direct Taxes" regulation begs the question of what taxes the firm would have paid in the absence of a program which sets the base taxation rate for Class 1 assets. GoQ's Br. at 29–39; GoC's Reply at 9.

Finally, the Plaintiffs each argue that Commerce's determination of financial contribution and benefit is not supported by substantial evidence. First, they argue that Commerce unreasonably compared

two dissimilar classes of assets. GoQ's Br. at 29–30; GoC's Br. at 17–18; Marmen's Br. at 27. Second, they argue that Commerce ignored contrary evidence that manufacturing plants have shorter useful lives. GoQ's Br. at 31; GoC's Reply at 7–9; Marmen's Br. at 27–28. Third, they argue that it was unreasonable for Commerce not to consider the normal rate of depreciation for the buildings, which here is captured by the additional depreciation as reflected in GoC's empirical study and budget. GoQ's Br. at 30; GoC's Reply at 8; Marmen's Br. at 27.

The court finds that Commerce's financial contribution and benefit determinations are in accordance with law and supported by substantial evidence. Commerce acted in accordance with law because it reasonably interpreted both the statutory financial contribution definition and the "Direct Taxes" benefit regulation. Neither the statutory financial contribution definition nor "Direct Taxes" regulation unambiguously requires Commerce to compare the challenged program to itself, or to the treatment allegedly justified by empirical study, where a default tax rate is applicable in the absence of the challenged program. The statute's "foregoing or not collecting revenue that is otherwise due" language does not provide an exception for programs which attempt to reflect (successfully or not) the economic reality of depreciation. Likewise, the regulation's "in the absence of the program" language does not require Commerce to ignore what tax the respondent would pay if not electing better tax treatment. Instead, Commerce reasonably interpreted the statute and regulation to require comparison to the otherwise applicable tax treatment — provided by the 4% rate applicable if taxpayers did not elect the additional depreciation — and the court is obliged to accept Commerce's reasonable interpretation as a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984). As the Government and WTTC note, the evidence supports a comparison between the Class 1 depreciation rate and the otherwise applicable rate: first, because the Class 1 depreciation provision is additional to the existing tax scheme; second, because GoC's own budget plan recognizes a default depreciation rate (e.g., "If the taxpayer forgoes the separate class, the current treatment will apply (i.e. a CCA rate of 4 per cent)"); and third, because taxpayers are required to file an election to receive the additional depreciation. Def.'s Br. at 27, 29–30; WTTC's Resp. at 26.

Commerce's determination was also supported by substantial evidence. First, Commerce did not unreasonably compare two dissimilar classes of assets; rather, it compared the different tax treatment under GoQ's and GoC's laws per the classifications those governments

provided. Second, Commerce did not ignore contrary record evidence by failing to explicitly engage with the empirical bases supporting GoQ's and GoC's depreciation allowances for certain manufacturing buildings. Rather, Commerce addressed the argument that the challenged depreciation "reflects the actual shorter useful life of the assets used for manufacturing purposes" and reasonably concluded that it was correct to compare the challenged tax treatment to the treatment of the whole of Class 1 assets that applies to those who cannot elect the more advantageous treatment.[20] IDM at 25. Finally, Commerce did not act unreasonably by declining to directly engage with the empirical bases governments stipulate as supporting their depreciation allowances or to treat those adequately supported rates as the normal rate or some other default or otherwise applicable rates. Rather, Commerce reasonably concluded that where a taxpayer can opt-in to more favorable treatment, it is reasonable for Commerce to confine its analysis to the comparisons provided for by law, even if the more favorable treatment better reflects economic reality. Where a government provides an option for more favorable tax treatment, Commerce is not required to undertake the analysis provided for by statute and regulations by comparing the challenged tax treatment to itself, even if the tax scheme as a whole attempts to accurately reflect the economic realities of specific taxpayers.[21] While the court's holding here does not prohibit Commerce from assessing empirical bases of a challenged tax program as might be appropriate to discharge its obligations under the statute and regulations where, for example, a non-elective tax program is more generous than economically justifiable, the court nevertheless finds that such analysis was neither necessary nor appropriate here. Commerce's determination that the

[20] The language in the IDM in response to the Plaintiffs' challenge focuses on the appropriate comparator group instead of what is the actual rate of depreciation or the empirical bases of the depreciation allowed. Nonetheless, Commerce adequately engaged with the record evidence by taking the position that Commerce must make the comparisons provided for in the statute and regulation and the Plaintiffs' challenge would have Commerce make an improper comparison. Accordingly, Commerce is best understood as concluding that even if the actual rate of depreciation coincides with depreciation allowed, that will not then require Commerce to compare the tax treatment under the challenged program to *itself*. The court holds that Commerce's approach was not unreasonable or inconsistent with law, even if the more favorable tax treatment elected more accurately reflects economic wear and tear.

[21] GoC's argument that "[t]here is no norm for determining what is "otherwise due" except . . . the country in question's own tax system," GoC's Br. at 19, is inapplicable where an election is available for more favorable tax treatment because the norm relied upon in such case is indeed provided by the country's own tax system. Similarly, GoC's argument that according to Commerce's own description "all claims for all tax deductions must be 'elected' by the taxpayer," GoC's Reply at 5, is also inapplicable as it ignores the practical difference that Commerce implicitly draws between a case in which a taxpayer can claim some tax benefit instead of none at all and one in which the taxpayer can claim a better tax benefit than a relatively worse one. The court's conclusion here is limited to the latter case.

additional depreciation rate available for Class 1 assets constituted a countervailable benefit is therefore sustained.

CONCLUSION

The court concludes that Commerce's final determination was in accordance with law and supported by substantial evidence. First, Commerce permissibly excluded the foreign auditor's adjustment as unreliable. Second, Commerce reasonably and lawfully determined that the Québec Local Content Requirement provided a recurring benefit. Third, Commerce acted reasonably within its statutory authority under 19 U.S.C. § 1677(5A)(D)(iii) in determining that the Québec On-the-Job Training tax credit was a de facto specific subsidy. Fourth, Commerce acted in accordance with law in excluding increased tax liabilities when conducting the benefit calculation for GASPÉTC. Fifth and finally, Commerce acted reasonably and lawfully when determining financial contribution and benefit from additional depreciation for buildings used in manufacturing by comparison to the rate applicable if the additional depreciation were not claimed.

For the foregoing reasons, Plaintiffs' and Defendant-Intervenor's motions for judgment on the agency record are denied; Commerce's *Final Results* are sustained, and judgment is entered in favor of the United States.

SO ORDERED.

Dated: March 18, 2022
New York, New York

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

Slip Op. 22–22

WHEATLAND TUBE COMPANY, Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 22–00004

[Dismissing action for failure to state a claim on which relief can be granted.]

Dated: March 18, 2022

Roger B. Schagrin, Schagrin Associates, of Washington, D.C., for plaintiff. With him on the response to the motion to dismiss were *Luke A. Meisner, Nicholas J. Birch,* and *Benjamin J. Bay*.

Antonia R. Soares, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the motion to dismiss were *Brian M. Boynton*, Principal Deputy Assistant Attorney

General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the motion to dismiss was *Mathias Rabinovitch*, Attorney, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Stanceu, Judge:

Plaintiff Wheatland Tube Company ("Wheatland"), a U.S. producer of steel pipes and tubes, commenced this action on January 12, 2022, claiming that U.S. Customs and Border Protection ("Customs" or "CBP") acted unlawfully in the actions it took, and declined to take, following Wheatland's submissions to Customs on the tariff classification of certain steel electrical conduit pipe products imported from Mexico. Defendants move to dismiss this action for lack of jurisdiction or, in the alternative, for failure to state a claim on which relief can be granted. The court grants the motion to dismiss, concluding that it has jurisdiction over this action but also that plaintiff's complaint, being based on a misinterpretation of the governing statute, does not state a claim on which the court can grant relief.

I. BACKGROUND

Background is provided in the court's previous opinion and order, Op. and Order, Slip Op. 22–16 (Feb. 23, 2022), ECF No. 19, which denied plaintiff's motion for a preliminary injunction to prevent liquidation of certain entries of steel conduit pipe imported into the United States. In denying the preliminary injunction motion, the court ruled that plaintiff is unlikely to succeed in showing that its claim is one on which relief can be granted and therefore has not demonstrated a likelihood of success on the merits.

Before the court are defendants' motion to dismiss this action, Def.'s Combined Mot. to Dismiss, Resp. to Pl.'s Mot. for a Prelim. Inj., and Resp. to Pl.'s Pet. for a Writ of Mandamus (Feb. 2, 2022), ECF No. 12 ("Defs.' Mot."), and plaintiff's response thereto, Resp. in Opp'n to Mot. to Dismiss (Mar. 9, 2022), ECF No. 21 ("Pl.'s Resp.").

II. DISCUSSION

This case arose from three submissions Wheatland filed with Customs under Section 516 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1516 ("Section 516")[1] in late 2020 and early 2021, each of which Wheatland directed to the tariff classification of imports from Mexico of steel electrical conduit pipe and tubing. Underlying the three submissions was Wheatland's assertion that these imports

[1] Citations herein to the United States Code are to the 2018 edition. Citations herein to the Code of Federal Regulations are to the 2021 edition.

were being misclassified and thereby evading import monitoring schemes imposed by the President of the United States under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232"), which delegates to the President the authority to adjust imports of products determined to threaten to impair the national security.[2]

Electrical conduit tubing made of base metal and lined with an insulating material is classified generally in subheading 8547.90, Harmonized Tariff Schedule of the United States ("HTSUS") (". . . electrical conduit tubing and joints therefor, of base metal lined with insulating material: Other [than insulating fittings of ceramic or plastic]"). Wheatland's submissions under Section 232 reflect a belief that two importers of steel electrical conduit from Mexico, Shamrock Building Materials, Inc. ("Shamrock") and Liberty Products Inc., dba RYMCO USA ("RYMCO USA"), are improperly entering their steel electrical conduit tubing under this subheading. Wheatland's position is that these imported products, which Wheatland considers not to be lined with insulating material, instead should have been entered under heading 7306, HTSUS ("Other [than seamless] tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel"). Unlike the products classified in subheading 8547.90, HTSUS, products classified under heading 7306, HTSUS, are subject generally to 25% duties, or to an import monitoring scheme, by Presidential proclamations issued under Section 232.

Wheatland's first submission, dated December 11, 2020, was a "Domestic Interested Party Request for Information" (the "Request for Information") asking pursuant to 19 U.S.C. § 1516(a)(1) that Customs "furnish Wheatland with the classification and rate of duty or export license requirement imposed upon imports of steel conduit pipe from Mexico." Compl. Ex. 2, at 1 (Letter from Roger B. Schagrin, Schagrin Associates, to Allyson R. Mattanah, Branch Chief, Chem., Petroleum, Metals and Misc. Articles Regs. and Rulings, Off. of Trade, U.S. Customs and Border Protection (Dec. 11, 2020) (on file with Customs)) ("*Request for Information*").

Wheatland filed with Customs a second submission (the "Ruling Request"), dated January 7, 2021, that sought "a ruling pursuant to 19 U.S.C. § 1516(a) and 19 C.F.R. 175, Subpart B, regarding the correct classification of certain steel conduit pipe." Compl. Ex. 3, cover

[2] The Presidential proclamations, Wheatland's three submissions, and the communications of U.S. Customs and Border Protection responding to Wheatland are described in detail in the court's previous opinion and order. Op. and Order at 5–15, Slip Op. 22–16 (Feb. 23, 2022), ECF No. 19.

letter (Letter from Roger B. Schagrin, Schagrin Associates, to Hon. Mark Morgan, Formerly Acting Commissioner, U.S. Customs and Border Protection (Jan. 7, 2021) (on file with Customs)) ("*Ruling Request*"). The Ruling Request also asked that Customs reconsider one of its previous rulings on the tariff classification of steel conduit pipe. *Id*.

Dissatisfied with the response to the Request for Information that Customs sent to Wheatland on January 22, 2021, Wheatland made a third submission (the "Supplemental Information Request") on February 22, 2021. Defs.' Mot. App. A3 (Letter from Roger B. Schagrin, Schagrin Associates, to Allyson R. Mattanah, Branch Chief, Chem., Petroleum, Metals and Misc. Articles Regs. and Rulings, Off. of Trade, U.S. Customs and Border Protection (Feb. 22, 2021) (on file with Customs)) ("*Supplemental Information Request*"). Referring to the two importers, Shamrock and RYMCO USA, that Wheatland believed were entering their products under incorrect tariff classifications, the letter explained that its request "only asks CBP to respond to two simple questions: 1. Under what tariff classification have Shamrock's imports of steel conduit pipe been entered since August 31, 2020 to the present? 2. Under what tariff classification have RYMCO USA's imports of steel conduit pipe been entered since August 31, 2020 to the present?" *Id*. at A4. Central to this dispute is the position Customs took on the Supplemental Information Request: that it was not a proper request under Section 516 and that Customs is precluded by law from providing the entry information Wheatland was seeking.

A. Plaintiff's Claim in this Litigation Is Not Moot

Wheatland's complaint alleges that "[a]s of the date of the filing of this Complaint [January 12, 2022], Customs has failed to respond to Plaintiff Wheatland's December 11, 2020 19 U.S.C. § 1516(a)(1) request for information and Plaintiff's January 7, 2021 19 U.S.C. § 1516(a) petition for tariff classification ruling." Compl. ¶ 40. The Complaint also alleges that "Customs has stated that it will not respond to either Plaintiff Wheatland's December 11, 2020 19 U.S.C. § 1516(a)(1) request for information and Plaintiff's January 7, 2021 19 U.S.C. § 1516(a) petition for tariff classification ruling." *Id*. ¶ 41. The Complaint alleges, further, that:

> Given that the misclassification of imports of steel conduit pipe allows import volumes in excess of historical levels, contrary to the agreement between Mexico and the United States, the failure of Customs to respond to Plaintiff Wheatland's December 11, 2020 19 U.S.C. § 1516(a)(1) request for information

> and Plaintiff's January 7, 2021 19 U.S.C. § 1516(a) petition for tariff classification ruling is unreasonable.

Id. ¶ 42.

Defendants' motion to dismiss this action under USCIT Rule 12(b)(1) for lack of jurisdiction centers on the response to the Request for Information Customs sent to Wheatland on January 22, 2021, and to a communication dated April 9, 2021, which responded further to the Request for Information and also responded to the Ruling Request. Defendants argue that because Customs has responded to Wheatland's submissions, plaintiff's claim that Customs "failed to respond" is moot and that the court therefore lacks jurisdiction. Defs.' Mot. 16–20. The court disagrees, concluding that defendants' argument interprets plaintiff's claim too narrowly.

Plaintiff brought this action on January 12, 2022, nine months after CBP's April 9, 2021 communication, and its submissions to the court were made in awareness of that communication and the previous January 22, 2021 communication by Customs. Plaintiff's factual allegations that Customs "failed to respond," Compl. ¶ 40, and "stated that it will not respond," *id*. ¶ 41, to the Request for Information and the Ruling Request, are, admittedly, not clearly expressed. Nevertheless, in context these allegations are best construed as a claim that Customs acted unreasonably in failing to "respond" to these two submissions in a way that satisfies the requirements of 19 U.S.C. § 1516(a). So construed, plaintiff's claim is a live dispute rather than one that has been mooted by agency action.

Because it challenges agency actions and alleged inactions, the court interprets plaintiff's claim as arising under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). The court has jurisdiction over this action according to 28 U.S.C. § 1581(i) and reviews it according to 28 U.S.C. § 2640(e), under which it "shall review the matter as provided in section 706 of title 5." The latter provision, also of the APA, directs the court, *inter alia*, to "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

B. Plaintiff's Claim Is Not One on which Relief Can Be Granted

The Request for Information, the Ruling Request and the supplement thereto, and CBP's responses to these submissions are before the court as exhibits to the Complaint or to defendants' motion to dismiss. These documents are sufficient for the court to determine whether plaintiff's claim is one on which relief can be granted. To do so, the court considers whether CBP's responses satisfied the agency's obligations under Section 516(a).

1. CBP's Responses to the Request for Information

In opposing dismissal, plaintiff argues that "[i]n enacting Section 1516, Congress intended to provide domestic manufacturers with a remedy to address importers that were misclassifying their imports of merchandise." Pl.'s Resp. 23. Wheatland's view is that Customs failed to respond to the Request for Information when it refused to address allegations of misclassification by specifically identified importers and merely explained its own classification position on steel electrical conduit tubing that is not lined with insulating material. According to Wheatland, that action alone "is not what the statute required of Customs" and that what "Wheatland was seeking was information from Customs that would confirm its belief that both Shamrock and RYMCO USA were misclassifying their imports under HTS 8547 instead of correctly classifying the imports under HTS 7306." *Id.* at 22.

Wheatland is correct that Customs refused to inform it as to how Shamrock and RYMCO USA were entering their imported steel conduit tubing. But as the court discusses below, Wheatland is not correct in its interpretation of the purpose of Section 516.

Customs first responded to the Request for Information in the January 22, 2021 communication to Wheatland's counsel. Defs.' Mot. App. A2 (Letter from Allyson R. Mattanah, Branch Chief, Chem., Petroleum, Metals and Misc. Articles Regs. and Rulings, Off. of Trade, U.S. Customs and Border Protection, to Roger B. Schagrin, Schagrin Associates (Jan. 22, 2021) (on file with Schagrin Associates)). The substance was as follows:

> U.S. Customs and Border Protection (CBP) liquidated entries of certain steel conduit pipe imported by Shamrock Building Materials, Inc. (Shamrock) between April 26, 2019, through July 19, 2019, inclusive, in subheading 7306.30.10, HTSUS, or in 7306.30.50, HTSUS, depending on whether the wall thickness of the pipe was less than 1.65 mm. The 2020 column one, general rate of duty for both subheadings is Free.

> Shamrock filed an action in the Court of International Trade (CIT), challenging the classification of its steel conduit pipe under those tariff provisions. Therefore, the issue of the classification of the merchandise described above is now before the CIT in *Shamrock Building Materials, Inc. v. United States*, No. 20–00074, and will be adjudicated in that forum.

Id. Wheatland's dissatisfaction with this response prompted the Supplemental Information Request, in which Wheatland asked Customs for the tariff classifications under which Shamrock's and RYMCO USA's imports of steel conduit pipe have "been entered since August 31, 2020 to the present." *Supplemental Information Request* at A4. That inquiry led to CBP's communication of April 9, 2021, to Wheatland's counsel (the "Final Response"). Compl. Ex. 7 (Letter from Craig T. Clark, Director, Com. and Trade Facilitation Div., U.S. Customs and Border Protection, to Roger B. Schagrin, Schagrin Associates (Apr. 9, 2021) (on file with Schagrin Associates)) ("*Final Response*"). Customs took the position, first, that the tariff classifications Shamrock and RYMCO U.S.A. listed on their entry documentation were information precluded from public disclosure by the Trade Secrets Act, 18 U.S.C. § 1905 and, second, that "your request fails to clearly frame a proper request under 19 U.S.C. § 1516(a)." *Id.* at 2. Customs added that:

> Moreover, as a matter of the designated imported merchandise you described in your initial letter as "steel conduit pipe imported from Mexico, with or without interior coating, where any such coating does not have insulation properties", CBP's position is that the merchandise is classified in heading 7306, HTSUS, irrespective of the date of entry.

Id. Customs then stated:

> More specifically, and as stated in our letter, dated January 22, 2021, CBP has liquidated entries of certain steel conduit pipe imported by Shamrock in subheadings 7306.30.10 and 7306.30.50, HTSUS, depending on the wall thickness of the pipe, and it is currently defending that position in the U.S. Court of International Trade (CIT). However, the CIT will likely rule on the correct classification of Shamrock's imported pipe.

Id. at 2–3.

Wheatland's view that Customs was required to inform Wheatland of the entered classifications of specific importers is at odds with the plain meaning of the statute. Section 516(a)(1) requires Customs, "upon written request by an interested party," to "furnish the classi-

fication and the rate of duty *imposed upon* designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by such interested party." 19 U.S.C. § 1516(a)(1) (emphasis added). Under the Tariff Act, it is Customs, not the importer, that determines "the classification and the rate of duty imposed upon" the imported merchandise. The statute requires the importer of record to "complete the entry . . . by filing with the Customs Service the declared value, classification and rate of duty applicable" to the merchandise, 19 U.S.C. § 1484(a)(1)(B), but it directs Customs to "fix the final classification . . . ," *id*. § 1500(b), and "liquidate the entry . . . of such merchandise," *id*. § 1500(d).

The context in which the word "classification" is used in Section 516(a)(1) casts further doubt on plaintiff's proffered construction. The procedure thereunder allows a domestic interested party to pursue a remedy if it "believes that the *appraised* value, the classification, or rate of duty is not correct." *Id*. § 1516(a)(1) (emphasis added). Like the tariff classification, the "appraised value" of the merchandise can be determined only by Customs, *see id*. §§ 1401a(a)(3), 1500(a), not by the importer, who enters the "declared value," *see id*. § 1484(a)(1)(B). Similarly, only Customs, not the importer, fixes the "rate of duty." *See id*. § 1500(b).

Even though it is not the importers who "fix the final classification," 19 U.S.C. § 1500(b), plaintiff nevertheless insists that "[t]he 'classification' referenced in Section 1516 is the classification by specific importers of designated imports of merchandise that has already entered the United States," Pl.'s Resp. 22. In addition to positing that "[i]n enacting Section 1516, Congress intended to provide domestic manufacturers with a remedy to address importers that were misclassifying their imports of merchandise," Pl.'s Resp. 23, Wheatland goes so far as to contend that "[i]ndeed, Customs' interpretation of Section 1516 leads to the absurd result—as exemplified in this case—where the domestic manufacturer is completely deprived of any remedy under Section 1516 and misclassification continues unabated, rendering Section 1516 altogether meaningless," *id*. at 24.

The court is unconvinced by plaintiff's hyperbole. Section 516 establishes a procedure by which a domestic interested party may "contest the appraised value, classification, or rate of duty" imposed upon the designated imported merchandise if the domestic party is "dissatisfied with the determination of the Secretary" on those matters. 19 U.S.C. § 1516(c). The interested party has the opportunity to contest CBP's classification decision in an action brought in the Court of International Trade on a future entry. *See id*. § 1516(c), (d). For a domestic interested party that believes Customs is not correctly ap-

praising or classifying "designated imported merchandise of a class or kind" that is "manufactured, produced, or sold at wholesale by such interested party," *id* § 1516(a)(1), the remedy provided by Section 516—judicial review of a valuation or classification decision of Customs with which it disagrees—scarcely can be described as "altogether meaningless," Pl.'s Resp. 24.[3]

In support of its statutory interpretation, plaintiff argues that "Congress's use of the term 'designated' shows that requests for information under Section 1516 pertain to the actual classification of specific entries of merchandise—not to Customs' position on the classification of hypothetical imports based on a general description of the imports" and that "[i]nterpreting the statute any other way renders the term 'designated' as superfluous, void, and insignificant." *Id.* at 15–16 (footnote omitted). This argument is misguided. The word "designated" connotes that a domestic interested party must identify, by "class or kind," the imported merchandise of which it is concerned and about which it seeks to know "the classification and the rate of duty imposed." 19 U.S.C. § 1516(a)(1). The Request for Information did just that in designating the "class or kind" of the merchandise by stating that "[t]he imported merchandise that is the subject of this request is steel conduit pipe imported from Mexico, with or without interior coating, where any such coating does not have insulation properties" and that "[t]he imported merchandise is covered by this request whether it is electrical metallic tubing finished conduit ('EMT'), intermediate metal conduit ('IMC'), or rigid metal conduit ('RMC')." *Request for Information* at 4–5. The appearance of the word "designated" in 19 U.S.C. § 1516(a)(1) does not compel, or even suggest, an interpretation under which a domestic interested party may use the provision to obtain information concerning the tariff classification shown on entry documents of specific importers.[4] Customs, therefore, was correct in responding that the Supplemental Information Request, which sought only information on how Shamrock and RYMCO USA were entering their imported steel conduit tubing from

[3] In contrast, Wheatland does not identify what remedy would have been available to it had Customs provided it the requested entry information of the two importers. Wheatland's argument that it should have been provided "information from Customs that would confirm its belief that both Shamrock and RYMCO USA were misclassifying their imports under HTS 8547 instead of correctly classifying the imports under HTS 7306," Resp. in Opp'n to Mot. to Dismiss at 22 (Mar. 9, 2022), ECF No. 21 ("Pl.'s Resp."), does not answer this question. Nor would such information, by itself, have demonstrated that the two importers were entering merchandise under an incorrect tariff classification or shed any light on how the entries at issue were liquidated.

[4] Wheatland argues, further, that its interpretation that Section 516(a)(1) required it to provide the requested entry information is supported by Part 175 of the Customs regulations, Pl.'s Resp. at 17–19, and by case law, *id*. at 20–21. The court finds nothing on point in the Part 175 regulations, and the case law on which Wheatland relies is inapposite.

Mexico, was not a proper request for information under Section 516(a)(1), and Customs was under no obligation to provide the information Wheatland identified therein. *See Final Response* at 2–3.

2. CBP's Response to the Ruling Request

Wheatland's second submission to Customs, the Ruling Request, sought "a ruling pursuant to 19 U.S.C. § 1516(a) and 19 C.F.R. 175, Subpart B, regarding the correct classification of certain steel conduit pipe." *Ruling Request*, cover letter. The Ruling Request identified the subject of the submission as follows:

> The imported merchandise that is the subject of this request is steel conduit pipe imported from Mexico, with or without interior coating, where any such coating does not have insulation properties. Electrical conduit pipe is used to route electrical wiring in a building or other structure. The imported merchandise is covered by this request whether it is EMT [galvanized electrical metallic tubing finished conduit], IMC [intermediate metal conduit], or RMC [rigid metal conduit].

Id. at 8. The Ruling Request further stated that "this merchandise is properly classified under HTS [Harmonized Tariff Schedule] 7306.30 and not under HTS 8547.90." *Id*. The submission also requested that Customs reconsider one of its previous rulings:

> As part of this request, Wheatland asks that Customs reconsider ruling N306508, "The tariff classification of steel conduit pipe from Thailand" (Feb. 21, 2020), which concluded that HTS 8547.90.0020 applied to certain conduit made up of steel with an exterior coating of zinc and an interior coating of stoved epoxy resin. Wheatland submits that ruling N306508 conflicts with other rulings, including N303775 (Apr. 26, 2019), which finds that electrical metal conduit and rigid steel conduit internally coated with epoxy resin are subject to HTS subheading 7306.30.

Id. at 1. The response of Customs, contained in the communication to Wheatland's counsel dated April 9, 2021, was that no ruling revoking the ruling at issue could be issued because a provision in its regulations precludes issuance of a ruling letter "with respect to any issue which is pending before the United States Court of International Trade." *Final Response* at 3 (quoting 19 C.F.R. § 177.7(b)). Referring to *Shamrock Building Materials v. United States*, Ct. No. 20–00074, the letter informed Wheatland that "[as] we stated in our letter, dated January 22, 2021, the issue of the classification of steel conduit pipe is currently before the CIT." *Id.*

Wheatland asserts that Customs has failed to provide a response to "Plaintiff's January 7, 2021 19 U.S.C. § 1516(a) petition for tariff classification ruling." Compl. ¶ 40. The Ruling Request, although submitted pursuant to Section 516(a)(1), was not a proper submission (i.e., a "petition") filed according to that statutory provision. Under it, a domestic interested party, after being informed by Customs of "the classification and the rate of duty imposed" upon the designated imported merchandise, may file a petition with Customs "[i]f the interested party believes that the appraised value, the classification, or rate of duty is not correct." 19 U.S.C. § 1516(a)(1). In the January 22, 2021 communication, Customs informed Wheatland that it had liquidated Shamrock's entries of "certain steel conduit pipe" in subheading 7306.30, HTSUS. Defs.' Mot. App. A2. The Ruling Request did not inform Customs that Wheatland disagreed with this classification and instead indicated general agreement with it.

Because the Ruling Request was not a valid "petition" submitted according to 19 U.S.C. § 1516(a)(1), Customs was under no obligation to make, and not in a position to make, one of the determinations described in 19 U.S.C. § 1516(b) or (c). Moreover, any obligation Customs may have had under Section 516 to inform Wheatland of the status of Wheatland's "petition" was satisfied by the Final Response, which informed Wheatland of CBP's classification position with respect to the designated imported merchandise, as Wheatland itself had defined it in the Ruling Request.

In arguing that Customs failed to respond to the Ruling Request in compliance with Section 516, Wheatland asserts that it "did—and does—disagree with the classification of the designated imported merchandise, which continues to be misclassified under HTS 8547." Pl.'s Resp. 26. This argument is misguided and also puzzling. It is misguided in reflecting Wheatland's incorrect interpretation that the word "classification" as it appears in Section 516(a)(1) refers to entered classification as opposed to the classification as determined by Customs. The argument is puzzling in asserting that the designated merchandise continues to be misclassified. Wheatland's position on the Request for Information is that Customs failed to submit a proper response to its inquiry as to *whether* Shamrock and RYMCO USA were entering their merchandise according to what Wheatland considered to be incorrect tariff provisions.

Finally, in its response to the motion to dismiss, Wheatland takes issue with the position Customs took in the Final Response that Section 177.7(b) of the Customs regulations precluded issuance of a ruling due to the *Shamrock Building Products* litigation pending

before this Court. *Id*. at 29 (arguing that "it is unreasonable to interpret 19 C.F.R. § 177.7(b) to preclude rulings even where the party seeking the ruling is different from the party that brought the CIT action."). According to plaintiff, "[i]t is thus unreasonable to allow an importer to frustrate a domestic producer's only remedy to misclassification by bringing and then delaying resolution of an action at the CIT." *Id*. at 30. This argument is meritless. The regulatory provision, which precludes issuance of a ruling "with respect to any *issue* which is pending before the United States Court of International Trade," 19 C.F.R. § 177.7(b) (emphasis added), does not draw the distinction Wheatland identifies and, accordingly, was not misinterpreted by Customs. What is more, Wheatland's complaint, which contests the actions Customs took and declined to take under Section 516, not Part 177 of the Customs regulations, does not include a claim that § 177.7(b) is invalid.

III. CONCLUSION

As discussed above, plaintiff's claim that Customs did not satisfy its obligations under Section 516 when responding to Wheatland's three submissions rests upon a misinterpretation of that statute and, as a result, is not a claim on which relief can be granted.

Contrary to plaintiff's claim, Customs provided the information it was required by Section 516 to provide in response to the Request for Information and was under no obligation to provide the information Wheatland sought in the Supplemental Information Request Wheatland filed on February 22, 2021, which was not a proper subject of an inquiry under Section 516(a)(1). Customs did not fail to respond, or fail to respond correctly, to the Ruling Request, which was not a proper petition under Section 516(a)(1).

Because plaintiff's complaint fails to state a claim on which relief can be granted, the court will grant defendants' motion to dismiss and enter judgment dismissing this action.

Dated: March 18, 2022
New York, New York

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

Slip Op. 22–23

GLOBE SPECIALTY METALS, INC. and MISSISSIPPI SILICON LLC, Plaintiffs, v. UNITED STATES, Defendant.

Court No. 21–00231

[Plaintiffs' motion for judgment on the agency record denied; action dismissed.]

Dated: March 21, 2022

Adam H. Gordon, *Jennifer M. Smith*, *Ping Gong*, and *Lauren Fraid*, The Bristol Group PLLC, Washington, DC, for the plaintiffs.

Bret R. Vallacher, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misham Preheim*, Assistant Director, for the defendant. Of Counsel *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Opinion & Order

AQUILINO, Senior Judge:

Plaintiffs Globe Specialty Metals, Inc. and Mississippi Silicon LLC challenge the final determination of the International Trade Administration, U.S. Department of Commerce ("ITA"), *sub nom. Silicon Metal from Bosnia and Herzegovina and Iceland: Final Affirmative Determinations of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances for Iceland*, 86 Fed.Reg. 11720 (Dep't of Commerce Feb. 26, 2021) ("Final Determination"), Public Record ("PR") 70, and accompanying issues and decision memorandum dated February 22, 2021 ("IDM"), PR 61.

Jurisdiction to hear and decide plaintiffs' motion for judgment on the agency record, proffered pursuant to USCIT Rule 56.2, is based upon 28 U.S.C. §§ 1581(c), 2631(c). The sole question raised is whether, in calculating normal value based on constructed value, ITA's use of financial statements pertaining to Ferroglobe PLC (Ferroglobe) was supported by substantial evidence and in accordance with the law. *See* 19 U.S.C. §1516a(b)(1)(B)(i). For the following reasons, it was.

I

As domestic producers of silicon metal, the plaintiffs filed an antidumping duty petition with ITA, alleging that that metal, imported from Bosnia, was being sold in the United States at less than fair value. *See* PR 1–11. Claiming inability to obtain financial statements from Bosnian producers, the petitioners estimated their costs of production using financial data from the Norwegian producer Elkem

ASA, which had no connection to this investigation apart from being a producer of silicon that the petitioners selected for this purpose. PR 6 at 10–11.

ITA issued a deficiency questionnaire instructing the petitioners to recalculate the costs of production alleged in their petition using the financial statements of a Bosnian producer, or, if information regarding such a producer was not available, to recalculate based on the financial statements of one of the petitioning companies and to provide those statements. *See* PR 16 and Confidential Record ("CR") 12, at 4. In response, the petitioners provided the financial statements of Ferroglobe, the parent company of one of them. PR 19, CR 14, Ex. "SUPP-II-5". Citing two decisions from 2002 and 2003, the petitioners refused to recalculate their alleged margin using their own financial statements on the grounds that Ferroglobe and its North American market segment experienced losses instead of profits in 2019. *See id*. at 10–12. ITA then calculated an estimated dumping margin using Ferroglobe's financial statements. Given the losses, ITA set the constructed value (CV) profit ratio at zero, resulting in a revised petition margin of 21.41 percent. *See* PR 24 at 8; IDM at 2.

ITA initiated investigation, setting the period therefor as April 1, 2019 through March 31, 2020, and assigning that percent as the estimated dumping margin for Bosnia. *Silicon Metal From Bosnia and Herzegovina, Iceland, and Malaysia: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed.Reg. 45177, PR 23 at 2, 10. The agency selected one mandatory respondent, "R-S Silicon D.O.O." ("RSS"), which represented the largest exporter of silicon metal from Bosnia during the period of investigation. *See* PR 28, CR 20.

Relevant to this action, RSS submitted its response to section A of the original antidumping questionnaire (*i.e*., the section relating to general information), PR 43, CR 21, but it subsequently notified ITA of its intent not to respond further in the investigation, PR 44. The petitioners then requested that the agency apply total facts available with adverse inferences to RSS and assign an adverse facts available (AFA) rate of 39 percent to the company. PR 46, CR 26. In so requesting, the petitioners contended that "the Department typically assigns the highest estimated dumping margin from its initiation notice as the AFA rate in these situations, which is 21.41 percent for Bosnia and Herzegovina in this case," *id*. at 2. RSS's response stated that ITA should apply the highest estimated dumping rate stated in the Initiation Notice of 21.41 percent. PR 47.

In its preliminary determination, ITA applied total facts available with adverse inference to RSS and assigned an AFA rate of 21.41 percent based on the estimated weighted-average dumping margin

relied on in the Initiation Checklist. *Silicon Metal from Bosnia and Herzegovina and Iceland: Preliminary Affirmative Determinations of Sales at Less Than Fair Value*, 85 Fed.Reg. 80009 (Dep't of Commerce Dec. 11, 2020), PR 69; Preliminary Decision Memorandum (PDM), PR 48, at 6; Initiation Checklist at 8. Because the adverse facts available rate was derived from information in the petition and the supplements to it, the agency corroborated the AFA rate, key elements of the export price, and normal value calculations, by examining information from various independent sources provided in the petition and its supplements. PDM at 7. Although the petitioners submitted a revised calculation in their supplement to the petition for an alleged margin of 39.00 percent, it was not calculated using the financial statements of the petitioners (or a parent company), as requested by ITA. *Id*. Based on the agency's inclination not to use statements from third countries to calculate constructed value ratios, ITA corroborated the recalculated rate of 21.41 percent found in the Initiation Notice, which it had calculated using Ferroglobe's financial statements. *Id*. at 8–9.

ITA issued its Final Determination and IDM in which the agency continued to use the margin from the Initiation Notice, which was calculated using Ferroglobe's financial statements, as the adverse facts available rate for RSS. IDM at 6, 11. ITA explained that data from Ferroglobe would have at least two advantages over data from the petitioners' hand-picked company. First, because "the petitioners calculated the cost of production based on their own experience," the agency "[found] it appropriate to base the CV ratios on that petitioner's parent company" so that the "usage rates and CV ratios have a link to the same source." *Id*. at 9. Second, ITA explained that it was "continu[ing] to not rely on third-party financial statements" and provided many examples of this practice. *Id*. at 9–10 n.48. It further explained that "[a]lthough the parent company is headquartered abroad, its financial statements include the data from the petitioner itself, making Ferroglobe's financial statements, at least in part, reflective of the financial data of that U.S. producer," whereas "Elkem's financial statements represent entirely third-country based data with no element of cost from either the country under investigation or a U.S. producer." *Id*. at 9.

ITA confirmed the accuracy and validity of the information underlying the calculation of the dumping margin used in the Initiation Notice by examining source documents and affidavits, as well as publicly available information. *Id*. at 10. Nothing in the record calls into question the validity of the information supporting the export price and normal value calculations provided in the initiation check-

list. *Id*. Accordingly, the agency found that the use of the dumping margin in the Initiation Notice of 21.41 percent was consistent with both the Tariff Act of 1930, as amended ("Act"), and ITA's practice, and was reliable for the purposes of the underlying investigation. *Id*. at 10.

II

The plaintiff-petitioners did not comply with ITA's instructions to revise their calculations, which relied on information regarding a non-party located in neither the home country (Bosnia) nor the United States. They now plead that this court disregard ITA's discretion, ignore its well-established practices, and overturn a decision with substantial evidence to support it. These arguments fail to overcome the standard of review to which this proceeding is subject. *See* 19 U.S.C. §1516a(b)(1)(B)(I). ITA acted well within its discretion in applying a 21.41 percent dumping margin, and the court will not substitute its judgment for that of ITA in choosing between two fairly conflicting views. *See*, *e.g*., *Goldlink Indus. Co. v. United States*, 30 CIT 616, 618, 431 F.Supp.2d 1323, 1326 (2006); *see also Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed.Cir. 2007) (improper to overturn an agency determination "simply because the reviewing court would have reached a different conclusion based on the same record").

The plaintiffs do not contend that ITA failed to abide by a statute or regulation and do not contend that a factual determination it reached lacks a basis in the record (*i.e*., substantial evidence). ITA's decision to resort to "adverse facts available" is uncontested here. The dispute at bar only concerns choice of the AFA rate. The statute and the regulation governing such determinations provide the agency with substantial discretion as to what sources it may use to establish such rate. *Accord PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) ("[ITA]'s discretion in applying an AFA margin is particularly great when a respondent is uncooperative by failing to provide or withholding information") (citing 19 U.S.C. §1677e); Statement of Administrative Action accompanying the Uruguay Rounds Agreements Act, H.R. Doc. No. 103–316 (SAA), at 840 (1994) (emphasizing the case-by-case nature of selecting sources by stating that it was inappropriate "to establish particular methods or benchmarks for applying this alternative"). The relevant statutory and regulatory sections provide that, in selecting from adverse facts available, ITA "may" rely on information from (1) the petition, (2) the final determination in the investigation, (3) any previous administrative review, or "(4) any other information placed on the record." *See* 19 U.S.C. §1677e(b); 19 C.F.R. §351.308(c) (same). Because Ferroglobe's finan-

cial statements are "other information placed on the record," *id*. (*see* Petition Supplement, CR 14, at 29–238), the "statute . . . expressly permitted [ITA] to turn to" them, *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1380 (Fed.Cir. 2016). Accordingly, the plaintiffs cannot and do not show that ITA's decision was in violation of a statute or regulation.

Instead, plaintiffs' arguments rest primarily on their interpretation of outdated agency practices, pursuant to which ITA's purported preference for using financial statements from profitable companies supposedly defeats a preference for using financial statements from domestic, petitioning companies. In so doing, the plaintiffs ignore ITA's explanations founded on its current well-established practices, rely on inapposite decisions to confer outsized importance to outdated practices, and attempt to blur the distinction between a company having substantial business in the United States and one having none. These arguments lack merit.

Plaintiffs' overriding position appears to be that ITA abused its discretion. *See*, *e.g*., *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1342 (Fed.Cir. 2021) ("[ITA] abuses its discretion . . . if it departs from a consistent practice without reasonable explanation"). The plaintiffs do not, however, establish that the agency's decision to use the 21.41 rate represents a departure from a consistent practice, much less an unexplained one.

Because financial information from a Bosnian producer was not available, ITA's potential sources from which to select an AFA in its investigation were limited. It could resort either to (a) financial statements from an entirely third-country producer, Elkem, or to (b) financial statements from the parent company of one of the (U.S. producer) petitioners, which they provided to ITA. IDM at 2. Although the plaintiffs continue to argue that the agency should have exercised its discretion to use Elkem's financial statements for calculation of the constructed value financial ratios,[1] it determined that Ferroglobe's financial statements were preferable because of (1) "[ITA]'s practice of relying on the petitioner's own data for initiation purposes in the absence of in-country information," *id*. at 10, and (2) ITA's general practice not to "rely on the third-country financial statements," *id*. at 9. Accordingly, the agency selected the financial statement linked to a U.S. producer over the financial statements from a third-country producer.

[1] *See* Pls' Reply Br, p. 16. The quality of this submission and the other papers filed by both sides herein obviates the need for oral argument, and the motion therefor can be, and hereby is, denied.

The plaintiffs do not persuade that ITA's decision was unreasonable. As evidenced by the numerous other determinations it cited in the IDM, it frequently uses financial statements of a U.S. producer of comparable merchandise to calculate normal value based on constructed value for initiations when no in-country data are available. *See id*. at 9–10 n.48, citing, *inter alia*, *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed.Reg. 23002 (April 24, 2020), and accompanying Indonesia initiation checklist at 9 (using a U.S. producer's financial statements); *Carbon and Alloy Steel Wire Rod from Belarus, Italy, the Republic of Korea, the Russian Federation, South Africa, Spain, the Republic of Turkey, Ukraine, United Arab Emirates, and United Kingdom: Initiation of Less-Than-Fair-Value Investigations*, 82 Fed.Reg. 19207 (April 26, 2017), and accompanying United Arab Emirates Initiation Checklist at 9–10 (using a U.S. producer's financial statements)). The IDM makes clear that this is done in accordance with agency practice of relying on a petitioner's own data for initiation purposes in the absence of in-country information, as well as ITA's preference for not using third-country financial statements to calculate constructed value profit and selling expense ratios. *Id*. at 6, 10.

The plaintiffs argue that Ferroglobe, like Elkem, "also is located in a third country," so ITA's justification for using information from Ferroglobe over Elkem is a "canard." Plaintiffs' Motion for Judgment on the Administrative Record ("Pls' Br"), ECF No. 19, at 4. At most, however, this argument only applies to the second rationale (concerning agency preference to not rely on third-country financial statements) and not the first (concerning its preference to use petitioners' own financial statements). In any case, this argument glosses over evident differences between Ferroglobe and Elkem. As ITA explained in the IDM, "[a]lthough the parent company is headquartered abroad, its financial statements include the data from the petitioner itself, making Ferroglobe's financial statements, at least in part, reflective of the financial data of that U.S. producer." IDM at 9. The agency found Ferroglobe's financial statements preferable to Elkem's financial statements because the latter "represent entirely third-country based data with no element of cost from either the country under investigation or a U.S. producer." *Id*. Furthermore, because "the petitioners calculated the cost of production based on their own experience," and thus ITA is "applying usage rates from a petitioner's own experience," it would be "appropriate to base the {constructed value} ratios on that petitioner's parent company" so that "the usage rates

and CV ratios have a link to the same source." *Id*. The plaintiffs have not demonstrated anything arbitrary or irrational about this reasoning.

The plaintiffs next argue that ITA's reliance on information from Ferroglobe violated its practice of not relying on financial information from companies that suffered losses. Pls' Br at 24–28. This argument fails for at least two reasons.

First, there is nothing in the statute that requires that ITA use financial statements showing a profit. In calculating normal value based on constructed value, it normally calculates a constructed value profit ratio using the preferred method under section 19 U.S.C. §1677b(e)(2)(A) of the Act, *i.e*., based on the respondent's own home-market or third-country sales made in the ordinary course of trade. 19 U.S.C. §1677b(e). When the preferred method is unavailable, ITA relies on one of the three alternatives outlined in sections 19 U.S.C. §1677b(e)(2)(B)(i) through (iii). They are: (i) the use of the actual amounts incurred and realized by the specific exporter or producer in connection with the production and sale of merchandise that is in the same general category of products as the subject merchandise; (ii) the use of the weighted average of the actual amounts incurred and realized by exporters or producers (other than the respondent) that are subject to the investigation or review in connection with the production and sale of a foreign like product; or (iii) "the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers [other than the respondent] in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . .." 19 U.S.C. § 1677b(e)(2)(B). The plaintiffs do not demonstrate why ITA's selection was aberrant.

Second, the statute does not establish a hierarchy for selecting among the alternatives for calculating constructed value profit. *See* SAA at 840 ("At the outset, it should be emphasized, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases."). Moreover, as explained in the SAA, "the selection of an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data." *See id*. at 840. The court does not concur with the argument that the fact that the SAA did not "establish particular methods and benchmarks for applying this alternative" implies that ITA must use any third-country, third-party source a

petitioner selects. *See* Pls' Br at 22. ITA has discretion to select from any of the three alternative methods, depending on the information available on the record, and in this instance the information in the record only permitted it to select option three — "any other reasonable method" — because the only respondent in the underlying investigation was non-responsive. *See supra*. The plaintiffs argue that the fact that there is a "cap on the amount of profit that will be included" under this option "inherently assumes that the agency will rely on a source that does not have zero profit or a loss", Pls' Br at 18, but a basic canon of statutory interpretation produces the opposite result: because the statute explicitly sets an exception capping the amount of profit that can be included from surrogate financial statements, the absence of a "profit floor" exception means that there is no minimum profit requirement among surrogate financial statements. *See*, *e.g.*, *Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed.Cir. 2004) ("Where Congress includes certain exceptions in a statute, the maxim *expressio unius est exclusio alterius* presumes that those are the only exceptions Congress intended.").

Be that as it may, the plaintiffs do not point to any authority for the proposition that ITA's preference for profitable companies[2] must triumph over its practice of using financial statements from U.S. producers when no in-country data are available. As explained below, plaintiffs' cases do not show ITA relying on third-country data for calculating constructed value when adequate financial information about U.S. producers was available. *See* Pls' Br at 21–22. Rather, the agency only used third-country financial statements when there were no financial statements covering home market sales or from a U.S. producer available on the record. *Id*. Here, however, ITA had record information available that was linked to one of the petitioning companies, which included data from a U.S. producer that could be used to calculate constructed value. IDM at 2, 10. Thus, none of those cases support plaintiffs' position.

They argue, largely based on *EMD from Australia* and *PVA from Korea*, that ITA has a practice of not selecting rates as adverse facts available when those rates were calculated using financial statements showing a loss. *See* Pls' Br at 24–31. However, those cases do not show that ITA has a practice of prioritizing profitable financial statements from third-country producers over those of U.S. producers that show a loss when calculating constructed value for initiation. In

[2] For example, in *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1273, 641 F.Supp.2d 1362, 1378 (2009), the dispute was whether ITA was reasonable in choosing to use a profitable third-country seafood processor to derive surrogate financial ratios for a nonmarket economy company to the exclusion of another third-country seafood processor that was not profitable.

fact, in both instances, the agency ultimately relied on profitable financial statements from other producers in the country of investigation, and not financial statements from a third-country producer. *See Notice of Final Determination of Sales at Less Than Fair Value and Termination of Critical Circumstances Investigation: Electrolytic Manganese Dioxide from Australia*, 73 Fed.Reg. 47586 (Dep't of Commerce Aug. 14, 2008); Issues and Decision Memorandum at 5–6 (ITA chose to calculate constructed value based on an Australian producer with home market sales); *Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From the Republic of Korea*, 68 Fed.Reg. 47540 (Dep't of Commerce Aug. 11, 2003); Issues and Decision Memorandum at Comment 1 (ITA used a Korean producer with home market sales as a surrogate company from which to select a reasonable constructed value profit rate).

Unlike in *EMD from Australia*, in the underlying investigation herein ITA did not have profitable surrogate financial statements from the country of investigation that could be used in calculating constructed value. IDM at 2. *PVA from Korea* likewise represented a different set of facts, in which ITA had a source for calculating constructed value that included both U.S. sales and home market sales in financial statements. *See PVA from Korea* at Comment 1. By contrast, in its investigation at bar, ITA was faced with the options of using either financial statements from Elkem, an entirely third-country producer, or financial statements from Ferroglobe, a parent company of one of the petitioning companies whose financial data included financial statements from a U.S. producer. IDM at 2, 9.

When ITA selects an alternative method for calculating normal value based on constructed value, its practice, in the absence of in-country information, is to rely on a petitioner's own data, in the form of financial statements from U.S. producers, over a third-party producer for initiation purposes. *Id*. at 9–10. Plaintiffs' citations to *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT ___, ___, 273 F.Supp.3d 1348, 1351–53 (2017), *aff'd in part*, 941 F.3d 530, 542–43 (Fed.Cir. 2019), and *Husteel Co. v. United States*, 40 CIT ___, ___, 180 F.Supp.3d 1330, 1343–46 (2016), *aff'd*, 710 Fed. Appx. 890 (Fed.Cir. 2018), are not to the contrary. *See* Pls' Br at 21–22. Neither of those cases addressed ITA's method of selecting an AFA rate, nor did they address whether the agency should have used third-country financial information over financial information regarding a petitioner operating in the United States. Here, ITA acted in accordance with its practice when it used Ferroglobe's financial statements, which were the only fully audited ones provided by the petitioners in response to

the agency to calculate normal value based on constructed value. *Id*. at 2, 9, 10.

The plaintiffs next argue that Elkem's financial information is superior to Ferroglobe's because the latter reflects a company involved in a "wide range of business activities," including the production of silicon metal, whereas Elkem is a "pure-play producer of silicon metal" like RSS. Pls' Br at 4. As a preliminary matter, and as the plaintiffs admit, "Petitioners also provided separate financial data for GSM, a subsidiary of Ferroglobe, which were used to compile the aggregated financial data forming the basis of Ferroglobe's audited consolidated financial statements." Pls' Br at 24. More importantly, the plaintiffs adduce no authority for the proposition that the surrogate company must only (or even primarily) produce the product at issue. Indeed, the Trade Preferences Extension Act of 2015 made clear that, in applying an adverse inference in selecting among the facts otherwise available, ITA "is not required" to demonstrate that the "dumping margin used" "reflects an alleged commercial reality of the interested party" for "any" purpose. 19 U.S.C. §1677e(d)(3). Accordingly, the relevance of Ferroglobe's other operations is neither established nor apparent. Plaintiffs' elevation of their own statement that "all silicon metal producers use essentially the same inputs and production process," Pls' Br at 23, would, at most, show that Elkem might be an acceptable (but not mandatory) surrogate company.

Finally, the plaintiffs argue that "[ITA]'s practice is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation." Pls' Br at 15, 28–31. According to them, the fact that the sole mandatory respondent did not provide sufficient information to calculate a rate required ITA to accept the highest rate alleged in their petition. *Id*. However, this framework does not reflect the agency's current practice when making adverse inferences, which is to "select the higher of: (1) the highest margin stated in the notice of initiation; or (2) the highest margin calculated for any respondent." *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1380 (Fed.Cir. 2016) (noting that plaintiff did not disprove this practice). In other words, as explained in the IDM, ITA has a practice of corroborating the rate found in the Initiation Notice and applying that rate as adverse facts available. *See* IDM at 7–8. Notably, the petitioners even acknowledged that "the Department typically assigns the highest estimated dumping margin from its initiation notice as the AFA rate in these situations, which is 21.41 percent for Bosnia and Her-

zegovina in this case . . .." *See Silicon Metal from Bosnia and Herzegovina: Request for Application of Total Facts Available with Adverse Inferences to RSS*, PR 46, CR 26, at 2.

Plaintiffs' citation to *Welded Stainless Pressure Pipe from Thailand: Final Determination of Sales at Less Than Fair Value*, 79 Fed.Reg. 31093 (Dep't of Commerce May 30, 2014), is not to the contrary because, in that case, the initiation margin was not adjusted from the petition margin, so there was no reason for ITA to make any distinction between the petition margin and the initiation margin. *See Welded Stainless Pressure Pipe From Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 78 Fed.Reg. 35253 (Dep't of Commerce June 12, 2013) (initiation notice accepting that the "estimated dumping margins for welded stainless pipe from Thailand range from 23.77 percent to 24.01 percent"). Notably, in that case was cited a related ITA decision in which the margins alleged in the petition had been "adjusted at initiation," and the agency ultimately selected an even higher rate based on information obtained during the course of its investigation. *See* Issues and Decision Memorandum, *Welded Stainless Pressure Pipe From Thailand: Final Determination of Sales at Less Than Fair Value*, 79 Fed.Reg. 31093 (Dep't of Commerce May 30, 2014). Here, the margin alleged in the petition was also "adjusted at initiation" in accordance with agency current practices. As explained above, the plaintiffs have not established that ITA was unreasonable in adjusting the petition rate in arriving at the initiation rate.

The other ITA decisions on which the plaintiffs now rely, *EMD from Australia* and *PVA from Korea* —- which are from 2003 and 2008 —- represent a prior practice of the agency. Under that practice, it would revisit the initiation margin when selecting for use as an AFA, potentially recalculating it using information later obtained in those investigations or evaluating whether it was sufficiently adverse. *See* IDM at 7–9. In each of those proceedings, ITA recalculated the rates under the premise that rates initially calculated based on financial statements showing a loss would not be adverse, but would rather benefit the non-cooperative respondents. *See* Pls' Br at 26 (quoting *EMD from Australia* and accompanying IDM at 6).

That practice, however, has since been superseded by ITA's current practice of not recalculating the initiation rate when selecting it as adverse facts available. Under current practice, the agency seeks to evaluate and confirm the reliability of the information presented in a petition at the time of the initiation of an investigation, and then ITA only corroborates the margin in the initiation notice when selecting

an AFA rate. IDM at 7–8 (citing *Aluminum Wire and Cable from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 Fed.Reg. 58134 (Dep't of Commerce October 30, 2019), and accompanying Issues and Decision Memorandum at Comment 1). Current policy and practice are based on the fact that ITA has no ability to evaluate whether the adverse facts available rate is sufficiently adverse when there are no participating respondents, there are no calculated rates, and there is no order in place. *See* IDM at 8 (citing *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 Fed.Reg. 32707 (Dep't of Commerce July 9, 2019), and accompanying Issues and Decision Memorandum at Comment 1 (*Steel Wheels from China*).

ITA has followed this practice now for over a decade, and has consistently stated that it does not revisit the initiation margin when selecting it for use as AFA. *See* IDM at 7–8 (citing *Certain Steel Grating from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 75 Fed.Reg. 32366 (Dep't of Commerce June 8, 2010) (*Steel Grating from China*), and accompanying Issues and Decision Memorandum at Comment 2; *Aluminum Wire and Cable from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 Fed.Reg. 58134 (Dep't of Commerce Oct. 30, 2019), and accompanying Issues and Decision Memorandum at Comment 1). Further evidence of this change in practice since the determinations in *EMD from Australia* and *PVA from Korea* can be found in ITA's inclusion of language in the initiation notices for those two matters stating that it would consider alternative options for calculating profit if it became necessary to rely on the constructed-value-based margin from the petition for adverse facts available. *See* IDM at 7, n. 35. This language is no longer included in ITA's initiation notices, however, and was not included in the Initiation Notice herein.

In the investigation underlying this action, ITA took the same approach as it has in other investigations presenting similar circumstances, such as in *Steel Wheels from China*. Like that matter, the administrative proceeding herein involved an investigation where no respondents participated, no order was in place, and there were no calculated rates that could be used to determine whether the adverse facts available rate would be sufficiently adverse in the context of a producer's actions over a period of time under the discipline of an order. IDM at 8, n.38. In accordance with current practice and under such set of facts, ITA corroborated the dumping margin found in the

Initiation Notice, determined that the margin was reliable and had probative value, and thus was appropriate to use as an adverse facts available rate. *Id*. at 8–9.

In short, the practice exemplified in the decisions the plaintiffs cite is no longer current and has not been for many years. *Id*. at 7–9. This is demonstrated by the cases spanning over a decade that ITA referenced in the IDM as evidence of its current practice, which replaced the practice the plaintiffs rely on in their arguments. *Id*. at 7–8 & n. 36, 38–40. When it selects an alternative method for calculating normal value based on constructed value, ITA's practice, in the absence of in-country information, is to rely on a petitioner's own data, in the form of financial statements from U.S. producers, over a third-party producer for initiation purposes. *Id*. at 9–10. ITA thus used Ferroglobe's financial statements, which were the only fully audited financial statements provided in response to its request, to calculate normal value based on constructed value. *Id*. at 2, 9, 10. Contrary to plaintiffs' argument, it would have been against the agency's current practice to evaluate the margin contained in the Initiation Notice to determine whether it was sufficiently adverse under the circumstances —- and there was nothing in the record to make this evaluation. *See id*. at 7–9.

To summarize, ITA acted in accordance with its current practice when it based the AFA rate on the initiation rate of 21.41 percent, which, as discussed above, was reasonably determined based on Ferroglobe's financial statements. The plaintiffs at times appear to suggest that this rate was so low that RSS secretly wanted it to apply because it would be more favorable than the rate it would be assigned if RSS had participated. *See* Pls' Br at 12, 14, 30 n. 7, 33. However, ITA "is not required to determine, or make any adjustments to" a "weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information." 19 U.S.C. §1677e(b)(1). *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed.Cir. 2003) (holding that ITA may apply an adverse inference for a respondent's "failure to cooperate to the best of respondent's ability, regardless of motivation or intent").

III

In view of the foregoing, plaintiffs' motion for judgment on the agency record must be denied, and this action dismissed.

So ordered.

Dated: March 21, 2022
New York, New York

/s/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

Slip Op. 22–24

THE ANCIENTREE CABINET CO., LTD., Plaintiff, CABINETS TO GO, LLC, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and AMERICAN KITCHEN CABINET ALLIANCE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 20–00114

[The court sustains Commerce's Final Results of Redetermination.]

Dated: March 21, 2022

Gregory S. Menegaz, *J. Kevin Horgan* and *Alexandra H. Salzman*, DeKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff The Ancientree Cabinet Co., Ltd.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., for Plaintiff-Intervenor Cabinets To Go, LLC.

Iona Cristei, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel *Savannah Rose Maxwell*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Luke A. Meisner and *Roger B. Shagrin*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor American Kitchen Cabinet Alliance.

OPINION

Katzmann, Judge:

The Ancientree Cabinet Co., Ltd. ("Plaintiff" or "Ancientree") brought this action to contest the U.S. Department of Commerce's ("Commerce") final affirmative antidumping duty ("AD") determination in its investigation of wooden cabinets and vanities from the People's Republic of China ("China"). Ancientree challenged Commerce's determination, alleging that its selection of Romania as primary surrogate country and subsequent analysis of surrogate factors of production were unsupported by substantial evidence, and that its calculation of financial ratios was arbitrary and capricious. *Ancientree Cabinet Co., Ltd. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1241, 1247 (2021). The court determined that, while Commerce's surrogate country selection and surrogate FOP analysis were adequately supported by the record, its financial ratio calculations re-

quired remand for further explanation. *Id.* at 1265. Commerce having now provided additional explanation of its calculations, the court concludes that the financial ratio calculations are supported by substantial evidence and sustains Commerce's determination on remand.

BACKGROUND

I. Legal and Factual Background

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Ancientree Cabinet Co., Ltd. v. United States*, 532 Supp. 3d 1241 ("*Ancientree I*"). Information relevant to the instant opinion is set forth below.

Where, as here, the merchandise under investigation is exported from a non-market economy ("NME"),[1] Commerce determines the normal value of the subject merchandise in large part through valuation of the manufacturer's factors of production ("FOPs"). 19 U.S.C. § 1677b(c)(1). FOPs are the factors "utilized in producing merchandise," and include the "hours of labor required, . . . quantities of raw materials employed, . . . amounts of energy and other utilities consumed, and . . . representative capital costs, including depreciation," among other factors. 19 U.S.C. § 1677b(c)(1), (3)(A)–(D).

Commerce is required to value the FOPs reported by NME manufacturers on the basis of "the best available information regarding the values of such factors in a market economy country or countries" it identifies. 19 U.S.C. § 1677b(c)(1)(B). These countries — commonly known as "surrogate countries" — must, to the extent possible, display "a level of economic development comparable to that of the [NME] country" as well as "significant produc[tion] of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Once the surrogate country or countries are selected, Commerce generates "surrogate financial ratios from 'the financial statements of . . . manufacturing firms'" within the primary surrogate country, relying on those "select financial statements" which provide the "best available information." *Ancientree I*, 532 F. Supp. 3d at 1248 (quoting *CP Kelco US, Inc. v. United States*, 40 CIT __, __, 2016 WL 1403657 at *1 (2016)).

The investigation of wooden cabinets and vanities from China currently before the court was initiated by Commerce on March 26, 2019. *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 84 Fed. Reg. 12,587 (Dep't Commerce Apr. 2, 2019) (initiat-

[1] *See AD Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Prelim. Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 82 Fed. Reg. 50,858, 50,861 (Dep't Commerce Nov. 2, 2017) (finding that China is a non-market economy).

ing AD investigation for the period of investigation of July 1, 2018 to December 31, 2018). Commerce selected Ancientree as a mandatory respondent to the investigation, *see* Respondent Selection Mem. (Dep't Commerce June 4, 2019), P.R. 838, and accordingly requested that Ancientree report the FOPs consumed to produce its wooden cabinets, *see* AD Questionnaire (Dep't Commerce Apr. 25, 2019), P.R. 842. Ancientree, in response, "reported various FOPs, including birch and poplar sawnwood, particleboard, medium density fibreboard . . . and paint." *Ancientree I*, 532 F. Supp. 3d at 1249–50.

At around the same time, Commerce's Office of Policy ("OP") determined, based on data from the World Development Report, that Romania, Malaysia, Russia, Mexico, Brazil, and Kazakhstan were all countries at a comparable level of economic development to China, and requested interested party comments on potential surrogates. *See* Request for Economic Development, Surrogate Country and Surrogate Value Cmts. and Information at 1–2, Attach. (Dep't Commerce June 17, 2019), P.R. 850. Defendant-Intervenor American Kitchen Cabinet Alliance ("AKC Alliance") recommended Romania as the primary surrogate country, while Ancientree recommended Malaysia. See Petitioner, Initial Surrogate Value Cmts. (Aug. 7, 2019), P.R. 956–61 ("AKC Alliance Prelim. SV Comments"); Ancientree, Prelim. Surrogate Value Submission (Aug. 7, 2019), P.R. 952–53 ("Ancientree Prelim. SV Comments").

On October 9, 2019, after consideration of the various submissions, Commerce issued its preliminary determination. *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Prelim. Affirmative Determ. of Sales at Less than Fair Value, Postponement of Final Determ. and Extension of Provisional Measures*, 84 Fed. Reg. 54,106 (Dep't Commerce Oct. 9, 2019) ("*Preliminary Determination*"), and accompanying Preliminary Decision Memorandum (Oct. 9, 2019) P.R. 1407 ("PDM"), as corrected by *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Prelim. Affirmative Determ. of Sales at Less than Fair Value, Postponement of Final Determ. and Extension of Provisional Measures*, 84 Fed. Reg. 56,420 (Dep't Commerce Oct. 22, 2019). In the *Preliminary Determination* Commerce selected Romania as the primary surrogate country, finding that its level of economic development was comparable to China's, that it was a significant producer of comparable merchandise, and its producers could supply reliable surrogate value data. *See* PDM at 14. Commerce accordingly preliminarily valued Ancientree's FOPs on the basis of the Romanian surrogate data, and calculated surrogate financial ratios from the financial statements of Romanian manufacturer S.C.

Sigstrat S.A. ("Sigstrat"). *Id.* at 13–14; Prelim. Surrogate Value Memo (Dep't Commerce Oct. 3, 2019), P.R. 1411–12 ("Prelim. SV Memo").

On February 28, 2020, Commerce issued its final determination, in which it concluded that wooden cabinets and vanities from China were being sold at less than fair value in the United States and calculated the applicable AD rate. *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Final Affirmative Determ. of Sales at Less Than Fair Value*, 85 Fed. Reg. 11,953 (Dep't Commerce Feb. 28, 2020), as corrected by *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Corrected Notice of Final Affirmative Determ. of Sales at Less Than Fair Value*, 85 Fed. Reg. 17,855 (Dep't Commerce Mar. 31, 2020) ("*Final Determination*"), and accompanying Issues and Decision Memorandum (Feb. 21, 2020), P.R. 1554 ("IDM"). In its *Final Determination*, Commerce largely maintained the surrogate value analysis from the *Preliminary Determination*, including both its selection of Romania as primary surrogate country and its calculation of surrogate financial ratios from Sigstrat's financial statements. IDM at 29–40. Commerce issued a final AD order on April 21, 2020. *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Antidumping Duty Order*, 85 Fed. Reg. 22,126 (Dep't Commerce Apr. 21, 2020) ("*Order*"). This appeal followed.

II. Procedural History

Ancientree initiated this challenge to Commerce's *Final Determination* on May 21, 2020. Summons, ECF No. 1; Compl., ECF No. 6. AKC Alliance joined the litigation as Defendant-Intervenor on June 17, 2020. Consent Mot. to Intervene as Def.-Inter., ECF No. 10; Order Granting Mot. to Intervene, ECF No. 14. Cabinets To Go, LLC then joined this litigation as Plaintiff-Intervenor on June 19, 2020. Consent Mot. to Intervene as Pl.-Inter., ECF No. 15; Order Granting Mot. to Intervene, ECF No. 19. After consideration of the motions filed by Ancientree and Cabinets To Go, LLC for judgment on the agency record, and the opposition of the United States ("the Government") and AKC Alliance, the court sustained the *Final Determination* with respect to Commerce's selection of Romania as primary surrogate country and its selection of surrogate values, but remanded for further explanation Commerce's calculation of financial ratios. *Ancientree I*, 532 F. Supp. 3d at 1265–66. In particular, the court determined that Commerce failed to adequately address Ancientree's argument

that the financial ratio calculations "differed from Commerce's past calculations of financial ratios using Sigstrat's financial statements" by employing substantially fewer line items. *Id.* at 1260.

On October 12, 2021, Commerce filed its remand results. Final Results of Redeterm. Pursuant to Court Remand, ECF No. 61–1 ("*Remand Results*"). Ancientree and Defendant-Intervenor AKC Alliance each filed comments on the *Remand Results* in early November, and both AKC Alliance and the Government replied to Ancientree's comments in December of 2021. Def.-Inter.'s Cmts. on the U.S. Dep't of Commerce's Final Remand Redeterm., Nov. 10, 2021, ECF No. 66 ("Def-Inter.'s Br."); Pl.'s Cmts. in Opp. to Remand Redeterm., Nov. 12, 2021, ECF No. 67 ("Pl.'s Br."); Def.-Inter.'s Reply to Pl.'s Cmts. on the U.S. Dep't of Commerce's Final Remand Redeterm., Dec. 21, 2021, ECF No. 70 ("Def.-Inter.'s Reply"); Def.'s Resp. to Cmts. on Remand Redeterm., Dec. 21, 2021, ECF No. 71 ("Def.'s Reply").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." A determination by Commerce "is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). The court also reviews the determinations pursuant to remand "for compliance with the court's remand order." *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (quoting *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT __, __, 2014 WL 1387529 at *2 (2014)).

DISCUSSION

On remand, Commerce continues to find that by beginning its financial ratio calculations with the cost of goods sold, "and not the income statement line items as Ancientree suggested, [it] used the methodology which yielded the most precise ratios possible, given the information present on this record." *Remand Results* at 20. In compliance with the court's remand instructions, Commerce responds directly to Ancientree's allegations that "Commerce's preliminary financial ratio calculation differed from Commerce's past calculations of financial ratios using Sigstrat's financial statements" and was therefore arbitrary and capricious. *Ancientree I*, 532 F. Supp. 3d at 1260. Commerce explains that while both Ancientree and AKC Alli-

ance proposed methodologies for calculating financial ratios from Sigstrat's financial statements, Ancientree's started with line items from the income statement — i.e., "costs identified by type of transaction" — and AKC Alliance's started with Note 7 to the financial statements, which "identifies costs by function." Remand Results at 10. Commerce adopted the latter methodology in the *Final Determination*, and adopts it again on remand, because starting with costs by function "allows Commerce to properly classify the costs as either manufacturing costs, operating costs . . . or financial expenses." *Id.* This in turn allows Commerce to "accurately calculate the cost of manufacturing ('COM')" and to "segregate the COM between direct manufacturing costs and factory overhead" by comparing the change in finished inventory and the cost of goods sold ("COGS"). *Id.* at 10–11. If Commerce were instead to rely on Sigstrat's income statement line-items identified by type of transaction, it would need to make additional assumptions to calculate a financial ratio, as it "cannot go behind surrogate financial statements to determine precisely what each item includes or to what activity it relates" where the data does not itself identify the function of a given expense.[2] *Id.* at 16. On this basis, Commerce concludes that calculating financial ratios from Note 7's costs-by-function accounting (including COGS) satisfies 19 U.S.C. § 1677b(c)(1)(B)'s requirement that "the valuation of the factors of production [in an NME] shall be based on the best available information regarding the values of such factors."

With respect to Ancientree's argument that, in any case, Commerce deviates from past practice by relying on Note 7's costs-by-function data over the line items identified by Ancientree, Commerce explains that in fact, it "prefers to use financial statements that list costs by function rather than type of transaction, because expenses such as labor can relate to manufacturing, administration, and selling" and further, "its preference is to use financial statements that include a line item for the costs of goods sold." *Id.* at 11–12 (quoting *Nantong Uniphos Chems. Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1345, 1354–55 (2019)). Commerce further notes that while it did not rely on COGS (and costs by function generally) to calculate surrogate financial ratios from Sigstrat's financial statements in *Multilayered Wood Flooring from the People's Republic of China: Final Results of*

[2] Commerce's practice of "refraining from 'peeking behind' the underlying data of surrogate financial statements" is longstanding, and was established in light of Commerce's inability to either "compel responses from third parties" or "ensure the timeliness or accuracy" of such responses. *CS Wind Vietnam Co., Ltd. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1273, 1279 (2017) (citation omitted), aff'd 721 Fed. Appx. 993 (Fed. Cir. 2018) (per curiam). Although not challenged in the present case, the court has previously found that that the maintenance of this policy is not an abuse of Commerce's discretion, and continues to do so here. *Id.* at 1284.

the Antidumping Duty Admin. Rev. and Final Determ. of No Shipments: 2016–2017, 84 Fed. Reg. 38,002 (Dep't Commerce Aug. 5, 2019) ("*MLWF 2016–2017*") — a prior investigation highlighted by Ancientree — it *did* rely on COGS and costs by function in *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Administrative Review; 2013–2014*, 81 Fed. Reg. 46,899 (Dep't Commerce July 19, 2016) ("*MLWF 2013–2014*"). *Id.* at 17–18. Indeed, in the latter review, Commerce explains that it calculated financial ratios from the same Note 7 explanation of costs employed in the instant investigation. *Id.* at 18 (quoting *MLWF 2013–2014* and accompanying IDM at 27–28). Although Commerce acknowledges that it employed Ancientree's methodology in *MLWF 2016–2017*, it notes that "the adjustments made in each segment may not be appropriate in other segments, let alone other proceedings" and declines to adopt the same methodology in the present case given the information on the record. *Id.* at 20.

In response, Ancientree disputes Commerce's assertion that its selected methodology is more accurate than the line-item analysis Ancientree proposed. Pl.'s Br. at 1. Ancientree again argues that beginning with Note 7's costs-by-function breakdown is contrary to Commerce's "normal and logical calculation methodology," and that calculation of the surrogate financial ratios must begin with the income statement's line-item classifications. *Id.* at 2. Disputing Commerce's assertion that an analysis based on COGS more accurately apportions costs that, when viewed on a transactional basis, commingle manufacturing, administration, and selling expenses, Ancientree argues that Commerce's failure to consider specific transactional line items (including "raw materials and consumable expenses" and "personnel expenditure") reduces the accuracy of the calculated ratio. *Id*. at 5. Ancientree reiterates its argument that Commerce "uniquely" relies on the costs-by-function breakdown set out in Note 7 in this investigation — rather than basing its ratio calculation on the income statement — and fails to "adequately or reasonably explain[] why it calculated the ratios differently in this investigation or how accuracy has been increased by this change." *Id.* at 6–7. Finally, Ancientree contends that where Commerce does consider line items from the income statement, as it does "outside expenses (with energy and water)," its adjustments to and assignment of those costs "amount[s] to pure speculation" and the resultant ratio cannot be supported by substantial evidence.[3] *Id.* at 5.

[3] Ancientree also alleges that Commerce's analysis runs "contrary to the flow" of Sigstrat's financial statements. Pl.'s Br. at 2. As Ancientree fails to provide any evidence for its apparent contention that reading a statement "out of order" renders its contents unreliable, the court declines to address this argument further.

Ancientree's arguments are opposed by the Government and AKC Alliance, each of whom support Commerce's remand results. Both the Government and AKC Alliance argue that Commerce's financial ratio calculation methodology is more accurate than Ancientree's proposed alternative, and is supported by substantial evidence. Def.'s Reply at 11–14; Def.-Inter.'s Br. at 2. AKC Alliance further notes that while a minimum level of detail is required for Commerce's analysis to be accurate, once the accuracy requirement is satisfied, "there is no general preference to use as many line items as possible." Def.-Inter.'s Reply at 5–6. The Government and AKC Alliance also contend that Commerce reasonably determined it was not departing from past practice by basing its ratio calculation on Note 7 rather than the income statement. Def.'s Reply at 15–18; Def.-Inter.'s Reply at 2–3, 6. Both parties note Commerce's stated preference for using COGS as the starting point for a valuation of manufacturing overhead, profits, and selling, general and administrative expenses. Def.'s Reply at 12; Def.-Inter.'s Reply at 3. They each additionally argue that the "past practice" identified by Ancientree is unsupported by evidence on the record and in any case fails to compel Commerce to rely on the income statement in the present case. Def.'s Reply at 15–16; Def.-Inter.'s Reply at 6–7. Finally, the Government contests Ancientree's assertion that Commerce's analysis of "outside expenses (with energy and water)" rests on mere speculation; arguing instead that Commerce's approach to adjustment and allocation was reasoned and conservative. Def.'s Reply at 23–24.

The court concludes that Commerce adequately explained its methodology on remand, and accordingly upholds Commerce's calculated financial ratios. First, with respect to the methodology itself, the court holds that Commerce's reliance on COGS — and on Note 7 generally — as the starting point for its surrogate ratio analysis is supported by substantial evidence. Commerce explains on remand that, because the financial ratios rely upon the total direct manufacturing costs of the surrogate producer, "selecting the best record information for the total direct manufacturing costs used in the financial ratio calculations is integral to the accuracy of Commerce's calculations." *Remand Results* at 11. As the court has previously noted, "[b]y definition, the cost of goods sold . . . captures all of the costs of manufacture." *Nantong*, 415 F. Supp. 3d at 1355 (citation omitted). It follows that the entirety of the "direct and indirect manufacturing costs necessary for the financial ratio calculations" are included within the COGS. *Remand Results* at 13. Commerce's decision to begin with COGS and perform adjustments based on change in inventory and production overhead costs (to calculate cost of manu-

facturing) and on energy and direct materials/labor costs (to calculate manufacturing overhead) thus reflects a reasonable methodological approach to calculating the applicable financial ratios. *Id.* at 35–36; 38–39. To require Commerce to rely instead on the line-item costs which make up COGS would at best entail needless summation, and at worst (where, as here, those line item costs fail to delineate between manufacturing, administrative, and selling expenses) require substantial additional labor to disaggregate costs into their component functions, if accurate disaggregation is possible at all. As Ancientree provides no evidence that the COGS relied upon by Commerce is itself inaccurate, its argument that a ratio calculation based on the Sigstrat income statement is necessarily superior indeed seems to "conflate[] the use of several line items with accuracy." *Id.* at 35. The court therefore rejects Ancientree's argument, and concludes that substantial evidence supports Commerce's determination that COGS provides the more-accurate starting point for financial ratio calculation.

Second, with respect to Commerce's prior investigations, there is insufficient evidence that Commerce has any "normal" or established past practice for the calculation of surrogate financial ratios. The determinations cited by Ancientree for the proposition that Commerce "has always started with the [income] statement" for its ratio calculations fail to support this conclusion. Pl.'s Br. at 6. Two of the cited determinations do not discuss financial ratio calculation at all in their published IDMs. *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Admin. Rev., Final Determ. of No Shipments, and Final Partial Rescission of Antidumping Duty Admin. Rev.; 2014–2015*, 82 Fed. Reg. 25,766 (Dep't Commerce June 5, 2017); *Certain Hardwood Plywood Products from the People's Republic of China: Final Determ. of Sales at Less Than Fair Value, and Final Affirmative Determ. of Critical Circumstances, in Part*, 82 Fed. Reg. 53,460 (Dep't Commerce November 16, 2017). In two more, the IDMs clearly state that Commerce based its surrogate financial ratio analysis on adjusted COGS, just as it did in the present case. *MLWF 2013–2014* and accompanying IDM at 27–28; *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Admin. Rev. and New Shipper Rev. and Final Determ. of No Shipments; 2017–2018*, 85 Fed. Reg. 78,118 (Dep't Commerce December 3, 2020) and accompanying IDM at Cmt. 1. Furthermore, as the Government notes, Ancientree fails to address the examples cited by Commerce — *MLWF 2013–2014* and

Nantong Uniphos Chems. Co. v. United States, 415 F. Supp. 3d 1345 — for the proposition that Commerce in fact prefers to begin its analysis with COGS. Def.'s Br. at 19. As the only evidence of contrary past practice currently before the court is therefore *MLWF 2016–2017*, and as "isolated investigations [do] not prove the existence of past practice[]" but rather only that "Commerce thought differently on different facts and different times," the court concludes that Commerce did not deviate impermissibly from its past practice by basing its surrogate financial ratio calculation on COGS in the present case. *CP Kelco US, Inc. v. United States*, 39 CIT __, __, 2015 WL 1544714 at *10 (2015).

Finally, the court rejects Ancientree's argument that Commerce's adjustments to COGS amount to "mere speculation" and are therefore unsupported by substantial evidence. Pl.'s Br. at 5. Commerce explains its adjustments to COGS in detail in the *Remand Results*, and indicates the general accounting principles supporting its conclusions that (1) production overheads encompassed all non-basic manufacturing costs, including energy costs, fixed personnel costs, and depreciation; and (2) outside expenses, including energy and water, are encompassed within production overhead. *Remand Results* at 37–39. Commerce acknowledges that its adjustments necessarily require a degree of speculation simply because Commerce is not empowered to go behind the information provided by surrogate manufacturers, but notes that the same is true of any potential analysis of Sigstrat's financial data — including Ancientree's. *Id.* at 39. The court therefore concludes that Commerce has supported both its adjustments and its rejection of Ancientree's alternative approach with such evidence "a reasonable mind might accept . . . as sufficient." *Maverick Tube*, 857 F.3d at 1359 (citation omitted).

CONCLUSION

For the foregoing reasons, Commerce's methodology for calculation of surrogate financial ratios is supported by substantial evidence, and its *Remand Results* are sustained. Judgment will enter accordingly in favor of Defendant.

SO ORDERED.

Dated: March 21, 2022
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

Slip Op. 22–26

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

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

[After a bench trial, holding that the Warehousing Agreement is a lease or similar use agreement and a Phase Two bench trial shall proceed to determine whether the subject merchandise is eligible for duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States.]

Dated: March 21, 2022

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

Monica P. Triana, Trial Attorney, International Trade Field Office, and *Edward F. Kenny*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With them on the pretrial brief were *John V. Coghlan*, Deputy Assistant Attorney General of the Federal Programs Branch, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and with them on the supplemental brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-in-Charge. Of counsel on the trial and supplemental briefs was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff SGS Sports Inc. ("Plaintiff" or "SGS") brings this action to contest the denial of its administrative protests by U.S. Customs and Border Protection ("Customs") regarding swimwear and related accessories that Plaintiff entered into the United States in 2013 and 2014 ("subject merchandise"). The Court conducted a bench trial via videoconference to determine whether the subject merchandise was entitled to duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States ("HTSUS"), 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 improved 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.[1] The bench trial focused on the issue of whether the Warehousing Agreement between SGS and 147483 Canada Inc. ("Canada 147483") constituted a lease or similar use agreement under HTSUS subheading 9801.00.20. Based on the following findings of fact and conclusions of law, the Court concludes that the Warehousing Agreement is a lease or similar use agreement under HTSUS subheading 9801.00.20.

PROCEDURAL HISTORY

Plaintiff attempted to enter the subject merchandise pursuant to HTSUS subheading 9801.00.20. Final Pretrial Order (Phase One of Remote Bench Trial), Schedule C (Phase One Uncontested Facts) ¶ 59, ECF No. 74. Customs denied Plaintiff's claim for duty-free treatment under HTSUS subheading 9801.00.20, reclassified the subject merchandise, and liquidated the entries. *See id.*, Schedule D-1 (SGS Sports, Inc. Claims and Defenses) ¶ 2, Schedule D-2 (Def.'s Claims and Defenses) ¶¶ 2–3. Thereafter, SGS filed three timely protests challenging Customs' classification determination. *See id.* Schedule B ¶ 1; Compl. ¶ 5, ECF No. 6. When denying SGS' protests, Customs stated its determination 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 because "no bailment occurred." HQ H216475 (Jan. 16, 2015); HQ H276403 (Dec. 12, 2017). SGS filed suit challenging the denial of its protests. Summons, ECF No. 1; Compl.

The Parties filed cross-motions for summary judgment. Pl.'s Mot. Summ. J., ECF No. 26; Mem. P. & A. Supp. Pl.'s Mot. Summ. J. ("Pl.'s Summ. J. Br."), ECF No. 26–2; Def.'s Cross-Mot. Summ. J., ECF No. 30. The Court denied Plaintiff's motion for summary judgment and granted the cross-motion for summary judgment filed by Defendant United States ("Defendant"). *SGS Sports[] Inc. v. United States*, 44 CIT __, 463 F. Supp. 3d 1356 (2020). In an order granting Plaintiff's Motion for Rehearing, ECF No. 41, the Court set aside its previous opinion and judgment, and scheduled the matter for trial. *SGS Sports Inc. v. United States*, 44 CIT __, Slip Op. 20–150 (Oct. 22, 2020).

The Court granted a motion to bifurcate the trial into Phase One and Phase Two. Am. Order ("Am. Bifurcation Order") at 1, ECF No.

[1] Plaintiff stopped entering merchandise under HTSUS subheading 9801.00.20 in 2015 and now enters merchandise under HTSUS subheading 9801.00.10,Trial Tr., Day 1, at 80, ECF No. 83, which was amended in 2016 to include "any other products when returned within 3 years after having been exported," HTSUS subheading 9801.00.10. HTSUS subheading 9801.00.10 was amended after the subject merchandise was entered in 2013 and 2014.

66. The Court ordered that the Phase One trial would resolve the sole issue of whether the Warehousing Agreement between SGS and Canada 147483, dated September 1, 2005, is a lease or similar use agreement. *Id.* If Phase One did not resolve the case in its entirety, Phase Two would encompass the remaining issues necessary to resolve the case. *Id.* The Court stayed the remaining issues reflected in Defendant's Motion in Limine, ECF No. 52; Plaintiff's Motion in Limine to Allow Introduction at Trial of an Evidence Summary Pursuant to FRE 1006 ("Plaintiff's Motion in Limine"), ECF No. 54; and the deadline for Defendant to respond to Plaintiff's Motion in Limine, pending the Court's decision in Phase One. Am. Bifurcation Order at 1–2. The Parties filed pretrial briefs and schedules. Def.'s Pretrial Br., ECF No. 67; Pl.'s Pretrial Mem. ("Pl.'s Pretrial Br."), ECF No. 68; [Proposed] Pretrial Order, ECF No. 71.

The Court conducted the Phase One trial on February 4 and 5, 2021. Docket Entries, ECF Nos. 81, 82. The Court heard testimony via videoconference from three fact witnesses: Anna Murdaca, Vice President of Finance and Chief Financial Officer of SGS since 1997 and part owner of SGS since 2007; Michael Couchman, Warehouse Manager of Canada 147483 for approximately ten years; and Steven Gellis, President of SGS since its incorporation in 1988 and President of Canada 147483 since its incorporation in 1985. Trial Tr., Day 1, at 59–298, ECF No. 83. The witnesses provided testimony that appeared to be truthful based on each witness' respective demeanor, inflection, length of employment in his or her position, and familiarity with the subject matter of the questions asked, and thus provided the Court with the necessary basis to conclude that they were credible witnesses.

In its pretrial brief, Plaintiff repeated its argument from its summary judgment response brief that Customs was bound by its previous rulings to treat the Warehousing Agreement as a similar use agreement under HTSUS subheading 9801.00.20 because Customs had not modified or revoked its previous rulings under the 19 U.S.C. § 1625(c) notice and comment procedure. Pl.'s Mem. P. & A. Opp'n Def.'s Cross-Mot. Summ. J. and Reply Supp. Pl.'s Mot. Summ. J. at 9–15, ECF No. 32; Pl.'s Pretrial Br. at 7–13. Defendant objected to the 19 U.S.C. § 1625(c) argument at the January 21, 2020 pretrial conference and renewed its objection at trial. Trial Tr., Day 1, at 6–8, 27; Trial Tr., Day 2, at 340; Docket Entry (Jan. 21, 2021 Pretrial Conference), ECF No. 72. The Court ordered supplemental briefing and held oral argument on the 19 U.S.C. § 1625(c) issue on January 12, 2022. Order (Oct. 8, 2021), ECF No. 85; Pl.'s Suppl. Br. Concerning 19 U.S.C. § 1625(c) ("Pl.'s Suppl. Br."), ECF No. 86; Def.'s Suppl. Sub-

mission ("Def.'s Suppl. Br."), ECF No. 89; Pl.'s Reply Br. Concerning 19 U.S.C. § 1625(c) ("Pl.'s Reply Br."), ECF No. 90; Docket Entry (Jan. 12, 2022 Oral Arg.), ECF No. 94; Oral Arg. (on file with the U.S. Court of International Trade).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The Court reviews classification cases based on the record made before the Court. 28 U.S.C. § 2640(a).

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 falls within the parameters of the tariff provision. *See id.* (citing *Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1276). 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). 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).

FINDINGS OF FACT

The Court makes the following findings of fact based on a review of the documents admitted into evidence and the credible testimony of the witnesses during the bench trial:

1. SGS is and has always been an importer and distributor of swimwear, sports apparel, and related merchandise. Schedule C ¶ 7; Trial Tr., Day 1, at 63, 117.
2. SGS is a Canadian corporation that was incorporated under the Canada Business Corporations Act on January 19, 1988 by Mr. Gellis. Schedule C ¶ 5; Pl.'s Ex. 1; Def.'s Ex. 1; Trial Tr., Day 1, at 63–64, 116.

3. From incorporation of SGS in 1988 until 2007, Mr. Gellis was the sole owner and sole officer of SGS. Schedule C ¶¶ 8–9; Trial Tr., Day 1, at 117.
4. Mr. Gellis is and has always been the President of SGS. Schedule C ¶¶ 9, 101; Trial Tr., Day 1, at 102, 272, 287–88.
5. SGS modified its ownership structure and reorganized the shares of the company in 2007 and 2013, both of which occurred subsequent to the execution of the Warehousing Agreement. Schedule C ¶ 91; Trial Tr., Day 1, at 201–03.
6. Canada 147483 is a Canadian corporation that was incorporated under the Canada Business Corporations Act on October 22, 1985 at the direction of Mr. Gellis. Schedule C ¶¶ 1–2; Pl.'s Ex. 2; Def.'s Ex. 2; Trial Tr., Day 1, at 72, 114.
7. From incorporation of Canada 147483 in 1985, Mr. Gellis is and has always been the sole owner and officer of Canada 147483. Schedule C ¶¶ 3, 101; Trial Tr., Day 1, at 115.
8. Beginning in 2001, SGS leased real property located at 6400 Cote de Liesse Road, St-Laurent, Quebec, which has continuously been the address of SGS' office. Schedule C ¶ 25; Pl.'s Ex. 10; Def.'s Ex. 14; Trial Tr., Day 1, at 69, 118–20.
9. In 2005, SGS leased additional real property adjacent to 6400 Cote de Liesse Road, with an address of 6450 Cote de Liesse Road, St-Laurent, Quebec, which has continuously been the location of the warehouse since 2005. Schedule C ¶ 26; Pl.'s Ex. 10; Def.'s Exs. 14, 16; Trial Tr., Day 1, at 69–70, 98, 118–20.
10. Canada 147483 does not pay any rent to SGS or any other entity for use of the warehouse. Schedule C ¶ 67; Trial Tr., Day 1, at 175.
11. All of the property, inventory, and equipment in the warehouse are owned by SGS and were identified as assets of SGS on its financial statements. Schedule C ¶ 68; Trial Tr., Day 1, at 176; *see* Def.'s Exs. 6–10.
12. The utility bill for the real property located at 6450 Cote de Liesse Road, which is separate from the utility bill for the real property located at 6400 Cote de Liesse Road, is paid by SGS. Schedule C ¶ 70; Trial Tr., Day 1, at 177.
13. The insurance policy on all of the merchandise and equipment in the entirety of the real property located at 6400 and 6450 Cote de Liesse Road is held by SGS. Schedule C ¶ 71; Trial Tr., Day 1, at 176–77.
14. On September 1, 2005, Mr. Gellis reviewed, approved, and executed a document entitled "Warehousing Agreement" by signing on behalf of both SGS and Canada 147483 in his

capacity as President and sole officer of both companies. Schedule C ¶¶ 40, 45, 57; Pl.'s Ex. 8 ("Warehousing Agreement"); Def.'s Ex. 12 ("Warehousing Agreement"); Trial Tr., Day 1, at 160, 295–96.

15. Mr. Gellis was not required, according to the bylaws of either company, to obtain approval from any other person in order to execute the Warehousing Agreement. Schedule C ¶ 44.
16. In the Warehousing Agreement, SGS and Canada 147483 mutually agreed that:

    (1) "[SGS] may, from time to time request that [Canada 147483] take delivery of merchandise on behalf of [SGS] and to hold said merchandise pending the instructions of [SGS] regarding the disposition of the merchandise.

    (2) "[Canada 147483] agrees that in taking delivery of said merchandise it will perform the following functions:

    (a) provide all necessary labor for the handling, storage and safe keeping of the property deposited for storage;

    (b) assist [SGS] and its agents in the transportation of the merchandise both to and from the warehouse;

    (c) create and maintain inventory records of all merchandise delivered to [Canada 147483];

    (d) maintain perpetual inventory records;

    (e) assist [SGS] in the issuance of samples from the inventory on deposit;

    (f) take periodic inventory of the merchandise deposited;

    (g) provide, at [SGS'] request, all of the services typically provided by a Warehouseman in the ordinary course of business, including, but not limited to, 'pick & pack' services."

    Warehousing Agreement at 1–2; *see* Schedule C ¶ 41; Trial Tr., Day 1, at 254.
17. SGS does not manufacture the merchandise it sells; the merchandise is imported from foreign suppliers, who are primarily located in China. Schedule C ¶ 27; Trial Tr., Day 1, at 66.
18. Beginning in 2005, SGS' foreign suppliers shipped SGS' merchandise, by sea or by air, to Canada. When sent by combined transport utilizing sea and rail, the goods were transported "through Montreal," and when sent by air, the airport of destination was Montreal. From Montreal, the merchandise was then transported by truck, in bond, to Champlain, New York. Order (Feb. 2, 2021) at 1, ECF No. 80 (granting the Parties' joint motion to amend Schedule C ¶ 33); Trial Tr., Day 1, at 67, 127, 130–36.

19. When the in-bond merchandise was brought into New York, SGS would file a consumption entry in the United States and duties were assessed on the price "paid or payable" to the foreign supplier. Order (Feb. 2, 2021) at 1; Trial Tr., Day 1, at 67–68, 128, 136–37.
20. Beginning in 2005 and up until at least the date the subject merchandise entered the United States, containers that were imported into the United States by SGS from its foreign suppliers were immediately exported, unaltered, from the United States to SGS' warehouse at 6450 Cote de Liesse Road in Canada by truck. Schedule C ¶¶ 26, 34; Trial Tr., Day 1, at 63, 67, 128.
21. As to the transactions from the United States to Canada, SGS acts as both the exporter (from the United States) and importer (into Canada). Schedule C ¶ 34; Trial Tr., Day 1, at 137, 139.
22. The physical handling of the merchandise by Canada 147483 began when the merchandise arrived at the loading dock for the SGS warehouse. Legal title to that merchandise did not pass from SGS to Canada 147483. Order (Feb. 2, 2021) at 2 (granting the Parties' joint motion to amend Schedule C ¶ 62); Trial Tr., Day 1, at 63, 67, 140, 163–64, 252.
23. When merchandise reached the SGS warehouse, Canada 147483 employees confirmed the number of cartons in the shipment; documented any open or broken boxes and notified SGS; segregated the merchandise by style, color, and size; and placed the merchandise in appropriate areas. Trial Tr., Day 1, at 67, 74, 217, 252, 254–57.
24. When a customer placed an order, SGS entered the order into its system. The allocation system compared the order to the inventory on hand and automatically allocated inventory to the orders. The SGS allocation manager reviewed the allocation and an SGS employee printed a picking ticket and placed it in a basket in the SGS front office. Schedule C ¶¶ 64–65; Trial Tr., Day 1, at 91–92; *see* Pl.'s Ex. 14.
25. Two or three times per day, a Canada 147483 employee entered the SGS front office, retrieved the accumulated pick tickets, and took the pick tickets to Mr. Couchman. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 92–94, 235, 258–59; *see* Pl.'s Ex. 14; Def.'s Ex. 32.
26. Mr. Couchman placed the pick tickets in order of priority. Trial Tr., Day 1, at 258–60.

27. A Canada 147483 employee retrieved the inventory by style and color as indicated on the pick ticket, packed the merchandise, and arranged for the carrier to ship the merchandise to the customer. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 92–94, 235, 258–59; *see* Pl.'s Ex. 14; Def.'s Ex. 32.
28. The Warehouse Manager for Canada 147483, Mr. Couchman, interacted with SGS' suppliers—both warehouse supply companies and transport companies, such as FedEx and UPS—on behalf of SGS, identifying himself as Warehouse Manager for SGS. Mr. Couchman was an authorized user on the SGS purchasing accounts for many such vendors. Schedule C ¶ 75; Trial Tr., Day 1, at 180–82, 246–48.
29. A Canada 147483 employee indicated by circling that all the inventory on a pick ticket had been picked and returned the fulfilled pick tickets back to the SGS front office. The fulfilled pick tickets were used to invoice SGS for Canada 147483's services. Schedule C ¶ 66; Trial Tr., Day 1, at 94–99, 109–10; *see* Pl.'s Ex. 12; Def.'s Exs. 16, 18, 39.
30. Canada 147483 on its own could not decide to direct any merchandise to leave the SGS warehouse. No merchandise left the SGS warehouse except according to a pick ticket from SGS. Trial Tr., Day 1, at 263.
31. Canada 147483 employees did not "use" merchandise for any purpose other than to provide "pick and pack" services. Trial Tr., Day 1, at 264–65.
32. In 2013 and 2014, SGS imported the subject merchandise into the United States under various consumption entries and paid duties on the price paid or payable to the foreign supplier. *See* Compl. ¶ 8; Order (Feb. 2, 2021) at 1; Trial Tr., Day 1, at 67–68, 128, 136–37.
33. SGS exported the subject merchandise immediately to Canada. *See* Compl. ¶ 9; Schedule C ¶¶ 34–35; Trial Tr., Day 1, at 63, 67, 128.
34. SGS and Canada 147483 understood the terms of the Warehousing Agreement to apply to Canada 147483's handling of the subject merchandise. *See* Trial Tr., Day 1, at 79, 241.
35. Canada 147483 handled the subject merchandise at the warehouse in the same manner in which it generally handled all of SGS' merchandise. *See* Order (Feb. 2, 2021) at 2; Schedule C ¶¶ 64–66, 75; Trial Tr., Day 1, at 67, 74, 91–94, 217, 235, 252–60, 264–65; *see* Pl.'s Ex. 14; Def.'s Ex. 32.

36. SGS imported the subject merchandise into the United States, asserting that the merchandise was properly classified under HTSUS subheading 9801.00.20. Schedule C ¶ 59.
37. Customs denied SGS' claim for duty-free treatment under HTSUS subheading 9801.00.20, liquidated the subject entries, reclassified the merchandise under HTSUS Chapters 61 through 63, and assessed duties. Compl. ¶ 24; Trial Tr., Day 1, at 100; *see* Pl.'s Ex. 16.

CONCLUSIONS OF LAW

I. HTSUS Subheading 9801.00.20

The Court conducts de novo review of whether the subject merchandise qualifies for duty-free treatment under HTSUS subheading 9801.00.20. The Court specifically addresses only the Phase One bifurcated trial issue of whether the Warehouse Agreement is a lease or similar use agreement.

A. 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)). Ordinarily, 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 here the tool is unavailable because Chapter 98 does not have Explanatory Notes. 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.

B. 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. *See* HTSUS subheading 9801.00.20; *Skaraborg Invest USA, Inc. v. United States*, 22 CIT 413, 417, 9 F. Supp. 2d 706, 709 (1998).

Generally, an importer must pay a duty on previously imported merchandise that was exported and then reimported 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 the subject merchandise was originally imported into the United States and duties were paid, the merchandise was exported outside the United States under a lease or similar use agreement, and then reimported back into the United States. The purpose of this provision is to prevent the imposition of double duties for merchandise that meets the specific requirements of HTSUS subheading 9801.00.20. Customs determines 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 reimported 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.

C. Lease or Similar Use Agreement

Phase One of this bifurcated trial involves only the third element, whether the Warehousing Agreement constitutes a lease or similar use agreement. Am. Bifurcation Order at 1; *see* HTSUS subheading 9801.00.20. Plaintiff argues that its Warehousing Agreement is a bailment agreement, which Customs has previously recognized as a "lease or similar use agreement[]." *See* Pl.'s Pretrial Br. at 3; Trial Tr., Day 2, at 330, 338–39. The Court notes at the outset that Plaintiff's characterization of its arrangement with Canada 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. The Court confines its analysis to whether the facts ascer-

tained at trial establish a lease or similar use agreement under a statutory analysis of HTSUS subheading 9801.00.20.

The Court looks to dictionary definitions to construe the tariff terms "lease or similar use agreement[]." "Lease" is defined as "[a] contract by which a rightful possessor of personal property conveys the right to use that property in exchange for consideration." *Lease* (5), *Black's Law Dictionary* (11th ed. 2019). "Similar" is defined as "alike in substance or essentials." *Similar*, *Merriam-Webster's Collegiate Dictionary* at 1161 (11th ed. 2020). "Use" as a noun is defined as "[t]he application or employment of something." *Use* (noun) (1), *Black's Law Dictionary* (11th ed. 2019). "Use" as a verb is defined as "[t]o employ for the accomplishment of a purpose." *Use* (verb) (1), *Black's Law Dictionary* (11th ed. 2019). "Use" is also defined as "to carry out a purpose or action." *Use*, *MerriamWebster's Collegiate Dictionary* at 1378. "Agreement" is defined 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* (1), *Black's Law Dictionary* (11th ed. 2019).

Accordingly, the Court construes the terms "lease or similar use agreement[]" under HTSUS subheading 9801.00.20 in light of these relevant dictionary definitions as follows:

The Court construes the term "lease" to mean a contract by which a rightful possessor of the subject merchandise conveys the right to employ the subject merchandise for the accomplishment of a purpose or action in exchange for consideration.

The Court construes the terms "similar use agreement" and "use agreement similar to a lease" to be synonymous in the context of HTSUS subheading 9801.00.20, because "similar" compares the use agreement to a lease.

The Court construes the synonymous terms "similar use agreement" and "use agreement similar to a lease" to mean a mutual understanding between two or more parties to employ the subject merchandise for the accomplishment of a purpose or action that is alike in substance to a lease. Both a lease and a similar use agreement require that the subject merchandise be employed for the accomplishment of a purpose or action.

Few cases at the U.S. Court of International Trade have opined on a lease or similar use agreement. In *Werner & Pfleiderer Corp. v. United States* ("*Werner*"), 17 CIT 916 (1993), the court held that consideration is not required for a valid similar use agreement. 17 CIT at 918. The Court of International Trade defined a "similar use agreement" under HTSUS subheading 9801.00.20 as a loan for tem-

porary use. *Skaraborg*, 22 CIT at 418; *Werner*, 17 CIT at 918. In *Werner*, the subject merchandise machine was reimported to the United States after it was loaned by the plaintiff to Ogilvie Mills Limited and several test runs of the subject merchandise machine were performed at Ogilvie Mills Limited's facilities in Canada. 17 CIT at 916. The *Werner* court determined that the agreement to "loan" the machine "for testing purposes" was "either a lease or a similar use agreement." *Id.* at 918–19. This is consistent with the Court's definition of a similar use agreement because testing requires operating the subject merchandise for the accomplishment of a purpose or action.

Legislative history also supports the Court's statutory interpretation. In the 1963 version of the Tariff Schedule of the United States ("TSUS"), which followed the enactment of the Tariff Classification Act of 1962, Pub. L. No. 87–456, Item 801.00 of the TSUS appeared as follows:

> 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 improved in condition by any process of manufacture or other means while abroad, after having been exported under *lease to a foreign manufacturer*, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

Tariff Classification Act of 1962, Pub. L. No. 87–456, Schedule 8, Item 801.00, 77A Stat. 403, 406 (1962) (emphasis added). Item 801.00 of the TSUS was amended by the Trade and Tariff Act of 1984, Pub. L. No. 98–573, to language identical to the language of HTSUS subheading 9801.00.20, as follows:

> **SEC. 118. REIMPORTATION OF CERTAIN ARTICLES ORIGINALLY IMPORTED DUTY FREE.**
>
> Item 801.00 is amended—
>
> . . .
>
> (2) by striking out "lease to a foreign manufacturer" in clause (1) and inserting in lieu thereof "*lease or similar use agreements*."

Trade and Tariff Act of 1984, Pub. L. 98–573, § 118, 98 Stat. 2948, 2953–54 (1984) (emphasis added). The legislative intent is recorded in a Ways and Means Committee Report of stand-alone bill H.R. 5448, as the amendment was originally introduced, and later a House of Representatives Report of the amendment as combined with other bills in omnibus bill H.R. 6064:

> Section 1 of H.R. 5448, if enacted, would extend the duty-free treatment of item 801.00 of the Tariff Schedules of the United States (TSUS) to the reimportation of articles which were imported into the United States and then exported *under lease or similar use agreement* to an entity other than a foreign manufacturer. . . . The intent of this legislation is to extend the coverage of that provision to the reimportation of goods which were exported *under lease* to someone other than a foreign manufacturer; of particular concern are exportations *under lease* to a government or service industry. . . .
>
> Item 801.00 may be applied to any type of article. However, it appears to be primarily applied to the reimportation of injection molds for plastic or rubber products, such as combs, plastic houseware items, toys, or tires. The molds are manufactured of steel and generally range in price from $8,000 to $80,000. Other reimported articles entered under item 801.00 include dies of all kinds and general tooling equipment such as jigs, fixtures, and CNC machine lathes. . . .

Report on Miscellaneous Tariff and Customs Bills Before the Subcomm. on Trade of the H. Comm. on Ways and Means, 98th Cong. 34, 157–59 (1984) (emphasis added); *see also* H.R. Rep. No. 98–1015, at 1, 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4960, 4983. The word "lease" in Item 801.00 was replaced with the phrase "lease or similar use agreement," but the legislative history reflects a focus on lease with references to "goods which were exported under lease" and "exportations under lease." A reading of the entire report supports a conclusion that the expansion of the provision intended by the 1984 amendment does not apply to all goods that were imported and duty-paid, then exported and reimported, under any type of agreement that might be described as a use agreement, but rather a use agreement that is similar to a lease.

Based on credible testimony presented during a bench trial, the Court finds that under the Warehousing Agreement in this case, SGS and Canada 147483 expressed a mutual understanding for Canada 147483 to "take delivery of merchandise on behalf of [SGS] and to hold said merchandise pending the instructions of [SGS] regarding the disposition of the merchandise;" "provide all necessary labor for the handling, storage and safe keeping of the property deposited for storage;" "assist [SGS] and its agents in the transportation of the merchandise both to and from the warehouse;" "create and maintain inventory records of all merchandise delivered to [Canada 147483]; "maintain perpetual inventory records;" "assist [SGS] in the issuance of samples from the inventory on deposit;" "take periodic inventory of

the merchandise deposited;" and "provide, at [SGS'] request, all of the services typically provided by a Warehouseman in the ordinary course of business, including, but not limited to, 'pick & pack' services." Warehousing Agreement at 1–2. Evidence elicited at trial established that Canada 147483's handling of the subject merchandise involved confirming the number of cartons in the shipment; notifying SGS of any open or damaged boxes; segregating by style, color, and size; placing the merchandise in appropriate areas; retrieving the inventory by style and color as indicated on the pick ticket; packing the merchandise; and arranging for a carrier to ship the merchandise to the customer. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 91–94, 217, 235, 252–55, 257–59; *see* Pl.'s Ex. 14. The Court finds that sufficient credible evidence was presented at trial to establish that Canada 147483 employees, pursuant to the Warehousing Agreement, used the subject merchandise for the accomplishment of the purpose or action of providing warehousing and "pick and pack" services that satisfies the meaning of a similar use agreement under HTSUS subheading 9801.00.20.

Defendant argues that by its plain or common meaning, a "use agreement similar to a lease" conveys the right to use and possess the property, and that possession is characterized by dominion and control over the property. Def.'s Pretrial Br. at 21; Trial Tr., Day 2, at 345–47. Defendant contends that because the services covered by the Warehousing Agreement do not involve use of merchandise, and Canada 147483 did not have exclusive possession, control, or dominion over the subject merchandise and could not use the subject merchandise as it wished, the Warehousing Agreement is not a use agreement similar to a lease. Def.'s Pretrial Br. at 21–26; Trial Tr., Day 2, at 347–52.

The Court does not agree with Defendant that the "use" must be for the specific purpose for which the subject merchandise was designed (for example, Canada 147483 employees do not need to wear the bathing suits for swimming under the "use" requirement), but it is sufficient if some purpose or action, such as performing warehousing services or "pick and pack" services, or testing as in *Werner*, is the purpose or action under the agreement.

Defendant proposed including an element of possession by defining "lease" as "a contract by which one owning property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payments." Def.'s Pretrial Br. at 18–19 (quoting *Black's Law Dictionary* at 800 (5th ed. 1979)) (emphasis and internal punctation omitted). Defendant proposed defining "possession" as:

> 1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. Civil law. The detention or use of a physical thing with the intent to hold it as one's own. La. Civ. Code art. 3421(a). 4. (usu. pl.) Something that a person owns or controls. . . .

Id. at 10 n.2 & 18–19 (quoting *Black's Law Dictionary* (11th ed. 2019)). The Court rejects Defendant's contention that use under HTSUS subheading 9801.00.20 must involve Canada 147483 possessing or having exclusive control over the subject merchandise, akin to temporary ownership of the goods. The Court declines to read "use" as narrowly as proposed by Defendant.

In sum, the Court concludes based on the credible evidence presented at trial that the Warehousing Agreement is a lease or similar use agreement, specifically a mutual understanding between two or more parties to employ the subject merchandise for the accomplishment of the purpose or action of providing warehousing and "pick and pack" services that is alike in substance to a lease. Therefore, the Court holds that the Warehousing Agreement is a lease or similar use agreement for purposes of HTSUS subheading 9801.00.20. Because the third requirement of HTSUS subheading 9801.00.20 is satisfied, the Court concludes that a further trial on Phase Two of the Bifurcation Order shall proceed.[2]

CONCLUSION

For the foregoing reasons, the Court holds that the Warehousing Agreement is a lease or similar use agreement and a trial should proceed under Phase Two of the Bifurcation Order to determine whether Plaintiff's subject entries qualify for duty-free treatment under HTSUS subheading 9801.00.20.

It is hereby

ORDERED that following a bench trial, the Court concludes that the Warehousing Agreement is a lease or similar use agreement under Phase One of the Bifurcation Order; and it is further

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[2] The Court considered supplemental briefing and held oral argument on the issue of whether 19 U.S.C. § 1625(c) applies in this case. In light of the Court's holding that the Warehousing Agreement is a lease or similar use agreement for purposes of HTSUS subheading 9801.00.20, the Court need not address the 19 U.S.C. § 1625(c) arguments presented by the Parties.

ORDERED that a trial should proceed under Phase Two of the Bifurcation Order to determine whether Plaintiff's subject entries qualify for duty-free treatment under HTSUS subheading 9801.00.20; and it is further

ORDERED that a status conference will be scheduled accordingly.

Dated: March 21, 2022
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 56, No. 13, April 6, 2022

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2022—419-479/80232