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 CAST-IRON CYLINDER HEADS AND BLOCK CASTINGS

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 cast-iron cylinder heads and block castings.

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 cast-iron cylinder heads and block castings 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. 40, on October 12, 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EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 5, 2023.

ADDRESS:

FOR FURTHER INFORMATION CONTACT: Gregory Connor, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0025.

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. 40, on October 12, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of cast-iron cylinder heads and block castings. 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") N312073, dated June 18, 2020, CBP classified cast-iron cylinder heads and block castings in heading 8409, HTSUS, specifically in subheading 8409.99.91, HTSUS, which provides for "Parts suitable for use solely or principally with the engines of heading 8407 or 8408: Other: Other: For vehicles of subheading 8701.20, or heading 8702, 8703 or 8704...." CBP has reviewed NY N312073 and has determined the ruling letter to be in error. It is now CBP's position that cast-iron cylinder heads and block castings are properly classified, in heading 8409, HTSUS, specifically in subheading 8409.99.10, HTSUS, which provides for "Parts suitable for use solely or principally with the engines of heading 8407 or 8408: Other: Other: Cast-iron parts, not advanced beyond cleaning, and

machined only for the removal of fins, gates, sprues and risers or to permit location in finishing machinery... ."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N312073 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H317007, 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*.

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H317007
December 13, 2022
CLA-2 OT:RR:CTF:EMAIN H317007 JDK
CATEGORY: Classification
TARIFF NO(s).: 8409.99.10

DEBORAH STERN
SANDLER, TAVIS & ROSENBERG, P.A.
5835 BLUE LAGOON DRIVE, SUITE 200
MIAMI, FL 33126

RE: Revocation of NY N312073; Tariff Classification of Cast-Iron Cylinder Heads and Block Castings

DEAR MS. STERN,

This is in response to your letter, dated February 24, 2021, submitted on behalf of PACCAR, Inc. (PACCAR) requesting reconsideration of New York Ruling Letter (NY) N312073, dated June 18, 2020. In NY N312073, United States Customs and Border Protection (CBP) classified the cast-iron cylinder heads and block castings under the Harmonized Tariff Schedule of the United States (HTSUS). Upon review of NY N312073, we have determined the ruling to be incorrect. We accordingly revoke the ruling.

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, notice proposing to revoke NY N312073 was published on October 12, 2022, in Volume 56, Number 40, of the Customs Bulletin. No comments were received in response to this Notice.

FACTS:

The instant merchandise is designed to be used with heavy duty diesel engines for vehicles. The steps that the castings and cylinder heads will undergo before importation to the United States is described in NY N312073 as follows:

(A) Manufacturing the cast-iron part:
1. Core making, 2. Core package assembly, 3. Painting core package, 4. Mold preparation, 5. Locating core package in mold, 6. Pouring, 7. Cooling down;

(B) Cleaning (or "fettling") the casting and rough machining for the removal of fins, gates, sprues and risers:
8. Removing sand, 9. Breaking gating system (i.e., removing the casting from the mold), 10. Rough shot blasting, 11. Rough automatic finishing, 12. Manual grinding, 13. Final shot blasting, 14. Quality checks;

(C) Machining to permit location in finishing machinery:
15. Primer (a coat of primer paint is sprayed onto the casting to prevent rust), 16. Data Matrix Code ("DMC") laser-etching;

(D) Packing: 18. Preservation, 19. Packaging.

For the cylinder head castings only, there is step 17. After precision scan measurements of each casting, the foundry will machine datum points to within microns of their required positions, and then performs a quality check. The datum points are used by the engine plant in the U.S. to ensure proper positioning of the machining processes; some of the U.S. processes are held to a few micron tolerances.

In your submission, you clarify that the primer step is only for block castings, and oiling is only for cast-iron cylinder heads.

ISSUE:

Whether or not the instant cylinder heads and block castings are "cast-iron parts, not advanced beyond cleaning, and machined only for the removal of fins, gates, sprues and risers or to permit location in finishing machinery."

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs). 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 GRIs 2 through 6 may then be applied in order.

There is no dispute that the subject merchandise are parts of diesel engines that are classified in heading 8408, HTSUS, or in subheading 8409.99, HTSUS. As such, the case is governed by GRI 6, which provides as follows:

> For legal purposes, the classification of goods in the subheading 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. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

The HTSUS provisions in question are as follows:

8409	Parts suitable for use solely or principally with the engines of heading 8407 or 8408:
	Other:
8409.99	Other:
8409.99.10	Cast-iron parts, not advanced beyond cleaning, and machined only for the removal of fins, gates, sprues and risers or to permit location in finishing machinery...
	* * *
	Other:
8409.99.91	For vehicles of subheading 8701.20, or heading 8702, 8703 or 8704...

Per GRI 6, the subject parts are properly classified under subheading 8409.99.10, HTSUS, if they fall under the scope of the provision for cast-iron parts, not advanced beyond cleaning, and machined only for the removal of fins, gates, sprues and risers or to permit location in finishing machinery.

In *Ross Machine & Mill Supply, Inc. et al. v. United States*, 69 Cust. Ct. 160 (U.S. 1972) (*Ross Machine*), the court held that "painting" cast-iron rollers for machines to protect them against oxidation did not advance them beyond being cleaned for the purposes of classification under the Tariff Schedule of the United States (TSUS), the predecessor tariff schedule to the HTSUS. Specifically, the issue in *Ross Machine* was whether painted iron castings were classified under TSUS provision 680.60, which provided for "Cast-iron

(except malleable cast-iron) rollers for machines, not alloyed and not advanced beyond cleaning, and machined only for the removal of fins, gates, sprues, and risers or to permit location in finishing machinery."

Decisions by the Customs Service and the courts interpreting nomenclature under the TSUS are not deemed dispositive in interpreting the HTSUS. However, such prior decisions should be considered on a case-by-case basis if they are instructive in interpreting the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS.[1] In this case, the text of subheading 8409.99.10, HTSUS, is quite similar to the text of the provision at issue in *Ross Machine*. As such, we find Ross Machine to be instructive in determining whether the instant parts are advanced beyond cleaning, and machined only for the removal of fins, gates, sprues and risers or to permit location in finishing machinery.

Likewise, in HQ H015186 (October 17, 2008), CBP also found that Ross Machinery was instructive when we held that a rust preventative coating did not remove certain cast iron machine tools, which are parts, from the applicable subheading of 8466.93.15, HTSUS. Subheading 8466.93.15, HTSUS, provides for cast iron parts, "not advanced beyond cleaning and machined only for the removal of fins, gates, sprues and risers, or to permit location in finishing machinery," which is identical to the language of 8409.99.10, HTSUS.

In the instant matter, the block castings are painted with primer and the cast-iron cylinder heads are coated with an oil only to prevent oxidation during transport. Pursuant to the reasoning in *Ross Machine* and HQ H015186, the application of rust preventative coating to products considered cast-iron parts do not advance the products beyond being cleaned, and the instant parts fall under the scope of subheading 8409.99.10, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the instant cast-iron cylinder heads and block castings are classified under heading 8409, HTSUS, and specifically provided under subheading 8409.99.10, HTSUS, as "[p]arts suitable for use solely or principally with the engines of heading 8407 or 8408: Other: Other: Cast-iron parts, not advanced beyond cleaning, and machined only for the removal of fins, gates, sprues and risers or to permit location in finishing machinery...." The column one, general rate of duty is free.

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.

---

[1] Omnibus Trade and Competitiveness Act of 1988, P.L. 100–418, August 23, 1988, 102 Stat. 1107, 1147; H.R. Rep. No. 576, 100th Cong., 2d Sess. 549–550 (1988) 1988 U.S.C.C.A.N. 1547, 1582–1583. *See also*, *Hewlett-Packard Co. v. United States*, 189 F. 3d. 1346; 22 Ct. Int'l. Trade 514 (1999)

EFFECT ON OTHER RULINGS:

NY N312073, dated June 18, 2020, is 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,

GREGORY CONNOR
for

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

CUSTOMS BROKER PERMIT USER FEE PAYMENT FOR 2023

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

ACTION: General notice.

SUMMARY: This document provides notice to customs brokers that the annual user fee that is assessed for each permit held by a broker, whether it may be an individual, partnership, association, or corporation, is due no later than February 24, 2023. The annual user fee reflects the changes made by two final rules, published in the **Federal Register** on October 18, 2022, and effective December 19, 2022, that eliminate broker districts and district permits, and transition all customs brokers to a single national permit. Pursuant to fee adjustments required by the Fixing America's Surface Transportation Act (FAST ACT) and U.S. Customs and Border Protection (CBP) regulations, the annual user fee payable for calendar year 2023 will be $163.71.

DATES: Payment of the 2023 Customs Broker Permit User Fee is due no later than February 24, 2023.

FOR FURTHER INFORMATION CONTACT: Melba Hubbard, Chief, Broker Management Branch, Office of Trade, (202) 325–6986, or *melba.hubbard@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 111.96 of title 19 of the Code of Federal Regulations (19 CFR 111.96(c)), U.S. Customs and Border Protection (CBP) assesses an annual user fee for each customs broker permit held by an individual, partnership, association, or corporation. CBP regulations provide that this fee is payable each calendar year for a national permit held by a broker and must be paid by the due date published annually in the **Federal Register.** *See* 19 CFR 24.22(h) and (i)(9); 19 CFR 111.96(c).

On October 18, 2022, CBP published two concurrent final rules in the **Federal Register** (87 FR 63262 and 87 FR 63267) modernizing the customs broker regulations in parts 24 and 111 of title 19 of the CFR. These two final rules eliminate broker districts and district permits, as well as the permit user fees for district permits. CBP is in the process of transitioning all district permit holders to a national permit. In accordance with the effective date of these two final rules

on December 19, 2022, all permit holders will hold one national permit only and must pay annual user fees for one national permit only.

Sections 24.22 and 24.23 of title 19 of the CFR (19 CFR 24.22 and 24.23) provide for and describe the procedures that implement the requirements of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114–94, December 4, 2015). Section 32201 of the FAST Act amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by requiring the Secretary of the Treasury to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation. Paragraph (k) in section 24.22 (19 CFR 24.22(k)) sets forth the methodology to adjust fees for inflation, and to determine the change in inflation as well as the factor by which the fees and limitations will be adjusted, if necessary. The customs broker permit user fee is set forth in appendix A of part 24, which lists fees and limitations subject to the adjustment. (19 CFR 24.22 appendix A.) On August 1, 2022, CBP published a **Federal Register** notice, CBP Dec. 22–17, which among other things, announced that the annual customs broker permit user fee would increase to $163.71 for calendar year 2023. *See* 87 FR 46973.

As required by 19 CFR 111.96 and 24.22, CBP must provide notice in the **Federal Register** no later than 60 days before the date that the payment is due for each broker permit. This document notifies customs brokers that for calendar year 2023, the due date for payment of the user fee is February 24, 2023.

Dated: December 5, 2022.

ANNMARIE R. HIGHSMITH,
Executive Assistant Commissioner,
Office of Trade.

[Published in the Federal Register, December 16, 2022 (85 FR 77132)]

FREE TRADE AGREEMENTS

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 February 14, 2023) 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 1651–0117 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: Free Trade Agreements.

OMB Number: 1651–0117.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours, method of collection or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Free Trade Agreements (FTAs) are established to reduce and eliminate trade barriers, strengthen, and develop economic relations, and to lay the foundation for further cooperation to expand and enhance benefits of the agreement. These agreements establish free trade by reduced-duty treatment on imported goods.

The U.S. has entered into FTAs with the following countries: Chile (Pub. L. 108–77); the Republic of Singapore (Pub. L. 108–78, 117 Stat. 948,19 U.S.C. 3805 note); Australia (Pub. L. 108–286); Morocco (Pub. L. 108–302); Jordan (Pub. L. 107–43); Bahrain (Pub. L. 109–169); Oman (Pub. L. 109–283); Peru (Pub. L. 110–138, 121 Stat. 1455); Korea (Pub. L. 112–41); Colombia (Pub. L. 112–42, 125 Stat. 462); Panama (Pub. L. 112–43); and Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua (Pub. L. 109–53, 119 Stat. 462); Japan (Presidential Proclamation 9974, (**Federal Register** Notice (84 FR 72187)); Mexico and Canada (USMCA) (Pub. L. 116–113 section 101—195) and Consolidated Appropriations Act of 2021 (Pub. L. No: 116–260) (December 27, 2020).

These FTAs involve collection of data elements such as information about the importer and exporter of the goods, a description of the goods, tariff classification number, and the preference criterion in the Rules of Origin.

Respondents can obtain information on how to make claims under these FTAs at *http://www.cbp.gov/trade/free-trade-agreements,* and use a standard fillable format for the FTA submission by going to *http://www.cbp.gov/document/guides/certification-origin-template*.

Type of Information Collection: Free Trade Agreements.

Estimated Number of Respondents: 4,699,460.

Estimated Number of Total Annual Responses: 4,701,060.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 9,402,120.

Dated: December 13, 2022.

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

[Published in the Federal Register, December 16, 2022 (85 FR 77131)]

NAFTA REGULATIONS AND CERTIFICATE OF ORIGIN

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 February 17, 2023 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 1651–0098 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 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: NAFTA Regulations and Certificate of Origin.

OMB Number: 1651–0098.

Form Number: 434, 446, and 447.

Current Actions: This submission is being made to extend the expiration dates for CBP Forms 434, 446, and 447 with no change to the estimated burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: On December 17, 1992, the U.S., Mexico and Canada entered into an agreement, the North American Free Trade Agreement (NAFTA). The provisions of NAFTA were adopted by the U.S. with the enactment of the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. 103–182, 107 Stat. 2057).

CBP Form 434, *North American Free Trade Agreement Certificate of Origin,* is used to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under NAFTA. This form is completed by exporters and/or producers and furnished to CBP upon request. CBP Form 434 is provided for by 19 CFR 181.11, 181.22, and is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

CBP Form 446, *NAFTA Verification of Origin Questionnaire,* is used by CBP personnel to gather sufficient information from exporters and/or producers to determine whether goods imported into the United States qualify as originating goods for the purposes of preferential tariff treatment under NAFTA. CBP Form 446 is provided for by 19 CFR 181.72 and is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

CBP Form 447, *North American Free Trade Agreement Motor Vehicle Averaging Election,* is used to gather information required by 19 CFR 181 appendix, section 11(2) "Information Required When Producer Chooses to Average for Motor Vehicles". This form is provided to CBP when a manufacturer chooses to average motor vehicles for the purpose of obtaining NAFTA preference. CBP Form 447 is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

Type of Information Collection: NAFTA Certificate of Origin (Form 434).

Estimated Number of Respondents: 13,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 13,000.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 26,000.

Type of Information Collection: NAFTA Questionnaire (Form 446).

Estimated Number of Respondents: 400.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 400.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 800.

Type of Information Collection: *NAFTA Motor Vehicle Averaging Election.*

Estimated Number of Respondents: 11.

Estimated Number of Annual Responses per Respondent: 1.28.

Estimated Number of Total Annual Responses: 14.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 14.

Dated: December 14, 2022.

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

[Published in the Federal Register, December 19, 2022 (85 FR 77626)]

U.S. Court of International Trade

Slip Op. 22–137

COOPER (KUNSHAN) TIRE CO., LTD. AND COOPER TIRE & RUBBER CO., Plaintiffs, ITG VOMA CORP., Plaintiff-Intervenor, and VOGUE TYRE & RUBBER CO., Consolidated Plaintiff, v. UNITED STATES, Defendant, and THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INT'L UNION, AFL-CIO, CLC, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Consol. Court No. 20–00113
PUBLIC VERSION

[Sustaining Commerce's Remand Results.]

Dated: December 8, 2022

Daniel J. Cannistra, Crowell & Moring LLP, of Washington, D.C., argued for plaintiffs Cooper (Kunshan) Tire Co., Ltd. and Cooper Tire & Rubber Company.

Jordan C. Kahn and *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington, D.C., argued for consolidated plaintiff Vogue Tyre & Rubber Co.

Nicholas R. Sparks, Hogan Lovells US LLP, of Washington, D.C., argued for plaintiff-intervenor ITG Voma Corporation. With him on the brief were *Jonathan T. Stoel* and *Craig A. Lewis*.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Nicholas J. Birch, Schagrin Associates, of Washington, D.C., argued for defendant-intervenor the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC. With him on the brief was *Roger B. Schagrin*.

OPINION

Denny Swift (portrayed by Milo Ventimiglia): "Car goes where your eyes go, Enz."[1]

* * *

Reif, Judge:

Before the court is the remand results of the U.S. Department of Commerce ("Commerce") pursuant to the court's order in *Cooper*

[1] THE ART OF RACING IN THE RAIN (20th Century Fox 2019). Enz, whose full name is Enzo, is the film's narrator and, notably, a Golden Retriever (notably, also, not an Airedale, but highly impressive and adorable nevertheless), and who is voiced by Kevin Costner.

(Kunshan) Tire Co. v. United States ("*Cooper I*"), 45 CIT __, __, 539 F. Supp. 3d 1316, 1339–41 (2021). *See* Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 69 ("Remand Results"). In *Cooper I*, the court remanded Commerce's final determination in the administrative review of the countervailing duty ("CVD") order on certain passenger vehicle and light truck tires from the People's Republic of China ("China") for the period of review ("POR") January 1, 2017, through December 31, 2017. *See* 45 CIT at __, 539 F. Supp. 3d at 1339–41; *see also Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 22,718 (Dep't of Commerce Apr. 23, 2020) (final determination) and accompanying Issues and Decision Memorandum ("IDM") (Dep't of Commerce Apr. 15, 2020), PR 383. The court ordered Commerce to respond to six discrete instructions by providing further explanation. *See* 45 CIT at __, 539 F. Supp. 3d at 1339–41.

On remand, Commerce responds to each distinct inquiry and continues to conclude that, based on its application of adverse facts available ("AFA"), Cooper (Kunshan) Tire Co., Ltd. ("Cooper Tire" or "CKT")[2] and Shandong Longyue Rubber Co., Ltd. ("Longyue")[3] (collectively, "respondents") used and benefited from the Export Buyers Credit Program ("EBCP") administered by the Export-Import Bank of the People's Republic of China ("China Export-Import Bank"). Remand Results at 2. For the following reasons, the court sustains Commerce's Remand Results.

BACKGROUND

The court presumes familiarity with the facts, as set out in *Cooper I*, and recounts only those facts relevant to the issues before the court on remand.

On October 12, 2021, the court addressed whether Commerce's determination based on AFA that Cooper Tire and Longyue had used the EBCP was supported by substantial evidence. *Cooper I*, 45 CIT __, 539 F. Supp. 3d 1316.[4] With respect to the application of AFA, the court held that Commerce: (1) identified the gap in the record formed by the failure of the Government of China ("GOC") to provide certain EBCP-related information; (2) explained, for purposes of verification, the necessity of certain loan disbursement and partner and corre-

[2] Cooper Tire is a subsidiary of Cooper Tire & Rubber Company ("CTRC"). Resp't Selection Mem. (Feb. 8, 2019), CR 4, PR 49.

[3] Longyue is not a party to this litigation.

[4] In addition, the court declined to consider plaintiffs' Count II argument pertaining to "additional errors by Commerce." *Cooper (Kunshan) Tire Co. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1316, 1337 (2021) (quoting Compl. at 4, ¶¶ 13–14, ECF No. 2).

spondent bank information but not the necessity of EBCP-related information about a USD 2 million contract threshold requirement; and (3) did not explain the reason that Commerce could not instead verify other information on the record. *Id.* at __, 539 F. Supp. 3d at 1327–28.

In *Cooper I*, the court ordered that Commerce provide the following explanations on remand related to Commerce's application of AFA for the EBCP:

> (1) [E]xplain the reason that the information withheld by the GOC about the threshold requirement and the 2013 revisions was necessary to verify nonuse by describing how the missing information prevented Commerce from taking the steps that it considered necessary to verify nonuse; (2)(a) explain the reason that the questionnaire statements by Cooper Tire of non-use by its customers are "unverifiable" by describing step-by-step Commerce's methodology for verifying non-use; (b) describe the extent to which the record would enable Commerce to understand the precise role that the mandatory respondents would play in permitting customers to participate in the EBCP; (c) describe the information that Commerce would need from the mandatory respondents and/or the customers to determine whether either the mandatory respondents or their customers used the EBCP; (3) explain the sources that Commerce would need to look at to complete the process of verification, including any correspondence or communications of any nature (e.g., emails, letters, faxes, telephone calls, text messages) between the mandatory respondents or their customers and the GOC, the China Export-Import Bank and partner/correspondent banks; (4) explain whether it would be feasible — and, if not, why not — for Commerce to solicit and obtain the withheld information about the threshold requirement from the mandatory respondents or their customers; (5) if Commerce were to consider that obtaining and conducting a review of the sources of information identified in "(3)", above, were unduly burdensome, explain with particularity the reasons for this conclusion; and (6) explain the extent to which Commerce would be able to rely on information from mandatory respondents by explaining how, if at all, such information would be relevant and reliable for Commerce to establish non-use. The court emphasizes that each of the aforementioned instructions for Commerce on remand is a distinct inquiry that requires a distinct individual response as well as clarification from Commerce in its redetermination.

Id. at __, 539 F. Supp. 3d at 1339–41.

On January 11, 2022, Commerce issued its draft redetermination ("Draft Remand Results"). Remand Results at 3 (citing Draft Results of Remand Redetermination (Jan. 11, 2022), *Cooper (Kunshan) Tire Co.*, Consol. Court No. 20–00113, 45 CIT __, Slip Op. 21–141 (Oct. 12, 2021)). On January 21, 2022, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union, AFL-CIO (the "USW"), Vogue Tyre & Rubber Co. ("Vogue"), ITG Voma Corporation ("Voma") and Cooper Tire provided comments on the Draft Remand Results. *Id.* at 4 (footnotes omitted).

On February 2, 2022, Commerce filed its final Remand Results, in which Commerce responded to the court's remand order, addressed the parties' comments, continued to find that the respondents used the EBCP and did not change any subsidy rates. *See id.* at 4, 41–42. On April 4, 2022, Cooper Tire, Cooper Tire & Rubber Company ("CTRC"), Voma and Vogue (collectively, "plaintiffs") provided comments on the Remand Results wherein plaintiffs continue to argue against the application of AFA. *See* Consol. Pl. and Consol. Pl.-Intervenor's Comments in Opp'n to Remand Redetermination ("Consol. Pls. Br.") at 1, ECF No. 75; Pls.' Comments on Final Remand Redetermination ("Pls. Br.") at 1, ECF No. 76. On May 19, 2022, defendant United States (the "Government") and the USW responded to plaintiffs' comments. *See* Def.'s Response to Comments Regarding Remand Redetermination ("Def. Br."), ECF No. 82; Def.-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, AFL-CIO, CLC Comments in Supp. of Remand Results ("Def.-Intervenor Br."), ECF No. 79.

On July 14, 2022, the court heard oral argument. *See* Oral Arg., July 14, 2022, ECF No. 87. On July 29, 2022, the parties provided responses to two follow-up questions. *See* Def.-Intervenor's Answer to Ct.'s Post-Hr'g Questions, ECF Nos. 90–91; Def.'s Resp. to Post-Arg. Questions, ECF No. 92; Consol. Pls.' Resp. to Ct. Question, ECF No. 93; Pls.' Comments in Resp. to Suppl. Questions, ECF Nos. 94–95. On August 4, 2022, the parties participated in a teleconference to discuss their responses. Teleconference, ECF No. 96.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018), and 28 U.S.C. § 1581(c).[5]

[5] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

On remand, the court will sustain Commerce's determinations "if they are in accordance with the remand order, are supported by substantial evidence[] and are otherwise in accordance with law." *MacLean-Fogg Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1349, 1355 (2015) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)); *see Prime Time Com. LLC v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1308, 1313 (2021) ("The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014)), *aff'd*, No. 2021–1783, 2022 WL 2313968 (Fed. Cir. June 28, 2022); *see also Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1273, 1276 (2020) (quoting *Xinjiamei Furniture (Zhangzhou) Co.*, 38 CIT at __, 968 F. Supp. 2d at 1259). Substantial evidence requires "more than a mere scintilla" of evidence. *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). In addition, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)). "[I]n remand proceedings, an administrative agency must modify its original determination in accordance with the remand order." *Dorbest Ltd. v. United States*, 35 CIT 136, 145, 755 F. Supp. 2d 1291, 1300 (2011).

LEGAL FRAMEWORK

Commerce shall impose a countervailable duty if: (1) Commerce determines that a foreign government or public entity of a foreign country is "providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States"; and (2) the U.S. International Trade Commission determines that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of [subject] imports." 19 U.S.C. § 1671(a). A subsidy is countervailable when a foreign government or public entity of a foreign country provides for a specific enterprise or industry a financial contribution, which confers a benefit. *Id.*§ 1677(5).

DISCUSSION

The court addresses whether Commerce complied with the remand order and whether Commerce's determination in which Commerce

applied AFA to determine that Cooper Tire and Longyue used and benefitted from the EBCP is supported by substantial evidence.

I. Whether Commerce complied with the remand order

The court concludes that Commerce complied with the remand order. Commerce provided responses with the requested explanations or descriptions for each of the court's enumerated instructions. *See* Remand Results at 5–21; *Prime Time Com. LLC*, 45 CIT at __, 495 F. Supp. 3d at 1313 (quoting *Xinjiamei Furniture (Zhangzhou) Co.*, 38 CIT at __, 968 F. Supp. 2d at 1259); *see also Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1339–41.

In the Remand Results, Commerce responded to the court's remand order in *Cooper I* and addressed plaintiffs' comments on the Draft Remand Results. Remand Results at 5–41.

1. Necessity of the withheld information on the threshold requirement and 2013 revisions

In response to the court's first instruction, Commerce explained the necessity of the missing information related to the threshold requirement and 2013 revisions by describing the impact of the missing information on Commerce's verification methodology. *Id.* at 5. Commerce described its methodology as a step-by-step review of balance sheets or tax returns followed by financing subledgers that detail loan information, after which Commerce targets specific subledger entries and requests loan applications or other documentation. *Id.* Commerce asserted that "[i]n selecting loans to scrutinize, the reliability of the verification rests on whether Commerce can intelligently determine on which loans to focus its attention." *Id.* Without information on the existence of a USD 2 million threshold, Commerce claimed that it is unable to "assess the scope of verification and effectively prove (or disprove)" EBCP use. *Id.* at 6. Commerce stated specifically that to know whether the threshold requirement remained in place would "greatly limit[] the universe of potentially relevant loans under the program and [could] significantly assist [Commerce] in targeting [its] verification of nonuse" and allow Commerce to avoid "mistakenly limit[ing] [its] verification" if the threshold requirement were no longer in place. *Id.* Commerce asserted that due to time limitations and the difficulty of verification without the threshold information, Commerce's conclusions could otherwise be based on irrelevant data and, therefore, be unreliable. *Id.* at 6–7.

Commerce claimed further that the 2013 revisions: (1) "could contain" useful information to support verification; and (2) are necessary because the respondents' statements pertaining to non-use assert

that the respondents "would be aware" of any EBCP use by their customers given the alleged requirements in the implementing rules as to exporter assistance and export insurance. *Id.* at 7.

Commerce concluded that, moreover, "regardless of the significance of the 2013 revisions to the administrative measures, Commerce is unable to verify the non-use information, because [Commerce] does not have a list of partner/correspondent banks, which the Court has determined to be necessary for verification." *Id.* at 8. In other words, "Commerce submits that the Court's finding regarding the intermediary banks alone is sufficient to support the AFA finding." *Id.*

In response to the Draft Remand Results, plaintiffs and defendant-intervenor provided comments. *See id.* at 21–24. Cooper Tire disputed the necessity of the threshold information to Commerce's ability to verify programs. *Id.* at 21–22 (citing *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determinations; 2012* ("*Isos from China*"), 79 Fed. Reg. 56,560 (Dep't of Commerce Sept. 22, 2014) and accompanying IDM (Dep't of Commerce Sept. 8, 2014) at 15; *Certain Vertical Shaft Engines Between 99cc and up to 255cc, and Parts Thereof, from the People's Republic of China: Final Determination in the Countervailing Duty Investigation* ("*VSE from China*"), 86 Fed. Reg. 14,071 (Dep't of Commerce Mar. 12, 2021) and accompanying IDM (Dep't of Commerce Mar. 5, 2021) at cmt. 2). Vogue and Voma raised Commerce's determination of non-use in *MAE from China*, in which the same information from the GOC was missing, to argue that Commerce should reach the same conclusion here. Remand Results at 22–23 (citing *Certain Mobile Access Equipment and Subassemblies Thereof from the People's Republic of China: Final Affirmative Determination in the Countervailing Duty Investigation* ("*MAE from China*"), 86 Fed. Reg. 57,809 (Dep't of Commerce Oct. 19, 2021) and accompanying IDM (Dep't of Commerce Oct. 12, 2021) at cmt. 5, 55–56). They also insisted that Commerce "confuses making verification easier with making verification impossible." *Id.* at 23.

The USW responded that *MAE from China* and *VSE from China* were distinct from the situation here and cited several recent determinations in which Commerce nonetheless applied AFA. *Id.* at 24 (citing Letter from Pet'r, re: Passenger Vehicle and Light Truck Tires from the People's Republic of China: Comments on Draft Redetermination (Jan. 21, 2022) ("Pet'r's 2022 Letter") at 8–11 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2018*, 86 Fed. Reg. 48,393 (Dep't of Commerce Aug. 30, 2021) and accompany-

ing IDM (Dep't of Commerce Aug. 23, 2021) at cmt. 1; *Pentafluoroethane (R-125) from the People's Republic of China: Final Affirmative Countervailing Duty Determination* ("*Pentafluoroethane*"), 87 Fed. Reg. 1,110 (Dep't of Commerce Jan. 10, 2022) and accompanying IDM (Dep't of Commerce Dec. 30, 2021) at cmt. 1)). The USW drew a parallel to determinations in which Commerce found that it could not rely on non-certified statements to fill the information gap. *See* Remand Results at 24 (citing Pet'r's 2022 Letter at 11 (citing *Certain Aluminum Foil from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; *2019* ("*Aluminum Foil from China*"), 86 Fed. Reg. 73,249 (Dep't of Commerce Dec. 27, 2021) and accompanying IDM (Dep't of Commerce Dec. 17, 2021) at 21)).

Commerce responded to the parties' comments by insisting that in EBCP cases, unlike in other scenarios involving value-added tax or import duties, only a subset of loans is relevant; therefore, Commerce continued, its inability to "identify the set of loans that should be scrutinized" due to the lack of the withheld information means that Commerce's attempted verification would be unlikely to "generate accurate results." *Id.* at 24–28 (comparing EBCP verification instead to tax benefit verification[6] and reiterating that "the program could not be verified using 'standard' or 'ordinary' methods, and that the issue is not simply a matter of whether verification is more or less easy for Commerce"); *see also* Def.-Intervenor Br. at 5 (citing Remand Results at 27–28) (describing complications posed by EBCP verification additional to those that might arise in an average tax subsidy verification scenario).[7]

Commerce also distinguished two recent Commerce determinations raised by Vogue and Voma to support Commerce's assertion that it did not need to "determine in this remand redetermination that the EBCP can be verified." Remand Results at 28–30; *see VSE from China* IDM at cmt. 2; *MAE from China* IDM at cmt. 5. Commerce said that *VSE from China* was inapposite because there was only one U.S. customer of the relevant respondent, which provided "information . . . demonstrating that [the customer] did not use the EBCP," whereas no certifications or other customer information were on the record here. Remand Results at 29–30 (citing *VSE from China* IDM at cmt.

[6] Commerce explained: "[I]f the government were unwilling to provide a sample tax return with the relevant annex or schedule, with the relevant line item marked and translated, it would not simply be a matter of what is 'easier for Commerce,' but what is likely to generate accurate results." Remand Results at 28.

[7] In its brief, the Government notes further that it "typically require[s] parties to report all forms of financing for verification." Def. Br. at 13. The Government also explains that its "spot-check methodology" would be ineffective here because the EBCP is "atypical" in that the withheld information precludes Commerce's ability to understand the EBCP and conduct a spot-check. *Id.* at 15–16 (citing Remand Results at 25, 27).

2). Commerce also noted that *VSE from China* involved a "facts available" determination whereby Commerce accepted "non-use assertions and the supporting information provided by the respondent and its customer" based on what Commerce described as its "recogni[tion] that the court has directed Commerce in numerous decisions to consider whether any available information provided by respondents may be sufficient to fill the gap of missing record information in considering claims of non-use for the EBCP," despite Commerce's continued concerns about the EBCP. Remand Results at 29 (quoting *VSE from China* IDM at 23); *see also* Def.-Intervenor Br. at 9.

Commerce also differentiated *MAE from China* by noting that, in that case, customer certifications of non-use were on the record, "which Commerce considered a prerequisite for issuing questionnaires to the U.S. customers and, subsequently, for attempting to verify the non-use certifications from the U.S. customers." Remand Results at 30 (quoting *MAE from China* IDM at cmt. 5) (citing *Certain Mobile Access Equipment and Subassemblies Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination* ("*MAE from China Preliminary Determination*"), 86 Fed. Reg. 41,013 (Dep't of Commerce July 30, 2021) and accompanying Preliminary Decision Memorandum ("PDM") (Dep't of Commerce July 26, 2021) at 21). In addition, Commerce noted that, in that case, Commerce referenced the court's insistence that Commerce seek to determine whether it could fill the gap. *Id.* at 29–30; *see also* Def. Br. at 20 (citing *MAE from China Preliminary Determination*, 86 Fed. Reg. 41,013 and accompanying PDM at 21); Def.-Intervenor Br. at 11–12.[8]

2. Explanations as to information needed for verification

a. The reason that the respondents' non-use claims are "unverifiable"

Commerce in its Remand Results next explained the reason that the respondents' non-use claims are "unverifiable" in relation to Commerce's verification methodology, which, as stated above, involves the review of financial and loan information. Remand Results at 8–11. Commerce summarized that Longyue: (1) provided its emails to customers asking about any EBCP credit use; (2) stated that the China

[8] Commerce stated in *MAE from China* that: "[W]hile we continue to find that the GOC's non-cooperation significantly impedes and prevents a complete verification of the EBC program, in recognition of court precedent, we find that neither {respondent} used the EBC program." Remand Results at 29 (second alteration in original) (quoting *MAE from China* IDM at 56). Commerce also noted that "its understanding of what is needed to verify non-usage evolved" after *Isos from China*. *Id.* at 39.

Export-Import Bank, other state owned or controlled banks and Longyue's export customers did not reach out to Longyue about EBCP credits; and (3) stated that it did not obtain export insurance required by the EBCP. *Id.* at 9 (citing Letter from deKieffer & Horgan, PLLC to Sec'y of Commerce, re: *Passenger Vehicle and Light Truck Tires from China*: Longyue Sec. III Quest. Resp. (Apr. 18, 2019) ("Longyue QR") at 25, Exs. 24–25, CR 46–77, PR 97–98). Further, Commerce noted that Cooper Tire stated that it: (1) was "not aware" of any customer EBCP use; (2) did not take any steps to permit or assist its customers to use EBCP credit; (3) was not contacted by any customers about the EBCP; and, therefore, (4) considered EBCP use "impossible." *Id.* at 9–10 (quoting Letter from Pepper Hamilton LLP to Sec'y of Commerce, re: *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*/CKT Resp. to Initial Quest. Resp. (Apr. 18, 2019) ("Cooper Tire QR") at III-32, CR 30–45, PR 88–96). Commerce concluded that it could not verify the respondents' non-use claims because the information in the 2013 revisions was unavailable. *Id.* at 10. That information, Commerce noted, would be necessary to confirm the alleged requirements that the respondents' reference regarding exporter assistance and/or insurance. *Id.*

Separately, Commerce detailed, it would be unable to verify the alleged lack of correspondence between the respondents and customers or banks using its previously described methodology. *Id.* at 10–11 (citing *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1334, 1355 (2016)).

b. Whether the record enables Commerce to understand the role of the respondents in any customer EBCP use

Further, Commerce concluded on remand that the record did not enable Commerce to form a "reliable understanding" of the respondents' roles in facilitating customer EBCP use. *Id.* at 12. Namely, Commerce noted that Longyue and the GOC provided merely "outdated" EBCP documentation — 1995 implementation rules, which both provided, and 2000 administrative measures, which the GOC provided. *Id.* at 12, 38. Moreover, the GOC did not provide a sample loan application or other supporting documentation on exporter participation. *Id.*

c. Information Commerce would need from the respondents and customers to determine EBCP use

Commerce specified information that it would request to demonstrate whether the respondents or their customers used the EBCP: (1) reports of all financing from every customer; and (2) customer financial statements or tax returns. *Id.* at 13. Nonetheless, Commerce asserted that such information would still be of "limited value to establish non-use" due to the absence of the partner/correspondent bank information and information as to whether the threshold requirement remains in place. *Id.* at 13–14; *see* Def. Br. at 14 ("Commerce would be unable to verify the respondents' claims of non-use even with full cooperation from respondents' customers."). Commerce stated further: "In instances with numerous U.S. customers, it is unlikely we would get full responses from all of the respondents' customers." Remand Results at 14. Moreover, Commerce concluded that it might not receive full, voluntary cooperation from third-party customers, particularly when they did not provide non-use certifications, meaning that requesting responses from them would be futile and could still result in the application of AFA. *Id.* at 14, 41. Commerce later reiterated that information from third parties would be unreliable and ineffective at filling the identified gap. *Id.* at 31.

3. Sources that Commerce could examine to verify non-use

Commerce addressed next the court's instruction to explain sources to which Commerce would need to look to accomplish verification. *Id.* at 14. Commerce responded that "[r]equests for correspondence/communications are not amenable to completeness tests," upon which Commerce's verification is based. *Id.* at 14–15 ("[V]erification relies on a completeness test whereby Commerce ensures it has a list of all relevant transactions by tying the list to audited financial statements or tax returns."); *see id.* at 17.[9] Commerce reiterated that it cannot prove a negative — namely, that Commerce is unable to confirm that the respondents did *not* communicate with the China Export-Import Bank or other banks or customers about the EBCP. *Id.* at 15. Even if Commerce could confirm such interactions, Commerce stated that it would still not know whether the EBCP requires such communications due to the lack of the 2013 revisions. *Id.* at 15, 17; *see also* Def. Br. at 9. Commerce stressed that it could not verify the respondents' statements pertaining to non-use without the cooperation of the

[9] Commerce also referenced its earlier statements provided in the Remand Results. Remand Results at 14.

GOC, noting that "standard or ordinary verification methods will not generate meaningful and accurate results when applied to the EBCP." Remand Results at 15, 37.

4. Whether Commerce could obtain the threshold information from the respondents or their customers

Commerce then replied to the court's instruction as to whether Commerce could seek the threshold information from elsewhere. *See id.* at 15–17. Commerce stated that it "does not know how the respondents or their customers would obtain copies of the 2013 administrative measures" because the GOC has asserted that the China Export-Import Bank has stated that the measures are "internal." *Id.* at 16 (quoting Letter from Curtis, Mallet-Prevost, Colt & Mosle LLP to Sec'y of Commerce, re: GOC's Suppl. Quest. Resp. *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China* (July 8, 2019) ("GOC SQR") at 9, PR 135–136); *see also* IDM at 20. Commerce added that the respondents and their customers would not appear to have "the requisite expertise or experience needed to speak on behalf of the GOC" about a program that neither claims to have used. *Id.* at 16–17. Commerce also raised "an additional problem of knowing what to look for once [relevant] loans are identified," underscoring further the need for the 2013 revisions beyond just the threshold information. *Id.* at 15–16.

5. Whether it is unduly burdensome for Commerce to seek and review other sources of information to verify non-use

In addition, Commerce explained that the potential undue burden of relying on other sources of information to pursue verification could depend on the scope of the request for information or correspondence. *Id.* at 17–18. For instance, Commerce stated that requesting China Export-Import Bank correspondence, threshold information or the 2013 revisions from the respondents would not raise an undue burden but that requesting "'complete correspondence and communications' without any limiting parameters" would. *Id.* As to a request for loan information, Commerce noted that it would "be required to collect and analyze information from [[ ]] customers" — [[ ]] from Cooper Tire and [[ ]] from Longyue — and highlighted the values of Cooper Tire's and Longyue's sales to the United States — [[ ]], respectively. *Id.* at 18. Commerce insisted that "this process would be onerous and nearly impossible for Commerce to complete with accuracy, especially because there were 27 other alleged programs subject to the review." *Id.* at 19.

Even if Commerce sought information from all customers, Commerce responded that it could not review all lending "with a tolerable degree of accuracy" due to the inability to know whether Commerce had received all requested documents and the lack of information as to the "parameters" of the ECBP. *Id.* at 17–19 (equating such a review with looking for "a needle in a haystack"); *see* Def. Br. at 12–13 (describing its necessary review of "*every* loan received by the respondents' customers" as "unduly burdensome, if not impossible, to carry out with a 'tolerable degree of accuracy'" (citing Remand Results at 19; *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1332)); *see also* Def.Intervenor Br. at 4 (citing Remand Results at 13–15, 25) (summarizing that Commerce cannot identify potential EBCP use, examine successfully or timely any customer information or attempt reasonably to verify without the withheld information). Commerce clarified that the difficulty of such a verification is a "direct consequence" of the GOC's failure to cooperate. Remand Results at 34–35.

Commerce explained further that "requesting [certain financing] information from each customer would lead to burdensome and complex verification measures that are unlikely to yield reliable results." *Id.* at 33. Moreover, Commerce stated that looking at only a "subset of customers" would pose an "additional impediment to an accurate verification." *Id.* at 33–34 (summarizing that plaintiffs are asking Commerce to "attempt verification hamstrung by an inadequate understanding of the program"); *see id.* at 41 (calling a "spot-check [of] the customers by issuing questionnaires only to a subset thereof" a "half measure[]" to address the gap created by the GOC); *see also* Def.-Intervenor Br. at 14 (discussing *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, and Intent to Rescind Review, in Part; 2019* ("*Multilayered Wood Flooring*"), 86 Fed. Reg. 73,244 (Dep't of Commerce Dec. 27, 2021) and accompanying IDM (Dep't of Commerce Dec. 17, 2021) at 19, in which a respondent and its U.S. customers did not respond fully). In response to Vogue and Voma's insistence that there would be a "clear paper trail" for Commerce to follow, Commerce raised bank confidentiality and verification complexity and burdensomeness concerns if Commerce needed to follow up with correspondent banks, of which Commerce would still not know the identities. Remand Results at 35.[10]

---

[10] As the court concluded in *Cooper I*, Commerce reiterated that it could not obtain "meaningful" access to pertinent information at the China Export-Import Bank. Remand Results at 36 (citing *Cooper I*, 45 CIT __, Slip Op. 21–141 (Oct. 12, 2021) at 26); *see Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1333–34.

6. The extent to which Commerce would be able to rely on information from the respondents to establish EBCP non-use

Last, Commerce responded to the court's remand instruction that Commerce explain the extent to which it would be able to rely on information from the respondents to establish EBCP non-use. *Id.* at 19. Commerce stated that it could not rely on the information provided to verify non-use because Commerce: (1) could not confirm (a) the receipt of all correspondence between the respondents and the China Export-Import Bank or other state owned or controlled banks, (b) the absence of affirmative customer email responses as to EBCP use, and (c) the necessity that the respondents take any steps to enable their customers' EBCP use without the 2013 revisions; (2) did not receive certified customer statements; (3) did not think that the respondents could provide the 2013 revisions or other information on the threshold requirement given the GOC's statement on their status; and (4) still lacked the list of partner and correspondent banks. *Id.* at 20–21.

Commerce determined that there was a lack of any "*certified* statements [of non use] signed by the customers themselves" on which Commerce could rely. *Id.* at 20–21 (emphasis supplied).[11] Commerce explained that the lack of certifications "raise[d] doubts as to whether any communication ever took place between the respondents and their customers or whether the non-use statements are based solely on assumptions about how the program currently operates." *Id.* at 21. Further, Commerce stated that requesting customer loan information

---

[11] Several recent EBCP cases have included certifications of non-use by U.S. *customers*. *See, e.g.*, *Both-Well (Taizhou) Steel Fittings, Co. v. United States* ("*Both-Well I*"), 46 CIT __, __, 557 F. Supp. 3d 1327, 1330 (2022); *Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1356; *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1331 (2019); *Changzhou Trina Solar Energy Co. v. United States* ("*Changzhou I*"), 42 CIT at __, 352 F. Supp. 3d at 1324 (citations omitted).

For examples of *customer* self-certifications of non-use in other cases, see, e.g., Letter from Perkins Coie LLP to Sec'y of Commerce, re: Certain Mobile Access Equipment and Subassemblies Thereof from China; AD Investigation; LGMG Initial Quest. Resp. (June 15, 2021) ("LGMG IQR"), Ex. I-37, bar code 4134012–01 (providing, in *MAE from China*, a signed customer declaration stating that the customer purchased the subject merchandise during the period of investigation and "did not finance any of its purchases . . . by using the [EBCP]"); Letter from Fox Rothschild LLP to Sec'y of Commerce, re: Pentafluoroethane (R-125) from the People's Republic China: Submission of Zhejiang Sanmei's New Subsidy Allegations Resp. (June 24, 2021) ("Sanmei New Subsidy Allegations Resp.") at 2, Ex. N-2, bar code 4136457–01 (including, in *Pentafluoroethane*, partially redacted certifications from customers stating that "[w]e hereby certify that we never received any export buyer's credits from China Export-Import Bank or any other entities").

By contrast, *respondents* in this case provided certain statements and other evidence to support the respondents' claims of non-use by their customers. *See infra* Section II.C.2 for a discussion of these submissions.

"would be unduly burdensome on Commerce both from the perspective of time and resources and from the perspective of being so burdensome as to be unlikely to be performed accurately." *Id.* Commerce concluded that it did not believe that the respondents could fill the gap in the record. *Id.* at 36.

In *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1339–41, the court instructed Commerce to clarify six aspects of its application of AFA for the EBCP. As described above, Commerce responded to each of the six directions in the court's remand order. *See* Remand Results at 5–21; *see also id.* at 24–41 (providing further clarifications in responses to plaintiffs' and the USW's comments on the Draft Remand Results). Accordingly, the court concludes that Commerce's Remand Results are in accordance with the remand order in *Cooper I*.[12]

II. Whether Commerce's application of AFA to determine that Cooper Tire and Longyue used the EBCP was supported by substantial evidence

A. Legal framework

As stated in *Cooper I*, "[d]uring a CVD investigation, Commerce requires information from both the foreign government alleged to have provided a subsidy and the respondent companies alleged to have received the subsidy." 45 CIT at __, 539 F. Supp. 3d at 1326 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014); *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1070, 721 F. Supp. 2d 1285, 1296 (2010), *rev'd on other grounds by* 678 F.3d 1268 (Fed. Cir. 2012)). Such information is subject to verification by Commerce. 19 U.S.C. § 1677m(i)(1); *see* 19 C.F.R. § 351.307(d) (noting that Commerce "verif[ies] the accuracy and completeness of submitted factual information").

Commerce "shall . . . use the facts otherwise available in reaching the applicable determination" if the record lacks "necessary information" or if a party: (1) withholds requested information; (2) fails to provide timely information "in the form and manner requested"; (3) "significantly impedes a proceeding"; or (4) provides unverifiable information. 19 U.S.C. § 1677e(a). Further, if Commerce finds that a party did not cooperate "to the best of its ability to comply with a request for information," Commerce may apply an adverse inference. *Id.*§ 1677e(b). If Commerce determines that a submission is deficient in that it "does not comply with the request," Commerce "shall promptly inform the person submitting the response of the nature of

[12] However, whether the substance of such responses supports the conclusion that Commerce's application of AFA was supported by substantial evidence is addressed separately *infra* Section II.

the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews." *Id.* § 1677m(d). *See generally* 19 U.S.C. § 1677m(e) (stating that Commerce must consider other necessary information submitted by an interested party if such information is timely, verifiable, complete enough to be reliable, provided to the best of the party's ability and usable "without undue difficulties"); *Papierfabrik August Koehler SE v. United States*, 38 CIT __, __, 7 F. Supp. 3d 1304, 1312 (2014) ("This Court has held that the 'remedial provisions' of section 1677m(d) 'are not triggered unless the respondent has met all of the five enumerated criteria' of section 1677m(e)." (quoting *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 789 (2001))).[13]

The Court has established that the application of AFA due to the failure of a foreign government to cooperate may impact a respondent company despite that company's own cooperation. *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1326–27 (citing *Fine Furniture*, 748 F.3d at 1373); *see also Guizhou Tyre Co. v. United States* ("*Guizhou VI*"), 45 CIT __, __, 523 F. Supp. 3d 1312, 1357 (2021) (citing *Fine Furniture*, 748 F.3d at 1373). Still, Commerce "should seek to avoid such impact if relevant information exists elsewhere on the record." *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013) (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1212, 865 F. Supp. 2d 1254, 1262 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014)).

In an EBCP case, the Court has determined further:

> [T]o apply an adverse inference that a cooperating party benefited from the EBCP based on the GOC's failure to cooperate, Commerce must: (1) define the gap in the record by explaining exactly what information is missing from the record necessary to verify non-use; (2) establish how the withheld information creates this gap by explaining why the information the GOC refused to give was necessary to verify claims of non-use; and (3) show that only the withheld information can fill the gap by

[13] The court acknowledges that the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") recently found that "the statutory entitlement to notice and opportunity to remedy any deficiency is unqualified in the circumstances of this case." *Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1384 (Fed. Cir. 2022), *modified and petition for panel reh'g denied per curiam*, Order (Nov. 23, 2022), ECF No. 77. That case is inapposite because, inter alia, as discussed *infra* Section II.C.2, Commerce in the present case did not apply AFA due to any deficiencies with the responses of the respondents; instead, Commerce applied AFA due to deficiencies in the GOC's responses. *See* IDM at 18–20; *see also Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1212 n.10, 865 F. Supp. 2d 1254, 1262 n.10 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014). In addition, the court addresses *infra* Section II.C.2 the verifiability and usability of the information that the respondents submitted — which relate to the criteria under 19 U.S.C. § 1677m(e)(2) and (e)(5).

explaining why other information, on the record or accessible by respondents, is insufficient or impossible to verify.

Jiangsu Zhongji Lamination Materials Co. v. United States, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333 (2019) (citing *Changzhou Trina Solar Energy Co. v. United States* ("*Changzhou I*"), 42 CIT __, __, 352 F. Supp. 3d 1316, 1326–27 (2018); *Guizhou Tyre Co. v. United States* ("*Guizhou II*"), 43 CIT __, __, 399 F. Supp. 3d 1346, 1352–53 (2019); *Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1360 (2019)); *accord Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1361 (quoting *Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333); *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1327.

B. Positions of the parties

1. Necessity of threshold information to verify non-use

Plaintiffs argue that the threshold information is unnecessary to verify non-use. Pls. Br. at 3; Consol. Pls. Br. at 24. In addition, Cooper Tire and CTRC insist that EBCP is "no different than other loan programs that Commerce has verified in the past" and assert that it would be "readily apparent if loans are part of the EBCP" based on a review of the financial information in a company's balance sheets or, if need be, a call to a customer's banker. Pls. Br. at 3–5; *see also* Consol. Pls. Br. at 18–19 (stating that Commerce can determine if there were any loans and, if so, if they were under the EBCP), 21. Vogue and Voma insist that Commerce could review customers' accounts payable loan documentation to clarify whether the loan is a part of the EBCP. Consol. Pls. Br. at 20, 22. Cooper Tire and CTRC argue further that Commerce could conduct sampling or use "the same verification procedures" as in *VSE from China*. Pls. Br. at 6; *see also* Consol. Pls. Br. at 7, 23, 26–27 (discussing that Commerce could use a "spotcheck methodology," even in situations in which a customer has many loans).

The Government stresses that Commerce explained on remand its verification methodology and the importance of knowing whether the USD 2 million threshold requirement was still in place for carrying out successfully its verification process by tailoring it or avoiding tailoring it mistakenly to larger loans. Def. Br. at 6 (citing Remand Results at 5–6), 14 (citing Remand Results at 7–9); *see also* Def.-

Intervenor Br. at 4.[14] The Government also notes that, given the absence of certain key information in the record, Commerce would be unable to determine whether loans are part of the EBCP or "which banks to call." Def. Br. at 15–16 (citing Remand Results at 27).

2. Use of other information on the record to fill the gap

To support their arguments that information on the record can fill the gap, the parties compare Commerce's approach here with its approach to verification of the EBCP in recent proceedings.

Plaintiffs maintain that Commerce could reach out to the respondents' customers if it needed information from them. *See* Pls. Br. at 7–9; Consol. Pls. Br. at 29–31. Specifically, Cooper Tire and CTRC argue that "Commerce has a well-established practice of soliciting third-party data in its proceedings." Pls. Br. at 7, 12–14 (quoting *MAE from China* IDM at 49–50). Vogue and Voma raise that Commerce would need to request information from at least some customers to calculate the benefit and benchmark if Commerce were to find actual EBCP use, regardless of Commerce's position on the complexity of obtaining third-party information. Consol. Pls. Br. at 29–31. As to third party participation at verification, Vogue and Voma state: "Commerce is not permitted to decline to solicit critical information and instead apply AFA based on conjecture as to what such responses would reveal or who would respond." *Id.* at 30 (citing *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed Cir. 2009)).[15]

---

[14] The Government notes also that Commerce raised the 2013 revisions as a source of information "that could have guided Commerce to the relevant transactions at verification." Def. Br. at 6–7 (citing Remand Results at 7–8).

[15] Vogue and Voma also argue that Commerce should have pursued verification at the China Export-Import Bank. Consol. Pls. Br. at 22–23 (citing *Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Affirmative Determination and Final Determination of Critical Circumstances, in Part*, 82 Fed. Reg. 3,282 (Dep't of Commerce Jan. 11, 2017) (final determination) and accompanying IDM (Dep't of Commerce Jan. 4, 2017) at cmt. 1). *But see* Def Br. at 18 (noting limited access to the China Export-Import Bank (citing Letter from Curtis, Mallet-Prevost, Colt & Mosle LLP to Sec'y of Commerce, re: GOC's Initial Quest. Resp. *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China* (Apr. 18, 2019) at 129–130, PR 73); *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1331 (holding that screenshots provided by the China Export-Import Bank are insufficient in terms of access). This court has noted previously that access to the China Export-Import Bank has been "repeatedly denied" and that Commerce need not seek access to the bank to verify non-use. *Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1373–74 (citing *RZBC Grp. Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773 (CIT June 30, 2016); *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1334, 1354 (2016)). In *Cooper I*, the court reached a similar conclusion. 45 CIT at __, 539 F. Supp. 3d at 1333–34. Accordingly, the court does not address this argument further.

Vogue and Voma submit that Commerce should ascertain usage by U.S. companies by following its practice for loan programs in CVD cases that do not involve China, in which Commerce asks the respondent whether it received a loan covered by the program at issue. *Id.* at 10. Cooper Tire and CTRC add that EBCP verification is no more burdensome than verification of other loan programs. Pls. Br. at 9–10.

In addition, Cooper Tire and CTRC argue that Cooper Tire's statement that it lacked knowledge of any EBCP use by its customers means that Commerce cannot find the EBCP to have conferred a benefit on Cooper Tire. *Id.* at 11–12. They assert that Commerce can confirm Cooper Tire's statement by reviewing the pertinent financial information, not correspondence. *Id.* at 10.

Still, Vogue and Voma argue here that Commerce needed only the respondents' statements, which Vogue and Voma submit were "certified pursuant to [Commerce] regulation." Consol. Pls. Br. at 13–14 (citing *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1336; 19 C.F.R. § 351.303(g); *MAE from China* IDM at 55); *see also id.* at 9–10. They argue that Commerce can verify the respondents' statements based on their role in the EBCP and because there would be a "clear paper trail" for Commerce to follow. Consol. Pls. Br. at 12, 17. The parties argue that if Commerce needs anything, "a list of loans from banks" would suffice. *Id.* at 13.

Vogue and Voma assert further that Commerce violated 19 U.S.C. § 1677m(d) by not issuing supplemental questionnaires to the respondents to address the deficiency in the record. *Id.* at 14–15. The two parties criticize Commerce for noting that the respondents did not submit customer self-certifications when Commerce never asked the respondents to provide such certifications or any other information. *Id.* at 15–16. In addition, Vogue and Voma state that the application of AFA to a cooperating respondent should be undertaken "only as a last resort." *Id.* at 23 (citing *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 21 & n.2, 942 F. Supp. 2d 1343, 1348 & n.2, 1362 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015)).

The parties discuss two Commerce determinations and a decision of this Court with respect to Commerce's recent treatment of EBCP verification: *MAE from China*, *VSE from China* and *Risen Energy Co. v. United States*, 46 CIT __, 570 F. Supp. 3d 1369 (2022). Vogue and Voma argue that in *MAE from China* Commerce sought and verified customer information for the respondents — Lingong Group Jinan Heavy Machinery Co., Ltd. ("LGMG") and Zhejiang Dingli Machinery Co., Ltd. ("Dingli") — even without the withheld information from the GOC. Consol. Pls. Br. at 1–2 (citing *MAE from China* IDM at cmt. 5);

see MAE from China IDM at cmt. 5. Vogue and Voma contend that Commerce's actions in that case mean that Commerce can rely on the statements pertaining to non-use to find non-use in this case as well. Consol. Pls. Br. at 1–2 (citing *MAE from China* IDM at cmt. 5).[16] In addition, the parties state: "*VSE from China* shows that EBCP non-usage can be readily assessed and *MAE from China* shows that non-usage can readily be verified – regardless of the number of companies involved and whether they are affiliated." *Id.* at 28. Vogue and Voma also raise *Risen Energy*, in which Commerce requested a voluntary remand "so that Commerce [could] consider whether its evolving practices with respect to the {EBCP} would change the outcome in th[at] case." *Id.* at 8–9 (emphasis omitted) (quoting Def.'s Mot. for Voluntary Remand (Mar. 28, 2022) at 2, 6–8, *Risen Energy Co. v. United States*, Consol. Court No. 2003912, ECF No. 83) (arguing that the remand request shows that Commerce "recognize[s] that *MAE from China*. . . presents a changed practice that precludes further application of AFA to countervail the EBCP").

By contrast, the Government argues that the lack of non-use certifications in this case differentiates it from *MAE from China*. Def. Br. at 20 (citing Remand Results at 30; *MAE from China Preliminary Determination*, 86 Fed. Reg. 41,013 and accompanying PDM at 21). Further, the Government stresses that unlike in this case, documentation on the record in *VSE from China* demonstrated that the customer, the parent of the respondent, received all pertinent financing for "specific purposes not related to the export of goods from China." *Id.* at 19–20 (quoting *VSE from China* IDM at 22–23); *see also* Def.-Intervenor Br. at 11. The USW states also that Longyue did not provide or detail any customer responses. Def.-Intervenor Br. at 6 (citing Remand Results at 9; Longyue QR at 25); *see* Remand Results at 9. *But see* Consol. Pls. Br. at 14 (quoting Remand Results at 9) (citing Longyue QR, Ex. 24 at 11/14); Longyue QR, Ex. 24 at 11.[17]

The USW adds that, "in both [*VSE from China* and *MAE from China*], Commerce was explicitly clear that these cases did not represent a change in its practice." Def.Intervenor Br. at 9 (citing *VSE from China* IDM at 20; *MAE from China* IDM at 49); *see id.* at 15 (citing *Hyundai Elec. & Energy Sys. Co. v. United States*, 15 F.4th 1078, 1089 (Fed. Cir. 2021)). The USW represents that in *VSE from China* Commerce also rejected one respondent's claim that it was "unaware" of any customer EBCP use. Def.Intervenor Br. at 10 (quot-

[16] *MAE from China* included customer self-certifications of EBCP non-use; Commerce also sought information about the respondents' U.S. customers in that case through supplemental questionnaires. *MAE from China* IDM at 49–50.

[17] Longyue included an email from its customer [[ ]], which was translated as "[[ ]]." Longyue QR, Ex. 24 at 11.

ing *VSE from China* IDM at 20–21). The USW notes that the same statement of "unawareness" is on the record in this case. *Id.*[18]

The Government submits that the respondents' statements pertaining to non-use are unverifiable and unreliable also due to the lack of GOC cooperation and the lack of customer signatures. Def. Br. at 11 (citing Remand Results at 21), 17 (citing Remand Results at 37). The USW also argues: "In situations such as here where the record lacked any information from a customer (or even contained some but not full information from customers), Commerce has consistently applied as facts available the inference that the program was used . . . ." Def.-Intervenor Br. at 12. Without customer self-certifications, the USW argues, Commerce has not issued supplemental questionnaires about the EBCP before. *Id.* at 13 (citing *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2019*, 87 Fed. Reg. 13,704 (Dep't of Commerce Mar. 10, 2022) and accompanying IDM (Dep't of Commerce Mar. 3, 2022) at 17; *Multilayered Wood Flooring*, 86 Fed. Reg. 73,244 and accompanying IDM at 19).

The Government asserts that *Risen Energy* involved distinct facts and that the case is still pending before the Court. Def. Br. at 20–21 (citing Def.'s Mot. for Voluntary Remand, *Risen Energy Co.*, Consol. Court No. 20–03912, ECF No. 83); *see id.*; *see also* Def.-Intervenor Br. at 13 (citing *Risen Energy Co.*, 46 CIT __, Slip Op. 22–44 at *5 (May 12, 2022); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 79,163 (Dep't of Commerce Dec. 9, 2020) accompanying IDM (Dep't of Commerce Nov. 27, 2020) at 32).[19]

In addition, the Government notes that Commerce applied AFA pursuant to 19 U.S.C. § 1677e(b) based on a factual inference made pursuant to subsection (a). Def. Br. at 4–5. The USW adds that

[18] The USW adds that the respondents certified that "they had not been contacted regarding the program"; however, the USW argues that the respondents' statements "were not based on actual knowledge." Def.-Intervenor Br. at 7 (citing *Cooper I*, 45 CIT __, Slip Op. 21–141 (Oct. 12, 2021) at 31–32). The USW argues further that the GOC's noncooperation prevents Commerce from knowing the impact of such statements. *Id.* at 7–8.

[19] The court granted the remand request in *Risen Energy* with instructions to attempt to verify or explain the reason that the court "should not provide some form of equitable relief." *Risen Energy Co. v. United States*, 46 CIT __, __, 570 F. Supp. 3d 1369, 1373 (2022). The remand results were filed on October 7, 2022. Redetermination Pursuant to Court Remand Order, *Risen Energy Co. v. United States*, Consol. Court No. 2003912, ECF Nos. 93–94. There, Commerce removed the EBCP subsidy rate for one respondent, which had "provided complete information on behalf of its sole importer/customer in response to the EBCP questionnaire." *Id.* at 6–7. However, Commerce continued to apply AFA to the other respondent, which had provided the information requested through a supplemental questionnaire for only half of its customers. *Id.* at 7–9.

Commerce need not "undertake considerable efforts to collect information to fill in the gap" left by the GOC's noncooperation. Def.-Intervenor Br. at 2.

C. Analysis

In *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1327–28, the court held that Commerce identified the gap in the record and explained the reason that the missing information on loan disbursement and partner and correspondent banks was critical. Therefore, this section addresses the remaining issues of whether Commerce on remand: (1) explained the reason that the missing information pertaining to the loan threshold was critical to verification; and (2) articulated an explanation as to the reason that Commerce could not otherwise fill the gap in the record by explaining the reason that "other information, on the record or accessible by respondents, [was] insufficient or impossible to verify." *Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333 (citing *Changzhou I*, 42 CIT at __, 352 F. Supp. 3d at 1326–27).

1. Whether Commerce explained the reason that the withheld information as to the threshold requirement and the 2013 revisions was necessary to verify non-use

The court addresses first whether Commerce provided an explanation on remand as to the reason that the missing information on the threshold requirement was necessary to verify non-use.

As the court noted previously, "Commerce's limited resources may constitute a legitimate constraint to verification." *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1332 (citing *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995)); *see also Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1369–70 ("Although Commerce appears to have the authority to verify a [third party's] response as accurate . . . the verification process generally entails a significant burden on Commerce and the responder may choose not to allow verification." (quoting *CS Wind Vietnam Co. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1273, 1284 (2017)). Moreover, "[i]t is within the discretion of Commerce to determine how to verify . . . and due deference will be given to the expertise of the agency." *Carlisle Tire & Rubber Co. v. United States*, 9 CIT 520, 532, 622 F. Supp. 1071, 1082 (1985) (citing *Zenith Radio Corp. v. United States*, 9 CIT 110, 112, 606 F. Supp. 695, 698 (1985), *aff'd*, 783 F.2d 184 (Fed. Cir. 1986)). Nonetheless, "Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be

reasonably discernable to a reviewing court." *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009).

Before the remand, Commerce stated that information about the threshold requirement is "critical to understanding how the [EBCP] operates, and[,] thereby[,] is also critical to Commerce's ability to verify and determine usage of this program." IDM at 19. The court noted that statements at oral argument as to the potential necessity of the threshold requirement to narrow and make feasible Commerce's investigation "may amount to a compelling reason" but that "a post-hoc explanation by defendant at oral argument cannot cure the lack of explanation by Commerce in the IDM." *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1332 (citing *State Farm*, 463 U.S. at 50). Accordingly, in *Cooper I*, the court concluded that Commerce failed to "state the *reason* that the information on the threshold is 'critical' to verification." *Id.*

In the Remand Results, Commerce presented three reasons that the USD 2 million threshold is "critical to Commerce's understanding of the program." Remand Results at 6. First, if the threshold remains in place, it "greatly limits the universe of potentially relevant loans . . . and can significantly assist [Commerce] in targeting [its] verification of non-use." *Id.* Second, if the threshold is no longer in place, Commerce will face greater "difficulty of verifying loans without any such parameters limiting the loans to scrutinize." *Id.* Third, "if the program was no longer limited to USD 2 million contracts, but Commerce were to accept the GOC's assertion that the program was limited, [Commerce] could mistakenly limit [its] verification to only larger loans received by the customer, and potentially miss smaller [EBCP] loans." *Id.* In addition, Commerce stressed that the 2013 revisions might "contain additional information that might guide Commerce to the relevant [information]." *Id.* at 7.

Following the filing of the Remand Results, Cooper Tire and CTRC argued at oral argument that Cooper Tire has only one U.S. customer that imports the subject merchandise: its parent company, CTRC. Oral Arg. Tr. at 14:2–7. The Government replied that it had not heard before that Cooper Tire's U.S. export customers "could only be a universe of one." *Id.* at 15:15–21.[20] In its affiliation response, Cooper Tire stated: "CKT exported subject tires that it produced through CTRC to the United States during the [POR]." Letter from Pepper

[20] As stated *supra*, Commerce based its Remand Results in part on there being the following number of U.S. customers: [[ ]] for Cooper Tire and [[ ]] for Longyue. Remand Results at 18 (citing Cooper Tire QR, Ex. 18, CR 36, PR 89; Longyue QR, Ex. 23, CR 69, PR 98). However, the Government acknowledged later the number of U.S. customers that Cooper Tire presented at oral argument. *See* Def.'s Resp. to Post-Arg. Questions at 4, ECF No. 92.

Hamilton LLP to Sec'y of Commerce, re: *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*/CKT Response to Sec. III of the Initial Quest. Identifying Affiliated Companies (Mar. 15, 2019) ("Cooper Tire Affiliate Resp.") at III-3, CR 6, PR 61. In addition, in its initial questionnaire, Commerce asked Cooper Tire to "[p]rovide a list of all of the customers to which you exported during the POR, along with the shipment addresses for these customers." Cooper Tire QR at III-31. In an exhibit, entitled "CKT's Export Customers List During the POR," Cooper Tire listed [[ ]]. *Id.*, Ex. 18, CR 36, PR 89. On the list, [[ ]]. *Id.*; *see* Pls.' Comments in Resp. to Suppl. Questions at 2 ("Since CTRC is the only U.S. importer/customer for ECB [sic] non-use verification purposes, there is only one customer at issue.").[21]

With respect to Cooper Tire, the court concludes that Commerce did not explain adequately the necessity of the threshold information to verify non-use because Commerce appears to have misidentified the number of customers at issue for Cooper Tire. *See* Remand Results at 18. If Cooper Tire exported to only one U.S. customer, CTRC, which was already a party to the action, as the record supports and the Government concedes, the need for the threshold requirement to limit appropriately Commerce's inquiry would not appear to be necessary. *See* Cooper Tire QR, Ex. 18; Cooper Tire Affiliate Resp. at 2; *see also* Def.'s Resp. to Post-Arg. Questions at 4. If Commerce needed to look through the financial and loan-related information of only one customer, the need for information about a threshold would appear to dissipate because the "universe of potentially relevant loans" during the POR might already be manageable with respect to Cooper Tire and CTRC. Remand Results at 6.

By contrast, with respect to Longyue, the court concludes that Commerce provided an adequate explanation as to the necessity of the threshold information. Commerce explained the reasons that knowing whether the threshold information is still in place would allow Commerce to determine whether to tailor its verification and to verify reliably within its "limited time available." *See id.* at 6–7.

Finally, the court agrees with Commerce's assertion on remand that its explanation as to the necessity of partner and correspondent bank information supports Commerce's application of AFA irrespective of the necessity of the threshold information. *See id.* at 8 (submitting that the court's finding in *Cooper I* on partner/correspondent banks is

[21] Longyue provided "the names and full address [sic] of all export customers in the United States to the GOC." Longyue QR at 24.

"sufficient to support the AFA finding"). As stated in *Cooper I*, the court concluded that Commerce explained the necessity of certain loan disbursement, and partner and correspondent bank, information to Commerce's verification of non-use in this case. 45 CIT at __, 539 F. Supp. 3d at 1334. Commerce argued that "the Court's finding regarding the intermediary banks alone is sufficient to support the AFA finding." Remand Results at 8.

Consequently, the court concludes that Commerce explained the necessity of the threshold information as to Longyue but not as to Cooper Tire. However, the court does not remand for further action on this issue because, as stated above, Commerce's application of AFA did not depend on resolution of the necessity of the threshold information.[22]

2. Whether Commerce explained that only the withheld information could fill the gap in the record

In this section, the court examines whether Commerce's determination that no other information on the record is verifiable is supported by substantial evidence. *See* Remand Results at 11; IDM at 20. In the original review, Commerce explained that it could not verify claims of non-use without the withheld information from the GOC about the "internal administration" of the EBCP. IDM at 20. However, the court concluded that Commerce had failed to analyze or explain whether the responses were sufficient to fill the gap left by the GOC's noncooperation and demonstrate non-use. *Cooper I*, 45 CIT at __, 539 F. Supp. 3d at 1336; *see id.* (quoting *Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1367). On remand, the court concludes that Commerce explained reasonably that only the withheld information can fill the gap in the record in this case because no other information on the record is sufficient or possible to verify. *See Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333 (citing *Changzhou I*, 42 CIT at __, 352 F. Supp. 3d at 1326–27).

To reach this conclusion, the court: (a) takes note of respondents' responsibility to create the record; (b) describes that respondents' claims are unsupported by customer non-use certifications; (c) takes account of Commerce's varying and evolving decisions over the last 18 months in response to the GOC's noncooperation and this Court's decisions; (d) applies Commerce's varying and evolving practice to

[22] The court addresses *infra* Section II.C.2.f whether Commerce adequately explained the necessity of other information that might be in the 2013 revisions to verify the other information on the record. *See generally* IDM at 19 n.69 ("The record indicates that the elimination of the USD 2 million threshold is one of the changes effected by the 2013 Revisions." (citing GOC SQR at 7–8)).

this case; (e) evaluates Commerce's failure to consider certain contrary evidence; and (f) addresses Commerce's explanation for its determination.

a. Respondents' responsibility to create the record

The GOC has been consistently nonresponsive and uncooperative in EBCP investigations. *See, e.g.*, IDM at 18–20; *Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1326. This posture frustrates Commerce's ability to investigate, places exporters in a difficult and impracticable position and creates issues, such as the ones present in this case, regarding Commerce's consideration of other information on the record. However, the court considers Commerce's determination to be supported by substantial evidence based on the applicable legal framework.

Namely, the U.S. Court of Appeals for the Federal Circuit has stated that "the burden of creating an adequate record lies with interested parties and not with Commerce." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337–38 (Fed. Cir. 2016) (alterations in original) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted)). Further, this court has noted: "The purpose of verification is to verify the accuracy of information already on the record, not to continue the information-gathering stage of [Commerce's] investigation . . . ." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306, 1349 (2015) (internal citations omitted), *aff'd sub nom. Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017); *see* 19 C.F.R. § 351.307(d). Still, "[w]hen Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to the exporter/producer . . . it is expected to consider such evidence." *GPX Int'l Tire Corp.*, 37 CIT at 58–59, 893 F. Supp. 2d at 1332; *see RZBC*, 2016 WL 3880773, at *2 (quoting *GPX Int'l Tire Corp.*, 37 CIT at 58–59, 893 F. Supp. 2d at 1332); *see also Fine Furniture*, 36 CIT at 1212 n.10, 865 F. Supp. 2d at 1262 n.10 ("[A]n inference adverse to the interests of a non-cooperating government respondent may collaterally affect a cooperative respondent. While such an inference is permissible under the statute, it is disfavored and should not be employed when facts not collaterally adverse to a cooperative party are available."). In considering the evidence, Commerce assesses whether the evidence is verifiable and, therefore, whether Commerce considers that the evidence may be used to confirm non-use. *See Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1368 (quoting *Zhejiang DunAn Hetian Metal Co. v.*

United States, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citing *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1335, 1343 (2019)); *see also Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333.

b. Respondents' claims, which are unsupported by customer non-use certifications

In this case, the respondents did not provide customer certifications of non-use.[23] *See generally* Cooper Tire QR; Longyue QR. Instead, the parties each provided other kinds of information in their questionnaire responses. *See* Cooper Tire QR at III-31-III-32, Ex. 18; Longyue QR at 24–25, Exs. 23–24.

Cooper Tire, for example, stated: "CKT did not apply for, use, or benefit from [the EBCP] during the POR." Cooper Tire QR at III-31. Further, Cooper Tire stated that it "is not aware that any of its customers applied for, used, or benefited from [the EBCP] during the POR," and noted that Cooper Tire did not assist or "perform any acts that in any way would permit these customers to receive any export buyer credits." *Id.* Cooper Tire also stated that it "believe[d] that it is impossible" that any of its customers used the EBCP since none contacted Cooper Tire to provide "information required to obtain an export buyer's credit." *Id.* at III-32. Cooper Tire also submitted "CKT's list of all the export customers during the POR." *Id.* at III-31; *see id.*, Ex. 18.

For its part, Longyue stated that it emailed its U.S. customers to "determine whether [they] used [the EBCP]." Longyue QR at 25. Longyue provided outgoing emails to [[ ]] customers and one response — an email from its customer [[ ]], which was translated as "[[ ]]." *Id.*, Ex. 24 at 11.[24] Further, Longyue presented as evidence of nonuse that it had never been contacted by the China Export-Import Bank, other state owned or controlled banks or any of Longyue's export customers to provide necessary assistance with their EBCP applications. *Id.* at 25. In addition, Longyue also stated that it did not purchase export credit insurance, which, it maintained, is required in support of an EBCP application. *Id.* (citing *id.*, Ex. 25, CR 69, PR 98). Longyue also submitted a list of all of its U.S. export customers. *Id.*, Ex. 23.

---

[23] *See supra* note 11.

[24] The exhibit does not include emails to [[ ]]], identified on Longyue's U.S. Customer List. Longyue QR, Ex. 24; *see id.*, Ex. 23.

c. Commerce's varying and evolving decisions over thelast 18 months in response to the GOC's noncooperation and this Court's decisions

Given the GOC's noncooperation, Commerce recently began seeking to clarify its practice with respect to EBCP cases in which the GOC is uncooperative. *See, e.g.*, *MAE from China* IDM at cmt. 5; *VSE from China* IDM at cmt. 2. Commerce explained recently that *MAE from China* and *Forged Steel Fittings from the People's Republic of China* are "examples of [Commerce's] change in practice," in which Commerce will issue supplemental questionnaires if a respondent has provided complete customer certifications of EBCP non-use. Redetermination Pursuant to Court Remand Order at 18–19, *Risen Energy Co. v. United States* ("*Risen Energy* Remand Results"), ECF Nos. 93–94 (citing *MAE from China* IDM at cmt. 5; *Forged Steel Fittings from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2019*, 87 Fed. Reg. 35,498 (Dep't of Commerce June 10, 2022) and accompanying IDM (Dep't of Commerce June 3, 2022) at cmt. 2).

In *VSE from China*, another recent determination, Commerce reached different results with respect to applying AFA to two differently situated respondents. *See VSE from China* IDM at 22–23. Commerce applied AFA to one respondent, which provided customer declarations of non-use and "claimed to be unaware that any U.S. customer [used the EBCP]." *Id.* at 19–20 (citing Letter from Perkins Coie LLP to Sec'y of Commerce, re: Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, from China; CVD Investigation; Chongqing Zongshen Sec. III Resp. (June 22, 2020) at Vol. I at 28, Vol. VII at 26, Ex. I-18, and Ex. VII-16, bar code 3989840–01). However, Commerce applied facts available to the other respondent, which had only one U.S. customer, its parent company, for which the respondent provided financial documentation, including a financing "reconciliation," a consolidated balance sheet for the parent company and lending agreements, *id.* at 22 (quoting Chongqing Kohler's Letter, re: Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof from the People's Republic of China: Letter in Lieu of Case Brief (Dec. 8, 2020) at 4), and a signed customer declaration of non-use, Letter from Wiley Rein LLP to Sec'y of Commerce, re: *Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof, from the People's Republic of China*: Resp. of Chongqing Kohler Engines Ltd. and Kohler (China) Investment Co. Ltd. to Sec. III Quest. (June 18, 2020) ("Chongqing Kohler QR") at 14–18, Ex. EBC-3, bar code 3988554–01. For the latter respondent, Commerce concluded that the "extensive documentation" for the re-

spondent's one customer — its parent company — allowed Commerce to find non-use based on facts available:

> [A]fter carefully considering arguments from the parties, we have determined that, due to its exceptional relationship with its sole U.S. customer (its parent company), Chongqing Kohler was able to provide unique evidence, which pertains to "loan instruments" and reconcilable documentation indicative of the scope of Kohler Co.'s financing during the POI, and which appears to indicate that the finance instruments have specific purposes not related to the export of goods from China.

VSE from China IDM at 22–23 (citing Chongqing Kohler QR at 17, Ex. 5, and Exs. EBC6a- EBC-6d). Commerce did not verify the information but was still able to find non-use for the latter respondent. *Id.* at 23.

VSE from China is inapposite even if Cooper Tire exported the subject merchandise to only one U.S. customer — its parent company, CTRC. In *VSE from China*, the latter respondent provided "extensive documentation," as described above, about the financing of the parent company to satisfy Commerce that the customer did not use the EBCP. *VSE from China* IDM at 22–23.[25] No such documentation exists on the record for CTRC in this case. *See* Remand Results at 30. Further, CTRC did not provide a customer certification, and Cooper Tire did not state that CTRC did not use the EBCP. *Id.*[26] Similarly, *VSE from China* is also inapposite to the court's consideration of Commerce's determination as to Longyue, which did not provide customer declarations and did not note in its questionnaire response that the company had any affiliated U.S. customers. *See* Longyue QR at 24–25.

Second, *MAE from China* supports Commerce's determination to continue to apply AFA in this case because in this case, unlike in *MAE from China*, the respondents did not provide customer certifications of non-use. *Compare* Remand Results at 30, *with MAE from China* IDM at cmt. 5. In *MAE from China*, Commerce found non-use in a circumstance in which the respondents provided customer certifications and, subsequently, completed responses to requests for financ-

[25] The respondent also stated that its parent company did not use the EBCP, as supported by a signed customer declaration of non-use for its parent company. Chongqing Kohler QR at 15, Ex. EBC-3.

[26] Cooper Tire stated only that it "*believes* that it is impossible" that its customers used the EBCP. Cooper Tire QR at III-32 (emphasis supplied). Cooper Tire's statement of belief appears to have been based on the fact that Cooper was not contacted by any of its customers. *See id.*

ing information. *See MAE from China* at cmt. 5. There, Commerce found non-use of the EBCP for both of the mandatory respondents "in recognition of court precedent." *Id.* at 56.[27] In that instance, mandatory respondent LGMG provided a customer declaration of non-use for its one U.S. export customer, its wholly owned subsidiary LGMG North America Inc. ("LGMGNA"). LGMG IQR at 38, Ex. I-37. LGMG also provided, inter alia, a liability subledger and statement of cash flows during the period of investigation for LGMGNA. *Id.* at 39, Exs. I-28-I-29; *see id.* at 40. In addition, mandatory respondent Dingli provided customer declarations of non-use from its unaffiliated U.S. importers and "company specific information" for its affiliated U.S. importer, such as an audited financial statement detailing certain loan information. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y of Commerce, re: *Dingli Initial Quest. Resp.*: Countervailing Duty Investigation of Certain Mobile Access Equipment and Subassemblies Thereof from the People's Republic of China (C-570–140) (POI: 2020) (June 15, 2021) at 30, Exs. B-21b-B-

---

[27] Commerce's recurring use of this language is inappropriate. *See, e.g.*, *MAE from China* IDM at 49–50, 55–56; *VSE from China* IDM at 23. For instance, in *VSE from China*, Commerce reiterate[d] that the GOC's lack of cooperation with regard to numerous requests for information pertaining to the EBCP continues to leave Commerce with an incomplete understanding of the program" but "also recognize[d] that the court has directed Commerce in numerous decisions to consider whether any available information provided by respondents may be sufficient to fill the gap of missing record information in considering claims of non-use for the EBCP." *VSE from China* IDM at 23 (citing *Clearon Corp. v. United States*, 44 CIT __, __, 474 F. Supp. 3d 1339, 1345–46, 1349, 1354 (2020)); *see supra* note 8; *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2019* ("*Solar Cells from China*"), 87 Fed. Reg. 40,491 (Dep't of Commerce July 7, 2022) and accompanying IDM (Dep't of Commerce June 29, 2022) at 22 ("[*MAE*] *from China* is an example of Commerce's accommodative efforts in its practice regarding the EBCP in light of the CIT litigation."). Still, the court notes that the redetermination before the court does not raise this circumstance directly because the particular facts and, consequently, Commerce's determination on non-use in this case differ from the others discussed *supra*. *See* Remand Results at 30, 41–42.

Commerce's obligation is to apply the statute: in this case, to determine that there is use or non-use based on Commerce's application to the record before it of the statute and regulations. Ensuring access to information in accordance with the statute is a core function delegated to Commerce. If Commerce disagrees with remand decisions of this Court, particularly on an issue of importance and one that recurs, Commerce's most appropriate recourse is to appeal a decision of the Court with which Commerce disagrees. For Commerce to state that it "continue[s] to find that the GOC's non-cooperation significantly impedes and prevents a complete verification of the EBC program," but is generating a finding of non-use based on a "recognition of court precedent" — and then for the Government not to appeal even a single decision of the Court — serves poorly the objective of clarity and rigor in Commerce's application of law as well as the objective of Commerce addressing what it has described as a lack of cooperation by a government respondent that has left Commerce with an "incomplete understanding" of a subsidy program. *MAE from China* IDM at 56.

21c, bar code 4133571–01; *see* Oral Arg. Tr. at 65:11–13 (noting that Dingli had two customers). Thereafter, Commerce, "considering court precedent," requested and received additional information from the mandatory respondents and found ultimately non-use by both. *MAE from China* IDM at 49–50, 55–56.[28]

Vogue and Voma observe that, following its determination in *MAE from China*,[29] Commerce appears to have verified EBCP use or non-use only if complete customer certifications have been provided. Consol. Pls.' Resp. to Ct. Question at 2. In such situations in which the GOC has been noncooperative, the Government concurs with Vogue and Voma: "[T]he receipt of voluntary non-use certifications from all United States customers is a prerequisite to Commerce's issuance of a supplemental questionnaire, and Commerce does not issue the supplemental questionnaire (and therefore does not attempt to verify) without the non-use certifications." Def.'s Resp. to Post-Arg. Questions at 2; *see also* Def.-Intervenor's Answer to Ct.'s Post-Hr'g Questions at 2–4 (presenting six administrative determinations between May 6, 2022, and July 25, 2022, in which voluntary self-certifications were required before Commerce attempted to verify (citations omitted)). Commerce reiterated this approach in its remand redetermination in *Risen Energy Co.*:

> Now, in cases in which a respondent company has provided non-use certifications from *all* of its U.S. customers, Commerce will send a supplemental questionnaire to the respondent, seeking information on the loans received by its customer(s) during the relevant period. If the respondent provides this information from its customer(s), Commerce will verify the customer(s)' information . . . or otherwise take into account the customer(s)' information.

Risen Energy Remand Results at 18–19.[30]

As one example, pursuant to a February 2022 court order in a case in which customer certifications were provided, *Both-Well I*, 46 CIT __, 557 F. Supp. 3d 1327, Commerce sought and received "a reconcili-

[28] In another administrative determination after *MAE from China*, however, Commerce applied AFA despite the record including: (1) the respondents' claims that they were unaware that any customers used the EBCP; (2) customer declarations of non-use, *Pentafluoroethane* IDM at 24; and (3) in the case of one respondent's customers, "a table of lending bank information indicating no buyers credit was received during the POI." Sanmei New Subsidy Allegations Resp. at 2, Ex. N-2. Commerce stated that information from the GOC was "critical to Commerce's ability to consider both respondents' claims of non-use." *Pentafluoroethane* IDM at 24.

[29] Commerce completed its IDM in *MAE from China* on October 12, 2021. *MAE from China* IDM at 1.

[30] The court has not yet addressed the *Risen Energy* Remand Results.

ation of [the customers'] financing," *Both-Well (Taizhou) Steel Fittings, Co. v. United States* ("*Both-Well II*"), 46 CIT __, __, 589 F. Supp. 3d 1343, 1345 (2022). Based on that information, Commerce declined to apply AFA, and the court sustained the remand redetermination. *Id.* at __, 589 F. Supp. 3d at 1345–46.

For the foregoing reasons, Commerce's approach supports its determination to continue to apply AFA in this case because the respondents failed to provide information that is sufficient to fill the gap in the record or that would prompt the issuance of additional questionnaires to the respondents. *See* Remand Results at 2830 (addressing *VSE from China* and *MAE from China*).

d. Applying Commerce's varying and evolving practice to this case

Based on the facts of this case, a determination as to whether it is Commerce's practice to issue supplemental questionnaires only in situations in which voluntary customer certifications of non-use are already on the record — or whether Commerce followed such a practice — is unnecessary. Such a determination is unnecessary because the respondents' customers did not provide such certifications or, with one exception, did not demonstrate their willingness to participate in the investigation. *See* Remand Results at 2, 16, 20–21, 30 ("In the present case, we do not have non-use certifications from the respondents' U.S. customers and, therefore, there is no indication that they would participate in verification."), 41; Longyue QR, Ex. 24.[31]

Commerce's approach as outlined in *MAE from China* does not mean that a respondent is entitled to receive a request from Commerce to provide customer certifications of non-use or other financial information. *See, e.g.*, *Risen Energy* Remand Results at 19 ("[W]hen we do *not* receive voluntary non-use certifications from *all* U.S. customers of a respondent, Commerce normally will *not* issue the supplemental questionnaire or otherwise take steps to verify the respondent's claims of non-use." (citing *Solar Cells from China*, 87 Fed. Reg. 40,491 and accompanying IDM at cmt. 1)). The Court outlined a three-part framework in *Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333, on when to apply AFA in circumstances in which there is a noncooperating foreign government that fails to provide requested information. Commerce's approach to attempting verification of statements pertaining to non-use is predicated upon the respondents voluntarily providing information on the record that might fill the gap caused by the GOC's noncooperation.

[31] Likewise, the court does not address whether any certain number of certifications would be sufficient to prompt Commerce to seek additional information from parties.

See Remand Results at 30 (citation omitted); Def.'s Resp. to Post-Arg. Questions at 2.

MAE from China is inapposite because in this case, unlike in that case, there were no customer certifications on the record, thereby giving Commerce "no indication that [the customers] would participate in verification." Remand Results at 30 (stating that Commerce considered such certifications to be a "prerequisite" in that case to issuing supplemental questionnaires) (citation omitted). Similarly, in *Risen Energy*, both respondents provided customer non-use declarations. *Risen Energy Co.*, 46 CIT at __, 570 F. Supp. 3d at 1373 (citing Risen Unaffiliated Supplier II, Sec. III Quest. Resp. (Jan. 6, 2020) at 23, Ex. 15, CR 277, PR 164; Quest. Resp. of JA Solar and Affiliates, Vol. 1 (Dec. 30, 2019), Ex. 25, CR 31–103, PR 132–38). By contrast, in this case, neither respondent provided signed customer certifications of non-use, and neither respondent actually stated that their customers did not use the EBCP. *See generally* Cooper Tire QR at III-32; Longyue QR at 25.[32]

In addition, the statute does not require that Commerce ask the *respondents* for supplemental information due to the *GOC's* noncooperation. Commerce "shall promptly inform *the person submitting the response* of the nature of the deficiency and shall, to the extent practicable, provide *that person* with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle." 19 U.S.C. § 1677m(d) (emphases supplied). The deficiency that Commerce identified was with the *GOC's* response; Commerce did not apply AFA based on the insufficiency of the *respondents'* submissions. IDM at 18–20.[33] Therefore, the language of the statute requires that Commerce give the GOC — not any other party — an opportunity to remedy the deficiency. *See* 19 U.S.C. § 1677m(d). In this case, Commerce provided that opportunity to the GOC through the issuance of a supplemental questionnaire. *See* Letter, re: Passenger Vehicle and Light Truck Tires from the People's Republic of China: Suppl. Quest. for Gov't of the People's Republic of China (June 24, 2019) at 2–3, PR 129; *see also* GOC SQR at 6–13. *See generally Qingdao Sea-Line Int'l Trading Co. v. United States*, 45 CIT __, __, 503 F. Supp. 3d 1355, 1361

[32] *See supra* Section II.C.2 and note 26; *see also supra* note 11 and accompanying text.

[33] The Government raises, inter alia, another administrative determination that illustrates this point. Def.'s Resp. to Post-Arg. Questions at 3 ("[A] lack of these complete certifications is not the basis on which Commerce is applying AFA." (quoting *Solar Cells from China* IDM at cmt. 1)). *See generally Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014) ("Although it is unfortunate that cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce's questions, this result is not contrary to the statute or its purposes, nor is it inconsistent with this court's precedent.").

(2021) ("Commerce may provide this notice and the opportunity to remedy deficiencies through issuance of a supplemental questionnaire."). The statute does not require Commerce to request that respondents place additional information on the record to fill the gap created by the *GOC's* noncooperation. *See Torrington Co.*, 68 F.3d at 1351.

The interested parties could have but did not submit any additional information on the record to support their claims of non-use. *See Nan Ya Plastics Corp.*, 810 F.3d at 1337–38 (quoting *QVD Food Co.*, 658 F.3d at 1324) (noting that the burden is on the interested parties to create the record). At the time that the respondents submitted their initial questionnaire responses, the court had already heard cases in which respondents had provided customer certifications. *E.g.*, *Clearon Corp.*, 43 CIT at __, 359 F. Supp. 3d at 1357; *Changzhou I*, 42 CIT at __, 352 F. Supp. 3d at 1324; *Guizhou Tyre Co. v. United States* ("*Guizhou I*"), 42 CIT __, __, 348 F. Supp. 3d 1261, 1271 (2018). As noted by the USW, "[t]his Court has recognized that the lack of customer certifications is an important distinction in cases where it has upheld Commerce's application of AFA to the EBC program." Def.-Intervenor Br. at 14 (citing *Changzhou Trina Solar Energy Co. v. United States* ("*Changzhou 2017*"), 41 CIT __, __, 255 F. Supp. 3d 1312, 1318 (2017)). In addition, respondents in other cases have offered more in support for their assertions prior to 2021. *See, e.g.*, *Guizhou I*, 42 CIT at__, 348 F. Supp. 3d at 1271 (customer declarations); *Changzhou 2017*, 41 CIT at __, 255 F. Supp. 3d at 1318 (partial certifications). Moreover, this Court has noted the importance of customer certifications, which are a key distinction on which Commerce has relied in the past. *See Changzhou 2017*, 41 CIT at __, 255 F. Supp. 3d at 1318 (citing *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 Fed. Reg. 76,962 (Dep't of Commerce Dec. 23, 2014) and accompanying IDM (Dep't of Commerce Dec. 15, 2014) at 93).

In the *Risen Energy* Remand Results, Commerce notes that Commerce does not consider even partial certifications to be "complete gap-filling information." *Risen Energy* Remand Results at 19–20. This treatment is consistent with the Court's treatment of incomplete certifications in the earlier cases described herein. Therefore, Commerce would not have to take the next step of sending supplemental questionnaires in this case, even if Commerce's decisions since *MAE from China* comprise a new practice, as Commerce asserts in the

Risen Energy Remand Results. *See id.* On this record, and as related to past EBCP cases, Commerce's finding that the respondents did not provide information that would allow Commerce to find non-use is reasonable.

Moreover, given the record here, there is no indication that the respondents' customers were prepared to provide certifications or participate in verification. *Cf. Solar Cells from China* IDM at 23 (describing partial non-use certifications as insufficient and concluding that "partial information on non-use does not leave Commerce with a path towards further investigating, completely verifying, or ultimately determining non-use of this program by either respondent"); *VSE from China* IDM at 22–23 (noting, for one respondent's customer, extensive financial information). Cooper Tire has just one U.S. customer, an affiliate, with which Cooper Tire submitted its initial questionnaire response, and for which it would have been particularly easy to provide more information as to the claims pertaining to non-use of the EBCP. *See* Cooper Tire QR at 1–2, Ex. 18; Cooper Tire Affiliate Resp. at III-3. That Cooper Tire did not provide any such information about CTRC lends support to Commerce's conclusion that "there is no indication that [CTRC] would participate in verification." Remand Results at 30.

For the foregoing reasons, the court concludes that Commerce did not have an obligation to ask for the certifications. As described, Commerce based its application of AFA on the GOC's noncooperation and not on any need for certifications from customers to verify the EBCP in the first place; rather, within the proper legal framework, Commerce considers certifications as information on the record that it could verify to fill the gap after concluding that other, necessary information has been withheld and that a party did not cooperate "to the best of its ability." 19 U.S.C. § 1677e(a)-(b); *see Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333.

e. Commerce's failure to consider certain contrary evidence

Further, Vogue and Voma asserted at oral argument that Commerce failed to consider "contrary evidence" in the form of the one email response on the record from one of Longyue's customers. Oral Arg. Tr. at 102:9–15; *see* Consol. Pls. Br. at 14 (quoting Remand Results at 9) (citing Longyue QR, Ex. 24 at 11/14). On remand, Commerce stated incorrectly: "[T]here are no responses in the relevant exhibit." Remand Results at 9.

Commerce's determination is supported by the record as a whole despite Commerce misstating the record as to the one email response

from one U.S. customer. *See* Oral Arg. Tr. at 102:3–4. "It is well settled that principles of harmless error apply to the review of agency proceedings." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996); *see Prime Time Com., LLC v. United States*, Appeal No. 21–1783, 2022 WL 2313968, at *5, *7 (Fed. Cir. June 28, 2022) (concluding that "Commerce's failure to consider [the appellant's] efforts to cooperate as an interested party was harmless error" because the failure "would not disturb" the antidumping duty rate or "entitle [the appellant] to a separate rate").

In addition, Commerce has explained previously as to the EBCP that an "email [from a customer] does not confirm non-use and falls short of the type of certifications or declarations provided by U.S. customers in other proceedings involving this program." *Aluminum Foil from China* IDM at 31 (footnote omitted); *see also Certain Walk-Behind Snow Throwers and Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 87 Fed. Reg. 17,987 (Dep't of Commerce Mar. 29, 2022) and accompanying IDM (Dep't of Commerce Mar. 21, 2022) at 25 (noting that a respondent provided only partial customer certifications).

In this case, Commerce mentioned emails as an example of the "little information on the record" that Commerce cannot verify, IDM at 20: "While Commerce frequently examines correspondence and communications at verification, it does so to confirm assertions that do not rest on the complete absence of an event," Remand Results at 15. Even if Commerce had sought to verify the one email, Commerce would have had no other information from any other customer in this case and would have faced the same issues with respect to third-party participation that Commerce discussed on remand, as described above. *Id.* at 14–15, 41; *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record *fairly detracts* from its weight." (emphasis supplied)); *see also Multilayered Wood Flooring from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2019*, 87 Fed. Reg. 36,305 (Dep't of Commerce June 16, 2022) and accompanying IDM (Dep't of Commerce June 10, 2022) at 37 ("[G]iven the apparent unwillingness of most of [one respondent's] U.S. customers to participate, [Commerce] did not issue any additional questions or requests for loan data." (footnote omitted)).

In sum, Commerce's failure to consider the single email response, together with the fact that no customers provided certifications of non-use, is not evidence that fairly detracts from Commerce's conclusion because its reasoning and conclusions would not be affected by

the one email response.[34] *See* Remand Results at 2, 16, 30, 41; *Universal Camera Corp.*, 340 U.S. at 488; *Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 3d 1315, 1359 (2015) (quoting *Altx, Inc. v. United States*, 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001)); *see also Prime Time Com., LLC*, Appeal No. 21–1783, 2022 WL 2313968, at *7.

f. Commerce's explanation for its determination

Finally, Commerce must also "explain the basis for its decisions." *NMB Sing. Ltd.*, 557 F.3d at 1319; *see also State Farm*, 463 U.S. at 43 ("We will . . . 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'") (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (citing *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (per curiam)). In the context of the EBCP, Commerce must explain that no other information on the record can fill the gap created by the noncooperation by the GOC. *See Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333. In situations in which third parties are involved, the court has held previously that Commerce need not seek third-party information due to the unnecessary burden posed as to time constraints, accuracy and the inability to "compel" responses. *CS Wind Vietnam*, 41 CIT at __, 219 F. Supp. 3d at 1279, 1284; *see also Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1372 (declining to conclude that "Commerce must attempt verification to conclude that verification is not possible or overly burdensome" (citing 19 U.S.C. § 1677e(a)-(b)). *But see Guizhou Tyre Co. v. United States* ("*Guizhou III*"), 43 CIT __, __, 415 F. Supp. 3d 1402, 1405 (2019) (noting that Commerce must attempt to verify customer certifications of non-use before reaching such a conclusion).

Here, as described *supra* Section I, Commerce explained the reason that it would be unable to verify the respondents' statements without an understanding of whether the EBCP requires their involvement. *See* Remand Results at 10, 12, 38; *see also* Cooper Tire QR at III-31-III-32, Ex. 18; Longyue QR at 24–25, Exs. 23–24. Commerce stated that "outdated" EBCP documentation did not allow Commerce to determine whether usage by a customer of EBCP required a respondent to: (a) be aware of such usage; (b) assist the customer in applying

[34] The USW presents five Commerce determinations between September 10, 2021, and June 30, 2022, and one Commerce memorandum from July 16, 2021, describing that Commerce did not issue supplemental questionnaires in situations without full certifications, further bolstering the notion that one email response is insufficient to fill the gap and establish EBCP non-use. Def.-Intervenor's Answer to Ct.'s Post-Hr'g Questions at 4–5, attach. 7 (citations omitted).

for EBCP benefits; or (c) purchase export insurance as a condition of a customer being eligible for EBCP benefits. Remand Results at 7, 10, 12, 21, 38; *see id.* at 5 & n.13 (citing Letter from Pet'r, re: Third Administrative Review of the Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China – The USW's Comments on and Submission of Rebuttal, Clarifying, and Correcting Factual Information to the Initial Questionnaire Responses (May 3, 2019), Ex. 7) (noting an inconsistency raised in the record about the continued existence of the threshold requirement). The court concludes that Commerce explained adequately that the above points that the respondents provided are unverifiable without an understanding of the requirements of the EBCP, such as in the 2013 revisions.

Commerce also explained adequately that information about the operation of the EBCP from the respondents and their customers would be unreliable. *See id.* at 16–17. Further, Commerce stated that it would not "result in a reasonably reliable verification" and would be unduly burdensome to "collect and analyze" all correspondence or loan information from each of the customers without the withheld information about the operation of the EBCP and the partner and correspondent banks. *Id.* at 17–19. Commerce discussed the burden that it would face given the number of customers[35] and the value of their sales, in addition to Commerce's inability to compel third-party participation. *Compare id.* at 14, 18–19, *with Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1370 (noting that Commerce "did not articulate the burden and unreliability of working directly with third parties"). In addition, Commerce insisted that a spot check of certain customers would serve only as a "half measure[]" since, again, the record demonstrated that Commerce did not have full information about the way that the EBCP works. Remand Results at 33–34, 41.

Commerce reiterated, and the court agrees that, because the respondents did not provide any customer certifications of non-use, it is unclear "whether any communication ever took place between the respondents and their customers or whether the non-use statements are based solely on assumptions about how the program currently operates." *Id.* at 20–21. In addition, Commerce explained reasonably that without certifications that show that the customers would be

[35] The court addresses through its discussion of *VSE from China* and *MAE from China supra* Sections II.C.2.c and II.C.2.d the situation in which Cooper Tire may have had only one affiliated customer. To the extent that such a situation impacts the overall number of customers for both of the respondents, the court notes that Commerce nonetheless adequately explained its conclusion through the discussion of the impact of the lack of other information, *see supra* Sections I.5 and I.6, and other facts about the value of sales and Commerce's inability to confirm whether the EBCP requires the respondents' involvement, as referenced in their questionnaire responses, *see* Remand Results at 10, 14, 16–19.

likely to participate, without the ability to compel third-party participation and without the withheld information, Commerce would not be able to conduct an accurate spot-check of potentially relevant transactions. *See id.* at 2, 14, 16, 25 (concluding that Commerce "might very well be wasting [its] time looking at loans that could not even have been offered under the EBCP" because Commerce "lack[s] the requested information . . . or any other parameters that would delimit the correct set of loans"), 30 (addressing *VSE from China* and *MAE from China*), 41.

In conclusion, Commerce's determination to apply AFA due to the lack of other verifiable information on the record to fill the gap is reasonable and supported by substantial evidence. *See* IDM at 20; Remand Results at 30. Commerce explained adequately the reason that the other facts on the record do not fill the gap to establish non-use of the EBCP. *See Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333 (internal citations omitted).

CONCLUSION

Ford v Ferrari, directed by James Mangold, is a 2019 sports drama based on the true story of automotive designer Carroll Shelby and race car driver Ken Miles in their quest to lead Ford Motor Company to victory over Scuderia Ferrari at the 1966 *24 Hours of Le Mans* race. Following Miles' untimely death, Shelby approaches Miles' home to visit his widow Mollie and brings along a wrench that Miles had once thrown at Shelby before a race. Before he reaches the house, Shelby sees Miles' son Peter. They have a somber conversation, in which they share the following exchange:

Carroll Shelby (portrayed by Matt Damon): "I came to say hello, check in on her and . . . then I started thinking that sometimes . . . words . . . just . . . ar-are not useful. Tools are useful 'cause you can make stuff with 'em and you can fix stuff with 'em. Here." Peter Miles (portrayed by Noah Jupe), accepting the wrench that Shelby offers: "Thanks."[36]

* * *

For the foregoing reasons, Commerce's Remand Results are supported by substantial evidence and comply with the court's instructions in *Cooper I*. The court sustains the Remand Results. Judgment will enter accordingly.

Dated: December 8, 2022
New York, New York

/*s*/ *Timothy M. Reif*
TIMOTHY M. REIF, JUDGE

[36] FORD V FERRARI (20th Century Fox 2019).

Slip Op. 22–141

BUILDING SYSTEMS DE MEXICO, S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, and FULL MEMBER SUBGROUP OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION, LLC AND COREY S.A. DE C.V., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00069
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand determination in the less-than-fair-value investigation of certain fabricated structural steel from Mexico.]

Dated: December 13, 2022

Matthew R. Nicely and *Daniel M. Witkowski*, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., for plaintiff Building Systems de Mexico, S.A. de C.V.

Daniel F. Roland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Franklin E. White, Jr.*, Assistant Director, and *In K. Cho,* Trial Attorney. Of counsel on the brief were *Spencer Neff* and *Savannah R. Maxwell,* Staff Attorneys, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price, *Christopher B. Weld*, *Stephanie M. Bell*, and *Adam M. Teslik*, Wiley-Rein LLP, of Washington, D.C., for defendant-intervenor Full Member Subgroup of the American Institute of Steel Construction, LLC. Also on the brief were *Enbar Toledano*, *Jeffrey O. Frank*, *Maureen E. Thorson*, and *Stephen J. Obermeier*.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand determination pursuant to the court's remand order, *see Building Systems de Mexico, S.A. de C.V. v. United States*, 567 F. Supp. 3d 1306 (Ct. of Int'l Trade 2022) ("*BSM I*"), issued on the court's review of Commerce's final determination in its less-than-fair-value ("LTFV") investigation into certain fabricated structural steel ("FSS") from Mexico. *See* Final Results of Redetermination Pursuant to Court Remand, A-201–850 (July 20, 2022), ECF Nos. 101–1, 102–1 ("*Remand Results*"); *see also Certain [FSS] from Mexico*, 85 Fed. Reg. 5390 (Dep't Commerce Jan. 30, 2020) (final determination of sales at LTFV) ("*Final Determination*"), and accompanying Issues and Decision Memo., A-201–850, PD 663, bar code 3935345–01 (Jan. 23, 2020), ECF No. 21–6 ("Final Decision Memo"). For the following reasons, the court sustains Commerce's determinations on remand.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to Commerce, *see BSM I*, 567 F. Supp. 3d at 1309, and now recounts only those facts relevant to the court's review of the *Remand Results*. In this LTFV investigation into FSS from Mexico, Commerce selected BSM and Corey S.A. de C.V. ("Corey") as mandatory respondents. *See Final Determination*, 85 Fed. Reg. at 5391. In the final determination, Commerce found that certain FSS from Mexico is being, or is likely to be, sold in the United States at LTFV during 2018, the period of investigation ("POI"). Final Decision Memo at 1. BSM moved for judgment on the agency record, challenging Commerce's: (i) calculation of BSM's constructed value profit rate; (ii) use of facts available with an adverse inference ("AFA")[1] based on an unreported BSM sale; (iii) use of the purchase order date or sales order acknowledgment date as the date of sale for purposes of converting foreign currency into U.S. dollars; and (iv) calculation of BSM's constructed export price ("CEP"). *BSM I*, 567 F. Supp. 3d at 1310.

In *BSM I*, the court remanded Commerce's final determination on this investigation. 567 F. Supp. 3d at 1309, 1321. Specifically, the court remanded Commerce's: (i) use of Corey's home market sales data in calculating BSM's constructed value profit rate, *id.* at 1310–16, (ii) application of AFA to BSM's unreported sales from one of its FUSS projects, *id.* at 1316–17, (iii) determination that the date of sale for purposes of currency conversion should be the date of purchase order or sales order acknowledgment, *id.* at 1317–18, and (iv) calculation of BSM's constructed export price ("CEP") profit rate. *Id.* at 1319–21.

Commerce filed the *Remand Results* on July 20, 2022. In the *Remand Results*, Commerce: (i) continues to use Corey's home market sales to calculate profit for BSM's constructed value; (ii) determines its previous application of AFA to BSM's unreported sales was unwarranted; (iii) uses the date of substantial completion, in place of the date of purchase order or sales order acknowledgment, as the date of

[1] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available and, second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b).

sale for purposes of currency conversion; and (iv) no longer excludes NCI's[2] Costa Rican data from its calculation of the CEP profit rate.[3] *Remand Results* at 1–2; *see also BSM I*, 567 F. Supp. 3d at 1320 (remanding Commerce's decision to remove NCI's Costa Rican data from BSM's CEP profit rate).

BSM argues the constructed value profit rate calculation includes data from a project contracted prior to the POI and is otherwise unreasonable.[4] Pl.'s Comments on Remand Redetermination at 7–16, Aug. 19, 2022, ECF Nos. 105–06 ("BSM Comments").[5] Defendant-Intervenor Full Member Subgroup of the American Institute of Steel Construction, LLC ("AISC") objects to Commerce's reliance on the date of substantial completion of the FSS project as the date of sale for currency conversion purposes, and to Commerce's determination that the unreported sale, for which Commerce previously applied AFA, was unreportable because BSM completed the project after 2018.[6] [AISC's] Comments on Remand Redetermination at 3–12, Aug. 22, 2022, ECF Nos. 107–08 ("AISC Comments"). No party objects to Commerce's remand determination of CEP profit. Defendant United States argues that Commerce's determinations on remand are supported by substantial evidence and in accordance with law. Def's Resp. to Comments on Remand Redetermination at 6–18, Sept. 22, 2022, ECF Nos. 113–14.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),[7] and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final affirmative LTFV determination. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise

[2] BSM's U.S. affiliates, NCI Group, Inc. and Robertson-Ceco II Corporation ("NCI"), sell all BSM's CEP sales through its Buildings or Components business segments. Final Decision Memo at 11.

[3] Corey did not comment on the *Remand Results*.

[4] BSM challenges Commerce's inclusion of Corey's sales of FSS related to the [[ ]] (the "challenged project") in Commerce's constructed value profit calculation. *Remand Results* at 12–15.

[5] SM asks the court not to remand on the constructed value profit issue if the court concludes that the *de minimis* dumping margin Commerce calculated for BSM in the *Remand Results* is otherwise supported by substantial evidence and in accordance with law. *Id.* at 3–6, 16–17.

[6] AISC challenges Commerce's remand determination to consider BSM's project [[ ]], which had its remaining two phases canceled in July 2019, outside the POI. *Remand Results* at 24–28.

[7] Further citations to the Tariff Act of 1930 will be to the relevant sections of the U.S. Code, 2018 edition.

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) (internal quotation marks omitted).

DISCUSSION

I. Constructed Value

On remand, Commerce continues to use Corey's home market sales to calculate BSM's constructed value profit and expenses, finding that sales for the challenged project are in-scope and that Corey's home market FSS sales constitute the best information available on the record for valuing BSM's constructed value profit and selling expenses. *Remand Results* at 4–23. For the reasons that follow, the court sustains Commerce's remand decision to use Corey's home market sales to construct BSM's constructed value profit and expenses.

In a LTFV investigation, Commerce compares the "normal value" of the merchandise to the U.S. price, which Commerce calculates as the "export price" or "constructed export price" under 19 U.S.C. §§ 1677a(a) or (b), respectively. 19 U.S.C. § 1677b(a). "Normal value" is the price for which a producer or exporter sells the merchandise in its home country, or a third country in certain circumstances, in the ordinary course of trade. *Id.* § 1677b(a)(1). However, if Commerce decides it cannot determine normal value under § 1677b(a)(1) using a producer or exporter's home market or third-country sales, Commerce will calculate and use constructed value in place of normal value. *Id.* § 1677b(a)(4), (e).

In calculating constructed value, Commerce approximates the sales price and profits of a producer's home market sales, *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 542 (Fed. Cir. 2019), and avoids "irrational or unrepresentative results." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,360 (Dep't Commerce May 19, 1997) ("*Preamble*"). Commerce considers whether the data with which it calculates constructed value profit results in a fair comparison between normal value and export price. *See Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1349 (Ct. of Int'l Trade 2015), *aff'd*, 710 F. App'x 890, 891 (Fed. Cir. 2018). Commerce's determination must be supported by substantial evidence, which is "such evidence that a reasonable mind might accept as adequate to support a conclusion." *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1326 (Fed. Cir. 2020) (internal quotation marks removed).

Commerce calculates constructed value profit by using the exporter or producer's actual profits from home market sales of the product at

issue, in the ordinary course of trade. 19 U.S.C. § 1677b(e)(2)(A). If this method is unavailable, Commerce has three alternate methods available. First, Commerce may calculate constructed value profit based on the producer's sales of merchandise in the same general category as the product at issue, as opposed to basing profit on the sales of like product. Id. § 1677b(e)(2)(B)(i). Second, Commerce may calculate constructed value profit based on the weighted average of profits and expenses from other investigated producers. *Id.* § 1677b(e)(2)(B)(ii). Third, Commerce may use any reasonable method to calculate constructed value as long as profit does not exceed the normal profit received by other exporters or producers. *Id.* § 1677b(e)(2)(B)(iii). The statute does not state a preference for any method—Commerce has discretion to apply the method it finds appropriate to each investigation. *Mid Continent*, 941 F.3d at 535; *see* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 840 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4176 ("SAA").

The court remanded for further explanation or reconsideration Commerce's decision to use Corey's actual profits pursuant to § 1677b(e)(2)(ii) in calculating BSM's constructed value profit. The court questioned Commerce's use of sales from the challenged project, where Corey's buyer appeared to have accepted the bid in 2017, outside the POI. *BSM I*, 567 F. Supp. 3d at 1313–14. The court also asked Commerce to explain how it could reject BSM's home market data for constituting insufficient volume as a percentage of its U.S. sales, and yet rely on Corey's data when Corey had indisputably fewer home market sales. *Id.* at 1315. Finally, the court concluded several other factors undermined the reasonableness of Commerce's determination and asked for reconsideration or further explanation.[8] *Id.* at 1315–16.

On remand, Commerce concludes that, despite the contract's 2017 project number, Corey and its buyer contracted the challenged project in 2018, rendering the project in scope. Although Commerce acknowledges Corey initially reported a project start outside the POI, Commerce concludes the weight of the evidence demonstrates Corey did not start the challenged project in 2017. *See Remand Results* at 16. Commerce contends Corey personnel mistakenly believed Corey had

[8] The court asked that Commerce further explain the reasonableness of its determination given that (i) Corey's business model is to produce FSS for a small number of large projects, while BSM produces FSS for pre-engineered metal building systems ("PEMBS"), which are typically smaller projects; (ii) Corey offers design and erection services in addition to its production and sale of FSS, while BSM only produces FSS; and (iii) Corey's home market profits might not be representative of the Mexican FSS market because its profits were higher than any other Mexican producer on the record. *Id.*

begun the challenged project in 2017. *Id.* at 16–17. As a result, Corey personnel assigned materials from the warehouse to the project, and Corey personnel created a project number to record costs for materials Corey personnel mistakenly believed Corey had purchased for the challenged project.[9] *Id.* at 17. Corey discovered its error late in 2018, but retained its 2017 project number, even though Corey and its buyer contracted the challenged project in 2018. *Id.* (explaining Corey assigned project numbers sequentially). Commerce points to record evidence demonstrating the parties contracted and performed the contract in 2018. *Id.* at 16. In particular, Corey's client issued purchase orders to accept Corey's project bid for the challenged project.[10] *Id.* at 16–17. These purchase orders were dated 2018, and Corey does not dispute that it contracted the challenged project in 2018. *Id.* at 6. Further, Corey's recordkeeping supports the conclusion that Corey and its buyer contracted and completed the challenged project in 2018.[11] *Id.* at 16. Commerce reasonably supports its explanation that the project was mistakenly dated in 2017 by referring to Corey's practice of contracting for projects via purchase orders, which show the project at issue began in 2018.

Regarding Commerce's use of Corey's home market sales despite its number of sales during the POI, Commerce explains it is reasonable to continue using Corey's home market FSS sales data because it is viable and therefore the best source of information available for valuing BSM's constructed value profit and expenses. *See Remand Results* at 9–11. Commerce considers viability for home market sales to be based on volume of sales as a percentage of the U.S sales rather than the number of sales.[12] *Id.* at 9. BSM argues the statute does not require the volume of home market sales to meet a viability threshold to be used to calculate constructed value profits. BSM Comments at

[9] BSM contends that Commerce's speculation is unsupported by the record: "There is no indication at all that the project number itself or the initial account creation . . .were created in error." BSM Comments at 9. Yet BSM itself concedes that record documents "explain that certain expenses were posted to the project in 2017 in error." *Id.* It is reasonably discernible that Commerce concludes that the incorrect posting of expenses relates to the mistaken creation of a project number. Additionally, that Corey's buyer issued all purchase orders for this project in 2018 supports Commerce's conclusion that the 2017 project number was an error.

[10] Commerce concluded that the issuance of a purchase order formed the contract because at verification Commerce did not find evidence of a signed contract or a signed final budget. *Remand Results* at 6.

[11] Corey reported [[ ]] *Id.* at 16.

[12] Although BSM notes it made [[ ]] sales compared with [[ ]], *id.* at 21, Commerce finds here that the volume of BSM's home market sales are below five percent of the volume of its U.S. sales and are thus too insignificant to accurately reflect the profit rate of the Mexican FSS market. *Id.* Commerce reasons that, if the volume of BSM's home market sales is insufficient for normal value, it is inappropriate to rely on BSM's home market sales for constructed value. *Id.*

12–13. However, the statute does not prevent Commerce from using a volume threshold for home market sales to ensure the reliability of the information. *Mid Continent*, 941 F.3d at 539. Here, Commerce has discretion on how it will determine which information is the best source on which to rely for constructed value. *See* 19 U.S.C. § 1677b(e)(2)(B). Therefore, Commerce reasonably relies on Corey's home market sales because it determines Corey's sales are viable based on their volume while BSM's are not.[13]

Likewise, Commerce's determination not to rely on data from the other companies on the record is reasonable. Commerce concludes that, unlike the alternative companies, "Corey's combined selling expenses and profit closely approximates the statutory preference for calculating [constructed value] profit and selling expenses because Corey is a Mexican producer of FSS and the profit and selling expenses that we used in our calculation are from Corey's home market sales of FSS in the ordinary course of trade." *Remand Results* at 10. Commerce explains the advantage of using Corey's data rather than other producers is that Corey's profits are specific to FSS producers. *Id.* at 10–11, 22.

Regarding the factors undermining the reasonableness of using Corey's home market sales, Commerce explains why those factors do not lead Commerce to reconsider using Corey's home market sales to calculate BSM's constructed value profit. *See Remand Results* at 11. The court questioned whether the differences between Corey and BSM's businesses—Corey produces FSS for a small number of large projects per year while BSM produces FSS for smaller projects—detract from the reasonableness of using Corey's home market data. *Id.* at 11. Commerce explains the record does not reveal a pattern of profit on Corey's FSS sales that would overstate the profit rate Commerce assigned to BSM's constructed value. *Id.* Commerce finds the fact that both BSM and Corey sold FSS, the actual merchandise at issue, to be more important than differences such as project size or design. *Id.* Additionally, although Corey's home market profit was higher than the profit of any other Mexican FSS producer on the record, *id.*, Commerce differentiates these other producers on remand

[13] BSM challenges Corey's home market profit rate as not comparable to BSM's home market sales profit rate. BSM Comments at 12–13. Yet, Commerce reasonably concludes that BSM's home market sales profit rate is not a proper comparator. Commerce determines that the volume of BSM's home market sales not viable to permit a proper comparison for the purposes of normal value. *See Remand Results* at 20–21. If the volume of home market sales is not viable for the purposes of comparing home market sales to U.S. sales, it is reasonably discernible that Commerce concludes the number of sales are insufficient to use as a basis of comparison for other purposes as well. Thus, Commerce's conclusion that home market sales profit rate data cannot be relied upon to produce an accurate reflection of the Mexican FSS market for use as a comparison for Corey's home market profits is reasonable.

in a manner that accounts for the profit differences. *Id.* at 18–20. These other companies produce a wide range of products while BSM produces only FSS, and Commerce determines that "their profit ratios are not sufficiently comparable to the profit rate of a Mexican producer of FSS to be appropriate benchmarks for gauging how representative a profit ratio is for a Mexican producer of FSS." *Id.* at 20. Thus, Commerce's use of Corey's home market sales is reasonable because it explains why Corey's data is the best source of information available on which to base constructed value and addresses the evidence detracting from its use of that data.

II. Facts Available with an Adverse Inference

In its final determination, Commerce applied AFA to one of the projects BSM did not report during the investigation. Final Decision Memo at 54–55. The court determined Commerce's decision on this issue to be unsupported by substantial evidence and remanded to Commerce for further explanation or reconsideration.[14] *BSM I*, 567 F. Supp. 3d at 1316–17. On remand, Commerce reconsiders its determination in light of the court's remand order and determines AFA to be unwarranted because BSM properly excluded sales related to the project from its response to Commerce. *Remand Results* at 25. For the reasons that follow, the court sustains Commerce's remand determination of this issue.

When information necessary to a LTFV investigation is missing, Commerce uses facts otherwise available to fill the gap in the record. *See* 19 U.S.C. § 1677e(a); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380–81 (Fed. Cir. 2003). If a party fails to cooperate to the best of its ability and causes a gap in necessary information, Commerce may apply an adverse inference when selecting facts available to fill the necessary information gap. 19 U.S.C. § 1677e(b); *Nippon*, 337 F.3d at 1380–83.

On remand, Commerce determines that application of AFA to the unreported project is unwarranted in light of the court's remand order. Commerce concludes that, because BSM and its buyer only completed the terms of the agreement in July 2019 when the buyer canceled the remaining project phases, the FSS order at issue was not substantially complete during the POI. *Remand Results* at 26. Thus, Commerce's decision not to apply facts otherwise available is reason-

[14] BSM and its buyer contracted the project at issue in 2018, and that project contained multiple phases. *BSM I*, 567 F. Supp. 3d at 1316. With two phases remaining, BSM treated this project as out of scope because BSM did not consider the project to be substantially complete during the POI. *Id.* at 1316. BSM's buyer canceled the remaining two phases of the project in July 2019 after the deadline passed for BSM to respond to Commerce's inquiries. *Id.* The court rejected Commerce's view that the final phases were retroactively completed in 2018. *Id.* at 1316–17.

able because it found BSM properly excluded FSS sales for this project from its U.S. sales database and its determination is supported by the record. *See id.* at 25–26.

AISC argues that, according to BSM's own questionnaire responses, the contract was complete in 2018. AISC Comments at 9. AISC points to BSM's response to Commerce indicating that a project is complete "when the final shipment occurred." *Id.* AISC argues, because the project was canceled in 2019, the final shipment occurred in 2018, and therefore the project must have been complete in 2018. *Id.* at 10. As explained in *BSM I* however, the final shipment was not final until 2019 when the buyer canceled the contract. 567 F. Supp. 3d at 1317.

AISC also argues that finding the project to be outside the POI might be inconsistent with how BSM reports its other sales. AISC Comments at 11–12. AISC speculates that, if a buyer canceled another project in early 2019, BSM would have reported the sale in its database, under the definition Commerce applies on remand. *Id.* However, AISC does not point to any record evidence showing another canceled project was in fact reported. Even if there were evidence of another canceled project that BSM included in its database, that fact would not cause this project to have been complete in 2018. Thus, AISC's argument fails.

III. Date of Sale

In the final determination, Commerce used the date of the purchase order or the sales order acknowledgment instead of the invoice date as the date of sale for currency conversion purposes. Final Decision Memo at 40. The court remanded for Commerce to further explain or reconsider its decision. *BSM I*, 567 F. Supp. 3d at 1317–18. On remand, Commerce determines the date of substantial completion to be the appropriate date of sale because it is the earliest date on which BSM and its buyer firmly established the material terms of sale. *Remand Results* at 33. For the following reasons, the court sustains Commerce's remand determination.

Commerce's regulations state that it will use the invoice date as the date of sale unless Commerce determines the buyer and seller established the material terms of the transaction on a different date. 19 C.F.R. § 351.401(i). Although Commerce does have some discretion in determining date of sale, it presumes the invoice date to be the date of sale. *See id.*; *see also Preamble*, 62 Fed. Reg. at 27,349. Commerce may use an alternative date only if there is "satisfactory evidence that the material terms of sale are finally established," and "the terms of sale must be firmly established and not merely proposed" to rebut the

presumption of using the invoice date.[15] *Preamble*, 62 Fed. Reg. at 27,349.

On remand, Commerce determines that the date of sale for custom-made merchandise is a date other than the date of invoice only when there is evidence the seller and buyer firmly established material terms on the alternative date. *Remand Results* at 30–31. Here, Commerce concludes that, because price and quantity are still unresolved after the purchase order and sales order acknowledgment, the buyer and seller instead firmly established material terms on the date of substantial completion. *Id.* at 31–34. Commerce's conclusion is reasonable because it applied its regulation to BSM's sales to determine that substantial completion is the proper date of sale for currency conversion purposes.

AISC argues Commerce fails to conduct a case-specific, fact-intensive analysis in determining that substantial completion is the appropriate date of sale for BSM. AISC Comments at 4. AISC points to BSM's statement that it considers orders to be firm with agreed terms on the contract date. *Id.* Further, AISC argues Commerce fails to address the nature of changes in the specific context of the FSS industry. *Id.* at 7. AISC in effect asks the court to reweigh the evidence, which the court declines to do.

CONCLUSION

For the foregoing reasons, the *Remand Results* are supported by substantial evidence in accordance with law, comply with the court's order in *BSM I*, and, therefore, are sustained. Judgment will enter accordingly.

Dated: December 13, 2022
New York, New York

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

[15] Commerce stated in the final determination that BSM regards the purchase order and sales order acknowledgments as contracts. Final Decision Memo at 40. Further, Commerce determined that FSS is "large custom-made merchandise," which allows Commerce to deviate from using the invoice date as the date of sale. *Id.* Yet, Commerce's regulations only permit it to rebut the presumptive use of the invoice date when Commerce determines the buyer and seller established the material terms of a transaction on a date other than the invoice date. *BSM I*, 567 F. Supp. 3d at 1317–18.

Slip Op. 22–143

WORLDWIDE DOOR COMPONENTS, INC., Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE AND ENDURA PRODUCTS, INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 19–00012

[Sustaining an agency decision submitted in response to court order.]

Dated: December 16, 2022

John M. Foote, Kelley Drye & Warren LLP, of Washington, DC, for plaintiff.

Aimee Lee, Assistant Director, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, Wiley Rein LLP, of Washington, DC, for defendant-intervenors. With him on the brief were *Alan H. Price* and *Elizabeth S. Lee*.

OPINION

Stanceu, Judge:

Plaintiff Worldwide Door Components, Inc. ("Worldwide") brought this action to contest a decision (the "Scope Ruling") by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") on its imported "door thresholds," each of which is an assembly containing an aluminum extrusion among various other components. In this litigation, Commerce previously took the position that an aluminum extrusion component within each door threshold is within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China (the "Orders").

Before the court is the Department's most recent decision ("Third Remand Redetermination"), which Commerce submitted in response to the court's opinion and order in *Worldwide Door Components, Inc. v. United States*, 46 CIT __, 589 F. Supp. 3d 1185 (2022) ("*Worldwide III*"). Responding to the court's order, Commerce decided in the Third Remand Redetermination, under protest, that the imported door thresholds, in the entirety, are excluded from the scope of the Orders.

Plaintiff has commented in favor of the Third Remand Redetermination. Defendant-intervenors, the Aluminum Extrusions Fair Trade Committee and Endura Products, Inc., a U.S. producer of aluminum extrusions, have commented in opposition.

The court sustains the decision in the Third Remand Redetermination that the door thresholds are excluded from the scope of the Orders.

I. BACKGROUND

Background on this litigation is presented in the court's previous opinions and is summarized and supplemented herein. *Id.*, 46 CIT at __, 589 F. Supp. 3d at 1187–92; *Worldwide Door Components, Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1403, 1405–11 (2021) ("*Worldwide II*"); *Worldwide Door Components, Inc. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1370, 1372–73 (2020) ("*Worldwide I*").

The decision plaintiff contests in this litigation is *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group Inc., and Columbia Aluminum Products Door Thresholds*, P.R. Doc. 36 (Int'l Trade Admin. Dec. 19, 2018) ("*Scope Ruling*"). The Scope Ruling construed the scope of *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"), and *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

The court remanded the Scope Ruling to Commerce in *Worldwide I*, ruling that Commerce had misinterpreted the scope language of the Orders in two respects. Commerce submitted a new determination in response (the "First Remand Redetermination"). Final Results of Redetermination Pursuant to Ct. Remand (Dec. 23, 2020), ECF No. 64–1 ("*First Remand Redetermination*"). In *Worldwide II*, the court again issued a remand to the agency. In response, Commerce filed another determination (the "Second Remand Redetermination") with the court on December 13, 2021. Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 85–1 ("*Second Remand Redetermination*"). The court remanded the Second Remand Redetermination to Commerce in *Worldwide III*.

Commerce filed the Third Remand Redetermination on September 9, 2022, in response to the court's opinion and order in *Worldwide III*. Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 101–1 ("*Third Remand Redetermination*"). Plaintiff submitted comments in support on September 26, 2022. Pl.'s Comments in Supp. of Commerce's Third Remand Redetermination, ECF No. 103. That same day, defendant-intervenors filed their comments in opposition. Def.-Intervenors' Comments on Final Results of Third Remand Redetermination Pursuant to Ct. Remand, ECF No. 104. Defendant

replied to the comments on October 6, 2022. Def.'s Resp. to Comments on Third Remand Redetermination, ECF No. 106.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.[1] Among the decisions that may be contested according to section 516A is a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id*. § 1516a(a)(2)(B)(vi). In reviewing the Scope Ruling, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B)(i).

B. The Court's Decisions in *Worldwide I*, *Worldwide II*, and *Worldwide III*

The Orders apply generally to "aluminum extrusions," which are defined in the Orders as "shapes and forms, produced by an extrusion process." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. As the court's previous decisions have recognized, the door thresholds at issue in this litigation are not themselves aluminum extrusions. *Worldwide II*, 45 CIT at __, 537 F. Supp. 3d at 1411 ("Worldwide's door thresholds are not 'aluminum extrusions' at the time of importation" (citing *Worldwide I*, 44 CIT at __, 466 F. Supp. 3d at 1357)). Nevertheless, the Orders contain a provision (the "subassemblies" provision) that enlarges the scope of the Orders to include aluminum extrusion components present in certain imported "partially assembled merchandise." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Another provision in the scope language of the Orders, the "finished merchandise exclusion," excludes from the scope of the Orders certain assembled and completed merchandise containing aluminum extrusions as parts. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

At issue in this litigation are eighteen models of imported door thresholds, each of which is not itself an aluminum extrusion but is instead an assembly of various components, including polyvinyl chlo-

[1] Citations to the United States Code and to the Code of Federal Regulations are to the 2018 editions.

ride, other plastics, wood, or steel. *Worldwide I*, 44 CIT at__, 466 F. Supp. 3d at 1373. One of those components in each door threshold is fabricated from a single piece of extruded aluminum and, were it imported separately, would be described by the scope language of the Orders. *Id*.

The court in *Worldwide I* held that the contested Scope Ruling, in determining that the aluminum extrusion component in each door threshold is subject to the Orders, misinterpreted the scope language of the Orders in three respects and discussed these errors in detail. 44 CIT at __, 466 F. Supp. 3d at 1373–79. Among these errors was the Department's refusal to consider whether Worldwide's door thresholds were excluded from the scope of the Orders under the "finished merchandise exclusion." *Id*., 44 CIT at __, 466 F. Supp. 3d at 1376–78. This express exclusion from the scope applies to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Commerce concluded in the Scope Ruling that "the express inclusion of 'door thresholds' within the scope of the *Orders* (regardless of whether the door thresholds are ready for use at the time of importation) renders the reliance of Worldwide . . . upon the finished merchandise exclusion inapposite." *Scope Ruling* at 35–36; *see also AD Order*, 76 Fed. Reg. at 30,651 & *CVD Order*, 76 Fed. Reg. at 30,654 ("Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks . . . ."). The court in *Worldwide I* rejected the Department's reasoning because it misinterpreted the scope language of the Orders. 44 CIT at __, 470 F. Supp. 3d at 1376 ("The scope language does not expressly include all door thresholds in which there is an extruded aluminum component. Instead, as the court has discussed, the inclusion of 'door thresholds' in the scope language as an exemplar is confined to door thresholds that *are* aluminum extrusions." (citing *AD Order,* 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654)).

Worldwide I concluded, further, that Commerce "erred in reasoning that 'finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of "door thresholds" meaningless.'" 44 CIT at __, 470 F. Supp. 3d at 1376 (quoting *Scope Ruling* at 36). As the court stated, "[d]oor thresholds that are fabri-

cated from aluminum extrusions are 'extrusions' for purposes of the scope language and are expressly included in the scope by operation of the reference to 'door thresholds'; other door thresholds, which are not themselves 'extrusions' for purposes of the Orders, are not." *Id*., 44 CIT at __, 466 F. Supp. 3d at 1376–77. The court in *Worldwide I* added that:

> Rather than rendering the express inclusion of door thresholds meaningless, excluding the assembled goods at issue from the Orders according to the finished merchandise exclusion would have no effect at all on the express inclusion of door thresholds, for a straightforward reason: a door threshold that is fabricated from an aluminum extrusion could never qualify under the finished merchandise exclusion in the first place because the finished merchandise exclusion applies only to assembled goods.

44 CIT at __, 466 F. Supp. 3d at 1377 (citing *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654).

In light of the multiple errors the court identified, the court in *Worldwide I* ordered Commerce to reconsider the Scope Ruling and to give "full and fair" consideration to the issue of whether the finished merchandise exclusion applies to Worldwide's door thresholds "upon making findings that are supported by substantial record evidence." 44 CIT at __, 466 F. Supp. 3d at 1380.

In response to the court's opinion and order in *Worldwide I*, Commerce submitted the First Remand Redetermination on December 23, 2020. In it, Commerce disagreed with the court that the finished merchandise exclusion was relevant to the Department's analysis but addressed, under protest, the issue of whether this exclusion applied to Worldwide's door thresholds. Commerce concluded that it did not.

Based on its factual findings on the applications for which Worldwide's door thresholds are produced, Commerce reached two conclusions in the First Remand Redetermination. Commerce concluded, first, that these products do not qualify for the finished merchandise exclusion because they are "partially assembled merchandise" and "intermediate products" for purposes of the subassemblies provision in the Orders. *Worldwide II*, 45 CIT at __, 537 F. Supp. 3d at 1411

(citing *First Remand Redetermination* at 23).[2] Second, Commerceconcluded that because they were described by the subassemblies provision, Worldwide's door thresholds could not qualify for the finished merchandise exclusion. According to the First Remand Redetermination, "[a] subassembly is merchandise which is designed for the sole purpose of becoming part of a larger whole"; Commerce concluded that each of Worldwide's door thresholds, which "must work in tandem with other components to be functional" and is "a component of a larger downstream product," cannot, for those reasons, qualify for the finished merchandise exclusion. *First Remand Redetermination* at 24 (citation omitted).

The court in *Worldwide II* rejected certain of the reasoning by which Commerce supported its ultimate conclusion in the First Remand Redetermination that the aluminum extrusion components within the door thresholds were subject to the Orders. "Under the Department's analysis, only goods that are not 'designed for the sole purpose of becoming part of a larger whole'. . . can satisfy the finished merchandise exclusion, but this rationale is contrary to the terms by which that exclusion is expressed in the scope language." *Worldwide II*, 45 CIT at __, 537 F. Supp. 3d at 1414 (quoting *First Remand Redetermination* at 24). The court pointed to two of the exemplars of products the scope language listed as qualifying for the finished merchandise exclusion, finished windows with glass and doors with glass or vinyl, as products that "*are* specifically designed for the sole purpose of becoming part of a larger whole." *Id*.

The court stated that "[e]ven the products Commerce itself considered to satisfy the finished merchandise exclusion, i.e., a complete, assembled door unit, and a 'final finished door with glass,' . . . do not 'function on their own,' . . . and cannot function until incorporated into a wall or other part of a building." *Id*. The court concluded that "[t]he [First] Remand Redetermination does not offer a plausible explanation of why the articles mentioned in the 'door' and 'window' exemplars of the finished merchandise exclusion satisfy that exclusion but that Worldwide's door thresholds . . . do not." *Id*.

---

[2] The subassemblies provision states that "[t]he scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below." *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650, 30,651 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*"). The reference to the "kit" is a reference to the "finished goods kit" exclusion, under which the antidumping and countervailing duty orders exclude an imported good in unassembled form that includes all the parts required for assembly of a final finished good. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Because the door thresholds at issue are imported in fully assembled, not disassembled, form, this exclusion does not apply.

In the First Remand Redetermination, Commerce, relying solely on statements by defendant-intervenors that did not pertain specifically to Worldwide's door thresholds, and despite certain record evidence that *did* pertain to Worldwide's products, inferred from these statements, but did not expressly find, "that the particular door thresholds at issue in this litigation . . . are so designed and manufactured as to require cutting or machining prior to assembly of a door unit or other structure." *Worldwide II*, 45 CIT at __, 537 F. Supp. 3d at 1412. The court attached significance to whether Worldwide's imported door thresholds required cutting or machining prior to use because that issue "is directly relevant to the applicability of the finished merchandise exclusion, which pertains to 'finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled *and completed* at the time of entry.'" *Id*., 45 CIT at __, 537 F. Supp. 3d at 1413 (quoting *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654). The court directed Commerce to reach "a finding from the record evidence that the door thresholds at issue in this case either are, or are not, so designed and produced as to require cutting or machining prior to use." *Id*., 45 CIT at __, 537 F. Supp. 3d at 1414.

In response to the court's opinion and order in *Worldwide II*, Commerce issued the Second Remand Redetermination. In the Second Remand Redetermination, Commerce determined, under protest, that Worldwide's door thresholds were outside the scope of the Orders. *Second Remand Redetermination* at 16.

The court in *Worldwide III* explained that the Second Remand Redetermination was not a decision in a form the court could sustain because it "is not the actual scope ruling or determination Commerce plans to issue," so "the Second Remand Redetermination would not be self-effectuating should the court sustain it, and the agency decision that would follow if it were sustained would escape direct judicial review." 46 CIT at __, 589 F. Supp. 3d at 1192. Instead of providing the scope ruling intended to be issued, Commerce in the Second Remand Redetermination stated that "[s]hould the court sustain these Final Results of Redetermination, we will issue a revised scope ruling accordingly." *Second Remand Redetermination* at 16. The court held "the Department's proposed resolution of this litigation unsatisfactory" because "[n]ot only would it deny the court the opportunity to review the agency's actual decision on remand, it also would not allow the parties to comment on that decision before the court reviews it." *Worldwide III*, 46 CIT at __, 589 F. Supp. 3d at 1192. The court directed "Commerce to issue a third remand redetermination that,

like the agency determination contested in this litigation, is a scope ruling or determination for the court's review, and it must be in a form that would go into effect if sustained upon judicial review." *Id.*, 46 CIT at __, 589 F. Supp. 3d at 1193.

The court in *Worldwide III* also took issue with the Second Remand Redetermination "in presenting no reasoning for ruling that the door thresholds are outside the scope of the Orders other than its incorrect conclusion that the court ordered Commerce to do so." *Id.* The court observed that "Commerce devoted most of the substantive discussion in the Second Remand Redetermination to its disagreements with certain of the issues the court decided previously" and explained how the Department's interpretation of *Worldwide II* erred in three respects. *Id.*, 46 CIT at __, 589 F. Supp. 3d at 1193–94. The court ordered Commerce to submit a third redetermination upon remand that complies with *Worldwide III*. 46 CIT at __, 589 F. Supp. 3d at 1195.

C. The Third Remand Redetermination

In the Third Remand Redetermination, Commerce decided once again, under protest, that Worldwide's door thresholds, in the entirety, fall outside the scope of the Orders. *Third Remand Redetermination* at 3. Commerce stated in the Third Remand Redetermination that it "do[es] not intend to issue a scope ruling or other agency determination subsequent to this Court's review of this remand redetermination" and that "if the CIT [Court of International Trade] affirms this redetermination, a *Federal Register* notice will be published stating that, consistent with the Court's holdings, Worldwide's door thresholds are excluded from the scope of the *Orders*." *Id.* "Relevant instructions to U.S. Customs and Border Protection (CPB) giving effect to that determination, as appropriate, will also be issued at that time." *Id*.

As the court explained in *Worldwide III*, Commerce was required to make a decision on whether the goods are within the scope of the Orders based on the record as a whole. Commerce has now done so in the Third Remand Redetermination in a form the court is able to sustain. The essential agency findings supporting the decision that the door thresholds, in the entirety. are outside the scope of the Orders are supported by substantial evidence on the record of this case. *See id.* at 8–16.

Defendant-intervenors' comments in opposition to the Third Remand Redetermination are unconvincing and merely reiterate arguments the court has rejected in its previous opinions and orders.

Def.-Intervenors' Comments on Final Results of Third Redetermination Pursuant to Ct. Remand 1–3 (Sept. 26, 2022), ECF No. 104.

Defendant-intervenors argue, first, that the contested Scope Ruling correctly found Worldwide's door thresholds to be expressly included within the scope of the Orders. *Id*. at 1–2. They maintain that because of this express inclusion, "the agency's determination that the 'finished merchandise' exclusion is inapplicable to these products was correct." *Id*. As the court concluded in *Worldwide I*, and as the scope language of the Orders makes clear, the express reference in the scope language to "door thresholds" as an exemplar refers to door thresholds that are aluminum extrusions, not assemblies such as those at issue here. 44 CIT at __, 470 F. Supp. 3d at 1376.

They argue, next, that "Commerce's first redetermination, under respectful protest, that even considering the exclusion, door thresholds are 'subassemblies' within the meaning of the scope and not excludable as 'finished merchandise' was also supported by substantial evidence and in accordance with law." Def.-Intervenors' Comments 2. As discussed above, the Department's reasoning that "subassemblies" cannot qualify for the finished merchandise exclusion because they are goods "designed for the sole purpose of becoming part of a larger whole" was rejected by the court in *Worldwide II* as "contrary to the terms by which that exclusion is expressed in the scope language," which includes exemplars of products the scope language listed as qualifying for the finished merchandise exclusion even though they "*are* specifically designed for the sole purpose of becoming part of a larger whole." 45 CIT at __, 537 F. Supp. 3d at 1414 (quoting *First Remand Redetermination* at 24).

Third, referring to Worldwide's door thresholds, defendant-intervenors argue that "substantial record evidence also demonstrated that these products generally require further finishing and fabrication after importation and prior to use, such that the thresholds would also fail to meet the [finished merchandise] exclusion requirements in this regard." Def.-Intervenors' Comments 2–3. This argument is also meritless. Commerce permissibly concluded that the evidence upon which defendant-intervenors rely for this argument did not pertain to the specific door thresholds at issue in this proceeding. Upon reassessing the record evidence, Commerce concluded in the Third Remand Redetermination that "the record does not support the conclusion that Worldwide's specific door thresholds require cutting or fabrication after importation into the United States." *Third Remand Redetermination* at 15.

III. CONCLUSION

For the reasons discussed in the foregoing, the court will enter judgment sustaining the decision in the Third Remand Redetermination that Worldwide's door thresholds are not within the scope of the Orders.

Dated: December 16, 2022
New York, New York

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

Slip Op. 22–144

COLUMBIA ALUMINUM PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE AND ENDURA PRODUCTS, INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 19–00013

[Sustaining an agency decision submitted in response to court order.]

Dated: December 16, 2022

Jeremy W. Dutra and *Peter Koenig*, Squire Patton Boggs (US), LLP, of Washington, D.C., for plaintiff.

Aimee Lee, Assistant Director, Civil Division, U.S. Department of Justice, of New York, New York, for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Robert E. DeFrancesco, III, *Alan H. Price* and *Elizabeth S. Lee*, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenors.

OPINION

Stanceu, Judge:

Plaintiff Columbia Aluminum Products, LLC ("Columbia") brought this action to contest a determination (the "Scope Ruling") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") on its imported "door thresholds," each of which is an assembly containing an aluminum extrusion among various other components. In this litigation, Commerce previously took the position that an aluminum extrusion component within each door threshold is within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China (the "Orders").

Before the court is the Department's most recent decision ("Third Remand Redetermination"), which Commerce submitted in response to the court's opinion and order in *Columbia Aluminum Products, LLC. v. United States*, 46 CIT __, 587 F. Supp. 3d 1375 (2022) ("*Columbia III*"). Responding to the court's order, Commerce decided in the Third Remand Redetermination, under protest, that the imported door thresholds, in the entirety, are excluded from the scope of the Orders.

Plaintiff has commented in favor of the Third Remand Redetermination. Defendant-intervenors, the Aluminum Extrusions Fair Trade Committee and Endura Products, Inc. ("Endura"), a U.S. producer of aluminum extrusions, have commented in opposition.

The court sustains the decision in the Third Remand Redetermination that the door thresholds are excluded from the scope of the Orders.

I. BACKGROUND

Background on this case is presented in the court's prior opinions and is briefly summarized and supplemented herein. *Id*., 46 CIT at __, 587 F. Supp. 3d at 1377–82; *Columbia Aluminum Products, LLC. v. United States*, 45 CIT __, __, 536 F. Supp. 3d 1346, 1348–52 (2021) ("*Columbia II*"); *Columbia Aluminum Products, LLC v. United States*, 44 CIT __, __, 470 F. Supp. 3d 1353, 1354–56 (2020) ("*Columbia I*").

Columbia brought this action to contest the Scope Ruling, which Commerce issued as *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components, Inc., MJB Wood Group, Inc., and Columbia Aluminum Products Door Thresholds*, P.R. Doc. 39 (Int'l Trade Admin. Dec. 19, 2018) ("*Scope Ruling*"). The court remanded the Scope Ruling to Commerce in *Columbia I*, ruling that Commerce had misinterpreted the scope language of the Orders in two respects and remanded it again in *Columbia II*, ruling that Commerce had relied upon a finding or inference that was not supported by substantial evidence on the record. The court issued a remand to Commerce once more in *Columbia III*.

Commerce filed the Third Remand Redetermination with the court on September 9, 2022. Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 85–1 ("*Third Remand Redetermination*"). Plaintiff submitted comments in support on September 23, 2022. Pl. Columbia Aluminum Products, LLC's Comments on Commerce's Final Remand Determination, ECF No. 87. Defendant-intervenors filed their comments in opposition on September 26, 2022. Def.-Intervenors' Comments on Final Results of Third Redetermination Pursuant to Ct. Remand, ECF No. 88. Defendant replied to the comments on October 6, 2022. Def.'s Resp. to Comments on Third Remand Redetermination, ECF No. 90.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff

Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.[1] Among the decisions that may be contested according to Section 516A is a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id*. § 1516a(a)(2)(B)(vi). In reviewing an agency determination, including one issued in response to court remand, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B)(i).

B. The Court's Decisions in *Columbia I*, *Columbia II*, and *Columbia III*

The Orders apply generally to "aluminum extrusions," which are defined in the Orders as "shapes and forms, produced by an extrusion process." *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650, 30,653 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*"). As the court's previous decisions have recognized, the door thresholds at issue in this litigation are not themselves aluminum extrusions. Nevertheless, the Orders contain a provision (the "subassemblies" provision) that enlarges the scope of the Orders to include certain "partially assembled" products that do not fall within the scope of the term "aluminum extrusions" but contain an aluminum extrusion as a component. Another provision in the scope language of the Orders, the "finished merchandise exclusion," excludes from the scope of the Orders certain assembled and completed merchandise containing aluminum extrusions as parts. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

At issue in this litigation are ten models of imported door thresholds, each of which is not itself an aluminum extrusion but is instead an assembly of various components. One of those components in each door threshold is fabricated from a single piece of extruded aluminum. Were that component imported separately, it would fall within the scope language of the Orders. Each of the ten models of door thresholds contains, in addition to the aluminum extrusion component, various other, non-aluminum components (made of various materials such as plastic or wood).

In *Columbia I*, the court held that the contested Scope Ruling, in determining that the aluminum extrusion component in each door

[1] Citations to the United States Code and to the Code of Federal Regulations are to the 2018 editions.

threshold is subject to the Orders, misinterpreted the scope language of the Orders in three respects and discussed these errors in detail. 44 CIT at __, 470 F. Supp. 3d at 1356–62. Among these errors was the Department's refusal to consider whether Columbia's door thresholds were excluded from the scope of the Orders under the "finished merchandise exclusion." *Id.*, 44 CIT at __, 470 F. Supp. 3d at 1358–60. This express exclusion from the scope applies to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Commerce concluded in the Scope Ruling that "the express inclusion of 'door thresholds' within the scope of the *Orders* (regardless of whether the door thresholds are ready for use at the time of importation) renders the reliance of . . . Columbia upon the finished merchandise exclusion inapposite." *Scope Ruling* at 35–36; *see also AD Order*, 76 Fed. Reg. at 30,651 & *CVD Order*, 76 Fed. Reg. at 30,654 ("Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks . . . ."). The court in *Columbia I* rejected the Department's reasoning because it misinterpreted the "door thresholds" exemplar in the scope language of the Orders. 44 CIT at __, 470 F. Supp. 3d at 1359 ("The scope language does not expressly include all door thresholds in which there is an extruded aluminum component. Instead, as the court has discussed, the inclusion of 'door thresholds' in the scope language as an exemplar is confined to door thresholds that *are* aluminum extrusions." (citing *AD Order,* 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654)).

The court in *Columbia I* concluded, further, that "Commerce also erred in reasoning that 'finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of "door thresholds" meaningless.'" 44 CIT at __, 470 F. Supp. 3d. at 1359 (quoting *Scope Ruling* at 36). As the court recognized, "[d]oor thresholds that are fabricated from aluminum extrusions are 'extrusions' for purposes of the scope language and are expressly included in the scope language by operation of the reference to 'door thresholds'; other door thresholds, which are not themselves 'extrusions' for purposes of the Orders, are not." *Id*. *Columbia I* added that:

> Rather than rendering the express inclusion of door thresholds meaningless, excluding the assembled goods at issue from the Orders according to the finished merchandise exclusion would have no effect at all on the express inclusion of door thresholds,

> for a straightforward reason: a door threshold that is fabricated from an aluminum extrusion could never qualify under the finished merchandise exclusion in the first place because the finished merchandise exclusion applies only to assembled goods.

Id. (citing *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654).

In light of the errors the court identified, the court in *Columbia I* ordered Commerce to reconsider the Scope Ruling and to give "full and fair" consideration to the issue of whether the finished merchandise exclusion applies to Columbia's door thresholds, "upon making findings that are supported by substantial record evidence." *Id*., 44 CIT at __, 470 F. Supp. 3d. at 1362.

In response to the court's opinion and order in *Columbia I*, Commerce filed a new decision (the "First Remand Redetermination") on December 23, 2020, Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 48–1 ("*First Remand Redetermination*"), which was reviewed by the court in *Columbia II*. In the First Remand Redetermination, Commerce, relying solely on statements by defendant-intervenors that did not pertain specifically to Columbia's door thresholds, and despite certain record evidence that *did* pertain to Columbia's products, implied, but did not expressly find, "that the specific door thresholds at issue in this proceeding are so designed and manufactured as to require cutting or machining prior to incorporation into a door frame or other structure." *Columbia II*, 45 CIT at __, 536 F. Supp. 3d at 1353; *see also First Remand Redetermination* at 44–45. The court attached significance to whether Columbia's imported door thresholds required cutting or machining prior to use because that issue "bears on the language in the finished merchandise exclusion referring to 'finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled *and completed* at the time of entry.'" *Id*., 45 CIT at __, 536 F. Supp. 3d at 1354 (quoting *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654). Recognizing the importance of this factual question, the court ordered Commerce in *Columbia II* to "make a factual determination to resolve this issue based on a consideration of the record evidence, viewed in the entirety." *Id*.

The court in *Columbia II* also found fault with certain reasoning in the First Remand Redetermination pertaining to the scope of the finished merchandise exclusion. Commerce determined that Columbia's door thresholds were described by the "subassemblies" provision in the scope language, *First Remand Redetermination* at 2, under which "[t]he scope includes the aluminum extrusion components that

are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below,"[2] *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. According to the First Remand Redetermination, "a subassembly is merchandise which is designed for the sole purpose of becoming part of a larger whole"; Commerce concluded that each of Columbia's door thresholds, which "must work in tandem with other components to be functional" and is "a component of a larger downstream product," cannot, for those reasons, qualify for the finished merchandise exclusion. *First Remand Redetermination* at 23–24 (citation omitted).

The court noted that Commerce, in the First Remand Redetermination, "reasoned that goods falling within the subassemblies provision of the Orders cannot also be considered goods qualifying for the finished merchandise exclusion, i.e., Commerce considers these two categories to be mutually exclusive." *Columbia II*, 45 CIT at __, 536 F. Supp. 3d at 1352 (citing *First Remand Redetermination* at 17–22). "Thus, Commerce employed an analysis under which any goods it deems to be described by the subassemblies provision are, *per se*, ineligible for the finished merchandise exclusion." *Id*. The court did not sustain this reasoning, nor did the court reject it. Instead, the court stated that "[t]he court need not decide whether this analysis is a correct interpretation of the scope language, for even if it is, the Department's decision still must be remanded to Commerce because it relies upon an impermissible finding or inference." *Id*. Thus, the court in *Columbia II* did not decide the question of whether or not Columbia's imported door thresholds were described by the subassemblies provision in the scope of the Orders.

The court proceeded in *Columbia II* to discuss the reasons why Commerce must decide the issue of whether Columbia's door thresholds "are so designed and manufactured as to require cutting and machining prior to incorporation into a door frame or other structure," 45 CIT at __, 536 F. Supp. 3d at 1353, and then decide whether or not the finished merchandise exclusion applied to Columbia's imported door thresholds.

With regard to the finished merchandise exclusion, Commerce reasoned in the First Remand Redetermination that the exemplars men-

[2] The reference to the "kit" is a reference to the "finished goods kit" exclusion, under which the antidumping and countervailing duty orders exclude an unassembled package of all the necessary parts to assemble a final finished good. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650, 30,651 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*"). Because the door thresholds at issue are imported in fully assembled, not disassembled form, this exclusion does not apply.

tioned in the scope language on the finished merchandise exclusion are defined by the scope language as finished merchandise and therefore, unlike Columbia's door thresholds, are not "intermediate products" described by the subassemblies provision. *Columbia II*, 45 CIT at __, 536 F. Supp. 3d at 1355–56 (quoting *First Remand Redetermination* at 46). The court identified flaws in the Department's reasoning, which failed to recognize that two exemplars of products the scope language described as satisfying the finished merchandise exclusion, finished windows with glass and doors with glass or vinyl, also describe products designed to become part of a larger whole. *Id*., 45 CIT at __, 536 F. Supp. 3d at 1355. The court noted, for example, that an assembled door is designed to become part of a larger structure, such as a door frame assembly, and a finished window part of a dormer or wall, with both ultimately destined to become part of a building. *Id*. Commerce nevertheless insisted in the First Remand Redetermination that because of the specific mention of the assembled door and the assembled window in the language of the finished merchandise exclusion, "[t]here is no need to further analyze whether the enumerated products in the finished merchandise exclusion work in conjunction with other products, and no requirement that, for example, a window with glass or a door with glass or vinyl be assembled into a house to satisfy the finished merchandise exclusion." *Id*., 45 CIT at __, 536 F. Supp. 3d at 1356 (quoting *First Remand Redetermination* at 46). The court opined in *Columbia II* that "[t]his reasoning is based on a serious misinterpretation of the scope language setting forth the finished merchandise exclusion." *Id.* "Contrary to the express terms of that exclusion, Commerce interprets the exemplars therein as separate, individual exclusions rather than as what they plainly are. They are exemplars, as shown by the use of the words 'such as.'" *Id*. (quoting *AD Order,* 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654).

At its conclusion, *Columbia II* directed Commerce to "reconsider in the entirety the decision reached in the [First] Remand Redetermination as to the finished merchandise exclusion and reach a new determination that complies with the instructions in this Opinion and Order." 45 CIT at __, 536 F. Supp. 3d at 1357.

In response to the court's opinion and order in *Columbia II*, Commerce issued the Second Remand Redetermination. Final Results of Redetermination Pursuant to Ct. Remand (Dec. 13, 2021), ECF No. 67–1 (*"Second Remand Redetermination"*). In the Second Remand Redetermination, Commerce determined, under protest, that the door thresholds were outside the scope of the Orders. *Id*. at 17.

The court in *Columbia III* explained that the Second Remand Redetermination was not a decision in a form the court could sustain because it "is not the actual scope ruling or determination Commerce plans to issue," so "it would not be self-effectuating should the court sustain it, and the agency decision that would follow if it were sustained would escape direct judicial review." 46 CIT at __, 587 F. Supp. 3d at 1382. Instead of providing the scope ruling intended to be issued, Commerce in the Second Remand Redetermination stated that "[s]hould the court sustain these Final Results of Redetermination, we will issue a revised scope ruling accordingly." *Second Remand Redetermination* at 17. The court held "the Department's proposed resolution of this litigation unsatisfactory" because "[n]ot only would it deny the court the opportunity to review the agency's actual decision on remand, it also would not allow the parties to comment on that decision before the court reviews it." *Columbia III*, 46 CIT at __, 587 F. Supp. 3d at 1382. The court directed "Commerce to issue a third remand redetermination that, like the agency determination contested in this litigation, is a scope ruling or determination for the court's review, and it must be in a form that would go into effect if sustained upon judicial review." *Id.*, 46 CIT at __, 587 F. Supp. 3d at 1383.

The court in *Columbia III* also took issue with the Second Remand Redetermination "in presenting no reasoning for ruling that the door thresholds are outside the scope of the Orders other than its incorrect conclusion that the court ordered Commerce to do so." *Id.* The court observed that "Commerce devoted most of the substantive discussion in the Second Remand Redetermination to its disagreements with certain of the issues the court decided previously" and explained how the Department's interpretation of *Columbia II* erred in three respects. *Id.*, 46 CIT at __, 587 F. Supp. 3d at 1383–84. The court ordered Commerce to submit a third redetermination upon remand that complies with *Columbia III*. *Id.*, 46 CIT at __, 587 F. Supp. 3d at 1385.

C. The Third Remand Redetermination

In the Third Remand Redetermination, Commerce decided once again, and again under protest, that Columbia's door thresholds, in the entirety, fall outside the scope of the Orders. *Third Remand Redetermination* at 3. Commerce stated in the Third Remand Redetermination that it "do[es] not intend to issue a scope ruling or other agency determination subsequent to this Court's review of this remand redetermination" and that "if the CIT [Court of International

Trade] affirms this redetermination, a *Federal Register* notice will be published stating that, consistent with the Court's holdings, Columbia's door thresholds are excluded from the scope of the *Orders*." *Id.* "Relevant instructions to U.S. Customs and Border Protection (CPB) giving effect to that determination, as appropriate, will also be issued at that time." *Id*.

As the court explained in *Columbia III*, Commerce was required to make a decision on whether the goods are within the scope of the Orders based on the record as a whole. Commerce has now done so in its decision in the Third Remand Redetermination in a form the court is able to sustain. The essential agency findings supporting the decision that the door thresholds, in the entirety, are outside the scope of the Orders are supported by substantial evidence on the record of this case. *See id.* at 8–16.

Defendant-intervenors' comments in opposition to the Third Remand Redetermination are unconvincing and merely reiterate arguments the court has rejected in its previous opinions and orders. Def.-Intervenors' Comments on Final Results of Third Redetermination Pursuant to Court Ct. Remand 1–3 (Sept. 26, 2022), ECF No. 88.

Defendant-intervenors argue, first, that the contested Scope Ruling was correct in "finding Columbia's door thresholds to be expressly included within the scope of these orders" and in ruling that the finished merchandise exclusion is "inapplicable." *Id*. at 1. As the court concluded in *Columbia I*, and as the scope language of the Orders makes clear, the express reference in the scope language to "door thresholds" as an exemplar refers to door thresholds that are aluminum extrusions, not assemblies such as those at issue here. *Columbia I*, 44 CIT at __, 470 F. Supp. 3d at 1359.

They argue, next, that "Commerce's first redetermination, under respectful protest, that even considering the exclusion, door thresholds are 'subassemblies' within the meaning of the scope and not excludable 'finished merchandise' was also supported by substantial evidence and in accordance with law." Def.-Intervenors' Comments 2. As discussed above, the Department's reasoning that "subassemblies" cannot qualify for the finished merchandise exclusion because they are goods "designed for the sole purpose of becoming part of a larger whole," *Columbia II*, 45 CIT at __, 536 F. Supp. 3d at 1355 (quoting *First Remand Redetermination* at 24), was rejected by the court in *Columbia II* as "contrary to the express terms of [the finished merchandise] exclusion," which includes "exemplars of products" even though they "are designed for the sole purpose of becoming part of a larger whole," 45 CIT at __, 536 F. Supp. 3d at 1356.

Third, referring to Columbia's door thresholds, defendant-intervenors argue that "substantial record evidence also demonstrated that these products generally require further finishing and fabrication after importation and prior to use, such that the thresholds would also fail to meet the [finished merchandise] exclusion requirements in this regard." Def.-Intervenors' Comments 2. This argument is also meritless. Commerce permissibly concluded that the evidence upon which defendant-intervenors rely for this argument did not pertain to the specific door thresholds at issue in this proceeding. Upon reassessing the record evidence, Commerce concluded in the Third Remand Redetermination that "the record does not support the conclusion that Columbia's specific door thresholds require cutting or fabrication after importation into the United States." *Third Remand Redetermination* at 18.

III. CONCLUSION

For the reasons discussed in the foregoing, the court will enter judgment sustaining the decision in the Third Remand Redetermination that Columbia's door thresholds are not within the scope of the Orders.

Dated: December 16, 2022
New York, New York

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

Slip Op. 22–145

DIAMOND TOOLS TECHNOLOGY LLC, Plaintiff, UNITED STATES, Defendant, AND DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Court No. 20–00060

[The court remands Customs' Final Remand Results in conformity with this opinion.]

Dated: December 16, 2022

Jay C. Campbell, White & Case LLP, of Washington, D.C., argued for plaintiff Diamond Tools Technology LLC. With him on the brief were *Walter J. Spak*, *Dean A. Barclay*, *Ron Kendler* and *Allison J. G. Kepkay*.

Antonia R. Soares, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Tamari J. Lagvilava*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

Daniel B. Pickard, Buchanan Ingersoll & Rooney PC, of Washington, D.C., argued for defendant-intervenor Diamond Sawblades Manufacturers' Coalition.

OPINION AND ORDER

Reif, Judge:

Before the court is the remand redetermination of U.S. Customs and Border Protection ("Customs") pursuant to the court's order ("Remand Order") in *Diamond Tools Tech. LLC v. United States* ("*Diamond I*"), 45 CIT __, 545 F. Supp. 3d 1324 (2021). *See* Final Remand Redetermination ("Remand Results"), ECF No. 70. In *Diamond I*, the court remanded in part Customs' Final Determination as to Evasion and Final Administrative Decision on Certain Diamond Sawblades and Parts Thereof from the People's Republic of China ("China"). *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356; TRLED Final Determination (7184) (Sept. 17, 2019) ("Final Determination"), CR 199, PR 220; REG AND RULINGS Final Administrative Determination for Diamond Tools (Jan. 29, 2020) PR 232. The court ordered Customs to make a finding consistent with the Remand Order as to whether Diamond Tools Technology LLC ("DTT USA" or "plaintiff") made any material and false statement or act, or material omission, pursuant to the second statutory requirement set forth in section 517(a)(5)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. §

1517(a)(5)(A) (2018).[1] *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356. On remand, Customs continued to find that the DTT USA made material and false statements or acts, or material omissions, with respect to the subject diamond sawblades entered prior to December 1, 2017. *See* Remand Results at 1. For the following reasons, the court remands the Remand Results to Customs for reconsideration in conformity with this opinion.

BACKGROUND

The court presumes familiarity with the facts of this case, as set out in *Diamond I*, and now recounts the facts relevant to the disposition of the instant action. On October 29, 2021, the court held that Customs' determination of evasion did not satisfy the requirement to establish that DTT USA entered covered merchandise by means of a material and false statement or act, or material omission. *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1351 (citing 19 U.S.C. § 1517(a)(5)(A)). In *Diamond I*, the court held that Customs did not explain how DTT USA's failure to seek clarification from Commerce constitutes a "material and false statement or act, or a material omission." *Id.* at 1354. Also, the court stated that Customs failed to reference any authority in its Final Determination and Final Administrative Decision that would create an obligation on DTT USA to seek a scope ruling from Commerce or to seek a clarification from Customs as to the applicability of the underlying antidumping duty ("AD") order. *Id.*; *see Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57,145 (Dep't of Commerce Nov. 4, 2009) (antidumping duty orders) (the "2009 Order"). The court ordered Customs to make a finding consistent with the court's opinion as to whether DTT USA made any material and false statement or act, or material omission concerning the entry of diamond sawblades predating December 2017. *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356.

On January 27, 2022, Customs filed its Remand Results. Remand Results at 1. In the Remand Results, Customs continued to find that DTT USA made material and false statements or acts, or material omissions, with respect to its entries of diamond sawblades. *See id.*

On February 28, 2022, DTT USA provided comments on the Remand Results. *See* Pl.'s Comments in Opp'n to the Final Results of Redetermination Pursuant to Court Remand ("Pl. Br."), ECF No. 77. Plaintiff argues that Customs' finding is inconsistent with the Re-

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

mand Order and that Customs' affirmative "evasion" determination continues to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *See id.* at 1 (citing 19 U.S.C. § 1517(g)(2)(A)-(B)). On March 30, 2022, defendant United States (the "Government") and defendant-intervenor Diamond Sawblades Manufacturer's Coalition ("DSMC") responded to the comments of DTT USA. *See* Def.'s Reply to Pl.'s Comments on the Remand Redetermination ("Def. Br."), ECF No. 83; Def.-Intervenor's Comments in Supp. of Redetermination Pursuant to Court Remand ("Def.-Intervenor Br."), ECF No. 82.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c). The Enforce And Protect Act ("EAPA") requires the court to determine whether a determination issued pursuant to 19 U.S.C. § 1517(c) or an administrative review pursuant to 19 U.S.C. § 1517(f) was conducted "in accordance with those subsections" by examining whether Customs "fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(1)-(2). "While the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency, the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). Further, "[i]n reviewing that explanation, a court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Id.* at 31.

On remand, the court also reviews the Remand Results "for compliance with the court's remand order." *See Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted). "[I]n remand proceedings, an administrative agency must modify its original determination in accordance with the remand order." *Dorbest Ltd. v. United States*, 35 CIT 136, 145 (2011). Substantial evidence requires "more than a mere scintilla" of evidence. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Moreover, "[i]t is axiomatic that the remand redetermination . . . must stem from a good faith *reconsideration* . . . [I]t must be supported by findings of fact grounded in substantial evidence on the record of this review, and it must adhere to statutory requirements." *Union Steel v. United States*, 33 CIT 1392, 1399, 645 F. Supp. 2d 1298, 1305 (2009)

(emphasis supplied)*, opinion set aside on reconsideration*, 35 CIT 1647, 804 F. Supp. 2d 1356 (2011) *judgment entered*, 37 CIT 1201 (Aug. 8, 2013).

LEGAL FRAMEWORK

The EAPA directs Customs to investigate allegations of evasion of AD and countervailing ("CVD") duties. *See* 19 U.S.C. § 1517. Customs must initiate an investigation within 15 days of receiving an allegation that "reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion." *Id.* § 1517(b)(1). The EAPA defines evasion as:

> [E]ntering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

Id. § 1517(a)(5)(A). The statute defines "covered merchandise" as merchandise that is subject to an AD or CVD order. *Id.* § 1517(a)(3)(A)-(B).

As the court stated in *Diamond I*, the purpose of the EAPA "was to empower the U.S. Government and its agencies with the tools to identify proactively and thwart evasion at earlier stages to improve enforcement of U.S. trade laws, including by ensuring full collection of AD and CVD duties and, thereby, preventing a loss in revenue."[2] *Diamond I,* 45 CIT at __, 545 F Supp. 3d at 1351 (citing H.R. Rep. No. 114–114, pt. 1 (2015)).

---

[2] In 2015, the Committee on Ways and Means in the U.S. House of Representatives released a report on the Trade Facilitation and Trade Enforcement Act of 2015. H.R. Rep. No. 114–114, pt. 1 (2015). This report demonstrates that Congress intended for the EAPA to provide a specific timeline for evasion investigations. *Id.* Sander M. Levin, Ranking Member of the Committee, included the following statement in the Additional Views section of the report:

> There appears to be growing consensus that ENFORCE is the appropriate way to address allegations of evasion. Prior efforts to require Customs to enforce these allegations by using existing statutory provisions (e.g., Section 516 of the Tariff Act of 1930) have failed by not requiring Customs to act on a petition within a fixed period of time. The longer Customs takes, the more entries are liquidated — that is, they become final, and any additional duties owing are foregone.

Id. at 381; *see also* S. Rep. No. 114–45 at 12 (2015).

DISCUSSION

I. Whether Customs complied with the Remand Order in determining thatDTT USA made a material and false statement or act, or material omission

A determination of evasion requires three elements: (1) entering covered merchandise into the United States; (2) by means of any document or data or information, written or oral statement, or act that is material and false, or any omission that is material; and (3) that results in any applicable cash deposit or other security being reduced or not applied to the merchandise. *See* 19 U.S.C. § 1517(a)(5)(A); *All One God Faith, Inc. v. United States*, Slip Op. 22–96, 2022 WL 3539511, *2 (CIT Aug. 18, 2022). In *Diamond I,* the court held that the diamond sawblades were properly categorized as "covered merchandise," but remanded to Customs to explain how DTT USA's entry of diamond sawblades prior to December 2017 as type 01 entries constituted a "statement. . . that is material and false" under the EAPA. 19 U.S.C. § 1517(a)(5)(A).

A. Positions of the parties

DTT USA argues that the Remand Results are inconsistent with the Remand Order and that Customs' affirmative "evasion" finding continues to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Pl. Br. at 1. First, DTT USA challenges Customs' conclusion that the EAPA does not have a culpability requirement. *See id.* at 4–11. DTT USA asserts that the court in *Diamond I* held that the plain meaning of material "false" statement or omission requires "some" degree of culpability. *Id.* at 3 (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1361). DTT USA further argues that Customs ignored the court's definition of "false" by asserting that "false" means "[e]rroneous, wrong" as well as the court's definition of "omission." *Id.* at 4.

DTT USA also challenges Customs' argument that the explicit culpability requirement of 19 U.S.C. § 1592(a) demonstrates that the absence of such an explicit culpability requirement in the EAPA means that the EAPA does not require *any* degree of culpability. *See id.* at 6–8. DTT USA further challenges Customs' position that a culpability requirement would be inconsistent with the "covered merchandise referral" provision codified under 19 U.S.C. § 1517(b)(4)(A). *See id.* at 8–10.

DTT USA also contends that the Remand Results do not comply with the court's conclusion in *Diamond I* that DTT USA was not obliged to request a scope ruling in light of Commerce's determination

in *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29,303 (Dep't of Commerce May 22, 2006) ("2006 Final LTFV Determination") and accompanying Issues and Decision Memorandum ("2006 IDM"). *See id.* at 10–15 (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1354–55). DTT USA challenges Customs' finding that the 2006 IDM placed importers on notice of circumvention concerns by asserting it is inconsistent with the context of the 2006 IDM. *See id.* at 11–14. DTT USA asserts that Commerce in the 2006 IDM rejected the petitioner's argument that the country of origin should be the location where the segments are produced — which the petitioner stated would pose circumvention concerns — and that Commerce instead determined that the country of origin is the location where the segments are joined to the core. *See id.* at 11–12. DTT USA argues that the court acknowledged Commerce's conclusion in the 2006 IDM, including the statement that Commerce retains authority to address circumvention, and found that Customs failed to reference any authority imposing an obligation on DTT USA to seek a scope ruling or clarification. *Id.* (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1354–55).

DTT USA further asserts that the claim that the importer lacked an obligation to request a scope ruling would not subvert the purpose of the EAPA to capture retroactively entries entered prior to an investigation. *See id.* at 14–15. DTT USA argues that Customs may suspend liquidation and require cash deposits only if it finds that the importer engaged in "evasion" under the EAPA. *Id.* (citing 19 U.S.C. §§ 1517(a)(5)(A), (c)(1), (d)(1)). Last, DTT USA contends that the Remand Results failed to establish that the importer made a false statement by disregarding the court's holding that importing diamond sawblades as Thai-origin was not an "erroneous," "untrue," or "deceitful" statement. *Id.* at 15 (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1353).

On remand, Customs continued to find that DTT USA made material and false statements with respect to its entries of diamond sawblades imported prior to December 1, 2017. *See* Remand Results at 3–12. Customs concluded in particular that: (1) the EAPA does not require a finding of intent or culpability; and (2) the importer did not exercise reasonable care when it failed to seek a scope ruling. *See id*.

In regard to the first conclusion, Customs reasoned that had Congress required importer "intent" in the context of evasion under the EAPA, Congress would have explicitly included an intent requirement in the statute, as Congress did with respect to 19 U.S.C. §

1592(a). *Id.* at 3–5. Customs further explained that the EAPA is a "strict liability statute" in view of the purpose of the statute to collect AD and CVD duties owed to the U.S. government. *Id*. at 5. Before the court, the Government asserts that Customs' conclusion is supported by statutory construction or, alternatively, that Customs' conclusion is entitled to *Chevron* deference, Def. Br. at 4–15 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). Moreover, if *Chevron* deference does not apply, the Government contends that Customs' interpretation still is entitled to deference under *Skidmore*. *Id*. at 15–17 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1366 (Fed Cir. 2005)).

In regard to the second conclusion, Customs stated that importers are required to exercise reasonable care when making an entry or submitting documentation to Customs pursuant to 19 U.S.C. § 1484. *See* Remand Results at 9. Customs concluded that DTT USA did not exercise reasonable care when it failed to seek a scope ruling despite being "on notice that Commerce had acknowledged potential circumvention concerns." *Id.* at 9–10.

DSMC agrees with Customs' conclusions in the Remand Results and argues that the court should sustain the Remand Results. *See* Def.-Intervenor Br. at 1.

B. Analysis

The court concludes that the Remand Results do not comply with the Remand Order that Customs provide an adequate explanation as to its determination that DTT USA made a material and false statement or act, or material omission. *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356. As such, the court concludes that the Remand Results are not in accordance with the Remand Order, not supported by substantial evidence and not otherwise in accordance with law.[3]

1. Whether Customs adequately explained that DTT USA made a materialand false statement or omission

In its Final Determination, Customs claimed that DTT USA's failure to enter the diamond sawblades as covered by the AD order in this case constituted the introduction of covered merchandise "by means of any [. . .] statement, or act that is material and *false*, or any

[3] *See Prime Time Com. LLC v. United States*, 45 CIT__, __, 495 F. Supp. 3d 1308, 1313 (2021) ("The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014)), *aff'd,* No. 2021–1783, 2022 WL 2313968 (Fed. Cir. June 28, 2022).

omission that is material," 19 U.S.C. § 1517(a)(5)(A) (emphases supplied) — and a consequent evasion of the 2009 Order. Final Determination at 8. In *Diamond I*, the court remanded this issue to Customs, noting that:

> Customs' conclusion appears to hinge either on (1) the presumption that entering covered merchandise without so declaring it is *per se* false or an omission, or (2) the legal conclusion that DTT USA was under an obligation to notify Customs of the Chinese origin of some of its cores and segments.

45 CIT at __, 545 F. Supp. 3d at 1353.

On remand, Customs claimed that "[s]electing an incorrect entry type constitutes a false statement." Remand Results at 11. Customs devoted significant space to its re-presenting its argument that there is a "[l]ack of [an] [i]ntent [r]equirement in the EAPA," *id.* at 3–7;[4] however, what Customs failed to do was to provide "a well-buttressed and well-reasoned explanation of its conclusion," as the court directed, *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1355.

The court concludes for three reasons that Customs failed to demonstrate that DTT USA's classification of its entries constitutes a material and false statement or material omission under 19 U.S.C. § 1517(a)(5)(A). First, Customs' application in this case of the statute is inconsistent with its language and structure. Second, even if Customs' application of the statute were not inconsistent, Customs' interpretation of the statute is not entitled to deference in this case. Third, the terms of the statute do not encompass the particular present circumstances.

a. Statutory construction

Customs' application of the statute in this case violates a core maxim of statutory construction. It is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (first quoting *Williams v. Taylor*, 529 U.S. 362,

[4] In support of this position, the Government states that the statute's design supports Customs' interpretation that "false" does not require "establishing a culpability level such as intent or negligence." Def. Br. at 8.

404 (2000); and then quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)).[5]

Customs' construction in both its Final Determination and Remand Results of the material and false statement or material omission provision of the statute would render that provision a nullity, thereby violating a core principle of statutory construction. The court reaches this conclusion because neither Customs' Final Determination nor its Remand Results provided an adequate explanation of Customs' determination.[6] Rather, Customs rests solely on its conclusion that DTT USA entered "covered merchandise" and represented it in entry documentation as merchandise that was not subject to an AD Order.[7] Remand Results at 7–9. As this court previously determined in *Diamond I*, 45 CIT at __, 545 F. Supp. 3d at 1354, DTT USA's act in itself does not meet the standard for a material and false statement without an adequate explanation and elucidation from Customs.

At the time of entry, DTT USA's representation of the entry type of the diamond sawblades reflected an accurate understanding of the 2006 IDM issued by Commerce:

---

[5] The Government raises this principle by quoting language from the Supreme Court in reply to plaintiff's comments on the Remand Results. Def. Br. at 9 (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). The Government explains: "Applying this canon, Customs found that 'to require a finding of knowledge or intent in a case where [Customs] has made a covered merchandise referral to Commerce would be inconsistent with the covered merchandise referral process as outlined in the EAPA statute.'" *Id.* (quoting Remand Results at 6). The Government's effort in this case to apply longstanding maxims of statutory interpretation to support Customs' "strict liability" theory fails for the reasons discussed *infra*.

[6] In *Home Meridian Int'l Inc. v. United States*, 36 CIT 1279, 1293, 865 F. Supp. 2d 1311, 1324 (2012), the court held that:

> Commerce has insufficiently explained the connection between the selection of surrogate countries and the selection of bookend countries. Absent a new and persuasive explanation, on these facts Commerce's decision to reject contemporaneous data in favor of non-contemporaneous data is unreasonable. The court remands the selection of bookend countries for redetermination or further explanation.

In *USEC Inc. v. United States*, 27 CIT 489, 506, 259 F. Supp. 2d 1310, 1326 (2003), the court held that "Commerce's decision requires a more persuasive explanation than provided in the agency's determinations."

[7] Customs admonished DTT USA for failing to exercise "reasonable care" under 19 U.S.C. § 1484 and for what Customs described as DTT USA's "blind reliance" on Commerce's language in the 2006 IDM. Remand Results at 9. Then, Customs claimed that "it would have behooved" DTT USA to request a scope ruling concerning diamond sawblades. *Id*. The court finds this posture peculiar. The core purpose of a transparent administrative process is for Commerce, Customs and other agencies to provide clear decisions on which parties can rely in engaging in commercial transactions. *See, e.g.*, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2575–76 (2019) (explaining that "[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public"); *Wheatland Tube Corp. v. United States*, 17 CIT 1230, 1237, 841 F. Supp. 1222, 1228 (1993) (recognizing "the value and need for consistency and predictability in the administration of the trade laws").

> [T]he Department has determined that it is the attachment of cores to segments that gives finished diamond sawblades their essential quality, not the manufacture of diamond segments. Even though there is a significant capital investment also associated with manufacturing diamond segments, given the fact that the attachment process imparts the essential quality of the diamond sawblade, coupled with the substantial capital investment and technical expertise that is required for the attachment process, we continue to find that the country of origin is determined by the location where segments and cores are attached to create finished diamond sawblades.

2006 IDM at Comment 4.

Commerce's words were unequivocal and left no doubt as to the meaning of the precise scope of the AD order in this case. What is more, in the 2006 IDM Commerce itself expressly rejected the petitioner's concern that Commerce's AD Order and accompanying IDM could lead to circumvention. *See* 2006 IDM at Comment 4. In response to the petitioner's stated concern — *i.e.*, that "the minimal capital investment required for the attachment process poses circumvention concerns," *see id*. — Commerce doubled down on its defense of its scope determination and concluded that the *petitioner's* proposed approach to determining the scope of the order was at least as likely to lead to circumvention issues:

> Petitioner argues that the minimal capital investment required for the attachment process poses circumvention concerns. As discussed above, the Department finds that the capital investment required for attaching segments to cores is substantial. In addition, country of origin determined by the location of segment manufacture would still pose circumvention concerns, as a producer of diamond sawblades could transfer aspects of segment manufacturing to third countries, *e.g.*, shipping pre-mixed bond powder and diamonds to third countries for pressing and baking into segments. In any event, the Department retains that statutory authority to address circumvention concerns as appropriate.[8]

[8] In the Remand Results, Customs stated that Commerce's wording in the 2006 IDM indicates that "Commerce reserved authority to address circumvention issues as they arose." Remand Results at 8. The court finds this portrayal of Commerce's explanation inapt. Commerce is not required to "reserve authority" to address circumvention concerns. Moreover, contrary to Customs' characterization, Commerce in the language quoted by Customs *refuted* the petitioner's concerns regarding Commerce's approach, rather than placing importers on notice regarding the petitioner's concerns in regard to the country of origin determinations. *See* 2006 IDM at Comment 4.

2006 IDM at Comment 4.

The 2006 IDM was a core public decisional document to explain to the parties and the public the scope of the 2009 Order that was still in effect when DTT USA classified its covered merchandise at the time of entry prior to the circumvention determination[9] that later changed the scope of the Order.

Separately, Customs asserted that because 19 U.S.C. § 1592 delineates specific degrees of culpability,[10] the absence of terms designating intent and culpability in 19 U.S.C. § 1517 demonstrates that the language in § 1517 means that the EAPA is a "strict liability" statute. Remand Results at 5.

Customs' assertions are not supported by the EAPA's language or legislative history. Customs' observation that § 1592 specifies three levels of culpability does not relieve Customs (or the court) from the requirement to apply the terms material and false statement or omission in § 1517. The court may look to complementary statutes for context and interpretative guidance, but § 1592 as a direct comparison for § 1517 is inapposite. By its own admission, under Customs' application, that statutory requirement — the second of three — would exist perforce every time Customs found that the statutory requirement of merchandise being "covered" — the first of three — was found by Customs to exist. As noted, such an application of the statute would violate the canons of statutory construction.

Customs protests that "the purpose of the EAPA is to collect antidumping and countervailing duties (CVD) that are due to the U.S. Government, and that the U.S. Government has been deprived of because the importer failed to report its merchandise as subject to an applicable AD/CVD order." Remand Results at 5. The purpose of the EAPA is indeed to "collect antidumping and countervailing duties . . . that are due to the U.S. Government" *when* Customs finds, consistent with the terms of § 1517— namely, a finding based on substantial evidence and an adequate explanation that the three statutory criteria have been met — that the importer has *evaded* the order. *Id.*

DTT USA filling out the import documentation based on the explicit and clear terms of Commerce's order and the associated 2006 IDM,

[9] Commerce published this affirmative final determination of circumvention in the Federal Register on July 16, 2019. *See* Commerce Scope Referral Memo (7184) (July 23, 2019), PR 211.

[10] 19 U.S.C. § 1592 sets forth levels of importer culpability and empowers Customs to determine whether a person has violated that provision by fraud, gross negligence or negligence. *See* 19 U.S.C. § 1592(a)(1). For its part, § 1517 does not contain parallel language enumerating specific levels of culpability, nor does the statute contain the term strict liability and the statute's legislative history does not indicate the application of that concept. *See id.* § 1517(a)(5)(A).

does not, in accordance with statutory construction, comprise a material and false statement or omission. It is not the role of the court to prognosticate what the term may mean in the abstract. It *is* the mandate and responsibility of the court to conclude, based on the record presented to the court — in which Commerce not only was crystal clear but in fact doubled down on its clear conclusion and formulation — that filling out the forms in a way that tracked explicitly Commerce's IDM, does not constitute a material and false statement or omission. In fact, not only did the importer expressly and *verbatim* follow the terms of the Order, there was, in fact, no other possible interpretation of the scope of this Order.[11]

As noted, Customs' proposed approach is inconsistent with basic statutory interpretation and does not support a conclusion that DTT USA's entry for diamond sawblades constitutes a "material and false" statement or "omission that is material." 19 U.S.C. § 1517(a)(5)(A)

b. Deference to Customs' interpretation of the EAPA

The court concludes that Customs' finding that DTT USA provided a statement that is material and false or an omission that is material is not entitled to deference under *Chevron*, 467 U.S. 837, or respect under *Skidmore*, 323 U.S. 134. *See* Def. Br. at 4–5, 15.

Turning first to *Chevron*, as the court noted in *Diamond I* : "When reviewing an agency's interpretation of a statute, the court must first determine 'whether Congress has directly spoken to the precise question at issue.' If the court concludes that the statute does address the precise question, the court '"must give effect" to Congress's unambiguous intent.'" 45 CIT at __, 545 F. Supp. 3d at 1349 (first quoting *Chevron*, 467 U.S. at 842; and then quoting *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (citing *Chevron*, 467 U.S. at 842–43)).

As discussed *supra*, Section I.B.1.a, Congress was unambiguous in establishing a three-part requirement for Customs to find evasion. 19 U.S.C. § 1517. Accordingly, *Chevron* does not apply in this case.

The Government in its final brief before the court also invokes deference under *Skidmore*, Def. Br. at 15–17, in the event that the court rejects deference under *Chevron*. *Id.* at 4–13. Customs' decision is not entitled to *Skidmore* respect. The Supreme Court has accorded "a measure of deference proportional to the 'thoroughness evident in

[11] At oral argument, the Government stated that Commerce's 2006 IDM is irrelevant to the interpretation of the 2009 Order. Oral Arg. Tr. at 35:17–19, ECF No. 90. The court finds this argument unpersuasive and notes an apparent contradiction in Customs' urging the court to refer to Commerce's 2006 IDM while the Government argued at oral argument that the 2006 IDM is irrelevant in other parts of the Government's legal argumentation. *Id.*

[the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 159 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140)). The Court added:

> [D]eference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Id. at 155.[12]

In this case, Customs, as already noted, has not provided an explanation of how DTT USA's entry of diamond sawblades under type 01[13] from Thailand constituted a false statement when Commerce itself instructed importers "that the country of origin should be determined by the location of where the segments are joined to the core."[14] 2006 IDM at Comment 4. Since Customs did not conduct a thorough reexamination and did not provide a clarification in the Remand Results, Customs' Remand Results are not entitled to *Skidmore* deference or respect. In fact, the timing of the Government's introduction of the *Skidmore* argument appears more suited as a "'convenient litigating position,' or a '*post hoc* rationalizatio[n].'" *Christopher*, 567 U.S. at 155 (first quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); and then quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

---

[12] Cases in which this court has afforded an agency respect under the standard set out in *Skidmore* stand in sharp contrast to the present case. *See Four Seasons Produce, Inc. v. United States*, 25 CIT 1395 (2001). In *Four Seasons*, the court stated that it would defer to Customs because, inter alia, of Customs': (1) "experience and informed judgment"; and (2) "thorough and carefully reasoned analysis." *Id.* at 1403. In the present case, the analysis presented in the Remand Results is neither thorough nor carefully reasoned and the consideration afforded to DTT USA on remand reflects legal argumentation rather than a reconsideration of the facts of the case. Finally, it is notable that the Government argued for *Skidmore* respect in its final response before this court on remand, suggesting a litigating posture and a *post-hoc* rationalization of Customs' decision presented by the Government that underscore the lack of serious reconsideration on remand by Customs. *See Christopher, infra,* 567 U.S. at 155

[13] The type 01 entry code constitutes merchandise intended for consumption that is not subject to an AD order.

[14] The court further notes that DTT USA, upon entering the subject merchandise could not have reported "Thailand" as the country of origin while also reporting the diamond sawblades as "type 03" (subject to AD orders), as Customs suggested DTT USA should have done. The court considers the impracticability — if not impossibility — of registering the diamond sawblades in this manner as a further indication of the lack of consideration Customs has afforded to the particular facts of this case and the legal issue presented in this case. Oral Arg. Tr. at 69:23–70:8.

To conclude, the court recalls that it ordered Customs "to provide a well-buttressed and well-reasoned explanation of its conclusion." *Diamond I,* 45 CIT at __, 545 F Supp. 3d at 1355.[15] Customs failed to provide such an explanation altogether, and therefore Customs' Remand Results are not entitled to deference under *Chevron*, or deference or respect under *Skidmore*.[16]

c. Intent or knowledge of falsity

Customs concluded that DTT USA's failure to select the correct entry type for its imports of diamond sawblades constituted a material and false statement and that "there is simply no language in the EAPA statute requiring [Customs] to find that an importer made false statements intentionally or with a degree of culpability." Remand Results at 14. Customs' response to the court's remand centered around Customs' legal argument protesting that Customs did not have to prove intent or culpability, Remand Results at 4, 14, and failed to provide reasoning adequate to support its conclusion.

There may be circumstances in which a determination by Commerce would create the need for a different responsive action by the importer, including instances in which an importer should request a scope ruling. Those circumstances could include instances in which Commerce was unclear, or expressly or by inference explained that the scope might need to evolve due to developments in the industry or in the manufacturing of the subject merchandise, or cases in which the scope covered multiple products or product varieties. Such a formulation could include, for example, Commerce basing its instructions on certain percentage values for the components or manufacturing processes, or the record indicating that these values might evolve and suggesting that the scope of the order might need to be revisited should the values change.

---

[15] In fact, the court elaborated that "[t]he fact that there may be additional consequences to an importer from a finding of evasion punctuates the need for Customs to provide a . . . well-reasoned explanation." *Diamond I,* 45 CIT at __, 545 F Supp. 3d at 1355. Customs claimed that "not all EAPA investigations may result in a penalty action." Remand Results at 6. Customs' attempt to respond to this aspect of this court's Remand Order by dismissing the exposure and potential liability to an exporter is not persuasive. In fact, Customs' own discussion confirms the accuracy and import of the court's initial statement: namely, that an affirmative finding of evasion by Customs creates exposure to additional consequences.

[16] A significant motivation for applying *Skidmore* respect is to promote uniformity and reliance on administrative agencies' decisions. *See Skidmore,* 323 U.S. at 140; *see also United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (iterating the "value of uniformity in [Customs'] administrative and judicial understandings of what a national law requires"). According *Skidmore* respect in this case would actually *undermine* the goals of uniformity and reliance identified by the Court. DTT USA relied on crystal clear language — language not susceptible of any other possible interpretation — in an administrative determination. To penalize DTT USA for doing so would harm not only DTT USA, but also the credibility of the administrative process.

Whatever the possibility of any of these scenarios arising in the future, none is presented here. In this case, not only did Commerce issue a clear and precise scope determination regarding country of origin, Commerce also expressly asked and answered the question of possible circumvention in the accompanying IDM. *See* 2006 IDM at Comment 4. DTT USA relied on and followed Commerce's clear and specific instructions — including Commerce's explicit rejection of petitioner's circumvention concerns. In view of these points, DTT USA's entry of diamond sawblades under type 01 instead of type 03 does not constitute a material and false statement under the EAPA.

CONCLUSION

Directed by Guy Hamilton, *Diamonds Are Forever* is a 1971 spy film based on the novel of the same title, authored by Ian Fleming. The film features Agent 007 James Bond in his efforts to uncover a diamond smuggling operation and foil plans to launch a weaponized laser satellite. In one scene, after many failed attempts to subdue him, Bond is knocked out by two henchmen, Mr. Wint and Mr. Kidd. As they load Agent Bond into the trunk of their car to dump him in a pipe in the desert, they have the following exchange:

Mr. Wint: "If at first you don't succeed, Mr. Kidd. . ."

Mr. Kidd: "Try, try again, Mr. Wint."[17]

* * *

For the foregoing reasons, the court remands Customs' Remand Results to Customs for reconsideration in conformity with this court's opinion. The court directs Customs to reconsider its conclusion consistent with this decision and the facts of this case and, in particular, the applicability of the EAPA in the confined circumstance of an importer's reliance on Commerce's clear directive.

Based on the foregoing reasons, it is hereby

ORDERED that Customs' Remand Results are remanded to Customs for reconsideration to make a finding in conformity with this opinion; it is further

ORDERED that Customs shall file its remand results within 90 days following the date of this Opinion and Order; it is further

ORDERED that, within 14 days of the date of filing of Customs' remand results, Customs must file an index and copies of any new administrative record documents; and it is further

[17] DIAMONDS ARE FOREVER (Eon Productions 1971).

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

Dated: December 16, 2022
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 22–146

JA SOLAR INTERNATIONAL LIMITED, AND JA SOLAR USA INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 21–00514

[Remanding Commerce's *Final Results* for further explanation and reconsideration of the application of its knowledge test.]

Dated: December 19, 2022

Bryan P. Cenko and *Jeffrey S. Grimson*, Mowry & Grimson, PLLC, of Washington, D.C., argued for Plaintiffs JA Solar International Limited and JA Solar USA Inc.

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. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Benjamin W. Juvelier*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, D.C.

OPINION

Gordon, Judge:

This action involves the U.S. Department of Commerce's ("Commerce") final results of the fifth administrative review of the antidumping ("AD") order on crystalline silicon photovoltaic products ("solar products") from Taiwan. *See Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 86 Fed. Reg. 49,509 (Dep't of Commerce Sept. 3, 2021) (final results and partial rescission of AD review, and final determ. of no shipments) ("*Final Results*"), and the accompanying Issues and Decision Memorandum, A-583–853 (Aug. 27, 2021), *available at* https://access.trade.gov/Resources/frn/summary/taiwan/2021–19052–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiffs JA Solar International Limited and JA Solar USA Inc., (together, "JA Solar"). *See* Pls.' Mem. of Points and Auths. in Supp. of R. 56.2 Mot. for J. upon the Agency R., ECF No. 24[1] ("Pls.' Br."); *see also* Def.'s Resp. to Pls.' R. 56.2 Mot. for J. upon the Agency R., ECF No. 29 ("Def.'s Resp."); Reply Br. in Supp. of R. 56.2 Mot. for J. upon the Agency R., ECF No. 37 ("Pls.' Reply"). The court has jurisdiction pursuant to Section 516A(a)(2(B)(iii) of the Tariff Act

[1] All citations to the parties' briefs and the agency record are to their confidential versions unless otherwise noted.

of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[2] and 28 U.S.C. §1581(c). For the reasons set forth below, the court remands Commerce's *Final Results*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2022). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2022).

II. Discussion

A. Background

In an AD proceeding, Commerce determines the export price of the subject merchandise and assigns sales of that merchandise to the party who sets the export price for the purpose of calculating that party's AD margin. *See Decision Memorandum* at 8–9. Export price is defined as:

[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.

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States....

19 U.S.C § 1677a(a). In assigning sales to the proper party, the foreign producer or exporter, Commerce focuses on the term "first sold" in the statute, interpreting it as denoting the first party in the sales chain with knowledge of the merchandise's United States destination at the time of sale. *Decision Memorandum* at 8–9. This reflects Commerce's view that the party who first sells the subject merchandise destined for the United States is the likely "price discriminator," and thus the one who "may have engaged in dumping." *Id.*

To identify the price discriminator, Commerce uses a "knowledge test" in which it "considers both a seller's actual knowledge (knew) and [constructive][3] knowledge (should have known) of the final destination of the subject merchandise at the time of sale." *Id.* at 9. A demonstration of "actual" knowledge requires "an admission" by the foreign producer or exporter that it knew that the United States was the ultimate destination of the subject merchandise. *See* Pls.' Br. at 3 (quoting *INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 125, 957 F. Supp. 251, 265 (1997)); Def.'s Br. at 4 (citing same language). Alternatively, Commerce may determine that a foreign producer or exporter had "constructive" knowledge, *i.e.* that it *should have known* its goods were destined for the United States, and is to "diligently inquire into allegations of knowledge and render its conclusion based on *all relevant facts and circumstances*." *See* Pls.' Br. at 3 (emphasis added) (quoting *Stupp Corp. v. United States*, 43 CIT ___, ___, 359 F. Supp. 3d 1293, 1310 (2019)); Def.'s Resp. at 4 (citing same language). In determining the existence of knowledge, Commerce takes into consideration a variety of documentary evidence. *See Decision Memorandum* at 9 (explaining that, among other things, Commerce considers "whether the relevant party prepared or signed any certificates, shipping documents, contracts, or other such documents stating that the destination of the merchandise was the [United States, as well as,] whether the relevant party used any packaging or labeling stating that the merchandise was destined for the U.S. Ad-

[3] The second prong of Commerce's knowledge test, which asks whether a respondent "should have known," is referred to by the parties as both "constructive" knowledge and "imputed" knowledge. *See, e.g.*, *Decision Memorandum* at 6, 7 (using "constructive"); *id.* at 8, 11 (using "imputed"). For consistency and clarity, this opinion uses only the term "constructive knowledge."

ditionally, in prior cases, Commerce examined whether any unique features, brands, or specifications of the merchandise indicated that the destination was the U.S.").

In the underlying administrative review, Commerce applied the knowledge test to identify the first sale of each component part of the subject solar products and include those sales in the margin calculation for the corresponding seller. The focus of the underlying dispute involves certain sales of crystalline silicon photovoltaic cells ("solar cells") from Inventec Solar Energy Corporation ("ISEC") to a subcontractor of JA Solar that were incorporated into solar products ultimately destined for the United States. *See generally Decision Memorandum* at Cmt. 2.[4] Commerce determined that JA Solar, not ISEC, was the first seller for purposes of calculating export price under § 1677a(a), and therefore, refused to include those sales in ISEC's margin calculation. *Id.* at 12.

Commerce explained that because "solar cells are an intermediary product in the production of solar panels, [with] both cells and panels ... covered by the scope of the order, the application of the knowledge test to cell manufacturers in Taiwan has been central to this proceeding since the investigation." *Id.* at 9. Commerce emphasized that it had previously excluded "a large portion of the reported sales" of mandatory respondents in its investigation "because of the lack of documentary evidence of knowledge at the time of sale." *Id.* at 9–10. Commerce also noted that in applying the knowledge test, "[s]worn statements made well after the time of the specific sales at issue were not relevant to the analysis of whether the [respondent] had reason to know at the time of the sale that specific sales of subject merchandise were destined for the U.S." *Id.* at 10. Commerce reiterated its "practice to 'give greater consideration to physical evidence and documentation prepared at the time of a transaction than to unsubstantiated statements or declarations that may be in the best interest of the investigated company sourcing those statements.'" *Id.*

In reaching its final determination, Commerce highlighted the following key facts:

> ISEC and its customer communicated with each other via instant messaging, discussing the transactions, and specifically mentioning the U.S. destination. Subsequently, ISEC and the customer began negotiations on a contract, and they exchanged several drafts. A key issue in these negotiations was whether or

[4] The period of review ("POR") covers February 1, 2019, through January 31, 2020. *Decision Memorandum* at 5. ISEC's sales of solar cells "to a third country for the assembly of solar modules, which would subsequently be delivered by the customer to the U.S.," were negotiated in early 2019 and shipments began in July 2019 and continued through the POR. *Id.*

> not, with certainty, the destination of ISEC's solar cells would be the U.S. market. At the end of the negotiations, the contract terms agreed upon by parties deliberately left ambiguous the ultimate destination of the merchandise, even though no other possible destination was named. Although ISEC claims that this contract language is not meaningful, the negotiated language that ISEC officials required in the contract indicates that ISEC really did not know where the solar cells would ultimately go. Such knowledge is the essence of Commerce's knowledge test.

Decision Memorandum at 10 (footnotes omitted). Commerce rejected "additional evidence provided by ISEC," consisting of sworn statements of prior knowledge by ISEC employees because those statements "were made expressly to respond to our requests for information in this administrative review, are the same type of self-serving statements that we refused to consider as valid evidence of knowledge in the investigation of this proceeding, when such statements were presented to Commerce at verification by [another respondent]." *Id.* at 10–11 (concluding that "[t]he memories of employees, even as sworn statements, are not documentary evidence of knowledge of the destination").

Commerce then found that ISEC's "customer for these sales[, and not ISEC,] had 'first knowledge' of the U.S. destination, and [therefore] was the first company in the sales chain that 'first sold' the subject merchandise for exportation to the United States." *Id.* at 12. Accordingly, Commerce determined that it would continue "to exclude these sales in ISEC's final margin calculation." *Id.* JA Solar now challenges the "exclusion of these sales for purposes of calculating ISEC's final dumping margin []as not supported by substantial evidence because the only reasonable reading of the record as a whole, ..., was that ISEC knew or had reason to know that its sales to JA Solar were destined for the United States." Pls.' Br. at 3–4.

B. Actual Knowledge

JA Solar argues that Commerce should have found that ISEC had actual knowledge of the fact that its solar cells were destined for the United States market. Specifically, JA Solar maintains that the sworn affidavits of ISEC and JA Solar employees, supported by the contemporaneous WeChat, text, and email exchanges between the two companies, constitute an admission of actual knowledge that should be "sufficient proof to satisfy [Commerce's] knowledge test." Pls.' Br. at 4 (citing *Grain-Oriented Electrical Steel from the Czech Republic*, 79 Fed. Reg. 58,324 (Dep't of Commerce Sept. 20, 2014)). Plaintiffs ex-

plain that, in "its initial response to Commerce's Section A questionnaire, ISEC set forth that it arranged with JA Solar to send its solar cells to JA Solar's subcontractor in [Country A][5] for further processing into modules prior to their shipment to the United States." *Id.* (citing Letter on Behalf of ISEC to Dep't of Commerce re: Section A Resp. at A-2, CR[6] 10–12 (July 16, 2020) ("ISEC Sec. A. Resp.")). Additionally, in response to Commerce's follow-up supplemental questionnaires, sworn statements from ISEC and JA Solar staff were placed on the record confirming "the underlying understanding between [ISEC and JA Solar] that ISEC's solar cells were ultimately destined for the United States." *Id.* at 7–12 (citing Letter on Behalf of ISEC to Dep't of Commerce re: Inventec's Supplemental Questionnaire Resp. at SA-4 to SA-6, PR 78 (Aug. 24, 2020) ("ISEC Supp. Sec. A. Resp.") (public version), and ISEC Second Supp. Sec. A. Resp. at 8–12, PR 92 (public version)).

Despite these admissions of actual knowledge by ISEC in its questionnaire responses and the corroborating sworn statements of ISEC and JA Solar's employees confirming that knowledge at the time of the underlying sales, Commerce determined that ISEC did not have actual knowledge that its merchandise was destined for the United States. *See Decision Memorandum* at 10, 12. Specifically, Commerce found that the negotiation of the final contract terms agreed upon between ISEC and JA Solar "deliberately left ambiguous the ultimate destination of the merchandise," and that the conscious decision to use ambiguous contract language indicated that "ISEC really did not know where the solar cells would ultimately go." *Id.* at 10 (concluding that "[s]uch knowledge is the essence of Commerce's knowledge test"). While Commerce does not specify the critical language changes that drove its finding, it appears clear from the record that Commerce was focused on a one-word change in the final contract language. Specifically, the record includes a draft contract that initially provided that ISEC's solar cells would be incorporated into modules that "*shall* be ultimately delivered to the United States," while the final contract language adopted in September 2019 stated that the solar cells "*might* be used" to make modules destined for the United States. *See* Pls.' Br. at 6–11, 6 n.1 (emphases added).

---

[5] The location and name of JA Solar's subcontractor are examples of business proprietary information that are not relevant to the underlying dispute. Accordingly, this opinion uses generic placeholders, such as "Country A," instead of revealing any confidential information.

[6] "PR" refers to a document contained in the public administrative record. *See* ECF No. 13–2. "CR" refers to a document contained in the confidential administrative record. See ECF No. 13–3.

Plaintiffs maintain that Commerce's reliance on this change in contract language as a basis for finding that ISEC lacked actual knowledge is unreasonable. Plaintiffs provide a detailed timeline of the sales arrangement to support its position, which is reproduced below:

Date	Event	Record Citation
March 2019	JA Solar began to engage in discussions with ISEC concerning its intentions to purchase solar cells from ISEC that would be sent to [Country A] for further processing into modules prior to shipment to the United States.	Letter on Behalf of ISEC to Dep't of Commerce re: Inventec Sections A-D Supplemental Questionnaire Resp. at 9, CR 67 (Oct. 5, 2020) ("ISEC Second Supp. Sec. A. Resp.")
June 2019	ISEC came to an agreement with JA Solar that "the United States was the final destination of the cells sold to JA Solar that were shipped to its designated subcontractor in [Country A]."	ISEC Second Supp. Sec. A Resp. at 8–9
July 2019	Based on this agreement, ISEC began to ship cells purchased by JA Solar to [Country A] to be assembled into modules by JA Solar' s subcontractor prior to being shipped to the United States.	ISEC Second Supp. Sec. A Resp. at 9
August 2019	ISEC formalized its ongoing arrangement to ship its cells to [Country A] for further processing prior to being shipped to the United States in a written sales contract.	ISEC Second Supp. Sec. A Resp. at 9–10
September 2019	Following ongoing discussion to formalize ISEC shipping arrangement with JA Solar, the two parties finalized a new sales contract.	ISEC Second Supp. Sec. A Resp. at 9–10

Pls.' Br. at 5. At oral argument, the court confirmed the parties' understanding that there were shipments of subject merchandise made during the POR prior to the adoption of a final written contract in September 2019. *See* Oral Argument at 25:45–28:30, ECF No. 48 (Nov. 15, 2022) (Plaintiff arguing how Commerce erred in focusing only on sales that occurred after finalization of the formal contract); *id.* at 1:07:25–1:08:36 (discussing how Commerce has obligation to diligently consider parties' course of conduct, including pre-contract sales); *id.* at 1:58:45–2:03:30 (discussing parties' course of conduct and understanding with respect to shipments pre-dating September 2019 final contract).

Plaintiffs emphasized that these sales pre-dating the signing of the final contract were made with the express understanding that JA Solar would eventually import the solar products into the United States. *See* Oral Arg. at 12:00–12:45 ("in July 2019 ISEC made its first shipment based on [the June 2019] understanding"); *id.* at 25:45–26:40 (arguing Commerce's knowledge analysis "focused on the wrong period of time," *i.e.* sales after September 2019 final contract rather than July 2019 commencement of informal shipping arrangement); *id.* at 2:01:00–2:01:40 (again confirming existence and inclusion of July 2019 shipments/sales in review); *see also* Pls.' Br. at 5, 11–12 (confirming shipping arrangement was informally agreed upon in June 2019 with shipments of solar cells commencing in July 2019 (citing ISEC Second Supp. Sec. A Resp.)). Given the totality of the record, the court cannot sustain as reasonable Commerce's determination that ISEC lacked actual knowledge as to the U.S. destination for the sales at issue, at least with respect to the sales that pre-date the adoption of the final contract language.

The Government has explained that Commerce sets a "high" standard in applying the knowledge test. *See* Def.'s Resp. at 4 (citing *Certain In-Shell Raw Pistachios from Iran*, 70 Fed. Reg. 7,470 (Dep't of Commerce Feb. 14, 2005) and accompanying IDM Cmt. 1). In applying this "high" standard, Commerce emphasizes the importance of contemporaneous documentary evidence. *See, e.g.*, *Decision Memorandum* at 10, 11. With respect to ISEC's underlying sales that predate the adoption of the final sales contract, the contemporaneous evidence on the record appears to lead to one, and only one, reasonable conclusion, namely, that ISEC understood its solar cells to be destined for the United States. In view of that, Commerce has failed to account for record evidence that detracts from its ultimate finding. Therefore, remand is warranted.

Recognizing that ISEC appears to have had actual knowledge in July 2019 as to the U.S. destination for its sales of solar cells, the court observes that on remand Commerce may also need to reconsider the reasonableness of its inference that ISEC lacked knowledge after August 2019 due to the change in final contract language discussed above. Additionally, as was noted at oral argument, the parties to the contract had agreed upon a price for the underlying sales early in their negotiations, and that price did not change even after the change to the final contract language relied on by Commerce for finding no knowledge. *See* Oral Arg. at 27:45–28:30 (emphasizing how prices "did not change" after initial July 2019 shipments during final contract negotiations); *id.* at 1:34:00–1:37:00 (court inquiry and discussion about Commerce's failure to consider solar cell pricing in

evaluating ISEC's knowledge). While Commerce has explained that its knowledge test is designed to identify the "price discriminator," it is unclear why Commerce did not address the lack of any price change in the parties' negotiations in identifying the price discriminator.

Commerce's consideration of actual knowledge merits remand for an additional, separate reason. In rejecting ISEC's claim of actual knowledge, Commerce reiterated its finding from the underlying investigation that "[s]worn statements made well after the time of the specific sales at issue [are] not relevant to the analysis of whether the [respondent] had reason to know at the time of the sale that specific sales of subject merchandise were destined for the U.S." *Decision Memorandum* at 10 (describing Commerce's application of knowledge test during investigation and that "it was Commerce's practice to 'give greater consideration to physical evidence and documentation prepared at the time of a transaction than to unsubstantiated statements or declarations that may be in the best interest of the investigated company sourcing those statements.'" (citation omitted)). Applying those considerations from the investigation here, Commerce found that "[t]he additional evidence provided by ISEC, specifically the sworn statements of prior knowledge of employees that were made expressly to respond to our requests for information in this administrative review, are the same type of self-serving statements that we refused to consider as valid evidence of knowledge in the investigation of this proceeding, when such statements were presented to Commerce at verification by the respondent...." *Id.* at 10–11 (concluding that "[t]he memories of employees, even as sworn statements, are not documentary evidence of knowledge of the destination.").

At oral argument, the court inquired how it could sustain Commerce's application of the knowledge test as reasonable given that there was no dispute that "actual" knowledge could only be demonstrated by an "admission," and that here, Commerce would not accept ISEC's proffered admissions where such admissions were "self-serving." *See* Oral Arg. at 1:41:00–1:42:04. Beyond a vague suggestion that consideration of knowledge may be different where a respondent provides a "self-serving" admission, rather than in circumstances where the respondent is trying to avoid a finding of knowledge, the Government avoided the court's question. *Id.* at 1:42:11–1:45:00 (Defendant arguing Commerce would accept "corroborated" self-serving admissions, while maintaining underlying record lacked corroboration); *see also id.* at 54:00–57:00 (distinguishing rejection of "self-serving" admissions from Commerce's acceptance of admissions of knowledge in other matters where admissions were against respon-

dent's interest). The Government also was non-responsive to the court's inquiry as to how ISEC, or other similarly situated future respondents, could demonstrate knowledge beyond what was put on the record here. *Id.* at 1:15:50–1:21:00. While it may potentially be reasonable for Commerce to apply the knowledge test differently in circumstances where a respondent's admission is "self-serving" than in circumstances where a respondent seeks to avoid a finding of knowledge, Commerce has not claimed to have done so. Even if such a rationale could be discerned from Commerce's analysis (which it cannot), Commerce has not explained how such a discriminating standard could be reasonably applied, much less how it was applied in the underlying review.

The court has acknowledged and previously affirmed Commerce's practice of attaching "more weight to documentary evidence than to [non-contemporaneous] statements such as declarations;" however, the context and the record indicate that Commerce's application of that practice in this matter is unreasonable. *Cf. Durum Gida Sanye Ve Ticaret A.S. v. United States*, 42 CIT ___, ___, 311 F. Supp. 3d 1367, 1371–72 (2018) (highlighting credibility issues in respondent's declaration of lack of knowledge, as well as the lack of any supporting contemporaneous documentary evidence, in affirming Commerce's knowledge determination). Here, ISEC and JA Solar provided consistent responses claiming actual knowledge in answering Commerce's questionnaires. *See* Pls.' Br at 4–11, 14–20. Plaintiffs supported those responses with sworn statements of employees who would have had knowledge at the time of the underlying sales. *See id.*; *see also* Pls.' Reply at 1–3. Under the undisputed standard that a finding of actual knowledge requires an "admission" by the respondent, Commerce's refusal to afford any weight to ISEC's "self-serving" admission in the underlying proceeding tests the bounds of reasonableness for Commerce's stated practice and cannot be sustained. Accordingly, the court remands Commerce's determination that ISEC lacked knowledge as to the U.S. destination for the sales at issue.

C. Constructive Knowledge

JA Solar also argues that even if ISEC did not demonstrate that it had actual knowledge that the United States was the ultimate destination for the subject sales, it was nevertheless unreasonable for Commerce to find that ISEC lacked even constructive knowledge of that fact based on the totality of the record. Pls.' Br. at 14, 23–28. In the absence of such an admission, or actual knowledge, Commerce must "look to other evidence to determine whether a [respondent] *should have known* that the goods were not for home consumption."

Id. at 3 (quoting, with emphasis, *INA Walzlager*, 21 CIT at 125, 957 F. Supp. at 265). In applying the knowledge test and evaluating constructive knowledge, Commerce "must diligently inquire into allegations of knowledge and render its conclusion based on all relevant facts and circumstances." *Stupp Corp.*, 43 CIT at ___, 359 F. Supp. 3d at 1310.

It appears that Commerce collapsed its determination that ISEC lacked both actual and constructive knowledge, despite the different standards applicable to each. *See Decision Memorandum* at 10–12 (finding generally that "essential facts...do not support ISEC's contention that it actually knew, or should have known, that the U.S. was the ultimate destination of the merchandise at issue, at the time of sale or prior to it."). Plaintiffs contend that Commerce's determination failed to take account of: contemporaneous WeChat, text, and email exchanges between ISEC and JA Solar employees discussing the sales arrangement, including the draft and final language of the sales contract; sworn statements of employees involved in the underlying transactions affirming that ISEC had knowledge of the U.S. destination for the solar products; evidence of the parties' bilateral understanding of a business arrangement to create a "closed-loop" shipping channel (*i.e.*, ISEC's sales of solar cells to JA Solar's subcontractor in Country A were all destined for sale in the United States after processing into solar modules); and, evidence corroborating that all sales of solar cells by ISEC to JA Solar through the aforementioned "closed-loop" shipping channel did ultimately enter the United States. Pls.' Br. at 4, 8–27; Pls.' Reply at 4–5. Given this failure to take into account evidence detracting from its conclusion, including contemporaneous documentary evidence to which Commerce claims to afford the most weight, Plaintiffs insist that Commerce's resulting finding that ISEC lacked constructive knowledge cannot be sustained as reasonable. Pls.' Br. at 23–27 (citing *Nippon Steel*, 458 F.3d at 1351).

In light of the discussion above and the conclusion that remand is necessary for Commerce to reconsider its evaluation of actual knowledge, the court need not reach JA Solar's alternative arguments regarding constructive knowledge. However, if on remand Commerce continues to find that ISEC lacked actual knowledge as to any of the sales at issue, it will then need to address whether the record demonstrates that ISEC had reason to know that the United States was the ultimate destination for the subject merchandise. In so doing, the court encourages Commerce to explain its findings as to constructive knowledge in light of the court's guidance in this opinion, as well as the court's discussions with the parties on the standard for construc-

tive knowledge at oral argument. *See, e.g.*, Oral Arg. at 47:00–52:00 (discussing differentiation in degree of certainty in actual knowledge vs. "reason to know" with Defendant's counsel); *id.* at 1:07:25–1:13:15 (discussing Commerce's obligation to consider entirety of record, including context of parties' pre-contract course of conduct); *id.* at 1:53:45–1:56:05 (discussing degrees of certainty with Plaintiff's counsel).

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Commerce's determination to exclude certain sales of solar cells from ISEC's final margin calculation, due to its finding that ISEC lacked actual or constructive knowledge that the subject merchandise would ultimately enter the United States, is remanded to Commerce for further explanation, and if appropriate, reconsideration; it is further

ORDERED that Commerce shall file its remand results on or before March 2, 2023; and it is further

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

Dated: December 19, 2022
New York, New York

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

Slip Op. 22–147

AMSTED RAIL COMPANY, INC., ASF-K DE MEXICO S. DE R.L. DE C.V., STRATO, INC., WABTEC CORP. AND TTX COMPANY, Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, AND ACTING SECRETARY KATHERINE M. HINER, in her official capacity, Defendants, and COALITION OF FREIGHT RAIL COUPLER PRODUCERS, Defendant-Intervenor.

Before: Judge Gary S. Katzmann
Court No. 22–00307

[Certain Plaintiffs' Motion for Injunction Pending Appeal is denied.]

Dated: December 20, 2022

Brian B. Perryman, Faegre Drinker Biddle & Reath, LLP, of Washington, D.C., argued for Plaintiffs Amsted Rail Company, Inc. and ASF-K de Mexico S. de R.L. de C.V. With him on the briefs were *Richard Ferrin*, *Douglas J. Heffner* and *Carolyn Bethea Connolly*.

Ryan M. Proctor, Jones Day, of Washington, D.C., for Plaintiff Wabtec Corp.

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y., argued for Plaintiff Strato, Inc. With him on the joint briefs was *Andrew T. Schutz*.

James M. Smith, Covington & Burling LLP, of Washington, D.C., argued for Plaintiff TTX Company. With him on the joint briefs were *Shara L. Aranoff* and *Sooan (Vivian) Choi*.

Andrea C. Casson, Assistant General Counsel for Litigation and *Jane C. Dempsey*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for Defendants U.S. International Trade Commission and Acting Secretary Katherine M. Hiner, in her official capacity. With them on the briefs were *David A.J. Goldfine*.

Daniel B. Pickard, Buchanan Ingersoll & Rooney PC, of Washington, D.C., argued for Defendant-Intervenor Coalition of Freight Rail Producers. With him on the briefs were *Amanda L. Wetzel* and *Claire M. Webster*.

OPINION AND ORDER

Katzmann, Judge:

The court, having denied a motion for preliminary injunction in this case for lack of subject matter jurisdiction, is now asked to order similar injunctive relief during the pendency of an expected appeal. Certain Plaintiffs Amsted Rail Company, Inc., ASF-K de Mexico S. de R.L. de C.V., Strato, Inc., and TTX Company[1] (together, "Plaintiffs") move pursuant to USCIT Rule 62(d) for an injunction pending appeal of the Judgment, Nov. 15, 2022, ECF No. 82, in this case. *See* Certain Pls.' Mot. for Inj. Pending Appeal at 1 n.1, Nov. 18, 2022, ECF No. 89 ("Pls.' Br."); *see also Amsted Rail Co. v. U.S. Int'l Trade Comm'n*, 46 CIT __, __ F. Supp. 3d __, 2022 WL 16959404 (Nov. 15, 2022) ("No-

[1] Plaintiff Wabtec Corp. does not join the Motion for Injunction Pending Appeal.

vember 15 Opinion"). Plaintiffs seek "an injunction . . . that, pending an appeal, forbids defendants, the U.S. International Trade Commission and Acting Secretary Katherine M. Hiner . . . , from allowing counsel for the defendant-intervenor, the Coalition of Freight Rail Producers . . . , any access to the antidumping and countervailing duty investigations before the Commission." *See* Pls.' Br. at 1–2; *see also Certain Freight Rail Couplers and Parts Thereof from China and Mexico*, USITC Inv. Nos. 701-TA-682 & 731-TA-1592–1593 ("Current Investigations").

As an initial matter, Plaintiffs' Motion for Injunction Pending Appeal is premature because an appeal to the Federal Circuit has not yet been noticed. But even if an appeal were noticed, the court concludes that an injunction pending appeal is unwarranted. Plaintiffs' Motion for Injunction Pending Appeal is therefore denied.

BACKGROUND

This opinion presumes familiarity with the facts and holding of *Amsted Rail*. *See* 46 CIT __, __ F. Supp. 3d __, 2022 WL 16959404. Plaintiffs alleged that counsel for Defendant-Intervenor the Coalition of Freight Coupler Producers (the "Coalition" or "Defendant-Intervenor") and his law firm engaged in attorney misconduct because they had violated the U.S. International Trade Commission's ("the Commission") administrative protective order ("APO") by using business proprietary information ("BPI") for improper purposes, and continued to participate in ongoing investigations before the Commission despite a disabling conflict of interest. *See generally id.* at *2–4. Asserting jurisdiction pursuant to 28 U.S.C. § 1581(i),[2] Plaintiffs sought, under the Administrative Procedure Act, 5 U.S.C. § 706, immediate review in this court of the Commission's actions denying further review of these claims, and sought declaratory and injunctive relief to block disclosure of Plaintiffs' BPI to the attorney and law firm for the remainder of the Current Investigations, disqualification of the law firm from participating in the investigations, and directive to the Commission to dismiss the petition that initiated the Current Investigations without prejudice to refiling. *See* Am. Verified Compl. or, in the Alternative, Petition for Writ of Mandamus at ¶ 1, pp. 26–27, Oct. 24, 2022, ECF No. 44. Plaintiffs alternatively pleaded jurisdiction pursuant to the court's power to supervise members of its

[2] 28 U.S.C. § 1581(i) grants to "the Court of International Trade . . . exclusive jurisdiction of any civil action commenced against the United States, its agencies, or officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B), (D).

bar and as a petition for writ of mandamus. *See id.* at ¶¶ 2–3, pp. 25–26. The court issued the Judgment on November 15, 2022, which dismissed the case for lack of subject matter jurisdiction. *See* Judgment at 1. The accompanying opinion found unpersuasive the Commission's argument that that 28 U.S.C. § 1677f precluded jurisdiction over Plaintiffs' claims, *see Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *6–7, but explained that jurisdiction pursuant to 28 U.S.C. § 1581(i) was ultimately improper because § 1581(c)[3] jurisdiction was not manifestly inadequate, *see id.* at *7–13. Alternative bases for jurisdiction were otherwise unavailable. *See id.* at *13–14. The Amended Complaint was therefore "dismissed for lack of subject matter jurisdiction, without prejudice to refiling once a claim under 28 U.S.C. § 1581(c) is ripe." *Id.* at *14. The court made clear that its "holding expresse[d] no views on the merits of Plaintiffs' claims." *Id.* at *4 n.4, *11.

Three days later, Plaintiffs filed the present Motion for Injunction Pending Appeal and requested a decision by December 9, 2022. *See* Pls.' Br. at 1–2. The court issued two questions to Plaintiffs on November 29, 2022, *see* Order, Nov. 29, 2022, ECF No. 90, to which Plaintiffs replied the next day, *see* Certain Pls.' Resp. to Order, Nov. 30, 2022, ECF No. 91. Defendant Commission and Defendant-Intervenor Coalition filed responses to Plaintiffs' Motion on December 6, 2022. *See* Def.-Inter.'s Resp. to Mot. for Inj. Pending Appeal, Dec. 6, 2022, ECF No. 94 ("Def.-Inter.'s Br."); Def.'s Opp. to Certain Pls.' Mot. for Inj. Pending Appeal, Dec. 6, 2022, ECF No. 95 ("Def.'s Br."). The court held oral argument the next day. *See* Oral Arg., Dec. 7, 2022, ECF No. 96. The court invited parties to file post-hearing submissions, and on December 8, 2022, Plaintiffs and Defendant-Intervenor filed such submissions. *See* Def.-Inter.'s Post-Argument Submission, Dec. 8, 2022, ECF No. 98; Pls.' Post-Argument Submission, Dec. 8, 2022, ECF No. 99.

DISCUSSION

The federal district courts and the Court of International Trade may issue injunctions appropriate to "preserve the status quo until decision by the appellate court." *Newton v. Consolidated Gas Co. of N.Y.*, 258 U.S. 165, 177 (1922); *see also* 28 U.S.C. § 1585 (granting to the Court of International Trade "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States"). USCIT Rule 62(d), like Federal Rule of Civil Procedure 62(d), codifies

[3] 28 U.S.C. § 1581(c) grants to "[t]he Court of International Trade . . . exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930." 28 U.S.C. § 1581(c).

that principle. *Cf.* 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2904 (3d ed. 2022). "While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." USCIT R. 62(d); *see also* Fed. R. Civ. P. 62(d) (mirroring this language). Because the court denied as moot Plaintiffs' two motions for preliminary injunction, *see* Judgment at 2, and vacated the prior Temporary Restraining Order, *see* Order at 1, Nov. 15, 2022, ECF No. 81, Plaintiffs, though they have not yet noticed an appeal to the Federal Circuit,[4] now petition the court for an injunction pending appeal pursuant to USCIT Rule 62(d).[5]

---

[4] Because the purpose of an injunction pending appeal is to "preserve the status quo until decision by the appellate court," *Newton*, 258 U.S. at 177, the text of Rule 62(d) requires "an appeal . . . pending from an interlocutory order or final judgment." USCIT R. 62(d). But "[w]hen there is reason to believe that an appeal will be taken, there is no reason why the district court should not make an order preserving the status quo during the expected appeal." Wright et al., *Federal Practice and Procedure* § 2904; *see also Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 34 CIT 1539, 1541, 2010 WL 5139443, at *2 (Dec. 17, 2010) ("The lack of a pending appeal does not necessarily preclude the court from exercising *its power* to stay its judgment and in so doing modify the injunctive relief it has ordered in this case." (emphasis added)). Courts have routinely considered and denied injunctions pending appeal under the four-factor test even after noting that such relief may be premature without a notice of appeal. *See, e.g.*, *Nat'l Fisheries Inst.*, 34 CIT at 1541; *Barber v. Simpson*, No. 2:05-CV-2326, 2006 WL 2548189, at *4 (E.D. Cal. Sept. 1, 2006); *Davila v. Texas*, 489 F. Supp. 803, 810 (S.D. Tex. 1980).

"The moving Plaintiffs intend to notice an appeal of the judgment regardless of the outcome of the motion for an injunction pending appeal." Certain Pls.' Resp. to Order at 2, Nov. 30, 2022, ECF No. 91. Plaintiffs also note that the appeal may be "voluntarily dismissed before or after the appeal is docketed." *Id.* Because there is reason to believe Plaintiffs will appeal, the court decides the Motion for Injunction Pending Appeal.

[5] The Coalition suggests that the court does not have the authority to issue an injunction pending appeal after finding a lack of subject matter jurisdiction. *See* Def.-Inter.'s Br. at 2 ("It is a seminal principle of the law that, 'without proper jurisdiction, a court cannot proceed at all.'" (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 84 (1998))). The general weight of the authority among district courts and the Court of International Trade indicates that courts may consider motions for injunction pending appeal after dismissal for lack of subject matter jurisdiction. *See, e.g.*, *Potter-Roemer, Inc. v. United States*, 12 CIT 1150, 1152, 702 F. Supp. 911, 913 (1988) (granting injunction pending appeal); *British Steel Corp. v. United States*, 10 CIT 716, 719, 649 F. Supp. 78, 81 (1986) (granting injunction pending appeal). *But see Blue Valley Hosp., Inc. v. Azar*, No. 18–2176, 2018 WL 2986686, at *2 (D. Kan. June 14, 2018) ("[I]t follows that this Court also lacks the authority to provide injunctive relief . . . pending appeal."); *Farrell-Cooper Mining Co. v. U.S. Dep't of the Interior*, No. CIV-16–12, 2016 WL 4097091, at *3 (E.D. Okla. Aug. 1, 2016) (questioning its authority but nonetheless granting the injunction); *Peak Med. Okla. No. 5, Inc. v. Sebelius*, No. 10-CV-597, 2010 WL 4809319, at *1 n.2 (N.D. Okla. Nov. 18, 2010) (collecting cases both affirming and questioning their authority to issue post-judgment relief).

Even though *Peak Medical* is not precedential, the court acknowledges the concern that there may be an "inherent inconsistency in ruling on an injunction pending appeal after finding the absence of subject matter jurisdiction," 2010 WL 4809319, at *1 n.2, and notes the lack of Federal Circuit authority on the issue. The court nonetheless proceeds to consider Plaintiffs' Motion for Injunction Pending Appeal by relying on two longstanding

But even when awarded on a temporary basis pending appeal, injunctive relief "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). An injunction pending appeal requires the satisfaction of four factors: "(1) whether the [injunction] applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990) (internal quotation marks omitted) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Nken v. Holder*, 556 U.S. 418, 425–26 (2009). Each of the four factors must be demonstrated, *Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1166 (Fed. Cir. 2014), though a strong showing of irreparable harm may permit "a reduced showing of probability of success" on the merits, *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (interpreting *Winter*, 555 U.S. 7).

First, Plaintiffs fail to demonstrate a strong showing of success on the merits. "[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Standard Haven*, 897 F.2d at 513 (internal quotation marks omitted) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). While Plaintiffs' claims implicate "sensitive and time-honored questions of federal jurisdiction and agency power, protection of confidential information, and professional responsibility," *Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *1, the November 15 Opinion focused on Plaintiffs' burden to establish jurisdiction. "[T]he party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *8 (internal quotation marks omitted) (alteration in original) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). Having considered the relevant facts and case law, the court concluded that "Plaintiffs' allegations of attorney misconduct in this case, just like their APO breach allegations, are too threadbare to meet the more specific showing [of] manifest inadequacy under § 1581(i)." *Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *7–11 (emphasis added).

principles: "a federal court always has jurisdiction to determine its own jurisdiction," *United States v. Ruiz*, 536 U.S. 622, 628 (2002), and "a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal," *Haw. Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983).

Plaintiffs contend that the November 15 Opinion "constitutes reversible error," Pls.' Br. at 3, because it "'erred in shifting the burden to [the former client] to identify confidences it has shared with its counsel,' including erring by 'fault[ing]' the former client for failing to show 'how its confidences would be relevant in the case,'" *id.* (alterations in original) (quoting *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 241 (2d Cir. 2016)); *see also Chugach Elec. Ass'n v. U.S. Dist. Ct.*, 370 F.2d 441, 444 (9th Cir. 1966). Instead, Plaintiffs insist that this court adopt the approach in *Makita Corp. v. United States*, which reasoned that:

> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent.

Makita Corp. v. United States, 17 CIT 240, 246, 819 F. Supp. 1099, 1105 (1993) (quoting *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268–69 (S.D.N.Y. 1953)).

Plaintiffs have not demonstrated a likelihood of success on this theory of jurisdiction. As an initial matter, the court did not "shift[] the burden" to Plaintiffs, where Plaintiffs bore the burden in the first place. Establishing § 1581(i) jurisdiction is a difficult task, *see ARP Materials, Inc. v. United States*, 47 F.4th 1370, 1377 (Fed. Cir. 2022) ("Though we describe § 1581(i) as a 'catchall' provision, 'its scope is strictly limited.'" (quoting *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992))), and for good reason. Confronting Plaintiffs with this heavy burden "preserves the congressionally mandated procedures and safeguards provided in the other subsections, absent which litigants could ignore the precepts of subsections (a)–(h) and immediately file suit in the Court of International Trade under subsection (i)." *Id.* at 1377 (internal quotation marks omitted) (quoting *Norcal/Crosetti Foods*, 963 F.2d at 359). The court, without speculating about fact patterns that would or would not meet the manifest inadequacy standard, reasoned that "manifest inadequacy under § 1581(i)" required "a more specific showing" than the facts before it. *Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *11. Put simply, the burden, which was always Plaintiffs' to meet, was not satisfied.

Moreover, even if the court were to conclude that a conflicted representation of two substantially related matters existed, Plaintiffs fail to identify any authority showing that such a finding is by itself sufficient to satisfy the burden of establishing jurisdiction under § 1581(i). Intermingling jurisdiction and merits, Plaintiffs instead cite cases from the motion to disqualify case law, where evaluating the "substantial relationship" between two representations is the test for the remedy of disqualification. *See Prevezon Holdings*, 839 F.3d at 239 (determining "whether disqualification is warranted" as a clear and indisputable right to the writ of mandamus); *EZ Paintr Corp. v. Padco, Inc.*, 746 F.2d 1459, 1460–61 (Fed. Cir. 1984) (determining a substantial relationship existed on interlocutory appeal from a district court's order to disqualify counsel[6]); *Chugach Elec. Ass'n*, 370 F.2d at 444 (entering a disqualification order by writ of mandamus). None of these cases used the "substantial relationship" test to satisfy the respective plaintiffs' burden of showing jurisdiction, let alone jurisdiction under § 1581(i).

Plaintiff's reliance on *Makita* is similarly misplaced. *See* 17 CIT 240, 819 F. Supp. 1099. The *Makita* court presumed jurisdiction under § 1581(i), *see id.* at 243, 245 & n.6, 819 F. Supp. at 1103–04 & n.6, then separately used the substantial relationship standard in evaluating the likelihood of success on the merits prong of the preliminary injunction sought in that case, *see id.* at 245–50, 819 F. Supp. at 1103–07 ("To summarize the preceding part C of this opinion, the plaintiffs have persuaded the court of the likelihood of their success on the merits . . . ."). The *Makita* court did not, and never purported to, undertake a jurisdictional analysis, let alone use the "substantial relationship" standard to somehow lessen the plaintiffs' burden of establishing § 1581(i) jurisdiction. This court declined on November 15, and declines again today, to speculate where the *Makita* court is silent.[7] The court instead reviewed Federal Circuit and Court of International Trade case law on § 1581(i) jurisdiction,

---

[6] The Supreme Court had held that denials of disqualification motions were not subject to interlocutory appeal, *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), but had not yet held that grants of disqualification motions were also not collateral orders subject to interlocutory appeal, *see Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440–41 (1985).

[7] The court reiterates:

> While the decisions of other trial courts are not binding, it is within the discretion of a court to consider and address them, particularly where they are cited and debated by the litigants, and facilitate the analysis of the case now before the court.

Amsted Rail, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *9 n.12 (citation omitted) (citing *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989)).

see Amsted Rail, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *8–10 (citing *NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998); *Shakeproof Indus. Prods. Div. of Ill. Tool Works Inc. v. United States*, 104 F.3d 1309 (Fed. Cir. 1997); *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 38 CIT __, 986 F. Supp. 2d 1381 (2014); *Dofasco Inc. v. United States*, 28 CIT 263, 326 F. Supp. 2d 1340 (2004), *aff'd on other grounds*, 390 F.3d 1370 (Fed. Cir. 2004); *Carnation Enters. v. U.S. Dep't of Com.*, 13 CIT 604, 719 F. Supp. 1084 (1989); *Koyo Seiko Co. v. United States*, 13 CIT 461, 715 F. Supp. 1097 (1989); *Nissan Motor Corp. v. United States*, 10 CIT 820, 651 F. Supp. 1450 (1986)), and further found *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), "persuasive in counseling against interlocutory appeals of attorney disqualification appeals." *Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *12. Like the *Firestone* petitioners, Plaintiffs "fail[ed] to supply a single concrete example of the indelible stamp or taint of which [they] warn[ed]," *id.* (internal quotation marks omitted) (quoting *Firestone*, 449 U.S. at 376), and even if Plaintiffs had alleged additional facts,[8] "[t]he propriety" of an agency's denial of disqualification "will often be difficult to assess until its impact on the underlying [proceeding] may be evaluated, which is normally only after" a "final" determination, *Firestone*, 449 U.S. at 377. Ultimately, "our cases . . . require much more before a ruling may be considered" manifestly inadequate absent immediate review under 28 U.S.C. § 1581(i). *Id.* (internal quotation marks omitted) (quoting *Firestone*, 449 U.S. at 376). The November 15 Opinion is clear: Plaintiffs, who bear the burden of

[8] Plaintiffs allege additional facts in the Amended Verified Complaint of the related case brought against the U.S. Department of Commerce that, in their view, constitute "specific, non-exhaustive examples of shared confidences that the Coalition and its counsel could use against Plaintiffs in the Current Investigations." Pls.' Br. at 4; *see also* Am. Verified Compl. or, in the Alternative, Pet. for Writ of Mandamus ¶¶ 29–40, *Amsted Rail Co. v. U.S. Dep't of Com.*, No. 22-cv-00316 (CIT Nov. 18, 2022), ECF No. 36. Those facts were not before the court in this case and will be considered independently in the related case.

establishing § 1581(i), did not show that adequate relief would be unavailable if they waited for § 1581(c) review to ripen.[9]

Second, Plaintiffs fail to demonstrate irreparable harm absent an injunction pending appeal. Following the Commission's affirmative preliminary determinations in the Current Investigations on November 15, 2022, and the court's decision on the same day, the Commission released the BPI from the preliminary phase to all APO counsel, including the Coalition's signatories to the APO, on November 25, 2022. Def.'s Br. at 11. The Commission's final phase investigations, which must follow Commerce's preliminary and final investigations, will not be initiated for several months; the Commission will not collect any additional BPI before then. *Id.* Plaintiffs nonetheless insist that "the unfair advantage enjoyed by the Coalition as a result of its counsel's disabling conflict of interest arising from his representation of [Amsted Rail Company] in a substantially related matter is not something the Commission or the courts can 'undo' following final determinations. The harm is ongoing in nature and will taint the entire proceedings." Pls.' Br. at 5.

The Commission's argument to the contrary is more persuasive. As an initial matter, Plaintiffs can no longer tie their harm to the imminent release of BPI. "A presently existing, actual threat must be shown," *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (internal quotation marks omitted) (quoting *S.J. Stile Assocs. Ltd. v. Snyder*, 646 F.2d 522, 525 (C.C.P.A. 1981)), and that

---

[9] Plaintiffs further rely on the Federal Circuit in *In re University of South Florida Board of Trustees*, which noted that "[o]rders involving the disqualification of counsel can be remedied through a writ of mandamus," to argue that Plaintiffs have no "other means of obtaining the relief desired" for purposes of establishing § 1581(i) jurisdiction. 455 F. App'x 988, 990 n.1 (Fed. Cir. Jan. 12, 2012) (citing *In re Shared Memory Graphics, LLC*, 659 F.3d 1336, 1340 (Fed. Cir. 2011)). That reading is overbroad. The Federal Circuit has not endorsed a categorical rule that the review of any attorney disqualification decision is appropriate for mandamus, let alone § 1581(i). *See In re Shared Memory Graphics LLC*, 659 F.3d at 1340 ("Mandamus thus acts as a safety valve to prevent such irreparable harm if *appropriate circumstances are presented*." (emphasis added) (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009))). Nor did the November 15 Opinion categorically "foreclose any interlocutory judicial review of APO breach or attorney misconduct allegations." *Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *12 n.16. Those two Federal Circuit cases involved parties petitioning for review of district court orders that had *found* a conflict of interest and implicated the right of petitioners to their choice of counsel in ongoing litigation. *See In re Univ. of S. Fla.*, 455 F. App'x at 990 (reviewing district court decision to deny withdrawal motion after finding a "concurrent conflict of interest" for abuse of discretion); *In re Shared Memory Graphics*, 659 F.3d at 1339–40 (reviewing district court order disqualifying counsel). By contrast, Plaintiffs here seek immediate review of an agency's decision *not* to further investigate alleged ethical violations and, as this court has explained, are "unable to demonstrate that an order denying disqualification is 'effectively unreviewable'" under a § 1581(c) action. *See Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *9–14 (quoting *Firestone*, 449 U.S. at 376).

"threat of irreparable harm must be immediate and viable," *Kwo Lee, Inc. v. United States*, 38 CIT __, __, 24 F. Supp. 3d 1322, 1326 (2014). BPI was already released to the Coalition's signatories to the APO, and any future threat of BPI-related harm is not "immediate and viable" until the Commission initiates the final stages of its investigation in several months. In response, Plaintiffs argue that, with each passing day, "[t]he ongoing harm remains the Coalition's unfair advantage from its ability to exploit confidences and insights about Plaintiffs' Mexican FRC production and operations," even when the proceeding is not ongoing. Pls.' Post-Argument Submission at 2. But speculative harm cannot establish irreparability. *See Otter Prods., LLC v. United States*, 38 CIT __, __, 37 F. Supp. 3d 1306, 1315 (2014). The Commission investigation cannot proceed until Commerce issues preliminary and final determinations. The threat of irreparable harm in the intervening months, when neither the parties nor the Commission are engaged in an injury investigation, "must be 'demonstrated by probative evidence' and 'cannot be determined by surmise.'" *Id.* (citations omitted) (first quoting *Am. Inst. for Imported Steel, Inc. v. United States*, 8 CIT 314, 318, 600 F. Supp. 204, 209 (1984); then quoting *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F. Supp. 2d 1324, 1331 (2001)); *see also Winter*, 555 U.S. at 21 ("[P]laintiffs must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief."). And without record evidence of imminent injury despite the statutorily-mandated, several-month hiatus on the Commission's investigations, Plaintiffs have not shown a threat of "immediate and viable" harm, *Kwo Lee, Inc. v. United States*, 38 CIT at __, 24 F. Supp. 3d at 1326, sufficient to justify an injunction pending appeal.

Finally, the balance of equities and public interest further weigh in favor of denial. Injunctions pending appeal are ordinarily limited to orders preserving the status quo. *See Haw. Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983); *Newton*, 258 U.S. at 177; Wright et al., *Federal Practice and Procedure* § 2904. While "there may be rare cases in which a court should issue an affirmative injunction pending appeal" in order to preserve a live controversy for appeal, *Medi-Natura, Inc. v. Food & Drug Admin.*, No. CV 20–2066, 2021 WL 1025835, at *7 (D.D.C. Mar. 16, 2021), this is not such a case. The Coalition would be prematurely and irreversibly deprived of its counsel before the Commission without a final court decision squarely addressing the merits of the ethical misconduct claim. Furthermore, the Commission has cognizable interests in conducting injury investigations on the "fullest possible record, as the public interest re-

quires," Def.'s Br. at 14, and soliciting party input when drafting its final investigation questionnaires, which would be hindered if the Coalition needed to get new counsel up to speed, *see* Def.'s Br. at 15. A post-judgment injunction removing the Coalition's counsel would, therefore, substantially injure the Coalition and Commission and run counter to the public interest.

Concluding that Plaintiffs have failed to meet any of the four factors for injunctive relief, the court declines to issue post-judgment relief that would disrupt the status quo and secure Plaintiffs' victory before decision on the merits. To be sure, Plaintiffs are entitled to their day in court. Claims of misconduct should be addressed in the appropriate fora, and the Commission's determinations should be subject to appropriate judicial review. But the issue before the court today is not *whether*, but *when*, Plaintiffs may seek judicial review. Plaintiffs may reformat their challenges to agency determinations not to investigate allegations of APO and ethical misconduct as part of a § 1581(c) challenge to a reviewable final determination by the Commission.[10] *See Amsted Rail*, 46 CIT at __, __ F. Supp. 3d at __, 2022 WL 16959404, at *8, *14. In the meantime, Plaintiffs may also move for expedited appeal before the Federal Circuit. *See* Fed. Cir. R. 4. As the Commission notes, however, the fact that appeal has not yet been noticed appears to undermine the urgency that Plaintiffs are asserting.

For the foregoing reasons, Plaintiffs' Motion for Injunction Pending Appeal is denied.

SO ORDERED.

Dated: December 20, 2022
New York, New York

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

[10] Congress and the case law have made clear that § 1581(c) challenges include "preliminary administrative actions . . . that will be incorporated in or superseded by the final determination," *M S Int'l, Inc. v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1332, 1336–37 (2020), *appeal voluntarily dismissed*, No. 2020–1670, 2020 WL 9171126 (Fed. Cir. June 16, 2020) (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A. ù. v. United States*, 38 CIT __, __, 986 F. Supp. 2d 1381, 1384–85 (2014); H.R. Rep. No. 96–1235, at 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759–60), and "the procedural correctness of a [final] determination, as well as the merits," *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987).

Slip Op. 22–149

SENECA FOODS CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 22–00243

[The court denies United States Steel Corporation's Motion to Intervene.]

Dated: December 21, 2022

James M. Smith, *Thomas Brugato*, *Kwan Woo (Kwan) Kim*, Covington & Burling LLP, of Washington, D.C., for Plaintiff Seneca Foods Corporation.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, U.S. Department of Justice, Washington, D.C., for Defendant United States. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*.

Luke A. Meisner, *Jeffrey D. Gerrish*, and *Michelle R. Avrutin*, Schagrin Associates, of Washington, D.C., for Proposed Defendant-Intervenor United States Steel Corporation.

OPINION AND ORDER

Katzmann, Judge:

Before the court is a Motion to Intervene in *Seneca Foods Corp. v. United States*, Court No. 22–00243, filed by putative Defendant-Intervenor United States Steel Corporation ("U.S. Steel" or "Putative Defendant-Intervenor").

Underpinning *Seneca Foods Corp. v. United States* is Plaintiff Seneca Foods Corporation ("Seneca" or "Plaintiff")'s challenge[1] to the Department of Commerce's denial of requests for exclusion from tariffs imposed on certain steel articles under Section 232 of the Trade Expansion Act of 1962, as codified at 19 U.S.C. § 1862. *See* Seneca Compl. ¶ 1, Aug. 19, 2022, ECF No. 6 ("Compl."). The President imposes Section 232 tariffs to remedy assessed threats to national security, in this case an assessed threat to the viability of the U.S. steel and aluminum industries. *See Proclamation 9705 of March 8, 2018: Adjusting Imports of Steel into the United States*, 84 Fed. Reg.

[1] Seneca lodges this challenge under the court's residual jurisdiction pursuant to 28 U.S.C. § 1581(i).

11,625 (Dep't Commerce Mar. 15, 2018).[2] Seneca — a fruit and vegetable processor that requires tin mill products consisting of steel to manufacture cans for its vegetables — maintains it sought exclusions for certain products from the Section 232 tariffs to supplement "shortfalls" in domestic supply. Compl. ¶¶ 7–8, 10. U.S. Steel — a domestic producer of tin mill products that claims it "can produce the products for which Seneca sought exclusions and/or can produc[e] suitable substitute products" — opposed Seneca's exclusion requests before Commerce and now contends that it has a right to intervene in the proceedings before this court under CIT Rule 24(a). *See* U.S. Steel's Mot. to Intervene at 2–3, 4, Oct. 5, 2022, ECF No. 11 ("U.S. Steel's Mot."). In the alternative, U.S. Steels submits that it should be permitted to intervene under CIT Rule 24(b). *Id.* at 3.

Plaintiff and Defendant United States ("the Government") oppose U.S. Steel's Motion to Intervene in its entirety, arguing that U.S. Steel has no right to intervene under CIT Rule 24(a) and that the court should exercise its discretion to deny permissive intervention under CIT Rule 24(b). *See* Pl.'s Resp. in Opp. to U.S. Steel's Mot. to Intervene at 4, 11, Oct. 26, 2022, ECF No. 19 ("Pl.'s Resp."); *see also* U.S. Gov't's Resp. in Opp. to U.S. Steel's Mot. to Intervene at 1, 6–7, Oct. 26, 2022, ECF No. 17 ("Def.'s Resp.").

Upon consideration of U.S. Steel's Motion and all other relevant papers and proceedings, the court denies U.S. Steel's Motion to Intervene as Defendant-Intervenor.

I. Precedent Establishes that U.S. Steel Does Not Satisfy the Requirements for Intervention as of Right under CIT Rule 24(a).

CIT Rule 24(a)(2) affords a right to intervene to "anyone" who "on a timely motion":

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the

[2] The Federal Circuit recently described the Section 232 scheme as follows:

> Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods to safeguard national security. Pursuant to this authority, in March 2018, the President imposed a 25 percent ad valorem tariff on imports of certain steel products. Domestic importers could request a tariff exclusion, however, either if the imported steel product was not produced in the United States in a satisfactory quality, or for a specific national security consideration. Likewise, any individual or organization that manufactures steel articles in the United States could then object to any such exclusion requests, providing domestic steel producers the opportunity to show that they either have or could have quickly produced a sufficient quantity of the same or similar quality product.

Cal. Steel Indus., Inc. v. United States, 48 F.4th 1336, 1339 (Fed. Cir. 2022) (citations omitted).

> action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

USCIT R. 24(a)(2). This rule requires a movant to establish:

> (1) the motion is timely; (2) the movant asserts a legally protectable interest in the property at issue; (3) the movant's interest "must be of such a *direct* and *immediate* character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment"; and (4) the movant's interest will not be adequately represented by the government.

NLMK Pa., LLC. v. United States, 45 CIT __, __, 553 F. Supp. 3d 1354, 1359 (2021) (quoting *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012) (emphasis in original)). Failure to satisfy any one of these requirements defeats the movant's right to intervene under CIT Rule 24(a)(2). *See Vivitar Corp. v. United States*, 7 CIT 165, 167, 585 F. Supp. 1415, 1417 (1984).

While U.S. Steel claims that it meets each of Rule 24(a)(2)'s requirements, *see* U.S. Steel's Mot. at 3, Seneca and the Government maintain that Federal Circuit precedent dictates that U.S. Steel may not intervene as of right because, at a minimum, U.S. Steel has no legally protectable interest, *see* Pl.'s Resp. at 5; *see also* Def.'s Resp. at 3. Seneca and the Government are correct.

Before this court, U.S. Steel argues that it has "at least three interests" for the purposes of Rule 24(a)(2), including: (1) "a participatory interest in ensuring that Commerce's determinations remain compliant with the Administrative Procedure Act," 5 U.S.C. § 500 *et seq.*; (2) an economic interest in defending Commerce's denial of exclusion requests that ostensibly benefit U.S. Steel's sales opportunities and price competitiveness; and (3) a status interest "as an expressly identified beneficiary of Section 232 tariffs on steel articles." *See* U.S. Steel's Mot. at 9. An insurmountable hurdle for U.S. Steel is that the Federal Circuit recently considered and rejected these precise purported interests in *California Steel Industries, Inc. v. United States*. *See* 48 F.4th 1336, 1343–44 (Fed. Cir. 2022) ("[P]roposed intervenors contend that they have a legally protectable interest in Commerce's denials of the importers' exclusion requests, considering the proposed intervenors' administrative participation, direct economic stake, and position as intended beneficiaries of the Presidents ad valorem tariff. . . . We disagree." (citations omitted)).

U.S. Steel advises this court "not [to] follow" the Federal Circuit's prior refusal for several reasons. *See* U.S. Steel's Mot. at 9. First, U.S. Steel attempts to draw a factual distinction, arguing that unlike in *California Steel*, where "U.S. Steel *did not subsequently supply the products at issue* to" the importer requesting an exclusion, U.S. Steel's Mot. at 9–10 (emphasis in original) (quoting 48 F.4th at 1340–41), here, "U.S. Steel made multiple tin shipments to Seneca" "in the wake of Seneca's . . . exclusion requests," such that this court's "upholding [of] Commerce's exclusion could provide U. S. Steel with specific sales opportunities," thereby impacting U.S. Steel's interests, *see id.* at 10. Even accepting the foregoing as true, any such "specific sales opportunities," *id.*, comprise the type of "'mere[] economic interests'" that the Federal Circuit has repeatedly declared "'[do] not suffice' to establish that a proposed intervenor has a legally protectable interest." *Cal. Steel*, 48 F.4th at 1344 (first alteration in original) (quoting *Wolfsen*, 695 F.3d at 1315); *see also Am. Mar. Transp., Inc. v. United States*, 870 F.2d 1559, 1562 (Fed. Cir. 1989) ("[A] 'legally protectable interest' . . . has been held to require something more than merely an economic interest."). Because Putative Defendant-Intervenor does not articulate a basis to overcome this threshold obstacle, U.S. Steel's attempts to distinguish the case at bar fail, and *California Steel*'s finding of no legally protectable interest controls.[3]

Putative Defendant-Intervenor next advises the court "not [to] follow" the Federal Circuit's prior refusal on the grounds that because U.S. Steel has requested a rehearing *en banc* of *California Steel*, "this [c]ourt should not consider the Federal Circuit's decision . . . to be final." U.S. Steel's Mot. at 8, 11. This, of course, the court cannot do. *See Aireko Constr., LLC v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1307, 1312 (2020) ("Decisions of the Court of Appeals for the Federal Circuit bind this Court, unless overruled by an *en banc* decision by that court or by the Supreme Court."); *Cemex, S.A. v. United States*, 384 F.3d 1314, 1321 n.5 (Fed. Cir. 2004) (stating that even other Federal Circuit panels "are bound to follow [their] own

[3] Even if such economic interests could suffice to establish a "legally protectable interest," U.S. Steel's motion would likewise stumble at the third requirement of CIT Rule 24(a)(2). *Supra* p. 3 (enumerating the additional requirement that a movant's interest "be of such a *direct* and *immediate* character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment"). As the Government persuasively explains, the impact — if any — on U.S. Steel stemming from this court's resolution of Seneca's underlying challenge will be "necessarily indirect." Def.'s Resp. at 4. This is so, because even if the court were to sustain Commerce's exclusion denial — as U.S. Steel desires — Seneca would "not [be] required to purchase any of their steel from" Putative Defendant-Intervenor, but rather would remain free to "make the business decision to purchase foreign steel and pay the tariff to the United States, or not [to] purchase steel at all." *Id.* The Federal Circuit has instructed that such indirect and contingent "interests" do not satisfy the third requirement of Rule 24(a)(2). *See, e.g.*, *Am. Mar. Transp.*, 870 F.2d at 1561.

precedent unless it is overruled by the Supreme Court or an *en banc* decision").

Perhaps recognizing that this court is not free to disregard the binding authority of the Federal Circuit, U.S. Steel alternatively asks the court to refrain from "decid[ing] the instant motion to intervene until the Federal Circuit issues a final decision in [*California Steel*] on any request for a rehearing *en banc*." U.S. Steel's Mot. at 11. When considering a motion to stay, the court must weigh the competing interests at stake. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). As determined, *supra*, U.S. Steel has no "legally protectable interest;" by contrast, Seneca has an interest in receiving expeditious refunds of any Section 232 duties erroneously paid, which would be prejudiced by a delay. *See NLMK*, 553 F. Supp. 3d at 1365. Moreover, any *en banc* rehearing of *California Steel* "will not resolve any part of [Seneca's] Complaint," such that "the proposed stay would not conserve any judicial or party resources." *Id.* at 1366. Accordingly, in light of the balance of equities, the court declines U.S. Steel's invitation to delay resolution of the instant motion.[4]

In sum, adhering to Federal Circuit precedent — as this court must — U.S. Steel does not satisfy the requirements for intervention as of right under CIT Rule 24(a).

II. U.S. Steel Is Not Permitted to Intervene under CIT Rule 24(b).

CIT Rule 24(b) instructs, in relevant part, that "[o]n timely motion, the court may permit anyone to intervene who" "is given a conditional right to intervene by a federal statute." USCIT R. 24(b)(1)(A). Paragraph 2631(j)(1) of 28 U.S.C. affords such a "conditional right" to "[a]ny person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade." 28 U.S.C. § 2631(j)(1). "Once a proposed intervenor demonstrates that it will be adversely affected or aggrieved, the court must 'consider whether [any such] intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *NLMK*, 553 F. Supp. 3d at 1359 (quoting 28 U.S.C. § 2631(j)(2)).

U.S. Steel contends it should be permitted to intervene in the case at bar because it satisfies the requirements of the above rules and because its intervention will not unduly delay or prejudice the adjudication of Seneca's right. *See* U.S. Steel's Mot. at 11–14. By contrast, Seneca and the Government maintain that "U.S. Steel has no conditional right to intervene by statute because it will not be aggrieved by

[4] Of course, if the Federal Circuit sitting *en banc* reverses *California Steel*, U.S. Steel may renew its Motion to Intervene and explain why any such decision warrants a different outcome in the proceedings at bar.

this action." Pl.'s Resp. at 12; Def.'s Resp. at 6 (substantively similar). Here too, Seneca and the Government are correct.

The court agrees with Seneca that Putative Defendant-Intervenor "misstates the potential [economic] consequences of this case," Pl.'s Resp. at 13 (alteration in original) (quoting *NLMK*, 553 F.3d at 1363), with its argument that any reversal of Commerce's exclusion determination "would result in an increase in tariff-free imports of directly competitive products" such that U.S. Steel qualifies as "adversely affected or aggrieved" for purposes of 28 U.S.C. § 2631(j)(1) and CIT Rule 24(b)(1)(A), *see* U.S. Steel's Mot. at 13. As Seneca and the Government explain, the dispute at bar concerns duties that Seneca has already paid and does not involve any requests for prospective relief. *See* Pl.'s Br. at 13–14; *see also* Def.'s Resp. at 6. If Seneca were to prevail in the underlying litigation, the United States Government, and not the domestic steel industry, would pay any resultant duty refunds. *See* Def.'s Resp. at 4. Accordingly, any attendant competitive injury — if, indeed, there is any — to U.S. Steel would be too diffuse to render it "adversely affected or aggrieved by a decision" of this court.[5] 28 U.S.C. § 2631(j)(1).

Because Putative Defendant-Intervenor does not meet the requirements under 28 U.S.C. § 2631(j)(1) and CIT Rule 24(b)(1)(A),[6] the court denies U.S. Steel's motion for permissive intervention.

For the foregoing reasons, it is hereby:

ORDERED that U.S. Steel's Motion to Intervene, ECF No. 11, is denied.

SO ORDERED.

Dated: December 21, 2022
New York, New York

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

[5] Nor, as previously explained, would the court's affirmance of the exclusion denials by Commerce — a favorable result in Putative Defendant-Intervenor's estimation — necessarily result in any benefits to U.S. Steel. *Supra* p. 5 n.3.

[6] Having determined that U.S. Steel does not meet the statutory requirements for permissive intervention under 28 U.S.C. § 2631(j)(1), the court need not consider whether intervention would unduly delay adjudication of Seneca's claim.

Slip Op. 22–150

LINYI CHENGEN IMPORT AND EXPORT CO., LTD., Plaintiff, and CELTIC CO., LTD., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE OF HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00002

[Remanding the fourth remand determination of the U.S. Department of Commerce, following the final determination in the antidumping duty investigation of certain hardwood plywood products from the People's Republic of China.]

Dated: December 21, 2022

Gregory S. Menegaz, *Alexandra H. Salzman*, *James K. Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff Linyi Chengen Import and Export Co., Ltd., Consolidated Plaintiffs Far East American, Inc. and Shandong Dongfang Bayley Wood Co., Ltd., and Consolidated Plaintiffs and Plaintiff-Intervenors Celtic Co., Ltd., Jiaxing Gsun Import & Export Co., Ltd., Anhui Hoda Wood Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Linyi Evergreen Wood Co., Ltd., Linyi Glary Plywood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Shandong Qishan International Trading Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Suining Pengxiang Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Pinlin International Trade Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., and Xuzhou Timber International Trade Co., Ltd.

Jeffrey S. Neeley, *Nithya Nagarajan*, and *Stephen W. Brophy*, Husch Blackwell LLP, of Washington, D.C., for Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd., Highland Industries Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd., Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited, Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co., Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic & Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp.

Jeffrey S. Grimson, *Bryan P. Cenko*, *Jill A. Cramer*, *Kristin H. Mowry*, and *Sarah M. Wyss*, Mowry & Grimson, PLLC, of Washington, D.C., for Consolidated Plaintiffs Taraca Pacific, Inc., Canusa Wood Products, Ltd., Concannon Corporation d/b/a Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPLY LLC.

Sonia M. Orfield, 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, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel were *Nikki Kalbing*, Attorney, and *Savannah R. Maxwell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Timothy C. Brightbill, *Adam M. Teslik*, *Derick G. Holt*, *Elizabeth S. Lee*, *Jeffrey O. Frank*, *Laura El-Sabaawi*, *Maureen E. Thorson*, *Stephanie M. Bell*, and *Tessa V. Capeloto*, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Coalition for Fair Trade of Hardwood Plywood.

OPINION AND ORDER

Choe-Groves, Judge:

This action concerns the import of hardwood and decorative plywood and certain veneered panels into the United States from the People's Republic of China ("China"), subject to the final affirmative determination in an antidumping duty investigation by the U.S. Department of Commerce ("Commerce"). *See Certain Hardwood Plywood Products from the People's Republic of China*, 82 Fed. Reg. 53,460 (Dep't of Commerce Nov. 16, 2017) (final determination of sales at less than fair value), *as amended*, 83 Fed. Reg. 504 (Dep't of Commerce Jan. 4, 2018) (amended final determination of sales at less than fair value) (collectively "*Final Determination*"); *see also* Issues and Decision Mem. for the Final Determination of the Antidumping Duty Investigation of Certain Hardwood Plywood Products from People's Republic of China ("Final IDM"), ECF No. 25–7.

Before the Court are the Final Results of Redetermination Pursuant to Court Remand ("*Fourth Remand Determination*"), ECF Nos. 205–1, 206–1, which the Court ordered in *Linyi Chengen Import & Export Co. v. United States* ("*Linyi Chengen IV*"), 45 CIT __, 539 F. Supp. 3d 1269 (2021). Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co. ("Dehua TB"), Taraca Pacific, Inc. ("Taraca"), and Celtic Co. ("Celtic") filed comments in opposition to the *Fourth Remand Determination*. Plaintiff Linyi Chengen Import & Export Co. ("Linyi Chengen"), and Consolidated Plaintiff Shandong Dongfang Bayley Wood Co. ("Bayley"), both mandatory respondents, did not file comments in response to the *Fourth Remand Determination*.

Dehua TB filed comments collectively on behalf of itself and Highland Industries, Inc., Jiashan Dalin Wood Industry Co., Happy Wood Industrial Group Co., Jiangsu High Hope Arser Co., Suqian Yaorun Trade Co., Yangzhou Hanov International Co., G.D. Enterprise Ltd., Deqing China-Africa Foreign Trade Port Co., Pizhou Jin Sheng Yuan International Trade Co., Xuzhou Shuiwangxing Trading Co., Cosco Star International Co., Linyi City Dongfang Jinxin Economic & Trade Co., Linyi City Shenrui International Trade Co., Jiangsu Qianjiuren International Trading Co., and Qingdao Top P&Q International Corp. Comments Opp'n Third Remand Redetermination Behalf Consol. Pls. [Dehua TB] et. al. ("the Dehua TB Comments" or "Dehua TB Cmts."), ECF No. 208.

Taraca filed comments collectively on behalf of itself and Canusa Wood Products, Ltd., Concannon Corp. d/b/a Concannon Lumber Co., Fabuwood Cabinetry Corp., Holland Southwest International, Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPLY LLC. Consol. Pls. [Taraca], Canusa Wood Products Ltd., Concannon Corp. [d/b/a] Concannon Lumber Co., Fabuwood Cabinetry Corp., Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, & USPLY LLC Comments Opp'n Third Remand Redetermination ("the Taraca Comments" or "Taraca Cmts."), ECF No. 209.

Celtic filed comments collectively on behalf of itself and Anhui Hoda Wood Co., Far East American, Inc., Jiaxing Gsun Import & Export Co., Jiaxing Hengtong Wood Co., Linyi Evergreen Wood Co., Linyi Glary Plywood Co., Linyi Jiahe Wood Industry Co., Linyi Linhai Wood Co., Linyi Hengsheng Wood Industry Co., Linyi Huasheng Yongbin Wood Co., Linyi Mingzhu Wood Co., Linyi Sanfortune Wood Co., Qingdao Good Faith Import & Export Co., Shanghai Futuwood Trading Co., Shandong Qishan International Trading Co., Suining Pengxiang Wood Co., Suqian Hopeway International Trade Co., Suzhou Oriental Dragon Import & Export Co., Xuzhou Andefu Wood Co., Xuzhou Jiangyang Wood Industries Co., Xuzhou Longyuan Wood Industry Co., Xuzhou Pinlin International Trade Co., Xuzhou Shengping Import & Export Co., and Xuzhou Timber International Trade Co. Consol. Separate Rate Pls.' Comments Opp'n Fourth Remand Redetermination ("the Celtic Comments" or "Celtic Cmts."), ECF Nos. 210, 211.

The Court refers collectively to the non-examined parties that filed the Dehua TB Comments, the Taraca Comments, and the Celtic Comments as the "Separate Rate Plaintiffs."

Defendant United States ("Defendant") responded to the Dehua TB Comments, the Taraca Comments, and the Celtic Comments. Def.'s Resp. Comments Remand Redetermination ("Def.'s Resp."), ECF Nos. 214, 215. Defendant-Intervenor Coalition for Fair Trade of Hardwood Plywood ("Defendant-Intervenor") filed comments in support of the *Fourth Remand Determination*. [Def.-Intervenor]'s Comments Supp. Commerce's Remand Redetermination ("Def.-Interv.'s Cmts."), ECF Nos. 213, 216.

The Court reviews whether Commerce's separate rate for the non-examined companies that were granted separate rate status ("all-others separate rate") is supported by substantial evidence. For the reasons discussed below, the Court holds that the all-others separate rate is not supported by substantial evidence and remands Com-

merce's *Fourth Remand Determination*.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Fourth Remand Determination*. *See Linyi Chengen Imp. & Exp. Co. v. United States*, 43 CIT__, __, 391 F. Supp. 3d 1283, 1287–92 (2019); *Linyi Chengen Imp. & Exp. Co. v. United States*, 44 CIT __, __, 433 F. Supp. 3d 1278, 1280–84 (2020); *Linyi Chengen Imp. & Exp. Co. v. United States* ("Linyi Chengen III"), 44 CIT __, __, 487 F. Supp. 3d 1349, 1351–54 (2020); *Linyi Chengen IV*, 45 CIT at __, 539 F. Supp. 3d at 1271–1274.

Commerce initiated an antidumping investigation after reviewing an antidumping duty petition ("Petition") submitted by Defendant-Intervenor. *See Certain Hardwood Plywood Products from the People's Republic of China*, 81 Fed. Reg. 91,125 (Dep't of Commerce Dec. 16, 2016) (initiation of less-than-fair-value investigation). The Petition contained price quotes, i.e., "two offers for sale for hardwood plywood produced in [China] from a Chinese exporter," as the basis for its estimated dumping margins ranging from 104.06% to 114.72%. *See id.* at 91,128–29.

Commerce accepted applications from exporters and producers seeking to obtain separate rate status in the investigation ("separate rate applications") to avoid the country-wide dumping margin because the investigation involved products from China, a non-market economy. *See id.* at 91,129. Commerce assigned the all-others separate rate to the companies that were not individually examined but demonstrated their eligibility for separate rate status ("separate rate respondents"). *Final Determination*, 82 Fed. Reg. at 53,462. Commerce selected Bayley and Linyi Chengen as the only mandatory respondents in the investigation. *See* Decision Mem. Prelim. Determination Antidumping Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China (June 16, 2017) ("Prelim. DM") at 4, PR 734.[1]

In *Linyi Chengen III*, 44 CIT __, __, 487 F. Supp. 3d 1349, 1356 (2020), the Court sustained as reasonable and supported by substantial evidence Commerce's determination that Linyi Chengen's dumping margin was 0%. *Id.* at 1356. The Court also concluded that Commerce did not support with substantial evidence its departure from the expected method and its determination of the all-others separate rate of 57.36% by using the simple average of Linyi Chen-

[1] Citations to the administrative record reflect the public record ("PR") document numbers.

gen's 0% rate and Bayley's adverse facts available ("AFA") rate of 114.72% and remanded the case for Commerce to reconsider or provide additional evidence. *Id.* at 1355–59.

In *Linyi Chengen IV*, 45 CIT __, __, 539 F. Supp. 3d 1269, 1276 (2021), the Court concluded that Commerce reasonably supported its determination to depart from the expected method in determining the all-others separate rate because Linyi Chengen's 0% rate would not be reflective of the potential dumping margins. *Id.* at 1276. Commerce based its determination on the evidence reviewed, including the comparability of a Petition price quote to a price from the Petition Separate Rate Application, differences between Linyi Chengen's and the Separate Rate Plaintiffs' pricing and cost structures, and commercial invoices showing disparities between the Separate Rate Plaintiffs' and Linyi Chengen's selling activities. *Id.* Commerce again applied "any reasonable method" and calculated the all-others separate rate of 57.36% by using the simple average of Linyi Chengen's 0% rate and Bayley's AFA rate of 114.72%. *Id.* This Court again concluded that Commerce's application of the 57.36% all-others separate rate to the Separate Rate Plaintiffs was not reasonable and was unsupported by substantial evidence. *Id.* at 1278. This Court noted that when applying "any reasonable method," Commerce is still required to assign dumping margins as accurately as possible that are supported by substantial evidence, and that Commerce cited as record evidence only one commercial invoice showing an approximately 20% price difference between the prices of the Petition Separate Rate Application and Linyi Chengen. *Id.* at 1277–78. Because Commerce's determination was not reasonable and was unsupported by substantial evidence, the Court remanded Commerce's determination. *Id.*

In the Fourth Remand Determination, Commerce assigned the same 57.36% all-others separate rate to the Separate Rate Plaintiffs, again taking the arithmetic average of the highest possible AFA rate and Linyi Chengen's 0% rate. *Fourth Remand Determination* at 9. The Court again finds Commerce's determination to be unsupported by substantial evidence.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __,

992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Legal Framework

Commerce is authorized by statute to calculate and impose a dumping margin on imported subject merchandise after determining that it is sold in the United States at less than fair value. 19 U.S.C. § 1673. Commerce determines an estimated weighted average dumping margin for each individually examined exporter and producer and one all-others separate rate for non-examined companies. 19 U.S.C. § 1673d(c)(1)(B). The Court of Appeals for the Federal Circuit has upheld Commerce's reliance on this method for determining the estimated all-others separate rate in § 1673d(c)(5) when "determining the separate rate for exporters and producers from nonmarket economies that demonstrate their independence from the government but that are not individually investigated." *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1011 (Fed. Cir. 2017) (citing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016)).

The general rule for calculating the all-others separate rate is to weight-average the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely on the basis of facts available, including adverse facts available. 19 U.S.C. § 1673d(c)(5)(A). If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis*, or are determined entirely under 19 U.S.C. § 1677e (i.e., determinations on basis of facts available), Commerce may invoke an exception to the general rule. *Id.* § 1673d(c)(5)(B). The Statement of Administrative Action provides further guidance, instructing that when the dumping margins for all individually examined respondents are determined entirely on the basis of the facts available or are zero or *de minimis*, the "expected method" of determining the all-others separate rate is to weight-average the margins determined pursuant to the facts available and the zero and *de minimis* margins, provided that volume data is available. Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201.

Commerce may depart from the "expected method" and use "any reasonable method" if it reasonably concludes that the expected

method is not feasible or results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers. *See* 19 U.S.C. § 1673d(c)(5)(B); *Navneet Publications (India) Ltd. v. United States*, 38 CIT __, __, 999 F. Supp. 2d 1354, 1358 (2014) ("[T]he following hierarchy [is applied] when calculating all-others rates—(1) the '[g]eneral rule' set forth in § 1673d(c)(5)(A), (2) the alternative 'expected method' under § 1673d(c)(5)(B), and (3) any other reasonable method when the 'expected method' is not feasible or does not reasonably reflect potential dumping margins"); *see also* SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201; *Albemarle Corp.*, 821 F.3d at 1351–52 (quoting SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201). Any reasonable method may include averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated. 19 U.S.C. § 1673d(c)(5)(B).

While Commerce is permitted to use various methodologies, "it is possible for the application of a particular methodology to be unreasonable in a given case." *Yangzhou Bestpak Gifts & Crafts Co. v. United States* ("*Yangzhou Bestpak*"), 716 F.3d 1370, 1378 (Fed. Cir. 2013) (quoting *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F. 3d 1077, 1085 (Fed. Cir. 2001)). In this case, the Court analyzes whether Commerce's methodology is reasonable as applied and supported by substantial evidence.

II. The Parties' Contentions

The Separate Rate Plaintiffs challenge Commerce's *Fourth Remand Determination* on numerous grounds. The Celtic Comments challenge Commerce's *Fourth Remand Determination* by arguing that Commerce failed to calculate a margin that is reasonably reflective of the Separate Rate Plaintiffs' potential dumping margin. Celtic Cmts. at 2. The Celtic Comments assert that Commerce's examination of additional invoices in a supplemental questionnaire on fourth remand was flawed because the new documents reflect purchases of plywood in China from the Separate Rate Petitioner's own suppliers, rather than from additional sales of subject merchandise to the United States. *Id*. at 3. The Celtic Comments state that the price at which the Petition Separate Rate Application exporter bought plywood in China was not relevant to Commerce's inquiry of the U.S. sales price, and the sales price was actually higher than the price at which the products were bought. *Id*. The Celtic Comments note that the invoice was not the only evidence of a sale of the specific plywood in the supplement questionnaire, which contained another invoice showing

higher sales prices. *Id*. The Celtic Comments argue that Commerce cited only two invoices showing lower sales prices than Linyi Chengen's sale of a similar product, while ignoring other invoices on the record that show sales of similar products at higher prices than Linyi Chengen's sale. *Id*. at 3. The Celtic Comments contend that other information on the record that could have been considered by Commerce includes full questionnaires submitted voluntarily by Jiangyang Wood, showing sales prices that range below and above the sales prices of Linyi Chengen. *Id*. at 7–8. The Celtic Comments assert also that Commerce ignored relevant sales data of Bayley, who placed a full U.S. sales database on the record. *Id*. at 8. In addition, the Celtic Comments contend that Commerce ignored sales data on the record from numerous Separate Rate Plaintiffs that show sales prices in the range of or higher than Linyi Chengen's sales prices. *Id*.

The Taraca Comments challenge Commerce's assertion that the only alternative rates on the record are those rates listed in the Petition. Taraca Cmts. at 5–6. The Taraca Comments assert that Commerce ignored evidence on the record, specifically the Separate Rate Applications containing commercial invoices of over 100 companies that Commerce determined were separate from the China-wide entity. *Id*. at 6. The Taraca Comments contend that many of the sales invoices of the Separate Rate Plaintiffs show pricing higher than Linyi Chengen's prices. *Id*. The Taraca Comments note that Commerce recognized that there is no basis to choose between the two Petition rates of 114.72% and 104.06% because both are for similar subject merchandise. *Id*. The Taraca Comments contend that Commerce unreasonably chose the highest potential Petition rate between a choice of the higher AFA rate of 114.72% and the lower Petition rate of 104.06%, particularly in light of information on the record consisting of invoices from forty Separate Rate Plaintiffs showing a variety of prices, some that were higher than Linyi Chengen's price. *Id*. The Taraca Comments criticize Commerce for claiming that the record provides no opportunity for Commerce to know or calculate the actual dumping margins of the Separate Rate Plaintiffs and for only relying on the rates listed in the Petition, while ignoring alternate evidence on the record of prices from the Separate Rate Plaintiffs. Id. at 5–6.

The Dehua Comments argue similarly that Commerce complained of a limited record, which is "of Commerce's own making." Dehua TB at 3. The Dehua Comments contend that the information cited by Commerce is flawed, unreasonable, and does not provide substantial support for Commerce's remand determination. *Id.* at 4–6.

The Government argues that Commerce's *Fourth Remand Determination* is supported by substantial evidence because on remand

Commerce reexamined the record and identified additional evidence of commercial invoices that support Commerce's determination to rely on the Petition rate. Def.'s Resp. at 7–8. The Government contends that several reasons support Commerce's *Fourth Remand Determination*.

First, the Government contends that Commerce's reliance on the Petition rate is supported by the price quote that forms the basis of the Petition rate and the invoice that corroborates that exporter's selling practices. *Id.* at 8. Commerce explained that "comparing prices between two companies selling comparable goods is a reasonable analysis to conduct in the antidumping context, where price comparisons form the basis of all calculated rates." *Id.* (quoting the *Fourth Remand Determination* at 29). The Government contends that this price comparison "sufficiently tethers the actual selling activities of separate rate recipients . . . to the margins in the petition[,]" because it indicates that sales were made at even lower prices than those that resulted in the Petition rates during the period of investigation. *Id.* at 8–9. The Government asserts that Commerce analyzed additional invoices for plywood purchased by the Petition Separate Rate Exporter from each of its suppliers. *Id.* at 9. The Government contends that the Petition Separate Rate Exporter "sold plywood to the United States during the period of investigation at even lower rates than the prices identified in the petition." *Id.* (citing *Fourth Remand Determination* at 32).

Second, the Government contends that Commerce reconsidered the 57.36% all-others separate rate applied to the Separate Rate Plaintiffs and provided a reasonable explanation of why it declined to use an alternative method for calculating the rate. *Id.* at 11. The Government argues that after the Court sustained Commerce's decision to calculate the separate rate using any reasonable method, Commerce investigated the other rates on the record of this investigation. The Government contends that the Court should sustain Commerce's determination because Commerce explained that: (1) the record does not provide any opportunity for Commerce to know or calculate the actual dumping margins of the Separate Rate Plaintiffs, (2) the only rates on the record of the review were the China-wide entity rate of 114.72%, and Linyi Chengen's 0% rate, and (3) the limited record information indicates that the selling behavior varied during the period of investigation. *Id.* at 11–13. The Government asserts that Commerce's determination is reasonable because the simple average of the two available rates most accurately represents the variance in potential dumping margins. *Id.*

The Government argues that Commerce was reasonable by selecting the higher of the two potential rates between 104.06% and 114.72% because "both of the petition rates begin with the pricing established by the Petition [Separate Rate] Exporter . . . [and] both of these rates are representative of the dumping behavior of the Separate Rate Plaintiffs." *Id.* at 13 (citing the *Fourth Remand Determination* at 12). The Government contends that because both of the potential rates were for in-scope plywood products, Commerce had no basis to choose between them. *Id.* The Government argues that Commerce was reasonable in determining that applying the average of the Petition rates (109.39%) would require it to ignore record evidence suggesting that separate rate companies had potential dumping margins at levels equal to, or in excess of the highest Petition rate of 114.72%. *Id.* at 14. The Government asserts that "Commerce explained that although Chengen's rate alone 'would not be representative of the separate rate respondents' actual dumping margins,' neither would either of petition rates alone be the most appropriate rate[.]" *Id.* (quoting the *Fourth Remand Determination* at 31). The Government argues that the Court should sustain Commerce's determination because by averaging Linyi Chengen's 0% rate with the China-wide entity rate based on the highest Petition rate, Commerce calculated the most accurate all-others separate rate for those Separate Rate Plaintiffs whose dumping more closely resembled the levels of the Petition Separate Rate Exporter and those whose dumping more closely resembled Linyi Chengen. *Id.*

Third, the Government contends that despite the Court's skepticism regarding the single invoice discussed at length in *Linyi Chengen IV*, which showed an approximately 20% price difference between the price at which Linyi Chengen sold the same product as the Petition Separate Rate Exporter, the price differential alone is not indicative of the potential dumping margin. *Id.* at 15. The Government asserts that because a margin must be calculated by reference to a U.S. price and normal value (i.e., the arithmetic difference between the normal value and the U.S. sales price), the Petition Separate Rate Exporter's own company-specific normal value is not on the record in this investigation. *Id.* The Government argues that absent a company-specific normal value, the price comparison merely shows that the Separate Rate Exporters priced their products at potentially much lower levels than the pricing level for Linyi Chengen's U.S. plywood exports. *Id.* Thus, the Government asserts that this single commercial invoice is not a good proxy for the Separate Rate Plaintiffs' rate because it does not inform Commerce as to the Separate Rate Plaintiffs' normal values.

Defendant-Intervenor argues that Commerce's margin calculation for the Separate Rate Plaintiffs is reasonable, fully explained, and based on substantial evidence. Defendant-Intervenor contends that because (1) there are only three calculated rates on the record (Linyi Chengen's 0% rate, and the 104.06% and 114.72% margins calculated in the petition), (2) the Court has already sustained Commerce's finding that Linyi Chengen's 0% rate would not reasonably reflect the Separate Rate Plaintiffs' potential dumping, (3) the 20% selling price differential between Linyi Chengen and the Petition Separate Rate Exporter alone is not indicative of the potential dumping differentials, and (4) given Commerce's explanation that there was variance in the separate rate companies' dumping margins, with some separate rate companies having potential dumping margins up to the highest rate calculated in the Petition (114.72%), the simple average of the highest potential AFA rate calculated in the Petition and Linyi Chengen's 0% rate most reasonably reflects the variance in potential dumping margins. Def.-Interv.'s Cmts. at 6–7.

III. Analysis

Antidumping law is intended to calculate antidumping duties on a fair and equitable basis. *U.S. Steel Group v, United States*, 225 F.3d 1284, 1290 (Fed. Cir. 2000) (citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994)). The purpose of 19 U.S.C. § 1677e is to incentivize respondents to cooperate, and not to impose punitive, aberrational, or uncorroborated margins. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032. As the court noted in *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013), Commerce is not permitted to consider only information that supports its determination while ignoring other relevant information to the contrary. *See generally Yangzhou Bestpak*, 716 F.3d 1370.

Yangzhou Bestpak is instructive here. Commerce calculated the all-others separate rate margin of Yangzhou Bestpak Gifts & Crafts Co. ("Bestpak") by using the simple average of an AFA rate and a *de minimis* rate, similar to the facts in this case. *Id.* at 1372. In *Yangzhou Bestpak*, Commerce selected the two largest exporters, Ningbo Jintian Import & Export Co., Ltd. ("Jintian") and Yama Ribbons & Bows Co., Ltd ("Yama"), as mandatory respondents for individual investigation. *Id.* Commerce received responses from Yama, but not from Jintian. *Id.* No other exporter requested voluntary investigation, and Commerce did not select a replacement mandatory respondent for Jintian, despite Commerce's past practice of selecting a replacement respondent when a mandatory respondent did not

comply. *Id.* Thus, Commerce's investigation only involved one participant. Commerce assigned a *de minimis* dumping margin to Yama, and an AFA China-wide entity rate of 247.65% to Jintian due to its failure to cooperate in the investigation. *Id.* Commerce calculated Bestpak's all-others separate rate using the simple average of Yama's *de minimis* rate and Jintian's AFA China-wide entity rate, resulting in a 123.83% all-others separate rate margin. *Id.* The U.S. Court of International Trade remanded, noting that the calculated separate rate was "exceptionally larger than the rate calculated for the lone cooperative mandatory respondent." *Id.*

On remand, Commerce reviewed the administrative record and compared the estimated average unit values ("AUVs") calculated from information provided by Jintian, Yama, and Bestpak in their Q&V questionnaire responses. *Id.* An estimated AUV "is a ratio calculated by dividing a respondent's total value of sales by its total quantity of sales[.]" *Id.* Using AUVs as a proxy for dumping margins, Commerce determined that Bestpak's AUVs fell between Yama's (*de minimis* margin) and Jintian's (AFA margin), and thus "a 'simple average of Jintian and Yama's estimated AUVs' equaled a rate which was 'very close' to Bestpak's 'estimated AUV.'" *Id.* (internal citation omitted). Commerce argued that the simple average of the two investigated companies' margins reasonably reflected Bestpak's potential dumping margin. *Id.* The U.S. Court of International Trade sustained Commerce's separate rate determination, noting that though the determination "may [have been] unfortunate and even frustrating, . . . it [was] not unreasonable on this limited administrative record." *Id.* at 1377 (quoting *Yangzhou Bestpak Gifts & Crafts Co., Ltd., v. United States*, 36 CIT 475, 483, 825 F. Supp. 2d 1346, 1353 (2012)).

On appeal, the Court of Appeals for the Federal Circuit held that substantial evidence did not support Commerce's all-others separate rate calculation and vacated and remanded accordingly. *Id.* The Court of Appeals for the Federal Circuit reasoned that:

> [W]hile various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case. . . . This court finds that this case presents that situation. . . . Although Commerce may be permitted to use a simple averaging methodology to calculate the separate rate, the circumstances of this case renders a simple average of a *de minimis* and AFA Chinawide rate unreasonable as applied. Similarly, a review of the administrative record reveals a lack of substantial evidence showing that such a determination reflects economic reality.

Id. at 1378. In addition to concluding that Commerce's selected calculation method was unreasonable as applied, the *Yangzhou Bestpak* Court held that "[t]his court does not find Commerce's late attempt to backfill with these AUV estimates, untethered to the three respondents' actual dumping margins, as amounting to substantial evidence." *Id.* at 1379. The Court of Appeals for the Federal Circuit concluded that even "[w]hile Bestpak's estimated AUV aligned with a simple average of Jintian's and Yama's estimated AUVs, Commerce's inference that their dumping margins paralleled that same correlation is speculative." *Id.* The Court stated that it was unfair and perhaps punitive to assign a fully cooperating separate rate respondent a margin that was one half of the China-wide entity rate—a rate reserved for those entities presumed to be under foreign government control. *Id.* Notably, the Court of Appeals for the Federal Circuit criticized Commerce's own actions of identifying only two significant exporters for review and failing to replace Jintian after it became clear that Jintian was unresponsive to Commerce's requests, leading to a situation of Commerce's own making with one *de minimis* and one AFA rate. The Court of Appeals for the Federal Circuit also rejected Commerce's claim that time constraints precluded it from investigating more thoroughly, and the *Yangzhou Bestpak* Court ultimately found "no support in this court's precedents or the statute's plain text for the proposition that limited resources or statutory time constraints can override fairness and accuracy." *Id.* (citing *SNR Roulements v. United States*, 402 F.3d 1358, 1363 (Fed. Cir. 2005)).

Following the principles established in *Yangzhou Bestpak*, this Court concludes that Commerce's determination is unreasonable as applied and not supported by substantial evidence. As in *Yangzhou Bestpak*, here Commerce selected only two mandatory respondents and failed to replace Bayley after it became clear that Bayley would not cooperate with Commerce's investigation, a practice that the Court of Appeals for the Federal Circuit has frowned upon. *See Yangzhou Bestpak*, 716 F.3d 1370; *but cf. Prestressed Concrete Steel Wire Strand from the People's Republic of China*, 74 Fed. Reg. 61,104 (Dep't of Commerce Nov. 23, 2009) (Commerce added a new mandatory respondent when it became clear that one respondent was uncooperative). As the Court noted in *Linyi Chengen IV*, Commerce created its own problem when it selected only two mandatory respondents, which resulted in sparse information on the record to support its assertions regarding the potential dumping margins of the separate rate respondents. *Linyi Chengen IV*, 539 F. Supp. 3d at 1277–78.

A speculative dumping margin using the average of a *de minimis* rate and an AFA rate cannot be upheld based on weak record evidence, particularly when Commerce itself created the scarcity of evidence. *See Bosun Tools Co. v. United States*, No. 2021–1930, 2022 WL 94172, at 4* (comparing *Yangzhou Bestpak* where "the record was 'so thin' that Commerce could not have reasonably 'found evidence to support [its] determination[,]'" while in *Bosun Tools* "in contrast, there was no such lack of data").

Commerce in this case simply averaged the *de minimis* and the AFA rate to determine the 57.36% all-others separate rate, which is half of the AFA rate. *See Fourth Remand Determination*. Using only two data points, Commerce reasoned that because the "limited record information available indicat[ed] that selling behavior varied during the [period of investigation[,]" the simple average of the two available rates most reasonably reflected the potential variance in dumping margins amongst the separate rate companies. *Id.* at 11. The Court observes that the all-others separate rate assigned to the fully cooperating Separate Rate Plaintiffs is nearly 60 times higher than that of the sole investigated respondent, Linyi Chengen. Similar to *Yangzhou Bestpak*, this Court concludes that an all-others separate rate applied to fully cooperating respondents that is 60 times higher than the only calculated *de minimis* rate and is half of the AFA rate seems unfair and unduly punitive.

With respect to the Government's argument that Commerce supported its determination by citing additional invoices from the Petition Separate Rate Applicant China Friend, *Fourth Remand Determination* at 31; Def.'s Resp. at 9–10; Petition SRA Exporter, Supplemental SRA Questionnaire Response (May 19, 2017) ("Supplemental Questionnaire"), PR 654–655, the Court disagrees that the invoices in the Supplemental Questionnaire support Commerce's determination that 57.36% is a reasonably accurate all-others separate rate and reflects the variation in prices during the period of investigation. Commerce determined that the Supplemental Questionnaire invoices indicate that "the Petition [Separate Rate] Exporter made sales of significant quantities of identical plywood at potential dumping rates higher than the Petition rates throughout the [period of investigation][.]" *Fourth Remand Determination* at 33. The Court notes that while Commerce concluded that variances in the selling behavior of the separate rate companies *only* implies dumping levels in excess of the highest Petition rate of 114.72%, Commerce ignored other potentially contrary record evidence, including potential evidence that the Petition SRA Exporter sold the same plywood for prices higher than the price upon which the Petition rate is based. *See*

Celtic Cmts. at 3; *see* Supplemental Questionnaire at Ex. S-5. The Court is persuaded by the Separate Rate Plaintiffs' argument that Commerce failed to review other potentially contradictory evidence on the record, including for example, record evidence showing that Separate Rate Plaintiff Jiangyang Wood had a higher weighted average sales price than Linyi Chengen, whose rate was determined to be 0%. Celtic Cmts. at 8; *see* Jiangyang Wood, Section C Questionnaire (February 28, 2017) ("Jiangyang Questionnaire"), PR 351; *see also* Chengen, Supplemental Questionnaire Response (May 15, 2017) ("Chengen Questionnaire"), PR 623. The Separate Rate Plaintiffs also cite additional contrary record evidence, such as Bayley's full U.S. sales database, Celtic Cmts. at 8; the Separate Rate Applications containing commercial invoices of over 100 companies who were determined by Commerce to be separate from the China-wide entity, Taraca Cmts. at 6; and invoices from 40 Separate Rate Plaintiffs showing a variety of prices, some that were higher than Linyi Chengen's price, *id.* The Court does not purport to reweigh the evidence, but emphasizes these examples to illustrate that Commerce is not permitted to create a scarcity of information, to use that scarcity as justification for its determination, and to claim that a constraint on resources prevents further examination, while ignoring potentially contrary evidence on the record.

The Court concludes that Commerce's determination to assign to fully cooperating separate rate respondents an all-others separate rate margin almost 60 times higher than the only investigated respondent, and half of the AFA rate for uncooperative respondents, is unreasonable as applied because it is unfair and unduly punitive. The Court also concludes that because Commerce selectively analyzed the invoice data while ignoring other potentially contrary record evidence, Commerce's determination is not supported by substantial evidence.

The Court has concluded in three separate opinions, including this one, that the all-others separate rate of 57.36% is unreasonable as applied and not supported by substantial evidence. The Court advises that Commerce should not submit the same 57.36% rate again for review by this Court without new, substantial evidence in support. The Court reminds the Government that the rules of the U.S. Court of International Trade require the just and speedy determination of every action and proceeding, and submitting the same unreasonable-as-applied, punitive all-others separate rate yet again would not be in the spirit of reaching a just and speedy resolution to this case. *See* Rule 1, Rules of U.S. Court of International Trade. On the fifth remand in this case, Commerce might choose to examine whether

other evidence on the record supports a lower rate after the applicable rates are averaged. The Court advises Commerce to not submit the same rate of 57.36% for the fourth time, which could likely result in yet another remand based on being unreasonable as applied to fully cooperating respondents if still based on a scarcity of record evidence.

CONCLUSION

For the foregoing reasons, the Court remands the *Fourth Remand Determination*.

Accordingly, it is hereby

ORDERED that the *Fourth Remand Determination* is remanded for Commerce to reconsider the all-others separate rate consistent with this opinion; and it is further

ORDERED that this case shall proceed according to the following schedule:

(1) Commerce shall file the fifth remand determination on or before March 17, 2023;

(2) Commerce shall file the administrative record on or before March 31, 2023;

(3) Comments in opposition to the fifth remand determination shall be filed on or before April 28, 2023;

(4) Comments in support of the fifth remand determination shall be filed on or before May 26, 2023; and

(5) The joint appendix shall be filed on or before June 23, 2023.

Dated: December 21, 2022
New York, New York

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

Slip Op. 22–151

FUJIAN YINFENG IMP & EXP TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION OF AMERICAN MILLWORK PRODUCERS, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00087
PUBLIC VERSION

[Plaintiff's Motion for Judgment on the Agency Record is denied and Commerce's Final Determination is sustained.]

Dated: December 21, 2022

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff Fujian Yinfeng Imp & Exp Trading Co., Ltd. With them on the briefs were *J. Kevin Horgan*.

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor Coalition of American Millwork Producers. With them on the briefs were *Elizabeth S. Lee*.

Iona Cristei, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, Washington, D.C., for Defendant United States. With her on the briefs and supplemental briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel *Shelby M. Anderson*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance.

OPINION

Katzmann, Judge:

This case concerns Fujian Yinfeng Imp. & Exp. Trading Co.'s ("Yinfeng" or "Plaintiff") challenge to the Department of Commerce's ("Commerce") selection of Brazil, rather than Malaysia, as the primary surrogate country ("PSC") in its antidumping duty investigation of wood mouldings and millwork products from China, a nonmarket economy ("NME") country.[1] *See Wood Mouldings and Millwork Products from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 63 (Dep't Commerce Jan. 4, 2021), P.R. 667 ("*Final Determination*"), and accompanying Issues and Dec. Mem., ECF No. 14–5, P.R. 661 ("IDM"), *as amended by Wood Mouldings and Millwork Products from the People's Republic of China: Amended Final Antidumping Duty Determination and Antidumping Duty Order*, 86 Fed. Reg. 9,486 (Dep't Commerce Feb. 16, 2021), P.R. 680 ("*Am. Final Determination*"). Yinfeng argues that where Malaysia offers better data to value

[1] "An NME country, such as China, is 'any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.'" *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018) (alteration in original) (quoting 19 U.S.C. § 1677(18)(A)).

its factors of production and noninput costs, among other advantages, no reasonable mind might accept Brazil as the superior PSC. The court assesses that each of Commerce's constituent determinations underpinning its overall PSC selection is supported by substantial evidence and otherwise in accordance with law, and that Yinfeng has raised no arguments sufficient to undermine Commerce's multifactorial selection of Brazil. Accordingly, Plaintiff's Motion for Judgment on the Agency Record is denied, and Commerce's *Final Determination* is sustained.

BACKGROUND

I. Legal and Regulatory Framework for Primary Surrogate Country Selections

The Tariff Act of 1930 empowers Commerce to investigate allegations that a product is being "dumped." *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1047 (Fed Cir. 2012) (discussing 19 U.S.C. § 1673). "Dumping occurs when a foreign company sells a product in the United States for less than 'fair value' — that is, for a lower price than its [normal value]." *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 43 CIT __, __, 396 F. Supp. 3d 1334, 1340 (2019) (quoting *Sioux Honey*, 672 F.3d at 1046). Accordingly, Commerce determines whether dumping is occurring by comparing the export price[2] of the subject merchandise with its "normal value," typically the price at which the subject merchandise is sold for consumption in the home market. *See* 19 U.S.C. § 1677b(a)(1)(B)(i).

When the subject merchandise is exported from an NME country and Commerce finds that the available information is inadequate to reliably calculate normal value, Commerce values the merchandise using surrogate values derived from another market economy country — referred to as the "primary surrogate country" ("PSC"); such surrogate values cover "the factors of production utilized in producing the merchandise" — which include, but are not limited to, labor, raw materials, energy, and depreciation — as well as "general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1)(A)–(B), (c)(3)(A)–(D).

[2] Although not before the court in this case, for the sake of completeness, we note that the statute also contemplates assessing dumping by comparing normal value to constructed export price, which is:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

19 U.S.C. § 1677a(b).

Concerning "factors of production," Commerce is required by statute to use "the best available information" in selecting surrogate values. *Id.* § 1677b(c)(1)(B). The term "best available information" is not further defined, affording Commerce "broad discretion" in making such determinations. *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1322 (Fed. Cir. 2010)). Commerce typically selects surrogate values for factors of production that are "(1) publicly available; (2) contemporaneous with the period of investigation . . . ; (3) a broad market average covering a range of prices; (4) from an approved surrogate country; (5) specific to the input in question; and (6) tax exclusive." *Ancientree Cabinet Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1241, 1249 (2021) (citation omitted). There is no hierarchy among these criteria. *United Steel & Fasteners, Inc v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1390, 1397–99 (2020).

Concerning "general expenses and profit . . . and other expenses," 19 U.S.C. § 1677b(c)(1)(B), Commerce values these noninput factors of production by deriving ratios from financial statements of producers of identical or comparable merchandise in the surrogate country. *See* 19 C.F.R. § 351.408(c)(4); *see also Ad Hoc Shrimp*, 618 F.3d at 1319–20 (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010)). Here too, Commerce requires surrogate financial statements that provide "the best available information" and has "broad discretion," *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1364–1365 (Fed. Cir. 2019), to evaluate financial statements based on their specificity, contemporaneity, data quality, and comparability with the NME producers' production experience, *see T.T. Int'l Co. v. United States*, 44 CIT __, __, 439 F. Supp. 3d 1370, 1382 (2020); *see also Shenzhen Xinboda Indus. Co. v. United States*, 38 CIT __, __, 976 F. Supp. 2d 1333, 1368 (2014). Where possible, Commerce prefers to use multiple financial statements to calculate surrogate financial ratios. *See NTSF Seafoods Joint Stock Co. v. United States*, 44 CIT __, __, 487 F. Supp. 3d 1310, 1318 (2020).

Typically, Commerce derives both factors of production and noninput costs of production from one surrogate country. See 19 C.F.R. § 351.408(c)(2), (4). Although it is Commerce's general practice to "value all factors in a single surrogate country," *id.* § 351.408(c)(2), the agency may also "mix and match" surrogate country values where a non-primary country provides some values that are more accurate, *Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1080–82, 810

F. Supp. 314, 316–17 (1992), *aff'd*, 43 F.3d 1442 (Fed. Cir. 1994). Commerce will "determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, 25 CIT 939, 947, 166 F. Supp. 2d 608, 616 (2001) (citing *Lasko Metal*, 43 F.3d at 1446); *see also Hardwood and Decorative Plywood from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 78 Fed. Reg. 58,273 (Dep't Commerce Sept. 23, 2013), and accompanying Issues and Dec. Mem. Cmt. 7C at 60 (Sept. 16, 2013) ("*Hardwood & Decorative Plywood from China* IDM") ("In determining the suitability of surrogate values, [Commerce] considers the available evidence with respect to the particular facts of each case and evaluates the suitability of each source on a case-by-case basis."). While the controlling statute "does not say — anywhere — that [surrogate values] must be ascertained in a single fashion," *Lasko Metal*, 43 F.3d at 1446, Commerce is at all times constrained by the statutory purpose "to facilitate the determination of dumping margins as accurately as possible," *id*. (quoting *Allied–Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993)).

II. Factual and Procedural Background

A. Initiation of Commerce's Less-Than-Fair-Value Investigation

On January 8, 2020, the Coalition of American Millwork Producers ("the Coalition" or "Defendant-Intervenor") filed an antidumping petition concerning imports of wood mouldings and millwork products from China. *See* Pets. for Imposition of Antidumping & Countervailing Duties (Jan. 8, 2020), P.R. 2. In response, on February 5, 2020, Commerce initiated a less-than-fair-value ("LTFV") investigation into wood mouldings and millwork products from China imported during the period of investigation ("POI") of July 1, 2019 through December 31, 2019. *Wood Mouldings and Millwork Products from Brazil and the People's Republic of China: Initiation of Less-ThanFair-Value Investigations*, 85 Fed. Reg. 6,502, 6,503 (Dep't Commerce Feb. 5, 2020), P.R. 117. Yinfeng, a mandatory respondent[3] in the investigation, was

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

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

selected for individual examination[4]. *See* Resp't Selection Mem. at 1, 5–6 (Dep't Commerce Mar. 2, 2020), P.R. 145.

On May 8, 2020, Commerce invited all interested parties to submit information to aid Commerce's selection of a surrogate country and surrogate values. *See* Req. for Econ. Dev., Surrogate Country & Surrogate Value Cmts. & Info. at 1 (Dep't Commerce May 8, 2020), P.R. 333 ("Req. for SV Cmts.").[5] In its Request for Comments, Commerce stated that it would not consider information received after June 17, 2020 or rebuttal comments received after June 29, 2020 — except as permitted by 19 C.F.R. § 351.301(c)(3) — in reaching its preliminary determination. *See id.* at 2. Yinfeng subsequently submitted surrogate value information advocating for Commerce to select Malaysia as the surrogate country on both June 17, 2020, *see* Resp't's Prelim. Surrogate Value Subm. at 1 (June 17, 2020), P.R. 411–414 ("Resp't's Prelim. SV Subm."), and July 6, 2020, *see* Resp't's Final Surrogate Value Subm. at 1 (July 6, 2020), P.R. 490510 ("Resp't's Final SV Subm."). The Coalition submitted surrogate value information advocating for the selection of Brazil as the surrogate country on the same dates. *See* Pet'r's Prelim. Surrogate Value Cmts. at 2 (June 17, 2020), P.R. 415–418 ("Pet'r's Prelim. SV Cmts."); *see also* Pet'r's Final Surrogate Value Subm. (July 6, 2020), P.R. 487–489.

The Coalition's Preliminary Surrogate Value Comments, filed on June 17, 2020, provided data from Global Trade Atlas ("GTA")[6] to value Yinfeng's primary inputs of radiata pine sawnwood and fir

[4] "In [antidumping] proceedings involving [NME] countries, including China, Commerce presumes that exporters and producers are state-controlled, and [thus] assigns them a single statewide rate." *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1370 (Fed. Cir. 2012) (discussing 19 C.F.R. § 351.107). However, "[t]his presumption is rebuttable; a company that demonstrates sufficient independence from state control may apply to Commerce for a separate rate." *Id.* Here, Commerce concluded that Yinfeng was entitled to a separate rate.

[5] Commerce provided interested parties with a non-exhaustive list of six countries that the agency determined to be at the same level of economic development as China, which included: Malaysia, Turkey, Russia, Mexico, Brazil, and Bulgaria. *See* Req. for SV Cmts. Attach. I at 2.

[6] Global Trade Atlas "is an online trade data system" that advertises it "allows users to view world trade flows for products of interest using the latest import/export data from the official sources of more than 70 Countries." *Glob. Trade Atlas*, Glob. Trade Info. Servs., www[.]gtis[.]com/English/GTIS_GTA[.]html (last visited Dec. 16, 2022). [Please note, in order to disable links to outside websites, the court has removed the "http" designations and bracketed the periods within hyperlinks. For archived copies of any webpages cited in this opinion, please consult the docket.]

sawnwood using the Brazilian Harmonized Tariff Schedule[7] ("HTS") subheadings 4407.11.00 and 4407.12.00, respectively. *See* Pet'r's Prelim. SV Cmts. at Exs. 1–2. These HTS subheadings cover pine and fir wood that has been "sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness > 6 mm." *Id.* at Ex. 2. To calculate surrogate financial ratios, the Coalition submitted financial statements from three Brazilian companies: Adami S.A. ("Adami"), Duratex S.A. ("Duratex"), and Eucatex S.A. ("Eucatex"). *See id.* at Exs. 8A–8C.

In contrast, Yinfeng's Preliminary Surrogate Value Submission, also filed on June 17, 2020, provided data from Trade Data Monitor[8] to value its radiata pine sawnwood and fir sawnwood inputs using the Malaysian HTS subheadings 4407.11.00 and 4407.12.00, respectively.[9] *See* Resp't's Prelim. SV Subm. at Ex. SV-2. To calculate surrogate financial ratios, Yinfeng submitted financial statements from two Malaysian producers: Sri Ledang and Inter Moulding. *See id.* at Exs. SV-9, SV-10.

Yinfeng's Final Surrogate Value Submission, filed on July 6, 2020, provided three relevant updates to its earlier submission. First, it included Malaysian surrogate value data from GTA. *See* Resp't's Final SV Subm. at Ex. SV2–1. Second, it provided data for its radiata pine sawnwood and fir sawnwood inputs using the Malaysian HTS subheadings 4407.11.00.10 and 4407.12.00.10, respectively. *See id.* at Ex. SV2–21. These ten-digit HTS subheadings[10] describe pine and fir wood that has been "sawn lengthwise" and "of a thickness exceeding 6 mm." *See id.* Third, Yinfeng supplied eighteen new financial statements from additional Malaysian companies. *See id.* at Exs. SV2–3–SV2–20.

---

[7] "Harmonized Tariff Schedules" derive from the international Harmonized System ("HS"), which "is a standardized numerical method" "used by customs authorities around the world to identify [traded] products when assessing duties and taxes and for gathering statistics." *Harmonized Sys. (HS) Codes*, Int'l Trade Admin., www[.]trade[.]gov/harmonized-system-hs-codes (last visited Dec. 20, 2022). "The HS assigns specific six-digit codes [to] . . . commodities." *Id.* Although the first six-digit are standardized across countries, individual nations may "add longer codes to the first six digits for further [country-specific] classification," generally at the eight- or ten-digit level. *Id.*

[8] Trade Data Monitor is another "supplier of trade statistics" that advertises it "collects monthly import and export statistics from customs agencies, statistics institutes and other sources in over 110 countries, then uses proprietary software to assemble, organize, and publish the data in user-friendly charts." *Prods.*, Trade Data Monitor, www[.]tradedatamonitor[.]com/products/ (last visited Dec. 16, 2022).

[9] These HTS subheadings from Malaysia match those submitted by the Coalition from Brazil.

[10] The Malaysian HTS subheadings that Yinfeng submitted in its Preliminary Surrogate Value Submission were at the eight-digit level.

B. Preliminary Determination

On August 12, 2020, Commerce published its preliminary finding that millwork products from China "are being, or are likely to be, sold in the United States at [LTFV]." *Wood Mouldings and Millwork Products from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 Fed. Reg. 48,669, 48,669 (Dep't Commerce Aug. 12, 2020), P.R. 616 ("*Preliminary Determination*"), and accompanying Prelim. Dec. Mem., P.R. 548 ("PDM"). At such time, Commerce also announced its selection of Brazil as the PSC on the grounds that the Brazilian GTA data offered superior surrogate values for valuing Yinfeng's factors of production,[11] and that the Brazilian producers' financial statements were likewise superior.[12] PDM at 8–9. Commerce did not consider either Yinfeng's or the Coalition's July 6, 2020 submissions in reaching its *Preliminary Determination* because the submissions did not meet the Commerce-imposed deadline. *Id.* at 6. However, Commerce stated that it would consider the parties' July 6, 2020 surrogate value submissions in rendering the *Final Determination*. *Id.*

C. Final Determination

In the *Final Determination*, issued on January 4, 2021, Commerce reiterated its conclusion that millwork products from China "are being, or are likely to be, sold in the United States at [LTFV]," *see Final Determination* at 63, and ultimately assigned Yinfeng a final dumping margin of 45.49 percent, *see Am. Final Determination* at 9,487.[13] After considering all the submitted data, including Yinfeng's Final Surrogate Value Submission, Commerce continued to rely on Brazil as the PSC, from which it derived all surrogate values. *See* IDM at 19–23.

One basis for Commerce's continued selection of Brazil as the PSC was the quality and contemporaneity of the surrogate producers' financial statements available on the record. *See* IDM at 21–22. In rendering its *Final Determination*, Commerce considered the additional eighteen financial statements from Malaysian producers sub-

[11] Commerce explained that GTA is its preferred source for surrogate value data. PDM at 8.

[12] Commerce stated that "although Adami, Duratex, Sri Ledang and Inter Moulding are producers of identical or comparable merchandise, Adami's and Duratex's [— the Brazilian companies —] financial statements are more contemporaneous with the POI than the financial statements for [the Malaysian companies,] Sri Ledang and Inter Moulding." *Id.* at 9.

[13] Yinfeng's pre-amendment dumping margin rate was 44.60 percent. *See Final Determination* at 64.

mitted by Yinfeng, *see* Resp't's Final SV Subm. at Exs. SV2–3–SV2–20; PDM at 6, and provided a brief summary of items it "noted" for each company, *see* Final Determination Surrogate Value Mem. at 3–7 (Dep't Commerce Dec. 28, 2020), P.R. 662–663 ("Final SV Mem."). Although Yinfeng argued before the agency that six of these additional Malaysian financial statements[14] were "contemporaneous with the POI" and "far superior to the [Brazilian] financial statements" of Adami and Duratex, Commerce rejected four of these statements because they were not contemporaneous with the entire POI and the agency maintains it has a preference for full contemporaneity.[15] *See* IDM at 18, 21–22. This left Commerce with a total of four financial statements from producers of the subject merchandise that were contemporaneous with the entire POI: two from Brazil (Adami and Duratex) and two from Malaysia (Classic Scenic and Minho). *See id.* at 22. Ultimately, Commerce determined that Adami and Duratex were superior to Minho and Classic Scenic because the production experience of the former two companies better aligned with that of Yinfeng. *See id.* Specifically, Commerce determined that "the two Brazilian producers . . . are limited more to wood products and [are] less inclusive of industries unrelated to the merchandise under investigation." *Id.*

Commerce also based its final PSC selection on its determination that "the Brazilian GTA data are the best available data for valuing" Yinfeng's "[factors of production] because they are complete, publicly-available, contemporaneous, and specific to each input used by the respondent to produce the subject merchandise during the POI." *Id.* at 19. Commerce found that the eight-digit Brazilian HTS and the Malaysian ten-digit HTS "note[] the same inputs at the same specificity," but that the "Brazilian GTA data, unlike the Malaysian GTA data, include imports for the particular type of wood scrap that Yinfeng[] generates from its production process" such that the agency could calculate a more accurate offset to Yinfeng's normal value using the Brazilian data. *Id.* at 20.

In so selecting the Brazilian GTA data, Commerce rejected Yinfeng's argument that the Malaysian GTA data is superior because it is reported on a cost, insurance, and freight ("CIF") basis, as opposed

[14] Namely the Malaysian financial statements from Chern Hinp Timber Trading Sdn Bhd ("Chern Hinp"); Haluan Mutiara Sdn Bhd ("Haluan Mutiara"); Minho (M) Berhad ("Minho"); Fine Quality Timber Sdn Bhd ("Fine Quality"); Classic Scenic Berhad ("Classic Scenic"); and LMT Superbonus Sdn Bhd ("LMT Superbonus"). *See* IDM at 21 n.139.

[15] Commerce acknowledged that it found evidence that all six Malaysian companies were producers of the subject merchandise. *See id.* at 22.

to a free on board ("FOB") basis, as Brazil's data is.[16] *See id.* at 20–21. Commerce reasoned that because it had the necessary surrogate data to adjust the Brazilian GTA FOB import values — and in light of the overall superiority of the Brazilian GTA data — it was unnecessary to use the CIF reporting as a "tiebreaker," as Commerce has done in the past. *Id.* at 21.

Finally, whileCommerce acknowledged the superiority of the Malaysian data in valuing labor, truck freight, brokerage & handling, and acrylic polymer (hereinafter "other inputs"), Commerce explained that this was an insufficient reason to depart from Brazil as the PSC given that those inputs are just a few of many data points considered in the surrogate country selection. *See* Final SV Mem. at 2–3.

Thus, after weighing the totality of the evidence, Commerce selected Brazil as the PSC and derived all surrogate values from there. IDM at 19–23.

D. Procedural History

Yinfeng initiated this litigation on March 3, 2021 to contest Commerce's overall selection of Brazil — instead of Malaysia — as the PSC, *see* Compl. ¶ 19, Mar. 3, 2021, ECF No. 6, and moved for judgment on the agency record on July 23, 2021, *see* Pl.'s Mem. in Supp. of Mot. for J. on Agency R., July 23, 2021, ECF No. 18 ("Pl.'s Br."). The Defendant United States ("the Government," that is Commerce, as represented by the U.S. Department of Justice) and the Coalition each responded in opposition to Yinfeng's Motion on October 13, 2021, *see* U.S. Gov't's Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., Oct. 13, 2021, ECF No. 25 ("Def.'s Br."); Def.-Inter.'s Resp. in Opp'n to Pl.'s Mot. For J. on the Agency R., Oct. 13, 2021, ECF No. 26 ("Def.-Inter.'s Br."), to which Yinfeng replied on November 15, 2021, *see* Pl.'s Reply Br., Nov. 15, 2021, ECF No. 28 ("Pl.'s Reply Br.").

In advance of oral argument, the court presented questions to the litigants, *see* Ct.'s Qs. for Oral Arg., Apr. 1, 2022, ECF Nos. 34–35, and the parties responded in writing on April 14, 2022, *see* Pl.'s Resp. to Ct.'s Apr. 1, 2022 Qs., Apr. 14, 2022, ECF No. 39 ("Pl.'s Oral Arg. Subm."); Def.'s Resp. to Ct.'s Apr. 1, 2022 Qs., Apr. 14, 2022, ECF No. 38 ("Def.'s Oral Arg. Subm."); Def.-Inter.'s Resp. to Ct.'s Apr. 1, 2022 Qs., Apr. 14, 2022, ECF No. 36 ("Def.-Inter.'s Oral Arg. Subm."). After examining the parties' written responses, the court presented parties with supplemental questions to be addressed at oral argument. *See* Ct.'s Supp. Qs. for Oral Arg., Apr. 18, 2022, ECF No. 41. Oral argu-

[16] When data is reported on a CIF basis that means it already "include[s] the costs associated with purchasing . . . inputs from foreign exporters, including brokerage and handling, marine insurance, and international freight," while data reported on an FOB basis does not. *See Jiangsu*, 396 F. Supp. 3d at 1343 n.2.

ment was held on April 19, 2022. ECF No. 42. Following oral argument, the parties submitted post-oral argument briefing to the court. Pl.'s Post-Arg. Subm., Apr. 26, 2022, ECF No. 44; Def.'s Post-Arg. Subm., Apr. 26, 2022, ECF No. 45; Def.-Inter.'s Post-Arg. Subm., Apr. 26, 2022, ECF No. 43.

Finally, to aid its deliberation, the court submitted supplemental questions to the parties on July 13, 2022 for answers in writing. *See* Ct.'s July 13, 2022 Suppl. Qs., July 13, 2022, ECF No. 47. With the parties' responses in hand, *see* Pl.'s Resp. to Ct.'s July 13, 2022 Suppl. Qs., July 22, 2022, ECF No. 48 ("Pl.'s Suppl. Qs. Resp."); U.S. Gov't's Resp. to Ct.'s July 13, 2022 Suppl. Qs., July 22, 2022, ECF No. 49 ("Def.'s Suppl. Qs. Resp."); Def.-Inter.'s Resp. to Ct.'s July 13, 2022 Suppl. Qs., July 22, 2022, ECF No. 50 ("Def.- Inter.'s Suppl. Qs. Resp."), the case is now decision ready.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (B)(i). The court will sustain Commerce's antidumping 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).

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 will not disturb Commerce's determination if it is "supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 838, 159 F. Supp. 2d 714, 718 (2001) (citing *Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 149 (2001)), *aff'd sub nom.*, 60 F. App'x 797 (Fed. Cir. 2003). Moreover, the court will uphold an agency's action "where the agency's decisional path is reasonably discernable." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)).

DISCUSSION

In selecting the PSC, Commerce narrowed its choice down to Brazil or Malaysia. Ultimately, Commerce selected Brazil because the agency found the Brazilian data to be superior, on the whole, to value

Yinfeng's factors of production as well as its noninput costs.[17] IDM at 17–23. Before this court, Yinfeng argues that Commerce's reliance upon Brazil as the PSC is unsupported by substantial evidence and otherwise not in accordance with law because, in Plaintiff's estimation, the selection is based on two unfounded determinations: (1) "that the Brazilian financial statements were more comparable than the Malaysian financial statements;" and (2) "that the Brazilian sawnwood HTS were equally specific to the Malaysian sawnwood HTS."[18] Pl.'s Br. at 4. Moreover, Yinfeng argues that Malaysia is the superior PSC choice because Malaysia: (3) reports its import values on Commerce's preferred CIF basis; and (4) sources the best available information to value other inputs of the subject merchandise.[19, 20] *Id.* at 27–32. By contrast, the Government and Coalition argue that substantial evidence supports Commerce's selection of Brazil and that Yinfeng's contentions "amount to nothing more than a disagreement with how Commerce weighed the available record evidence." Def.'s Br. at 11; Def.-Inter.'s Br. at 2 (substantively similar).

Before delving into the parties' specific arguments, the court notes that the controlling question is not whether the surrogate values selected by Commerce were indeed the best available, but only "whether a reasonable mind could conclude that Commerce chose the best available information." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)). Cognizant that "there is no requirement that the data [relied upon by the agency] be perfect," *Home Meridian Int'l, Inc. v. United States*, 772 F.3d 1289, 1296 (Fed. Cir. 2014), and for the

---

[17] Recall that in LTFV investigations involving NMEs, Commerce typically selects a single surrogate country to value both the NME producer's factors of production and noninput costs of production. *See* 19 C.F.R. § 351.408(c)(2).

[18] Yinfeng asserts that it "challenges each of these determinations separately as well as the overall country selection related to the Department's findings for these two issues." Pl.'s Br. at 4. For its part, the Coalition argues that where Yinfeng did not raise any challenge to Commerce's selection of individual surrogate values in its administrative case brief, it failed to exhaust any such arguments. *See* Def.-Inter.'s Br. at 16 n.6, 18 n.7. Because the court ultimately sustains each element of Commerce's determination, *infra*, the Association's exhaustion argument is inconsequential.

[19] Recall that these "other inputs" include labor, truck freight, brokerage & handling, and acrylic polymer. Pl.'s Br. at 29.

[20] In its briefing before this court, Yinfeng also "note[d] a procedural unfairness" arising from Commerce's refusal to consider certain surrogate value information that Yinfeng submitted after the Commerce-imposed deadline — but before the regulatory deadline of 19 C.F.R. § 351.301(c)(3) — in rendering the *Preliminary Determination*. *See* Pl.'s Br. at 4–6. However, Plaintiff clarified in its oral argument responses that Yinfeng does not raise this issue as a separate argument or seek any particular relief. *See* Pl.'s Oral Arg. Subm. at 18. As such, the court need not address this particular matter further.

reasons outlined herein, the court assesses that Commerce's selection of Brazil as the PSC is supported by substantial evidence and otherwise in accordance with law.

I. Commerce's Selection of Surrogate Financial Statements Was Supported by Substantial Evidence and Otherwise in Accordance with Law.

As part of its overall decision to select Brazil as the PSC over Malaysia, Commerce determined that Brazil offered superior financial statements to value Yinfeng's noninput costs. *See* IDM at 21–22. In reaching this decision, Commerce assessed each of the twenty Malaysian financial statements submitted by Yinfeng,[21] *see* Final SV Mem. at 3–7, but found that only two of them — the statements of Minho and Classic Scenic — were suitable for further examination, IDM at 21–22. When compared against the two statements deemed usable[22] from Brazilian producers — Adami and Duratex — Commerce concluded that the Brazilian statements were "limited more to wood products and less inclusive of industries unrelated to the merchandise under investigation," such that they "best represent[] the industry under investigation." *Id.* at 22.

Yinfeng contests Commerce's selection on two grounds. First, Yinfeng argues that Commerce acted contrary to its established practice in rejecting four Malaysian financial statements from producers of the subject merchandise — LMT Superbonus, Fine Quality, Haluan Mutiara, and Chern Hinp — solely because they did not cover the entire POI. Pl.'s Br. at 14–16. Second, Yinfeng argues that "[w]hether considering all six [of the] Malaysian statements [that Yinfeng contends are usable] or [only] the two that overlap [with] the entire POI, the Malaysian surrogate financial statements are far more comparable than the two Brazilian [ones]." Pl.'s Br. at 16. Neither argument is availing.

A. Commerce's Rejection of Financial Statements from Malaysian Companies Chern Hinp, Haluan Mutiara, Fine Quality, and LMT Superbonus Accorded with Law.

In challenging Commerce's rejection of the partially contemporaneous financial statements, Yinfeng contends that "[t]he Department's

[21] Recall that prior to Commerce's issuance of its *Preliminary Determination*, Yinfeng submitted twenty Malaysian financial statements; however, in light of agency-established deadlines, Commerce only considered two of these twenty statements in rendering the *Preliminary Determination*. PDM at 6.

[22] At the *Preliminary Determination* stage, Commerce rejected the financial statements of a third Brazilian producer of subject merchandise, Eucatex, because the company's financial statements received a qualified auditor opinion. PDM at 30.

exclusion . . . was arbitrary in light of [past agency] practice."[23] Pl.'s Br. at 16. By contrast, the Government maintains that Commerce reasonably declined to rely on less contemporaneous Malaysian financial statements where fully contemporaneous ones from producers of identical merchandise were available. *See* Def.'s Br. at 16. The Government's position prevails.

It is generally Commerce's practice to select surrogate financial statements that are, among other features, "(1) from an appropriate surrogate country; (2) from a producer of identical or comparable merchandise; (3) contemporaneous with the PO[I]; . . . (4) publicly available," and (5) otherwise comparable to the respondent's experience. *Certain Steel Nails from the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014), and accompanying Issues and Dec. Mem. Cmt. 2A at 8 (Mar. 31, 2014) ("*Certain Steel Nails from China* IDM"); *see also Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 84 Fed. Reg. 54,106 (Dep't Commerce Oct. 9, 2019), and accompanying Prelim. Dec. Mem. at 9–14 (Oct. 2, 2019). In "evaluat[ing] the suitability of each source," Commerce weighs these criteria "with respect to the particular facts of each case." *Hardwood & Decorative Plywood from China* IDM Cmt. 7C at 60.

The court notes that the "case-by-case" nature of surrogate value selection, *id.*, complicates any efforts to divine "rules" from past agency practice. For example, regarding the contemporaneity criteria, Commerce has at times declined to "select one set of financial statements over another simply because the overlap with the PO[I] is larger," stating "that as long as the potential surrogate statement covers a portion of the PO[I], it is deemed contemporaneous and appropriate for use if it meets the remaining criteria." *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of 2007–2008 Deferred Antidumping Duty Administrative Review and Final Results of 2008–2009 Antidumping Duty Administrative Review*, 76 Fed. Reg. 2,883 (Dep't Commerce Jan. 18, 2011), and accompanying Issues and Dec. Mem. Cmt. 2C at 17–18 (Jan. 10, 2011). Whereas at other times, Commerce has declared that where "all other factors are equal, the Department prefers financial statements that

[23] Importantly, Yinfeng does not argue that it "can[] find in the statute [or caselaw] any precise prohibition on the use of Commerce's [chosen] methodology," *Lasko Metal*, 43 F.3d at 1443, only that Commerce's arbitrarily deviated from past agency practice.

cover the most months of the PO[I]." *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 Fed. Reg. 49,162 (Dep't Commerce Aug. 20, 2008), and accompanying Issues and Dec. Mem. Cmt. 1C at 16 (Aug. 11, 2008) ("*Wooden Bedroom Furniture from China* IDM").

Exemplifying this latter position, in *Wooden Bedroom Furniture from China*, Commerce concluded that the financial statements of four Philippine companies were superior to those of four Indian companies to derive surrogate financial ratios in an LTFV investigation covering the period of January 1, 2006 to December 31, 2006. *See Wooden Bedroom Furniture from China* IDM at 1, Cmt. 1C at 19. In so assessing, Commerce whittled down the submitted Indian financial statements from twenty-two to four useable ones, *id.* at 13 n.3, 14, first rejecting eleven statements because they either derived from nonproducers of subject merchandise, did not show a profit, evidenced subsidies, and/or were incomplete, *see id.* at 14–16, and then — critically — eliminated seven more Indian statements because they were less contemporaneous than other suitable Indian statements on the record, *see id.* at 16. Commerce explained:

> Although the Indian financial statements from the 2005 - 2006 period are contemporaneous with three months of the PO[I], we determined that these Indian companies (i.e., James Andrew Newton, Jodhpur, Highland House, Askriti Furnishers, Jayabharatham, Nizamuddin, Sujako) statements were not suitable for use in deriving the surrogate financial ratios because the 2006 - 2007 financial statements cover nine months of the PO[I] and, as such, are more contemporaneous than the 2005 - 2006 statements. Thus, we did not review these statements to determine whether they were from identical or comparable producers, were complete, were profitable, or whether they contained subsidies because there were numerous financial statements on the record that better matched the PO[I]. *Further, when all other factors are equal, the Department prefers financial statements that cover the most months of the PO[I] and in this case for the Indian companies it is the financial statements that cover the 2006 - 2007 period*.

Id. at 16 (emphasis added). Accordingly, Commerce "made cuts" *among* the Indian statements purely on the basis of contemporaneity. From there, Commerce compared the four remaining Indian statements against the four useable Philippine ones and concluded — once again, solely on information":

> Based on our examination of record evidence, we have determined that the record contains four financial statements from Indian companies (*i.e.*, Delhi, Dinesh Rajen, Nikhil, and Turya) for the 2006 - 2007 period that the Department could have used in the final results. *Although the Indian financial statements are contemporaneous with many months of the PO[I], the [four] Philippine financial statements cover the entire PO[I] almost exactly and are therefore more contemporaneous*.

Id. at 18–19 (second emphasis added).

Commerce's decision-making in the LTFV investigation here at issue accords with that in the *Wooden Bedroom Furniture from China* IDM. For example, in rejecting the financial statements of Malaysian companies Chern Hinp, Haluan Mutiara, Fine Quality, and LMT Superbonus, Commerce explained:

> [R]espondents claim that their . . . SV submission contain[s] financial statements for six additional Malaysian producers of identical merchandise which are not only contemporaneous with the POI but are also far superior to the financial statements of the two Brazilian producers Commerce relied on for the *Preliminary Determination*. After a careful review of these six [Malaysian] financial statements, we find that the financial data for only two of these companies, Minho and Classic Scenic, cover the entire POI . . . . With respect to the other four Malaysian companies, [Chern Hinp, Haluan Mutiara, Fine Quality, and LMT Superbonus,] we find that although the website information provided for each of them indicates that they are also producers of the subject merchandise, none of their financial statements covers the entire POI. *In situations such as this one, Commerce has preferred to use financial statements of producers of subject merchandise that cover the entire POI, as they best reflect the respondent's production experience during the POI*.

IDM at 21–22 (emphasis added) (footnote omitted). Just as Commerce in the *Wooden Bedroom Furniture from China* IDM "made cuts" *within* the Indian statements on the basis of contemporaneity, so too here, the agency declined to rely on partially contemporaneous

Malaysian financial statements where otherwise equal,[24] fully contemporaneous Malaysian statements existed on the record.

While the reasoning in the *Wooden Bedroom Furniture from China* IDM is not precedential, its existence undermines Plaintiff's claim that "[t]he Department's exclusion of contemporaneous relevant statements was arbitrary in light of [past agency] practice." Pl.'s Br. at 16. Here, it is "reasonably discernable," *Wheatland Tube*, 161 F.3d at 1369–70, that in rejecting the financial statements of Malaysian companies Chern Hinp, Haluan Mutiara, Fine Quality, and LMT Superbonus, Commerce was adhering to its "prefer[ence for] financial statements that cover the most months of the PO[I]" where "all other factors are equal," *Wooden Bedroom Furniture from China* IDM Cmt. 1C at 16. The court, thus, concludes that this element of Commerce's surrogate value selection accorded with law.

---

[24] A comparison of the criteria enumerated in the *Certain Steel Nails from China* IDM, *supra* p. 17–18, against Commerce's rationale and record evidence illuminates that save for contemporaneity, "all other factors [we]re equal," *Wooden Bedroom Furniture from China* IDM Cmt. 1C at 16, among the financial statements from Malaysian companies Minho, Classic Scenic, Chern Hinp, Haluan Mutiara, Fine Quality, and LMT Superbonus.

First, the statements were each from "an appropriate surrogate country," namely Malaysia. *See* Req. for SV Cmts. Attach. I at 2 (Commerce's identification of six countries as a starting point for surrogate country selection, including Malaysia and Brazil).

Second, the statements were each from a producer of identical merchandise. *See* Final SV Mem. at 4 (stating one of Classic Scenic's subsidiaries "is involved in the production of merchandise under consideration"); *see also* IDM at 22 (stating one of Minho's subsidiaries "appears to be a producer of subject merchandise"); *id.* (stating the "website information provided for each of [Chern Hinp, Haluan Mutiara, Fine Quality, LMT Superbonus] indicates that they are also producers of the subject merchandise."). The parties agree that "the terms 'subject merchandise' and 'identical merchandise' are interchangeable." Pl.'s Suppl. Qs. Resp. at 1; *see also* Def.'s Suppl. Qs. Resp. at 2 (substantively similar); Def.-Inter.'s Suppl. Qs. Resp. at 2 (substantively similar).

Third, the statements were each "publicly available." In the *Preliminary Determination*, Commerce assessed that it had "complete SV data and financial ratios on the record for both Brazil and Malaysia that are publicly available." PDM at 8. Although Commerce deferred until the *Final Determination* consideration of the six Malaysian financial statements here at issue, "Commerce made no changes to its finding regarding public availability in the *[F]inal [D]etermination*." Def.'s Suppl. Qs. Resp. at 1–2 (emphasis added).

Where Commerce's assessment of the Malaysian statements diverged was upon consideration of the "contemporaneity" factor. The POI in the underlying LTFV investigation is July 1, 2019 to December 31, 2019. *See* 85 Fed. Reg. at 6,503. The financial statements from Minho and Classic Scenic each "cover[] calendar year 2019," *see* Final SV Mem. at 3–4, thereby overlapping with all six months of the POI. By contrast, LMT Superbonus's financial statement overlaps with only four months of the POI, *see id.* at 4, Fine Quality's statement overlaps with only three months, *see id.* at 4–5, and Haluan Mutiara's and Chern Hinp's statements each overlap with only two months, *see id.* at 5.

Accordingly, having found that only two of the otherwise "equal" Malaysian financial statements overlap with the entire POI, Commerce concluded that the statements of Minho and Classic Scenic "best reflect the respondent's production experience." IDM at 22.

B. Substantial Evidence Supports Commerce's Selection of the Financial Statements from Brazilian Companies Adami and Duratex Over Those from Malaysian Minho and Classic Scenic.

Yinfeng further argues that "[w]hether considering all six Malaysian statements or the two that overlap the entire POI, the Malaysian surrogate financial statements are far more comparable than the two Brazilian financial statements." Pl.'s Br. at 16. This is so, in Yinfeng's estimation, because: (1) it is unclear that Adami produces subject merchandise; (2) the Malaysian producers are more limited to comparable products and less inclusive of unrelated industries; and (3) the Brazilian producers are large, global conglomerates and/or at a different level of integration than Yinfeng such that they cannot best represent the industry. *See* Pl.'s Br. at 16–25. For their part, the Government and the Coalition maintain that Commerce's selection of the Brazilian financial statements "is supported by substantial evidence[] where Commerce found that these . . . statements are fully contemporaneous with the POI and are more specific to wood product manufacturing . . . than alternative Malaysian statements." Def.'s Br. at 7; *see also* Def.-Inter.'s Br. at 31 (substantively similar). Here too, Defendants' position prevails.

The court begins by reiterating that its task is to discern "whether a reasonable mind could conclude that Commerce chose the best available information" in relying on the Brazilian financial statements. *Zhejiang*, 652 F.3d at 1341 (quoting *Goldlink*, 30 CIT at 619, 431 F. Supp. 2d at 1327). This means that "[w]here Commerce is confronted with two alternatives (both of which have their good and bad qualities), and Commerce has a preferred alternative, the court will not second-guess Commerce's choice." *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1141, 502 F. Supp. 2d 1295, 1313 (2007). With these principles in mind, the court considers and rejects each of Yinfeng's objections to Commerce's reliance on the Brazilian financial statements in turn.

1. Substantial Evidence Supports Commerce's Determination that Adami Produces Subject Merchandise.

Yinfeng's first argument — that Brazilian company Adami either does not produce "any identical merchandise" or only produces "very minor" amounts — is unavailing because the record contains sub-

stantial evidence to the contrary.[25] Pl.'s Br. at 20. Commerce's Antidumping Order specifically covers wood blocks, blanks, and building components, such as "interior paneling," and wooden door components, including frames, frame kits, and frame trim. *See Am. Final Determination* at 9,488–89. Consistent with the Order, Adami's financial statements report revenue from sales of "wood processing products such as frames, pine panels, doors, door and pellet kits." *See* Pet'r's Prelim. SV Cmts. Ex. 8A at 119. Adami's corporate materials further state that its "main products" include "pallets, panels, frames, doors, [and] door kits," *see* Resp't's Rebuttal Prelim. SV Subm. Ex. SVR-1 at 2 (June 29, 2020), P.R. 459–465 ("Resp't's Rebuttal Subm."), and that it produces sawn, raw, and processed wood, including "*blocks*, *blancs*, *panels* and frames," *see* Pet'r's Prelim. SV Cmts. Ex. 8A at 131 (emphasis in original). Thus, evidence on the record supports Commerce's finding that Adami is a producer of the subject merchandise. IDM at 22.

Yinfeng's alternative argument — that even if Adami produces some subject merchandise, such production is "very minor" — is impermissibly speculative. *See* Pl.'s Br. at 20. Yinfeng invokes an excerpt from Adami's website that it "recently expanded and modernized for the production of *blocks*, *blancs*, [and] frames, among other products destined for the foreign market," *see* Pet'r's Prelim. SV Cmts. Ex. 8A at 133 (emphasis in original), to allege that because Adami only recently began production, it could only "produce[] a very small or inconsequential amount of mouldings (if any)," such that its financial statements are unrepresentative of the industry, Pl.'s Br. at 20. Yinfeng cites to no additional record evidence to support this theory, *see Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 39 CIT __, __, 71 F. Supp. 3d 1338, 1351 (2015) ("It is well established that speculation does not constitute substantial evidence" (quoting *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F3d 1301, 1327 (Fed. Cir. 2009))), but rather ignores contradictory evidence in lodging it, as Adami's website further states: "In 1994, the company implemented a modern sawmill for the production of sawn, raw and processed wood. In the processing area, it started to produce *blocks*, *blancs*, *panels* and

[25] Although Yinfeng is correct that where possible, "it is Commerce's practice to use information from sources that are producers of identical merchandise over sources that are producers of comparable merchandise," *Light Walled Rectangular Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2019–2020*, 87 Fed. Reg. 13,968 (Dep't Commerce Mar. 11, 2022), and accompanying Issues and Dec. Mem. Cmt. 2 at 8 (Mar. 7, 2022), this preference is not here determinative because Commerce found that Adami, Duratex, Minho, and Classic Scenic were each producers of "subject merchandise," IDM at 22. As previously noted, the parties agree that "the terms 'subject merchandise' and 'identical merchandise' are interchangeable." Pl.'s Suppl. Qs. Resp. at 1; *see also* Def.'s Suppl. Qs. Resp. at 2 (substantively similar); Def.- Inter.'s Suppl. Qs. Resp. at 2 (substantively similar).

frames selling all its products on the foreign market," *see* Pet'r's Prelim. SV Cmts. Ex. 8A at 131 (emphasis in original). Accordingly, Commerce could reasonably read Adami's webpage to suggest that the company began producing blocks, blanks, panels and frames in 1994 and recently expanded and modernized its facilities to improve such production.

Because Commerce's determination that Adami is an adequate producer of the subject merchandise is "supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion," *Shandong Huarong*, 25 CIT at 838, 159 F. Supp. 2d at 718 (citing *Heveafil*, 25 CIT at 149), Yinfeng's first argument as to why the two Malaysian financial statements are superior to the two Brazilian ones fails.

2. Substantial Evidence Supports Commerce's Determination that Adami and Duratex are More Limited to Comparable Products and Less Inclusive of Unrelated Industries.

Yinfeng's second argument — that contrary to Commerce's finding, the Malaysian producers are more limited to comparable products and less inclusive of unrelated industries — is also unavailing. *See* Pl.'s Br. at 13. In Yinfeng's view, Minho and Classic Scenic are better companies from which to derive surrogate financial statements because they are significant producers of the subject merchandise[26] and their other business lines are comparable to the industry under investigation.[27] However, record evidence supports Commerce's assessment that Minho is a holding company — as its financial statement consolidates the data of several subsidiaries[28] — with "multiple divisions not involved with the subject merchandise and timber trading and extraction operations and activities, neither of which Yinfeng

[26] Yinfeng submits that Minho "has a capacity of 10 million linear feet of moulding per month," *see* Pl.'s Br. at 16 (citing Resp't's Final SV Subm. Ex. SV2–3 Company Info. at 5), and Classic Scenic primarily manufactures the subject merchandise of picture frame mouldings, representing over 88.95 percent of its revenue, *see id.* (citing Resp't's Final SV Subm. Ex. SV2–4 at 62–63).

[27] Yinfeng asserts Minho's comparable businesses include "manufacturing sawn timber, trading timber and timber products, sawmilling and timber equipment, and manufacturing paper bags from wood," *see* Pl.'s Br. at 16 (citing Resp't's Final SV Subm. Ex. SV2–3 at 103–105), and Classic Scenic's only other division manufactures comparable timber products, *see id.* (citing Resp't's Final SV Subm. Ex. SV2–4 at 63, Company Info. at 1).

[28] Of Minho's fourteen subsidiaries, *see* Resp't's Final SV Subm. Ex. SV2–3 at 103–105, Commerce found that only one, Victory Enterprise Sdn. Bhd. is a producer of subject merchandise, while another, Lionvest Timber Industries Sdn. Bhd. produces a product related to the industry, *see* IDM at 22. Minho's additional subsidiaries are involved in disparate operations, including plantations and timber, property management, chemical services and custom kiln drying, and rough sawntimber trading and logging. *See* Resp't's Final SV Subm. Ex. SV2–3 at 3, 10, 103–105, 121.

has." IDM at 22. Likewise, substantial evidence supports Commerce's finding that Classic Scenic "is also principally an investment holding company," *id.*, with two subsidiaries producing subject merchandise and/or timber products[29] and two additional subsidiaries engaged in dissimilar rental and property holding operations. *See* Resp't's Final SV Subm. Ex. SV2–4 at 11.

By contrast, Commerce supportably found that the Brazilian statements — though not unimpeachable — are nevertheless superior because they are "limited *more* to wood products and *less* inclusive" of unrelated industries. IDM at 22 (emphasis added). Although Yinfeng correctly notes that Adami has multiple divisions engaged in disparate activities, including forestry, energy, chemical, and paper/cardboard box production, *see* Resp't's Rebuttal Subm. Ex. SVR-1 at 2–3, the same corporate materials Yinfeng relies on further state that Adami's "main products" are mostly wood ones, including "sawn and processed wood, pallets, panels, frames, doors, door kits, modulated, packaging paper, sheets and corrugated boxes," *id.* at 1. Similarly, although two of Duratex's three divisions are unrelated to the merchandise under investigation,[30] *see id.* Ex. SVR-2 at 1, Commerce found that Duratex's financial data allowed the agency to derive financial ratios specific to its wood division, eliminating the issue of unrelated industries, IDM at 22 (citing Pet'r's Prelim. SV Cmts. Ex. 8B).

In sum, Yinfeng's second line of argument does not establish that no "reasonable mind could conclude that Commerce chose the best available information" in selecting the Brazilian statements. *Zhejiang*, 652 F.3d at 1341 (quoting *Goldlink*, 30 CIT at 619, 431 F. Supp. 2d at 1327).

3. Substantial Evidence Supports Commerce's Determination that the Production Processes of Adami and Duratex are the Most Representative.

Yinfeng's third, and final, argument — that the Brazilian producers are large, global conglomerates and/or at different levels of integration than Yinfeng such that they cannot best represent the industry under investigation — is likewise unsuccessful. *See* Pl.'s Br. at 18–22.

Yinfeng contends that Duratex's financial statements cannot be considered representative of Plaintiff's production experience because

[29] Namely, Finesse Moulding (M) Sdn. Bhd. produces subject merchandise in the form of picture frame mouldings and Lim Ket Leng Timber Sdn. Bhd. produces timber products. IDM at 22.

[30] Duratex operates three divisions: deca (ceramics, metal fittings, and electronic showers), ceramic tiles (floor and wall coverings), and wood. *See* Resp't's Rebuttal Subm. Ex. SVR-2 at 1.

Duratex has subsidiaries in other non-economically comparable countries, including four facilities in Brazil and three in Colombia in its wood division alone. *See* Pl's Br. at 21 (citing Pet'r's Prelim. SV Cmts. Ex. 8B at 40–41, n.12). To support its position, Yinfeng invokes *Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, and Preliminary Determination of No Shipments; 2018–2019*, 85 Fed. Reg. 67,709 (Dep't Commerce Oct. 26, 2020), and accompanying Prelim. Dec. Mem. at 24–25 (Oct. 19, 2020) ("*Chlorinated Isocyanurates from China* PDM"). But that investigation is easily distinguishable, because there, Commerce declined to utilize financial statements from a "holding company composed of 64 subsidiaries operating in multiple industries with numerous product lines in multiple countries, including [in] . . . hyperinflationary economies." *Chlorinated Isocyanurates from China* PDM at 25. By contrast, here, Commerce explained that it can isolate the financial data of Duratex's wood division, which is based only in Brazil and Colombia. *See* IDM at 22 (citing Pet'r's Prelim. SV Cmts. Ex. 8B); *see also* Pl.'s Br. at 21; Def.'s Br. at 23. Moreover, record evidence supports Commerce's finding that Duratex is primarily oriented towards the Brazilian market, as the company is headquartered in São Paulo and sixteen of its nineteen industrial operations are located in the country. *See* Resp't's Rebuttal Subm. Ex. SVR-2 at 1. Thus, Yinfeng has not succeeded in showing that any reasonable mind would reject Duratex's financial statements simply because the company maintains some operations outside of Brazil.

Yinfeng further argues that the Brazilian companies are not representative of the industry under investigation because Adami and Duratex maintain "extensive forestry divisions[s]"[31] and are, therefore, at dissimilar levels of integration than Yinfeng, which has no forestry operations. *See* Pl.'s Br. at 19, 22–23. Yinfeng maintains that when selecting surrogate financial statements, it is Commerce's general practice to weigh the level of company integration and reject data from companies with dissimilar production processes when better

[31] *See* Resp't's Rebuttal Subm. Ex. SVR-1 at 1, 18–20, 21–22 (describing Adami's forestry division and explaining that Adami also produces its own energy), and *id.* Ex. SVR-2 at 1 (describing Duratex's forestry division).

information is available. *Id.* at 22– 23 (citing *Hardwood & Decorative Plywood from China* IDM at 62).[32]

As Yinfeng itself crucially acknowledges, dissimilar production processes are only decisive "*when better information is available*." *Id.* (emphasis added). Here, Commerce found that Minho also maintains forestry operations, *see* Final SV Mem. at 3; *see also* Resp't's Final SV Subm. Ex. SV2–3 at 104 (listing "operation of an integrated timber complex" as a principal activity of Minho's subsidiary, Lionvest Corporation (Pahang) Sdn. Bhd.). And Commerce further assessed that both Minho and Classic Scenic are involved in "timber trading *and extraction operations and activities*, neither of which Yinfeng has." *See* IDM at 22 (emphasis added). Thus, Yinfeng's production process and integration-focused arguments do not clearly compel a finding that the financial statements of Minho and Classic Scenic are more representative.

4. Conclusion

In choosing between the financial statements of Brazilian companies Adami and Duratex and those of Malaysian companies Minho and Classic Scenic, "Commerce [wa]s confronted with two alternatives (both of which have their good and bad qualities), and Commerce ha[d] a preferred alternative," namely the Brazilian companies. *Mittal Steel*, 31 CIT at 1141, 502 F. Supp. 2d at 1313. Because Commerce's "'best available information' analysis is context and fact dependent," *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 842 (Fed. Cir. 2020), and because "there is no requirement that the data [relied upon] be perfect," *Home Meridian*, 772 F.3d at 1296, the court here declines to "second-guess Commerce's choice," *Mittal Steel*, 31 CIT at 1141, 502 F. Supp. 2d at 1313.

---

[32] More recently, Commerce explained that a surrogate company's differing level of integration is not *per se* disqualifying. *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Administrative Review, Final Determination of No Shipments, and Final Partial Rescission of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 25,766 (Dep't Commerce June 5, 2017), and accompanying Issues and Dec. Mem. Cmt. 2 at 8 (May 26, 2017) (explaining that "while [a company's] production process may not be an exact match . . . , this is not a disqualifying factor"); *see also Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60,632 (Dep't Commerce Oct. 25, 2007), and accompanying Issues and Dec. Mem. Cmt. 3B at 21–22 (Oct. 17, 2022) (explaining that Commerce considers level of integration when selecting financial statements, but "it is not [Commerce's] practice to match individual companies to their potential surrogates" (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999))).

II. Commerce's Selection of Surrogate Values for Yinfeng's Sawnwood Inputs Was Supported by Substantial Evidence and in Accordance with Law.

Commerce's selection of Brazil as the PSC was also largely dependent on Commerce's determination that Brazil offered superior data to value Yinfeng's primary inputs: namely, radiata pine and fir sawnwood of a thickness exceeding 6 mm, sawn lengthwise. *See* IDM at 19–21; *see also* Yinfeng, Suppl. Questionnaire Resp. — Part II (July 7, 2020) at Section D.1, Ex. SQ1–34, Ex. SQ1–35, P.R. 511. In valuing these inputs, Commerce opted to rely on Brazil's eight-digit HTS subheadings 4407.11.00 and 4407.12.00[33] — advocated for by the Coalition — which cover pine and fir wood, respectively, that is "*sawn or chipped lengthwise, sliced or peeled*, whether or not planed, sanded or end-jointed, of a thickness of [exceeding] 6 mm," *see* Pet'r's Prelim. SV Cmts. at Exs. 1–2 (emphasis added); Pet'r's Rebuttal Br. (Nov. 10, 2020) at 9, P.R. 641, over the ten-digit Malaysian HTS subheadings 4407.11.00.10 and 4407.12.00.10 — advocated for by Yinfeng — which cover pine and fir wood, respectively, that is *sawn lengthwise only*, whether or not planned, sanded or end-jointed, of a thickness exceeding 6 mm, *See* Pl's Br. at 10 (emphasis in original); Resp't's Final SV Subm. Ex. SV2–21 at 2.

Although the parties do not dispute that Yinfeng uses only pine and fir wood that is *sawn lengthwise* to produce its subject merchandise or that the Malaysian HTS subheadings cover pine and fir wood sawn lengthwise *only*, while the Brazilian HTS subheadings comprise a "basket category" that include other wood cuts not consumed by Yinfeng, *see* Def.'s Br. at 11–13, Commerce, nevertheless, determined that the Brazilian HTS are superior to value Yinfeng's primary sawnwood inputs, *see* IDM at 19–21. The agency so assessed because the Brazilian data "are complete, publicly-available, contemporaneous, and specific to each input used by the respondent to produce the subject merchandise during the POI." *Id.* at 19. Moreover, Commerce explained that while the Brazilian and Malaysian HTS subheadings "note[] the same inputs at the same specificity," the Brazilian data alone offers a complete set of surrogate values to value all of Yinfeng's factors of production, such that Commerce can adhere to its preference of valuing all inputs from a single surrogate country. *Id.* at 20.

Before the court, Yinfeng presents a three-fold objection to Commerce's reliance on the Brazilian HTS to value its primary sawnwood

[33] Although Yinfeng argues that Commerce in fact relied on six-digit HTS 4407.11 and 4407.12 from Brazil, Yinfeng acknowledges there is no distinction between the six-digit and eight-digit level of the Brazilian HTS where, as here, the seventh and eight digits are "00." *See* Pl's Br. at 7–8; Def.-Inter.'s Br. at 16–17. As such, the court need not address this point further.

inputs: First, Yinfeng argues that the Malaysian HTS are more specific, and Commerce must use the most specific surrogate HTS headings to value inputs, *see* Pl.'s Br. at 11–12; second, Yinfeng contends that Commerce's selection of Brazil was based, in part, on an erroneous determination that the Brazilian HTS were "equally specific" to the Malaysian HTS, *see id.* at 4; and third, Yinfeng disputes Commerce's determination that the Brazilian data offers a more complete set of surrogate values than the Malaysian data, *see id.* at 31–32. Each of these arguments is unavailing. Because the court can reasonably discern Commerce's rationale that the Brazilian HTS are sufficiently specific to value Yinfeng's sawnwood inputs in light of other relevant advantages afforded by the data, the court sustains this surrogate value selection as supported by substantial evidence and in accordance with law.

A. Commerce Need Not Select the "Most Specific" HTS to Value Inputs as a Matter of Course.

It is undisputed that the Malaysian HTS — in covering pine and fir wood that is sawn lengthwise *only* — correspond more precisely to the primary wood inputs consumed by Yinfeng, and are, thus, in a sense "more specific" than the Brazilian HTS relied upon by Commerce. *See* Pl.'s Reply Br. at 2; Def.'s Br. at 11. Yinfeng argues that this fact alone should compel Commerce to rely on the Malaysian HTS to value Yinfeng's wood inputs — and to designate Malaysia as the PSC — given Commerce's "well-established preference for specificity" in selecting surrogate value data. *See* Pl.'s. Br. 12–13; Pl.'s Reply Br. at 2–3. In response, the Government and Coalition maintain that Commerce's selection of Brazil is sound because the agency "is not required to 'duplicate the exact production experience'" of Yinfeng. Def.'s Br. at 12 (quoting *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)); *see also* Def.-Inter.'s Br. at 16–18.

As a general matter, Yinfeng overstates the importance of product specificity in Commerce's determination. Similar to the financial statement inquiry, when selecting surrogates to value an NME producer's factors of production, Commerce looks for data that is: (i) publicly available; (ii) contemporaneous with the POI; (iii) based on broad-market averages; (iv) tax and duty-exclusive; and (v) specific to the inputs being valued. *See Policy Bulletin No. 04.1: Non-Market Econ. Surrogate Country Selection Process*, Dep't Commerce, enforcement[.]trade[.]gov/policy/bull041[.]html (last visited Dec. 16, 2022) ("Policy Bulletin 04.1"). This court has repeatedly accepted Commerce's position that there is no hierarchy among these criteria. *See, e.g., United Steel & Fasteners*, 469 F. Supp. 3d at 1397–99; *Fine Furniture (Shanghai) Ltd. V. United States*, 42 CIT __, __, 353 F.

Supp. 3d 1323, 1336 (2018); *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1256, 1269 n.19 (2016); *Xiamen Int'l Trade & Indus. Co. v. United States*, 37 CIT 1724, 1727–28, 953 F. Supp. 2d 1307, 1312–13 (2013); *contra Taian Ziyang Food Co. v. United States*, 35 CIT 863, 906–07, 783 F. Supp. 2d 1292, 1330 (2011) ("All of the criteria outlined in Policy Bulletin 04.1 . . . are not equally important. As a matter of pure logic, first among them must be 'product specificity'")[34].

Thus, the court once again finds that "[t]he relevant question is" "not whether [Commerce's selected HTS] is the most . . . product specific heading available," — as Yinfeng contends — but "whether substantial evidence on the record supports that [Commerce's selected HTS] is sufficiently product-specific to the FOP at issue." *United Steel & Fasteners*, 469 F. Supp. 3d at 1398.

B. Substantial Evidence on the Record Supports that the Brazilian HTS Are "Sufficiently Specific" and Commerce's Selection Did Not Turn On an Erroneous Assessment.

The Government and Coalition contend that Commerce found the Brazilian HTS to be "sufficiently specific" to Yinfeng's sawnwood inputs and that such finding is supported by substantial evidence. *See* Def.'s Br. at 12 (citing *IDM* at 20 (asserting the Brazilian and Malaysian HTS subheadings "note[] the same inputs at the same specificity")); Def.-Inter.'s Br. at 17. In contrast, Yinfeng asserts that "the Brazilian HTS is over broad," Pl.'s Reply Br. at 2; moreover, Yinfeng presents a different interpretation of Commerce's comparative specificity finding, arguing that Commerce made the "definitively incorrect" assessment that the Brazilian and Malaysian HTS are "equally specific" — and not that the Brazilian HTS are "sufficiently 'product specific,'" Pl.'s Br. at 4, 11–12. While the court easily finds that the Brazilian HTS are "sufficiently specific" to value Yinfeng's sawnwood inputs, whether Commerce itself supplied this rationale such that the court should sustain its determination is a closer question, which the court ultimately answers in the affirmative.

1. The Brazilian HTS Are "Sufficiently Specific" to Value Yinfeng's Sawnwood Inputs.

A "surrogate value is sufficiently product specific to the material input when the surrogate data is 'not so removed from the material input such that they are not comparable.'" *Ancientree*, 532 F. Supp 3d

[34] The court notes, of course, that one judge on the United States Court of International Trade is not bound by the decisions of another judge on the court. *See Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989).

at 1262 (quoting *United Steel & Fasteners.*, 469 F. Supp. 3d at 1398–99). In *United Steel & Fasteners, Inc. v. United States*, this court discerned "a rational relationship between Thai HTS 7228.20 — which covers 'Bars And Rods of Silico-Manganese Steel' — and the material input of [steel] Bar because the former includes the latter by definition." 469 F. Supp. 3d at 1400. So too here, the court discerns a rational relationship between Brazilian HTS 4407.11.00 and 4407.12.00 — which cover "Pine Wood Sawn/Chipped Lngtw, Thickness Gt 6Mm" and "Fir Wood Sawn/Chipped, Thickness Exceeding 6Mm," respectively[35] — and Yinfeng's primary inputs of pine and fir wood sawn lengthwise because the former, likewise, includes the latter by definition. Although the Brazilian HTS are indeed basket categories that include wood cuts not consumed by Yinfeng, the case at bar is clearly unlike the hypothetical example of Commerce impermissibly using data on fishing rods to value cardboard packing cartons. *Id.* (discussing *Taian*, 783 F. Supp. 2d at 1330). Because the Brazilian HTS relied upon by Commerce cover Yinfeng's sawnwood inputs exactly, the court concludes that substantial evidence supports that the Brazilian HTS are "sufficiently specific."

2. Commerce's Decisional Path to Finding That the Brazilian HTS Are "Sufficiently Specific" Is Reasonably Discernable.

Yinfeng argues that Commerce's selection of Brazil as the PSC was based, in part, on the erroneous determination that the Brazilian and Malaysian sawnwood HTS are "equally specific," Pl.'s Br. at 4, 12, while Defendants contest that Commerce's selection "hinge[d] on a finding that Malaysian and Brazilian GTA data capture pricing at precisely the same level of granularity," Def.'s Br. at 12. Resolving this dispute turns on whether in assessing that the Brazilian and Malaysian HTS "note[] the same inputs at the same specificity," IDM at 20, Commerce meant that both sets of HTS cover the exact inputs at issue or that they both cover the exact inputs at issue *only*. The former description is an accurate characterization, while the latter would amount to a mistake of fact that would undermine Commerce's selection of Brazil as the PSC. *See Guizhou Tyre Co. v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1302, 1317 (2022) ("[T]he court cannot sustain an agency determination that relies, in whole or in part, upon an invalid finding of material fact.").

[35] The court notes that "Pine Wood Sawn/Chipped Lngtw, Thickness Gt 6Mm" and "Fir Wood Sawn/Chipped [Lngtw], Thickness Exceeding 6Mm" are abbreviated definitions for the full definitions of HTS 4407.11.00 and 4407.12.00, which include pine wood and fir wood sawn lengthwise, respectively. *See* Pet'r's Prelim. SV Cmts. at Ex. 2.

The court finds that, while perhaps of less-than-ideal clarity, Commerce's decisional path to its determination that the Brazilian HTS are "sufficiently specific" is reasonably discernible. In the IDM, Commerce accurately cites to the Malaysian and Brazilian sawnwood HTS subheading descriptions in the record, which lay bare the differences in the scope of product coverage among the HTS sets, *see* IDM at 20 n.126 & 128 (citing Pet'r's Prelim. SV Cmts. at Ex. 2 (The Brazilian sawnwood HTS description) and Resp't's Final SV Subm. Ex. SV2–21 at 2 (The Malaysian sawnwood HTS description)), while also stating:

> [T]he descriptions for the Brazilian HTS subheading numbers are just as detailed as the descriptions for the Malaysian HTS subheading numbers, at the eight or 10-digit level, whichever appropriate. For example, for both pine sawnwood and fir sawnwood, the eight-digit Brazilian HTS subheading numbers for these two major inputs clearly note the wood species of each input being also sawn lengthwise, whether or not planned, sanded, or end jointed of a thickness greater than six millimeters. Similarly, the Malaysian HTS notes the same inputs at the same specificity at the 10-digit level.

IDM at 20 (footnotes omitted). Despite the varying degrees of product inclusivity between the Brazilian and Malaysian HTS, Commerce's above statements are valid in that both countries' HTS "note" the same inputs — pine and fir sawnwood — at the same specificity — sawn lengthwise at a thickness greater than six millimeters — such that both sets of HTS cover the exact specifications of Yinfeng's sawnwood inputs. Commerce's assessment is accurate, even if the agency did not mention that the Brazilian HTS includes additional wood cuts that the Malaysian HTS does not.

Moreover, Commerce further explained that unlike Brazil, the Malaysian data does not provide a complete set of surrogate values to value all of Yinfeng's factors of production; Commerce states:

> [W]hile both the Malaysia and Brazil GTA data show HTS imports of the primary wood inputs (*e.g.*, pine sawnwood and fir sawnwood), the Brazilian GTA data, unlike the Malaysian GTA data, include imports for the particular type of wood scrap that Yinfeng[] generates from its production process, based on data it placed on the record.

IDM at 20. This suggests Commerce weighed other factors — i.e., the data completeness — alongside the specificity factor to determine

that the Brazilian HTS was overall superior for valuing Yinfeng's sawnwood inputs. This reading is supported by Commerce's conclusion that:

> After careful consideration of all the SV data submitted on the record, we find that the Brazilian GTA data are the best available data for valuing the respondent Yinfeng[]'s FOPs because they are *complete*, publicly-available, contemporaneous, and *specific to each input* used by the respondent to produce the subject merchandise during the POI.

IDM at 19 (emphasis added). Thus, while Commerce's assessment of the comparative specificity of the HTS sets is perhaps of less-than-ideal clarity, the court can reasonably discern that Commerce found the Brazilian HTS to be sufficiently specific in light of other relevant advantages afforded by the Brazilian data, such that it comprises the better choice.

C. Additional Considerations Support Commerce's Decision to Use the Brazilian HTS.

This court has held that it is within Commerce's discretion to choose a basket header over a more specific one as long as the chosen header is sufficiently product specific and supported by additional considerations, such as Commerce's preference to value all inputs from a single surrogate country.[36] *See United Steel & Fasteners*, 469 F. Supp. 3d at 1398, 1401–02 (sustaining Commerce's decision to choose a sufficiently specific Thai HTS over a more specific Indonesian HTS where Commerce expressed its preference for using a single surrogate country and the record did not show it would be unreasonable to do so). Again, Commerce here explained:

> [W]hile both the Malaysia and Brazil GTA data show HTS imports of the primary wood inputs (*e.g.*, pine sawnwood and fir sawnwood), the Brazilian GTA data, unlike the Malaysian GTA data, include imports for the particular type of wood scrap that Yinfeng[] generates from its production process, based on data it placed on the record. Although the parties differ on the importance of wood scrap in the FOP valuation process, it is clear that valuing this input with import data under the incorrect HTS

[36] Recall that regulation directs Commerce to endeavor to value all factors of production from a single surrogate country. *See* 19 C.F.R. § 351.408(c)(2). "Courts have found that Commerce's single surrogate country preference is strong and must be given significant weight." *Jacobi Carbons AB v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1360, 1376 (2014), *aff'd*, 619 F. App'x 992 (Fed. Cir. 2015).

> subheading would result in inaccurately calculating the offset to Yinfeng[]'s normal value calculation.

IDM at 20 (footnotes omitted); *see also* Final SV Mem. at 3 (Commerce articulating its preference for valuing all factors of production from a single country). Although Yinfeng does not appear to contest the premise that Commerce may prioritize deriving all surrogate values from a single country, *see* Pl.'s Br. at 4, Yinfeng challenges the conclusions underpinning Commerce's selection of Brazil on that basis, *see id.* at 31–32. Specifically, Yinfeng argues that Malaysia does in fact provide data to value wood scrap such that it offers a complete data set; and in the alternative, Yinfeng argues that the wood scrap by-product is too minor an input to outweigh the other advantages afforded by the Malaysian data. *Id.* The court rejects both arguments.

First, Yinfeng argues Commerce should have valued its wood scrap by-product under HTS 4401.39, which would provide Malaysian import data for the period of investigation, rather than under the Commerce-selected HTS 4401.40, which provides no Malaysian import data for the relevant period. *Id.* This argument is unpersuasive because it is undisputed that Yinfeng's wood scrap is *not* agglomerated. *Id.*; Def.'s Br. at 13–14. The HTS selected by Commerce to value Yinfeng's by-product, HTS 4401.40, covers sawdust and wood waste and scrap, *not* agglomerated; whereas HTS 4401.39 — the HTS advocated for by Yinfeng — covers sawdust and wood waste and scrap, whether or not agglomerated in any form other than wood pellets. *See* Resp't's Final SV Subm. Ex. SV2–21. Therefore, substantial evidence supports Commerce's determination that HTS 4401.40 is the appropriate header to value Yinfeng's admittedly not agglomerated wood scrap by-product.

In the alternative, Yinfeng argues that even if the court sustains Commerce's selection of HTS 4401.40 to value the by-product, "the wood scrap is minor in Yinfeng's cost components" and cannot outweigh the greater specificity that Malaysia's 10-digit HTS affords to value Yinfeng's primary inputs of pine and fir sawnwood. Pl.'s Br. at 32; *see also* Pl.'s Reply Br. at 4 (arguing that wood scrap is much less valuable than its sawnwood inputs because, as the name connotes, it is "a mere scrap"). By contrast, the Coalition argues that the wood scrap is "clearly a major input" because Yinfeng's submissions show that the "wood scrap constitutes [[ ]] [Yinfeng's] starting wood amount and that [[ ]]." Def.-Inter.'s Br. at 14 (citing Pet'r's Rebuttal Br. at 4). In reaching the *Final Determination*, Commerce noted the parties' disagreement concerning the importance of the wood scrap to

the FOP valuation process and concluded that "valuing this input with import data under the incorrect HTS subheading would result in inaccurately calculating the offset to Yinfeng[]'s normal value calculation." IDM at 20. Because courts hesitate to "substitute [their] own judgment for the agency's in considering and weighing the relative importance of various criteria," *Bristol Metals L.P. v. United States*, 34 CIT 478, 484, 703 F. Supp. 2d 1370, 1376 (2010), the court defers to Commerce's assessment of the importance of wood scrap to the valuation process.

D. Conclusion

Because the Brazilian HTS subheadings that Commerce selected to value Yinfeng's sawnwood inputs were sufficiently specific in light of other relevant advantages afforded by the Brazilian data, the court sustains this surrogate value selection as supported by substantial evidence and otherwise in accordance with law.

III. Commerce Appropriately Weighed Additional Advantages Afforded by Malaysia in Selecting Brazil as the PSC.

In rendering the *Final Determination*, Commerce acknowledged that the Malaysian data afforded certain advantages, namely that the Malaysian data: (1) are reported on a CIF basis[37] such that no adjustments are necessary, *see* IDM at 20–21; and (2) provide superior data to value labor, truck freight, brokerage & handling, and acrylic polymer, *see* Final SV Mem. at 2–3. Despite these conceded advantages, Commerce explained that Brazil was still the overall superior surrogate country given the combination of Commerce's reliance on Brazilian GTA data and financial statements to value Yinfeng's sawnwood inputs and noninput costs, respectively, and the agency's preference to value all factors of production from a single country. *See* IDM at 20–21; *see also* Final SV Mem. at 2–3.

Before this court, Yinfeng argues that "[w]hile each of these" — the CIF delivery terms and the superior data for other inputs — "on their

[37] Recall that when data is reported on a CIF basis that means it already reflects costs for marine insurance and freight, while data reported on an FOB basis — like that of Brazil — does not. Parties do not dispute that as a general practice, Commerce prefers surrogate values reported on a CIF basis rather than on an FOB basis. *See Refillable Stainless Steel Kegs from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures*, 84 Fed. Reg. 25,745 (Dep't Commerce June 4, 2019), and accompanying Issues and Dec. Mem. at 10 (May 28, 2019) ("*Refillable Stainless Steel Kegs from China* IDM") ("Commerce prefers to rely on SVs reported on a CIF basis because they include the costs associated with purchasing these inputs from foreign exporters . . . [and] this is the price that is most representative of a domestic price for the input in the surrogate country."); *see also Jiangsu*, 396 F. Supp. 3d at 1343 n.2 (substantively similar).

own may not demand selection of Malaysia over Brazil," when considered in light of the entire record, a "reasonable mind only could conclude that Malaysia . . . should be the primary surrogate country." Pl.'s Reply Br. at 13. In the court's assessment, Commerce committed no inherent error in weighing these additional advantages of the Malaysian data. Moreover, because the court has sustained Commerce's reliance on the Brazilian financial statements and GTA data, the court correspondingly finds that these other advantages afforded by Malaysia are insufficient to undermine Commerce's totality-of-the circumstances selection of Brazil as the PSC.

A. That Malaysia Reports Import Values on a CIF Basis is Not Decisive to the PSC Selection

Yinfeng argues that Commerce should have selected Malaysia as the PSC over Brazil, in part, because only the Malaysian GTA data was reported on a CIF basis and Commerce generally prefers CIF data over FOB data. *See* Pl.'s Br. at 27–29; IDM at 18. While Commerce does not contest Yinfeng's representation of the agency's general preference,[38] the agency explained that here, this factor did not sway the overall PSC selection because: (1) "it is not Commerce's normal practice to select the surrogate country based solely on the difference in delivery terms;"[39] (2) the record contained "the necessary surrogate marine insurance and ocean freight values" to convert the Brazilian data to a CIF basis; and (3) it was not necessary to use the difference in delivery terms as a "tiebreaker" where, "after careful consideration" of the financial and GTA import data on the record, Commerce found Brazil provided the best surrogate value data. IDM at 21. The agency is correct.

1. Because Commerce Could Convert the Brazilian Data to a CIF Basis, This PSC Factor Was Neutral.

It is well established that, where possible, Commerce will convert data reported on an FOB basis to a CIF basis by adding certain surrogate value shipping costs. *See Heze Huayi Chem. Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1301, 1329 (2021) (citing *Policy Bulletin 10.2: Inclusion of Int'l Freight Costs When Imp. Prices Constitute Normal Value*, Dep't Commerce, enforcement[.]trade[.]gov/policy/PB-10.2[.]pdf (last visited Dec. 16, 2022)). Accordingly, Commerce tends to give more weight to data reported on a CIF basis

[38] *Supra* p. 39 n.37.

[39] Again, Yinfeng does not dispute that Commerce need not choose Malaysia as the PSC solely because it reports its data on a CIF basis. *See* Pl.'s Reply Br. at 13. However, Yinfeng maintains that "this is not the only data deficiency in Brazil." Pl.'s Br. at 28.

primarily where the record is devoid of the surrogate value data necessary to calculate a CIF adjustment for data reported on an FOB basis. *See, e.g.*, *Certain Steel Racks and Parts Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 Fed. Reg. 35,595 (Dep't Commerce July 24, 2019) and accompanying Issues and Dec. Mem. at 8–9 (July 17, 2019) (selecting Romania over Brazil as the PSC, in part, because the Romanian data is reported on a CIF basis and the record does not contain a surrogate value for marine insurance to adjust the Brazilian FOB data); *see also Refillable Stainless Steel Kegs From China* IDM at 10 (substantively similar). In contrast, here, Commerce found that it "h[ad] on the record the necessary surrogate marine insurance and ocean freight values with which to adjust the Brazilian GTA FOB import values,"[40] rendering neutral this PSC factor. IDM at 21.

2. Commerce Did Not Need to Rely on its Preference for CIF Data As a Tiebreaker Here.

Where the record contains the necessary surrogate values to adjust FOB data, Commerce generally treats its preference for CIF data as a tiebreaker among *otherwise equal* datasets in its overall PSC determination. *See, e.g.*, Final Results of Redetermination Pursuant to Ct. Remand at 10–11, *Jacobi Carbons AB v. United States*, Consol. Ct. No. 16–00185 (June 17, 2019), ECF No. 139 (selecting Malaysia as the PSC over the Philippines because, all else being relatively equal, "[w]hile the underlying record of this administrative review contains international freight SVs to put the Philippine GTA import data on a [CIF] basis, the Malaysian GTA import data available on record are already on a CIF basis"). Here, Commerce assessed that the Malaysian and Brazilian datasets were not otherwise equal, but rather that Brazil was superior, such that Commerce did not need to use its preference for CIF data as a tiebreaker. IDM at 21 ("[W]e find that Brazil continues to provide the best SV data without needing to consider the difference in delivery terms between the Brazilian and Malaysian GTA import data as a tiebreaker."). The court finds no issue with Commerce's characterization of its general practice on this matter; moreover, because the court has already affirmed Commerce's

[40] In its briefing before this court, Yinfeng appeared to dispute — for the first time — the reliability of the surrogate values Commerce used to convert the Brazilian data, specifically noting that the marine insurance data predates the POI by nine years and that the ocean freight price reflects the cost of shipping wood products from China to the United States, rather than the costs of importing raw materials for mouldings into Brazil. See Pl.'s Br. at 27. However, Yinfeng clarified at oral argument and in its post-oral argument briefing to the court that it does not in fact assert such a challenge. See Pl.'s Post-Arg. Subm. at 6 ("Defendant-Intervenor emphasizes that Yinfeng cannot argue over the data used to adjust the Brazilian FOB data (an argument Yinfeng has not even made)."). As such, the court need not resolve this matter.

reliance on the Brazilian financial statements and HTS, the court correspondingly sustains Commerce's neutral treatment of this PSC factor.

B. Commerce Gave Appropriate Consideration in its Overall PSC Selection to Malaysia's Provision of Superior Data to Value Labor, Truck Freight, Brokerage & Handling, and Acrylic Polymer Inputs.

The parties do not dispute that Malaysia provides superior data to value Yinfeng's other inputs of labor, truck freight, brokerage & handling, and acrylic polymer inputs.[41] *See* Final SV Mem. 2–3. Importantly, Yinfeng does not appear to contest Commerce's reliance on Brazilian data to value these inputs *individually*, but only the weight that Commerce afforded these inputs in its overall PSC selection. Pl.'s Br. at 29–32.[42] The court therefore does not reach the hypothetical question whether had Yinfeng challenged Commerce's selection of these inputs individually, such a line of attack would have been meritorious given the agency's statutory directive to value factors of production according to the "best available information." *See* 19 U.S.C. § 1677b(c)(1)(B); *see also Baoding Mantong Fine Chemistry Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1321, 1325 (2017) ("[T]he statute contemplates situations in which Commerce may need to rely upon data from more than one surrogate country in order to fulfill its statutory obligation."). Yinfeng closes its discussion on these other inputs by "ask[ing] the Court to remand for the Department to reconsider its primary surrogate country." Pl.'s Br. at 32. Accounting for the argument adequately lodged, the court finds that these other

[41] Concerning the labor input, Commerce acknowledged that the Malaysian data on record is more "specific to the POI and more specific to the wood products-making industry than the Brazilian 2019 labor data." *See* Final SV Mem. at 2. Similarly, for truck freight and brokerage & handling, Commerce found that the Malaysian data on record is more contemporaneous to the POI because it covers 2019 expense data, while the Brazilian data covers 2018 expense date. *Id.* at 3. Finally, for acrylic polymer, Commerce found that the Brazilian and Malaysian HTS subheadings were both specific to acrylic polymers in primary forms, but acknowledged that the Malaysian HTS offered a more detailed breakout for the specific type of primary acrylic polymer used by Yinfeng. *Id.* at 2.

[42] For instance, Yinfeng's argument that "Malaysia Sources the Best Available Information to Value Other Inputs" is included in the overarching section "The Department's Selection of Brazil as the Primary Surrogate Country is Not Supported by Substantial Evidence." Pl.'s Br. at 29–32; *see also* Pl.'s Reply Br. at 13–15. Moreover, when asked "if this court were to sustain Commerce's overall selection of Brazil as the primary surrogate country," whether "Commerce can and should still use Malaysian data to value certain inputs," Ct.'s Qs. for Oral Arg. at 2, Yinfeng did not enumerate these other inputs, *see* Pl.'s Oral Arg. Subm. at 1–2. As such, the court concludes that any challenge that Yinfeng might have lodged against Commerce's individual selection of these other inputs is waived. *See JBF RAK LLC v. United States*, 38 CIT __, __, 991 F.Supp.2d 1343, 1356 (2014) (citing *United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived.")).

inputs — but a few of "many data considered"[43] — are insufficient to undermine Commerce's totality-of-the-circumstances selection of Brazil as the PSC.

CONCLUSION

For the foregoing reasons, the court concludes that Commerce's selection of Brazil as the PSC was supported by substantial evidence and otherwise in accordance with law. Accordingly, the court denies Plaintiff's Motion for Judgment on the Agency Record and sustains the agency's *Final Determination*.

SO ORDERED.

Dated: December 21, 2022
New York, New York

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

[43] See Final SV Mem. at 2–3.

Slip Op. 22–152

VALEO NORTH AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION COMMON ALLOY ALUMINUM SHEET TRADE ENFORCEMENT WORKING GROUP, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Court No. 21–00581

[Remanding the U.S. Department of Commerce's scope determination concerning the antidumping duty and countervailing duty orders on common alloy aluminum sheet from the People's Republic of China.]

Dated: December 21, 2022

Daniel J. Cannistra, Crowell & Moring LLP, of Washington, DC, argued for Plaintiff. With him on the brief was *Pierce J. Lee*.

Alison S. Vicks, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Kyle S. Beckrich*, Trial Attorney. Of counsel on the brief was *Leslie M. Lewis*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Joshua R. Morey and *John M. Herrmann*, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenor. With them on the brief was *Paul C. Rosenthal*.

OPINION AND ORDER

Barnett, Chief Judge:

This action involves a challenge to a U.S. Department of Commerce ("Commerce" or "the agency") scope determination for the antidumping duty ("ADD") and countervailing duty ("CVD") orders on common alloy aluminum sheet ("CAAS") from the People's Republic of China ("China"). *See* Compl., ECF No. 4; *Common Alloy Aluminum Sheet From the People's Republic of China*, 84 Fed. Reg. 2,813 (Dep't Commerce Feb. 8, 2019) (ADD order); *Common Alloy Aluminum Sheet From the People's Republic of China*, 84 Fed. Reg. 2,157 (Dep't Commerce Feb. 6, 2019) (CVD order) (together, "the *China CAAS Orders*");[1] Confid. Final Scope Ruling Determination: Valeo's Heat

[1] The administrative record associated with Commerce's scope determination is contained in public and confidential administrative records filed in the antidumping and countervailing proceedings underlying the *China CAAS Orders*. Because the relevant parts of the administrative records are identical, the court cites to the documents filed in the ADD proceeding. *See* Public ADD Index ("PR"), ECF No. 18–3; Public CVD Index, ECF No. 18–2; Confid. ADD Index ("CR"), ECF No. 18–5; Confid. CVD Index, ECF No. 18–4. Valeo submitted joint appendices containing all record documents cited in the Parties' respective Rule 56.2 briefs. *See* Confid. J.A. ("CJA"), ECF No. 40; Public J.A., ECF No. 41. The court references the confidential documents.

Treated T-Series Aluminum Sheet, A-570–073, C-570–074 (Oct. 15, 2021) ("Final Scope Ruling"), CR 15, PR 40, CJA Tab 26.[2]

Plaintiff Valeo North America, Inc. ("Valeo") challenges Commerce's determination that its T-series aluminum sheet is covered by the scope of the *China CAAS Orders*. Confid. Mot. for Pl. [Valeo] for J. on the Agency R., ECF No. 23, and accompanying Confid. Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Mem."), ECF No. 23–2; Pl.'s Reply Mem in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Reply"), ECF No. 35. Defendant United States ("the Government") and Defendant-Intervenors[3] urge the court to sustain Commerce's scope ruling. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Def.'s Opp'n"), ECF No. 30; Confid. Def.-Ints.' Resp. Br. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def.-Ints.' Opp'n"), ECF No. 31. For the following reasons, the court remands Commerce's Final Scope Ruling.

BACKGROUND

I. Legal Framework for Scope Determinations

Because the descriptions of merchandise covered by the scope of an antidumping or countervailing duty order must be written in general terms, questions may arise as to whether a particular product is included within the scope of an order. *See* 19 C.F.R. § 351.225(a) (2020).[4] When such questions arise, Commerce's regulations direct it to issue "scope rulings" that clarify whether the product is in-scope. *Id*. Although there are no specific statutory provisions that govern Commerce's interpretation of the scope of an order, Commerce is guided by case law and agency regulations. *See Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017); 19 C.F.R. § 351.225.

---

[2] The public version of the Final Scope Ruling is filed at ECF No. 18–6.

[3] Defendant-Intervenors consist of the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its Individual Members: Aleris Rolled Products, Inc., Arconic Corporation, Commonwealth Rolled Products Inc., Constellium Rolled Products Ravenswood, LLC, Jupiter Aluminum Company, JW Aluminum Company, and Novelis Corporation. Defendant-Intervenors incorporated by reference some of the Government's arguments and presented additional arguments on certain issues. *See* Def-Ints.' Opp'n at 13–21.

[4] Commerce recently revised its scope regulations; the revisions apply "to scope inquiries for which a scope ruling application is filed . . . on or after the effective date" of November 4, 2021. *See Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300, 52,300, 52,327 (Dep't Commerce Sept. 20, 2021). The court cites to the prior regulations that were in effect when Valeo submitted its complete scope application.

Commerce's inquiry must begin with the relevant scope language. *See, e.g.*, *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020). If the scope language is unambiguous, "the plain meaning of the language governs." *Id.* If, however, the language is ambiguous, Commerce interprets the scope "with the aid of" the sources set forth in 19 C.F.R. § 351.225(k)(1) (referred to as a "(k)(1) analysis" or the "(k)(1) sources"). *Meridian Prods*., 851 F.3d at 1382 (citation omitted). Subsection (k)(1) directs Commerce to consider the descriptions of the subject merchandise in the petition, initial investigation, and prior determinations by Commerce (including scope determinations) or the U.S. International Trade Commission ("ITC"). 19 C.F.R. § 351.225(k)(1). If the (k)(1) sources are dispositive, Commerce may issue its ruling based solely on the party's application and the (k)(1) sources. 19 C.F.R. § 351.225(d).[5] In all other cases, Commerce will initiate a scope inquiry and may consider the factors enumerated in subsection (k)(2) of the regulation (referred to as "the (k)(2) factors"). *See Meridian Prods*., 851 F.3d at 1382 (citing 19 C.F.R. § 351.225(k)(2));[6] *see also* 19 C.F.R. § 351.225(e) (providing for Commerce to initiate a scope inquiry).

II. Administrative Proceedings and Procedural History

Commerce issued the *China CAAS Orders* in February 2019. 84 Fed. Reg. at 2,813; 84 Fed. Reg. at 2,157. The scope of the *China CAAS Orders* covers, *inter alia*:

> aluminum common alloy sheet (common alloy sheet), which is a flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width. Common alloy sheet within the scope of this order includes both not clad aluminum sheet, as well as multi-alloy, clad aluminum sheet. With respect to not clad aluminum sheet, common alloy sheet is manufactured from a 1XXX-, 3XXX-, or 5XXX-series alloy as designated by the Aluminum Association. With respect to multi-alloy, clad aluminum sheet, common alloy sheet is produced from a 3XXX-series core, to which cladding layers are applied to either one or both sides of the core.

---

[5] To be dispositive, the (k)(1) factors "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007).

[6] The (k)(2) factors include: "(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

84 Fed. Reg. at 2,815; 84 Fed. Reg. at 2,158–59.[7]

On May 1, 2020, Valeo submitted its first scope ruling request. Req. for Scope Ruling on Heat-Treated T-Series Aluminum Sheet, Case No. A-570–073 (May 1, 2020) ("First Ruling Req."), CR 1, PR 1, CJA Tab 1. The domestic interested parties ("DIPs")—Defendant-Intervenors here—filed comments on the First Ruling Request. Domestic Industry's Resp. to Scope Ruling Request by Valeo Group (May 27, 2020) ("First DIPs Cmts."), CR 2–4, PR 9–11, CJA Tab 2. On June 3, 2020, Commerce rejected the First Ruling Request as improperly filed pursuant to Commerce's regulations. Rejection of Reqs. for a Scope Inquiry on Heat-Treated T-Series Aluminum Sheet (June 3, 2020), PR 12, CJA Tab 3.

On June 4, 2020, Valeo resubmitted its scope ruling request. Req. for Scope Ruling on Heat-Treated T-Series Aluminum Sheet, Case No. A-570–073 (June 4, 2020) ("Second Ruling Req."), CR 5, PR 14, CJA Tab 5. On June 12, 2020, Commerce held a telephone conference with counsel for the DIPs and placed on the record a summary of the *ex parte* meeting. Tel. Meeting Re: Scope Inquiry on Valeo Group's Heat-Treated T Series CAAS (June 17, 2020) ("June 17 *Ex Parte* Mem."), PR 16, CJA Tab 7. Valeo and the DIPs submitted various filings regarding Valeo's application. Rebuttal Cmts. to Pet'rs' Cmts. on Valeo's Scope Ruling Req. (June 15, 2020) ("Valeo Rebuttal Cmts."), CR 6, PR 15, CJA Tab 6; [DIPs] Resp. to [Valeo's] Rebuttal Cmts. (June 25, 2020) ("Second DIPs Cmts."), CR 7, PR 17, CJA Tab 8; Resp. to the [DIPs] Cmts. on Valeo's Rebuttal Cmts. (July 9, 2022), PR 22, CJA Tab 10.

On July 20, 2020, Commerce issued a supplemental questionnaire to Valeo seeking additional information about the T-series aluminum sheet. Suppl. Questionnaire on Heat-Treated T-series Aluminum Sheet (July 20, 2020), CR 9, PR 23, CJA Tab 11. Commerce requested that Valeo explain why its T-series aluminum sheet should not be considered a clad product when Valeo described the product as containing both "a 'center layer'" and "outer layers." *Id.* at 3, Qu. 4.

On August 7, 2020, Valeo resubmitted its application. Req. for Scope Ruling and Resp. to Suppl. Questionnaire on Heat-Treated T-Series Aluminum Sheet, Case No. A570–073 (August 7, 2020) ("Third Ruling Req."), CR 10, PR 24, CJA Tab 12. The DIPs responded to Valeo's application. [DIPs] Resp. to [Valeo's] Resubmitted Scope Ruling Request (Aug. 24, 2020) ("Third DIPs Cmts."), CR 11, PR 25, CJA Tab 13.

[7] Parties agree that the phrase "as designated by the Aluminum Association" used in the sentence to describe "not clad aluminum sheet" also modifies the phrase "3XXX-series core" appearing in the next sentence describing "clad aluminum sheet." Oral Arg. 2:10–3:20 (reflecting the timestamp from the recording on file with the court).

On February 3, 2021, Commerce rejected Valeo's Third Ruling Request and again requested additional information. Second Suppl. Questionnaire on Heat-Treated T-Series Aluminum Sheet (Feb. 3, 2021), CR 12, PR 30, CJA Tab 17.

On March 24, 2021, Valeo submitted its scope request. [Resp. to] Req. for Add'l Info., Case No. A-570–073 (March 23, 2021) ("Fourth Ruling Req."), CR 13, PR 31, CJA Tab 18.[8] Commerce accepted this request as a complete scope ruling application. *See* Final Scope Ruling at 2.

On April 19, 2021, Commerce held a virtual meeting with counsel for the DIPs and memorialized the *ex parte* meeting on the record. Meeting with Couns. for the Domestic Indus. (Apr. 22, 2021) ("Apr. 22 *Ex Parte* Mem."), PR 33, CJA Tab 19. On May 11, 2021, Valeo requested additional information about the *ex parte* meeting, and, on May 27, 2021, Commerce responded. *See* Resp. to Dep't's Mem. Regarding Pet'r's *Ex Parte* Meeting (May 11, 2021), CR 14, PR 35, CJA Tab 21; Letter from Commerce to Valeo Group (May 27, 2021) ("May 27 Commerce Ltr."), PR 36, CJA Tab 22.

During the administrative proceeding, Commerce issued seven extensions of the regulatory deadline for issuing its scope determination. *See* Final Scope Ruling at 2 & nn.9, 13. On October 15, 2021, Commerce issued its Final Scope Ruling.[9]

Commerce issued its affirmative decision pursuant to 19 C.F.R. § 351.225(d) and (k)(1). *See id.* at 10. Commerce concluded that Valeo's T-series aluminum sheet is covered by the scope of the *China CAAS Orders* because it "is a flat aluminum product" with a thickness of "6.3 mm or less, but greater than 0.2 mm," and "is a multi-alloy, clad aluminum sheet produced from an aluminum core that has a primary alloying element of manganese, i.e., a 3XXX-series core." *Id.* at 11. Discussed further below, Commerce's determination turned on whether Valeo's T-series aluminum sheet constitutes a clad product and whether it has a 3XXX-series core.

---

[8] Because Valeo filed its Fourth Ruling Request after 5:00pm on March 23, 2021, Commerce considered the submission "to be filed on March 24, 2021." Final Scope Ruling at 1 n.1.

[9] On November 30, 2021, Valeo voluntarily dismissed an action commenced pursuant to 28 U.S.C. § 1581(i) in which Valeo sought to compel Commerce to issue its scope ruling and to obtain a declaratory judgment that Commerce's extensions were unlawful. *See* Notice of Dismissal, *Valeo N. Am., Inc. v. United States*, Court No. 21-cv-00426 (Nov. 30, 2021); Compl. ¶¶ 28–37, *Valeo N. Am., Inc. v. United States*, Court No. 21-cv-00426 (Aug. 17, 2021). While Valeo's reply brief alluded to the asserted completeness of the First Ruling Request, Valeo did not raise substantive claims or arguments concerning any alleged unlawfulness of Commerce's extensions in this litigation. *See* Compl. ¶¶ 49–79 (setting out Valeo's claims); Pl.'s Mem. at 13 (summary of Valeo's arguments in which Valeo asserted, without more, that it "wait[ed] more than 18 months for a determination that Commerce is required to conduct in 45 days").

Clad Product

In the underlying proceeding, Valeo asserted that its product should be considered heat-treated and excluded from the scope. *See id.* at 11. Valeo argued that "a clad product" has "discrete layers of distinct metals and alloys that are metallurgically bonded." *Id.* at 11 & n.91 (citing Second Ruling Req. at 10). Valeo distinguished a clad product from a heat-treated product, which Valeo described as "a singular, not composite, aluminum product" in which "the individual layers los[e] their original chemistries" during heat treatment such that a "new alloy" is formed "with a unique chemistry." *Id.* at 12 & n.93 (citing Second Ruling Req. at 10).

The DIPs argued that Valeo's product is instead a clad product covered by the scope. *Id.* at 11. The DIPs argued that "thermal treatment" may result in "some diffusion between the core and cladding layer" such that "it is not the case that each layer [of a clad product] retains its original chemistry." *Id.* at 12 & n.95 (citing First DIPs Cmts. at 8–9; Third DIPs Cmts. at 4). Commerce credited the DIPs argument regarding the potential for diffusion in a clad product because it was supported by documentation from the Aluminum Association. *Id.* at 12 & n.96 (citing First DIPs Cmts. at 9; Third DIPs Cmts. at 4).[10]

Commerce considered whether "Valeo's T-series aluminum sheet should be considered a clad or heat-treated product," and concluded that it is a clad product. *Id.* at 12.[11] Commerce based this finding on evidence that the constituent "layers [of Valeo's T-series aluminum sheet] maintain their separate chemistries because the phases of diffused alloys have a larger manganese content toward the center . . . and a larger silicon content toward the surface." *Id.* at 12 & n.101 (citing Fourth Ruling Req.,Attach. II, Qu. 11). Commerce found that Valeo had not shown that the "integration between the outer layer and center core of T-series aluminum sheet" exceeded that which could be ascribed to a clad product. *Id.* at 12–13.

3XXX-Series / As Designated by the Aluminum Association

Valeo argued that its product is manufactured "from a proprietary alloy core" that cannot be considered a 3XXX-series core and is,

[10] The DIPs cited to an Aluminum Association standards publication stating that "[t]he composition of the cladding may be subsequently altered by diffusion between the core and cladding due to thermal treatment." First DIPs Cmts. at 9 (quoting First DIPs Cmts., Attach. 2 at 6–4 n.1). Attachment 2 consists of a publication titled "Aluminum standards and data 2017," issued by the Aluminum Association.

[11] Commerce first found that Valeo's product is a "'multi-alloy' product" based on Valeo's description of the product as one that contains "intermediate input layers of an outer layer of aluminum alloy 4045 that has a principal alloying element of silicon and an inner layer of a proprietary aluminum alloy that has a principal alloying element of manganese." Final Scope Ruling at 12. Valeo does not contest this finding.

therefore, out-of-scope. *Id.* at 13. Valeo further argued that the phrase "as designated by the Aluminum Association" would be rendered superfluous if Commerce interpreted the scope "to include unregistered alloys." *Id.* at 14. Commerce rejected both arguments.

Commerce explained that the Aluminum Association uses "a four-digit numerical system for designating registered aluminum alloys," pursuant to which "[t]he first of the four digits in the designation system indicates the alloy group, also called the series." *Id.* at 11. The alloys are "grouped by majoring alloying elements" as indicated in the following chart, reproduced from Commerce's scope ruling:

> Aluminum, 99.00 percent and greater ...1xxx
> Aluminum alloys grouped by majoring alloying elements
>
> Copper ...2xxx
> Manganese ...3xxx
> Silicon ...4xxx
> Magnesium ...5xxx
> Magnesium and Silicon ...6xxx
> Zinc ...7xxx
> Other elements ...8xxx
> Unused series ...9xxx. [87]

Id. at 11 & n.87 (citing Second Ruling Req., Ex. 3 at 28); *see also id.* at 13–14 & nn.104–05 (citing same).[12] Commerce relied on the Teal Sheets to find that Valeo's proprietary core "corresponds to 3xxx-series aluminum alloy because the major alloying element is manganese." *Id.* at 14 & n. 106 (citing Third Ruling Req., Attach. 2 at 3).

Commerce disagreed with Valeo that Aluminum Association designations are limited to registered alloys. *Id.* at 14. Commerce relied on a declaration issued by the Aluminum Association's Vice President for Standards and Technology to find "that an alloy with a principal alloying element corresponding to the Aluminum Association's alloy series is generally referred to by the applicable series designation" even when the alloy is unregistered. *Id.* at 14 & n.111 (citing First DIPs Cmts., Attach. 6 (Decl. of John Weritz (May 27, 2020) ("Weritz Decl.")) ¶ 7).

Consistent with this interpretation, Commerce found that the phrase "as designated by the Aluminum Association" refers solely "to the *series* of the aluminum alloy" and clarifies the meaning of "a 1xxx,

---

[12] Exhibit 3 consists of the January 2015 version of the Aluminum Association's Teal Sheets. The record also contains the August 2018 version of the Aluminum Association's Teal Sheets, which the court references and cites herein. First DIPs Cmts., Attach. 5 ("Teal Sheets").

3xxx, or 5xxx-series alloy." *Id.* at 14. Commerce stated that this interpretation of the scope language is consistent with documentation in the underlying ADD and CVD investigations in which "Commerce refer[red] to a four-digit numerical designation as a 'specific-alloy' and a one-digit alloy series as an 'alloy' and as a 'series alloy.'" *Id.* at 15 & n.115 (citing Factual Information Relevant to the Final Scope Ruling Determination: Valeo's Heat-Treated T-Series Aluminum Sheet (Oct. 15, 2021) ("Commerce Factual Information"), Attach. 1 (Mem. Re: Prod. Characteristics for the [ADD] Investigation of [CAAS] from [China] (Feb. 1, 2018) ("Prod. Characteristics Mem.")), PR 41, CJA Tab 27).[13]

Commerce also addressed Valeo's argument that because the Aluminum Association "classifies 3xxx . . . series aluminum alloys as non-heat-treatable," Valeo's proprietary core cannot be considered a 3xxx-series alloy because it is heat-treated. *Id.* at 17. Commerce noted that Valeo has not established that its product is heat-treated, but that even if it had, evidence demonstrates that the Aluminum Association determines the series in which an "alloy falls based on its aluminum content and/or principal alloying agent" and not on heat-treatability. *Id.* at 17 & n.127 (citing Weritz Decl.). Further, while the ITC, in its injury report, stated that "heat-treated aluminum sheet (e.g., 6xxx alloy series) is not covered by Commerce's scope," *id.* at 17 & n.129 (citing Second Ruling Req. at 13–14),[14] Commerce found that the ITC's statement did not demonstrably apply "beyond the alloy series that the ITC identified as heat-treatable (e.g., 6xxx-series)," *id.* at 18. Commerce acknowledged the ITC's characterization of "1xxx, 3xxx, and 5xxx-series alloys [as] non heat-treatable," *id.* at 17 &

[13] Commerce disagreed with Valeo that the explicit inclusion of proprietary alloys in the scopes of other ADD and CVD orders supports a narrower interpretation of the underlying order that lacks such language. Final Scope Ruling at 15; *see also Common Alloy Aluminum Sheet From Bahrain, et al.*, 86 Fed. Reg. 22,139 (Dep't Commerce Apr. 27, 2021) (ADD orders) ("*Bahrain CAAS Order*"); *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (ADD order) ("*China Extrusions Order*"). The *Bahrain CAAS Order* contains certain language identical to the *China CAAS Orders* with the following addition: "The use of a proprietary alloy or non-proprietary alloy that is not specifically registered by the Aluminum Association as a discrete 1xxx-, 3xxx-, or 5xxx-series alloy, but that otherwise has a chemistry that is consistent with these designations, does not remove an otherwise in-scope product from the scope." *Bahrain CAAS Order*, 86 Fed. Reg. at 22,143. The *China Extrusions Order* covers, *inter alia*, "aluminum extrusions . . . made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." 76 Fed. Reg. at 30,650.

[14] For the referenced information, see *Common Alloy Aluminum Sheet from China*, Inv. Nos. 701-TA-591 and 731-TA-1399, USITC Pub. 4861 (Jan. 2019) (Final) ("USITC Pub. 4861") at I-18, *available at* https://www.usitc.gov/publications/701_731/pub4861.pdf (last visited Dec. 21, 2022).

nn.130–31 (citing, *inter alia*, USITC Pub. 4861 at I-13), and that additional record evidence is consistent with the ITC's characterization, *id.* at 18 & n.133 (citing Second DIPs Cmts., Attach. 1 (Decl. of John Weritz (June 24, 2020) ("Second Weritz Decl.")) ¶ 7).

Lastly, Commerce rejected Valeo's argument that the term "common" should be defined as "known to the community" and Valeo's corresponding argument that the scope therefore excludes proprietary alloys. *Id.* at 21 & n.152 (citing Second Ruling Req. at 16). Commerce explained that "[t]he scope includes all products which meet the physical description of the scope and do not otherwise qualify for an exclusion." *Id.* at 21.[15]

On November 12, 2021, Valeo commenced this action. Summons, ECF No. 1; Compl. Valeo's motion is fully briefed, and the court heard oral argument on November 10, 2022. Docket Entry, ECF No. 46.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2018),[16] and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

"[W]hether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that [the court] review[s] de novo." *Meridian Prods.*, 851 F.3d at 1382. Whether a product is covered by the language of the scope is "a question of fact reviewed for substantial evidence." *Meridian Prods.*, 851 F.3d at 1382; *see also OMG, Inc.*, 972 F.3d at 1363–64 (discussing the standard of review).

"Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty orders." *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). Nevertheless, "Commerce cannot 'interpret' an antidumping order so as to change the scope of th[e] order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citation omitted).

---

[15] Commerce does not cite to the source of this information but describes it as the "Preliminary Scope Memorandum." The court understands this reference to mean the preliminary scope memorandum from the investigation underlying the *China CAAS Orders*. *See* Commerce Factual Info., Attach. 4 (Scope Cmts. Prelim. Decision Mem. (June 15, 2018)) at 6.

[16] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code and all citations to the U.S. code are to the 2018 edition, unless otherwise specified.

DISCUSSION

Valeo raises several challenges to Commerce's determination. As discussed herein, Valeo argues that Commerce (1) exceeded the bounds of a (k)(1) analysis; (2) failed to adequately support its findings (a) that the term "3XXX-series" covers unregistered alloys, (b) that T-series aluminum sheet is a clad product rather than a heat-treated product, or (c) that any such heat-treatment does not remove T-series aluminum sheet from classification as a 3XXX-series alloy; and (3) failed to disclose factual information presented in purportedly unlawful *ex-parte* meetings. *See* Pl.'s Mem. at 15–20, 22–39; Pl.'s Reply at 3–15, 17–23.

Valeo's arguments concerning Commerce's reliance on 19 C.F.R. § 351.225(k)(1) and determination not to initiate a scope inquiry are relevant to Valeo's arguments concerning the lack of record support for Commerce's determination that the term "3XXX-series" covers unregistered alloys. Thus, the court discusses those issues together. The court then addresses Valeo's arguments concerning Commerce's interpretation of the term "clad" and the relevance of heat-treatment. Next, the court addresses Commerce's *ex parte* communications.

I. Commerce's Interpretation of the Phrase "3XXX-Series Core"

This issue comprises two parts: whether Commerce's interpretation of the scope terms "3XXX-series core" in conjunction with "as designated by the Aluminum Association" is in accordance with the law governing a (k)(1) analysis and whether Commerce supported its interpretation with substantial evidence.

A. Parties' Contentions

Valeo contends that Commerce's determination was unlawful insofar that Commerce exceeded the limits of a (k)(1) analysis in resolving Valeo's ruling request. Pl.'s Mem. at 15–20; *see also* Pl.'s Reply at 4–5.[17] Valeo acknowledges that Commerce may consult trade usage to interpret scope terms, *see id.* at 20 (citing *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 88 n.8 (Fed. Cir. 2012)), but contends that Commerce went beyond (k)(1) sources to define and apply scope and non-scope terms, *see* Pl.'s Mem. at 19–20. Valeo also faults Commerce for relying on the Weritz Declaration based on the

[17] Valeo points to various pages and footnotes in the Final Scope Ruling to support its contention. Pl.'s Mem. at 19 (citing Final Scope Ruling at 11 n.86, 12 n.100, 13 n.102, 14 n.111, 18 nn.133–34). Valeo also cites page 16, note 127 of the Final Scope Ruling, which appears to be a typographical error that should instead point to page 17, note 127. *See* Pl.'s Mem. at 19.

Aluminum Association's status as a domestic interested party and defendant-intervenor here. Pl.'s Reply at 19.

Valeo further contends that Commerce's interpretation of the term "3xxx-series" to include unregistered alloys is unsupported by substantial evidence. Pl.'s Mem. at 22. Valeo argues that the "Aluminum Association nomenclature system is limited to registered alloys and the chemical content of registered designations." *Id.* at 22; *see also id*. at 23–24. Valeo asserts that its proprietary alloy core "is not designated by the Aluminum Association as a 3xxx-series alloy" or a defined variation thereof, and, thus, Commerce impermissibly expanded the scope of the *China CAAS Orders* to include Valeo's product. *Id.* at 27; *see also* Pl.'s Reply at 6–8.[18]

The Government contends that Commerce issued its ruling in compliance with 19 C.F.R. § 351.225(d) because it relied solely on the scope terms, (k)(1) sources, and Valeo's scope application. *See* Def.'s Opp'n at 24. The Government further contends that Commerce's reliance on "industry standards" to interpret scope terms and consideration of record evidence was lawful and consistent with Commerce's obligation to "make its determination based on the entire record." *Id.* at 25. The Government contends that Commerce permissibly analyzed certain characteristics of Valeo's T-series aluminum sheet to address the distinctions Valeo drew between its product and the subject merchandise. *See id.* at 27–28.[19] The Government also contends that Commerce permissibly relied on the Weritz Declaration as "evidence of the industry standard" in conjunction with the product characteristics memorandum from the investigation to support its scope interpretation. *Id.* at 31–33.

Defendant-Intervenors likewise contend that Commerce properly relied on Aluminum Association publications and "information on the physical characteristics of Valeo's merchandise" contained in Valeo's submissions to issue its ruling. Def-Ints.' Opp'n at 15. Defendant-Intervenors further contend that any delay in Commerce's issuance of the scope ruling stemmed from Valeo's failure to issue "a clear scope ruling application" and the need for "additional information." *Id.*

---

[18] Valeo further contends that the scope of the *Bahrain CAAS Order* supports its position. Pl.'s Mem. at 25–26 (citing Fourth Ruling Req. at 9). The proper interpretation of the *Bahrain CAAS Order* is not before the court. There are differences between the respective scopes, moreover, and thus, this is not a situation where Commerce has offered different interpretations of identical language. *Cf. ArcelorMittal*, 694 F.3d at 88–90 (faulting Commerce for interpreting language contained in the scope of an order covering certain stainless steel plate to be ambiguous when Commerce found the same language in an order covering cut-to-length carbon steel plate to be unambiguous).

[19] The Government also contends that Commerce would have used limiting language if the agency had intended to limit the scope to registered designations. Def.'s Opp'n at 31. What Commerce *could have stated* is beside the point. The issue before the court is whether Commerce reasonably interpreted the scope language the agency *did* use.

B. Analysis

As noted above, whether an ambiguity exists is a question of law that the court considers *de novo*. *Meridian Prods.*, 851 F.3d at 1382. The phrase "3XXX-series" is not defined in the scope except in reference to the phrase "as designated by the Aluminum Association," which is also undefined. Commerce is correct that the latter phrase aids in the interpretation of the former. *See* Final Scope Ruling at 14. The scope is ambiguous, however, as to whether Commerce intended the scope to cover any alloy that contains a major alloying element corresponding to the Aluminum Association's alloy groups (including unregistered alloys), or whether Commerce intended the scope to be limited to registered alloys within the enumerated series with four-digit designations assigned by the Aluminum Association. For the reasons discussed below, Commerce's scope interpretation exceeded the limits of a (k)(1) analysis and is unsupported by substantial evidence.

First, Commerce's reliance on the Teal Sheets to interpret "3XXX-series" to include unregistered alloys fails to account for the Teal Sheets as a whole. *See* Final Scope Ruling at 13–14.[20] The Teal Sheets contain "designations and chemical composition limits for wrought aluminum and wrought aluminum alloys *registered with* The Aluminum Association. Numerical designations are assigned in accordance with the Recommendation—International Designation System for Wrought Aluminum and Wrought Aluminum Alloys," which is printed on pages 31 to 32 of the Teal Sheets (referred to herein as "the Recommendation"). Foreword to the Teal Sheets (emphasis added). Thus, from the outset, the Teal Sheets use the term "designation" to refer to registered alloys. Note 1 to the Recommendation "describes a four-digit numerical system for designating wrought aluminum and wrought aluminum alloys." *Id.* at 31. Note 2 to the Recommendation lists the alloy groups recognized by the Aluminum Association and states that "[t]he *first* of the four digits *in the designation* indicates

[20] At the hearing, the Government pointed to additional documentation to demonstrate use of alloy series regardless of registration status, including a document titled "Aluminum Alloys 101" published by the Aluminum Association. Oral Arg. 11:00–11:35 (citing First Ruling Req., Ex. 4 ("Aluminum Alloys 101")). In addition to being impermissibly *post hoc*, the Government's reliance on Aluminum Alloys 101 is misplaced. While the document discusses various alloy series, the document prefaces its discussion with the explanation that "[a]lloys are assigned a four-digit number, in which the first digit identifies a general class, or series, characterized by its main alloying elements." Aluminum Alloys 101 at 1. While the Government emphasizes the latter assertion, it overlooks the first clause indicating that the alloy series designation is but one number in a four-digit number assigned by the Aluminum Association. *See id.* Thus, even the Government's *post hoc* reasoning does not show that the information contained in Aluminum Alloys 101 is understood in the industry to apply to unregistered alloys.

the alloy group." *Id.* (emphasis added). In Note 4, the Recommendation states that "[t]he alloy designation in the 2xxx through 8xxx groups is determined by the alloying element . . . present in the greatest mean percentage." *Id.* The Recommendation then goes on to explain the basis for the second, third, and fourth digits in the designation. *Id.* Thus, when read as a whole, the Aluminum Association's use of "3" in "3XXX" in the list of alloy groups indicates a major alloying element of manganese while contemplating the addition of three more digits to complete the four-digit designation. *See id.*[21] Accordingly, while it *may* be true that an aluminum alloy containing a major alloying element of manganese that is submitted to the Aluminum Association for a designation would receive a designation in the 3XXX-series, Commerce has not identified anything in the Teal Sheets that indicates the Aluminum Association applies this framework to unregistered alloys.

Commerce next relied on the Weritz Declaration to buttress its interpretation. *See* Final Scope Ruling at 14. Commerce's reliance on the Weritz Declaration as evidence of trade usage of the phrase "3XXX-series" is, however, unlawful and unsupported by substantial evidence.

"A petitioner has an obligation to be explicit and precise in its definition of the scope of the petition both prior and during the investigation." *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 921 (Fed. Cir. 2014). Moreover, "(k)(1) sources are afforded primacy in the scope analysis . . . because interpretation of the language used in the orders must be based on the meaning given to that language *during the underlying investigations*." *Id.* (emphasis added). While Commerce—and the court—may consider trade usage to ascertain the intended meaning of scope terms, *see ArcelorMittal*, 694 F.3d at 88 & n.8, the Weritz Declaration is not a trade publication of the type considered in *ArcelorMittal*.[22] Instead, the declaration was prepared by an interested party specifically for purposes of the scope proceed-

[21] This interpretation of the way the term "designation" is used in the Recommendation is consistent with Appendix A to the Teal Sheets, which explains the use and assignment of designations. *See* Teal Sheets at 33. As explained therein, "[d]esignations for a new alloy registration" are assigned based on whether the alloy has "chemical composition limits that are identical to a registered designation," represents a variation or modification of an existing alloy designation or constitutes "[a] new original designation." *Id.* The Declaration of Accord on an International Alloy Designation System for Wrought Aluminum and Wrought Aluminum Alloys also uses the term designation to refer to a number consistent with the Recommendation that is the product of a registration with the Aluminum Association and subsequent assignment by the Aluminum Association. *See id.* at 34.

[22] In that case, Commerce had relied on a standards publication produced by the American Society for Testing and Materials as evidence of trade usage. *See* Final Results of Redetermination Pursuant to Remand at 6–8 & n.4, *ArcelorMittal*, 35 CIT 796 (2011) (No. 08–434), ECF No. 60 (docket location for the agency decision reviewed in *ArcelorMittal*, 694 F.3d 82).

ing. *See* Weritz Decl. ¶¶ 3–5. Commerce failed to acknowledge the source of the declaration, instead referring to the document generally as "[r]ecord information," Final Scope Ruling at 14, and thus failed to adequately support the agency's reliance on the declaration as an indicator of trade usage that properly informs the intended meaning of the scope terms. *Cf. Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1303–04 (Fed. Cir. 2013) (finding "subsequent comments made by the petitioners" irrelevant "under subsection 351.225(k)(1)" when "Commerce did not address the comments during the investigation").[23] Commerce's reliance on the Weritz Declaration is therefore unlawful.

Additionally, the Weritz Declaration's attempt to connect Aluminum Association designations (and, thus, the meaning of the phrase "as designated by the Aluminum Association") to an alloy series or group alone and, thereafter, to unregistered alloys based on the primary alloying element that *would be considered* when the alloy is submitted for a designation, *see* Weritz Decl. ¶¶ 6–7, is undermined by the manner in which the Aluminum Association uses the term "designation" in the Teal Sheets, as set forth above. Commerce's findings in reliance on the Weritz Declaration are therefore unsupported by substantial evidence.[24]

Lastly, Commerce's reliance on the product characteristics memorandum fails to persuade the court that Commerce's interpretation was supported by substantial evidence. *See* Final Scope Ruling at 15. In the cited memorandum, Commerce requested information from the respondents in the underlying investigation. *See* Prod. Characteristics Mem. at 1. In Field Number 2.1, titled "Specific Alloy," Commerce asked respondents to "[r]eport the appropriate series grade number for the aluminum sheet (e.g., 3003)." *Id.* at 3. In Field Number 3.1, titled "Alloy," Commerce requested respondents to "[r]eport the code based on the requirements of the appropriate grade series noted

[23] The current version of Commerce's regulation contains a new provision permitting Commerce to "consider secondary interpretive sources under paragraph (k)(1) . . ., such as any other determinations of [Commerce] or the Commission not identified above, Customs rulings or determinations, industry usage, dictionaries, *and any other relevant record evidence*." 19 C.F.R. § 351.225(k)(1)(ii) (eff. Nov. 4, 2021) (emphasis added). As mentioned above, however, Commerce's Final Scope Ruling is governed by the previous version of the regulation, which lacks this provision.

[24] Commerce's reliance on the Weritz Declaration stands in contrast to Commerce's reliance on the Aluminum Association's 2017 Aluminum standards and data publication to define "clad" with respect to the extent of diffusion. *See* Final Scope Ruling at 12–13 & nn.100, 102 (citing First DIPs Cmts., Attach. 2, Table 6.1). The cited publication predates the scope proceeding, represents the product of a committee composed of persons from an array of companies, and was prepared "as a guide to aid the manufacturer, the consumer, and the general public." First DIPs Cmts., Attach. 2 (acknowledgment and notice/disclaimer).

above." *Id.* at 4. Commerce provided the following information to guide reporting:

> DESCRIPTION: 1000 = All 1000-series alloys
> 3000 = All 3000-series alloys
> 5000 = All 5000-series alloys, unless code 5500 applies
> 5500 = All 5000-series alloys for which the minimum required percentage content of magnesium is over 3.00 percent (regardless of the actual magnesium content) (*e.g.* 5083, 5086, *etc.*)

Id.

Commerce found support in Field Number 3.1 through its use of the phrase "series alloy." Final Scope Ruling at 15. Commerce contrasted its use of series-based reporting in Field Number 3.1 with its use of the phrase "specific alloy" in Field Number 2.1 to find that the phrase "series alloy" in the scope means "a one-digit alloy series" and not "a specific four-digit numerical alloy designation." *Id.* Field Number 3.1 does not, however, indicate that Commerce contemplated the respondents reporting alloys lacking a four-digit code in accordance with the referenced codes and series. In fact, Commerce's reference to specific four-digit codes in the description (5500, 5083, 5086) indicates the opposite. *See* Prod. Characteristics Mem. at 4. Moreover, while Commerce used the phrases "series alloy" and "3XXX-series" in the scope, it did so in conjunction with the phrase "as designated by the Aluminum Association." The product characteristics memorandum does not address or contain the latter phrase and, thus, does not "definitively answer the scope question." *Sango Int'l L.P.*, 484 F.3d at 1379.

In sum, Commerce's interpretation of the phrase "3XXX-series" in conjunction with "as designated by the Aluminum Association" to include unregistered aluminum alloys with a major alloying element of manganese is unlawful insofar as Commerce relied on the Weritz Declaration and is unsupported by substantial record evidence.[25]

---

[25] Valeo's arguments that Commerce exceeded the bounds of a (k)(1) analysis are premised on Commerce's reliance on the Teal Sheets and purported consideration of the physical characteristics of the T-series aluminum sheet. *See* Pl.'s Mem. at 19. Except to the extent discussed herein, Commerce's determination complied with 19 C.F.R. § 351.225(k)(1) and (d). Valeo itself submitted a copy of the Teal Sheets to support its scope application. *See* Second Ruling Req. at 7–8, Ex. 3. And while "[t]he physical characteristics of the product" constitutes a (k)(2) factor, 19 C.F.R. § 351.225(k)(2)(i), a complete scope application must contain "[a] detailed description of the product, including its technical characteristics and uses, and its current U.S. Tariff Classification number," *id.* § 351.225(c)(1)(i). Commerce's request for additional product information and consideration of such information included in Valeo's submissions in order to issue a ruling complied with section 351.225(d).

Commerce's Final Scope Ruling is therefore remanded.[26] On remand, if Commerce continues to rely on (k)(1) sources, it must reconsider and further explain its ruling pursuant to 19 C.F.R. § 351.225(d) consistent with this opinion. Alternatively, Commerce may determine to conduct a scope inquiry pursuant to 19 C.F.R. § 351.225(e).[27]

II. Commerce's Discussion of the Relevance of Heat-Treatment

Commerce examined Valeo's arguments concerning heat-treatment both in the context of addressing the distinction between clad and non-clad products and when responding to Valeo's argument that 3XXX-series alloys are not heat-treatable. The court discusses these issues, and the need for further explanation, in tandem.

A. Parties' Contentions

Valeo contends that Commerce impermissibly regarded heat-treatment and cladding as mutually exclusive. Pl.'s Mem. at 28–29, 31. Valeo further contends that the record establishes that its T-series aluminum sheet is heat-treated and not simply annealed, and that, because its product is heat-treated, it is out-of-scope regardless of whether it is a clad product. *Id.* at 29–31.

By way of support, Valeo points to statements by the ITC during the investigation. Valeo contends that Commerce failed to consider the ITC's assertion that "heat-treated aluminum sheet (e.g., 6xxx alloy series) is not covered by Commerce's scope." Pl.'s Mem. at 34 (citing USITC Pub. 4861 at I-18). Valeo also contends that the ITC's statement indicates that "heat-treated aluminum sheet," such as Valeo's, is out of scope, and that the ITC explicitly characterized 3XXX-series alloys as "non-heattreatable." *Id.* at 35.

The Government contends that substantial record evidence supports Commerce's determination that Valeo's T-series aluminum sheet is a clad product despite "some diffusion between the core and cladding layer." Def.'s Opp'n at 18. According to the Government, the distinction Commerce drew between clad products and heat-treated products was "responsive to Valeo's arguments that its product is not

[26] In its reply, Valeo argued that Statistical Note 6 to Chapter 76 provides further evidence that the phrase "as designated" has a narrow meaning in the industry. Pl.'s Reply at 10–11 (citing Fourth Ruling Req., Ex. SUPP-4, ECF pp. 789–91 (Chapter 76 and accompanying Notes)). Valeo did not present this argument to Commerce or include it in its moving brief and, therefore, the court will not address it in the first instance.

[27] The court does not reach Valeo's arguments concerning the meaning of the term "common." *See* Pl.'s Mem. at 21–22. Valeo's arguments implicate the meaning of the scope terms subject to the remand and thus, the court will defer resolution of them, to the extent they remain live, until Commerce issues its remand redetermination.

clad because it is heat-treated," *id.* at 20, and, in fact, that Commerce recognized that Valeo's T-series aluminum sheet "undergoes heat-treatment processes," *id.*

The Government further contends that Commerce considered and correctly interpreted the ITC's findings not to imply an exclusion for heat-treated 3XXX-series series alloys. *Id.* at 35–36. The Government argues that record evidence demonstrates that the Aluminum Association links alloys with groups or series "based on its aluminum content and/or principal alloying agent." *Id.* at 37. The Government pointed to alloy 4643 as an example of an alloy that is heat-treatable notwithstanding the Aluminum Association's classification of 4XXX-series alloys as non-heat-treatable. *Id.* at 37–38. Thus, the Government contends, Valeo has not shown "why its proprietary aluminum alloy" is "precluded from being considered a 3XXX-series aluminum based on its heat-treatability." *Id.* at 38.

Defendant-Intervenors contend that because substantial evidence supports Commerce's determination that Valeo's T-series aluminum sheet is a clad product, "Valeo's arguments concerning 'heat-treatable' alloys are irrelevant." Def-Ints.' Opp'n at 17–18. Defendant-Intervenors also contend that Commerce has previously recognized that the ITC's reference to 6XXX-series alloys pertained solely to "not clad aluminum sheet" and, thus, "do not encompass" Valeo's clad product. *Id.* at 17. Defendant-Intervenors argue that although Commerce may consider ITC determinations in a (k)(1) analysis, such determinations "cannot overcome the plain scope language or [Commerce's] own scope interpretation." *Id.* at 19.

B. Analysis

Commerce's determination that Valeo's T-series aluminum sheet is a clad product is supported by substantial evidence. However, Commerce's response to Valeo's argument concerning the heat-treatability of 3XXX-series alloys requires further explanation.

In the underlying proceeding, Valeo presented Commerce with definitions of clad products and heat-treated products that appeared to be in conflict. *See* Final Scope Ruling at 11–12. On the one hand, Valeo argued, a clad product contains "discrete layers of distinct metals and alloys that are metallurgically bonded." *Id.* at 11. On the other hand, Valeo argued, a heat-treated product may begin with "layers that bond during the heat-treatment, resulting in . . . a new alloy with a unique chemistry." *Id.* at 12. The DIPs presented Commerce with evidence that a clad product can contain some "diffusion between the

core and cladding layer" as a result of "thermal treatment." *Id.* at 12 & n.96 (citing First DIPs Cmts. at 9; Third DIPs Cmts. at 4). Commerce accepted the DIPs position as backed by industry standards, *id.*, and found, based on record evidence, that Valeo's T-series aluminum sheet constitutes a clad product, *id.* at 12–13. Valeo does not identify record evidence undermining Commerce's findings. Thus, Commerce's determination that Valeo's product is a clad product is supported by substantial evidence.

That finding does not, however, end the inquiry. If Commerce continues to find, on remand, that the scope terms are reasonably interpreted to include unregistered alloys, Commerce must further address Valeo's arguments regarding heat-treatment.

Commerce explained that "the Aluminum Association 'determines which of the eight groupings (or series) into which the alloy falls based on its aluminum content and/or principal alloying agent" and *not* heat-treatability. Final Scope Ruling at 17 & n.127 (citing Weritz Decl.). Commerce's reliance on the Weritz Declaration fails as a matter of law for the reasons set forth above. Moreover, while it may be true that the Aluminum Association would consider the principal alloying element to determine the alloy group for an alloy submitted for a registered designation, *see* Teal Sheets at 31, that alone is not substantial evidence for Commerce's finding that heat-treatability is irrelevant.

Commerce attempted to support its explanation with evidence purportedly showing that alloy 4643 is heat-treatable, despite 4XXX-series alloys being classified as non-heat-treatable by the Aluminum Association. Final Scope Ruling at 17 & n.128 (citing Valeo Rebuttal Cmts., Exs. 1, 3). Commerce thus found that heat-treatment does not preclude characterization as a 3XXX-series alloy even if such alloys are otherwise characterized as non-heat-treatable. *See id.* (finding that, even if Valeo's product "was heat-treated, . . . record evidence contradicts Valeo's conclusion that a heat-treatable alloy that otherwise meets the criteria of [a 3xxx-series alloy] would be precluded from being classified as such"). Commerce's reliance on 4XXX-series alloys to find heat-treatability non-dispositive as to alloy series is unpersuasive.

Exhibit 3 to Valeo's Rebuttal Comments explains that certain 4XXX-series alloys are heat-treatable (such as alloy 4643) whereas others (such as alloys 4043 and 4047) are not. Valeo Rebuttal Cmts., Ex. 3 at 1–2; *see also id.*, Ex. 1 (listing "[c]old work" as the "[s]trengthening method" for 4XXX series alloys with the notation "some heat treat," indicating that some 4XXX-series alloys are heat-treated). Information provided by the DIPs likewise states that 4XXX-series

alloys are "the *only* alloy series that consists of both heat-treatable *and* not heat-treatable alloys." Second DIPs Cmts. at 8 (emphasis added). Commerce's explanation did not account for this industry-recognized characteristic of 4XXX-series alloys. Moreover, to the extent the record shows that 3XXX-series alloys are not heat-treatable,[28] unlike 4XXX-series alloys, the record does not indicate that there are exceptions within the 3XXX-series alloys. *See id.* Thus, it appears that heat-treatability could be relevant to whether an alloy may be considered a 3XXX-series alloy and covered by the scope of the *China CAAS Orders*.

To the extent that Commerce also construed the ITC's determination to indicate that heat-treatability was irrelevant to scope coverage beyond the 6XXX-series alloys, that reasoning is misplaced. *See* Final Scope Ruling at 18. The ITC listed 6XXX-series alloys as an example of excluded heat-treated sheet—not the universe thereof. *See* USITC Pub. 4861 at I-18 ("[H]owever, heat-treated aluminum sheet (e.g., 6xxx alloy series) is not covered by Commerce's scope.").

Underlying the court's difficulty in discerning the path of Commerce's reasoning is the lack of any explanation by Commerce regarding the meaning of the phrases "heat-treated" or "heat-treatable" for purposes of understanding the relevance of thermal treatment to classification as a 3XXX-series alloy. Commerce appeared to consider the question whether the scope contains an *exclusion* for heat-treatable 3XXX-series alloys, *see* Final Scope Ruling at 18 (finding no such exclusion), when the key question is whether a heat-treated (or heat-treatable) clad sheet *can be classified as* having a 3XXX-series core and therefore be in-scope.[29] On remand, to the extent necessary to its determination, Commerce must address evidence that Valeo's product undergoes heat-treatment, *see* Fourth Ruling Req. at 4; Third Ruling Req., Attach. 2 at 4, and reconcile such evidence with evidence indicating that 3XXX-series alloys are non-heat-treatable, *see* USITC Pub. 4861 at I-13.[30]

---

[28] The Aluminum Alloys 101 publication lists 3XXX-series alloys under the heading "Non Heat-Treatable Alloys." Aluminum Alloys 101 at 2–3; *cf.* USITC Pub. 4861 at I-13 (describing 3XXX-series alloys as non-heat-treatable).

[29] Commerce's reliance on the Second Weritz Declaration to find that the term "heat-treatable" does not apply to 3XXX-series alloys and to find the absence of an exclusion for heat-treatable 3XXX-series alloys, *see* Final Scope Ruling at 18 & nn.133, 137 (citing Second Weritz Decl. ¶ 7), suffers from the same problems the court recognized in relation to Commerce's reliance on the Weritz Declaration. The Second Weritz Declaration is not a type of document included in the (k)(1) sources and Commerce did not address the propriety of relying on a declaration authored and placed on the record by an interested party.

[30] The ITC described two heat-treating processes (annealing and solution heat-treatment and aging) and stated that heat-treated alloys are excluded from the scope. USITC Pub. 4861 at I-18.

III. Commerce's *Ex-Parte* Meetings and Memoranda

A. Parties' Contentions

As noted above, Commerce held two *ex-parte* meetings with DIPs and placed summaries of the meetings on the record. June 17 *Ex Parte* Mem.; Apr. 22 *Ex Parte* Mem. Valeo contends that the memoranda Commerce placed on the record failed to adequately disclose the factual information presented at the meetings. Pl.'s Mem. at 36–39. With respect to the April 22 *Ex Parte* Memorandum, Valeo contends that the underlying meeting involved discussions about an ongoing, related administrative review and that the memorandum should have included the review questionnaire responses discussed at the meeting. *Id.* at 37; *see also* Pl.'s Reply at 20 (arguing that the court should remand this matter for Commerce to provide "a meaningful discussion of the subject matter of those meetings").

The Government contends that Valeo waived any challenges to the June 17 *Ex Parte* Memorandum by failing to specify the deficiencies in the memorandum. Def.'s Opp'n at 39 n.6. The Government also contends that Commerce's April 22 *Ex Parte* Memorandum complied with statutory, regulatory, and other agency requirements. *Id.* at 40. The Government further contends that factual information from the administrative review was never placed on the record of this proceeding, and Commerce did not rely on such information in reaching its decision. *Id.* at 40–42.

In its reply brief, Valeo contends that Commerce's scope proceedings are governed by the Government in the Sunshine Act ("the Act"), 5 U.S.C. § 557(d)(1)(A),[31] and the *ex parte* communications were unlawful pursuant thereto. Pl.'s Reply at 21–23. Valeo did not respond to the Government's argument regarding waiver.

B. Analysis

The statute requires Commerce to "maintain a record of any *ex parte* meeting between . . . interested parties" and the agency "if information relating to [the relevant] proceeding was presented or discussed at such meeting." 19 U.S.C. § 1677f(a)(3). "The record of such an *ex parte* meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted. The record of the *ex parte* meeting shall be included in the record of the proceeding."

[31] On September 13, 1976, Congress enacted "An Act to provide that meetings of Government agencies shall be open to the public, and for other purposes," P.L. No. 94-409, 90 Stat 1241 (1976), referred to as the "Government in the Sunshine Act." The Act was codified at 5 U.S.C. § 552(b) and further amended 5 U.S.C. § 557 to include subsection (d)(1), the provision on which Valeo relies.

Id.; *cf.* 19 C.F.R. § 351.104(a) (requiring placement of *ex parte* memoranda on the administrative record). Commerce has issued a policy statement requiring *ex parte* memoranda to "be drafted expeditiously in all cases, reviewed by a person in attendance at the meeting, and placed in the record as soon as possible, so that parties may comment effectively on the factual matters presented." *Policy Statement Regarding Issuance of Ex-Parte Memoranda*, 66 Fed. Reg. 16,906, 16,906 (Dep't Commerce Mar. 28, 2001). Additionally, "memoranda are required whether or not the factual information received was received previously, is expected to be received later in the proceeding, or is expected to be used or relied on." *Id.*

Valeo waived its challenge to the June 17 *Ex Parte* Memorandum by failing to present substantive arguments challenging the insufficiency of the memorandum. *See United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013). Additionally, the memorandum appears sufficient on its face. The statute requires Commerce to summarize "the matters discussed or submitted." 19 U.S.C. § 1677f(a)(3). Commerce's June 17 *Ex Parte* Memorandum summarized the "matters discussed" as the DIPs "May 28, 2020, comments on the Valeo Group's scope request." June 17 *Ex Parte* Mem. Valeo has not shown that the statute requires more.

Valeo's challenge to the April 22 *Ex Parte* Memorandum also fails. Therein, Commerce explained that, during the meeting, the DIPs discussed how a respondent's sales database in an administrative review of the underlying antidumping order related to the scope proceeding. Apr. 22 *Ex Parte* Mem. at 1. In a subsequent letter, Commerce further explained that counsel for the DIPs "did not submit any facts or reference any documents not currently on the record of the first administrative review of the antidumping duty order" and noted that the DIPs "inquired about the logistics of filing information from one segment of a proceeding to another segment of the same proceeding." May 27 Commerce Ltr. at 1–2. The agency officials in attendance referred the DIPs to the relevant agency office and further indicated that the scope ruling would be based on its own record. *See id.* Valeo asserts, without supporting authority, that "[t]he statute requires a complete and fulsome discussion of the facts presented at an *ex-parte* meeting," Pl.'s Mem. at 37, but the statute does not use those terms. While Valeo might prefer more information, the statute simply requires a "summary of the matters discussed." 19 U.S.C. § 1677f(a)(3). Commerce complied with that requirement and Valeo fails to identify any deficiency in Commerce's memorandum.

Valeo's reliance on the Government in the Sunshine Act, Pl.'s Reply at 21–23, is wholly misplaced.[32] The Act prohibits *ex parte* communications in certain agency proceedings. *See* 5 U.S.C. § 557(d)(1)(A)–(B). The Act applies "when a hearing is required to be conducted in accordance with section 556 of this title," *id.* § 557(a), "except to the extent required for the disposition of *ex parte* matters as authorized by law," *id.* § 557(d)(1). Commerce hearings are not, however, "subject to the provisions of subchapter II of chapter 5 of Title 5," which includes sections 556 and 557. 19 U.S.C. § 1677c(b); *see also* 19 C.F.R. § 351.310(d)(2) ("The hearing is not subject to 5 U.S.C. §§ 551–559 . . . .").[33] Moreover, both 19 U.S.C. § 1516a(b)(2)(A)(i)[34] and 19 U.S.C. § 1677f(a)(3) contemplate the occurrence of *ex parte* meetings.

At the hearing, the court asked Valeo to reconcile its reliance on the Act with the above-mentioned authorities that appear to emphatically preclude such reliance. Valeo suggested that its argument presupposed the requirement for a hearing pursuant to a scope inquiry. Oral Arg. 1:38:25–1:38:30. As explained above, however, whether Commerce conducts a hearing is beside the point because any hearing is not subject to the statutory provision—5 U.S.C. § 556—that triggers application of the Government in the Sunshine Act, *see* 5 U.S.C. § 557(a), (d)(1). Accordingly, Valeo's argument is completely lacking in merit.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Final Scope Ruling is remanded to the agency for further consideration in accordance with the terms of this opinion; it is further

ORDERED that the agency shall file its redetermination on remand on or before March 21, 2023; it is further

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

---

[32] Valeo raised the argument for the first time in its reply brief. At the hearing, however, the court afforded the Government and Defendant-Intervenors the opportunity to address the issue. Oral Arg. 1:40:20–1:45:25.

[33] Valeo points to 19 C.F.R. § 351.310(c) as authority to request a hearing in a scope proceeding but does not address 19 C.F.R. § 351.310(d)(2). *See* Pl.'s Reply at 22.

[34] Pursuant to 19 U.S.C. § 1516a(b)(2)(A)(i), the administrative record compiled in a scope proceeding may include a "record of *ex parte* meetings required to be kept by section 1677f(a)(3)."

ORDERED that any comments or responsive comments must not exceed 5,000 words.

Dated: December 21, 2022
New York, New York

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

Slip Op. 22–153

COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD, Plaintiff, and RICHMOND INTERNATIONAL FOREST PRODUCTS LLC, TARACA PACIFIC INC., CONCANNON CORPORATION, XUZHOU JIANGHENG WOOD PRODUCTS CO., LTD., AND XUZHOU JIANGYANG WOOD INDUSTRIES CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and RICHMOND INTERNATIONAL FOREST PRODUCTS LLC, TARACA PACIFIC INC., CONCANNON CORPORATION, LINYI CHENGEN IMPORT AND EXPORT CO., LTD., XUZHOU JIANGHENG WOOD PRODUCTS CO., LTD., AND XUZHOU JIANGYANG WOOD INDUSTRIES CO., LTD., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 20–03930

[Sustaining the U.S. Department of Commerce's final determination in the first administrative review of the antidumping duty order on certain hardwood plywood products from the People's Republic of China and granting Defendant United States' motion to strike.]

Dated: December 22, 2022

Timothy C. Brightbill, *Stephanie M. Bell*, *Tessa V. Capeloto*, and *Jeffrey O. Frank*, Wiley Rein LLP, of Washington, D.C., for Plaintiff Coalition for Fair Trade in Hardwood Plywood.

Jeffrey S. Grimson and *Jill A. Cramer*, Mowry & Grimson, PLLC, of Washington, D.C., for Consolidated-Plaintiffs and Defendant-Intervenors Richmond International Forest Products LLC, Taraca Pacific Inc. and Concannon Corporation.

Gregory S. Menegaz, *Alexandra H. Salzman*, and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors Xuzhou Jiangheng Wood Products Co., Ltd. and Xuzhou Jiangyang Wood Industries Co., Ltd., and Defendant-Intervenor Linyi Chengen Import and Export Co., Ltd.

Sonia M. Orfield, 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, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Savannah Maxwell*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves hardwood and decorative plywood, as well as certain veneered panels. This consolidated action challenges several aspects of the final results filed by the U.S. Department of Commerce ("Commerce") in the first administrative review of the antidumping duty order covering hardwood plywood from the People's Republic of China ("China").*See Certain Hardwood Plywood Products from the People's Republic of China* ("*Final Results*"), 85 Fed. Reg. 77,157 (Dep't of Commerce Dec. 1, 2020) (final results of antidumping duty

administrative review; 2017–2018), and accompanying issues and decision memorandum dated November 23, 2020 ("Final IDM"), PR 210[1]; *see also* 19 U.S.C. § 1675 (periodic review of the amount of duty).[2] The period of review is June 23, 2017 through December 31, 2018. Final IDM at 1. For the following reasons, the Court sustains the *Final Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's calculation of normal value for Linyi Chengen Import and Export Co., Ltd. ("Linyi Chengen") using Commerce's normal methodology, and not the intermediate input methodology, was based on substantial evidence;

2. Whether Commerce's selection of the surrogate value data for Linyi Chengen's log inputs and calculation of the surrogate value for logs was based on substantial evidence;

3. Whether Commerce's selection calculation of the surrogate value for labor was based on substantial evidence;

4. Whether the reply brief submitted by Linyi Chengen and Consolidated Plaintiffs and Defendant-Intervenors Xuzhou Jiangheng Wood Products Co., Ltd. and Xuzhou Jiangyang Wood Industries Co., Ltd. raises new arguments and includes new factual information that were not before Commerce;

5. Whether Commerce's selection of the surrogate value for Linyi Chengen's formaldehyde input was supported by substantial evidence; and

6. Whether Commerce's selection of financial statements and calculation of surrogate financial ratios were supported by substantial evidence.

BACKGROUND

I. Introduction

An administrative review of the dumping margin involves a comparison of the subject merchandise's U.S. export price or constructed export price with its "normal value" in the home market (or a comparable third country if there are no useable sales in the home market). 19 U.S.C. § 1675(a)(2)(A). The process resembles the determination of the margin of dumping in the antidumping duty investi-

[1] Unless otherwise indicated, citations to the administrative record reflect the public record ("PR") document numbers filed in this case, ECF No. 46.

[2] All statutory citations are to the 2018 edition of the United States Code; all citations to regulations are to the 2020 edition of the Code of Federal Regulations.

gation, pursuant to which Commerce determines whether imports of subject merchandise are, or are likely to be, sold in the United States at "less than fair value."[3] *See* 19 U.S.C. § 1673d(a)(1); *see, e.g.*, *Certain Hardwood Plywood Products from the People's Republic of China* ("*Investigation*"), 82 Fed. Reg. 53,460 (Dep't of Commerce Nov. 16, 2017) ("final determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part") and accompanying issues and decision memorandum. The dumping margin, if any, is the amount by which the subject merchandise's normal value exceeds its U.S. price. *See, e.g.*, 19 U.S.C. §§ 1677a(a)–(b), 1677b(a)(1), 1677(35)(A).

In April 2019, Commerce initiated the first administrative review of the antidumping duty order on certain hardwood plywood products from China to determine the dumping margins for the period of review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 12,200 (Dep't of Commerce Apr. 1, 2019). The period of review was June 23, 2017 through December 31, 2018. *See id.* at 12,202.

Commerce selected as mandatory respondents Linyi Chengen and Lianyungang Yuantai International Trade Co. ("Lianyungang Yuantai"). *See Certain Hardwood Plywood Products from the People's Republic of China* ("*Preliminary Results*"), 85 Fed. Reg. 7270 (Dep't of Commerce Feb. 7, 2020) (preliminary results of antidumping duty administrative review; 2017–2018), and accompanying preliminary issues and decision memorandum ("Prelim. IDM"), PR 163. *See also* Commerce's Mem. Re: Certain Hardwood Plywood Products from the People's Republic of China: Respondent Selection (May 16, 2019), PR 69. Lianyungang Yuantai notified Commerce that it desired to withdraw from participating in the review. *See* Lianyungang Yuantai's Letter Withdrawing Request Admin. Rev. (Jul. 1, 2019), PR 84. Commerce subsequently rescinded the administrative review with respect to 29 companies for which all review requests were timely withdrawn, including Lianyungang Yuantai. *See Certain Hardwood Plywood Products from the People's Republic of China*, 84 Fed. Reg. 62,509 (Dep't of Commerce Nov. 15, 2019) (partial rescission of antidumping duty administrative review; 2017–2018).

[3] In an antidumping investigation, Commerce compares average U.S. price to average normal value, whereas in a review the comparison is normally between U.S. price and a weighted average normal value calculated on a monthly basis on an entry-by-entry basis. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005); *see also*, *e.g.*, 19 U.S.C. § 1673 (requiring imposition of additional duties "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise"); 19 U.S.C. § 1673b(d)(1)(A)(i) (preliminary proceedings); 19 U.S.C. § 1673d(c)(1)(B)(i)(I) (final proceedings).

For this proceeding, Commerce continued to consider China to be a non-market economy country, which implicated how the normal value of the subject merchandise was to be determined. *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China*, 82 Fed. Reg. 50,858, 50,861 (Dep't of Commerce Nov. 2, 2017) (affirmative preliminary determination of sales at less-than-fair value and postponement of final determination) (citing Commerce's China's Status Non-Market Economy Mem. (Oct. 26, 2017)), unchanged in *Certain Aluminum Foil from the People's Republic of China*, 83 Fed. Reg. 9282 (Dep't of Commerce Mar. 5, 2018) (final determination of sales at less than fair value); *see also* 19 U.S.C. § 1677b(c). When a proceeding concerns a non-market economy, the statute generally requires Commerce to determine normal value based on the factors utilized to produce the subject merchandise, including raw materials, labor, and utilities, and general expenses and profit, plus the cost of containers, coverings, and other expenses. 19 U.S.C. § 1677b(c)(1). These factors of production in non-market economy cases are based on data from a surrogate market economy country or countries. *See id.* § 1677b(c)(4). Pursuant to 19 C.F.R. § 351.408(c)(2), Commerce will normally value factors of production using data from a single surrogate country. 19 C.F.R. § 351.408(c)(2); *see* Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (Dep't of Commerce Mar. 1, 2004).

After granting separate-rate status to Linyi Chengen,[4] Commerce turned to the surrogate country issue. When selecting a value for a given factor of production, § 1677b(c) requires Commerce to use the "best available information." *See* 19 U.S.C. § 1677b(c)(1); *see, e.g.*, *Nation Ford Chem. Co. v. United States* ("*Nation Ford*"), 166 F.3d 1373, 1377 (Fed. Cir. 1999). Provided that Commerce uses the best available information and determines the antidumping duty margin as accurately as possible, Commerce has discretion over what factors of production methodology is "best" for a given situation. *See Nation Ford*, 166 F.3d at 1378 (section 1677b(c) "does not require that a uniform methodology be used in the valuation of all relevant factors"); *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1261 (Fed. Cir. 2009) (Commerce enjoys broad discretion in valuing factors of production). Because the proceeding involved a non-market economy country, Commerce was required to determine the subject merchandise's normal value by relying on the "best available information" from a market economy country meeting certain criteria.

[4] In non-market economy proceedings, Commerce applies a rebuttable presumption that all exporters and producers are controlled by the government. *See, e.g.*, *China Mfrs. All., LLC v. United States*, 1 F.4th 1028, 1030–31, 1039 (Fed. Cir. 2021).

For this proceeding, Commerce's list of countries that are economically comparable to China, based on 2018 gross national income data, included Brazil, Bulgaria, Malaysia, Mexico, Russia, and Turkey. *See* Commerce's Letter to Interested Parties Requesting Economic Development, Surrogate Country, and Surrogate Value Comments and Information (Aug. 16, 2019) at 1, Attachment at 1–2, PR 98 (containing the list of surrogate countries for antidumping investigations and reviews from China).

Linyi Chengen argued that data from Romania should be used, which was not on the surrogate country list. Linyi Chengen's Comments Surrogate Country List Primary Surrogate Country (Aug. 23, 2019) at 1–2, PR 101. The Coalition for Fair Trade in Hardwood Plywood ("Coalition") provided data for Malaysia, among others. Coalition's Comments Surrogate Country Selection (Aug. 23, 2019) at 2, PR 102.

II. Preliminary Determination

In the *Preliminary Results*, Commerce selected Malaysia as the primary surrogate country because Malaysia was at a comparable level of economic development to China, was a significant producer of comparable merchandise, and its data constituted the best available data for valuing Linyi Chengen's factors of production. Prelim. IDM at 14–15. In addition, Commerce determined preliminarily that the Malaysian data were superior with respect to the breadth of available financial statements from producers of comparable merchandise, whereas the Romanian data included only one financial statement. *See id.* at 16.

Another threshold issue was the methodology to use for valuing Linyi Chengen's log inputs. In some circumstances, Commerce will calculate normal value by applying a surrogate value to an intermediate input rather than valuing the individual factors of production used to produce that intermediate input. The Parties refer to this as "intermediate input methodology." *See* Final IDM at 8–19; *see also Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 460–66, 617 F. Supp. 2d 1281, 1291–95 (2009) (explaining that Commerce employs the intermediate input methodology within the statutory framework because the "best way to value the factors of production used to produce an intermediate product . . . is through the direct valuation of that intermediate input").

As a result of the antidumping investigation into certain hardwood plywood products from China, Commerce issued its final affirmative determination in that proceeding in November 2017. *See Investigation*, 82 Fed. Reg. at 53,460 and accompanying issues and decision

memorandum dated November 6, 2017 ("*Investigation* IDM"), Court No. 18–00002, PD 871. In the *Investigation*, Commerce calculated Linyi Chengen's margin based on its intermediate input—veneers. *See Investigation* IDM at 23. The decision to apply the intermediate input methodology was due to inconsistencies discovered at verification during the investigation with respect to Linyi Chengen's reported information. *See* Final IDM at 14; *Investigation* IDM at 23–25. During the investigation, Commerce considered Linyi Chengen's reporting of the log quantity to be "imprecise" based on observations made at verification, such as how the suppliers marked and measured the log diameter, how the production manager verified the log supply through spot checks, and whether Linyi Chengen used the "Chinese National Standard" conversion table, a table that results in a volume in excess of the volume of the simple cylinder that is necessary for the log-to-veneer peeling process.[5] *Investigation* IDM at 24–25. In particular, Commerce was concerned that the formula Linyi Chengen used to calculate the volume of its reported log consumption only relied on the narrow end of the log and that the total volume of logs purchased and reported in Linyi Chengen's records was calculated by Linyi Chengen itself. *See* Final IDM at 14; *see also Investigation* IDM at 24–25.

Linyi Chengen appealed that determination, among other appealed issues. The Court remanded for further explanation of Commerce's intermediate input methodology reasoning. *Linyi Chengen Imp. and Exp. Co., Ltd. v. United States* ("*Linyi Chengen I*"), 43 CIT __, __, 391 F. Supp. 3d 1283, 1295 (2019). The Court deemed Commerce's explanation in the remand results to be inadequate. *Linyi Chengen Imp. and Exp. Co., Ltd. v. United States*, 44 CIT __, __, 433 F. Supp. 3d 1278, 1284–86 (2020) ("*Linyi Chengen II*"). Commerce's investigation had revealed "no discrepancies" in Linyi Chengen's documentation; therefore, the Court held that Commerce's determination that Linyi Chengen's documentation was unreliable for lack of third-party confirmation was unsupported by substantial evidence and otherwise contrary to law. *Id.* at __, 433 F. Supp. 3d at 1286. On further remand of the case, Commerce reversed its determination to apply the intermediate input methodology to Linyi Chengen in the investigation. *See* Final Results Redetermination Pursuant Court Remand (Jun. 18, 2020), Court No. 18-00002, ECF No. 114. This redetermination was

[5] *Cf.* Linyi Chengen's Supp. Section D Questionnaire Resp. (Dec. 2, 2019) ("Linyi Chengen's SDQR") at 10–12, PR 148, *with Linyi Chengen Imp. and Exp. Co., Ltd. v. United States*, 43 CIT __, __, 391 F. Supp. 3d 1283, 1289 (2019) ("Commerce considered Linyi Chengen's reporting of the log quantity to be 'imprecise' based on observations made at verification, such as . . . whether Linyi Chengen used the Chinese National Standard conversion table" (citation omitted)).

sustained. *Linyi Chengen Imp. and Exp. Co., Ltd. v. United States*, 44 CIT __, 487 F. Supp. 3d 1349 (2020) ("*Linyi Chengen III*").

In this first administrative review, Linyi Chengen reported in its initial questionnaire responses how its purchases of logs were transacted and invoiced, and how it calculated the log volumes using the Chinese National Standard. Final IDM at 14 (citing Linyi Chengen's Sections C and D Questionnaire Resp. (Jul. 23, 2019) ("Linyi Chengen's CDQR") at D6–D7, Ex. 11, PR 90). In a supplemental questionnaire response, Linyi Chengen demonstrated how the Chinese National Standard formula accounts for the taper coefficient of the log (i.e., the difference between the narrow end of a log and the wider end) and calculates a volume in excess of the volume of a simple cylinder. *See* Linyi Chengen's Supp. Section D Questionnaire Resp. (Dec. 2, 2019) ("Linyi Chengen's SDQR") at 10–12, PR 148. Linyi Chengen also demonstrated how the formula results in the largest log volume when compared to two other formulae detailed in the U.S. Department of Agriculture ("USDA") Forest Service's General Technical Report: A Collection of Log Rules ("USDA Technical Report"), one of which was described as "one of the three cubic volume formulae most commonly used in forest mensuration research." *Id.* at 15–16; *see also* Final IDM at 14; Linyi Chengen's CDQR at D6–D7 at Ex. 12; USDA Technical Report at 44.

Using this information, Commerce preliminarily calculated Linyi Chengen's normal value using its normal methodology rather than the intermediate input methodology. Prelim. IDM at 20–21. In those results, Commerce stated that it intended to "conduct a verification of the accuracy of [Linyi] Chengen's log volume calculation, its reported consumption rates, and its sales and accounting documentation" in accordance with 19 U.S.C. § 1677m(i)(3)(B) because Commerce found "that the disagreement between interested parties with respect to such a fundamental component of our calculation, *i.e.*, whether to value the respondent's actual [factors of production] or intermediate input, constitutes good cause for verification." *Id.* at 21.

Other relevant preliminary determinations are as follows. To value Linyi Chengen's birch and poplar log inputs, the Coalition placed Malaysian import data on the record, specifically the Malaysian Global Trade Atlas ("GTA") data. *See* Coalition's Submission of Surrogate Values (Sept. 13, 2019) ("Coalition's Surrogate Value Comments"), PR 109–15. Linyi Chengen also placed Malaysian import data, the United Nations International Trade Statistics Database ("UN Comtrade") data, and Romanian import data on the record. *See* Linyi Chengen's Final Surrogate Value Comments (Jan. 2, 2020) at

Ex. SV2–1, PR 150–53; *see also* Linyi Chengen's Prelim. Surrogate Value Submission (Sept. 13, 2019) ("Linyi Chengen's Prelim. Surrogate Values") at Ex. SV-2, PR 105–08. Commerce preliminarily determined that the Malaysian GTA data were the best available information to value Linyi Chengen's log inputs because the data were reported in cubic meters, as were Linyi Chengen's factors of production, and the GTA data were based on the ten-digit Harmonized Tariff Schedule ("HTS") categories. Prelim. IDM at 18–19. Therefore, Commerce preliminarily valued Linyi Chengen's log inputs using Malaysian GTA import data for HTS categories 4403.97.10.00 and 4403.95.10.00. *Id.*

To value labor, Commerce preliminarily used wage data from the Malaysia Department of Statistics ("MDS").*See* Commerce's Prelim. Surrogate Value Mem. (Jan. 31, 2020) at Attachment 9, PR 167; *see also* Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-4, PR 120. The record also contained manufacturing-specific Malaysian wage data from "Trading Economics – Malaysia." *See* Coalition's Surrogate Value Comments at Ex. M-3. Commerce calculated the labor surrogate value by first dividing the total wages earned over the period of review by the total number of employees to derive an average monthly wage and then dividing that figure by the number of working days per month and the number of hours in a working day. *See* Commerce's Prelim. Surrogate Value Mem. at Ex. 9. Commerce's calculation had assumed 21 working days per month.

To value the formaldehyde input used by Linyi Chengen to make the glue that holds its plywood layers together, *see* Linyi Chengen's CDQR, the Parties placed on the record GTA data for Malaysia falling under the six-digit HTS category 2912.11, which is defined as "Methanal (formaldehyde)." *See* Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-3. Included under that six-digit subheading are certain ten-digit HTS subcategories: (1) HTS 2912.11.10.00, defined as "Formalin;" and (2) HTS 2912.11.90.00 defined as "Other."

Linyi Chengen clarified its formaldehyde input as formalin in its surrogate rebuttal comments. *See id.* at Exs. SVR-1 and SVR-2. According to Linyi Chengen's documentation, formalin must contain 40 percent formaldehyde by volume or 37 percent by mass. *Id.* at Ex. SVR-2. For the *Preliminary Results*, Commerce valued Linyi Chengen's formaldehyde using GTA data in HTS subheading 2912.11.10, which is specific to "formalin." *See* Commerce's Prelim. Surrogate Value Mem. at Attachment 1.

To calculate surrogate financial ratios in the *Preliminary Results*, Commerce selected four out of seven potential financial statements from Malaysian producers. Prelim. IDM at 17–18. Specifically, Com-

merce selected the Focus Lumber Berhad ("Focus Lumber") statements from the Coalition's Surrogate Value Comments, Ex. 10, and also the financial statements for Fu Yee Corporation Sdn. Bhd. ("Fu Yee"), Megamas Plywood Sdn. Bhd. ("Megamas"), and Ta Ann Plywood Sdn. Bhd ("Ta Ann") from Linyi Chengen's Final Surrogate Value Comments, Ex. 3 (Fu Yee statements), Ex. 5 (Megamas statements), and Ex. 8 (Ta Ann statements), respectively. *Id.* at 17–18. Commerce's evaluation indicated that the statements for these companies all demonstrated that they were primarily engaged in the production and sale of plywood, with between 79.8 and 99 percent of sales revenue being generated through sales of plywood. *Id.* at 18.

III. Administrative Case Briefs and *Final Results*

With the issue of input methodology still unsettled, on April 6, 2020, during the early stages of the COVID-19 global pandemic, Commerce issued a case briefing schedule noting that it still intended to conduct verification of Linyi Chengen's reported information "when the conditions allow," and that Commerce would issue a separate briefing schedule for issues arising from verification after the release of any verification report. *See* Commerce' Briefing Schedule Mem. (Apr. 6, 2020), PR 180. Afterward, on April 23, 2020, Commerce suspended the deadline for case and rebuttal briefs indefinitely in response to a request from the petitioner to extend the deadline for case brief issues related to Linyi Chengen until verification was either cancelled or completed. *See* Commerce's Suspension Briefing Schedule Mem. (Apr. 23, 2020), PR 182. On June 15, 2020, in light of the "Global Level 4 travel advisory" preventing Commerce personnel from traveling abroad due to the COVID-19 pandemic, Commerce cancelled verification. *See* Commerce' Cancellation Verification Establishment Briefing Schedule Mem. (Jun. 15, 2020), PR 186. Commerce explained that because "verification is not possible under the current conditions, and statutory deadlines prevent us from issuing a supplemental questionnaire or postponing the final results any further, we are relying on the information submitted on the record for the *Preliminary Results*, as facts available in reaching our final results." *See id.* at 7; Final IDM at 7.

Commerce then received administrative case briefs and rebuttal briefs from the Coalition, Linyi Chengen, and an importer coalition consisting of, among others, Taraca Pacific Inc., Richmond International Forest Products LLC, and Concannon Corporation (collectively, "Taraca"). In its administrative case brief, the Coalition argued that verification was necessary, as there were disagreements regarding a fundamental aspect of the margin calculation, namely the use of the

intermediate input methodology, and that Commerce should postpone the final results in order to either conduct on-site verification or issue an additional supplemental questionnaire to Linyi Chengen. *See* Coalition's Resubmission Case Br. (Nov. 13, 2020) ("Coalition's Case Br."), PR 208 The Coalition argued that Commerce should use the intermediate input methodology because of alleged issues with documentation that Linyi Chengen supplied for its log factors of production. *See id.* at 9–33.

Linyi Chengen and Taraca opposed the Coalition's position and supported Commerce's calculation of Linyi Chengen's normal value based on Commerce's standard methodology. *See* Linyi Chengen's Case Brief (Jun. 29, 2020) ("Linyi Chengen's Case Br."), PR 190; *see also* Taraca's Letter in Lieu Case Brief (Jun. 29, 2020) ("Taraca's Case Br."), PR 189. Linyi Chengen and Taraca argued that Commerce should not postpone the final results, that Commerce had discretion whether to conduct a verification, that the significant evidence on the record supported the use of Linyi Chengen's actual log purchase data, that absent evidence warranting use of the intermediate input method the cancellation of verification should not be a reason for Commerce to deviate from its normal methodology for valuing Linyi Chengen's log factor of production data, that Linyi Chengen has not changed its production or accounting methodology since the last verification, and that the problem the Coalition identified had been addressed by the substantial questionnaire responses of Linyi Chengen. *See* Linyi Chengen's Case Br.; Taraca's Case Br.

For the *Final Results*, Commerce continued to select Malaysia as the primary surrogate country. Final IDM at 26. No party challenges Commerce's surrogate country selection.

Regarding log input methodology, Commerce continued to calculate Linyi Chengen's normal value based on its standard or normal methodology rather than the intermediate methodology. *See id.* at 13–19.

Regarding Linyi Chengen's log factors of production, Commerce's selection of Malaysian GTA import data for HTS categories 4403.97.10.00 and 4403.95.10.00 as surrogates remained unchanged for the *Final Results*. *Id.* at 25–28.

Regarding labor, based on further examination of the Malaysian Department of Statistics wage data, Commerce concluded in the *Final Results* that use of this data would lead to an inaccurate result and therefore determined that the "Trading Economics – Malaysia" data were the best available information to value Chengen's labor factors of production. *Id.* at 31–32. Commerce also "corrected" its preliminary calculation, which had assumed 21 working days per month instead of 24, which is Commerce's stated practice. *See id.* at

31 (citing *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,094 (Dep't of Commerce Jun. 21, 2011)).

Regarding the formaldehyde input, upon further review, Commerce determined in the *Final Results* that the record did not support Linyi Chengen's assertion that its input was formalin. *Id.* at 30. Thus, Commerce averaged the two ten-digit categories (HTS 2912.11.10.00 "Formalin" and HTS 2912.11.90.00 "Other") to value Linyi Chengen's formaldehyde input. *Id.*

Regarding the surrogate financial ratios, the Coalition opposed Commerce's reliance upon the Fu Yee and Ta Ann financial statements to calculate surrogate financial ratios. *See id.* at 19–20. For the *Final Results*, Commerce continued to select the financial statements of Fu Yee and Ta Ann, in addition to Focus Lumber, as the best available information on the record to calculate the surrogate financial ratios. *Id.* at 21. Commerce determined not to select the Megamas financial statements because the auditor's report for the company included a note of material uncertainty. *Id.* Specifically, the report identified that Technical Note 4 in the financial statements indicated that the company recorded negative operating cash flows of RM164,274 during the financial year ending December 31, 2018, and that as of that date the company recorded a deficit in its equity and the company's liabilities exceeded its current assets. *See id.* at 21–22 (citing Linyi Chengen's Final Surrogate Value Comments at Ex. SV2–5). The auditor's note concluded that these conditions "indicate that a material uncertainty exists that may cast significant doubt on the Company's abilities to continue as a going concern." *See id.* As a result of the concern raised by the auditor with respect to Megamas and because other usable financial statements were available on the record to calculate the surrogate financial ratios, Commerce declined to include the Megamas financial statements in the surrogate financial ratio. *Id.* at 21–22.

For the *Final Results*, Commerce calculated a weighted-average dumping margin of 14.95 percent for Linyi Chengen; Commerce also applied Linyi Chengen's weighted-average dumping margin of 14.95 percent as the rate for all unexamined separate rate respondents. See *Final Results*, 85 Fed. Reg. at 77,159.

IV. Appeal to CIT

Plaintiffs and Consolidated Plaintiffs commenced multiple actions in the U.S. Court of International Trade to contest Commerce's final determination. The Court consolidated the cases on March 3, 2021.

See Order (Mar. 3, 2021), ECF No. 26. Before the Court are three motions for judgment on the agency record filed pursuant to USCIT Rule 56.2.

The Coalition submitted a Rule 56.2 motion for judgment on the agency record. *See* Pl.'s Rule 56.2 Mot. J. Agency R., ECF Nos. 32, 33; *see also* Pl.'s Mem. Supp. Pl.'s Rule 56.2 Mot. J. Agency R. ("Coalition's Br."), ECF Nos. 32–2, 33–2; Pl.'s Reply Br. ("Coalition's Reply"), ECF Nos. 43, 44. The Coalition raises two challenges in its motion for judgment on the agency record: (1) Commerce's calculation of the dumping margin for Linyi Chengen without using the intermediate input methodology, and (2) Commerce's calculation of the surrogate financial ratio using data for Fu Yee and Ta Ann.[6] Coalition's Br. at 17–31, 35–41.

Defendant-Intervenor Linyi Chengen Import and Export Co., Ltd. and Consolidated Plaintiffs Xuzhou Jiangheng Wood Products Co., Ltd. and Xuzhou Jiangyang Wood Industries Co., Ltd. (collectively, "Linyi Chengen") also submitted a Rule 56.2 motion for judgment on the agency record. *See* Linyi Chengen's Rule 56.2 Mot. J. Agency R., ECF No. 31; *see also* Linyi Chengen's Rule 56.2 Mem. Supp. Mot. J. Agency R. ("Linyi Chengen's Br."), ECF No. 31–2; Linyi Chengen's Reply Br. ("Linyi Chengen's Reply"), ECF No. 41. Linyi Chengen raises three issues that pertain to Commerce's selection of surrogate values for (1) birch and poplar logs, (2) labor, and (3) formaldehyde. Linyi Chengen's Br. at 1–11.

Consolidated-Plaintiffs Richmond International Forest Products LLC, Taraca Pacific Inc. and Concannon Corporation (collectively, "Taraca") also submitted a Rule 56.2 motion for judgment on the agency record. *See* Taraca's Rule 56.2 Mot. J. Agency R., ECF No. 30; *see also* Taraca's Mem. Supp. Rule 56.2 Mot. J. Agency R. ("Taraca's Br."), ECF No. 30–1; Taraca's Reply Br. ("Taraca's Reply"), ECF No. 42. The motion incorporates by reference the arguments made by the other separate rate respondents challenging the dumping rate calculated for Linyi Chengen and the separate rate in their respective Rule 56.2 motions. Taraca's Br. at 1, 17. Taraca raises four issues specifically: (1) Commerce's exclusion of the financial statements of Megamas (i.e., Megamas Plywood Sdn. Bhd.) from the calculation of surrogate financial ratios; (2) Commerce's reliance on Malaysian GTA data to derive the surrogate value for Linyi Chengen's log inputs instead of relying on the UN Comtrade data under the six-digit U.S. HTS subheadings 4403.97 and 4403.95; (3) Commerce's reliance on

[6] The Coalition raised a third claim in its initial brief to challenge Commerce's assumption of 24 working days per month instead of 21 as was done in the preliminary determination, but appears to have abandoned that claim without further comment. Pl.'s Br. at 32–35; *see generally* Coalition Reply.

the average of data for HTS 2912.11.10 and HTS 2912.11.90 to derive the surrogate value for Linyi Chengen's formaldehyde input, arguing that the best available information and most specific data for Linyi Chengen's actual formaldehyde input was the import data reported under the HTS subheading 2912.11.10; and (4) Commerce's separate rate calculation, which Taraca contends was incorrect because Commerce assigned the erroneous dumping margin calculated for Linyi Chengen, the sole mandatory respondent, to the separate rate respondents. *Id.* at 9–17.

The Coalition opposes Taraca's and Linyi Chengen's Motions for Judgment on the Agency Record. *See* Pl.'s Resp. Br. ("Coalition's Resp."), ECF Nos. 37, 40. Taraca, and Linyi Chengen (as Defendant-Intervenors), oppose the Coalition's Motion for Judgment on the Agency Record. *See, e.g.,* Taraca's Resp. Opp'n Coalition's Mot. J. Agency R. ("Taraca's Resp."), ECF No. 34; Linyi Chengen's Resp. Br. ("Linyi Chengen's Resp."), ECF Nos. 38, 39. Defendant United States ("Defendant") argues for sustaining the Final Results as is, in opposition to all Motions for Judgment on the Agency Record. *See* Def.'s Resp. Pls.' Rule 56.2 Mots. J. Agency R. ("Def.'s Resp."), ECF Nos. 35, 36.

STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an antidumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Regarding the Parties' three separate Rule 56.2 motions for judgment on the agency record, the Court addresses the issues raised as follows.

I. Log Inputs

A. Input Methodology

As described above, in the less than fair value investigation, Commerce relied on the "intermediate input methodology," which resulted in values placed on Linyi Chengen's veneer consumption rather than the logs consumed to produce the veneers. *See* Prelim. IDM at 19. For this administrative review, Commerce concluded that departing from its preferred methodology of valuing the actual inputs consumed by

Linyi Chingen to produce subject merchandise was not warranted. Final IDM at 19. Commerce thus accepted Linyi Chengen's log consumption calculations as reported. *See id.* The Coalition contests the use of this preferred methodology in calculating Linyi Chengen's dumping margin rather than the intermediate input methodology. Coalition's Br. at 17–31. The issue that the Coalition ultimately contests is the relative uncertainty of surrogate valuations, based on either logs or veneers.

The Coalition argues that substantial evidence on the record not only demonstrates that Linyi Chengen's veneer consumption data were the best available information for calculating normal value, but that Linyi Chengen's log factors of production cannot be considered the best available information, and that Commerce did not adequately explain or address its arguments on why veneer consumption data were not the best available information or why log consumption data were the best available information given its inherent flaws. *Id.* at 20–23. The Coalition also contends that Commerce's cancellation of verification and Commerce's determination on the record as developed to rely on Linyi Chengen's log factors of production without conducting any type of verification, further questioning Linyi Chengen's data, or explaining why verification was no longer necessary, were arbitrary and capricious in light of Commerce's preliminary determination that verification was necessary. *Id.* at 29–31.

1. Verification

Addressing the issue of verification first, Commerce stated in the *Preliminary Results* that it:

> intends to conduct a verification of the accuracy of [Linyi] Chengen's log volume calculation, its reported consumption rates, and its sales and accounting documentation, in accordance with section 782(i)(3)(B) of the Act, [19 U.S.C. § 1677m(i)(3)(B),] because we find that the disagreement between interested parties with respect to such a fundamental component of our calculation, *i.e.*, whether to value the respondent's actual [factors of production] or intermediate input, constitutes good cause for verification.

Prelim. IDM at 21; *see* Final IDM at 7.

For the *Final Results*, Commerce explained that due to the "Global Level 4 travel advisory" (*see* U.S. Department of State website) and statutory deadlines for the review, "for reasons beyond [Commerce's] control," it intended to rely on the information as submitted. Final IDM at 7.

The Coalition contests Commerce's position to not conduct a verification, explaining that "it is inaccurate to say that Commerce had *no* concerns regarding [Linyi] Chengen's reporting" given Commerce's determination that it needed "to conduct a verification of the accuracy of [Linyi] Chengen's log volume calculation, its reported consumption rates, and its sales and accounting documentation[.]" Coalition's Reply at 3 (quoting Prelim. IDM at 21). The Coalition complains that while Commerce ultimately did not conduct verification, the decision was not based on a finding that verification was no longer necessary. *Id.* at 4 (referencing Final IDM at 7).

The Court agrees with the Coalition that the fact that Commerce relied on facts available for its final determination because information could not be verified is indication that the agency understood that verification was "needed." *See id.* Nonetheless, Congress intended for 19 U.S.C. § 1677e(a)(1) (determinations on the basis of facts available) to provide a work-around in situations such as this, where verification was precluded due to a "Global Level 4 travel advisory." *Cf.* Statement of Administrative Action, H.R. Rep. No. 103–316, at 869 (1994) ("where requested information is missing from the record"), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4198. An interested party cannot expect that Commerce would not adopt a different approach in determining the final results. *Id.* The Court has sustained Commerce's change in its stance on issues decided preliminarily in its final determinations if Commerce explains the reasoning for the change and "its decision is supported by substantial evidence and in accordance with law." *E.g.*, *Hyundai Steel Co. v. United States*, 42 CIT __, __, 319 F. Supp. 3d 1327, 1343 (2018) (citing *Timken Co. v. United States*, 23 CIT 509, 515, 59 F. Supp. 2d 1371, 1376 (1999)). In light of the statutory deadlines and the disruption of travel due to the COVID-19 pandemic that precluded Commerce officials from conducting an on-site visit to Linyi Chengen's facilities, the Court concludes that Commerce's decision not to conduct verification was reasonable.[7]

2. Choice of Methodology

Turning to the substantive issue of choice of input methodology, Commerce adhered to its preference of valuing the actual inputs used by a respondent in the production of subject merchandise instead of

[7] 19 U.S.C. § 1677m(i) requires verification in the case of (1) a final determination in an investigation, (2) a determination to revoke a trade order, or (3) if requested, and no verification has occurred during the two immediately preceding administrative reviews. 19 U.S.C. § 1677m(i). Commerce's preliminary decision to verify in this instance was made under the permissive "good cause" authority of subsection (3) (i.e., verification was not mandatory in this instance).

applying the intermediate input methodology. Final IDM at 19. Adherence to administrative preference is evaluated for reasonableness on the record presented. *See, e.g.*, *Jiaxing Bro. Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1302 (Fed. Cir. 2016) (upholding use of Thai import statistics in accordance with administrative preference to appraise surrogate values from a single surrogate country); *Diamond Sawblades Mfrs.' Coal. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1323, 1332 (2021) (reasonable to rely on Thai data absent evidence of aberrancy); *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1301, 1315 (2020) (use of unconsolidated financial statements held reasonable to adhere to administrative preference for information from producers of identical or comparable merchandise in the surrogate country); *Atar S.R.L. v. United States*, 730 F.3d 1320, 1329 (Fed. Cir. 2013) (evaluating reasonableness of agency method of calculating constructed value profit cap under § 1677b(e)(2)(B)(iii)).

Commerce explained that because Linyi Chengen disclosed the facts that were cause for concern in the investigation early in this review, it was able to request detailed supplemental information and documentation regarding the Chinese National Standard and Linyi Chengen's practice of providing purchase invoices to its suppliers of poplar logs. Final IDM at 19. Noting its second remand of the investigation that had included a similar analysis of the log volumes of various sizes, calculated using the Chinese National Standard and calculated using the formula for the volume of a simple uniform cylinder,[8] Commerce concluded based on the resultant volumes of its analysis in this review that the difference between the two volumes was attributable to the taper coefficient accounted for by the Chinese National Standard and the amount of wood that would need to be removed from a log until it is a uniform cylinder and more suitable for the rotary peeling process. *Id.* at 17.

As in the *Investigation*, for this administrative review Linyi Chengen's "actual" log input factors of production are derived from the documentation it maintained for its veneer consumption, since Linyi Chengen does not maintain documentation of actual production of veneers from logs. *See, e.g.*, *id.* at 12 (Linyi Chengen stating that log factors of production "are calculated according to log consumption and veneer production quantities"); Coalition's Br. at 21. "In other words, the starting point for [Linyi] Chengen's log [factors of production] was the documentation [it] maintained for its veneer *consumption*, not regarding its *production* of veneers from logs." Coalition's

[8] The volume of a simple uniform cylinder (V) is equal to the product of 2π, the radius of the cylinder's base(r), and the cylinder's length(l) ($V=2\pi rl$).

Reply at 5 (emphasis in original); *see id.* at 6 ("the operative fact is that [Linyi] Chengen has [bills of materials] detailing veneer consumption but does not have [bills of materials] detailing veneer consumption but does not have [bills of materials] (or other similar documentation) detailing log consumption"). The log factors of production were thus "backed into" by being based on overall consumption and production records that relate to the veneer factors of production, which in turn are based on product-specific information reported in bills of materials in the normal course of business. *See* Linyi Chengen's CDQR at Exs. D-2.1–D-2.4; Linyi Chengen's SDQR at Ex. SQ3–17. Because of this fact, the Coalition argues that Commerce's explanation fails to adequately address its arguments regarding the veneer consumption data as superior to the log consumption data and that it was unreasonable for Commerce not to resort to the intermediate input methodology as Commerce had during the investigation. Coalition's Br. at 17–29. The Coalition contends that Commerce's recitation of Linyi Chengen's documented information does not equate to information about the production of veneers from logs, nor does it demonstrate that the log documentation is equivalent or preferable to the veneer documentation. *Id.* at 21–23. According to the Coalition, the relatively sparse documentation supporting Linyi Chengen's log consumption can be cured by relying on Linyi Chengen's veneer factors of production. *See id.* The Coalition argues that substantial evidence of record not only demonstrates that Linyi Chengen's veneer consumption data were the best available information for calculating Linyi Chengen's normal value but also that its log factors of production cannot be considered the best available information. See id. at 20–29.

Commerce accepted Linyi Chengen's construction, based on record evidence showing purchases from its suppliers and what its log factors of production amounted to, and Commerce discerned no information on the record that would cast doubt on that reported information. Final IDM at 19. Defendant explains that the only circumstances in which Commerce has applied intermediate input methodology are: (1) when the factors of production for the intermediate input accounts for an insignificant share of the total output, and the burden associated with valuing each factor of production outweighs the potential increase of calculation accuracy in such an analysis, and (2) when valuing the factors of production associated with producing the intermediate input would result in inaccurate calculations because Commerce is not able to value a significant cost in the overall factors buildup. Def.'s Resp. at 16–17 (referencing Final IDM at 23; *Frozen Fish Fillets from Vietnam*, 68 Fed. Reg. 37,116 (Dep't of Commerce

Jun. 23, 2003) (notice of final antidumping duty determination of sales at less than fair value and affirmative critical circumstances) and accompanying issues and decision memorandum at cmt. 3; *Honey from China*, 71 Fed. Reg. 34,893 (Dep't of Commerce Jun. 16, 2006) (final results and final rescission, in part, of antidumping duty administrative review) and accompanying issues and decision memorandum at cmt. 9; *Fresh Garlic from China*, 71 Fed. Reg. 26,329 (Dep't of Commerce May 4, 2006) (final results and partial rescission of antidumping duty administrative review and final results of new shipper review) and accompanying issues and decision memorandum at cmt. 1). The first circumstance is not implicated here, as it appears undisputed that logs are a significant share of the output of plywood. Regarding the second circumstance (valuing the log factors of production), Commerce did not find problematic Linyi Chengen's method of calculating quantities by applying its log consumption ratio to the veneer factors of production.

The Court observes that Commerce supported its determination to accept Linyi Chengen's reported calculation of logs consumed during the period of review rather than basing normal value on veneer consumption, based on evidence of Linyi Chengen reporting in its initial questionnaire responses how its purchases of logs were transacted and invoiced and how the log volumes were calculated using the Chinese National Standard. Final IDM at 14 (citing Linyi Chengen's CDQR at D6–D7 and Ex. 11). Linyi Chengen also provided the USDA Technical Report discussing the various U.S. standards for calculating the volume of logs and the European Union standard for measuring the volume of round timber, noting that a number of the various formulae rely on a measurement from the narrow end of the log. *Id.* at 14; Linyi Chengen's CDQR at D6–D7, Exs. 12 (USDA Technical Report) and 13. Linyi Chengen demonstrated in a supplemental questionnaire response how the Chinese National Standard formula accounts for the taper coefficient of the log (i.e., the difference between the narrow end of a log and the wider end) and calculates a volume in excess of the volume of a simple cylinder. *See* Linyi Chengen's SDQR at 10–12. Linyi Chengen demonstrated how the formula results in the largest log volume when compared to two other formulae detailed in the USDA Technical Report, one of which was described as "one of the three cubic volume formulae most commonly used in forest mensuration research." *Id.* at 15–16; *see also* USDA Technical Report at 44. Commerce stated in the Final IDM that this additional information resolved its concerns from the investigation that Linyi Chengen's calculation of its log consumption was inaccurate because its formula relied on the narrow end of the log. Final IDM at 13–14. Commerce

noted that Linyi Chengen provided additional evidence regarding its material purchase records, clarifying questions Commerce had made about those records at verification during the investigation. *Id.* Specifically, Linyi Chengen explained that Chinese regulations stipulate that the purchaser of certain agricultural products issue tax invoices on behalf of the sellers. *See* Linyi Chengen's CDQR at D6, Ex. 10.

Defendant's position is that Linyi Chengen provided facts for the record sufficiently early in the review to address Commerce's prior concerns from the investigation, which had resulted from the discovery of new information at verification. Final IDM at 19. Commerce noted that Linyi Chengen's cooperation during this review enabled Commerce to request detailed supplemental information and documentation regarding the Chinese National Standard and Linyi Chengen's practice of providing purchase invoices to its suppliers of poplar logs. *Id.* (citing Linyi Chengen's SDQR at 5–17). Commerce also requested a significant amount of supplemental documentation, clarification, and explanation for this review regarding purchaser-issued tax invoices on behalf of sellers, which Linyi Chengen provided in a timely manner. *See* Linyi Chengen's SDQR at 5–9, Exs. 7–10. Linyi Chengen also provided a sample "delivery sheet" from the period of review provided by its suppliers of poplar logs, and the corresponding warehouse journal and warehouse-in slip. *Id.* at 16–17, Ex. 12.

In further support of its preferred input methodology, Commerce also reviewed information from the investigation placed on the record of this review. That information showed that during verification at the time of the investigation, Commerce verifiers examined Linyi Chengen's log consumption and veneer production records supporting its log factors of production, including its log warehouse journals and supporting log warehouse-in tickets, log purchase value-added tax invoices and corresponding accounting vouchers, log raw material ledgers, log supplier account payable sub-ledgers, bank payment slips, log warehouse out slips, semi-finished goods cost of production ledgers, veneer production record reports, veneer warehouse journals and supporting veneer warehouse-in tickets, and self-made semifinished product ledgers. *See* Coalition's Letter Placing Info. Investigation R. Admin. Rev. (Sept. 24, 2019), at Ex. 3.2 ("Investigation Verification Report" at Ex. 26), PR 122–132. Commerce reasoned that "[t]hese are typical types of documents that are examined at verification." Final IDM at 15.

Based on the record evidence, Commerce determined that the Coalition's claims regarding a lack of information supporting Linyi Chengen's log consumption data were meritless. *Id.* at 15. Commerce was thus not persuaded that the Coalition's arguments undermined

Commerce's determination that Linyi Chengen's log consumption data provided the best available information to calculate Linyi Chengen's normal value in this review. *Id.* at 13–19. As a result, based on the record evidence, Commerce determined to calculate Linyi Chengen's normal value using its log inputs in accordance with its normal methodology. *Id.* at 19.

Defendant contends that the Coalition's argument that the veneer consumption data are superior is "undercut" by the fact that the same type of documents used to support Linyi Chengen's log factors of production are also used to support Linyi Chengen's veneer factors of production. Def.'s Resp. at 20–21 (referencing, *inter alia*, Final IDM at 15 (citing *Investigation* Verification Report (Sept. 28, 2017) at Ex. 26, Court No. 18–00002, PR 834)). Defendant and Linyi Chengen also contend that it was reasonable for Commerce to find that Linyi Chengen would not maintain bills of materials for the log-to-veneering production because the bills of materials operated as a "recipe" for production (i.e., production instruction), and that it would serve no purpose to rely on a recipe that had a single ingredient (logs) that was placed through a single process (rotary peeling). *See* Final IDM at 15. Commerce was "well aware of this" practice during the investigation phase of hardwood plywood from China, according to Linyi Chengen, and also through "numerous" verifications of multilayered wood flooring from China. Linyi Chengen's Resp. at 4; *see, e.g.*, *Multilayered Wood Flooring from the People's Republic of China*, 85 Fed. Reg. 78,118 (Dep't of Commerce Dec. 3, 2020) (final results of antidumping duty administrative review and new shipper review and final determination of no shipments; 2017–2018); *Multilayered Wood Flooring from the People's Republic of China*, 86 Fed. Reg. 21,693 (Dep't of Commerce Apr. 23, 2021) (preliminary results of countervailing duty administrative review, and intent to rescind review, in part; 2018). Linyi Chengen adds that it confirmed from the beginning that it relied on the Chinese National Standard, used in the industry by log sellers, to verify its purchases of log volumes. Linyi Chengen's Resp. at 2.

The Coalition contends that Linyi Chengen's yield and yield loss ratios are problematic because the comparison with the Chinese National Standard appeared to account only for wood removed prior to the peeling process and did not account for the scrap generated in subsequent steps of the production process, and because the ratios presume that every veneer produced is usable for plywood production. Coalition's Br. at 26; Coalition's Reply at 8. Defendant and Defendant-Intervenors assert that Commerce sufficiently addressed the Coalition's arguments on yield and loss. Def.'s Resp. at 21–23;

Linyi Chengen's Resp. at 4–7; Taraca's Resp. at 13–14. The Coalition disagrees that their arguments are responsive. Coalition's Reply at 7–8.

Arguing that rote application of the Chinese National Standard is inconsistent with Linyi Chengen's own apparent experience (because Linyi Chengen only uses certain grades in the production of plywood and Linyi Chengen does not maintain records for veneer quality), the Coalition contends that Linyi Chengen cannot document the type and quantity of veneers that move through its inventory or that remain in inventory as unsuitable for plywood production. *See* Coalition's Case Br. at 20–23. If any of these veneers were not suitable for use in hardwood plywood, this necessarily means that Linyi Chengen's reported yield ratio was distorted. *See* Linyi Chengen's SDQR at 43, Ex. SQ3–43.4; Coalition's Br. at 24. The Coalition refers to additional inferences regarding yield, yield loss, and veneer disposition, contending that they undermine Commerce's assumption regarding the feasibility of relying on Linyi Chengen's reported log consumption data. *See* Coalition's Br. at 24; Coalition's Reply at 6–7 (referencing Linyi Chengen's SDQR at 44, Ex. SQ3–43.3). The Coalition complains that Commerce only tangentially refers to this contention by pointing to information showing that Linyi Chengen disregards very few lower grade core veneers, and in the end Commerce states that Linyi Chengen's failure to track grades is irrelevant because the surrogate value used does not reflect grades. Coalition's Br. at 24–25; *see* Final IDM at 16–17; Def.'s Resp. at 21–22. The Coalition contends that neither of these statements addresses their actual argument: the first point addresses core veneers but ignores face veneers, and the second point does not address the effect, if any, on Linyi Chengen's yield ratio. Coalition's Br. at 23–25

Linyi Chengen's response is that its yield and yield loss ratios are accurate. Linyi Chengen contends that the grades of veneers have no influence on the wood log factors of production because the respondents report the consumption quantity rather than the actual costs incurred by the company, and regardless of whether a piece of veneer is of higher or lower grade, it consumed the same or similar quantity of log in its production. Linyi Chengen's Resp. at 5. Linyi Chengen maintains that it did not sell the core veneers, as they would all be consumed in its plywood production. *Id.* Defendant's response adds that during the investigation, Commerce observed workers at verification "repairing veneers by filling in holes with pieces of wood and tape" as support for Linyi Chengen's claim that Chinese producers do not disregard lower grade core veneers and that defects are repaired

during the production process. Def.'s Resp. at 22 (referencing *Investigation* Verification Report at 14 and Linyi Chengen's Rebuttal Brief (Jul. 10, 2020) ("Linyi Chengen's Rebuttal Br.") at 4, PR 198). Defendant also argues that Linyi Chengen documented all of its core veneers as a single core grade, meaning that "the veneers can have cracks, holes, stains, [and] knots" and also stated that since core veneers are not visible in the final product, there are "very few" core veneers that are not usable. Def.'s Resp. at 21–22 (referencing Linyi Chengen's CDQR at 11 and Coalition's Letter Placing Info. Investigation R. Admin. Rev. at Ex. 1.2 (Linyi Chengen's SCQR) at 5 and Ex. 4.2 (Linyi Chengen LTFV Rebuttal Brief) at 12).

The Coalition also argues that Commerce's determination did not adequately address its arguments regarding the yield loss ratio but merely cited to the second remand redetermination from the investigation. Coalition's Br. at 25. In response, Defendant claims that Commerce's reference to the second remand redetermination in the investigation was to explain that it had responded to nearly identical arguments made by the petitioner, where under protest, Commerce provided a detailed analysis of Linyi Chengen's yield conversion ratio and explained why the Coalition had not provided sufficient grounds to disregard Linyi Chengen's reported log consumption data. Def.'s Resp. at 22 (referencing Final IDM at 17); *see* Final Results of Redetermination Pursuant to Court Remand ("*Second Remand Results*") at 29, Court No. 19–0002, ECF No. 114. Included in that *Second Remand Results* was an analysis of the log volumes of various sizes, calculated using the Chinese National Standard and the formula for the volume of a simple uniform cylinder ($V=\pi r2L$). *See* Final IDM at 17 (citing *Second Remand Results*). Based on the resulting volumes, Commerce concluded that the difference between the two volumes was attributable to the taper coefficient accounted for by the Chinese National Standard and the amount of wood that would need to be removed from a log until it is a uniform cylinder and more suitable for the rotary peeling process. *Id.* This determination was sustained by the Court in *Linyi Chengen III*. *Linyi Chengen III*, 44 CIT at __, 487 F. Supp. 3d at 1355–56. Commerce thus determined in this case that, although Linyi Chengen's yield conversion ratio may differ from the Coalition's own experience, the *Investigation* Verification Report and Linyi Chengen's documentation supported Linyi Chengen's reported consumption and production data. Final IDM at 17.

The Coalition argues, nonetheless, that in relying on Linyi Chengen's log records, Commerce did not capture certain cost elements. Coalition's Br. at 27. In particular, the Coalition argues that there is a lack of information regarding how the volumes represented by the

import data surrogate values are calculated. *Id. See* Final IDM at 14. The Coalition contends that because there is no way of knowing what conversion rates were used in the preparation of the import data, there is inherent uncertainty regarding the accuracy of the log surrogate values as applied to Linyi Chengen's log factors of production; likewise, because Linyi Chengen requires that all logs be custom-cut to 2.6 meters long, it is unknown how this may create additional costs associated with Linyi Chengen's log inputs. Coalition's Br. at 27; Coalition's Reply at 8. The Coalition claims that these issues are not present with respect to veneers. Coalition's Reply at 8.

Defendant responds that Commerce has a longstanding practice of valuing factors of production using GTA import data, and there is no information on the record suggesting that the surrogate values based on import data would result in inaccurate or distortive surrogate values. Def.'s Resp. at 23–24. Linyi Chengen points out that import surrogate value data does not impugn its calculated quantity of log factors of production in any event. *Cf.* Linyi Chengen's Resp. at 7 ("veneer surrogate values (i.e., import values) would also have used a conversion with no guarantee that all countries and parties used the same conversion"). Although the Coalition also argues that the size of the logs Linyi Chengen receives would result in considerable waste and additional costs, Commerce determined that nothing on the record supports the conclusion that Linyi Chengen's suppliers would demand a premium for the specific size of logs purchased by Linyi Chengen. Final IDM at 18. Because Commerce's determinations must be based on the record before it, Commerce determined that it could not "reach a conclusion on the mere allegation that such log sizes could theoretically introduce increased scrap or costs because Commerce's decisions must be based on the weight of the evidentiary record." *Id.*; *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) ("substantial evidence is more than a mere scintilla"); *Crawfish Processors All. v. United States*, 483 F.3d 1358, 1361 (Fed. Cir. 2007) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The Coalition's overall argument is that Commerce did not adequately respond to its arguments that the veneer factors of production constituted the best available information on the record. Coalition's Br. at 21. Defendant's response is that Commerce did address whether the veneer factors of production data were more reliable than the log factors of production data, and that Commerce found, for purposes of this review, that the Coalition's arguments did not demonstrate that the use of veneer surrogate values over log surrogate

values resulted in a more accurate calculation. Final IDM at 15; *see Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (in determining factors of production, "the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible"). Commerce explained that the HTS subheadings proposed by the Coalition to value Linyi Chengen's veneer factors of production were 4408.90.1000 for hardwood veneer and 4408.10.3000 for coniferous veneer. *Id.* Commerce included the descriptions of the materials covered by these subheadings in the preliminary surrogate value memorandum: "Face Veneer Sheets" and "Coniferous: Face Veneer Sheets." *See* Commerce's Prelim Surrogate Value Mem. at Attach. 3f, PR 167–178; *see also* Coalition's Surrogate Value Comments. Because the core veneers used by Linyi Chengen are of much lower quality than its face veneer sheets, Commerce concluded that valuing all of Linyi Chengen's veneers, the vast majority of which are core veneers, with a surrogate value for face veneers, would not yield a more accurate calculation. Final IDM at 15. The Court concludes that Commerce's determination is reasonable based on the record evidence.

Each side appears to accuse the other of engaging in mere speculation. *See, e.g.*, Coalition's Br. at 23–29; Def.'s Resp. at 23–24; Linyi Chengen's Resp. at 7–8; Taraca's Resp. at 11. In particular, the Coalition argues that the conversion method associated with the import data is unknown, so Commerce could not conclude that surrogate values based on such import data provide an "apples-to-apples" basis for application to Linyi Chengen's log volumes. Coalition's Br. at 28. However, since verification was precluded by the "Global Level 4 travel advisory" during this review, and Commerce determined to rely on facts available, the Coalition's arguments over yield and yield loss remain speculative, while Commerce's determination to accept Linyi Chengen's calculated quantity of logs is based on facts available and the absence of information on the record suggesting that the surrogate values based on import data would result in inaccurate or distortive surrogate values. *See* Def.'s Resp. at 23–24. The Coalition's summary of the record is not inaccurate, and its arguments are not unreasonable as far as logical inferences may be drawn, but the Coalition's arguments are insufficient to undermine the *Final Results*. The Court observes that Commerce's determination is based on the extent of the information before it on the record as a whole, which included consideration of the extent of detracting information. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002). Thus, on the arguments presented, the Court cannot

conclude that Commerce's reliance on its preferred methodology was unreasonable as applied in this instance. The Coalition's essential argument, at this point, seems to be that the intermediate input methodology is "more reasonable" than Commerce's preferred methodology, but it is well-settled that the Court may not substitute its judgment for that of the agency when the choice is between two fairly conflicting views.[9] *Universal Camera Corp.*, 340 U.S. at 488; *see, e.g.*, *NSK Corp. v. United States*, 32 CIT 966, 969, 577 F. Supp. 2d 1322, 1329 (2008); *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984). The result here, of valuing the logs Linyi Chengen consumed in producing subject merchandise, is in accordance with Commerce's general practice of valuing all factors used in each stage of production when considering integrated firms. *See Linyi Chengen I*, 43 CIT at __, 391 F. Supp. 3d at 1289. The Court holds that substantial record evidence supports Commerce's reliance on its preferred methodology.

B. Log Input Surrogate Values

Commerce selected Malaysia as the primary surrogate country and relied upon Malaysian import statistics to value Linyi Chengen's primary raw materials, poplar logs and birch logs. Prelim. IDM at 19. Commerce relied upon the 10-digit import data, HTS 4403.97.10.00 and HTS 4403.95.10.00, from GTA reported on a cubic meter basis for these inputs. *See* Commerce's Final Surrogate Value Mem. (Nov. 23, 2020) at 2, PR 214–215. This was consistent with Commerce's practice of relying on GTA data from the primary surrogate country for surrogate values unless those values are aberrational or demonstrably unreliable. Final IDM at 25–26. In doing so, Commerce determined that Linyi Chengen had failed to demonstrate that the Malaysian GTA data were unusual or unreliable, and it did not find Linyi Chengen's claim that the data were distorted to be substantiated by the record. *Id.* at 27.

Linyi Chengen and Taraca argue that Commerce should not have relied upon the Malaysian GTA data because they resulted in high volume densities of kilogram per cubic meter that were "wholly unreasonable given the known density of poplar and birch." Linyi Chengen's Br. at 10; Taraca's Br. at 13. Linyi Chengen came to this con-

[9] The Coalition's contrast is that Linyi Chengen's "veneer [factors of production] were derived from [bills of materials] and used the actual veneer consumption amounts as reflected on inventory slips for veneers that were pulled directly from inventory and then immediately used in production." Coalition's Case Br. at 13; *see* Linyi Chengen's SDQR at 25–26 (explaining that standard consumption for core and face veneers are derived from bills of materials maintained in the normal course of business). The Coalition's argument is that this is necessarily better and more accurate data than log consumption data. Coalition's Case Br. at 13–14.

clusion by calculating conversion ratios based on the UN Comtrade data in kilograms divided by the GTA volume data in cubic meters. Linyi Chengen's Br. at 10; Linyi Chengen's Case Br. at 1–2. The results, Linyi Chengen claimed, show that the GTA data are flawed. Linyi Chengen's Br. at 11; Linyi Chengen's Case Br. at 2. Linyi Chengen argues that Commerce should have relied instead on the six-digit HTS subheadings from UN Comtrade data to address the alleged inconsistency, or in the alternative Commerce should have used Romanian data because of the "very low quantity of imports into Malaysia for this critical surrogate value." Linyi Chengen's Br. at 11–13.

In its Final IDM, Commerce stated that "[a]lthough [Linyi] Chengen argues that the Malaysian GTA data must be inaccurate because they demonstrate impossible log densities, its argument assumes its own conclusion—that the UN Comtrade data are reliable while the Malaysian GTA data are flawed. The record does not support this assumption." Final IDM at 27. Defendant emphasizes that Linyi Chengen did not provide the data necessary for Commerce to evaluate its claims of aberrancy.[10] Def.'s Resp. at 35. More precisely, Defendant contends that when selected surrogate data are challenged as aberrational, Commerce's practice is to compare the surrogate values in question to the GTA average unit values calculated for the same period in other potential surrogate countries to the extent that such data are available, a practice recently sustained by this Court, *see The Ancientree Cabinet Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1241, 1253–55 (2021), and that Commerce evaluates claims of aberrational data by examining historical data from the same HTS category for the surrogate country over multiple years. Def.'s Resp. at 37–38 (citing *Trust Chem. Co. v. United States*, 35 CIT 1012, 791 F. Supp. 2d 1257 (2011)). Linyi Chengen did not place either set of data on the record for Commerce to compare. *See* Final IDM 26–27. Because the burden of creating an adequate record lies with interested parties and not with Commerce, *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011), Defendant argues that Linyi Chengen cannot now complain that Commerce did not conduct such an evaluation, when Linyi Chengen did not provide Commerce with

[10] Linyi Chengen disputes that it made a claim of "aberrancy," insisting that it "made a distinct, different argument that the quantity is too small for the [average unit volume ('AUV')] to be a commercial value and a representative surrogate value," Linyi Chengen's Br. at 13, but that appears to be a distinction without a difference. "The burden is on interested parties to provide Commerce with information in support of their arguments." Final IDM at 27 (citing *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Generally, when "faced with a choice between two imperfect options, it is within Commerce's discretion to determine which choice represents the best available information." *Dorbest Ltd. v. United States*, 30 CIT 1671, 1687, 462 F. Supp. 2d 1262, 1277 (2006).

data on the record to do so, nor is it of any consequence that Linyi Chengen itself purchased wood in greater quantities. Def.'s Resp. at 38 (citing Final IDM 38–39).

The Court concludes that Linyi Chengen's attempt at showing an alternate method of demonstrating aberrancy is not without reason underpinning it, but in the final analysis it is insufficient to overcome Commerce's point that Linyi Chengen's calculation assumes the validity and reliability of the UN Comtrade data. Linyi Chengen claims that its Rule 56.2 brief addressed Commerce's line of argument and that the United States failed to address Linyi Chengen's further argument that logs are not, in fact, measured on a cubic meter or other volume basis. Linyi Chengen's Reply at 2. (For example, the logs are not placed in water to determine their actual cubic meter volume displacement; rather, they are either weighed or the cubic meter volume is calculated using a formula.) Linyi Chengen responds that "the Malaysian GTA import statistics include an apparent error in the [cubic meter] *calculated* volume." *Id.* (emphasis in original). The response, however, assumes the reliability and validity of the UN Comtrade data in drawing that conclusion.

Commerce concluded that Linyi Chengen's claims regarding the GTA data did not undermine Commerce's determination that the Malaysian GTA data, which were in cubic meters at the ten-digit level, were superior to the UN Comtrade data reported in kilograms and at the six-digit level. Final IDM at 27. Because Commerce addressed Linyi Chengen's arguments, evaluated the record evidence, and determined that the Malaysian GTA data were the best available information on the record to value Linyi Chengen's log inputs, the Court agrees with Commerce's determination.

Linyi Chengen argued in the alternative that Commerce could have relied upon the Romanian import statistics to value Linyi Chengen's log inputs.[11] Linyi Chengen's Br. at 12. Romania imported 29,033 cubic meters of poplar logs under HTS 4403.97.00 and 128 cubic meters of birch logs under HTS 4403.95.10. *Id.* (citing Linyi Chengen's Prelim. Surrogate Values at Ex. SV-2). Linyi Chengen argues that the Romania import statistics, particularly for poplar logs, rep-

[11] According to Linyi Chengen, Malaysia only imported insignificant and noncommercial quantities of Linyi Chengen's primary two raw materials (birch logs and poplar logs). Linyi Chengen's Br. at 12 (citing Coalition's Prelim. Surrogate Values; Linyi Chengen's Final Surrogate Value Comments at Ex. 1). During the period of review of 18 months, Malaysia imported only 75 cubic meters of birch logs under HTS 4403.95.1000 from only one country, Latvia, during only one month of the period of investigation, April 2018. *See id.* Malaysia also imported only 59 cubic meters of poplar logs under HTS 4403.97.1000 from Belgium, during June 2018. *See id.* Linyi Chengen argues these are not commercial quantities when considered against the other import quantities on the record and the quantity consumed by respondents. *Id.*

resents a far more commercial quantity. *Id.* Taraca supports Linyi Chengen's argument that the Romanian values at least "corroborated" the six-digit UN Comtrade data for Malaysia. *See* Taraca's Br. at 14.

Here, Linyi Chengen's arguments regarding the superiority of the Romanian import data fail for several reasons. Commerce explained that because Romania was neither at the same level of economic development as China during this period of review nor selected as the primary surrogate country in this review, it was not appropriate to rely on the Romanian import data. Final IDM at 27. This is consistent with Commerce's practice. Commerce "normally will value all factors in a single surrogate country." 19 C.F.R.§ 351.408(c)(2). No party has challenged Commerce's selection of Malaysia as the primary surrogate country. Commerce will "only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable." *See Jiaxing Bro. Fastener Co. v. United States*, 38 CIT 1404, 1412, 11 F. Supp. 3d 1326, 1332–33 (2014) (citations omitted), *aff'd*, 822 F.3d 1289 (Fed Cir. 2016). Commerce avoids selecting data from countries that are not at the same level of economic development so long as there are suitable options from the countries on the surrogate country list. *See* Policy Bulletin No. 04.1. The Court has long recognized that Commerce has discretion over what methods to employ to carry out its statutory mandate. *See, e.g.*, *Wheatland Tube Corp. v. United States*, 17 CIT 1230, 1245, 841 F. Supp. 1222, 1234 (1993) ("Commerce has broad discretion to choose a methodology to satisfy the statutory mandate."). The argument that Commerce was unreasonable in relying on Malaysia's importation of "insignificant" and "non-commercial" quantities of Linyi Chengen's primary inputs of birch logs and poplar logs during the period of review is inconsistent with Commerce's established methodology, and the Court concludes that the established methodology is reasonable. Commerce "need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a reasonable way." *Coal. for the Preservation of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999); *see The Ancientree Cabinet Co.*, 45 CIT at __, 532 F.Supp.3d at 1258. In other words, Commerce need not duplicate the exact production experience of the Chinese manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value of the respective input in a hypothetical market-economy. *See Nation Ford*, 166 F.3d at 1377. Furthermore, Commerce does not automatically consider that small

quantities necessarily result in aberrational import values. *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1501, 460 F. Supp. 2d 1338, 1356 (2006) (Commerce does not have "a longstanding practice of omitting import values merely because they were the product of a small quantity of imported goods."); *see* Final IDM at 26. Commerce's position is that small import quantities are not inherently distortive but must instead be demonstrated to be too small to be a viable surrogate source. *See Trust Chem.Co.*, 35 CIT at 1019–20, 791 F. Supp. 2d at 1264–65. Linyi Chengen did not make that showing here.

In light of the above, the Court considers Linyi Chengen's remaining arguments on commercial significance and the preferability of Romanian data unavailing. Because the record evidence supports Commerce's determination that the Malaysian GTA data were reliable, Commerce reasonably determined that it did not need to resort to data from a country that was not economically comparable to China during the period of review. Commerce also determined that the relatively low import quantities of birch and poplar into Malaysia alone did not impugn the accuracy of the log surrogate values derived from the Malaysian import data, which are specific to the input consumed by Linyi Chengen. Final IDM at 26. When Commerce provides a reasoned basis for finding that the selected data satisfy its criteria and constitute better data than Plaintiff's alternatives, the Court refrains from "substitut[ing] its own evidentiary evaluation for Commerce's and to substitute its own judgment for the agency's in considering and weighing the relative importance of the various criteria applied." *Bristol Metals L.P. v. United States*, 34 CIT 478, 484, 703 F. Supp. 2d 1370, 1376 (2010) (internal citation and quotation omitted). Accordingly, the Court sustains Commerce's valuation of Linyi Chengen's log inputs using the Malaysian GTA data.

II. Labor Surrogate Value

Linyi Chengen next challenges Commerce's reliance upon "Trading Economics – Malaysia" wage data in the *Final Results*, *see* Final IDM at 30, arguing that the labor rate sourced from the Malaysian Department of Statistics ("MDS wage data"), relied upon in the preliminary results, is the best available information to value labor because the data are more specific to Linyi Chengen's production process. Linyi Chengen's Br. at 4–8. Linyi Chengen argues that the Trading Economics data is a general manufacturing labor rate, covering all manufacturing industries, and that it is less detailed than the Malaysian wage data, which are specific to the "Manufacture of Veneer

Sheets and Plywood." *Id.* at 4. Linyi Chengen also argues that the MDS wage data are more contemporaneous to the period of review, since they cover the entire 18 months, versus the Trading Economics data, which only cover six months of the period of review. *Id.* at 5.

The Court concludes that substantial record evidence supports Commerce's selection of the Trading Economics data as the best available information to value Linyi Chengen's labor. *See* Final IDM at 31. When examining the two data sources, Commerce determined that the MDS wage data included technical notes that called into question the accuracy of these data. *Id.* Commerce determined that the raw data included "full-time" workers who work less than 24 days a month and less than eight hours a day, which is Commerce's standard assumption, as well as part-time workers who work for less than six hours a day and/or less than 20 days a month, and Commerce explained that including such workers in the normal calculation for a labor surrogate value (a value that includes 24 working days a month and eight working hours a day) would understate the resultant labor surrogate value.[12] *Id.* at 31–32. Because the data did not differentiate the numbers of full-and part-time workers counted in the data, Commerce explained that it could not determine the degree of distortion or could not control for any inaccuracies with a different calculation. *Id.* The MDS wage data also indicated that the data exclude employer contributions to the "Employees' Provident Fund" and "Social Security Organisation,"[13] and Commerce inferred that it could not be certain of the impact of this exclusion on the calculation. *Id.* at 32. By contrast, Commerce concluded that the Trading Economics data represented manufacturing-specific and contemporaneous wage data from the primary surrogate country, did not suffer from the same deficiencies as the MDS wage data, and therefore represented the best available information for valuing Linyi Chengen's labor factors of production for the *Final Results*. *Id.*

Linyi Chengen argues that the MDS wage data are definitely "more specific" to its production process, and that while Commerce may not know the exact number of part-time employees included in the MDS wage data, Commerce can still make a reasonable estimation of the hours covered by that data. Linyi Chengen's Br. at 5–6; Linyi Chengen's Reply at 9–10. Linyi Chengen contends that part-time employment is far less common and Commerce has no reason to believe that

[12] The MDS wage data explain that "[t]he employment data cover full-time and part-time employees" and defines full-time employees as "paid workers who work for at least six hours a day and for at least 20 days a month," and part-time employees as "paid workers who work for less than six hours a day and/or less than 20 days a month." *See* Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-4 (Technical Note 7).

[13] *See id.* (Technical Note 8).

a "significant" portion of the laborers worked fewer than its normal assumption of eight hours a day, 24 working days in a month. Linyi Chengen's Br. at 5–6. Linyi Chengen argues that Commerce "almost always" has to make some sort of assumption in its hourly labor calculation, so the additional consideration of slightly lowering its normal assumption to consider the presence of some part-time employees is not unreasonable. Linyi Chengen's Br. at 6. For example, to calculate an hourly wage, Commerce divides the total wages by the total employees to arrive at total monthly wages per employee, and then divides that number by an assumption of the hours worked in a month. *Id.* at 5. Because most labor sources do not provide an hourly rate, Commerce has a long-standing practice of having to apply an assumption to the hours worked in a month. *Id.* Linyi Chengen thus argues that the MDS wage data are still usable and has other significant advantages regarding specificity and contemporaneity. *Id.* at 6.

Given that Commerce questioned the usability of the MDS labor data because of part-time employment, Linyi Chengen also criticizes the Trading Economics data as providing no information on whether they do or do not also include part-time employees. *Id.* Linyi Chengen points out that the two-page Trading Economics webpage printout provides no description about the data, which labor rates are an average monthly wage in manufacturing, or their source, which provides no definition of what employees are covered by this wage data—in other words, "[Commerce] has no evidence to support the contention that the Trading Economics data does not suffer the same deficiency as the [MDS] data." *Id.* (citing Coalition's Surrogate Value Comments at M-3).

Further, regarding Commerce's determination that Technical Note 8 of the MDS wage data indicates that employer contributions to "Employees' Provident Fund [ ] and Social Security Organisation [ ]" are excluded, Final IDM at 32, Linyi Chengen also argues that the MDS wage data affirmatively does explain that the salaries and wages paid include "cash payments, including bonuses, commissions, overtime wages, cost of living allowances and other allowances made to all employees during the reference month. The employees' contribution to Employees' Provident Fund [ ] and Social Security Organisation [ ] is included." Linyi Chengen's Reply at 10 (quoting Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-4). "Therefore, the [MDS wage] data is in fact very encompassing of the cost of labor and provides specific details on the benefits included." Linyi Chengen's Br. at 7.

Commerce is presumed to have considered the entire record. *See* Final IDM at 18 ("Commerce's decisions must be based on the weight of the evidentiary record.").[14] This necessarily follows from the presumption of administrative regularity "as to the record it prepares, because the agency, as the decision-maker, is generally in the best position to identify and compile those materials *it considered*." *JSW Steel (USA) Inc. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1320, 1328 (2020) (emphasis added). Linyi Chengen is essentially asking the Court to substitute its judgment for that of Commerce, which the Court cannot do. The fact that the MDS wage data may be "more specific" to Linyi Chengen's production process, if Commerce does not deem it so, does not render Commerce's selection of the Trading Economics data unreasonable, in light of the current state of the law and the uncertainty Commerce identified in this proceeding with respect to what the MDS wage data represent. The statute does not require Commerce to perfectly replicate a non-market economy respondent's production experience. *See Juancheng Kangtai Chem. Co. v. United States*, 2017 Ct. Intl. Trade LEXIS 3, at *31, 2017 WL 218910, at *10 (Ct. Int'l Trade Jan. 19, 2017) (citing *Nation Ford*, 166 F.3d at 1378).

Linyi Chengen's alternative argument for using the Romanian labor value evidence on the record fails for the same reason, regardless of whether it does not have the problem of part-time wage data. *See* Linyi Chengen's Br. at 7–8 (referencing, *inter alia*, Linyi Chengen's Prelim. Surrogate Values at Ex. 5). Linyi Chengen fails to demonstrate that Commerce's determination that it did not need to resort to data from a country that was not economically comparable to China during the period of review was unreasonable.

Thus, considering the foregoing, the Court concludes that Commerce's selection of the "Trading Economics – Malaysia" data and its calculation of the labor surrogate value was reasonable and supported by substantial evidence.

---

[14] *Accord*, *e.g.*, *Fujitsu Ltd. v. United States*, 23 CIT 46, 50 n.5, 36 F. Supp. 2d 394, 398 n.5 (1999); *Companhia Paulista De Ferro-Ligas v. United States*, 20 CIT 473, 476 (1996); *Torrington Co. v. United States*, 16 CIT 220, 224, 790 F. Supp. 1161, 1167 (1992), *aff'd*, 991 F.2d 809 (Fed. Cir. 1993); *Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136, 787 F. Supp. 224, 226 (1992); *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988); *British Steel Corp. v. United States*, 8 CIT 86, 98, 593 F. Supp. 405, 414 (1984); *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984); *Sprague Elec. Co. v. United States*, 2 CIT 302, 310, 529 F. Supp. 676, 682 (1981).

III. Formaldehyde Surrogate Value

Linyi Chengen and Taraca challenge Commerce's determination as to the surrogate value for formaldehyde.

A. Motion to Strike

As a preliminary matter, Defendant filed a motion to strike Attachment 1 of Linyi Chengen's Reply and references to that attachment pursuant to USCIT Rule 81(m). *See* Def.'s Mot. Strike ("Defendant's Motion to Strike" or "Def.'s Mot. Strike"), ECF No. 48. Defendant contends that Linyi Chengen's Reply raises a new argument on the formaldehyde surrogate value and includes new factual information not on the record of the underlying investigation and not raised in Linyi Chengen's prior written materials.[15] *Id.* at 1–2. Linyi Chengen did not respond to Defendant's Motion to Strike.

The Court's review of antidumping duty administrative proceedings is limited by statute to the record before the agency. 19 U.S.C. § 1516a(b)(2)(A) (defining scope of record for review in proceedings before the Court of International Trade); *see* S. Rep. No. 96–249, at 247–48 (1979) (judicial review of antidumping proceedings is based on "information before the relevant decision-maker at the time the decision was rendered"). The administrative record in this case consists of all materials properly submitted to or obtained by Commerce in connection with the affirmative final determination in an antidumping duty review of hardwood plywood from China. *See* 19 U.S.C. § 1516a(b)(2); *Final Results*, 85 Fed. Reg. 77,157. The complete list of those documents is set forth in the indices of the administrative record that Commerce filed with the Court. *See* Admin. R. Index, ECF No. 23. The additional documents that Linyi Chengen included in Attachment 1 to Linyi Chengen's Reply concern events that occurred after issuance of the *Final Results* and are not part of the administrative record in this case under 19 U.S.C. § 1516a(b)(2). Because the scope of judicial review in antidumping proceedings is based on the "information before the relevant decision-maker at the time the decision was rendered," *QVD Food Co.*, 658 F.3d at 1324– 25 (quoting S. Rep. No. 96–249, at 247–48), any further consideration of them here

[15] Defendant's specific objection is to Linyi Chengen's argument that Commerce should have sent supplemental questionnaires to Linyi Chengen regarding formaldehyde valuation, which Attachment 1 indicates as letters from Commerce to Linyi Chengen pertaining to a subsequent and separate administrative proceeding. Def.'s Mot. Strike at 1–2; *see also* Linyi Chengen's Reply at 8–9 and Attachment 1.

would not be proper. *See* USCIT R. 81(m).[16] The Court will therefore grant Defendant's motion to strike and will disregard Linyi Chengen's post-*Final Results* references and attached material.

B. Selection of Formaldehyde Surrogate Value

Turning to the merits, Linyi Chengen's brief in support of its motion for judgment on the agency record calls attention to the fact that Commerce preliminarily valued the formaldehyde input using HTS 2912.11.10 for formalin, a liquified form of formaldehyde, i.e., methanol. Linyi Chengen's Br. at 8; *see* Commerce's Prelim. Surrogate Value Mem. at Attachment 1. In briefing before Commerce, the petitioner contested the test reports submitted by Linyi Chengen, arguing that Linyi Chengen failed to demonstrate that the formaldehyde used in Linyi Chengen's production process was "formalin" and that Commerce should therefore rely upon HTS 2912.11.90, which covers "other forms of methanol formaldehyde." *See* Coalition's Case Br. at 35–37; Final IDM at 29. For the *Final Results*, Commerce agreed in part with the petitioner in determining that:

> [the] test reports were not accredited to any testing agency, nor did they contain any indication that they pertained to [Linyi] Chengen (including, significantly any link to [Linyi] Chengen's production of plywood). . . . The test reports also failed to specify if the percentage of formaldehyde reported was with respect to mass or volume.

Final IDM at 30. Determining uncertainty in the type of formaldehyde that Linyi Chengen used in plywood production, Commerce therefore relied on an average of both HTS 2912.11.10 and HTS 2912.11.90. *Id.*

Linyi Chengen argues that the record establishes that its input is best classified as formalin, and therefore that the best available information to value this input is HTS 2912.11.10. Linyi Chengen's Br. at 8. Linyi Chengen placed on the record evidence that formalin is defined as a 37 percent solution of formaldehyde as well as the three test reports of formaldehyde input mentioned above that Linyi Chen-

[16] USCIT Rule 81(m) provides: "A brief or memorandum must be concise, logically arranged, and free from burdensome, irrelevant, immaterial, pejorative and scandalous matter. A brief or memorandum not complying with this rule may be disregarded by the court." USCIT Rule 81(m). The Court has broad discretion in deciding motions to strike. *Beker Indus. Corp. v. United States*, 7 CIT 199, 200, 585 F. Supp. 663, 665 (1984). In general, since motions to strike are considered an "extraordinary remedy," they are generally "not favored by the courts and are infrequently granted." *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986) (citation omitted). The usual remedy, in situations such as this, is to disregard such extraneous matter. *See, e.g.*, *Jacobi Carbons AB v. United States*, 42 CIT __, __ n.17, 313 F. Supp. 3d 1308, 1321 n.17 (2018).

gen claims it purchased during the period of review. *See* Linyi Chengen's Rebuttal Surrogate Values at Exs. SVR-1, SVR-2. According to Linyi Chengen, those test reports "definitely" demonstrate the formaldehyde concentration of the input ranged from 36.87 to 37.1 percent, "which was well within the tolerance concentration standard for 37% solution" of formaldehyde. Linyi Chengen's Br. at 8–9 (citing Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-2).[17] Linyi Chengen contends that the record thus establishes that its formaldehyde input meets the definition of formalin, and that HTS 2912.11.10, which is specific to formalin, is the most specific HTS to value this input and therefore the best available information. Linyi Chengen's Br. at 9; *see Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (product-specificity is the most important surrogate value factor).

Taraca, in support of Linyi Chengen, also contests Commerce's reliance on the average of data for HTS 2912.11.10 and 2912.11.90 to derive the surrogate value for Linyi Chengen's formaldehyde input. Taraca's Br. at 15 (referencing Final IDM at 30 and *Taian Ziyang Food Co. v. United States*, 35 CIT 863, 907, 783 F. Supp. 2d 1292, 1330 (2011) ("product specificity logically must be the primary consideration in determining best available information" (internal quotation and citation omitted)). Taraca argues that the best available information on the record to value Linyi Chengen's formaldehyde input was HTS subheading 2912.11.10 (pertaining to formalin) and that Commerce disregarded Linyi Chengen's three testing reports improperly as well as the industry definitions submitted by Linyi Chengen stating that formalin is a 37% solution of formaldehyde. *Id.* at 15–16 (referencing Linyi Chengen's Rebuttal Br. at 12 (citing Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-1)). Taraca contends that Commerce's determination was unreasonable, given that Linyi Chengen's evidence was accompanied by a certification from the company and its counsel attesting to the veracity of the information submitted. *Id.* at 16; *see* Linyi Chengen's Rebuttal Surrogate Values (company certification; representative certification). According to Taraca, Commerce pointed to no competing evidence on the record suggesting that Linyi Chengen's input was not formalin—in other words, "Commerce had before it (i) data from one HTS that was shown to be specific to the input that Linyi Chengen used (i.e., 2912.11.10) based on certified record evidence and (ii) data from another HTS that pertained to an input not used by Linyi Chengen (i.e., 2912.11.90) and that could not

[17] "Even the full name of the input is called '37% Level Industrial Use Formaldehyde Solution.'" Linyi Chengen's Br. at 9.

be attributed to Linyi Chengen absent speculation." Taraca's Br. at 16. Taraca thus argues: "It is unreasonable for Commerce to elevate speculation over certified record evidence." *Id.* at 16; *Inner Mong. Jianlong Bioch. Co., Ltd. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1332, 1340 (2017) ("[t]his court's standard of review requires more from Commerce than reference to a dearth of evidence and a conclusion based upon mere speculation") (citing *Thai Plastic Bags Indus. Co v. United States*, 37 CIT 354, 360, 904 F. Supp. 2d 1326, 1332 (2013)). And yet, Taraca claims, this is exactly what Commerce did in the *Final Results*, by ignoring record evidence showing that Linyi Chengen actually used formalin and instead relying on speculation that it had no reason to favor the HTS specific to formalin over the other, less specific HTS code. Taraca's Br. at 16–17. Taraca claims that "in reality" the record evidence shows that the best available information, based on certified submissions from Linyi Chengen including testing reports and industry standards, was import data reported under HTS subheading 2912.11.10 because subheading 2912.11.10 was most specific to Linyi Chengen's actual formaldehyde input, and that Commerce's inclusion of the data for HTS 2912.11.90 in determining the surrogate value for formaldehyde was not supported by substantial evidence. *Id.* at 17.

Defendant contends that in order to value Linyi Chengen's formaldehyde, Commerce reasonably averaged the input for the HTS subcategories HTS 2912.11.10.00, defined as "Formalin," and HTS 2912.11.90.00, defined as "Other," because the record did not support the claim that Linyi Chengen's input met the specifications of formalin. Def.'s Resp. at 39. Addressing Linyi Chengen's and Taraca's argument that Commerce should have valued Linyi Chengen's formaldehyde using HTS subheading 2912.11.10 (which is specific to "formalin"), Defendant argues that Commerce's decision to average the two HTS categories was reasonable based on the record. *Id.* Specifically, Defendant contends that Commerce examined the three test reports that Linyi Chengen placed on the record claiming that they demonstrate that the formaldehyde concentration of its input ranged from 36.87 to 37.1 percent. *Id.*; *see also* Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-2. Defendant explains that Commerce determined that the test reports were not accredited to any testing agency, nor did they contain any indication that they pertained to Linyi Chengen, much less Linyi Chengen's production of plywood. Def.'s Resp. at 39 (citing Final IDM at 29; Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-2).

In addition, Defendant points out that the test reports failed to specify if the percentage of formaldehyde reported was with respect to mass or volume (formalin must contain 40 percent formaldehyde by volume or 37 percent by mass). *Id.* Defendant argues that Commerce determined that there was insufficient support for valuing Linyi Chengen's input with the category specific to formalin alone (HTS 2912.11.10). *Id.* As a final point, Defendant argues that in evaluating the other HTS subheadings, including 2912.1 defined as "Methanal (formaldehyde)," and 2912.11.90.00 "Other," Commerce determined that the descriptions did not provide sufficient information to determine which subheading was most specific to Linyi Chengen's formaldehyde input. *Id.* at 39–40; *see also* Final IDM at 29. Given the uncertainty as to whether Linyi Chengen's formaldehyde was "formalin" or some other type of formaldehyde, Commerce determined that there was no basis to favor one HTS subheading over the other. Final IDM at 30. Therefore, Defendant contends, Commerce reasonably valued Linyi Chengen's formaldehyde input using the average of HTS subheadings 2912.11.10 and 2912.11.90. Def.'s Resp. at 40; Final IDM at 30.

As with other issues addressed in this opinion, Linyi Chengen's and Taraca's arguments to the contrary over Commerce's surrogate value for formaldehyde amount to mere disagreements with Commerce's rational determination. The function of the Court is to evaluate "whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). On that question, "when faced with a choice between two imperfect options, it is within Commerce's discretion to determine which choice represents the best available information." *CS Wind Vietnam Co. v. United States*, 38 CIT 376, 393, 971 F. Supp. 2d 1271, 1288 (2014) (quotation omitted). The Court concludes that substantial evidence supports Commerce's reticence to credit the three test reports to Linyi Chenyen's formaldehyde input for the reasons stated by Commerce. Taraca complains that the company and representative certifications of Linyi Chengen's Rebuttal Surrogate Values attested that the information is "accurate and complete," but the "submitting entry" field on the test reports all merely indicate "our factory," and there is no indication of an accredited testing agency, a state that is not incompatible with attestations of accuracy and completeness *as submitted*. *See* Linyi Chengen's Rebuttal Surrogate Values at Ex. SVR-2. The Court also notes that when Commerce selects import statistics as a means of valuing factors of production for a non-market economy, in general it prefers an

average price derived from the broader range of prices. *See Dorbest Ltd. v. United States*, 30 CIT 1671,1687, 462 F. Supp. 2d 1262, 1277 (2006). Linyi Chengen and Taraca's arguments here are insufficient to undermine Commerce's determination to rely on an average of both HTS 2912.11.10 and 2912.11.90. The Court sustains Commerce's determination.

IV. Surrogate Financial Ratios

After calculating the total value of the factors of production, Commerce adds "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Commerce achieves this by calculating surrogate financial ratios derived from the financial statements of one or more companies that produce identical or comparable merchandise, preferably in the primary surrogate country. *See, e.g.*, *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 482, 318 F. Supp. 2d 1339, 1341 (2004).

Commerce selects financial statements based on "specificity, contemporaneity, and quality of the data." *See, e.g.*, *Dongguan Sunrise Furniture Co. v. United States*, 37 CIT 489, 496, 904 F. Supp. 2d 1359, 1365–66 (2013). In addition, Commerce will not use financial statements that it has reason to believe or suspect are distorted by countervailable subsidies and those that show no profit. Specifically, Commerce's practice is "to rely on the financial statement of a company that is or may be the beneficiary of subsidies, so long as those subsidies were not previously found countervailable by Commerce." *See Shenzhen Xinboda Indus. Co. v. United States*, 45 CIT __, __, 494 F. Supp. 3d 1347, 1351 (2021) (sustaining Commerce's remand explanation of its practice regarding financial statements used in the surrogate final ratio); *see also Clearon Corp. v. United States*, 35 CIT 1685, 1688, 800 F. Supp. 2d 1355, 1359 (2011).

In assessing which of the financial statements on the record constituted the best available information, Commerce considered the quality, specificity, and contemporaneity of the available data, and evidence of tax and subsidies. *See* Final IDM 20–22; *see also Qingdao Sea-Line Trading Co.*, 766 F.3d at 1386; 19 U.S.C. § 1677b(c)(1); Policy Bulletin No. 04.1. Commerce determined that the financial statements for Focus Lumber, Fu Yee, and Ta Ann constituted the best available information on the record. Final IDM at 21.

A. Inclusion of Fu Yee Financial Statement

The Coalition argues that Commerce should not have relied on the financial statements of Fu Yee because those statements showed that the company was not profitable. Coalition's Br. at 38–39. Commerce determined, however, that the record does not support the Coalition's

argument. Final IDM at 21. Instead, the record supports Commerce's conclusion that Fu Yee's financial statements show that the company was profitable at the time. *See* Linyi Chengen's Final Surrogate Value Comments at Ex. SV2–3. Commerce explained that, although the profit rate for Fu Yee was lower compared to other financial statements, the financial statement did not indicate that the company was not profitable. Final IDM at 21 (citing Linyi Chengen's Final Surrogate Value Comments at Ex. SV2–3).

Commerce declined to further investigate certain line items that the Coalition claimed called into question whether Fu Yee was indeed profitable. *Id.* Commerce explained it does not look beyond the face of the statements themselves and engage in speculation as to what each item includes or how each item should be treated. *Id.* (citing *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 11,143 (Dep't of Commerce Feb. 15, 2013) (final results of antidumping duty administrative review; 2009–2010), and accompanying issues and decision memorandum at cmt. 16; *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40,485 (Dep't of Commerce Jul. 15, 2008) (final affirmative determination of sales at less than fair value and partial affirmative determination of critical circumstances), and accompanying issues and decision memorandum at cmt. 18B). Because the data in the financial statements have been prepared and examined by the appropriate financial authorities, in accordance with the generally accepted accounting principles applicable to the relevant surrogate country, Commerce relied upon the treatment of these items as they are reflected in the financial statement when utilizing the line items in the financial ratio calculations. Final IDM at 21.

Further, the record shows that the auditor for Fu Yee provided an unqualified opinion as to the accuracy of Fu Yee's financial statements, and thus Commerce found no reason to find the stated profit figure unreliable. *Id.*; *see* Linyi Chengen's Final Surrogate Value Comments at Ex. SV2–3. In response to the Coalition's claim that the "hire purchase payables" identified in its brief indicated that Fu Yee incurred late fees related to overdue payment, Commerce explained that the notes of the financial statement only identified that a portion of this payable is due within 12 months and a portion is due after 12 months and that the outstanding amount bore an interest rate of 4.93 percent, not that Fu Yee was being assessed an overdue payment fee. Final IDM at 21. Commerce reiterated that it would not be appropriate to look behind the financial statements themselves and treat the outstanding payables amount essentially as a write-off (in direct conflict with the assessment of Fu Yee's auditors) and count this

amount against its profit for fiscal year 2018. *Id.* Accordingly, Commerce determined that the record evidence indicated that Fu Yee was a profitable company during the period of review and that its financial statements constituted the best available information on the record, and thus included Fu Yee's financial statements in the calculation of surrogate financial ratios. *Id.* The Court concludes that Commerce's determination to include Fu Yee's financial statements in the surrogate financial ratios was reasonable and supported by substantial evidence.

B. Inclusion of Tan Ann Financial Statement

The Coalition argues that Commerce should not have included the financial statement for Ta Ann in the surrogate financial ratio because Commerce's prior subsidy determinations indicate that Ta Ann received countervailable subsidies. Coalition's Br. at 36–38. However, the Coalition never articulated its precise argument before Commerce that Ta Ann received *countervailable* subsidies, and therefore failed to exhaust its administrative remedies. The argument that the Coalition made before Commerce was limited to a claim that "Ta Ann's financial statements indicate that it was the beneficiary of tax subsidies as referenced in its financial notes: '[u]nutilised reinvestment allowance, being tax incentives that is not a tax base of an asset, is recognised as a deferred tax asset . . . .'" Coalition's Case Br. at 33–34 (citing Linyi Chengen's Final Surrogate Value Comments at Ex. SV2–8). The Coalition stated in its administrative case brief that "[f]urthermore, Ta Ann's financial statements show an increase of 317,000 RM in reinvestment allowance in 2018 that was 'recognised in profit or loss.'" *Id.* at 34 (citing Linyi Chengen's Final Surrogate Value Comments at Ex. SV2–8).

In response to the allegation that Ta Ann had received subsidies, Commerce explained that there is a distinction between a party receiving a subsidy or receiving a subsidy that Commerce had previously countervailed. Final IDM at 22. Commerce examined the relevant record evidence and determined that there was no record evidence indicating that Ta Ann was receiving any countervailable subsidies. *Id.* Specifically, Commerce explained that the Coalition "provided no information as to how this reinvestment allowance constitutes a subsidy from a program that Commerce previously found to be countervailable." *Id.* As explained above, Commerce's practice is "to rely on the financial statement of a company that is or may be the beneficiary of subsidies, so long as those subsidies were not previously found countervailable by Commerce." *See Shenzhen Xinboda Indus. Co.*, 45 CIT at __, 494 F. Supp. 3d at 1351. Thus, because there

was no record evidence to support a conclusion that these tax subsidies had previously been found by Commerce to be countervailable, the Court concludes that Commerce reasonably included the Ta Ann financial statements in its calculation of the surrogate financial ratios. Final IDM at 22.

The Coalition now argues that the subsidies Ta Ann received were previously countervailed, and they cite a case not previously mentioned on the record of this proceeding for support of their position, *Certain Frozen Warmwater Shrimp from Malaysia*, 78 Fed. Reg. 50,381 (Dep't of Commerce Aug. 19, 2013) (final affirmative countervailing duty determination). Coalition's Br. at 37. Neither the Coalition nor any other party raised this argument before Commerce.

Congress has directed that this Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The statute "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)). Commerce's regulations specifically require that a party raise all arguments in a timely manner before the agency. *Corus Staal*, 502 F.3d at 1379 (citing 19 C.F.R. § 351.309(c)(2)). And "general policies underlying the exhaustion requirement—protecting administrative agency authority and promoting judicial efficiency"—would be vitiated if the court were to consider arguments raised for the first time in judicial proceedings. *See id.* (internal quotation and citation omitted).

For these reasons, courts "generally take[ ] a 'strict view' of the requirement that parties exhaust their administrative remedies before [Commerce] in trade cases." *See id.* None of the limited exceptions to the exhaustion requirement apply here, i.e., if exhaustion would have been "futile," the relevant matter is a "pure question of law," an intervening court decision would affect the agency's action, or a party had no reason to believe the agency would not follow established precedent. *Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (citing authorities).

When an interested party to the administrative proceeding is concerned that Commerce should use data in a particular way, it is incumbent on the party to raise the issue in their case briefs. *Boomerang Tube*, 856 F.3d at 913; *accord Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1384–1385 (Fed. Cir. 2008) (explaining

that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952))) (emphasis added in *Mittal Steel Point Lisas Ltd.*). Here, the Coalition did not develop the argument that Ta Ann received countervailable subsidies during the administrative review. The Coalition now seeks to raise a new argument, with new information, that they did not present to Commerce. *Compare* Coalition's Case Br. at 33–34 *with* Coalition's Br. 36–38. The Court concludes that Commerce's determination to include the Ta Ann financial statement in the surrogate financial ratio was reasonable and supported by substantial record evidence. In addition, asserting an argument for the first time in litigation by claiming that Commerce "failed to address information that detracted from its decision" when that "information" was not raised before Commerce does not relieve a party of its obligation to exhaust its remedies.

C. Rejection of Megamas Financial Statement

Taraca challenges Commerce's decision to exclude Megamas's financial statements in the calculation of the surrogate financial ratios. Taraca's Br. at 9–13 Taraca contends that Commerce did not provide a reasonable explanation for rejecting a company's financial statements where the company's current liabilities may exceed the company's current assets. *Id.* at 11. Taraca also claims that Commerce failed to explain why the other financial statements that it relied on were the best available information. *Id.*

Commerce explained that it was not including the Megamas financial statement in the surrogate financial ratio calculation because the auditor's report for Megamas included a note of material uncertainty, which "cast significant doubt on the Company's ability to continue as a going concern." Final IDM at 22 (citing Linyi Chengen's Final Surrogate Value Comments at Ex. SV2–5). Commerce acted similarly in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 85 Fed. Reg. 23,756 (Dep't of Commerce Apr. 29, 2020) (final results of antidumping duty administrative review and final determination of no shipments; 2017–2018), and accompanying issues and decision memorandum at cmt. 2C. In that case, Commerce relied instead on the financial statements of a profitable company that reflected no additional shortcomings. *See id.*; *see also NTSF Seafoods Joint Stock Co. v. United States*, 46 CIT __, Slip .Op 22–38, 2022 Ct. Intl. Trade LEXIS 40, at *53, 2022 WL 1375140, at *17 (Ct. Int'l Trade Apr. 25, 2022) ("Thus, here there were two conflicting regulatory

preferences—the preference for using multiple financial statements and the preference for a single surrogate country. It is not this court's role to balance those preferences. Commerce explained why it considered one Indian company's financial statement reliable and why it found the Indonesian statements inadequate, and it then chose to give priority to the single-country preference over the two-statement preference.") (sustaining in relevant part; remanding on other grounds). Similarly here, when weighing the financial statements, Commerce determined that the Megamas statement did not constitute the best available information on the record when compared to the three remaining financial statements that contained no notes of concern, and thus Commerce did not include the Megamas statement in the surrogate financial ration calculation. Final IDM at 22.

Given Commerce's discretion to determine what information is the "best available information," and the fact-specific nature of this case-by-case inquiry, the Court's review of Commerce's determination considers "not whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Jiaxing Bro.*, 822 F.3d at 1300–01 (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011)). Given Commerce's expressed concern about material uncertainty of the Megamas statement, the Court concludes that Commerce's determination to exclude the Megamas financial statement was reasonable and supported by substantial evidence.

To summarize, Commerce's determination that the Focus Group, Fu Yee, and Ta Ann financial statements were the best available information on the record to calculate the surrogate financial ratios is based on substantial evidence and in accordance with the law. In selecting from the available financial statements, Commerce exercised its discretion to choose the appropriate financial statements to calculate surrogate financial ratios. *See FMC Corp. v. United States*, 27 CIT 240, 251 (2003) (holding that Commerce acts within its discretion by choosing among reasonable alternatives), *aff'd*,87 F. App'x 753 (Fed. Cir. 2004).

Accordingly, Commerce's determination on its selection of financial statements is sustained by this Court.

V. Challenge to Separate Rate

The Court notes that Taraca adopted and incorporated by reference the comments, if any, filed by other plaintiff-respondent parties to the extent they challenge the determination of the rates applied to Linyi Chengen and the determination of the separate rate, to the extent

such comments are not inconsistent with their own arguments. Taraca's Br. at 17. However, in light of this opinion, arguments on a redetermination of the separate rate are moot.

CONCLUSION

For the foregoing reasons, the Court concludes that substantial record evidence supports: (1) Commerce's reliance on its preferred methodology; (2) Commerce's valuation of Linyi Chengen's log inputs using the Malaysian GTA data; (3) Commerce's selection of the "Trading Economics – Malaysia" data and its calculation of the labor surrogate value; (4) Commerce's use of an average of HTS 2912.11.10 and HTS 2912.11.90; and (5) Commerce's determination to include financial statements of Fu Yee and Ta Ann and to exclude the financial statements of Megamas in the surrogate financial ratios. The motions for summary judgment filed by Plaintiff Coalition for Fair Trade in Hardwood Plywood, ECF Nos. 32–33, Consolidated Plaintiffs and Defendant-Intervenors Richmond International Forest Products, LLC, Taraca Pacific Inc., and Concannon Corporation, ECF No. 30, and Defendant-Intervenor Linyi Chengen Import and Export Co., Ltd. and Consolidated Plaintiffs and Defendant-Intervenors Xuzhou Jiangheng Wood Products Co., Ltd. and Xuzhou Jiangyang Wood Industries Co., Ltd., ECF No. 31, are denied. Defendant's motion to strike, ECF No. 48, is granted. In accordance with this opinion, judgment dismissing this consolidated action will be entered.

Dated: December 22, 2022
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 56, No. 51, January 4, 2023

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2023—423-106/30005